



REPUBLIC OF KENYA
IN THE SENIOR RESIDENT MAGISTRATE’S COURT AT GITHONGO
ELECTION PETITION 2 OF 2017

SAMSON KINYUA MAGAMBO.....APPLICANT

VERSUS

THE INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION.....1ST RESPONDENT

HABIBA GODANA HALIMA

R/O IMENTI CENTRAL.....2ND RESPONDENT

EUNICE KAREGI KIRIMI.....3RD RESPONDENT

JUDGMENT

This petition filed by **Samson Kinyua Magambo** contests the election of **Eunice Karegi Kirimi** as the Kiagu ward member of county assembly following the general elections held on 8th August 2017. He filed the present petition on 7th September, 2017 alleging many irregularities and therefore questioned the validity of that election.

In the general election for the member of County Assembly elections conducted on the 8th August, 2017, the following candidates contested and the results were as below:-

S/ NO.	NAME OF CANDIDATE	PARTY	VOTES GARNERED
1.	FRANCIS RUTH MAKENA	INDEPENDENT	150
2.	KITHIIRA ISAAC KIRIA	INDEPENDENT	1125
3.	EUNICE KAREGI KIRIMI	MAENDELEO CHAP CHAP	1792
4.	KIUGU MUGIRA PATRICK	INDEPENDENT	97

5.	M'MURITHI JOSEPH MWANGI	DEMOCRATIC PARTY	441
6.	MAGAMBO SAMSON KINYUA	INDEPENDENT	1690
7.	MARETE RICHARD MWANGI	PARTY OF NATIONAL UNITY	1354
8.	MIRITI DANIEL MAWIRA DAVID	JUBILEE	1417
9.	MURITHI PHILIP MICHENI	PTP	11
10.	MWITI PETER	MAZINGIRA GREEN PARTY	12
11.	NABEA HENRY MBAE	INDEPENDENT	18
12.	NCURAI JAMES MUTUMA	INDEPENDENT	44
13.	NGARUNI SIMON KIAMBI	NARK KENYA	763

The petitioner in his petition seeks the following orders from the court;

- a. That this election court do order the recounting of all votes from all polling stations within KIAGU WARD in respect of the MCA Contest.
- b. An order for scrutiny and audit of all the returns of the KIAGU WARD Election including but not limited to Forms 36A, 36B and 36C;
- c. A specific order for scrutiny of the rejected and spoilt votes.
- d. An order for scrutiny and audit of the system and technology used by the 1st Respondent in the KIAGU WARD MCA Election including but not limited to the KIEMS Kits, the Server(s); website/portal;
- e. A declaration that the non-compliance, irregularities and improprieties in KIAGU WARD MCA Election were substantial and significant that they affected the result thereof;
- f. A declaration that the **KIAGU WARD** election held on 8th August 2017 was not conducted in accordance with the Constitution and the applicable law rendering the declared result invalid, null and void;
- g. A declaration that the 3rd Respondent was not validly declared as the MCA elect and that the declaration is invalid, null and void;
- h. An order directing the 1st Respondent to organize and conduct fresh MCA Election in respect to KIAGU WARD in strict conformity with the Constitution and the Elections Act;

i. Costs of the Petition;

Grounds for the petition/Facts of the case

The petitioner in his petition alleges that;

a. The Election for the Kiagu Ward held on the 8th of August 2017 was not administered in an impartial, neutral, efficient, accurate and accountable manner contrary to Article 81(e)(v) as read together with Sections 39, 44 and 44A of the Elections Act, the Regulations made there under, and section 25 of the IEBC Act.

b. That it is a mandatory requirement and legitimate expectation that the data entered into the KIEMS Kits should be consistent, comparable and verifiable with the information recorded in the Forms 36A.

1. The Petitioner avers that in all polling stations within the Ward the data entered into the KIEMS Kits was not consistent with the information and data from the respective Forms 36A.

2. The Petitioner avers that the data that was being displayed publically by the 1st Respondent at the Sub County Tallying Centre was not consistent with the information and data in the respective Forms 36A.

3. As a result of the foregoing the 2nd Respondent did not administer the Kiagu Ward MCA Election in an efficient, accurate and accountable manner as required under the law and in contravention of Article 81(e) of the Constitution.

4. The information in Forms 36A is not consistent with the information recorded in Forms 36B as required and legitimately expected.

5. Therefore, whatever Forms 36B were purported to have been relied upon by the 2nd Respondent at the Sub County Tallying Centre and on the basis of which the final result of the Kiagu Ward MCA seat was declared were inaccurate as they were inconsistent with the Forms 36A which were the primary documents from which they are required by law to be created;

6. As a result of the immediately foregoing the Forms 36B were not accurate and verifiable and consequently invalid;

7. As an ultimate result, the results declared by the 2nd Respondent on the basis of the impugned

8. As a result of the foregoing the Forms 36B were not accurate and verifiable and consequently invalid;

9. As an ultimate result, the results declared by the 2nd Respondent on the basis of the impugned Forms 36B was rendered invalid and a nullity.

ON PLEADINGS

THE PARTIES

1. The Petitioner is a male adult, a registered voter and an independent candidate for Member of County Assembly Kiagu Ward

2. The 1st Respondent is an Independent Constitutional Commission established under Article 88 of the Constitution, 2010, by the Kenyan people in exercise of their sovereign will in accordance with Articles 1, 4 and 38 of the Constitution and a body corporate capable of suing and being sued on its own name.

3. The 2nd Respondent is a female adult and a returning officer, Imenti Central constituency.

4. The 3rd Respondent is a Female adult, Maendeleo Chap Chap Candidate and the MCA-Elect Kiagu Ward as declared by the 2nd respondent on the 11th, August 2017.

BRIEF OVERVIEW

Article 1 of the constitution sets out the foundation and framework of the Nation of Kenya and the social contract between the people and their elected representatives.

Articles 2(1) and 2(2) of the Constitution of Kenya declares the supremacy of the Constitution of Kenya and oblige every person to exercise State authority only as provided for in the Constitution.

Article 3(1) of the Constitution of Kenya, 2010 oblige the Petitioner (and indeed all other persons) to uphold and defend the Constitution and in particular to insist that all organs and or bodies of the Government of Kenya equally respect, uphold and defend the Constitution.

Article 4 of the Constitution establishes a republican system of governance, which is founded on the sovereignty of the people and under which the conduct of periodic elections is one of the mechanisms by which the people delegate their sovereign power to their representatives

Article 38 of the Constitution sets out the mechanism and framework by which the sovereign people of Kenya exercise their sovereign will under Article 1 and 4 of the Constitution

Articles 10 and 73(2) of the Constitution of Kenya, 2010 declare the national values and principles of governance and obliges the 1st and 2nd Respondents to, inter alia, observe the rule of law, human rights, non-discrimination, good governance, and integrity in exercise of their functions.

Article 81 of the Constitution of Kenya, 2010 provides the principles that the electoral system shall comply with, *inter-alia* freedom of citizens to exercise their political rights under **Article 38**.

THAT Section 83 of the **Elections Act** provides that where an election is not conducted in accordance with the Constitution and the written law, then that election must be invalidated notwithstanding the fact that the result may not be affected.

Grounds for the petition/Facts of the case

1. The Election for the Kiagu Ward held on the 8th of August 2017 was not administered in an impartial, neutral, efficient, accurate and accountable manner contrary to Article 81(e)(v) as read together with Sections 39, 44 and 44A of the Elections Act, the Regulations made there under, and section 25 of the IEBC Act.

2. That it is a mandatory requirement and legitimate expectation that the data entered into the KIEMS Kits should be consistent, comparable and verifiable with the information recorded in the Forms 36A.

- The Petitioner avers that in all polling stations within the Ward the data entered into the KIEMS Kits was not consistent with the information and data from the respective Forms 36A.

- The Petitioner avers that the data that was being displayed publically by the 1st Respondent at the Sub County Tallying Centre was not consistent with the information and data in the respective Forms 36A.

- As a result the of the foregoing the 2nd Respondent did not administer the Kiagu Ward MCA Election in an efficient, accurate and accountable manner as required under the law and in contravention of Article 81(e) of the Constitution.

- The information in Forms 36A is not consistent with the information recorded in Forms 36B as required and legitimately expected.

- Therefore, whatever Forms 36B were purported to have been relied upon by the 2nd Respondent at the Sub-County Tallying Centre and on the basis of which the final result of the Kiagu Ward MCA seat was declared were inaccurate as they were inconsistent with the Forms 36A which were the primary documents from which they are required by law to be created;

- As a result of the immediately forgoing the Forms 36B were not accurate and verifiable and consequently invalid;

- As an ultimate result, the results declared by the 2nd Respondent on the basis of the impugned Forms 36B was rendered invalid and a nullity.

a) The computation and tabulation of the results in a significant number of Forms 36B is not accurate, verifiable and internally consistent.

1. The additions and figures do not add up.

2. The Petitioner aver that the nature and extent of the inaccuracies and inconsistencies in the tabulations is not clerical but deliberate and calculated.

3. The Petitioner aver that the inaccuracies and inconsistencies affect and account for at least 700 votes.

(b) The Petitioner avers that in numerous instances the 2nd Respondent selectively manipulated, engineered and/or deliberately distorted the votes cast and counted in his favour thereby affecting the final results tallied.

(c) The Petitioner avers that in numerous instances the 2nd Respondent selectively manipulated, engineered and/or deliberately distorted the votes cast and counted particularly in favour of the 3rd Respondent thereby affecting the affecting the final results tallied.

(d) The Petitioner avers that in a substantial and significant number of instances the 2nd Respondent grossly inflated the votes cast in favour of the 3rd Respondent thereby affecting the final results tallied.

(e) The grounds, information and evidence detailed in the supporting affidavits are indicators of a deliberate and/or systemic and systematic interference and manipulation of the results of the Kiagu Ward MCA Election by the 2nd Respondent.

(f) The effect of the systemic and systematic manipulation and distortion of the results renders it impossible to determine who actually won the Kiagu Ward MCA Seat and/or whether the threshold for winning the Election under the Constitution was met.

(g) The purported results in the 1st Respondent's Forms 36B are materially different from what the 1st Respondent publically relayed and continues to relay as at the time of filing in its web site or portal.

(h) The Petitioner aver that the 1st Respondent abetted and allowed the electronic media and news channels to relay and continue relaying the purported results, which the 1st Respondent was aware had no legal or factual basis. Petitioner aver that this was deliberate and calculated to create a false narrative and national psyche in preparation to steal the election in favour of the 3rd Respondent.

(i) Notwithstanding the foregoing averments in respect of Forms 36B, the Petitioners further aver that at the time of declaration of the result, the 2nd Respondent did not have most Forms 36B nor did it

publically display or avail the same for verification. The declaration of the final result was therefore invalid and illegal.

CONTRAVENTIONS

1. THAT the 1st and 2nd respondents conducted an election contrary to Article 81 of the Constitution of Kenya, 2010 provides the principles that the electoral system shall comply with, *inter-alia* freedom of citizens to exercise their political rights under Article 38.
2. THAT out of these actions the 1st and 2nd respondents abdicated their role and duty to exercise, protect and safeguard the sovereign will of the people of Kiagu ward.
3. THAT Section 83 of the Elections Act provides that where an election is not conducted in accordance with the Constitution and the written law, then that election must be invalidated notwithstanding the fact that the result may not be affected.
4. Even so, although the Petitioner aver that both the results and the conduct of the election were affected and rendered invalid, the Petitioners' position is that the non-compliance with the Constitution and the written law is by itself sufficient to invalidate the Ward vote.
5. THAT the respondents have violated the provisions of the Constitution of Kenya, the Elections Act, The IEBC Act, Election (General) Regulations, 2012 Laws of Kenya.

1ST AND 2ND RESPONDENTS' RESPONSE TO PETITION

In response to the Petition, the 1st and 2nd Respondents filed a response stating that;

THAT Save what was expressly admitted, the 1st and 2nd Respondents denied each and every allegation of alleged fact as set out in the Petition as if the same were set out verbatim and traversed seriatim.

1. The 1st Respondent is an Independent Institution established under **Article 88 of the Constitution**. It is charged with the exclusive mandate of conducting and/or supervising elections and referenda to any elective body or office established by the Constitution, and any other elections as prescribed by an Act of Parliament. The 1st Respondent is accorded its status as an independent constitutional commission pursuant to **Article 248 (2) (c) of the Constitution** with the principal purpose of, inter alia, protecting the sovereignty of the people of the Republic of Kenya.
2. In Carrying out its duties under Article 88 of the Constitution, the 1st Respondent is enjoined by Article 249 (2) of the Constitution to exercise its powers subject only to the provisions of the Constitution and National Legislation.
3. The 1st and 2nd Respondents admitted paragraphs 2, 3 and 4 of the Petition in so far as the same are merely descriptive of the parties suffice to add that her address of service for the purpose of the Petition is care of **C.B. MWONGELA & CO. ADVOCATES, VIEW PART TOWERS, 13TH FLOOR, MONROVIA STREET/UTALII LANE, P.O. BOX 8841 – 00200 NAIROBI.**
4. The 1st and 2nd Respondents conducted a general election on the 8th August, 2017 for the member of County Assembly elections where, the following candidates contested and the results were as below:-

S/ NO.	NAME CANDIDATE	OF	PARTY	VOTES GARNERED
1.	FRANCIS	RUTH	INDEPENDENT	150

	MAKENA			
2.	KITHIIRA KIRIA	ISAAC	INDEPENDENT	1125
3.	EUNICE KIRIMI	KAREGI	MAENDELEO CHAP CHAP	1792
4.	KIUGU PATRICK	MUGIRA	INDEPENDENT	97
5.	M'MURITHI MWANGI	JOSEPH	DEMOCRATIC PARTY	441
6.	MAGAMBO KINYUA	SAMSON	INDEPENDENT	1690
7.	MARETE MWANGI	RICHARD	PARTY OF NATIONAL UNITY	1354
8.	MIRITI MAWIRA DAVID	DANIEL	JUBILEE	1417
9.	MURITHI MICHENI	PHILIP	PTP	11
10.	MWITI PETER		MAZINGIRA GREEN PARTY	12
11.	NABEA MBAE	HENRY	INDEPENDENT	18
12.	NCURAI MUTUMA	JAMES	INDEPENDENT	44
13.	NGARUNI KIAMBI	SIMON	NARK KENYA	763

5. That the tallying process confirmed that **Eunice Karegi Kirimi**, the 3rd Respondent herein, garnered the highest number of votes.

6. The 1st and 2nd Respondents admitted the contents of paragraphs 5,6,7,8,9,10 and 11 of the Petition in so far as the same are descriptive and/or highlighting or positions of the law as set out in the constitution and other electoral governing laws, including but not limited to Election Act No.24 of 2012 in so far as elections of Members of County Assembly of Kiagu Ward are concerned.

7. The 1st and 2nd Respondents did not admit the allegations as contained in paragraph 12 – 17 (both inclusive) of the Petition and put the petitioner to strict proof thereof.

8. In response to the allegations raised in paragraphs 12-17 (both inclusive) of the Petition, the 1st and 2nd Respondents categorically stated that they conducted general election on the 8th August, 2017, for the Member of County Assembly of Kiagu Ward within the confines of the set laws and

principles in Article 81(e)(v) of the Constitution of Kenya, 2010 as read together with Section 39,44 and 44A of the Election Act as well as the Elections Rules and Regulations and that the results as announced by the 2nd Respondent reflect the true will of the people of Kiagu Ward.

9. The petitioner and the 3rd Respondent contested for the seat of Member of County Assembly Kiagu Ward and the results were as below:

(i) 1st Respondent, Kirimi Eunice Karegi had a Total of 1,792 votes

(ii) The Petitioner, Magambo Samson Kinyua had a Total of 1,690 votes.

10. The tallying process confirmed that the 3rd Respondent herein, garnered the largest number of votes, a clear manifestation of the will of the sovereign power of the people of Kiagu Ward through the election held on 8th August, 2017. In conducting the said elections, the 1st and 2nd Respondent discharged its mandate in accordance with the Constitution and the applicable body of electoral laws.

11. In response to allegations particularly in paragraph 12(b) (1-7) of the Petition, 1st and 2nd Respondents wish to state that:-

(i) The data entered into the KIEMS Kits from all polling stations within Kiagu Ward was consistent with the information and date from respective Forms 36A and put the Petitioner to strict proof of any allegations to the contrary;

(ii) The data being displayed publicly by the 1st Respondent at the Sub County Tallying Centre was consistent with the information and data in respective Form 36As and put the Petitioner to strict proof of any allegations to the contrary.

(iii) The 2nd Respondent administered the Kiagu Ward MCA Election in an efficient, accurate and accountable manner as required under the Constitution and all other electoral laws in Kenya and put the Petitioner to strict proof of any allegations to the contrary.

(iv) The information in Forms 36a is consistent with the information recorded in Forms 36B as required under the law and put the Petitioner to strict proof of any allegations to the contrary.

