



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT AT KISUMU
ELECTION PETITION NO. 5 OF 2017
IN THE MATTER OF THE ELECTIONS ACT, 2011

AND

**IN THE MATTER OF THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS
PETITION) RULES, 2017**

AND

**IN THE MATTER OF ELECTION FOR MEMBER OF THE COUNTY ASSEMBLY FOR
KOLWA EAST WARD**

-BETWEEN-

JOHN OSUMBA OLUM.....PETITIONER

VERSUS

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

ACHIENG OKEYO YVONE.....2ND RESPONDENT

OWITI STEPHEN OUMA.....3RD RESPONDENT

JUDGMENT

INTRODUCTION

MR. **JOHN OSUMBA OLUM** herein after referred to as the petitioner filed this election petition on the 6th day of September 2017 challenging the declaration and subsequent announcement of **HON. OWITI STEPHEN OUMA** herein referred to as the 3rd Respondent as elect Member of the County Assembly of KOLWA EAST WARD in the general elections held on 8/8/2017. The petitioner also sued the 1st and 2nd Respondents as the statutory body mandated to conduct elections in Kenya and the Returning officer of the said elections respectively.

This petition was first received and filed at Kisumu Chief Magistrates court as Election Petition No. 5 OF 2017 but it was later brought to Winam Law Courts as the venue of the hearing after the Hon. The Chief Justice and the President of the Supreme Court gazetted me to hear and dispose off this petition.

After perusing the court record and being satisfied that all parties had filed their pleadings, Notices for pretrial conference were sent to all the parties and it is on the basis of the said notices that a preliminary objection by all the Respondents to strike out the petition was first argued on 10/10/2017 and dismissed on 13/10/2017. I will revisit this subject later in this full judgment. It is equally clear from the court record that after complying with the necessary procedural hoops the petition was then set down for hearing and the petitioner presented himself and 13 other witnesses to proof the case against the Respondents. The court then ordered for a scrutiny and recount in the following polling stations:

- Chiga Primary School Polling Station
- Rweya Primary School Polling Station
- Obino Primary School Polling Station
- Buoye Primary School Polling Station
- Orongo Primary School Polling Station
- Kadiju Primary School Polling Station
- Bungu Primary School Polling Station and
- Okago Primary School Polling Station

The 2nd Respondent and the 1st Respondent's ICT expert one **CALISTO OYUGI OMONG** also tendered their evidence in defense of the allegations raised by the petitioner relating to the manner in which the elections in issue were conducted. Finally, the 3rd Respondent testified and called his chief agent to adduce his testimony in defense of the issues raised by the petitioner. It is equally revealed by the court record that on 28/12/2017, the SD cards were availed for a read only access as ordered in my ruling of 22nd November, 2017 and after the reading of the same, a report dated 29th December, 2017 by the court's ICT officer one **MR VICTOR OGONE** was filed and later supplied to the parties on 4/1/2017.

THE PETITIONER'S EVIDENCE

In summary, the case by the petitioner and his 13 witnesses was that the elections complained of were not properly conducted as per the constitutional and statutory requirements because even before the 8/8/2017, he was vilified by the ODM membership during the campaign trails who painted him as an independent candidate thus voters were being urged to vote six piece for ODM candidates. It was also alleged that the 1st and 2nd Respondents had colluded with the 3rd Respondent in hiring his relatives and campaign manager to precede over the elections of 8/8/2017 thus influencing voters to vote in favor of the 3rd Respondent. The witnesses also told the court that as agents of the petitioner, they were denied entry into the polling stations, the 3rd Respondent was highly favored by being allowed to have many agents, there was bribery of voters in some polling stations to wit at RWEYA polling station, Forms 36A were never filled to wit at Chiga polling station, Forms 36A at CHIGA, OKAGO, OBINO, RWEYA and AYARO polling stations were not signed by the presiding officer, agents were not allowed by the Presiding officer to witness assisted voters voting, agents were also not allowed to witness the sorting out and counting of the votes and in some instances like at CHIGA station 1 of 2 lights went off for about 15 minutes but when they resumed the place where votes belonging to the petitioner had been placed during counting had now been interchanged with that of the 3rd Respondent, the petitioners agents were never supplied with copies of Forms 36A, Forms 36As were not signed by agents, Forms 36A issued to the petitioner had different serial numbers as opposed to those supplied to the court by the 1st Respondent and the KIEMS kits were not used to send results but instead a mobile phone was used by the Presiding Officer to send the results.

