



**REPUBLIC OF KENYA**  
**IN THE CHIEF MAGISTRATE'S COURT AT BUNGOMA**

**ELECTION PETITION NO. 2 OF 2017**

**DANIEL MAKECHO NDALILA MUYELELE ..... PETITIONER**

**VERSUS**

**BARASA TONY KHAOYA ..... 1<sup>st</sup> RESPONDENT**

**KENNEDY OCHANYO ..... 2<sup>nd</sup> RESPONDENT**

**I.E.B.C ..... 3<sup>rd</sup> RESPONDENT**

**JUDGMENT**

Daniel Makecho Ndalila Muyelee the Petitioner herein, contested for the seat of member of County Assembly for Lwandanyi ward within Sirisia Constituency of Bungoma County on a Ford Kenya ticket in the general election held on 8<sup>th</sup> August, 2017. The race for this seat attracted thirteen other contestants out of whom Barasa Tony Khaoya, the 1<sup>st</sup> Respondent herein emerged the winner and was so declared by the Independent Electoral and Boundaries Commission (the commission) the 3<sup>rd</sup> Respondent herein vide a Special Issue of the Kenya Gazette, that is, Gazette Notice No. 8239 of 22<sup>nd</sup> August, 2017.

The 2<sup>nd</sup> Respondent (the Returning officer) was responsible for the conduct of the Election in Sirisia Constituency. According to the declared Election results for the Member of County Assembly for Lwandanyi Ward in Sirisia Constituency, Voters in that area voted for each of their favourite candidate as hereunder:-

<b><u>CANDIDATE</u></b>	<b><u>VOTES</u></b>
Barasa Tony Khaoya	3046
Kilui G. Shaban	57
Kisiero Philip	59
Masinde F. Wakoli	50
Mutoro J. Wafula	1021
Muyelee Daniel	2770
Obwana Nathan	2389

Ojala Noah	641
Wanyonyi Edwin	180
Wanyonyi Galgaro	83
Wasama Maurice	112
Wasike Samuel	50
Wekesa N. Okumu	503
Wekesa T. Naliakho	146

The Petitioner filed this Petition on the 5<sup>th</sup> of September, 2017 to challenge the outcome of the results for the Election of the Member of County Assembly for Lwandanyi Ward. He was represented by Mr. Makokha.

The 1<sup>st</sup> Respondent being the declared winner of what the Petitioner considers to be a flawed Election was sued to respond to the issues raised against him in the Petition in regard to the entire Electoral process. He was represented by M.S. Antonina Muyoka.

The 2<sup>nd</sup> Respondent has been joined to this Petition as an agent appointed by the commission under Regulation 3(1) of the Elections (General) Regulations, 2012 (the Elections Regulation) to conduct the Elections in issue, in Sirisia Constituency.

The 3<sup>rd</sup> Respondent is sued in its capacity as the body responsible for conducting or supervising Elections to any Elective Body, including the County Assembly pursuant to its mandate under Article 88(1) and (4) of the Constitution. Rule 9 of the Elections (County and Parliamentary Elections) Petitions Rules 2017 (the Elections Petitions Rules) also provides that in an Election Petition the Commission must be a Respondent. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were represented by Mr. Teti.

In the Petition dated 5<sup>th</sup> September, 2017, the Petitioner sought the following reliefs;

- (a) An order for elaborate Scrutiny of the Principal voter Register for Lwandanyi Ward of Sirisia Constituency and all documents related, including the Polling Day diaries and Field Note books, a Security of the used and unused Ballot papers, BVR records for the Polling day and KIEMS (Kenya Integrated Election Management System) records for the Polling day, and a recount of all ballot papers cast during the Elections held on 8<sup>th</sup> August, 2017.
- (b) An Order for Verification of all Statutory forms 36A and 36B.
- (c) A declaration that the 1<sup>st</sup> Respondent was involved in Electoral malpractices/ Offences and therefore was not validly elected.
- (d) A declaration that the Petitioner was the Validly Elected candidate and so to be declared the valid winner of the Lwandanyi Ward of Sirisia Constituency Member of County Assembly seat.
- (e) A declaration that the entire electoral process in Lwandanyi Ward of Sirisia Constituency Member of County Assembly Election from Polling, Counting, Tallying and declaration of results was not only unconstitutional, but also illegal and Irregular. That the process therefore is null and void, including the outcome and declaration of the winner for the Member of County Elections.
- (f) A declaration that electoral process in Lwandanyi Ward of Sirisia Constituency Member of County Assembly Election should begin a fresh, given the massive and widespread electoral

malpractices identified in this Petition and Information contained in the Witness affidavits.

(g) An order for payment of costs of this Petition and

(h) Any other order that this Honourable Court may deem necessary to grant.

In support of this Petition the Petitioner filed an Affidavit sworn by himself on 5<sup>th</sup> September, 2017.

Pursuant to Rule 12(1) of the Elections Petitions Rules, the Petitioner also filed three (3) witnesses affidavits sworn on 5<sup>th</sup> September, 2017 by witness he intended to call at the trial. These witnesses adduced evidence in support of the Petitioner.

The Petitioner in his Petition has advanced a wide range of grounds of Complaints. The grounds range from voter bribery, violence, intimidation, harassment, electoral malpractices, undue influence and discrepancy in the results announced by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. The Petitioner also complained of how the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents conducted the Elections held on 8<sup>th</sup> August, 2017.

The Petitioner in his Petition at paragraph 18 pleaded that the 3<sup>rd</sup> Respondent's appointed officers deliberately or by way of Omission or Commission made false and inaccurate entries in the Statutory forms for the Lwandanyi Ward Member of County Assembly Election results which entries gave an undue advantage to the 1<sup>st</sup> Respondent. He went on to state that in particular at St. Antony Sirisia Tallying Centre the entries made in form 36B were very different from those announced at the Polling Stations.