(v) The final results declared by the 2nd Respondent at the Sub County Tallying Centre for Kiagu Ward MCA seat were accurate and consistent with forms 36A and 36B, which were the primary documents from which the results were announced.

(vi) Consequently, Forms 36B being verifiable and a true record and reflection of forms 36A, the elections as conducted on 8th of August, 2017 for MCA seat, Kiagu Ward were validly and lawfully conducted and a true reflection of the sovereign will of the People of Kiagu Ward and put the Petitioner to strict proof of any allegations to the contrary.

12. The 1st and 2nd Respondents therefore state that they verified and accurately tallied the results of all the candidates and in declaring the results of Kiagu Ward elections in accordance with the Constitution.

13. In response to paragraph 12(b)(i-ix) of the Petition, the 1st and 2nd Respondents wish to stated as follows:-

a) The computation and tabulation of the results in all Forms 34B is accurate, verifiable and internally consistent. All figures add up to the declared and announced results without an iota of inconsistencies and/or inaccuracies and put the Petitioner to strict proof of any allegations to the

contrary.

b) Further, and without prejudice to the foregoing, and averments which should not be construed as to constitute admissions, the 1st and 2nd Respondents aver that if there were any inaccuracies and/or inconsistencies and/or inaccurate tabulations, the same are inadvertent mistakes, equal to human error and any isolated cases of discrepancies and/or inconsistencies between the results as contained in Forms 36A and Forms 36B which is denied, arose from inadvertent human error during the process of tallying and verification of the results contained in the Forms 36A. The said errors, if any, did not materially affect the outcome of the elections and would not in any way encumber the will of the sovereign people of Kiagu Ward.

c) The results contained in Forms 36B tally with the results obtained from the polling stations as set out in Forms 36A which are the primary date entry forms.

d) The 2nd Respondent categorically stated that at no particular time did she selectively manipulate, engineer and/or deliberately distort the votes cast and counted in favour any particular candidate, not even the 3rd Respondent puts the Petitioner to strict proof of any allegations to the contrary.

e) The 2nd Respondent averred that at no particular time, at the onslaught, during and even after the counting and tallying of votes did she inflate, grossly or otherwise, the votes cast, in favour of the 3rd Respondent, or any other candidate contesting for the Member of County Assembly seat of Kiagu Ward puts the Petitioner to strict proof of any allegations to the contrary.

f) The 2nd Respondent is a stranger to the contents of paragraph 12(b) (v &vi) and reiterated her earlier assertions that together with the 1st Respondent, they conducted free, fair, verifiable and transparent elections void of any malpractices, were accurate and without illegalities, in a manner that was very clear to determine who had won the Kiagu Ward MCA elections, having met the threshold set by the Constitution and all other electoral laws puts the Petitioner to strict proof of any allegations to the contrary.

g) The 1st and 2nd Respondents are strangers to the contents of paragraph 12 (b) (vii & viii) of the Petition suffice to say that the process was backed by an elaborate electoral management system supported by the various electoral laws, which included several layers of safeguards to ensure an open, transparent, participatory and accountable system to guarantee free and fair elections pursuant to Article 81 as read together with Article 86 of the Constitution.

h) The 2nd Respondent wishes to state that at the time of declaration of Kiagu Ward MCA results, she had in her possession all forms 36B and availed all those forms publicly for verification by the candidates' agents. As such, the final result declared was therefore valid and lawful and a true reflection of the sovereign will of the people of Kiagu Ward.

14. In response to paragraph 13,14 and 15, the 1st and 2nd Respondents averred that they conducted the Kiagu Ward MCA elections in consonance with the provisions and principles as set out in the Constitution, in full compliance of Article 81 and other electoral governing laws, inter alia, Section 83 of the Elections Act.

15. At no particular point in time did the 1st and 2nd Respondents abdicate their role and duty to exercise, protect and safeguard the will of the people of Kiagu Ward.

16. The 1st and 2nd Respondents averred that the member of County Assembly election was conducted in accordance with the Constitution, the Independent Electoral and Boundaries Commission Act, Elections Act, the Regulations made thereunder and all other relevant provisions of the law and maintain that the Petitioner's allegations contained in paragraph 13 to 17 of the Petition (inclusive of both paragraphs are couched in generalities, misplaced and without any

factual basis.

17. In further response to paragraph 15,16 and 17 of the Petition the 1st and 2nd Respondents state that **Section 83 of the Elections Acts** provides the following:-

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.

18. In response to paragraphs 11 and 12, the 1st and 2nd Respondents state that the allegations are vague and couched in generalities and lack particulars as required by law. The 1st and 2nd Respondents reiterate that the election was conducted in accordance with the Constitution, the Election Act and all governing statutes and was not marred with irregularities as alleged by the Petitioner.

19. The 1st and 2nd Respondents contend that the Petitioner's allegations fail to satisfy the evidentiary threshold required to validate those factual assertions.

20. In view of the foregoing, the election conducted in Kiagu Ward for the Member of County Assembly was conducted in an impartial, neutral, efficient, accurate and accountable manner in accordance with Article 81 (e) of the Constitution.

The 1st and 2nd Respondents invited the Honourable Court to find and hold that:

- a) The elections conducted in Kiagu Ward by the 1st and 2nd Respondents were not in breach of and did not contravene the provisions of the Constitution, the Electoral Act or of any other electoral statute;
- b) The 3rd Respondent was validly elected as the Member of County Assembly in Kiagu Ward, Imenti Central Constituency.
- c) The Petition lacks merit and should be dismissed; and
- d) The Petitioner should bear the costs of the Petition

3RD RESPONDENT RESPONSE TO PETITION

In response to the petition, the 3rd Respondent stated THAT:-

1. Save what is expressly admitted, the 3rd Respondent denied each and every allegation of fact set out in the Petition as if the same were herein set out verbatim and traversed seriatim.
2. The 3rd Respondent is the member of the Meru County Assembly (**hereinafter "the M.C.A"**) for Kiagu Ward in Meru County having garnered the highest number of votes in the general elections that took place on 8/8/2017.
3. The 3rd Respondent admitted paragraphs 1, 2 and 3 of the Petition in so far as the same were merely descriptive of the parties
4. The 1st and 2nd Respondents conducted a general election on the 8th August, 2017 for the member of County Assembly and the tallying process confirmed that **EUNICE KAREGI KIRIMI** the 3rd Respondent herein, garnered the largest number of votes.

5. The 3rd Respondent denies having committed any electoral malpractices irregularities or offences whether before, during or after the elections held on 8/8/2017. The 3rd Respondent categorically denied;

a) That she was engaged in widespread voter bribery, voter buying or influenced voter at Gitiye polling station, Gikuuru, Karimbene or any other polling station within Kiagu ward as alleged or at all.

b) That she breached any electoral law and principle on 8/8/2017 as alleged or at all.

c) That her agents were bribing voters as alleged.

The 3rd Respondent urged this Honourable Court to find and hold that:-

a) The 3rd Respondent **EUNICE KAREGI KIRIMI** was duly elected as the county representative for Kiagu Ward and the election was valid.

b) The petition lacks merit and should be dismissed; and

c) The petitioner should bear the costs of the petition.

AGREED ISSUES FOR DETERMINATION

1. Whether the elections held on 8/8/2017 were conducted in accordance with the constitution and the election's Act and the Elections Rules.

2. Whether there was undue improper influence, corruption or irregularities in the conduct of the elections?

3. Whether there was substantive, noncompliance with the constitution, elections Act and the applicable Rules and if so, what was the effect of the non-compliance on the results?

4. Is the petitioner entitled to the prayers in the petition?

5. Who should bear the costs of the petition?

Other issues were determined by the court when it made a ruling on the respondent's application to have the petition dismissed. I will therefore not determine those issues in this judgment.

ON EVIDENCE

PETITIONER'S CASE

SAMSON KINYUA MAGAMBO, is a registered voter in **KIAGU WARD**, within Imenti Central Constituency of Meru County as evidenced by his copy of identity card annexed and marked **SKM-1**. That he was a candidate for the position of Member of County Assembly, **KIAGU WARD**, within Imenti Central Constituency in the elections conducted on 8th August 2017 as evidenced by his copy of nomination Certificate and certificate of nomination marked **SKM-2, SKM-3** respectively. He stated that he was vying as an independent candidate as evidenced by a copy of resignation letter and intention to contest marked **SKM-4, SKM-5** respectively. That the 3rd Respondent herein was declared by the 2nd Respondent on 11th August 2017 to be the validly elected MCA for **KIAGU WARD**, within Imenti Central Constituency. According to him, the 8th August 2017 the elections did not proceed as set out under the law. That on 8/08/2017 at around 6:00pm the petitioner casted his vote at St. Paul Makandune polling station in Kiagu ward within Meru county. That during the casting of vote process the agents of **EUNICE KAREGI (MCA)** were going round compelling voters to vote for her. According to him, the

voters were being escorted to their respective homes after casting votes in favour of the third respondent. That the voters were also given money as a bribery and the said process went on until the closing of the polling station at 5.00pm. He further stated that the presiding officer was not neutral but was acting in favor of the 3rd respondent. It was his evidence that his agents in other polling station called him reporting the same issue of voter bribery. He alleged that the presiding officer of GITIE polling station allowed people to continue voting up to 1.00pm after the normal closure of their polling station. The voters were being ferried from different places and taken to the polling station. It was his evidence that at KARIMBENE shopping centre polling station one of the aspirant namely RUTH MAKENA had scored nil votes in form "36A" but in form "36B" it was indicated that the same aspirant scored 130 votes. MR. JOSEPH MWANGI M'MURITHI scored 1 vote in form 36A but in FORM 36 B it was indicated that he scored 36 votes. At KALIMBENE polling station the petitioner scored 36 votes in form 36A but in form 36B declaration form he got one vote. He annexed a copy of form 36A and 36B and marked them as **SKM-6 SKM-7** respectively. The witness believed that in other polling stations the same mistake was visited therefore frustrating his efforts to win the election. According to him, the elections were not fair and credible. He urged the Court to cancel the elections since he believed that the same were fraudulent. He stated that he has been pleading with the returning officer to supply him with the form 36As but all the efforts have been futile making him believe that the refusal to supply the said form 36As is a furtherance scheme to cover the fraud.

When cross examined by Miss Kaimenyi advocate for the first and second respondents, the witness stated that there were 26 polling stations and that he had a total of 26 agents. He further stated that he voted at St. Paul's Makandune being the first voter. He further stated that he voted at 6.00am contrary to the contents of his affidavit stating that he voted at 6.00pm. He admitted that he had stated that agents of 3rd respondent were going round compelling people to vote for her since he saw them at his polling station. According to him, one of them was his neighbor and was carrying voters using his motor cycle making him believe that the said rider was urging the voters to vote for his opponent. The witness further stated that he spoke to a person called Kirimi who informed him that he was giving voters Kshs.50/- each so that they could vote for the 3rd respondent. That he went to Gitiye polling station where he was informed that people voted until 1.00am. On further questioning, he stated that he only had 25 agents who had been trained by IEBC and that he had advised his agents to report to the right authorities in case they noted any forms of mal practice. The witness stated that he had issues with the results of Karimbene especially in forms 36A and 36B. That he scored 36 votes in Karimbene but the same were stated as one vote in form 36B. He noted the anomaly and informed the returning officer who promised to correct the same. He stated that he noted that other people's results too had errors. When Form 36B and form 36A were shown to the witness, he stated that the same indicated that FRANCIS RUTH MAKENA had nil votes according to form 36A yet she had 130 votes in form 36B. ISAAC KIARA had 130 votes in form 36A and 4 votes in form 36B. EUNICE had 4 votes in form 36A and 0 in form 36B. He stated that he did not have any problem with forms 36A of Karimbene and other forms for the other polling stations. He however stated that what was posted in the KIEMS KITS is not consistent with the information contained in form 36A. When the witness was pushed further he stated that he knew nothing about the contents of KIEMS KITS. He confirmed that he only had issues with results from Karimbene.

When the witness was cross-examination by Miss Kiome advocate for the third respondent, the witness stated that there was voter bribery at his polling station. According to him, Gitiye, Gachuru Primary, Gikuru and Karimbene had cases of voter bribery. He however stated that he could not tell if the said cases of voter bribery were recorded in the polling station diary. He further stated that his agent at Gacuru polling station (whose name he could not recall) did not sign the form. The witness stated that he did his independent tallying of the votes and found that he had garnered 1824 votes. He confirmed to the court that all forms 36A were okay and that only form 36B for Karimbene had issues. The witness stated that although he had stated that he witnessed voter bribery, he did not make a report at the police station. He further confirmed that he did not see any agent bribing the voters.

PW2 was an agent of PW1 at Karimbene polling station. It was her evidence that she arrived at the polling station at 7.00 am and stayed there until 3.00 am. According to her, it started raining at around 1.00 am. And since there was no place to shelter, IEBC officials took shelter at the shops which were small and could not accommodate everyone. At the time when the rains started, the votes had

already been counted and the results announced. She called PW1 and informed him of the results. It was her evidence that she did not witness when the results were being transmitted. According to her, PW1 called her at around 3.00 am. and informed her that the results at the tallying center indicated that he had scored one vote. She later left for her home. The witness confirmed that she signed form 36A.

On cross examination by Miss Kaimemyi advocate, the witness stated that she did not leave the polling station at any time. She stated that there was an agent of the third respondent by the name Magdalene who was paying kshs. 200/= to the voters for them to vote for the third respondent. She stated that their main duty was to show voters where to vote from. According to her, some voters informed them that they were going to vote for a certain candidate but after meeting Magdalene, they would change their mind. She informed the presiding officer of what was happening. Police officers took action and send those people away. According to her, voting stopped at 6.00pm and the votes were counted in their presence. The results for MCA were out by 1.00 am.

In cross-examination by Miss. Kiome advocate for the third respondent, the witness stated that the voting started at 6.00am but that she arrived at the polling station at 7.00 am. She further stated that she did not see anyone bribing the voters. She further stated that she did not see Magdalene giving out bribes. She could not give the names of any voter who stated that she had been paid money to vote. The witness further stated that she signed form 36A after vote counting and confirmed that the signature appended to form 36A is hers.

PW3 was a voter a Gikuuru primary school polling station. It was his evidence that he got to the polling station at 6.30am but were asked to wait in the cue until 7.00am. since the ballot box for MCA was missing. The box arrived at around 9.00 am. That was the time when they started voting. They voted and the voting ended at around 5.00 pm.

In cross-examination by Miss kaimenyi advocate for the 1st and 2nd defendants, the witness stated that he voted and left and only went back to the polling station at about 5.00pm. He stated that the polling station was at a Primary school and that they stood outside the classroom as the votes were being counted. He stated that he had found Chief Andrew Kirema at the polling station. He stated that the said chief was moving in and out of the classroom. It was his evidence that he heard the chief telling people to vote for ISAAC and that there was an agent of Simon Kiambi by name Josephat Mutua who was giving voters a bribe of kshs. 100/=. He further stated that he saw Francis Murithi, agent of Kiambi giving out money. He confessed that his wife was given kshs. 100/=. After noting what was going on, he made a report to the police officer who was at the polling station He told the court that the agents were send out when the votes were being counted. According to him, the results were announced at 5.00pm on 8/8/2017 but could not tell the time when vote counting started.

When he was cross-examination by Miss Kiome advocate, the witness admitted that he was an MCA aspirant (Mazingira green party) but that he abandoned his candidature two months to the election. He stated that Gikuru was his strong hold but he stepped down and opted to support the petitioner. He further stated that he believed that PW1 could have scored more than 200 votes at the polling station since that was his home area. That he had spoken to his family members and they had promised to vote for the petitioner. He stated that he found Josephat Mutua and another giving bribe and he reported. According to him, two of them fled on a motor cycle when the police officer approached them. He further stated that he had not reported the same to the police. According to him, voters took tea at the hotel of Anjelo kirema (the ass. Chief). He told the court that the agents were not allowed to get into the hall when the votes were being counted. He confirmed that form 36A which was shown to him was signed by the agents of the parties.

PW4 voted at Gitiye polling station on 8/8/17. She was an agent of PW1 and voted in stream 1 of 2. It was her evidence that she arrived at the polling station at 6.00am and that voting started at 6.20am. She told court that she saw supporters of the third respondent buying votes at the road and field. According to her, voters insisted on seeing the third respondent's agent called Mwenda before voting. She reported the matter to the presiding officer who took time before acting. He finally ordered Mwenda not to move from the place where he was sitting. According to her, voting went on upto 1.00 am. They asked the presiding

officer to record it in the diary but he refused to do so. When Form 36A of stream 2 – Gitiye primary school was shown to the witness, she stated that Vote counting started at 2.00 am on 9/8/2017. She further stated that she did not sign the form 36A since she had noted that the election had not been conducted in a fair way. According to her, PW1 got 3 votes at the said polling station. When the Poll diary (at page 11) for Gitiye primary school stream 2 was shown to the witness, she confirmed that the same contained her name and that of MILTON MWENDA who was the 3rd respondent's agent.