PW8 a telecommunication expert told the court that the 1st Respondent's servers had been interfered with and the files containing genuine results deleted hence leading to the announcement of losers as winners and winners as losers.

RESPONDENTS' EVIDENCE

The 2nd Respondent told the court that she was the returning officer for Kisumu East Constituency and she physically received all Forms 36A from all the Presiding officers for KOLWA EAST WARD and

after collation and tabulation of the said results as contained in Forms 36A, she then filled Form 36B and declared the 3rd Respondent as the Member of County Assembly elect with 4676 votes. On the failure to sign Form 36A by the Presiding officer, she asserted that such failure was not fatal and could not invalidate the results. She also testified further that most of the Forms 36A she received had been signed by agents and that the serial numbers on Forms 36A could not be the same because the booklet had the said serial numbers done continuously as opposed to the carbon copies bearing the same serial number as that of the original copy. The 2nd Respondent therefore concluded that the elections of 8/8/2017 were free and fair.

CALISTO OYUGI OMONG an ICT expert and an employee of the 1st Respondent relied on his affidavit and told the court that the Presiding officers would tally results, fill Form 36A then input the results in text and form and the images of Form 36A captured and sent to the result transmission data center. According to this witness, the 1st Respondent's servers were not interfered with because it only provided for a public portal which had no log in features and that in order to access such information one needed a user-name and password.

HON. OWITI STEPHEN OUMA told the court that he participated in the campaigns which were peaceful except for one incident where Professor Nyong'o's campaign convoy faced rowdy members of the public at Chiga who did not want him to address them and in the process the 3rd Respondent's vehicle was hit with stones and damaged. The 3rd Respondent stated that the voting was peaceful, he had one agent per polling station, his relative were also the petitioner's relatives because they all come from Kakwema clan and they have blood relationship since he calls the petitioner his grandfather. According to the 3rd Respondent, the elections of 8/8/2017 where he was returned as the dully elected Member of the County Assembly of KOLWA EAST WARD were free and fair.

Lastly, **COSMAS OWINO** the 3rd Respondent's chief campaigner only highlighted on what happened at the tallying center where Form 36B was signed by him as the chief agent but other agents for other candidates did not sign because they were absent.

ANALYSIS OF THE EVIDENCE AND ISSUES FOR DETERMINATION

I have set out above in brief what appears to be the evidence by all the parties in this matter and at this stage, I now wish to embark on considering the said evidence in light of the Constitutional edicts and all other enabling laws governing the conduct of elections in this country.

There is no doubt at this stage that the legal burden of proof rests with the petitioner and this, unlike in civil cases, is not on a balance of probability. The law on this subject has been well settled by superior courts. In the case of **Raila Odinga and others v Independent Electoral and Boundaries Commission and 3 others SCK Petition No. 5 of 2013 [2013]eKLR**, the Justices of the court held at paragraph 203 as follows:

".....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."

It is therefore the expectation of the law that in this petition, the petitioner should be able to discharge this legal burden as required.

I have since read the pleadings on record, the final submissions by all the parties and their framed issues for determination filed during the pre-trial conference and I consider the following issues falling for my determination:

- (i) Whether the petition as drafted is defective in substance
- (ii) Whether the elections as conducted by the 1st and 2nd respondents were free, fair, credible,

transparent, accountable, verifiable and accurate.

Whether the petition as drafted is defective in substance

I have at this juncture found it necessary to revisit the issue of the pleadings as pointed earlier in the introductory part of this judgment because the same was framed by the Respondents as one of the issues for determination. The 1st and 2nd Respondents in their final filed submissions have equally submitted ably on the same and supplied the court with relevant authorities on this subject. The petitioner on the other hand has not submitted on this subject.

This germane issue was first raised by all the Respondents in their respective preliminary objections. The Respondents have submitted that the petition is still defective and ought to be struck out for referring to a different ward other than that in issue which is KOLWA EAST WARD. In order to appreciate the substance of this issue, the petition filed on 6/9/2017 captures this complaint at page 21 where among other final prayers sought for, the petitioner prays as follows:

(d) For an order that a fresh election be held for the ward seat of South West Kisumu within the strict confines of the constitution and the election laws within the legal prescribed time.

The question to be answered at this stage is whether the 1st Respondent can be ordered in case of the petitioner succeeding to hold fresh elections in SOUTH WEST KISUMU WARD. It is my view that this will be embarrassing to do so and the 1st Respondent will be unable to conduct such an election since none of the candidates who took part in the said ward were parties to this petition. Any order to such an effect will have been issued contrary to the well laid down rules of natural justice.