At paragraph 19 of the Petition, the Petitioner claimed that the 3<sup>rd</sup> Respondents officers knowingly and intentionally denied the Petitioner and his Lawfully appointed and accredited agents access to documents and other Electoral processes.

The Respondents upon being served with the Petition filed their response to the Petition as required. They all opposed the Petition. The 1<sup>st</sup> Respondent filed his Response in court on 22<sup>nd</sup> September, 2017. Together with the Response he filed a supporting affidavit on 21<sup>st</sup> September, 2017 and three (3) witnesses affidavits all sworn on 21<sup>st</sup> September, 2017.

The 1<sup>st</sup> Respondent in his response urged the Court to dismiss the Petition and determine that the 1<sup>st</sup> Respondent was duly elected as the Member of County Assembly for Lwandanyi Ward in Sirisia Constituency, because the Elections were held in accordance to the Electoral Laws and in conformity with the Provisions of the Constitution.

The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed their joint Response to the Petition on 29<sup>th</sup> September, 2017 and a Replying Affidavit of Kennedy Ochanyo sworn on 21<sup>st</sup> September, 2017.

The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents case was that the Elections for the Member of County Assembly Lwandanyi Ward in Sirisia Constituency held on 8<sup>th</sup> August, 2017 were conducted in Compliance with the Written Law and the Principles of the constitution. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent urged the Court to dismiss the Petition with costs.

On 19<sup>th</sup> October, 2017, parties in this Petition filed in Court the agreed issues for determination. After perusing the said issues and the Pleadings filed herein in my view the issues in this Petition may be condensed into the Following three (3) issues:-

(a) Whether the 1<sup>st</sup> Respondent committed Electoral offences and Malpractices in the Elections held on 8<sup>th</sup> August, 2017 in respect of Lwandanyi Ward of Sirisia Constituency.

(b) Whether the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents conducted the August 8<sup>th</sup> Elections in contravention of the Constitution and the Electoral Laws in respect of the said Ward.

(c) If the said Elections were not carried out in accordance to the Principles of the Constitution and Written Law, whether the said non – compliance materially affected the outcome of the results.

After the trial, all counsel on record filed their final Submissions and authorities for the Court's consideration.

For the Petitioner to Succeed in a Petition challenging the declaration of a person as validly elected he must prove that the Election was not free and Fair within the meaning and the Standards of the Constitution.

Section 83, of the Elections Act 2011 provides a threshold saving clause that:-

***“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.”***

When considered together the Provisions of the Constitution and the Elections Act on the voting rights and method or process of voting the Injunction in Section 83 must mean that a valid Election must accord to the Principles laid down in the Constitution and in that written Law, and deviations from the Provisions must not be of a scale, nature or character as to affect the result of the Election.

The Principles which are set out in the Constitution and are sought to give effect in the body of the Elections Act Pursuant to Articles 82(1), (d) and 105 (3) of the Constitution require that the Elections will:-

(a) Embody the right to vote in Universal Suffrage (Article 81).

(b) Be free and fair that is to say,

(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; (Article 81)

(c) Be conducted in a system that is Simple, accurate, verifiable, Secure, accountable and transparent (Article 86); and therefore

(d) Be expressive of the will of the People (Article 38).

From the aforesaid it is clear that a valid Election must in Principle accord to these Principles and that in the case of non-compliance with the Law enacted to give effect to these principles, such non-compliance must not affect the result of the Election because then the will of the voters (Electors) would be defeated rather than upheld, as required under Article 38 of the Constitution.

The court of Appeal in England in the case of Morgan = vs = Simpson (1974) & ALL ER . 722 held that:-

***“Under Section 37(1) an Election Court was required to declare an Election invalid;***

***(a) If irregularities in the conduct of the Election had been such that it could not be said that the Election had been “so conducted as to be substantially in accordance with the Law as to elections”***

***or***

***(b) “If the irregularities had affected the result.***

***Accordingly where Breach of the Election Rules, although trivial, had affected the result, that by itself was enough to compel the Court to declare the Election Void even though it had been conducted substantially in accordance with the Law as to Elections, Conversely, if the Election had been conducted so badly that it was not substantially in accordance with the Election Law it was vitiated irrespective of whether or not the result of the Election had been affected. ”***

Lord Denning MR concluded as follows in regard to the same issue:-

***“collating all these cases together, I suggest that the Law can be stated in these propositions:-***

***1. If the Election was conducted so badly that it was not substantially in accordance with the Law as to Elections, the election is vitiated, irrespective of whether the result was affected or not.***

***2. If the Election was conducted that it was substantially in accordance with the Law as to Elections, it is not vitiated, by a breach of the rules or a mistake at the Polls – provided that it did not affect the results of the Election.***

***3. 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 poles and it did affect the results then the Election is Vitiating.”***

In the case of John Fitch = vs = Tom Stephenson & 3 others QBD (2008) EWHC 501 – the Court held as follows:-

***“The decided cases, including those which Lord Denning considered in Morgan =vs= Simpson, established that the courts will strive to preserve an Election as being in accordance with the Law, even where there have been significant breaches of official duties and Election rules provided the results of the Election was unaffected by those breaches. This is because, where possible, the court seek to give effect to the will of the People..... ”***

The Supreme Court of Kenya in the case of Raila Odinga and others = vs = I.E.B.C and others Presidential Petitions Nos. 3, 4 and 5 of 2013 adopted a similar standard that non-compliance must affect the results when it held as follows:-

***“Where a party alleges non-conformity with the Electoral Law, the Petitioner must not only prove that there has been non-compliance with the Law, but that such failure of Compliance did affect the validity of the Elections.”***

The Petitioner must to succeed demonstrate and satisfy the Court that the Election was so badly conducted as to be substantially in contravention of the Constitution and the Election Law or that deviations from the Election Law is such as to affect the result of the Election. Before I analyze the Evidence adduced in this Petition it is proper for me to address the issue of Burden and Standard of Proof.