When the witness was cross-examined by Miss kaimenyi advocate, she stated that she got to the polling station at 6.00 am and stayed there until the results were announced at 8.00 am on the following day. That she left after the boxes were sealed. It was her evidence that by 5.00pm, the cue was still very long but denied that most of the people in the cue were elderly people. According to her, a voter took a maximum of 2 minutes to vote. That, once the old and illiterate were given the ballot papers, 3 agents would accompany them so as to witness as the clerk guided them on how to vote. According to her, it is the clerk who read to them (elderly and illiterate) what was on the ballot paper in their presence. She stated that she heard people say that there were voters who were being bribed. When shown paragraph 5 and 6 of her affidavit, she stated that she believed that any person who called for a specific agent to see them vote, meant that they were to be paid after voting. She stated that although she made a report to the presiding officer she refused to record it in the polling station diary. She told court that she was aware that bribery is a criminal offence but that she did not make a report of the same at the police station. According to her, the last voter voted at 0050hrs and that she was present when the votes were being counted. Form 36A was shown to the witness who confirmed that JOSEPH had 4 votes. The witness stated that she refused to sign the form because the presiding officer denied her a chance to witness. She confirmed that the petitioner had one vote.

PW5, was an agent of the petitioner at Gacuuru. He voted at Ucheru polling station before proceeding to Gachuru polling station where he arrived at 8.00am. It was his evidence that at around 2.30 pm a group of 3 men went to the polling station on board a motor cycle but stopped at the gate. One of them was Mureithi. According to him, there were rumours that they were buying votes and alerted a police officer who went to the gate and the said people fled on seeing the officer. According to him, the said people were buying votes for the third respondent. It was his evidence that the polling station was closed at 6.00 pm and the votes for MCA seat were counted at about 6.30 pm. By 7.00 pm, they had already received the results. They asked for a recount of the votes for their confirmation but the presiding officer refused to have them recounted. He stated that he did not sign Form 36A for Gachuru primary school but that an agent by the name JOEL MWITIA signed it.

When the witness was cross-examined by Miss Kaimenyi, he stated that he was sick when he was scheduled to attend the agent's seminar but that he was given a form which allowed him to access the polling station. That they were two agents at that polling station. He was with JOEL MWITI but he could not confirm if JOEL attended the training. He stated that the contents of Paragraph 5 of his affidavit were not correct since the riders arrived at around 2.30 pm and not at 11.00 am as stated in his affidavit. On paragraph 6 of his affidavit, he stated that it is the people who received the bribe who told them that the said riders were bribing voters. According to him, SAMSON garnered fifty something votes and that he was present when the votes were counted. He stated that he did not refuse to sign the form but that he had already left when the form was being signed. He further stated that he did not see an IEBC officer putting petitioner's votes to the 3rd respondent's. He stated that he demanded to have the votes recounted since he had seen anomalies in the 2013 elections.

When he was cross-examined by Miss Kiome, he stated that Gachuru polling station was opened at 6.00 am and closed at 6.00pm. when the polling station diary was shown to him, he stated that the same indicated that the polling station was opened at 6.15 am and closed at 6.25pm. He stated that he had been told that voters were bribed but he did not witness it.

1ST AND 2ND RESPONDENTS' EVIDENCE

HABIBA GODANA HILAMA, was the Returning Officer, Central Imenti Constituency, within Meru County in the just concluded 8th August general elections, and the 2nd Respondent herein. She did not

dispute that the petitioner was a candidate for the position of the MCA, Kiagu Ward as an Independent Candidate. She admitted that within the powers conferred upon her as a Returning Officer, Central Imenti Constituency, she declared the 3rd Respondent as validly elected MCA for Kiagu Ward. It was her evidence that the General Elections held on 8th August, 2017 proceeded as set out in law without any hiccups whatsoever. That voting generally began at around 6.00am and ended successfully at 6.00pm in many polling stations within the constituency. It was her evidence that no incidences of voter bribery, intimidation and/or coercion were ever reported to her or any other election agents/officials during the entire voting period and exercise. The allegation therefore that the 3rd Respondent compelled any voter to vote for her and/or any other person is based on no evidentiary proof and the same should be treated as such. According to her, all presiding officers were neutral and impartial and did not in any way, through any of their acts and/or omissions, act in favour of either the 3rd Respondent or any other candidate. The witness stated that it was not true that the Presiding Officer, GITIYE polling station allowed people to continue voting past voting hours. Those allegations to her were mere buffs and should be treated as such as they contained no evidentiary and/or probative value. It was her evidence that while tallying results for **Karimbene Polling Station** she made the following posting errors as captured in Form 36B:-

- a. Francis Ruth Makena scored 0 votes, Kithiira Isaac Kiara scored 130 votes and Eunice Karegi Kirimi scored 4 votes. However in form 36B Francis Ruth Makena scored 130 votes, Kithiira Isaac Kiara scored 4 votes and Eunice Karegi Kirimi scored 0 votes.
- b. Kiugu Mugira Patrick scored 0 votes, Marete Richard Mwangi scored 1 vote. However in Form 36B Kiugu Mugira Patrick scored 1 vote, Marete Richard Mwangi scored 0 votes.
- c. M'Murithi Joseph Mwangi scored 1 vote and Magambo Samson Kinyua scored 36 votes. However in Form 36B, M'Murithi Joseph Mwangi scored 36 votes and Magambo Samson Kinyua scored one vote.

NAME CANDIDATE	OF	ERROR FORM 36B	IN CORRECT FORM 36A
FRANCIS MAKENA	RUTH	130	0
KITHIIRA KIARA	ISAAC	4	130
EUNICE KIRIMI	KAREGI	0	4
KIUGU PATRICK	MUGIRA	1	0
M'MURITHI MWANGI	JOSEPH	36	1
MAGAMBO KINYUA	SAMSON	1	36
MARETE MWANGI	RICHARD	0	1

Form 36A of Karimbene Shopping Centre Polling Station and Form 36B for Kiagu Ward were Annexed to her affidavit and marked as HGH-1.

She stated that the aforesaid posting errors in the recording or tallying of the votes were inadvertent, unpremeditated and unintentional human error mistakes and the said errors do not materially affect the results declared at all. That the tallying of some votes in Kiagu Ward may have minor challenges but the election cannot be said to be devoid of merits or so distorted as to fall short of expressing the people's electoral intent. It was her evidence that all votes were counted, form 36As filled correctly, and duly attested by agents. Thereafter the results as indicated in Form 36A were transferred to form 36B without any tampering whatsoever. She denied allegations that she had failed to supply forms 36A to the petitioner since the same were accessible to the public either from the 1st Respondent's portal, regional offices and/or from its headquarter offices in Nairobi and therefore no scheme of fraud can be linked and/or associated with her or the 1st Respondent. According to her, the Kiagu Ward MCA elections were not a fraud, to the contrary, they were conducted in a free, fair and transparent manner and the results announced were credible. She averred that an election is not an event but a process and that the will of the people of Kiagu was clearly reflected through a free, fair and transparent process that culminated with the declaration of the 3rd Respondent as the MCA elect, Kiagu Ward. The witness further stated that in executing their constitutionally mandated responsibilities, the 1st and 2nd Respondents did not subvert or abuse the democratic process and/or infringe on the rights of the Petitioner in any way whatsoever and that the 3rd Respondent, having been duly elected by the people of Kiagu Ward, was gazette as the winner of the MCA position, Kiagu Ward.

On cross-examination by Mr Kiogora advocate, the witness stated that Kiagu ward had 26 polling stations. That where Voters exceeded 700, they split the polling stations. She stated that she cleared petitioner to vie as an independent candidate. That independent candidates were allowed to bring one agent for every polling station. She stated that she was the one who was doing the tallying but had staff who supported her. It was her evidence that after receiving form 36A she would confirm that the calculations are correct before announcing them. According to her, the results that were being displayed came from the polling station. The ICT team were feeding those results to the system at the tallying centre. The witness stated that the tallying centre was at St Mary's Immaculate in Gatimbi. The witness further stated that she noticed errors as she was doing her filing on 12/8/2017 after announcing the final results on 11/8/2017. That she noted the errors late and could not rectify them at that time. She further stated that had she noted the mistakes earlier, she could have noted them in the comments. It was her evidence that she did not follow up to inform the candidates after noting the errors. She also stated that none of the candidates complained to her about it. According to the witness, the error in Karimbene polling station results was a posting error. She explained that she was the one who read out the results as the ICT officers keyed them in. She admitted that she may have made the mistake as she was reading the results. The mistakes according to her, was not intentional. That In Kiagu ward, the polling stations were to open by 6.00am and that if a station opened late, then the same ought to be recorded in the poll diary. It was her evidence that she did not have information that in Gikuru Police station, voting started late. When Page 14 of polling station diary for Gikuru was shown to the witness she stated that the same indicated that the station opened at 7.00 am on the polling day. That the same was confirmed by agents who signed the polling station diary. The witness stated that the Polling station diary for Gitiye primary indicated that stream 2 closed at 5.30 pm on 9/8/2017. The witness stated that the polling station diary for Karimbene shopping centre polling station, Kiamuri Primary school, Mpindi primary school polling station, Kijja Primary, 2 polling stations, Marathi primary school stream 1 and Makandune primary school polling station did not have the hours of closure indicated. The witness further stated that every ballot box is required to have five seals but that they had shortages of seals and some of the seals broke making them less than that which they had distributed. She admitted that some boxes did not have all the seals but explained that the problem was spread country wide. It was her evidence that the broken seals still hanging on some ballot boxes may not have been tampered with since some broke during transportation to the warehouse. According to her they placed 3 seals on some boxes due to the shortage. She explained that presiding officers were under instructions to stamp where they sign in forms 36A. That every form 36A must have 2 stamps but where it is stamped once, the same was still okay. It was her evidence that Gicuru primary school polling station's form 36A was signed by the presiding officer who stamped elsewhere.

On re-examination by Miss. Kaimenyi advocate, the witness stated that a candidate was allowed to have one agent. That she had a total of 150 presiding officers for the whole constituency. That after

confirming that the results were correct, the agents had a discretion to leave or stay and that after announcing the results and form 36B filed, the same could not be altered.

KABURU REBECCA KAIRUTHI a resident of Meru County was gazetted as the Presiding Officer for Central Imenti Constituency for purposes of the general elections that were held on 8th August, 2017. She was deployed at Gitiye Primary School Polling Station (stream 2). According to her, Polling started at 6.30am on 8th August, 2017 in the presence of agents, clerks and voters who were queuing at the time. She ensured that the election process went on well and clerks assigned to the polling station did their roles as assigned while agents of particular parties and candidates witnessed the voting process as provided for by the law. According to her, voters were being identified using KIEMS and National Identity Cards before being allowed to vote. There were no malpractices noted during the voter identification, casting of the ballots and counting of the votes. According to her, the voting process went on well. She stated that polling having started at 6.30am, the same was scheduled to end at 5.30pm. However, at 5.30pm, there were many voters queuing waiting for their turn to vote. That at 5.30pm, she physically counted approximately 200 voters in the cue and directed that each and every voter who was in the voting queue as at 5.30pm be allowed to vote. The witness observed during polling that many of the voters were elderly and took a lot of time to vote. The voting was also slowed down by heavy rains. According to her, the last person voted at around 1.00am on 9th August, 2017. When the voting process was concluded, tallying was done as per the laid down procedures. She stated that she ensured that votes for the respective candidates were correctly counted, captured and recorded in Form 36A and accordingly transmitted to the tallying centre. She annexed to her affidavit a copy of Form 36A for Gitiye Primary School Stream 2. The same was marked KRK-1

The witness further stated that agents of the particular candidates witnessed the voter identification, casting of the ballots, tallying of the results and signed the result forms before the ballot boxes were sealed and taken to the Constituency Tallying Centre together with other election materials where they were presented to the 1st Respondent. It was her evidence that she was not aware of the commission of any electoral offence at Gitiye Primary School Polling Station.

On cross examination by Mr. Kiogora Advocate she confirmed that in the 8/8/2017 elections she was the presiding officer at Gitiye Primary polling station and that she was a deputy presiding officer in the 2013 elections. According to her, the first voter voted at 6.30 am. She stated that more than 100 voters were on the cue at the time of closing the polling station. The witness told the court that the total number of people who voted was 495. That at 5.00 pm, 309 people had already voted. The balance therefore was 186 voters. She confirmed that 186 voters voted after 5.30 pm and that stream 1 too voted until late. It was her evidence that there were illiterate people who were assisted by the presiding officer and two agents at a time while others came with their relatives. It was her evidence that she would read for the voter, the voter identifies the person whom they wanted to vote for and then she would tick/mark the same, fold and give it to the voter. According to her, KIEMS KITS failed to identify some voters and that is when they used the register. According to her voters voted up to 1.00 am. but Vote counting ended at 5.30 am and not at 5.30 pm. She announced the results after the counting and that only 3 agents were present when she the announced the results and they signed. None of the agents refused to sign. It was her evidence that she was the one who transmitted the results to the tallying centre after counting. She used the KIEMS KIT to transmit the same. The transmission was partly successful since she was not able to transmit the results for Senator and others.

NKIROTE GLORY MUGAMBI, a resident of Meru was a gazetted Presiding Officer for Central Imenti Constituency for purposes of the general elections that were held on 8th August, 2017. She was deployed at St. Paul's Makandune Secondary School Polling Station in Kiagu Ward. According to her, Polling started at 6.00am in the morning of 8th August, 2017 in the presence of agents, clerks and voters who were in the queue and ended at 5.00pm. She ensured that the election process went on well and clerks assigned to the polling station did their roles as assigned while agents of particular parties and candidates witnessed the voting process as provided for by the law. According to her, voters were being identified by KIEMS KITS and National Identity Cards before being allowed to vote. According to her, there were no malpractices noted during the voter identification, casting of the ballots and counting of the

votes. That the voting process went on well. She denied allegations that the agents of the 3rd Respondent were going around the polling station compelling voters to vote for her. That she did not allow any agent to go out and engage with the voters. She denied allegations that voters were being given Kshs.50 to vote for the 3rd Respondent as no such complaint was ever made to her. It was her evidence that tallying was done as per the laid down procedures and that she ensured that votes for the respective candidates were correctly counted, captured and recorded in Form 36A and accordingly transmitted to the tallying centre. She annexed to her affidavit and marked KRK-1 is a copy of Form 36A for St. Paul's Makandune Secondary School Polling Station. The witness further stated that agents of the particular parties witnessed the voter identification, casting of the ballots, tallying of the results and they signed the result forms and the ballot boxes were sealed and taken to the Constituency Tallying Centre together with other election materials and presented to the 1st Respondent. She stated that she was not aware of commission of any electoral offence at St. Paul's Makandune Secondary School Polling Station.

On cross examination by Mr. Kiogora advocate the witness stated that she had worked as an IEBC clerk in the 2007 elections. That their polling station had one stream and that they opened the polling station at 6.00 am and closed at 5.00 pm. She stated that no one reported to her that voters were being bribed and that she did not experience any incidences of voter bribery. She did not have issues with the agents. According to her, 7 members were identified by the printed register. On MCA ballot box, the witness told court that she placed five seals and that form 36A of St. Paul's Makandune, had a lot of write ups due to the carbon paper. She stated that they had the original and the 2nd original and they gave them to the returning officer. The 3rd one was placed at the polling station door. According to her, the results were announced at 2.00 am.

3RD RESPONDENT'S EVIDENCE

EUNICE KAREGI KIRIMI a resident of Kiagu ward in Imenti Central Constituency of Meru County stated that she was elected member of the Meru County Assembly (hereinafter "the M.C.A") for Kiagu Ward in Meru County after being validly elected as the M.C.A for Kiagu Ward at the general elections held on 8th August, 2017 after garnering the most votes cast for that seat, which was a total of 1,792 votes. According to her, the elections for the seat of M.C.A in Kiagu Ward were free fair and devoid of any electoral offences, irregularities or malpractices. It was her evidence that on 8th August, 2017 she left her house at 2.30pm to cast her vote at Gitiye Primary School polling station. She voted and went back to her home where she slept and did not venture out to see what was happening. She told the court that she did not bribe voters and that her agents did not bribe voters at any polling station. The Member of County Assembly elections for Kiagu Ward according to her were conducted in accordance with the Constitution, the Elections Act and all governing statutes and was not flawed with irregularities as alleged by the petitioner. She further stated that she was not aware of any voter bribery, intimidation or any kind of incidents reported to any police station within Kiagu Ward on the general elections day of 8th August, 2017 and was also not aware of commission of any election offence.

On cross examination by Mr. Kiogora advocate, the witness stated that she had 26 agents, one at each polling station but did not have a chief agent. She vied on a Maendeleo chap chap party ticket which had a chief agent called Samwel Kinyua. She told the court that she did not inquire to know when the polling station was closed. That only the chief agent went round the polling stations. That she woke up at around 7.00 pm. and went to Nkubu Lamcy hotel. She went to the tallying centre at St Mary Immaculate in Gatimbi on 9th at around 7.00pm. Her agents had given her results which totaled to 1792. The same tallied with the results at the tallying centre. She later learnt that her 4 votes had not been reflected. It was her evidence that she did not bribe voters and her agents too did not give bribes since she had not given them any money for bribes.