Secondly, it is trite law that each party is bound by his own pleadings. It ought to be recalled that when the preliminary objections were raised and declined by the court, the court was very clear in its ruling rendered on 13/10/2017 that what had been complained of was a typographical error capable of being amended. In fact, MR ONSONGO advocate for the petitioner was categorical that at that time of the hearing of the preliminary objection, he was not making an application for amendment. It is clear to me that even after allowing the petition to be prosecuted, no attempts were made to correct the typographical errors. The petitioner appears to have decided to ride on the ruling hoping that the court would continue overlooking the apparent typographical errors. I have also read the petitioner's final submissions filed on 12/1/2018 and it is apparent at page 5 paragraph 3 thereof that the same still suffers from the same errors affecting the petition. In the said paragraph, it is submitted that several witnesses who testified on behalf of the Respondents admitted that the elections of 8/8/2017 of the Governor of Kisumu County were not in line with the Constitution, the Statutes and the regulations. This having been an election challenging the election of a member of County Assembly, no substance or nexus can be found in any reference to the elections of the Governor of the Kisumu County.

Thirdly, I consider this to be a grave issue at this final stage because if the court is to allow the prayers in the manner they are drafted, then the 1st Respondent will be in a legal quagmire as to how to effect the orders. Similarly, if the court is to allow the petition and order for fresh elections in KOLWA EAST WARD, then the absurdity would be that the court will have amended the prayers for the petitioner.

I have had the chance of reading the submissions by the 1st and 2nd Respondents and the very useful authorities relied on and I am convinced that what was described by the petitioner as typographical errors it is such a grave error that cannot be overlooked at this stage.

In the circumstances, I am fully persuaded that the failure by the petitioner to amend his pleadings at the right time as provided for by the rules renders his petition fatally defective. The court is unable to generate suitable prayers for the petitioner at this final stage. I am satisfied that this determination of this issue alone is enough to dispose off the entire petition but I will nonetheless proceed to evaluate the entire evidence on record to find out if the petitioner proved his case against the Respondents.

Whether the elections were free, fair, credible, transparent, accountable, verifiable and accurate

In order to address this issue, the court appreciates the precepts of Articles 1, 38, 81, and 86 of the Constitution which guides the 1st Respondent and its officers in conducting an election. (*See Justice D.S Majanja in JACKTON NYANUNGO RANGUMA Vs The IEBC and 2 others Kisumu EP No. 3 of 2017 paragraphs 10-14*).

In a nutshell, Article 1 of the Constitution guarantee and vests all sovereign power in the people of the Republic of Kenya while Article 38 which is under Chapter 4 on the bill of rights guarantees political rights to every citizen to make political choices. On the other hand, Article 81 sets out principles governing an electoral system and part (e) thereof commands that free and fair elections shall be:

(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.

Article 86 places the burden of conducting a watertight election on the 1st Respondent so that at every voting, it should 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 safe keeping of election materials.

In this case, I will address this issue by dealing with the complaints of electoral malpractices, illegalities and irregularities as can be singled out from the pleadings on record.

Pre 8/8/2017 allegations

Although the petitioner raised in his petition allegations of electoral malpractices and irregularities before the 8/8/2017 but when he was cross-examined, he was categorical that he was not complaining of the incidences of what occurred before the elections of 8/8/2017. In any event, even if this were not the case, there is no evidence on record to demonstrate on the required standard of proof that any of the Respondents were involved in any act of electoral irregularities, illegalities or malpractices. The evidence to demonstrate that ODM politicians were advocating for six piece against independent candidates does not meet the evidential threshold as contemplated under section 106B of the Evidence Act on computer print outs.

There is equally evidence on record showing that the elections of 8/8/2017 were conducted in a peaceful manner but what the petitioner takes umbrage with is the manner the officials of the 1st Respondent handled the actual voting and the outcome of the same.