It is trite Law that the burden of proof is with the Petitioner with the evidential burden shifting from time

to time in the course of the hearing of the Petition. The Petitioner has to tender in court firm and credible evidence in support of his Pleadings on record. I am guided by the decision of the Supreme Court in *Raila Odinga & others = vs = I.E.B.C & others (SUPRA)* where it held as follows;

***“There is apparently, a common thread in the foregoing comparative jurisprudence on burden of proof in Election Cases. Its essence is that an Election case is established much in the same way as a civil case: The legal burden rests on the Petitioner, but depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting. Ultimately, of course it falls to the Court to determine whether a firm and unanswered case has been made.”***

The court went on to state that:-

***“We find merit in such a Judicial approach as is well exemplified in the several cases from Nigeria where a party alleges non-conformity with the Electoral Law, the Petitioner must not only prove that there has been non-compliance with the Law, but that such failure of compliance did affect the validity of the Elections. Its on that basis that the Respondent bears the Burden of proving the contrary. This emerges from a long standing common Law approach in respect of alleged irregularity in the acts of public bodies.***

***Omnia Praesumuntur rite et Solemniter esse acta: all acts are presumed to have been done rightly and regularly. So, the Petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescriptions of the Law.”***

The standard of proof set by the Supreme Court in an Election Petition is higher than the one in Civil Cass which is on a balance of Probabilities but below the Criminal Law standard of beyond reasonable doubt save for matters which manifest themselves in Criminal offences. Having set out the Burden and standard of proof required in an Election Petition and having already set out the issues for determination in this Petition it is now my duty to address the issues which came up during the hearing.

The following imputations of Electoral offences and Malpractices were cast against the 1<sup>st</sup> Respondent:-

- a) – That he personally and/ or with his agents and servants engaged in bribery and treating of voters prior to the voting day and on 8<sup>th</sup> August, 2017 more particularly at Lwandanyi Youth Polytechnic and Lwakhakha primary School polling stations.
- b) – That he engaged in violence directly and indirectly through his agents and supporters during the campaign and on the polling day especially at Lwandanyi Youth Polytecnic and Lwakhakha polling stations. The alleged violence was against the Petitioner's supporters and agents.
- c) – That he engaged in illegal campaigns and meetings and voter manipulation.

Bribery is an Election Offence. It is provided under section 9(1) of the Election Offences Act, 2016 as follows:-

***“A person who, during an Election period -***

***(a) Directly or indirectly offers a bribe to influence a voter to -***

***(i) Vote or refrain from voting for a particular candidate or Political party.***

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

***(b) In any manner, unlawfully influences the results of an Election,***

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

The Petitioner alleges at Paragraph 15 of his Petition that there was Bribery and treating of voters prior to the polling day and on the Polling day (8<sup>th</sup> August, 2017) particularly at Lwandanyi Youth Polytechnic Polling station and Lwakhakha Primary School polling station.

At paragraph 16 of the Petition he goes on to say that the said bribery was illegal and irregular and it induced voters to cast their votes in favour of the 1<sup>st</sup> Respondent and to the detriment of the Petitioner. The evidence tendered in this Petition is clear that the 1<sup>st</sup> Respondent was not at both venues on the date the Elections were conducted.

The Petitioner at Paragraph 17 of his affidavit deponed on 5<sup>th</sup> September, 2017 averred that he had information from several eye witnesses and other sources that the 1<sup>st</sup> Respondent engaged in Bribery and treating of voters in various polling stations in Lwandanyi Ward of Sirisia Constituency.

When being cross examined by Counsel for the 1<sup>st</sup> Respondent M/s Antonina Muyoka the Petitioner told Court that he did not mention the names of the eye witnesses who witnessed the Petitioner bribing voters. He also stated that he did not report the matter to the Police. The Petitioner went on to state that he did not disclose in his affidavit at paragraph 17 where bribery incidents had taken place. When being cross examined by Mr. Teti Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents the Petitioner told Court that the Information he deponed in his affidavit was obtained from some of his agents.

He gave the names of the agents who had given him the information:

They are:-

- Silas Watanga
- Dennis Mukwa
- Fred Ariko Barasa and
- Rodgers Wanyela

The above agents according to the Petitioner did not testify because they had been threatened and they feared for their lives. No evidence was tendered before Court in Support of the allegations by the Petitioner that the above agents had been threatened. The court was not told who threatened them.

No report was made to the police in that regard. I find what the Petitioner told the court to be hearsay and the same is not admissible.

PW2 Pius Sindani Ndiwa testified that he was taken to a shop by Charles Mwangi and he was offered Money and asked to vote for Jubilee candidates but he declined to receive the money. PW2 did not report that incident to the police or to the Independent Electoral and Boundaries Commission (3<sup>rd</sup> Respondent).

PW3 Godwin Kasuti Nandokha adduced evidence that he met with two people who were putting on Jubilee party badges and were dishing out money to voters. They gave him money Kshs. 100/= but he refused to take the said money. They attacked him and tore his Shirt. PW3 did not disclose the names of the people he had met and who had allegedly given him money in his affidavit.

PW3 did not state the voters who had received money from the said people. It was not enough for PW3 to state that Women and youth received money from those people. PW3 alleged that he reported the

incident at Lwakhakha police station but no evidence to that effect was brought to Court. PW3 did not report the matter to the Commission (3<sup>rd</sup> Respondent).