SAMUEL KINYUA a resident of Kiagu Ward in Imenti Central of Meru is a registered voter at Kianthumbi Primary Polling Station in Kiagu Ward. He stated that he participated in the general elections held on 8/8/2017 as the Maendeleo Chap Chap (M.C.C) Imenti Central Constituency party agent (as per documents annexed and marked "S.K.I (a) and (b)). He stated that he was also in charge of the party agents in Kiagu Ward and started monitoring the Polling Stations at 6.45am. He had access to the polling

stations where he witnessed voter identification, casting of the ballots, tallying of the results and signing of the form 36A's by the party agents and when the ballot boxes were sealed and taken to the Constituency Tallying Centre together with other election materials which were presented to the 1st Respondent. That contrary to the averments that voters were bribed, no voters were bribed at the polling stations whether inside or outside the polling stations as alleged. That the security agents were around at all time and the petitioner and/or his agents ought to have reported the matter to the police. He stated that he was not aware of commission of any electoral offense at any of the polling stations in Kiagu Ward.

In cross-Examination by Mr Kiogora Advocate, he stated that he is a registered voter at Kianthumbi polling station in Abothuguchi west ward. That his duties as a chief party agent included representing the other agents at the tallying centre in Gatimbi and keeping communication with the other agents. He stated that he was not the one who trained their agents. That he was trained by Maendeleo chap chap officials on 28/3/2017 in their head office in Lavington. His party had only one candidate in Kiagu ward. He was also foreseeing elections for the women representative, MP and Senator. That on 8/8/2017 he visited 14 polling stations within Kiagu ward. He visited Gitiye at 7.55 am, Mujwa polling station, Kijja polling station, Muthithine polling station, Njunga polling station, Makandune polling station, St. Paul's then Rikana. He stated that some polling stations had 2 streams making it a total of 14 polling stations. It was his evidence that he arrived at Rikana at around 4.30 pm. He stated that he did not receive any report of a polling station which was opened late. He confirmed that Kiagu ward had 26 polling stations and that there were no cases of voter bribery in the polling stations that he did not visit since he spoke to his agents in those polling station. After 4.30 pm, he went back to the main tallying centre. It was his evidence that for every polling station that he attended, he was able to see the actual process. At Rikana, he witnessed what was being done at the main tallying centre. That's where the votes were being tallied. When he went to the tallying centre, he had not received the results since he had been informed that the voters were still voting. The witness could not tell when the voting ended at Gitiye. It was his evidence that their agent at Karimbene, Mandaitha Kiregi, called and informed him that the process had ended and their candidate had scored 4 votes.

MILTON MWENDA who is a resident of Kiagu Ward in Imenti Cental of Meru County is a registered voter at Gitiye Primary polling station in Kiagu Ward. He stated that he participated in the general elections held on 8/8/2017 as a Maendeleo Chap Chap (M.C.C) party agent at Gitiye Primary School (**as per an appointment letter annexed to his affidavit and marked "M.M.I"**). The witness stated that he was at the polling station as early as 6.00am but accessed the voting room at 8.00 am since he had misplaced his appointment letter. He further stated that contrary to the averments in paragraph 5 of the affidavit of Susan Ngugi (the petitioner's witness) voters were not bribed inside or outside Gitiye Primary School polling station as alleged. According to him the security agents were around at all time and the petitioner and/or his agents ought to have reported the matter to the police officers if indeed there were cases of voter bribery. He further stated that he was not aware of commission of any electoral offenses at Gitiye Primary School Polling Station. He stated that he witnessed the voter identification, casting of the ballots, tallying of the results and he signed form 36A. That the ballot boxes were sealed and taken to the Constituency Tallying Centre together with other election materials and presented to the 1st Respondent.

In cross examination by Mr. Kiogora Advocate, he stated that he was appointed as an agent by the 3rd respondent through the chief agent. He was trained by IEBC on a date that he could not recall. He voted at Gitiye police station stream 2 where he was an agent. He confirmed that there was one male police officer at the polling station. That voters who could not read and write were directed by the clerks. He explained that clerks picked 3 agents then proceed to the secret box. The agent would explain to the voter how to vote in the presence of the agents. That the duty of the agents was to confirm that the clerk marked the votes as per the voter's instructions. He admitted that he helped voters but could not recall the number of times that his group went to help them. According to him, voting went on up to around 1.00am.since there were so many people on the cue at 5.00pm when the station was to close. That vote counting started at around 2.00 am. He confirmed the results and signed the form 36A. He told court that he did not go to the tallying centre but was present when the results were being relayed by the person who had the KIEMS KIT.

At the close of the hearing, the court ordered for a scrutiny and recount of the votes in four polling

stations namely; Gitiye primary school (stream 1 and 2), Karimbene shopping centre and Gikuuru primary school. All the results as per IEBC and the results after the recount tallied in three polling stations. The results for Karimbene shopping centre tallied except the results for Isaac Kiara who had **130** votes but after recount, his votes were **129**. There was one rejected vote marked in favour of Samson Kinyua Magambo.

SUBMISSIONS

PETITIONERS SUBMISSIONS

The Petitioner submitted that he is challenging both the conduct of the Kiagu Ward election and the validity of the results declared in the 8/8/17 general elections. That the underlying premise of the Petition is simple yet fundamental. The Petitioner contend that the Kiagu Ward Election was so badly conducted, administered and managed by the 1st & 2ND Respondents that it failed to comply with the Constitution and other laws relating to the election. Throughout their submissions, they sought to demonstrate and prove that before the election, during the election and after the election the 1st & 2nd Respondent failed to deliver a free, fair and credible election and deliberately set out to subvert the sovereign will of the Kiagu Ward people.

It was submitted that the facts supporting the Petitioners' claims are set forth in the Petition, the supporting affidavits, and the entire Petitioners' Applications made during the hearing of the petition, the report from placing of additional seals, the report from the partial scrutiny of select polling stations, the various anomalies found in all the twenty six (26) forms 36A and the various anomalies found in all the twenty six(26) poll diaries. The Petitioner further relied on the ubiquitous admissions contained in the Respondents responses, especially in regard to the late opening and closing of polling stations, shortage of seals, results of Karimbene Shopping Centre where 36 votes were never tallied in favour of the petitioner and total denial of known facts. The petitioner submitted that the essence of Section 83 of the Elections Act is that for elections to be valid, they must comply with the principles laid down in the constitution, written law and regulations. The constitutional principles governing elections in Kenya are established by Articles 81, 86 and 38.

Article 81(e) of the Constitution establishes the principle of free and fair elections and provides for some of the ingredients for free and fair elections as follows:

“The electoral system shall comply with the following principles: free and fair elections, which are: by secret ballot; free from violence, intimidation, improper influence or corruption; conducted by an independent body; transparent; and administered in an impartial, neutral, efficient, accurate and accountable manner.”

The Constitution has elevated the principle of free and fair elections to the status of a fundamental right provided for under Article 38. That Article 86 goes further to stipulate additional principles that focus on the system of election; the casting, counting and tallying of the votes; the transmission of the results; and the appropriate structures and mechanisms for elimination of malpractices:

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

Whatever voting system is used, the system is simple, accurate, verifiable, secure, accountable and transparent; the votes are counted, tabulated and the results announced promptly by the presiding officer at each polling station; the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and appropriate structures and mechanisms to eliminate electoral malpractices are put in place, including the safekeeping of election materials.”

It was further submitted that, the Constitution imposes an obligation on the 1st Respondent to ensure that the voting system used is simple, accurate, verifiable, secure, accountable and transparent. The main objective of these principles is to avoid the possibility of manipulation of the system. The atmosphere in which elections are conducted determines the quality, integrity and credibility of the election results.

The petitioner went ahead to give the meaning of the principles laid out in Article 86 of the Constitution that are relevant to this Petition as;

Accurate – it means that the election results must be mathematically precise and competent. Ballots must be correctly counted, results must be properly tabulated, and totals must be correctly calculated.

Verifiable – means supported by a legal instrument that authenticates the contents. In respect of an election, this would mean the recording of the results in the prescribed form, the execution of those prescribed forms by the appropriate electoral officers and the publication of those prescribed forms in the appropriate media.

Secure – electoral processes and materials must be protected from manipulation and interference. Election materials and data must be protected from loss and damage.

Accountable – the election must be capable of being scrutinized on the basis of its own records. In the context of an election, the Ward tally must be capable of being audited by the polling station tally and the polling station tally must be capable of being audited by the ballot papers.

Transparent – an election is transparent when its processes are open and easily accessible to observation by the stakeholders and the public. This means that there must be admission of agents into polling, counting and tallying centres, the open announcements of all results; open furnishing of copies of the documents to all the agents and the timely publication of the polling results forms on the public portal.

That as will be demonstrated later in the submissions, the elections conducted on 8th August, 2017 fundamentally violated the above principles.

1. Whether elections held on 8/8/2017 were conducted in accordance with the constitution of Kenya, Elections Act and applicable rules?

It was submitted that the validity and integrity of any election is gauged upon the conduct of that election being in substantial compliance with the electoral law of that election. Lord Denning succinctly stated this principle in *Morgan v Simpson*;

“Collating all these cases together, I suggest that the law can be stated in these propositions:-

- 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 is affected, or not...
- If the election is 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...
- 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 result is vitiated.”

This principle was also reiterated by the **Ugandan Court of Appeal in the case of Kakooza John Baptist v. Electoral Commission & Another**. Locally the principle has been applied in the cases of **Joho v Nyange John Kiarie Waweru v Beth Wambui Mugo and Munyao v Munuve & 4 Others** to cite but a few. **In Gatirau Peter Munya v. Dickson Mwenda Githinji and 2 Others (2014) eKLR: the court held,**

“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 there under, 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.”

The essence of Section 83 was that for elections to be valid, they must comply with the ‘principles laid down in the Constitution’, written law and Regulations. The constitutional principles are established in Articles 38, 81 and 86 of the Constitution. Article 81(e) has established principles of free and fair elections, which principles have been elevated to the status of fundamental rights under Article 38 of the Constitution .an election that does not comply with the constitutional principles results is a usurpation of the peoples’ sovereignty by false representatives who do not represent the people’s will and who are not accountable to them. This goes contrary to the essence of Article 4 of the Constitution, which establishes Kenya as a sovereign Republic.

On violation of the principles set out in the Constitution as well as the electoral laws and regulations, the petitioners’ case as contained in the affidavits in support of the petition and oral submissions is that in relation to elections, the citizenry’s fundamental political rights under Article 38 are encapsulated in the principles of free and fair elections in Article 81(e) and IEBC’s obligation to conduct elections in a simple, accurate, verifiable, secure, accountable and transparent manner as stated in Article 86 of the Constitution.

IEBC, like all other state organs and persons, is bound by the principle of constitutional supremacy under Article 2(1) of the Constitution. It follows then that, in the conduct of any election, any of its acts that violates those principles, shall by dint of Article 2(4) of the Constitution, be ipso facto invalid and any election conducted contrary to those principles shall be nothing but a usurpation of the people’s sovereignty under Article 4 and shall produce masqueraders who do not represent the people’s will and are not accountable to them. In a nutshell;

- a) The 1st & 2nd Respondents flouted the governing principles set out in Articles 1, 2, 4, 10, 35(2), 38, 81, 86, and 249 of the Constitution, the Elections Act and the Regulations
- b) There was undue or improper influence, corruption and irregularities in the conduct of the elections
- c) There was un necessitated and untold delays in tallying ,counting and announcing of the results which to a larger extent depicts that the system may not have been simple as required by the law
- d) There were discrepancies in the seals used for the ballot boxes which is not only a contravention of the law but a key indicator of monkey business
- e) There were discrepancies in vote counts at the polling station whose illegal access had been awarded to the 3rd respondent
- f) Votes were tallied in the absence of agents which is a complete violation of the electoral laws.

2. Whether there was undue or improper influence, corruption and irregularities in the conduct of elections

Bribery and treating are among the election offences in Part VI of the Elections Act. Sections 62 and 64 of the Elections Act set out the acts that amount to treating and bribery respectively. For ease of reference, we would like to reproduce verbatim the provisions of these Sections. Section 62 which deals with the offence of treating states:

“62. (1) A candidate who corruptly, for the purpose of influencing a voter to vote or refrain from voting for a particular candidate or for any political party at an election

- (a) Before or during an election—

(i) Undertakes or promises to reward a voter to refrain from voting;

(ii) gives, causes to be given to a voter or pays, undertakes or promises to pay wholly or in part to or for any voter, expenses for giving or providing any food, drinks refreshment or provision of any money, ticket or other means or device to enable the procurement of any food, drink or refreshment or provision to or for any person for the purpose of corruptly influencing that person or any other person to vote or refrain from voting for a particular candidate at the election or being about to vote or refrain from voting, for a particular candidate, at the election; or

(b) After an election, gives, provides or pays any expense wholly or in part to or for any particular voter or any other voter for having voted or refrained from voting as aforesaid, commits the offence of treating.”

With regard to bribery, Section 64 provides:-

“64(1) A candidate who;

(a) directly or indirectly in person or by any other person on his behalf gives, lends or agrees to give or lend, or offers, promises or promises to procure or to endeavor to procure any money or valuable consideration to or for any voter, or to or for any person on behalf of any voter or to or for any other person in order to induce any voter -

(i) to vote or refrain from voting for a particular candidate;

(ii) to 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 any political party or candidate;

(iii) corruptly does any such act on account of such voter having voted for or refrained from voting at any election, for a particular candidate; or

(b) directly or indirectly, in person or by any other person on his behalf, gives or procures or agrees to give or procure, or offers, promises, or promises to procure or to endeavour to procure, any office, place, or employment to or for any voter, or to or for any person on behalf of any voter, or to or for any other person, in order to induce any voter

(i) to vote for or refrain from voting for a particular candidate; or

(ii) corruptly does any such act on account of such voter having voted for or refrained from voting;

(c) in any manner unlawfully influences the result of an election;

(d) directly or indirectly, in person or by any other person on his behalf, makes any gift, loan, offer, promise, procurement, or agreement to or for any person in order to induce that person to –

(i) procure or endeavour to procure the election of any person; or

(ii) Procure the vote of any voter at any election;

(e) upon or in consequence of any gift, loan, offer, promise, procurement or agreement, procures or engages, promises or endeavours to procure, the election of any person, or the vote of any voter at an election;

(f) advances, pays or causes to be paid any money to, or to the use of any other person with the intent that such money or any part thereof shall be used in bribery at any election, or who knowingly pays or causes to be paid any money to any person in discharge or repayment of any money wholly or in part used in

bribery at any election;

(g) being a voter, before or during any election directly or indirectly, in person or by any other person on his behalf receives, agrees or contracts for any money, gift, loan, or valuable consideration, office, place or employment for himself or for any other person, for voting or agreeing to vote or for refraining or agreeing to refrain from voting for a particular candidate at any election;

(h) after any election, directly or indirectly in person or by any other person on his behalf, receives any money or valuable consideration on account of any person having voted or refrained from voting or having induced any other person to vote or to refrain from voting for a particular candidate at the election;

(i) directly or indirectly, in person or by any other person on his behalf, on account of and as payment for voting or for having voted or for agreeing or having agreed to vote for any candidate at an election, or on account of and as payment for his having assisted or agreed to assist any candidate at an election, applies to the candidate or to the agent of the candidate for a gift or loan of any money or valuable consideration, or for the promises of the gift or loan of any money or valuable consideration or for any office, place or employment or for the promise of any office, place or employment; or

(j) 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, gives or procures any office, place or employment to endeavour to procure any office, place or employment, to or for such other person, or gives or lends or agrees to give or lend, or offers or promises to procure or to endeavour to procure any money or valuable consideration to or for any person or to or for such other person on behalf of such other or to or for any person, commits the offence of bribery.

The petitioner submitted that in view of the cited anomalies the will of the people of Kiagu Ward was subverted as there was eminent buying of votes at various polling stations as demonstrated many times before this Honourable Court. The petitioner relied on the averments brought up in the affidavits of Samson Kinyua Magambo, Grace Kendi, Peter Mwiti Mpuria, Susan Ngugi and Festus Mburugu Ntonjara premising on the testimony subsequently adopted in court;

Susan Ngugi was quoted as saying;

‘I saw people buying votes at the polling station. It is the supporters of EUNICE who were buying votes.’

The petitioner drew the attention of the court to the affidavit of **Peter Mwiti Mpuria** who with this regard cited numerous instances of bribery and was quoted as saying;

‘there were agents of SIMON KIAMBI giving voters a bribe of Kshs 100/=’.