The petitioner alleged that the 1st and 2nd Respondents colluded with the 3rd Respondent to have him declared a winner including hiring his relatives and a campaign manager to participate as officials of the 1st Respondent. The petitioner having alleged so was then required to create a nexus between the 3rd Respondent and the IEBC and the 2nd Respondent showing that they really colluded to employ his relatives. There is no evidence on record to prove that the 3rd Respondent was involved in the recruitment of officers who were employed by the 1st Respondent to man the elections of 8/8/2017. In any event, it was the testimony of the 3rd Respondent that he was a relative of the petitioner and they thus shared relatives so that if any relative of the 3rd Respondent was employed by the 1st Respondent, then they were by extension also relatives of the petitioner. The court is therefore not convinced that there was collusion between the Respondents in employing its officers who participated in the elections of 8/8/2017 at KOLWA EAST WARD as pleaded in paragraph 19 of the petition. The petitioner did not also offer any tangible evidence to prove that the officials who participated in overseeing the said elections were members of ODM and had taken part in the primaries where the 3rd Respondent was nominated as an ODM candidate.

Bribery allegations

The petitioner at page 11 paragraph 10 of the petition alleged that JOSEPH ONINGO OGOT who was the 3rd Respondent's agent at RWEYA polling station was dishing out money to voters who were coming to vote and telling them to vote only for ODM. PW6 told the court in her testimony that voters at RWEYA polling station were being bribed but when she was confronted in cross-examination she was unable to substantiate these serious allegations. She admitted that she did not take photographs of the incident and no report was made to the police for action to be taken against the perpetrators.

In *Onalo V Ludeki & Others(2008)3KLR 614* it was held that:

"The burden of proof of election offenses like bribery etc as per the Elections Act in the election petition are higher because they are quasi criminal and if the offense is not proved to the satisfaction of the court and if the court is not satisfied and when it is in doubt and where a reasonable doubt exists the same cannot be held to be proved against the respondents."

I am also alive to the decision of Justice D.Majanja in **Richard Kalembe Ndile & Another Vs. Dr Patrick Musimba & 2 others Election Petition (Machakos) 1 of 2013** where it was held that:

"Bribery is a serious charge to make against someone and in this respect the petition is vague and lacks particulars as against Mr. Musimba (the elected Member of the National Assembly for Kibwezi Constituency).....Evidence of bribery needs to be reasonably precise and capable of being quantified if it is to be considered to affect the results. For instance, how many votes were procured as a result of the bribery, were they two, ten, or a whole polling station or what number" If it were to be assumed that such amorphous crowd was bribed to either vote in a particular way or abstain from voting, aside from the criminal aspect of it, what number is the court to attribute to such illegal conduct in order for it to say that such conduct affected the result of the election." This is crucial because if such evidence is proved then such vote is liable to be excluded in a scrutiny exercise by virtue of section 82(2)(b) of the Act."

In the circumstances of this petition and the evidence tendered on this subject, I find no substance in the allegations of vote bribery and they are hereby dismissed.

Allegations on Forms 36A

The petitioner at page 12-13 paragraph 13 of the petition pleaded that Forms 36A at CHIGA Primary polling station no results were keyed in and not stamped. It was also alleged that at CHIGA, OKAGO, OBINO, RWEYA and AYARO the presiding officers did not sign Forms 36A. In attempting to prove this claim, he relied on the copies of the Forms attached to his petition but after perusing the Forms attached to the response by the 1st and 2nd Respondents and also having done the scrutiny exercise, I find that the

petitioner had no scintilla of evidence to buttress his allegations. The Forms 36A found out during the scrutiny and recount were all populated with results of the election in issue. This complaint has no substance and it is dismissed.

Similarly, it was the petitioner's charge that Forms 36A were not signed by the Presiding officers and his agents did not also sign them in which case the Presiding officer was required to indicate the reasons as to why the agents did not sign.

On this issue, I concur with the 2nd Respondent's evidence that failure to sign Form 36A by the Presiding officer does not in itself invalidate the results. This conclusion can be best understood in view of the recent amendments to the **Elections Laws(Amendment) Act, 2017(Act no.34 of 2017)** which came into force on 2/11/2017. The law now makes it mandatory for the Presiding officers to sign these statutory instruments unlike before. There is therefore no evidence to persuade me to find in favor of the petitioner on this matter.

In **PAUL GITENYI MOCHORWA V TIMOTHY MOSETI E BOSIRE & 2 OTHERS[2013]eKLR Justice EDWARD M. MURIITHI** at paragraph 30 of the said judgment and while acknowledging the obligations of IEBC under the constitution held as follows:

" Being the official body charged with the conduct of elections under the constitution, the IEBC's documents presented by the 3rd respondent through its officer the 2nd respondent must be taken to be the official record of the elections and in the event of conflict any other documents purporting to be the IEBC documents the ones presented by the IEBC and its official set of documents must prevail"

In light of the said holding, it is my finding that this position equally applies to this petition and I have no reservations toward Forms 36A and B attached to the response by the 1st and 2nd Respondents.