PW4 Robert Gikenyi Wanyonyi was not at the scene (Lwandanyi Youth Polytechnic Polling station) when PW3 was given money. No evidence was adduced by the Petitioner and his witnesses to link the 1<sup>st</sup> Respondent with bribery. Had there been corroborative evidence in form of a photograph or an audio recording then there may have been grounds to find that bribery may have occurred.

The Petitioner failed totally to connect the people who were dishing out money to voters on the voting day with the 1<sup>st</sup> Respondent.

In the case of Hosea Mundui Kiplagat = vs = Sammy Komen Mwaita and 2 others, Eldoret Election Petition No. 11 of 2013, the Court held that;

***“Where the Election offence is allegedly committed by the agents of a candidate the connection with the candidate must be comprehensively established.”***

In the case of John Kiarie Waweru = vs = Beth Wambui Mugo & 2 others Election Petition No. 13(2008) the Court held that:-

***“For the offence of Bribery to be proved, evidence must be adduced to show that the bribe was offered and received to influence a voter to vote for a particular candidate. The evidence must establish a nexus between the persons giving the money and the 1<sup>st</sup> Respondent”.***

From the foregoing it is clear in my mind that the Petitioner has failed to prove the allegation of bribery as pleaded in the Petition. Bribery is a serious offence which he who alleges must be prepared to offer cogent and independent evidence to prove to the Court that it took place. Mere allegations without proof to the required standards remains mere speculation which the court cannot accept as truthful.

I now turn to the allegations made by the Petitioner under Paragraph 17 of his Petition in regard to violence.

Section 11 of the Election Offences Act, 2016 in relation to the use of violence provides that:-

***“A person who is directly or indirectly in person or any other person on his behalf, inflicts or threatens to inflict injury, damage, harm or loss on or against a person -***

***(a) So as to induce or compel that person to support a particular candidate or Political party;***

***(b) On account of such person having voted or refrained from voting; or***

***(c) In order to induce or compel that person to vote in a particular way or refrain from voting, commits an offence and is Liable on conviction to a fine not exceeding Two million shillings or to imprisonment for a term not exceeding six years or to both.”***

At paragraph 17 of the Petition its pleaded that the 1<sup>st</sup> Respondent directly and indirectly through his agents and supporters engaged in Physical violence against the supporters and agents of the Petitioner during the campaigns and on the Polling day especially at Lwandanyi Youth Polytechnic and Lwakhakha primary school polling stations.

PW2 adduced evidence that he found Jubilee party supporters beating one Ali Kaita on the voting day. No affidavit was deponed by the said Ali Kaita in that regard. No evidence was tendered in court to show that a report was made to the police in respect of what had happened to the said Ali Kaita. In addition no evidence was tendered in court to show that the said Jubilee supporters were agents working for the 1<sup>st</sup> Respondent. The names of the Jubilee supporters who were allegedly beating the said Ali Kaita were not

given to the Court. No medical evidence was availed to Court to confirm that the said Ali Kaita was beaten on the polling day. PW3 alleged that he was attacked by 2 Jubilee supporters on 8<sup>th</sup> August, 2017 after he refused to be bribed. The said Jubilee supporters allegedly tore his shirt. He screamed and people came to his rescue. He failed to state the names of those who rescued him. He also failed to attach any medical evidence to show the injuries he sustained as a result of the assault.

No evidence of the torn shirt was produced in court in support of his allegations.

PW3 did not call any witness from the police station where he claimed to have reported the incident to support his oral testimony before court. If at all the matter had been reported to the police it could have been appropriate to get an affidavit deponed by the investigating officer in support of PW3 to the effect that he had lodged a complaint and the matter was being investigated. PW3 did not give the OB number he was given by the police after he reported the matter.

PW4 alleged that he heard screams from Lwandanyi Youth Polytechnic while at his home which was at Lwandanyi market. He proceeded to the Scene and found Erick Wanyera and Andrew Wafula Wangusi beating Godwin Kasuti (PW2). He rescued PW2 and managed to snatch a bundle of notes (Kshs. 50 notes) and took them to the police and was given OB No. 10.

No evidence was availed from the police station where the report was made by PW4 to corroborate his evidence before the court. PW4 did not report the matter to the commission (3<sup>rd</sup> Respondent). The Court was not told what happened after PW4 reported the matter to the police. PW4 further alleged that he was bitten on his right hand when he was rescuing PW2. PW4 did not produce in court any Medical evidence to show that he was bitten as alleged.

The Court was not told whether he sought any medication for the injury he sustained. PW4 did not inform the Court the police station where he had made his report. His affidavit deponed on 5<sup>th</sup> September, 2017 does not state the name of the police station where he had made his report. He did not state the date he had made that report to the police. PW4 in his affidavit claimed that those who attacked PW2 were Jubilee members.

I have looked at Form 36A in respect of Lwandanyi Youth Polytechnic polling station 1 of 1 and I note that the names of Eric Wanyera and Andrew Wangusi do not appear. The Petitioner and his witnesses did not report the incidents of violence complained of in this Petition to the Commission or it's officials for further action.

Based on the above analysis the Petitioner has failed to discharge his duty of proving the allegation in regard to violence, intimidation, threats and harassment as pleaded in the Petition to the required standards. The allegation by the Petitioner at paragraph 19 of his affidavit that the 1<sup>st</sup> Respondent was engaged directly or indirectly by himself or his agent and or servants in Election Campaigns and meetings outside the stipulated campaign period and during the polling exercise was not proved by way of evidence.

The Petitioner failed to provide particulars as to where the 1<sup>st</sup> Respondent had participated in illegal campaigns. No affidavits were deponed to that effect. No reports were made to the commission and to the police in regard to the same. No photograph or video evidence was tendered in support of his pleadings. The allegation by the Petitioner at paragraph 20 of his affidavit that the Election officials were compromised by the 1<sup>st</sup> Respondent to execute illegal and irregular practices is unfounded. The same was not proved by way of evidence as required.