The petitioner submitted that Article 10 has integrity as one of the core national values and principles of good governance and Chapter Six of the Constitution requires State Officers to be persons of integrity. That the term “integrity” comes from a congruence between thoughts, feelings, words, and actions when all that you are and do spring from your core values. The English Dictionary defines the term “integrity” as honesty and moral uprightness. In his book: *Developing the Leaders around You*, John C. Maxwell defines “integrity” as the trustworthiness and solid character at consistent words and walk. True leaders demonstrate integrity by example. Men and women of integrity are those whose word can be depended upon in any situation. Trust and confidence are the foundations of every business relationship they engage in. Mahatma Gandhi was one of the greatest examples of integrity we have seen in modern times, and the many moving stories about his life demonstrate the power of teaching this character trait by example.

He further submitted that the opposite of integrity is corruption. Sections 62 and 64 of the Elections Act quoted above include the term “corruption” in the acts that constitute the election offences of bribery

and treating. Corruption is defined the act of “dishonesty in return for money or personal gain.” A person who bribes for anything cannot, by any stretch of imagination, therefore be said to be a person of integrity and should therefore not be allowed to hold any office depicting leadership. As such the 3rd Respondent in this case is short of the integrity test and should not be allowed to lead the honourable people of Kiagu Ward.

Consequently, if one engages in bribery, treating or commits any other election offence, his election violates the electoral law principle of “free and fair election” contained in the Constitution, the Elections Act and the Election Regulations. Stating this point of freedom of choice in elections in the case of **Azhar Hussein v. Rajiv Gandhi [the Supreme Court of India said:**

“...the results of the Election are subject to judicial scrutiny and control ... to ascertain that the 'true' will of the people is reflected in the resultsIn order that the "true will" is ascertained the Courts will step in to protect and safeguard the purity of Elections, for, if corrupt practices have influenced the result, or the electorate has been a victim of fraud or deception or compulsion on any essential matter, the will of the people as recorded in their votes is not the 'free' and 'true' will exercised intelligently by deliberate choice. It is not the will of the people in the true sense at all. And the Courts would, therefore, it stands to reason, be justified in setting aside the election in accordance with law if the corrupt practices are established...”

It was further submitted that should the 3rd respondent deny knowledge of the culprits arrested and or chased away by security officers having been caught buying out leadership, and should the burden of proof be shifted to the petitioner to prove that indeed the said arrested persons were a direct representation of the 3rd Respondent, the petitioner drew the Courts’ attention to the statement at Paragraph 113 of Halsbury’s Laws of England, Vol. 153rd Edition which succinctly expresses this point thus:

“Due proof of bribery by or with the knowledge and consent of the candidate or by his agents, however insignificant that act may be, is sufficient to invalidate the election. The judges are not at liberty to weigh its importance, nor can they allow any excuse, whatever the circumstances maybe...”

In further contemplation of the Respondents arguments with regard to proof of bribery, the petitioner urged the court to endorse the statement in **Muliro v. Musonye & Another**, where it was held that it is not necessary to prove the amount of bribery. “It should suffice if it is shown that with [the] intention to influence voters to vote for a given candidate, bribes were given to voters”.

On the issue of improper influence, the Supreme Court in **Raila Odinga 2017** held that improper influence occurs when “*there was interference or an attempted interference with the exercise of any electoral right (Paragraph 318 -321 citing Chaan Lal Sahu & Others)* The Court noted that the “*test of undue influence is where the... Respondents’*” *conduct created an impression in the mind of a voter that adverse consequences would follow as a result of their exercise of their political choices.*” The court was urged to see;**Anthony Luyundi Isayi v Independent Electoral & Boundaries Commission [2013] eKLR; Watson v Electoral Commission [2015] NZHC 666. The Ugandan Supreme Court agrees.Rtd Col Dr. Kiiza Besigye v Yoweri Kaguta Museveni &another Petition No. 1 of 2001**(where the Court stated that “the entire election process should have an atmosphere free of intimidation, bribery, violence, coercion or anything intended to subvert the will of the people.”)

The petitioner made reference to the affidavit of **peter mwiti mpuria and susan Ngugi** where its averred that the Petitioner’s agents were not allowed to witness vote counting as well distraction in the queues to people who pledged allegiance to the petitioner which summarily amounts to intimidation and to large extent, undue influence

That **Section 10 of the Election Offences Act** provides:

Undue Influence

(1) A person who directly or indirectly in person undue influence or through another person on his behalf

uses or threatens to use any force, violence including sexual violence, restraint, or material, physical or spiritual injury, harmful cultural practices, damage or loss, or any fraudulent device, trick or deception for the purpose of or on account of;

(a) Inducing or compelling a person to vote or not to vote for a particular candidate or political party at an election;

(b) Inducing or compelling a person to refrain from becoming a candidate or to withdraw if he has become a candidate; or

(c) Impeding or preventing a person from being nominated as a candidate or from being registered as a voter, Commits the offence of undue influence.

(2) ...

(3) A person who directly or indirectly by duress or intimidation??

(A) Impedes, prevents or threatens to impede or prevent a voter from voting; or

(b) In any manner influences the result of an election, commits an offence.

The petitioner in his submissions went ahead to give the meaning of the term “undue influence” in the context of an electoral malpractice and particularly as used under Section 10 above. That In India, the meaning of the term ‘**undue influence**’ is found in Section 171(C) of the Penal Code which defines the offence of undue influence at an election as:

171(C). (1) Whoever voluntarily interferes or attempts to interfere with the free exercise of any electoral right commits the offence of undue influence at an election.

(2) Without prejudice to the generality of the provisions of sub-section (1), whoever—

(a) Threatens any candidate or voter, or any other person in whom a candidate or voter is interested, with injury of any kind, or

(b) induces or attempts to induce a candidate or voter to believe that he or any person in whom he is interested will become or will be rendered an object of Divine displeasure or of spiritual censure, shall be deemed to interfere with the free exercise of the electoral right of such candidate or voter, within the meaning of sub-section (1).

(3) A declaration of public policy or a promise of public action or the mere exercise of a legal right without intent to interfere with an electoral right, shall not be deemed to be interference within the meaning of this section.”

That although the wording of the Indian Penal Code quoted above is materially different from Section 10 of the Election Offences Act, the meaning injected into the above legal provisions, shows its applicability in the Kenyan context. The Supreme Court of India in the consolidated cases of **Charan Lal Sahu & Others v. Giani Zail Singh and Another; Nem Chandra Jain v. Giani Zail Singh; Charan Singh and Others v. Giani Zail Singh** thus explicitly stated that the test was whether there was an interference or an attempted interference with the free exercise of any electoral right. Similarly, Section 10 above, whose marginal note is ‘*undue influence*’, forbids any impediment of a person’s exercise of the electoral right. In India, the electoral right of an elector, is defined under Section 171A (b) of the Indian Penal Code, as “the right of a person to stand, or not to stand as, or to withdraw from being, a candidate or to vote or refrain from voting at an election.” This is comparable to Article 38(3) of our Constitution which confers certain political rights on every citizen without any restrictions including the right to vote by secret ballot in an election.

3. Whether there was a substantive noncompliance with the constitution, election Act and other applicable rules and if so what was the effect of non-compliance of the results.

The petitioner submitted that the election for Kiagu Ward was conducted in an environment characterized by many systematic and systemic illegalities and irregularities that fundamentally compromised the integrity of the election, contrary to the principles laid down in the Constitution. The alleged illegalities and irregularities, ranged from blatant non-compliance with the law, to infractions of procedure, some of which were requirements of the laws and regulations relating to the election, while others, had been put in place by the 1st respondent, for the management of the elections.

It was further submitted that Article 81(e) requires, in mandatory terms, that our electoral system “shall comply”, inter alia “with ... the principles ... of free and fair elections, which are—

- (i) By secret ballot;
- (ii) Free from violence, intimidation, improper influence or corruption;
- (iii) Conducted by an independent body;
- (iv) Transparent; and,
- (v) Administered in an impartial, neutral, efficient, accurate and accountable manner.

In addition to these principles, Article 86 of the Constitution demands that “at every election, the Independent Electoral and Boundaries Commission shall ensure that—

- (a) Whatever voting method that 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 safe keeping of election materials.

It was submitted that the Affidavit of Samson Kinyua Magambo stated that the results were announced on 11/8/2017 depicting huge delays which consequently means that the process was in contravention of the provisions that the whole system ought to have been simple. That Article 86 focuses on system of election, and that most importantly, the Constitution imposes an obligation on the 1st respondent to ensure that the voting system used is simple, accurate, verifiable, secure, accountable and transparent. This is meant to avoid the possibility of manipulation of the system.

On voting, Counting and Tabulation of Results the petitioner made reference to the case of **Karanja Kabage v. Joseph Kiuna Kariambegu Nganga & 2 Others** where Court observed that:

“an election is an elaborate process that begins with registration of voters, nomination of candidates to the actual electoral offices, voting or counting and tallying of votes and finally declaration of the winner by Gazettement. In determining the question of the validity of the election of a candidate, the court is bound to examine the entire process up to the declaration of results....The concept of free and fair elections is expressed not only on the voting day but throughout the election process....Any non-compliance with the law regulating these processes would affect the validity of the election of the Member of Parliament.”

That it is the testimony of the petitioner that the delays in announcing the results was a ploy by the 1st & 2nd respondents to manipulate the results and declare the 3rd respondent the winner. The partial vote scrutiny unearthed 36 votes not tallied in favour of the petitioner, there is huge possibility that there were discrepancies between the results declared versus the actual results bearing in mind the margin of votes between the petitioner and the 3rd respondent is a mere 102 votes.

Article 86 of the Constitution which requires that:

“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 elections materials.*

On discrepancies in form 36a, it was submitted that despite evidence to the contrary all the twenty six (26) Form 36A's bear the 8th of August 2017 as the date when results were counted and announced.

Form 36A from Gicuru Primary school the presiding officer signed but never stamped.

Form 36A from Gitiye primary stream 01 the results are dated 9/8/17.

Form 36A from Gitiye Primary stream 02 the results are dated 9/8/17.

On Poll station diaries with discrepancies it was submitted that;

1. The poll station diary for Karimbene Shopping Centre stream 01 at page 18 it is not indicated the time at which the polling station closed. At page 22 the record of ballot box seals for member of National assembly and member of county assembly are interchanged. At page 24 it is recorded that the polling station needed a tent and officials of the 1st respondent sought shelter from a make shift hotel to shield from rain.

2. The poll station diary for Gitune Coffee Factory stream 01 at page 16 no voting is recorded at the record of voter turnout column after 0900hrs. That further on page 25 the presiding officer did not date the time he declared the contents of the diary to be a true reflection.

3. The poll station diary for Manthi primary stream 01 at page 18 does not show the time at which the polling station closed. That further at page 24 the indelible marker used to mark whoever voted was used up to mid-day when officials of the 1st respondent reverted to use an ordinary marker.

4. The poll station diary for Kiija primary stream 01 at page 18 does not show the time at which the polling station closed. That further on page 25 the presiding officer did not date the time he declared the contents of the diary to be a true reflection.

5. The poll station diary for Kiija Primary stream 02 at page 18 does not show the time at which the polling station closed. That further on page 25 the presiding officer did not indicate the time he declared the contents of the diary to be a true reflection.

6. The poll station diary for Kiamuri Primary School stream 01 at page 16 does not show the time at which the polling station closed.
7. The poll station diary for Mujwa Primary School stream 02 at page 25 the presiding officer did not indicate the time he declared the contents of the diary to be a true reflection.
8. The poll station diary for Mpindi Primary School at page 18 it is not indicated the time at which the polling station closed. At page 24 it is recorded that the KIEMS KIT had power problems. Further at Page 25 the presiding did not indicate the time he declared the contents of the diary to be a true reflection.
9. The poll station diary for Mujwa Primary school stream 01 at page 16 the number of voters on the queue after 1700hrs is recorded to be 81 voters and the record of voters identified by printed register of voters is recorded as 317 voters. Further at page 25 the presiding officer did not indicate the date and time she declared the contents of the diary to be a true reflection.
10. The poll station diary for Kanywee Primary school stream 01 at page 18 no agent signed to confirm that he/she was present and witnessed the closure of the polling station by the presiding officer.
11. The poll station diary for Rikana Primary School stream 01 at page 18 it is not recorded the time at which the polling station closed. At page 23 the deputy presiding officer did not certify the serial numbers of the ballot boxes and seals used to seal the ballot boxes at the closure of counting. Further at Page 25 no tallying centre agents certified that all seals are intact and the polling station results are forwarded to the constituency returning officer.
12. The poll station diary for Makandune Primary School stream 01 at page 16 no voting is recorded in the record of voter turnout after 1500hrs. At page 18 it is not recorded the time at which the polling station closed. Further at page 25 no tallying centre agents certified that all seals are intact and the polling station results are forwarded to the constituency returning officer.
13. The poll station diary for Gitiye Primary School stream 01 at page 14 it is recorded the polling station opened at 0630hrs. At page 16 it's recorded the number of voters on the queue after 17:00hrs was 102. At page 18 it is not indicated the time at which the polling station closed. Further at page 25 the P.O failed to record the time he declared the contents of the poll diary to be true and no tallying centre agents certified that all seals are intact and the polling station results are forwarded to the constituency returning officer. At page 26 the 2nd respondent signed the poll diary on the 10th of August 2017.

Is the petitioner entitled to prayers in the petition?

It was submitted that the petitioner has proved his case that there were illegalities and irregularities rendered in the election and as such the court should invalidate the election. In contemplation of the Respondent's arguments that the irregularities maybe trivial, the petitioner adopted statements of the great Lord Stephenson who once held that even trivial breaches of the election law should alone vitiate an election. He was quoted as saying:

“Any breach of the local election rules which affects the result of the election is by itself enough to compel the tribunal to declare the election void. It is not also necessary that the election should be conducted not substantially in accordance with the law as to local elections...If substantial breaches of the law are, as I think enough to invalidate an election though they do not affect its result, it follows that, contrary to the opinion of the Divisional Court, trivial breaches which affect the result must also be enough. I cannot hold that both substantial breach and an effect on the result must be found in conjunction before the Court can declare an election void.”

Nearer home, we adopt the concurring opinion of Justice Professor Lilian Tibatemwa Ekirikubinza issued

in **the case of Col. DR Kizza Besigye v. Attorney-General** where, notwithstanding the conjunctive nature of the Ugandan provision, she opined:

“Although validity is not equivalent to perfection, if there is evidence of such substantial departure from constitutional imperatives that the process could be said to have been devoid of merit and rightly be described as a spurious imitation of what elections should be, the court should annul the outcome. The Courts in exercise of judicial independence and discretion are at liberty to annul the outcome of a sham election, for such is not in fact an election.”

That the Supreme Court of Kenya recently held that a petitioner who is able to prove that the conduct of the election in question substantially violated the principles laid down in our Constitution as well as other written law on elections, will on that ground alone, void an election. He will also be able to void an election if he is able to prove that although the election was conducted substantially in accordance with the principles laid down in our Constitution as well as other written law on elections, it was fraught with irregularities or illegalities that affected the result of the election.

It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce ‘factual’ evidence to prove his/her allegations of breach, then the burden shifts and it behooves the respondent to adduce evidence to prove compliance with the law.

As the Tanzanian High Court stated in the old case of *Madundo v. Mweshemi & A-G Mwanza*;

“An election petition is a more serious matter and has wider implications than an ordinary civil suit. What is involved is not merely the right of the petitioner to a fair election but the right of the voters to non-interference with their already cast votes”

That With reference to Articles 81 and 86 of the Constitution which he already reproduced, Of importance are the expectations of transparency, accountability, simplicity, security, accuracy, efficiency and especially, verifiability of the electoral process. These terms should be understood to refer to:

- (a) an accurate and competent conduct of elections where ballots are properly counted and tabulated to yield correct totals and mathematically precise results;
- (b) an election with a proper and verifiable record made on the prescribed forms, executed by authorized election officials and published in the appropriate media;
- (c)** a secure election whose electoral processes and materials used in it are protected from manipulation, interference, loss and damage;
- (d) an accountable election, whose polling station, constituency and national tallies together with the ballot papers used in it are capable of being audited; and
- (e) a transparent election whose polling, counting and tallying processes as well as the announcement of results are open to observation by and copies of election documents easily accessible to the polling agents, election observers, stakeholders and the public and, as required by law, a prompt publication of the polling results forms is made on the public portal.

In the words of the SCOK ,”whether it be about numbers, whether it be about laws, whether it be about processes, an election must at the end of the day, be a true reflection of the will of the people, as decreed by the Constitution, through its hallowed principles of transparency, credibility, verifiability, accountability, accuracy and efficiency.

In concluding this aspect of the petition, we urge that the Honorable court makes finding that the illegalities and irregularities committed by the Respondents were of such a substantial nature that no Court properly applying its mind to the evidence and the law as well as the administrative arrangements put in place by IEBC can, in good conscience, declare that they do not matter, and that the will of the people was expressed nonetheless.