The court conducted a scrutiny of the election materials and it is evident that all Forms 36A were properly filled with results from each polling station. The only issue detected was in respect of a few votes having been credited to a wrong candidate or where some votes were treated as invalid when in the actual sense were valid. This one affected both the petitioner and the 3rd Respondent and the net result was that the 3rd Respondent's total valid votes cast increased. For example Form 36A at CHIGA 1 of 2 was missing but when scrutiny was done, it revealed that the petitioner garnered 245 votes more than all other candidates including the 3rd Respondent. Form 36A at CHIGA 2 of 2 was signed by both the presiding officer and the Deputy Presiding officer. This also obtains for OBINO polling station and Rweya 1. For OBINO 2 of 2 the Presiding officer's comment was that voting went on smoothly. For OKAGO 1 of 1, the scrutiny revealed that Form 36A was signed by both the Presiding officer and 4 agents. After considering the outcome of the scrutiny and recount, I am convinced beyond any peradventure that the petitioner's allegations in respect of Forms 36A are hopeless and have not been established as by law required.

Having cited this evidence and while considering the arithmetic difference admitted to by the 2nd Respondent in the filling of Form 36B, I am of the finding that these were human errors or imperfections which did not go to the root of the final results declared by the 2nd Respondent. It ought to be recalled that, there was no fundamental fault found with Forms 36A when the scrutiny was conducted and in view of the decision in the **Maina Kiae** case, the said results remain final.

Indeed in the case of **Gatirau Peter Munya v Dickson Mwenda Kithinji and 2 others SCK Petition No. 2B of 2014[2014]eKLR** it was held at paragraphs 216-220 as follows:

" 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 Election's 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 Elections Act, then such election is not to be invalidated only on grounds 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.”

In Ranguma case *supra*, Justice Majanja at paragraph 23 of his judgment while considering the issue of malpractices and irregularities held as follows:

“what the supreme court recognized is that an election is a process where mistakes will be made and malpractices may occur but in order to succeed in annulling the election, the petition must establish either that there was non-compliance with the constitution and the law governing election or that election malpractices and irregularities that took place were of such magnitude that they substantially and materially affected the results of the election.”

In this petition, the only issue the 1st Respondent and its officers ought to be held culpable of relates to the absence of Forms 32 for assisted voters. Regulation 72 requires the Presiding officer to fill the Form where he assists voters in need of such assistance when voting. In this regard, the 2nd Respondent was unable to produce any single Form showing that some voters were assisted despite the fact that the polling day diary attested to the fact that some voters were assisted in voting and others could not be identified biometric-ally. The 2nd Respondent's response was that the Forms were just somewhere in the warehouse. I find this response to have been reckless considering that this was a necessary document which ought to have been readily available to the parties. The petitioner's agents alleged that these voters were not allowed their free democratic choice to elect their leaders by secret ballot because the Presiding officer was the one voting for them “six piece”. In the absence of any evidence to the contrary, I find that the IEBC and its officials must be held liable for the failure to comply with this rudimentary provision of the Constitution and the election laws.

Interference with the 1st Respondent's Server

PW8, LEVY told the court that the server of the 1st Respondent had been infiltrated and files with genuine results deleted. This was a serious allegation bordering on criminal conduct but the same was not proved to the required standard. In any event, PW8 was so casual and cavalier in the manner he responded to answers in cross-examination when he was put to test as to how he gained access to the servers of the 1st Respondent. I therefore do not find any value his testimony added to the petitioner's case considering that the said evidence was not authenticated and did not relate to Forms 36A of KOLWA EAST WARD.

Similarly, I note that even though the SD cards for Orongo 02 and Chiga 01 were not availed for scrutiny, this does not change the fact that when scrutiny and recount was done on 6th and 7th December, 2017 it was found out that Forms 36As relating to the said stations were properly filled and results therefrom captured by the 2nd Respondent in Form 36B. The question to be answered at this stage is whether the

failure to transmit the results electronically was fatal.

In **AHMED ABDULLAHI MOHAMED & ANOTHER Vs MOHAMED ABDI MOHAMED & 2 OTHERS [2017]eKLR** (Unreported) while dealing with a complaint relating to the failure to transmit results through the KIEMs KIT, Justice A.MABEYA held at paragraph. 145 that:

“.....While I am in agreement with the petitioners that technology was meant to be central in the elections of 8th August, 2017, nevertheless it was not the only mode of transmission of results. Indeed, a reading of Regulations 5(1A)(d) and 82 of the Regulations, will show that the Presiding officer is only mandated to electronically transmit presidential results.”