No affidavit was filed in this Petition to support the allegation that voters were manipulated by Election officials to cast ballot papers in favour of the 1<sup>st</sup> Respondent. At paragraph 21 of the Petitioner's affidavit it is alleged that the officials of the 3<sup>rd</sup> Respondent deliberately made false and inaccurate entries in some statutory form 36A's which results gave undue advantage to the 1<sup>st</sup> Respondent. The Petitioner did not give evidence in Court in support of this allegation.

It was also alleged by the Petitioner that the 1<sup>st</sup> Respondent conspired with the officials of the Commission to deny Ford Kenya agents access to polling stations sorting, counting and tallying process as well as to form 36A's and 36B for Member of County Assembly results for Lwandanyi Ward of Sirisia Constituency.

No affidavits were deponed by agents of the Petitioner (or Ford Kenya) in support of this allegation. This allegation is unfounded and the same is disregarded. The same applies to the allegation by the Petitioner at paragraph 21 of the Petition that the Election officials ejected the agents of the Petitioner from the polling stations and the tallying centre (St. Antony Sirisia Secondary School). No affidavits were filed in court in support of what the Petitioner alleged at paragraph 21 of his Petition.

PW2 in his affidavit at paragraph 8 alleged that the Elections officials at Lwakhakha polling station asked the agents of various parties to get out of the polling centre and they declined which resulted to a commotion. PW2 did not elaborate what happened after the commotion and how the said commotion affected the Election process.

The Petitioner's agent did not adduce evidence by way of affidavits in support of what PW2 stated. PW2 did not state the names of the agents who were ejected from the Polling room on the material day. Further no report was made to the commission or to the police or what had taken place as alleged by PW2. I find this allegation unsubstantiated and the same false.

The allegation made at paragraph 13 of the Petition that the 3<sup>rd</sup> Respondent's officers committed criminal offences under Section 59 (a),(b), (d), (f), (j), (k), (l) and (m) of the Election Act is of no legal basis. The above provisions were repealed by Act No. 37 of 2016.

Paragraph 14 of the Petition alleges ballot stuffing, multiple voting or gerrymandering or inflating of the number of votes in the tallying centre by the Election officials. This was not substantiated by way of evidence by the Petitioner. The allegation is hereby dismissed in its entirety.

Before the hearing commenced in this Petition the Court ordered that all the statutory forms in respect of Lwandanyi ward of Sirisia Constituency in relation to the Elections conducted on 8<sup>th</sup> August, 2017 be availed in court. The same were availed as ordered. The forms are 36A, 36B and 36C. A few issues arose which I wish now to address.

The Supreme Court found in the case of Raila = vs = I.E.B.C Supra that the I.E.B.C must enjoy the Presumption of validity of action.

At paragraph 197 of that decision the Court stated that:-

***“I.E.B.C is a Constitutional entity entrusted with specified obligations, to organize, manage and conduct elections, designed to give fulfillment to the People's political rights (Article 38 of the Constitution). The execution of such mandate is underpinned by specified Constitutional Principles and Mechanisms and by detailed provisions of the statute Law. While it is conceivable the Law of Elections can be infringed, especially through incompetence, malpractices or fraud attributable to the responsible agency, it behoves the person who thus alleges to produce the necessary evidence in the first place and thereafter, the evidential burden shifts and keeps shifting”.***

I.E.B.C (3<sup>rd</sup> Respondent) being the official body charged with the conduct of Elections under the Constitution through its officer the 2<sup>nd</sup> Respondent herein presented the Forms 36A's, 36B and 36C in Court. Those documents (Forms) which were in Original forms must be taken to be the official record of the Elections and in the event of conflict with any other documents the ones presented by the I.E.B.C in its Original form are the Commissions official documents and they must prevail.

The 2<sup>nd</sup> Respondent the Commissions official confirmed in Court that the Original form he had availed to

Court were the Official documents in respect of the Elections held on 8<sup>th</sup> August, 2017. After looking at the Forms presented to Court by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent's I am satisfied that the data the forms have can be verified safe for minor errors here and there. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents availed to court all the Forms 36A's in respect of all the 42 polling stations in Lwandanyi Ward of Sirisia Constituency.

When the 2<sup>nd</sup> Respondent was testifying in Court, Learned Counsel for the Petitioner Mr. Makokha raised the issue of Form 36C. The 2<sup>nd</sup> Respondent was the returning officer of Sirisia Constituency. He offered an explanation under oath that the form 36C which he annexed to his affidavit was an error. He told the court that the correct or Proper form which was issued to the 1<sup>st</sup> Respondent was the one annexed to the affidavit of the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent on his part also offered an explanation to that effect. It is clear in my mind that the Form 36C annexed to the 2<sup>nd</sup> Respondent's affidavit was erroneous and it ought not to have been filed in Court. The explanation given by the 2<sup>nd</sup> Respondent is in my view satisfactory.

During the final submissions on 12<sup>th</sup> February, 2018 Counsel for the Petitioner Mr. Makokha submitted that there were no results declared before the Court in form 36B. He further submitted that the form attached to the affidavit of the 2<sup>nd</sup> Respondent has a heading or it refers to Member of National Assembly Election results and not Member of County Assembly Election results. He also told court that the logo of I.E.B.C is not appearing on that form and the serial number is also missing. Counsel also mentioned that the form did not have I.E.B.C Returning officers stamp but instead it had the stamp of I.E.B.C presiding officer.

I wish to point out that the Petitioner did not bring up such issues in regard to the aforesaid (form 36B) during the hearing of his Petition. Further they were not pleaded in his Petition. Had it been raised when the Returning officer (2<sup>nd</sup> Respondent) testified he could have given an explanation on the issues raised above in regard to form 36B. On my own Examination of the said Form 36B, I note that it bears the heading Declaration of Member of National Assembly Election Results at the Constituency tallying centre.