Consequently, in the words of Justice Thakar of the Indian Court of Appeal in the case of **Ponnala Lakshmaiah v. Kommuri Pratap Reddy & Others** in which he observed:

“There is no denying the fact that the election of a successful candidate is not lightly to be interfered with by the Courts. The Courts generally lean in favor of the returned candidates and place the onus of proof on the person challenging the end result of an electoral contest. That approach is more in the nature of a rule of practice than a rule of law and should not be unduly stretched beyond a limit. We say so because while it is important to respect a popular verdict and the courts ought to be slow in upsetting the same, it is usually important to maintain the purity of the election process. Further,

“An election which is vitiated by reason of corrupt practices, illegalities and irregularities.....cannot obviously be recognized and respected as the decision of the majority of the electorate. The Courts are, therefore, duty bound to examine the allegations whenever the same are raised within the framework of the statute without being unduly hyper-technical in its approach & without being oblivious of the ground realities. Experience has shown that the electoral process is, despite several safeguards taken by the Statutory Authorities concerned, often vitiated by use of means, factors and considerations that are specifically forbidden by the statute.”

The petitioner submitted that it did not matter who won or was declared as the winner of the Ward election in Kiagu; the validity of the Election was irredeemably marred and compromised.

1ST AND 2ND RESPONDENT’S SUBMISSIONS

On Burden of proof

It was submitted that the party who alleges the basic facts upon which the case is based has the burden to prove them. Consequently, the petitioner has the burden to adduce evidence to support his assertions in the Petition.

That In **Raila Odinga and Others Vs Independent Electoral and Boundaries Commission –Petition No. 5 of 2013**, the Supreme Court of Kenya put the issue as follows: -

“A Petitioner should be under obligation to discharge the initial burden of proof, before the Respondents are invited to bear the evidential burden.”

1. The court should also look into the **“Standard of Proof** which is 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.

As stated in **Hassan Mohamed Hassan & another v Independent Electoral & Boundaries Commission & 2 others [2013] eKLR-**

“In my view it is now correct to say that Section 83 of the Elections Act, lays down the standard of proof required in election petitions in Kenya”. It provides: -

‘No elections shall be declared to be void by reason of non-compliance with any written law relating to that elections 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.’

My understanding of the above provision is that the Constitution and the Elections Act have laid down the main principles which is a free, fair, just and transparent election must comply with free, fair and transparent election must comply with in order to achieve such a purpose. Regulations and/or rules were then created to lay down and operationalize the practical aspects of the principles in order to achieve maximum compliance or obedience of the said basic election, i.e. the Elections Act. The main purpose of the regulations is therefore to enforce compliance so that the end election results do achieve maximum integrity and respectability.

Section 83 of the Act afore cited therefore, is understood by this court to state that breach of the regulations or procedure laid down by those regulations, which does not go far enough as to interfere with the democratic choice of the voters, will not persuade the court to interfere with an election result. Put differently, unless the irregularities or malpractices proved by the Petitioner are such that they actually interfered with the free choice of the voters, the court will not be willing to interfere with the existing voter's choice...

...Clearly then, the standard of proof discussed above cannot be the usual standard of proof on the balance of probabilities applicable in civil cases. Such a standard in election petitions must be much higher."

Whether the Petition was served within the prescribed time and in the prescribed manner and if not the consequences of such non-compliance?

The Respondents filed an application dated 2nd October, 2017 seeking for orders:- that the Petitioner's Petition dated 7th September 2017 and filed in this Honourable Court on the same day, challenging the election of the 3rd Respondent as the Member of County Assembly for Kiagu Ward, Imenti Central Constituency be dismissed for want of compliance with mandatory statutory requirements on time, service and *deposit of security*.

The application was premised on the ground that:- the Petitioner did not serve the Respondents with the Petition within fifteen (15) days of the filing of the petition in court contrary to the requirements of **Section 76 (1) (a) of the Election Act, no 24 of 2011 and Rule 10 of the Elections Parliamentary and County Elections) Petition Rules, 2017.**

Service of an Election Petition is covered under **Article 87 of the Constitution**, thus;

- a. Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.*
- b. Petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission.*
- c. Service of a petition may be direct or by advertisement in a newspaper with national circulation*

Section 76 (1)(a) of the Elections Act, 2011 and Rule 10 (1) of the Elections (Parliamentary and County Elections) Petition Rules, 2017 service of Election Petitions should be done within **fifteen (15)** days of filing the petition.

Rule 9 and 10 (2) of the Elections (Parliamentary and County Elections) Petition Rules, 2017 service of an Election Petition should be by-

- a. Delivery at the constituency, county or head office of the Commission.*
- b. Delivery at such other office as the commission may notify.*

c. An advertisement that is published in a newspaper of national circulation

They submitted that service of the Election Petition was not effected upon the 1st and 2nd Respondents as required by law. They relied on the affidavit evidence and the submissions that were tendered by 1st and 2nd Respondents in support of their application dated 2nd October, 2017 which are part of the court record.

That It is well settled that service of an Election Petition is a legal requirement. In the case of **Kagunyi v Gathua & another Civil Appeal no.6 of 2004** relied upon by the Respondents, the Court of Appeal rendered itself thus:

“Election petitions are of such importance to the parties concerned and to the general public that unless parliament has itself specifically dispensed with the need for personal service, then the courts must insist on such service. The other modes of service are only alternative to personal service.”

Similarly in the case of **Ayub Juma Mwakesi v Mwakwere Chirau Ali and 2 others (2008) KLR**, Justice Serгон (as he then was), stated as follows:

“If the petition is not properly served upon all the Respondents named, then the entire petition will be rendered incompetent”.

Article 87 (3) of the Constitution 2010 provides the mode of service of an election petition. The same provides as follows:

“Service of a petition may be direct or by advertisement in a newspaper with national circulation....”

It was submitted that the affidavit of service was only filed after the Respondents filed an application to strike out the Petition for want of service. That affidavit of service relates to how the 3rd Respondent was allegedly served. There is no affidavit of service showing how the 1st and 2nd Respondents were served. We submit that even the return of service on the 3rd Respondent’s alleged service was clearly an afterthought. In **JUSTUS M. OMITI V WALTER ENOCK OSEBE NYAMBATI KISII ELECTION PETITION NO.1 OF 2008**, Mohammed J as he then was when dealing with a similar situation stated...

“the so called affidavit of service was an afterthought and a reaction to the application to strike out.”

In the event they submitted that service of the election petition was not effected as required by law and that service of an election petition is not a mere technicality. It is an issue that goes to the root of the petition.

SECURITY FOR COSTS

Whether security deposit for costs was made in accordance with the law and if not what are the consequences? Whether the court has jurisdiction to validate late payment of security deposit by the Petitioner? Whether payment of security for costs and service of the Petition are substantive or procedural matters?

The 1st and 2nd Respondents via their application dated 2/10/2017 also sought to have the petition dismissed for **failure to deposit in court KSHS 100,000/=** being the security for costs **within ten (10) days of the date of filing the petition** as required by **Section 78 of the Elections Act, 2011** and **Rule 13 of the Elections (Parliamentary and County Elections) Petition Rules**.

That the court in its ruling of 24/10/2017 dismissed the application and ordered the petitioner does pay security for costs within eight days of the ruling.

That It is not in dispute that the petition herein was filed on 7/09/2017. It is also not in dispute that the

security by deposit of money had not been completed until eight days after the ruling of 24/10/2017. The relevant provisions of the law governing the security by deposit of money are found in Section 78 of the Act which provides as follows:-

78 (1) A petitioner shall deposit security for the payment of costs that may become payable by the petitioner not more than ten days after the presentation of a petition under this Part

A person who presents a petition to challenge an election shall deposit one million shillings, in the case of a petition against a presidential candidate five hundred thousand shillings, in the case of a petition against a member of parliament or a county governor; or one hundred thousand shillings in the case of a petition against a member of a county assembly.

(3) Where a petitioner does not deposit security as required by this section, or if an objection is allowed and not removed, no further proceedings shall be heard on the petition and the respondent may apply to the court for an order to dismiss the petition and for the payment of the respondents' costs.

(4) The costs of hearing and deciding an application under subsection (3) shall be paid as ordered by the election court, or if no order is made, shall form part of the general costs of the petition.

*(5) An election court that releases the security for costs deposited under this section shall release the security after **hearing all the parties before the release of the security.***

In **Esposito Franco –vs- Amason Jeffah Kingi & 2 others – Court of Appeal Nairobi Civil Appeal No.248 of 2008 [2010] eKLR** the appellant did not make the deposit required within the stipulated three (3) days. The Court of Appeal held that the late payment which was made by a 'bankers' cheque was properly rejected by the Deputy Registrar and that "there was simply no deposit of security made in accordance with the law ---- even if the law allowed for extension of time, which it does not."

Whether security for costs is a substantive issue- The court in **Evans Nyambaso Zedekiah & another v Independent Electoral and Boundaries Commission & 2 others [2013] eKLR** stated-

'I entirely agree with the learned judges in holding that the deposit of security for costs is a substantive issue that goes to the root of the proceedings as non-payment of the same deprives the court of the jurisdiction to deal with the matter further. I also agree that the requirement for deposit of security for costs keeps away from the court corridors some busy bodies who file cases in court while knowing that such cases have no chance of succeeding and also while knowing that they have no intention of paying the costs once they lose their cases. There is no argument that a court which has no jurisdiction cannot move one single step in a matter that is before it.'

It was submitted that this court lacks jurisdiction to validate the late deposit made by the petitioners as Section 78 of the Elections Act is the anchoring provision which requires a petitioner to make his deposit not later than 10 days from the date of filing of the petition. As can be seen from the wording of section 78 (3) where the petitioner does not comply, the court has no further business in the matter.

Whether there was undue or improper influence, corruption and irregularities in the conduct of the elections.

The petitioner avers that the election was marred by widespread bribery of voters. This is against **section 9 of the Elections Offences Act, 2016.**

(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; 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 result 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 described 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.

The **standard of proof when one alleges bribery is beyond reasonable doubt**. The donor/briber must be clearly identifiable as should the recipient. As was stated in **Moses Masika Wetang'ula v Musikari Nazi Kombo & 2 others [2014] eKLR**

'If there are allegations of commission of election offences in an election, the law requires that those allegations be proved beyond reasonable doubt. In other words, the standard of proof required in allegations of commission of election offences made in election petitions is beyond reasonable doubt.

PW2 stated that in Karimbene Polling station she was told by voters that a lady called Magdalene was seen going around handing out Sh. 200. On cross examination by the 3rd Respondent's advocate, she states that she did not see anyone being bribed. The persons who were bribed are not named and **PW2** stated that 'she did not have anything to show that they were agents of Eunice'. She also states that the same was not reported to any police station or officer. We submit that this amounts to mere hearsay and cannot be admitted before this court.

PW3 alleges that one Josephat Mutua and an unnamed person were giving out bribes of sh. 100 to compel voters to vote for one Issac. He also states that his wife was bribed by these agents who were chief campaigners of Isaac. He also did not report the same to the police station claiming that the police station was too far.

PW4 and PW5 both admit not having seen any voter being bribed. **PW4** makes an assumption that the voters who supposedly requested to be assisted by a specific agent called Mwenda were bribed. **PW5** goes on to say that what he heard were 'rumors' of voter bribery taking place. Both these testimonies must be disregarded for lacking in the weight necessary to prove the offence of bribery and also for being hearsay.

Voter bribery is a criminal offence yet none of the 26 agents of the petitioner (whom the petitioner avers were trained and knew what to do in the event of voter bribery) ever reported the same to the police station.

The petitioner also avers that some agents were not allowed to witness the counting process, to sign the form 36A. However, **PW2** stated that she was present when the votes were being counted and that she signed the 36 A for Karimbene Polling station and only when it started raining did the counting move into the small room which could not accommodate every agent.

PW3 avers that all agents in Gikuru Polling station were sent out of the polling station. We submit that the evidence given by this witness is not believable and is untruthful. He is inconsistent in his evidence about the time that voting ended, when the agents were supposedly chased from the polling station, what time the counting started and results announced.

In examination in chief he says the voting ended at 5.00pm but in cross - examination he states that he returned to the polling station at 4.30 P.M. to find there was no voting going on and that the results were announced soon thereafter at 5.00 P.M. after being counted. Counting votes is a laborious process that cannot be complete in a few minutes as intimated by the witness who is being untruthful. It is also suspect how he was allowed into the polling station during counting. Form 36A for Gikuru Polling Station has also been signed by more than 4 agents who were present during the counting of the votes adding authenticity to the results.

PW4 and PW5 both confirmed that as agents of the Petitioner, they were present when the counting was done. **PW5** confirmed that she witnessed the entire process and that the Petitioner got one (1) vote in Gitiye polling station stream 2 as rightly recorded in form 36A filed in court. **PW5** confirms that they were two agents for the Petitioner and that he witnessed the counting of the votes wherein the Petitioner obtained 58 votes in Gikuru Polling Station.

Scrutiny and recount

The court in its ruling of 17/11/2017 directed that scrutiny be conducted in Karimbene Polling Station, Gitiye Polling Station stream 1, Gitiye Polling Station Stream 2 and Gikuuru Polling Station. Scrutiny and recount was done in the four polling stations and it established that the results as declared in the form 36A were an accurate reflection of the votes cast in the ballot box with no discrepancies.

The scrutiny, we submit, established that the electoral officials substantially did their work in compliance with the law.

Consequently the scrutiny and testimonies in court prove that the petitioner's claim to the effect that irregularities complained of account for at least 700 votes is hot air which should be disregarded.

Whether there was substantive non-compliance with the Constitution, Election Act and other applicable rules and if so what was the effect of non-compliance of the results of Karimbene Polling Station

It was the 2nd Respondent's evidence that there were errors in form 36 B in regard to Karimbene Primary School and that the same were posting errors made with no ill motive and attributable to an innocent mistake. The 2nd Respondent has from the very beginning of the suit never disputed that the said errors occurred but stated under oath that the errors were only limited to Karimbene Polling Station. It also submitted that the said human errors did not materially affect the results.

In John Mbaabu Murithi v Jacob Mwirigi Muthuri & 2 others [2013] eKLR

Apart from the fact that the petitioner is required to establish that the errors and irregularities were either occasioned by outright negligence or deliberate action on the part of the guilty party. Irregularities which can be attributed to an innocent mistake or an obvious human error cannot constitute a reason for impeaching an election result. This court is mindful of the fact that at the stage where election officials are required to tally results, some of them would have stayed awake for more thirty six (36) hours and therefore simple arithmetic mistakes are bound to happen.

The supreme court in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR** has dealt with the question whether '**the facts show the election to have been conducted substantially in accordance with the law,**' and instances '**where irregularities did not affect the results of the election**' and have given the following guidelines-

'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.'

The court at paragraph 205A of the same judgment stated that an election should only be annulled on ascertained facts and not speculative facts.

'We would state as a principle of electoral law, that an election is not to be annulled except on cogent and ascertained factual premises. This principle flows from the recurrent democratic theme of the Constitution, which safeguards for citizens the freedom to make political choice'

We submit that the election as conducted by the 1st and 2nd Respondents was substantively in accordance with the constitution and electoral laws and any error.

Whether the elections held on 8/08/17 were conducted in accordance with the constitution of Kenya, Election Act and other applicable election rules

It is the 1st and 2nd Respondent's submissions that the elections for MCA in Kiagu Ward were conducted in accordance with the Election Act and Election Rules. As was the evidence by DW1, DW2, DW3, DDW1, DDW2 and DDW3 voting generally began on time, voters who were on the queue at closing were allowed to vote, voting was by secret ballot, the election was peaceful, and authorized agents and observers were allowed to witness and authenticate the process. They also testified on oath that the counting was done with full view and observation of everyone present.

Moses Masika Wetang'ula v Musikari Nazi Kombo & 2 others [2014] eKLR the court held that;

"It is an accepted fact that no human activity can be perfect. The conduct of an election is therefore no exception. That notwithstanding, however, for an election to be valid, substantial compliance with the law governing that election is mandatory. For instance no election can be valid if it is not based on the principle of universal suffrage; if it is not by secret ballot; if it is not transparent and free from violence, intimidation, improper influence or corruption; and if it is not conducted by an independent body and administered in an impartial, neutral, efficient, accurate and accountable manner. No election can be valid if, whatever method of voting is employed, it is not "simple, accurate, verifiable, secure, accountable and transparent"; as well as if "appropriate structures and mechanisms to eliminate electoral malpractice are [not] put in place"; and the counting and collation of votes and announcement of the results are not open and accurate.

It was submitted that further evidence that the elections were conducted well is that the petitioner also testified that he had no issue with any of the twenty-six (26) form 36As from the polling stations in Kiagu Ward. The said form 36A's are the primary documents from which flows the will of the people.

Whether the petitioner is entitled to the prayers in the petition

It was submitted that the orders being sought in the petition ought not to be granted. **Article 1 of the Constitution** states that all sovereign power belongs to the people of Kenya who may exercise it through their democratically elected representatives. The rights of the people of Kiagu Ward override the private rights of the Petitioner.