This position of the use of the KIEMs KITs in the transmission of results was made clear in the case of ***National Super Alliance (NASA) Kenya v. IEBC & 2 Others [2017] eKLR*** that notwithstanding the provisions of sections 39 and 44 of the Elections Act, the elections of 8th August, 2017 were not to be exclusively electronic.

In light of the above holding of the superior courts, I find that the complaint raised by the petitioner's agents that in some instances the Presiding officer used a mobile phone to transmit results has no sound basis in law and it must fail.

Finally, the petitioner pleaded at paragraph 13(iii) that at RWEYA primary polling station the total number of votes cast was 621 which was way much higher than the total registered voters of 489. In order to answer this complaint, I have read the outcome of the scrutiny conducted on 6/12/2017 and 7/12/2017 as read with the scrutiny of the SD cards done on 28/12/2017 and it is evident that RWEYA 01 had 489 registered voters. This was similar to RWEYA 02. According to the outcome of the scrutiny, the total number of valid votes cast at RWEYA 01 was 411 and at RWEYA 02, the total number of valid votes cast was 423. Interestingly, it was at this station where the petitioner garnered more valid votes than all his competitors. However, be it as it may, there is no evidence adduced by the petitioner to show that the total number of registered voters at this station was 621 as pleaded and in absence of such evidence, then the number provided by the 1st Respondent ought to be treated as the valid one.

On the issue of the voter turn out being higher than the number of registered voters, I am alive to the holding of the Supreme Court of Kenya decision in ***Petition 2B of 2014 Gatirau Peter Munya V. Dickson Mwenda Kithinji & 2 Others [2014]eKLR*** that an allegation of votes cast exceeding the registered voters is a serious issue that must be strictly proved. Accordingly, I find that the petitioner did not strictly prove this allegation and the same is rejected.

In summary of the analysis of the entire evidence on record, I am satisfied at this penultimate stage that the petitioner having made grave allegations of serious electoral illegalities, irregularities and malpractices he has however failed to rise to the occasion required by the law on election proceedings to establish any scintilla of evidence to warrant overturning the free democratic will of the people of KOLWA EAST WARD. The petition therefore stands dismissed.

COSTS

This being an election court, Section 84 of the Elections Act as read with Rule 30(1) empowers the court to make an award of costs to the successful party. The rule further provides that the court shall specify who to pay costs and to whom it shall be paid. In this regard, I have considered the fact that this was a fairly brief and straight forward petition which did not involve complex issues for determination. The submissions by the parties attest to this fact and it is clear that no new or novel point of law arose for determination. The petition was also heard and concluded after 14 court appearances. I also consider that counsel for the 1st and 2nd Respondents is based in Nairobi hence they must be adequately remunerated for the just expenses incurred in defending the petition.

In bearing the above in mind, I am inclined to make an award of an all inclusive sum of Kshs. 400,000.00

as costs for each of the Respondents. The petitioner shall pay the costs as ordered.

FINAL VERDICT

In light of the examination of the entire evidence on record, the case law applicable and the submissions by all the parties, i make the following orders:

(1) That the petitioner's petition dated 6/9/2017 and filed in this court on 6/9/2017 is devoid of merit and the same is hereby dismissed

(2) That the court now determines and confirms that **OWITI STEPHEN OUMA** was at the General Elections of 8th of August, 2017 validly elected as a Member of the County Assembly of **KOLWA EAST WARD**. Accordingly, the certificate of the court as to the validity of the election will, pursuant to section 86 of the Elections Act, issue to the Independent Electoral and Boundaries Commission and the Speaker of the County Assembly of Kisumu.

(3) The petitioner shall pay costs to the 1st, 2nd and 3rd Respondents. The amount of Kshs.100,000.00 paid as deposit for security shall be paid out to all the Respondents on *pro rata* basis.

DATED and DELIVERED at WINAM this 2nd Day of February, 2018

HON. BERNARD KASAVULI

SENIOR RESIDENT MAGISTRATE

Coram:

C/a: Susan Bala

ONSONGO & CO. ADVOCATES FOR THE PETITIONER

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.....

MASIKA & KOROSS ADVOCATES FOR THE 1ST AND 2ND RESPONDENTS

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MAXWELL O. OGONDA & COMPANY ADVOCATES FOR THE 3RD RESPONDENT

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