The word National has been cancelled and replaced by the word County on top. The form also has other details at the top left side. It shows the name of the County Assembly as Lwandanyi – code 1084 and the Constituency Sirisia – Code 217. The said form was signed by the 2<sup>nd</sup> Respondent on 09/8/2017. The 2<sup>nd</sup> Respondent confirmed to the Court that he is the one who had signed the said form on 09/8/2017. The cancellation stated above is not countersigned.

Having considered the evidence on record and the submissions in respect of the form No. 36B and 36C, I do not see how the cancellation on form 36B and the erroneous filling of form 36C by the 2<sup>nd</sup> Respondent could affect the results of the Election. I am satisfied that form 36B has sufficient information to show that the results were in respect of Lwandanyi Ward in Sirisia Constituency as confirmed by the Returning officer when he testified in Court.

I find the stamp appearing on on form 36B to be of no consequence. It did not at all affect the results. I also hold that the other details which are missing on the said forms in respect of the voter turn out did not affect the results in any manner. In arriving at that holding, I am guided by the decision in Paul Gitenyi = vs = Timoth Mosei E. Bosire and 2 others (2013) e KLR where the court had to consider the issue of improvised statutory form No. 35.

In the above decision, the Petitioner had alleged that the improvised form 35's were used to rig the Election. It was contended that the I.E.B.C officials contravened regulation 79(2) (b) of Election (general) regulations 2012 in that they failed to use the standard and prescribed form 35 at three named polling stations. In the said three stations, the forms had cancellation of the Original name of the polling station to enable them be used by another station.

The form remained the same form 35 with the same particulars only the name and the code of the station

was changed to correspond with the polling station for which the details were inserted. There was no countersignature either by the respective presiding officers or the agents. The Court in the above case made a finding that it was the duty of the Petitioner to prove that the forms were used for rigging the Elections and that he had failed to do so. The Court accepted the results in the said forms as genuine or valid.

At paragraph 44(a) of the Petitioners Submissions it is submitted that the following form 36A's were missing:-

- (i) Mufungu Primary School polling station 1 of 1.
- (ii) Lwandanyi Youth Polytechnic polling station 1 of 1.
- (iii) Lurare Primary School polling station 1 of 1.
- (iv) Namwesi Market polling station 1 of 1.

This Court vide the ruling delivered on 18<sup>th</sup> January, 2018 in respect of the Application by the Petitioner dated 27<sup>th</sup> November, 2017 for Scrutiny and recount stated that form 36A's for the above polling stations were annexed to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents further affidavit dated 18<sup>th</sup> October, 2017 and filed in Court on 19<sup>th</sup> October, 2017. In view of the foregoing, I find the Submissions by the Petitioner's Counsel at paragraph 44 to be misleading.

Paragraph 44(b) of the Petitioners Submissions makes reference to form 36A's which have anomalies and irregularities. In some instance they are compared with form 36B.

- (i) Londo ACK Primary School polling station 1 of 1.

The form 36A has erasures which are not countersigned and the Arithmetic on the form shows votes cast as 186 while form 36B shows votes cast as 185.

- (ii) Stabicha Primary School polling station 1 of 1.

Form 36A had erasures which were not countersigned. The Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents Mr. Teti submitted that there's no legal requirement that erasures must be countersigned. I agree with Submissions by Mr. Teti in that regard. I also noted from the said form that the agents signed those forms. They never raised any queries in regard to the erasures.

The decision in the case of Paul Gikenyi Mocharwa = vs = Timothy Moseti E. Bosire and 2 others (2013) e KLR at paragraph 56 addresses the same issue. The Court in the above case held that there is no requirement in Law that Form 35A's or any other Form be without alteration see paragraph 57 of the decision in the above case. It is also observed that the difference of one vote in the two forms in respect of Londo A.C.K Primary School 1 of 1 polling station did not affect the results.

- (iii) Malakisi Muslim Primary School polling station 1 of 2.

Where there were no statutory comments by the Presiding officer. It is my view that there is no legal requirement to that effect. Further lack of comments on the said form does not affect or invalidate the Elections.

- (iv) Malakisi Muslim Primary School polling station 2 of 2.

I note a variance of 3 votes which did not in my view affect the results and in any event the said votes were not in favour of the 1<sup>st</sup> Respondent. The erasure appearing on the form 36A even though not countersigned did not affect the results. The error in regard to the data when the presiding officer signed

the form did not affect the result.

(v) Tamlesa Primary School polling station 1 of 1.

Where the Presiding officer did not give his statutory comments. There is no legal requirement that the form must have comments of the presiding officer.

(vi) Nambuya Primary School Polling station 1 of 1.

Form 36A had erasures not countersigned and did not have polling station counts. I have already held herein above that there is no legal requirement that erasures must be countersigned. Further that the form must have the polling station counts the same applies to:-

(vii) Machaka Primary School polling station 2 of 2 in which the Presiding officer failed to countersign form 36A which had erasures.

(viii) Kibindoi Primary School polling station 1 of 1.

Form 36A had a variance of 2 votes which did not favour any of the candidates who contested for the seat of Member of County Assembly Lwandanyi Ward of Sirisia Constituency.

(ix) Tororo Primary School polling station 1 of 1.

Form 36A did not have the statutory comments. There is no legal requirements for the same.

(x) Kaburweti Primary School polling station 1 of 1.

Form 36B had an arithmetic error in respect of the votes cast. It read 206 instead of 205. Further the votes of Wasike Samuel Mulongo were shown as three (3) on form 36A while on form 36B he had two (2) votes. The errors on the two forms were minor and did not affect the results.