Election petitions involve great public interest. In **MILKAH NANHYOKIA MASUNGO V ROBERT WEKESA MWEMBE & 2 OTHERS [2013] eKLR** the court stated that *"....electoral issues should not be determined only as between the parties in the proceedings, but with reference to the wider interest of the residents of the concerned electoral area (Misikhu Ward) to challenge the validity of the election of a member to the county assembly as their representative: a right that is guaranteed under the Constitution."*

They further relied on the case of **STEPHEN KARIUKI V GEORGE MIKE WANJOHI & 2 OTHERS [2013] eKLR** where Justice G. K. Kimondo stated as follows:-

“The court should endeavor to ensure that the democratic rights and choices of the voter are given full effect or as much as is practicable. Elections are not perfect and not all malpractices will lead to nullification of the result.”

Who should bear the costs of the suit?

It was submitted that should the court find that this petition is not meritorious, the petitioner should be condemned to pay the 1st and 2nd Respondents' the costs of the suit.

The 1st and 2nd Respondents prayed that this Honourable Court finds and holds that:-

- a) The elections conducted in Kiagu Ward were won by the 3rd respondent, the 1st and 2nd Respondents were not in breach of and did not contravene the provisions of the Constitution, the Elections Act or of any other electoral statute;**
- b) The 3rd Respondent was validly elected as the Member of County Assembly in Kiagu Ward, Imenti Central Constituency.**
- c) The Petition lacks merit and should be dismissed; and**
- d) The Petitioner should bear the costs of the Petition.**

3RD RESPONDENT WRITTEN SUBMISSION

It was submitted that various grounds of the petition have been laid down. The petitioner deponed that the Election for Kiagu Ward held on 8th August, 2017 was not administered in an impartial manner contrary to Article 81 (a) (v) as read together with section 39, 44 and 44 A of the Elections Act, the regulations made there under and sections 25 of the IEBC Act.

Pursuant to the above thus, the 3rd respondent submitted that the allegations above were not supported by any evidence as barely all the witnesses could not bring out any evidence in this relation.

On grounds b, the data entered into the Kiems kit was consistent, comparable and verifiable with the information recorded in the forms 36 A.

On allegations b (i) it was submitted that the petitioner did not bring any evidence to satisfy the court that indeed the data entered in all polling stations was not consistent with the information and data from the respective forms 36 A.

On grounds b (2) the petitioner did not bring out any evidence that indeed data displayed at sub-county tallying center did not tally with the information of forms 36 A's.

It was submitted that under grounds b (3) it cannot then be said that the 2nd respondent did not administer Kiagu Ward MCA election in an efficient accurate and accountable manner as required under the Law and in contravention of Article 81 (6) of the Constitution.

Regarding ground b (4), it was submitted that the error in form 36 B was only experienced with regard to Karimbene Shopping Center Polling Station where the correct information was reflected on form 36A however Form 36 B entries were made in error which the returning officer in her evidence adduced to the fact that the sum was inadvertent as it occurred in the results of all the candidates.

On grounds 5 therefore even if the missing 36 votes were added to the petitioner, then a win would still

not suffice.

The above is not enough to invalidate an election as it was only an isolated case.

Under grounds B (7) (1), it was submitted that the computation and tabulation of the results in a significant number of forms 36 B cannot be said to be inaccurate, unverifiable and internally inconsistent as only one polling station had this problem. Even the petitioner confirmed this fact during cross examination.

That looking at the affidavit of Habiba Godana Prima Facie there was no deliberate and calculated clerical errors. The trend of the inconsistency in the results is only noticed in one station and affected all the candidates.

It was further submitted that **pursuant to ground b (7) (i) (3)** the petitioner is not honest to aver that the inaccuracies and inconsistencies affect and account for at least 700 votes. According to the evidence on record, the inconsistencies effected only 36 votes of the petitioner.

On grounds B 7 (ii), she submitted that there was no evidence tendered by court to the effect that in numerous instances 2nd respondent selectively manipulated, and /or deliberately distorted the votes cast and counted in his favour thereby effecting the final results tallied.

It was submitted that the petitioner is merely alleging without any evidence, and that looking at the two forms 36A and 36 B. All the forms were consistent save for the Karimbene case. That the Court shall take note of the fact that even the 3rd respondent who got 4 votes was given 0 votes how could she have been a beneficiary whereas she was also claiming her 4 votes? Therefore grounds b 7 (iv) (v) (vi) (vii) (viii) and (ix) are not true and have not been supported by any material evidence before this court and hence have no basis in Law.

ON SCRUTINY

It was submitted that the court gave an order for scrutiny which was held in the presence of parties and their advocates. The ballots were opened one by one and the Court noted that there was consistency and accuracy of the results *vis a vis* what was contained in the ballot boxes of the few selected polling stations.

That it is therefore evident that the elections were conducted in a fair manner and the results were tabulated as they had been counted.

CONTRAVENTIONS

It was submitted that the 1st and 2nd respondents cannot be said to have conducted the elections contrary to article 81 of the Constitution of Kenya, 2010. That the principles laid down for electoral system were complied with and citizens were given freedoms to exercise their political rights under Article 38. The sovereign will of the people was zealously and jealously guarded by the 1st and 2nd respondent.

It was further submitted that there has been no tangible evidence which has been brought forth before court to show that the election was not conducted in accordance with the constitution and the written law. The inconsistency of one polling station is not enough to invalidate the entire election.

The 1st and 2nd respondents complied with the law substantially save for the one particular error that occurred at Karimbene. This error was not even realized early enough to correct it and thus not sufficient to invalidate the entire ward votes.

That there is thus no evidence that the respondents have violated the provisions of the Constitution of the elections Act. The IEBC Act. Elections (General regulations, 2012 Laws of Kenya.

The Petitioners Averments In His Undated Affidavit (as per 3rd respondent's copy) in Support of the petition.

Paragraph 7 of this affidavit in support of the petition, there was no evidence to support this claim.

Paragraph 9 during cross examination the petitioner categorically stated that indeed he did not witness any agent of the 3rd respondent issuing bribes to voters. He also confirmed before Court that he did not see any voter being given Ksh. 50 (Fifty Shillings) bribe.

Paragraph 10. The petitioner did not adduce any evidence to show that the presiding officer was not neutral and was acting in favour of the 3rd Respondent. This was a mere allegation. The court will take profound interest in Karimbene polling station where the 3rd respondent got 4 votes and was given 0 votes in form 36 B which is the epitome of the petitioners claim.

Paragraph 11 the agents of the petitioner who tendered their evidence in Court stated in cross examination that they did not see any particular person bribing, save for one who said that his wife had been given Ksh. 50/- The said witness did not witness and the wife was not brought to adduce such evidence. His agents said that they only heard there was voter bribery but did not witness the same.

Paragraph 12 the Gitiye Polling station evidence adduced by Kaburu Rebecca Kairuthi the presiding officer there on behalf of the 1st and 2nd respondent evidence in her affidavit dated 23rd September, 2017 testified that polls began at 6:30am, there were no malpractices noted and that the overall voting process went on well.

She further testified that the voting ought to have been closed at 5: 30 pm however when they closed at 5:30am there were many voters on the cue, and mostly elderly people who took a lot of time to vote, she further testified that the last person voted at 1:00am on 9th August, 2017. There is no evidence that was brought by the petitioner to dispute her evidence that the Gitiye Polling Station conducted its polls as prescribed by the Law.

She submitted that the law is very clear that at the time of closing of a polling station, all people who are in the queue must be allowed to vote that is why the last person voted at 1:00am in the morning of 9th August, 2017.

Paragraph 13- 15 those dealt with the Kalimbene Polling Station which we have substantially submitted on.

Paragraph 16, the petitioner on cross examination confirmed that the only polling station which he disputed its results was Kalimbene and only on form 36 B and 36 A was verified to have been containing the right information.

The elections were done in a free, fair and credible manner and no party was favored by the 1st and 2nd respondents.

It was further submitted that the evidence adduced by the witnesses of the petitioner confirmed that no one saw an actual act of bribery taking place. The witnesses stated that they heard that there was voter bribery. No report was done to the police stations near the polling stations and not even one presiding officer noted that there were any particular incidences of bribery in any of the 24 polling stations within Kiagu Ward.

DETERMINATION

General principles applicable

The general principles governing elections and election disputes are not in doubt .The electoral process is

a realization of the principle of the sovereignty of the people of Kenya which is articulated in **Article 1** of the Constitution. **Article 38** which sets out political rights underpins this sovereignty. It provides;

38(1) every citizen is free to make political choices, which includes the right -

(a) -----

(b) -----

(c) -----

(2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for-

(a) any elective public body or office established under this Constitution; or

(b) any office of any political party of which the citizen is a member.

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

(a) to be registered as a voter;

(b) to vote by secret ballot in any election or referendum; and

(c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.

The rights protected by **Article 38** are realized through the electoral system set out in **Chapter Seven** titled, **“Representation of the People.”** Under **Article 81(e)**, the electoral system should comply with the principle of free and fair elections. According to this provision, elections are free and fair when they are by secret ballot, free from violence and intimidation, improper influence or corruption, conducted by an independent body, transparent and administered in an impartial, neutral, efficient, accurate and accountable manner.

As regards the conduct of voting, the Constitution imposes specific obligations on the IEBC. It is an independent body established under **Article 88(1)** and **Independent Electoral and Boundaries Commission Act (No.9 of 2011)**. **Article 86** states that:

86. 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 malpractices are put in place, including the safekeeping of electoral materials.

Since an election is the ultimate expression of sovereignty of the people, the electoral system is designed to ascertain and implement the will of the people. Thus the bedrock principle of election dispute resolution is to ascertain the intent of the voters and to give it effect to the fullest extent while upholding the principles that underlie a free and fair election.

The burden of establishing the allegations of non-compliance with the Constitution and the law, electoral malpractice and misconduct which would result in the election being declared invalid rests on the petitioner. The court will not interfere with the results of the elections unless it is established to the required standard of proof that such non-compliance with the Constitution and the law, the irregularities and electoral malpractices complained of render the said elections invalid.

In ***Raila Odinga and others v Independent Electoral and Boundaries Commission and 3 Others*** SCK **Petition No. 5 of 2013 [2013]eKLR**, the Supreme Court held that the petitioner bears the burden of proof. It observed that;

.... This emerges from a long standing common law approach in respect of alleged irregularity in the acts of public bodies, omnia praesumuntur rite et solemniter esse acta, all acts are presumed to be done rightly and regularly. So the Petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescriptions of the laws.

As regards the standard of proof, the Court went further and held that;

.... The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable-doubt – save that this would not affect the normal standards where criminal charges linked to an election, are in question.

Related to the burden of proof is that fact that the petitioner is bound to prove the case it has pleaded. A petitioner is not permitted to make a case outside the pleadings and his affidavits and testimony must be consistent with and support the case pleaded. In ***Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission and 2 Others*** SCK **Presidential Petition No. 1 of 2017 [2017]eKLR**, the Supreme Court quoted with approval the Supreme Court of India in ***Arikala Narasa Reddy v Venkata Ram Reddy Reddygari and Another*** Civil Appeal Nos. 5710 -5711 of 2012[2014] 2 SCR where it stated that;

In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.

I shall therefore limit my observations and judgment to what is pleaded in the petition and supported by the testimony and other evidence.

The circumstances under which the election court will invalidate an election are set out in **section 83** of the **Act**. **Section 83** of the **Act**, which is applicable to this case, read as follows;

83. 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.

The Supreme Court in ***Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission and 2 Others***, **Presidential Election Petition No. 1 of 2017 [2017] eKLR** expounded on the meaning and application of **section 83** of the **Act**. It stated that the provision comprised two limbs; the first regarding compliance with the Constitution and the law on elections and the second, concerning irregularities that may affect the result of the election. The court noted;

“Guided by these principles, and given the use of the word “or” in Section 83 of the Elections Act as well as some of our previous decisions, we cannot see how we can conjunctively apply the two limbs of that

section and demand that to succeed, a petitioner must not only prove that the conduct of the election violated the principles in our Constitution as well as other written law on elections but that he must also prove that the irregularities or illegalities complained of affected the result of the election as counsel for the respondents assert. In our view, such an approach would be tantamount to a misreading of the provision.”

The Court reiterated what it had stated in **Gatirau Peter Munya v Dickson Mwenda Kithinji and 2 Others SCK Petition No. 2B of 2014[2014] eKLR** that;

“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

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.

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.”

I now turn to consider the issues framed, by reference to the petition, in light of the principles I have highlighted. This court already made a decision on some of the issues agreed by the parties. The ruling was delivered by this court on 24th October, 2017. The ruling is subject to an appeal of which this court cannot purport to make another determination as the same will be tantamount to hearing its own appeal. This court will therefore determine the following issues;

1. Whether the elections held on 8/8/2017 were conducted in accordance with the constitution and the election's Act and the Elections Rules.
2. Whether there was undue improper influence, corruption or irregularities in the conduct of the elections?
3. Whether there was substantive, noncompliance with the constitution, elections Act and the applicable Rules and if so, what was the effect of the non-compliance on the results?
4. Is the petitioner entitled to the prayers in the petition?
5. Who should bear the costs of the petition?

Whether elections held on 8/8/2017 were conducted in accordance with the constitution of Kenya, Elections Act and applicable rules?

The yardstick for determining whether elections were held in a free, fair and credible manner is provided for by **Article 81(e)** of the **Constitution**. In **Manson Oyongo Nyamweya v James Omingo Magara & 2 others** (supra) the learned Judge in considering whether an election was free and fair, stated that:-

“...The court has to consider whether the grounds as raised in the petition sufficiently challenge

the entire electoral process and lead to a conclusion that the process was not transparent, free and fair. It is not just a question of who got more votes than the other. It cannot be said that the end justifies the means. In a democratic election the means by which a winner is declared plays a very important role. The votes must be verifiable by the paper trail left behind, it must be demonstrated that there existed favourable circumstances for a fair election and that no party was prejudiced by an act or omission of an election official.”

The presiding officer says that she complied with the law. The Petitioner says that there was no compliance with the law. The party who has alleged noncompliance had the obligation of proving the allegations and going a step further to demonstrate how he was substantially prejudiced as a result of the cited contraventions. The Petitioner has not shown that the 1st and 2nd Respondents failed to comply with **Article 86** of the **Constitution** and all other relevant provisions of the law in the conduct of the elections.

The law is alive to the fact that the holding of elections may not be picture perfect and errors may occur. The mere presence of irregularities does not vitiate an election. The burden remains on the petitioner to prove his allegations, and only then will the burden shift. The petitioner in his submissions stated that;

- a) The 1st & 2nd Respondents flouted the governing principles set out in Articles 1, 2, 4, 10, 35(2), 38, 81, 86, and 249 of the Constitution, the Elections Act and the Regulations
- b) There was undue or improper influence, corruption and irregularities in the conduct of the elections
- c) There was un necessitated and untold delays in tallying ,counting and announcing of the results which to a larger extent depicts that the system may not have been simple as required by the law
- d) There were discrepancies in the seals used for the ballot boxes which is not only a contravention of the law but a key indicator of monkey business
- e) There were discrepancies in vote counts at the polling station whose illegal access had been awarded to the 3rd respondent
- f) Votes were tallied in the absence of agents which is a complete violation of the electoral laws.

For the allegations a) and b) above, I will deal with them while addressing the second issue herein.

On the allegation that there was un necessitated and untold delays in tallying ,counting and announcing of the results, the witnesses who testified before me told the court that the vote counting started immediately after the polling station was closed. It was also clear from their evidence that the counting of votes took place in the presence of the agents for the parties. It was apparent from the evidence tendered that the results were relayed to the tallying centre immediately after being announced. The 2nd Respondent clearly told this court that once she received the results from the polling stations, the same would be relayed on their screens immediately. I did not therefore find evidence to proof the contrary.

On the allegation that there were discrepancies in the seals used for the ballot boxes which is not only a contravention of the law but a key indicator of monkey business, the only issues which the court noted when it went to reseal the ballot boxes was that some seals were broken and others were missing. The second respondent testified before this court and told the court that ballot box was required to have five seals but that they had shortages of seals and some of the seals broke making them less than that which they had distributed. She admitted that some boxes did not have all the seals but explained that the problem was spread country wide. It was her evidence that the broken seals still hanging on some ballot boxes may not have been tampered with since some broke during transportation to the warehouse. According to her they placed 3 seals on some boxes due to the shortage. When this court went to do a scrutiny and recount of the votes, it was found that what was contained in form 36A was the same results that we found after the recount. I therefore do not believe that the ballot boxes were tampered with as

alleged by the petitioner.

On allegation that there were discrepancies in vote counts at the polling station whose illegal access had been awarded to the 3rd respondent. No evidence was tendered by any witness to confirm this. I therefore find it to be a mere allegation by the petitioner.