(xi) Chebukunyi Primary School polling station 1 of 1.

The original form 36A was brought to court and it was noted that the same was signed.

(xii) Lwakhakha Primary School 1 of 2.

Form 36A had erasures which were not countersigned and there were no statutory comments. There is no legal requirement to that effect.

(xiii) Kaproti Primary School polling station 1 of 1.

Form 36A had erasures and it didn't have statutory comments. There is no legal requirement that the erasures must be countersigned and further that it must have comments of the Presiding officer.

(xiv) Lwandanyi Primary School polling station 1 of 2.

Form 36A had an arithmetic error which in my view did not benefit any of the candidates. The original form had a stamp of I.E.B.C which meant that they were valid. The form did not have the date and in my view this was a human error which did not affect the results.

The forms shows further that the agents of various parties signed the same. The candidate by the name Kitui George Robert Shaban had two (2) votes as per form 36(A) but in form 36 B he had twelve (12) votes. The above variance did not affect the results in any way since they did not benefit the 1<sup>st</sup> respondent herein.

(xv) Lwandanyi Primary School polling station 2 of 2.

I note an error in the number of the total votes cast in form 36B which shows 362 instead of 262 as per form 36A. The error did not benefit any candidate in the elections held on 8<sup>th</sup> August, 2017. The erasures in form 36A did not affect the results. The absence of comments by the Presiding officer in form 36A did not affect the results as well.

(xvi) Wamono Primary School Polling station 1 of 1.

There is no legal requirement that the Presiding officer must give his comments on Form 36A. The difference in the dates when the Presiding officer and the Deputy Presiding officer signed form 36A is not material for it did not affect the results.

Further the difference in regard to the votes of Wanyonyi Edwin Mulongo in form 36A and 36B did not affect the results.

(xviii) Kapkera Primary School polling station 1 of 2.

Form 36A and form 36B indicates that the valid votes cast are 271 but when adding the number it adds up to 270 votes. The difference is minimal and as such it did not affect the results.

(xviii) Mukhuyu ECD Centre polling station 1 of 1.

(xix) Malakisi Health Centre Polling station 1 of 1.

In (xviii) and (xix) above there is no legal requirement that the Presiding officer must give his comments on form 36A.

(xx) Lurende Market polling station 1 of 1.

The arithmetic error of 1 vote in both forms (Form 36A and Form 36B) did not affect the results.

(xxi) Kabendo Primary School polling station 1 of 1 and

(xxii) Kamunyong'ole Primary School polling station 1 of 1 where in both polling stations erasures were not countersigned. There is no legal requirement that Erasures must be countersigned.

(xxiii) Namundi Primary School polling station 1 of 1.

No legal requirement that form 36A must have comments of the Presiding officer.

(xxiv) Namwanga K.A.G Primary School polling station 1 of 1.

It is noted that form 36A shows the votes of Wasama Maurice Chemangei as 00 while form 36B shows he has 2 votes. The error did not in anyway affect the results. Further the arithmetic error in the additions in Form 36B in regard to be votes cast did not affect the results. This was caused by the error in regard to the votes of Wasame Maurice Chemangei who had 00 (nil) in form 36A but in form 36B he had 02 votes.

(xxv) Khabukoya Primary School polling station 1 of 1.

Form 36A did not have statutory comments by the presiding officer and further all agents did not sign the form. The Law is clear that it is the duty of the candidates and their agents to ensure that they sign the statutory forms as required. If they do not do so then they should give reasons for failure to sign the forms.

Having failed to do any of the above cannot form the basis for invalidating the results.

(xxvi) Lwandanyi polling station 1 of 1.

I have looked at the form 36A and I note that it has the I.E.B.C official stamp

(xxvii) Namwesi Market polling station 1 of 1.

I note that the form does not have the station counts nor does it have the comments made by the Presiding officer. The law is clear that there is no legal requirement that the Presiding officer must give his comments and state the station counts in Form 36A.

Failure to do the above does not invalidate the Elections results. Form 36A in respect of Namwesi Market Polling station clearly shows that the agents left the polling station before tallying was completed.

The Petitioner did not call any of his agents to adduce evidence in support of his Petition. What the Court has dealt with in regard to the polling stations listed above is what came up in Court during the hearing of the Petition. Most of the forms 36A were duly signed by agents of various parties. This included the forms with alterations, cancellation, overwriting and overemphasis. By so doing I presume that whatever they did was right and proper.

I am guided by the decision in Jonas Misto Vincent Kuko and another = vs = David Wafula Wekesa & 2 others (2013) e KLR where the Court held that:-

***“The agents signed the forms and there was no evidence adduced that these agents were coerced to sign the forms. The Acts are therefore presumed to have been done rightly and regularly”***

In the case of Ali Hassan Joho = vs = Hassan Nyange and another (2008) 3 KLR Maraga, J (as he then was observed)

***“Because elections are conducted by human beings, there are bound to be errors which can be explained, there is no Election which can be perfectly conducted. However, it is only when such errors, which constitute non-compliance with the Law, materially affects the outcome of the results that the Court will have no option other than to nullify the said results.”***

In view of the above holding by the Court it was the duty of the Petitioner in this Petition to tender evidence in court that the irregularities were not mere arithmetical errors and that they fundamentally altered the outcome and that the Election was conducted in a flawed manner and in a manner that was not transparent or credible and that the irregularities were of such a magnitude to affect the outcome of the Elections. After satisfying the aforesaid then the Court can interfere and declare the Election a nullity.

This Court notes that there were six Elective posts which were being managed by the Election officials on the 8<sup>th</sup> August, 2017. The 2<sup>nd</sup> Respondent while adducing evidence in Court gave an explanation which in my view was satisfactory on what happened on the voting day. The administrative errors noted on the statutory forms were due to pressure of work which led to fatigue of the officers of the Commission while conducting the Elections.

This Court finds that the Petitioner has not proved that the irregularities complained of were deliberate or of a magnitude to warrant this court to invalidate the Outcome of the Election. Having said so I now wish to make reference to the case of Richard Kalembe Ndile and another = vs = Patrick Musimba Mueu and 2 others (2013) e KLR where Justice Majanja made the following observations:

***“An Election is a human endeavour and is not carried out by programmed machines. Perfection is aspiration but allowance must be made for human error. Indeed the evidence is clear that the counting was done at night and in less than ideal conditions hence errors which are admitted were bound to occur particularly in the tallying of the result. What is paramount is that even in the face of such errors, whether advertent or otherwise is that the ultimate will of the electorate is ascertained and upheld at all costs.”***

At this point I wish to quote the words of Kennedy, J in the Islington West Division Case, Medhurst = vs = Laugh and Casquet (1901) 17 T.L.R (at page 230)

***“An Election ought not to be held void by reason of transgressions of the Law committed without any corrupt motive by the returning officer or his subordinate in the conduct of the Election where the Court is satisfied that the Election was not withstanding those transgressions, an Election really and in substance conducted under the existing Election Law, and that the result of the Election, that is, the success of the one candidate over the other was not and could not have been affected by those transgressions. If on the other hand the transgressions of Law by the officials being admitted, the Court sees that the effect of the transgressions was such that the Election was not really conducted under the existing Election Laws, or it is open to reasonable doubt whether the candidate who has been returned has really been elected by the majority of persons, voting in accordance with the Laws in force relating to Elections, the Court is then bound to declare the Election void.***

***It appears to us that this is the view of the Law which has generally been recognized and acted upon by the tribunals which have dealt with Election matters.”***

Again in the Canadian case of Opitz = vs = wrzenshewskjy 2012 the Court said as follows;

***“The practical realities of Election administration are such that imperfections in the Conduct of Elections are inevitable. A Federal Election is only possible with the work of thousands of Canadians who are hired across the Country for a period of a few days or, in many cases, a single 14 hour day.***

***These workers perform many detailed tasks under difficult conditions. They are required to apply multiple rules in a setting that is Unfamiliar. Because Election are not everyday occurrences, it is difficult to see how workers could get practical on the Job experience. The current system of Electoral administration in Canada is not designed to achieve perfection, but to come as close to the ideal of enfranchising all entitled voters as possible. Since the system and the Act are not designed for certainty alone, Courts cannot demand perfect certainty. Rather, Courts must be concerned with the integrity of the Electoral system. This overreaching concern informs our interpretation of the phrase “irregularities that affected the result”(Rothsterin and Moldaver JJ).”***

In conclusion, this Court finds that the Petitioner has failed to prove that the 1<sup>st</sup> Respondent committed Electoral offences and Malpractices in the Elections which were conducted on 8<sup>th</sup> August, 2017.

This Court further finds that irregularities by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were not deliberate and calculated to manipulate the Election in favour of the 1<sup>st</sup> Respondent and they did not affect the results of the Election.

The Election is found to have been conducted Substantially in accordance with the Principles set out in the constitution.

This Court finds that Barasa Tony Khaoya was validly elected as Member of County Assembly Lwandanyi Ward of Sirisia Constituency. Accordingly the Petition herein dated 5<sup>th</sup> September, 2017 is hereby dismissed.

A certificate under the Provisions of Section 86(1) of the Elections Act to issue.

On the issue of costs Section 84 of the Elections Act provides that costs follow the cause. The Court may depart from this under some special circumstances.

Rule 30 of the Elections (Parliamentary and County Elections) Petition Rules, 2017 empowers the Court

to Cap the costs payable in an Election Petition. These provisions are not punitive in nature but seeks to compensate successful litigant for the expense they incurred as a result of the case.

I am guided by R. Kuloba in Judicial hints on Civil procedure 2<sup>nd</sup> Edition Law Africa, Nairobi 2011 at page 94 which states that;

***“The object of ordering a party, to pay costs is to reimburse the successful party for amounts expended on the case. It must not be made merely as a Penal measure.”***

***- Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting an action.”***

In the Ugandan case of Col (RTD) Besigye Kizza = vs = Museveni Yoweri Kaguta and Electoral Commission Presidential Election Petition No. 1 of 2001, Odoki C.J (as he then was) ordered that each party should bear its own costs and stated as follows:

***“Costs are not intended to be punitive but a successful litigant may be deprived of his costs only in exceptional circumstances.”***

In this Petition no reasons were advanced to warrant the Court to deprive the Respondents the costs. The Petition was not complex. There were two interlocutory applications. One was allowed by Consent of all parties and the other one was determined by the Court. A total of 9 witnesses testified in this Petition for 2 days. The Submissions filed herein and the authorities relied on are also noted.

Having taken into account all the above, I order the Petitioner to pay costs totaling Kshs. 400,000/= to be apportioned as follows:

The first Respondent Kshs. 200,000/=.

The Second and Third Respondents Kshs. 200,000/=.

The security deposited by the Petitioner to be shared equally as follows:

The first Respondent Kshs. 50,000/=, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents Kshs. 50,000/=.

Orders accordingly.

**S.O. MOGUTE, PM**

**02/2/2018**

**CERTIFICATE**

**Judgment is Signed, dated and delivered in Open Court in the presence of;**

**Court Assistant: Clare**

**Mr. Makokha for the Petitioner**

**M.S Antonina Muyoka for the 1<sup>st</sup> Respondent**

**Mr. Teti for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent – Absent**

**Petitioner – Present**

**1<sup>st</sup> Respondent – Present**

**2<sup>nd</sup> Respondent – Present**

**S.O. MOGUTE, PM**

**02/2/2018**