On allegation that votes were tallied in the absence of agents, PW2 told the court that she was present when the votes were counted and confirmed that she signed form 36A. PW3 on his part told the court that all the agents were not allowed into the hall when the votes were being counted. On cross examination, he confirmed that party agents had signed form 36A an indication that they were present when the votes were being counted. PW4 and PW5 on their part told court that they were also present when the votes were being counted. PW5 alleged that he did not sign form 36A since there was another agent (for petitioner) called Joel Mwitia and that that agent signed the form 36A. I therefore find that the petitioner's allegation on that issue is not true.

Whether there was substantive, noncompliance with the constitution, elections Act and the applicable Rules and if so, what was the effect of the non-compliance on the results?

The petitioner's case was that the process of relaying and transmission of results from polling stations to the Constituency and to the County Tallying Center was not simple, accurate, verifiable, secure, accountable, transparent, open and prompt contrary to **Article 81(e), (iv) and (v)** of the Constitution. As a result of these flaws, he avers that the respondents committed malpractices, election offences which compromised the entire election.

The petitioner in his petition set out the following allegations:

- a) The computation and tabulation of the results in a significant number of Forms 36B is not accurate, verifiable and internally consistent.
- b) The additions and figures do not add up.
- c) That the nature and extent of the inaccuracies and inconsistencies in the tabulations is not clerical but deliberate and calculated.
- d) That the inaccuracies and inconsistencies affect and account for at least 700 votes.
- e) That in numerous instances the 2nd Respondent selectively manipulated, engineered and/or deliberately distorted the votes cast and counted in favour of the third thereby affecting the final results tallied.

The allegations concerning voting, counting and tabulation of results are that the votes cast in a significant number of polling stations were not counted, tabulated and accurately collated as required under the Constitution. The petitioner complained that the votes captured in Forms 36A differ from the results captured in Forms 36B and those displayed on the IEBC portal. As a result of these errors, the petitioner claimed that the purported results were fundamentally flawed and are therefore a nullity.

The 2nd Respondent in her affidavit and her evidence stated that while tallying results from Karimbene Polling Station she made the following posting errors as captured in Form 36B:-

NAME CANDIDATE	OF	ERROR FORM 36B	IN	CORRECT FORM 36A
FRANCIS RUTH& MAKENA	;	130		0

KITHIIRA KIARA	ISAAC	4	130
EUNICE KIRIMI	KAREGI	0	4
KIUGU PATRICK	MUGIRA	1	0
M'MURITHI MWANGI	JOSEPH	36	1
MAGAMBO KINYUA	SAMSON	1	36
MARETE MWANGI	RICHARD	0	1

It is clear from the above form that there was an error on the posting of all the results (for Karimbene polling station) in form 36B. From the form, it is clear that the Petitioner garnered 36 votes but it was indicated as 1 vote in form 36B. The third respondent on her part scored 4 votes but the same was indicated as 0 in form 36B. It is clear from the form that there was an error in the posting of results for all the candidates. The 2nd respondent told the court that the same was human error and was not done intentionally.

The petitioner has alleged that the nature and extent of the inaccuracies and inconsistencies in the tabulations is not clerical but deliberate and calculated. The 2nd respondent on her part told the court that the same was erroneous and not intentional at all. The petitioner alleged that the said posting errors were calculated so as to favour the third respondent. I have looked at the results which were posted by the 2nd respondent in form 36B. It is clear that the errors affected both the petitioner and the 3rd respondent. It also affected all the other candidates. The petitioner lost 35 votes while the third respondent lost 4 of her votes. I do not therefore agree with the petitioner that the said posting errors were meant to favour the third respondent.

The petitioner alleged that the inaccuracies and inconsistencies affect and account for at least 700 votes. From the evidence tendered, it is clear that the petitioner lost 35 votes from the error in the said posting. This court ordered for a scrutiny and recount and noted that the results in the elections and the results after the recount tallied. It is therefore not true that the inaccuracies and inconsistencies affected and accounted for at least 700 votes.

In *John Mbaabu Murithi v Jacob Mwirigi Muthuri & 2 others* [2013] eKLR the court held that:

“Apart from the fact that the petitioner is required to establish that the errors and irregularities were either occasioned by outright negligence or deliberate action on the part of the guilty party. Irregularities which can be attributed to an innocent mistake or an obvious human error cannot constitute a reason for impeaching an election result. This court is mindful of the fact that at the stage where election officials are required to tally results, some of them would have stayed awake for more thirty six (36) hours and therefore simple arithmetic mistakes are bound to happen.

The supreme court in ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR** has dealt with the question whether ***‘the facts show the election to have been conducted substantially in accordance with the law,’*** and instances ***‘where irregularities did not affect the results of the election’*** and have given the following guidelines-

'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.'

Having made an observation that the wrong posting may have been caused by honest human error as explained by the second respondent, I find that there was no evidence tendered by the petitioner to confirm that the same was mainly done with the intention of manipulating the results in favour of the third respondent. I find that the petitioner has failed to establish that the errors and irregularities were either occasioned by outright negligence or deliberate action on the part of the 2nd respondent. I attribute the errors to an innocent mistake or an obvious human error on the part of the 2nd respondent.

Secondly, if the said results could have been posted correctly, then it is clear that the petitioner would have scored **1690+35=1725 votes** while the third respondent would have scored **1792+4=1796 votes**. It is clear that the third respondent would still be the winner even if the said results were correctly posted. It is therefore clear that the said errors did not have an impact/effect on the final results. I find and hold that the petitioner has not proved that the election results were interfered with or manipulated in the manner suggested by the petitioner or in a manner that would lead me to invalidate the elections.

Whether there was undue improper influence, corruption or irregularities in the conduct of the elections?

On Bribery and Treating

Section 64 of The Elections Act defines bribery in a most detailed manner and makes it an offence. In dealing with the allegation of bribery our Courts have embraced the following passage from **Halsbury's Laws of England, Vol.14 3rd Edition paragraph 384**, it is stated as follows:

***Proof of bribery.** Due proof of a single act of bribery by or with the knowledge and consent of the candidate or by his agents, however insignificant that act may be, is sufficient to invalidate the election, the judges are not at liberty to weigh its importance, nor can they allow any excuse, whatever the circumstances may be such, such as they can allow in certain conditions in cases of treating or undue influence by agents. For this reason clear and unequivocal proof is required before a case of bribery will be held to have been established. Suspicion is not sufficient, and the confession of the person alleged to have been bribed is not conclusive. Bribery, however, may be implied from the circumstances of the case, and the court is not bound by the strict practice applicable to criminal cases, but may act on the uncorroborated testimony of an accomplice. The court strips the proceedings in each case of every colour, every dress, and every shape to discover its real and true nature. The court has always refused to give any exhaustive definition on the subject, and has always looked to the exact facts of each case to discover the character of the transaction.*

A corrupt motive must in all cases be strictly proved. A corrupt motive in the mind of the person bribed is not enough. The question is as to the intention of the person bribes him.

Where the evidence as to bribery consists merely of offers or proposals to bribe, stronger evidence will be required than in the case of a successful standing. A general conversation as to a candidate's wealth and liberality is not evidence of an offer to bribe. General evidence may, however, be given to show that what the character of particular acts has presumably been.

J.V.O Juma J. In Eustace Mbuba Ntwiga v Julius Musyoka & 3 others [1999] eKLR remarked;

“The burden of proof throughout rests on the Petitioner and the quality of the evidence that is preferred by him is to be considered with a thoroughness and gravity which is commensurate with the dire consequences to the Second Respondent that can follow by virtue of the provisions of Section 6 of the National Assembly and Presidential Elections Act (Cap 7) and Section 35 of the Constitution.”

Juma J. in discussing the consequences in the past statutory framework. They are still dire consequences under Section 87 of the current Election Act. An Election Court is required at the conclusion of the hearing of a Petition to send to amongst others the Director of Public Prosecutions a written report indicating whether an Election offence has been committed and the names and descriptions of the persons who have been proved at the hearing to have been guilty of that Election offence.

Stating this point of freedom of choice in elections in the case of **Azhar Hussein v. Rajiv Gandhi the Supreme Court of India said:**

“...the results of the Election are subject to judicial scrutiny and control ... to ascertain that the 'true' will of the people is reflected in the resultsIn order that the "true will" is ascertained the Courts will step in to protect and safeguard the purity of Elections, for, if corrupt practices have influenced the result, or the electorate has been a victim of fraud or deception or compulsion on any essential matter, the will of the people as recorded in their votes is not the 'free' and 'true' will exercised intelligently by deliberate choice. It is not the will of the people in the true sense at all. And the Courts would, therefore, it stands to reason, be justified in setting aside the election in accordance with law if the corrupt practices are established...”

The **standard of proof when one alleges bribery is beyond reasonable doubt.** The donor/briber must be clearly identifiable as should the recipient. As was stated in **Moses Masika Wetang'ula v Musikari Nazi Kombo & 2 others [2014] eKLR**

“If there are allegations of commission of election offences in an election, the law requires that those allegations be proved beyond reasonable doubt. In other words, the standard of proof required in allegations of commission of election offences made in election petitions is beyond reasonable doubt.”

PW1 told the court that there was massive bribery going on at his polling station and at other polling stations as informed by his agents. He however failed to substantiate his allegations which were merely hearsay.

PW2 on his part stated that in Karimbene Polling station she was told by voters that a lady called Magdalene was seen going around handing out Sh. 200. In cross examination she stated that she did not see anyone being bribed. She did not give names of the persons who were allegedly bribed by the said Magdalene. There was no evidence to show that the people who were bribing were agents of the third respondent. The people who were allegedly bribed were not called as witnesses before this court. The witnesses told court that the said incidences were not reported at any police station. No one was charged for committing the said offences.

PW3 alleged that one Josephat Mutua and an unnamed person were giving out bribes of Kshs.100 to compel voters to vote for one Isaac. He also stated that his wife was bribed by those agents who were chief campaigners of Isaac. He did not report the same to the police station claiming that the police station was too far. The wife was not called as a witness to confirm his evidence. He stated that Gikuru was his strong hold but he stepped down and opted to support the petitioner. He further stated that he believed that PW1 ought to have scored more than 200 votes at the polling station since that was his home area. He told the court that he had spoken to his family members and they had promised to vote for the petitioner. He stated that he found Josephat Mutua and another giving bribe and he reported. According to him, two of them fled on a motor cycle when the police officer approached them. He further stated that he had not reported the same to the police. According to him, voters took tea at the hotel of Anjelo Kirema (the ass. Chief). He told the court that the agents were not allowed to get into the hall when the votes were being counted. He however confirmed that form 36A which was shown to him was signed by the agents of the parties. Looking at his allegations, it is clear that the witness worked on an assumption that the

people that he had asked to vote for PW1 were automatically going to vote for him. That to me is a mistaken assumption since voting is done secretly and every voter has a right to vote for a candidate of his choice. I did not find merit in his evidence that voters who took tea at the hotel of Anjelo Kirema did so as a reward for voting for a particular candidate. I am aware that voting starts early and most voters always leave their homes before taking their breakfast. I did not therefore find any fault if any voter went to take tea at Anjelo's hotel before or after casting their votes. This court cannot act on assumptions but on real and substantiated evidence.

PW4 made an assumption that the voters who supposedly requested to be assisted by a specific agent called Mwenda were bribed. The witnesses who appeared before me clearly explained to the court how the old and illiterate people were helped during the voting. I did not find sufficient evidence to confirm that the said Mwenda helped specific people to vote. He did so with other agents and in the presence of a clerk. **PW5** stated that what he heard were 'rumors' of voter bribery taking place. Both these testimonies must be disregarded for lacking in the weight necessary to prove the offence of bribery and also for being hearsay. It is clear that the said allegations were based on mere allegations and hearsay. That to me does not amount to prove beyond reasonable doubt as required in law.

It is clear that a clear and unequivocal proof is required before a case of bribery will be held to have been established. Suspicion is not sufficient, and the confession of the person alleged to have been bribed is not conclusive. A corrupt motive must in all cases be strictly proved. A corrupt motive in the mind of the person bribed is not enough. The question is as to the intention of the person bribes him. I find that the petitioner has failed to prove his allegations to the required standards. I find no merit in his allegations and dismiss the same.

Misdirection of assisted voters

There are voters who by reason of disability or inability to read or write need the assistance or support of another person to cast their votes. Regulation 72 is the legal framework for this assistance and support and it reads-

72 (1) "On the application of a voter who is, by reason of a disability or being unable to read or write, and therefore unable to vote in the manner prescribed in these Regulations, the Presiding Officer shall permit the voter to be assisted or supported by a person of the voter's own free choice, and who shall not be a candidate or an agent."

To mismark a vote of an assisted voter is an assault to the voter's right to vote and a direct defilement of the voter's will. No doubt a serious issue. It also is, agreed that where a charge is in the nature of a criminal allegation then it must be proved with cogent evidence. Hence it is a criminal offence for a person authorized to assist a voter to deliberately mismark the vote.

A person assisting a voter may either be a Presiding Officer or any other person qualified to assist. In the latter circumstances, the person is required, before assisting or supporting, to make a declaration of secrecy before the Presiding Officer. Regulation 72 (5) (a) and (b) provides-

"5) The following shall apply in respect to a person who assists a voter under this Regulation-

The person shall, before assisting or supporting the voter, make a declaration of secrecy before the Presiding Officer in Form 32 set out in the schedule.

A person who breaches his or her Regulations commits an offence under the Act."

Form 32 requires an assistor to declare that he or she shall assist the voter in strict obedience of those the requirements, one being, that;

"1.

2. *That I shall mark the role of the voter I am assisting for the candidate of the voters choice and for no other person.*”

To Act against this declaration is to commit a crime.

In respect to the Presiding Officer any misdirection would amount to an offence under Section 59 of the Act which is an offence by members and staff of the Commission. He could be liable under Section 59 (1) (a) or 59 (1) (l) -

“59(1) A member of the Commission, staff or other person having any duty to perform pursuant to any written law relating to any Election who”

makes, in any record, return or other document which they are required to keep or make under such written law, an entry which they know or have reasonable cause to believe to be false, or do not believe to be true;...

(l) willfully contravenes the Law to give undue advantage to a candidate or a political party on partisan, ethnic, religious, gender or any other unlawful consideration.

It is clear from the evidence tendered before me that voters were assisted by a clerk in the presence of three agents. The said agents belonged to the several candidates. There was no sufficient evidence tendered to prove that the presiding officer was working in collaboration with the agents of the 3rd respondent so as to favour her. I did not find any evidence to confirm that the voters were misguided to vote for the third respondent.

Is the petitioner entitled to the prayers in the petition?

1. Article 1 of the Constitution states that all sovereign power belongs to the people of Kenya who may exercise it through their democratically elected representatives. The rights of the people of Kiagu Ward override the private rights of the Petitioner.

2. Election petitions involve great public interest. In MILKAH NANHYOKIA MASUNGO V ROBERT WEKESA MWEMBE & 2 OTHERS [2013] eKLR the court stated that *“...electoral issues should not be determined only as between the parties in the proceedings, but with reference to the wider interest of the residents of the concerned electoral area (Misikhu Ward) to challenge the validity of the election of a member to the county assembly as their representative: a right that is guaranteed under the Constitution.”*

In the case of **STEPHEN KARIUKI V GEORGE MIKE WANJOHI & 2 OTHERS [2013] eKLR** where Justice G. K. Kimondo stated as follows: -

“The court should endeavour to ensure that the democratic rights and choices of the voter are given full effect or as much as is practicable. Elections are not perfect and not all malpractices will lead to nullification of the result.”

In conclusion, I find that the petitioner has not proved his case to the required standards and I did not find any reasons to nullify the elections of Kiagu Ward (MCA Elections). From the evidence presented before me, I believe that it was the will of the voters of Kiagu ward that the third respondent be their member of the County Assembly. From the evidence tendered, I find no merit in the petition and therefore find that the petitioner is not entitled to the orders sought.

Who bears the cost of the petition?

Costs always follow the event and the court has broad jurisdiction to determine costs.

The court having found that the petitioner have been unable to prove his claims, his petition is dismissed

and he is ordered to pay costs to the respondents. The same shall be assessed by the court.

CONCLUSION

The final Orders therefore are as follows;

1. The petition be and is hereby dismissed
2. The election of the 3rd respondent is upheld
3. The respondents are awarded costs which shall be assessed.
4. A certificate of this determination in accordance with section 86(1) of the Elections Act, 2011 shall issue to the Independent Boundaries and Electoral Commission and speaker of the County Assembly of Meru.

It is so ordered

Caroline Kemei

Senior Resident Magistrate

JUDGEMENT is read and signed in the open court this 22ND day of JANUARY 2018

in the presence of:

Petitioner:-----

1st and 2nd Respondents:-----

3rd Respondent:-----

Petitioner Advocate's:-----

1st and 2nd Respondent's Advocate:-----

3rd Respondent's Advocate:-----

Court Clerk:-----

CAROLINE KEMEI:

SENIOR RESIDENT MAGISTRATE