



REPUBLIC OF KENYA

IN THE PRINCIPAL MAGISTRATE'S COURT AT

MUKURWE-INI

KARATINA ELECTION PETITION NO. 1 OF 2018

JAMES KIBERENGE GATERE.....1ST PETITIONER

SAMUELMWANGI KARIUKI.....2ND PETITIONER

RENNY GITHUNGO MIGWI.....3RD PETITIONER

ROY ONYANGO OWITI.....4TH PETITIONER

VERSUS

I.E.B.C.....1ST RESPONDENT

THE RETURNING OFFICER,

MATHIRA CONSTITUENCY.....2ND RESPONDENT

ERASTUS KARANJA MURIUKI.....3RD RESPONDENT

JUDGMENT

Background

On the 18th of April 2018, the people of Ruguru Ward, Mathira Constituency in Nyeri County were called upon to elect in a by- election their member of county Assembly (**herein after referred to as the MCA**).

There were two candidates for the position and after voting counting and tallying the returning officer declared the following results:-

Erastus Karanja Muriuki - 4270

James Simpson Ndegwa Macharia - 3946

The above results show that there was a margin of 324 votes between Erastus Karanja and James Simpson Ndegwa and consequently Erastus Karanja Muriuki was declared the winner through Gazette Notice No. 3971 dated 27th April, 2018.

The Parties

The petitioners herein James Kiberenge Gatere, Samuel Mwangi Kariuki, Kennedy Githungo Migwi and Roy Onyango Owiti described themselves as residents of Nyeri County and registered voters in Ruguru Ward of Mathira constituency. They filed this petition on the 16th May 2018.

The 1st Respondent is the Independent Electoral and Boundaries Commission (**herein after referred to as "IEBC"**) an Independent commission established under Article 88 as read with Article 248 and 249 of the Constitution of Kenya 2010, which has the constitutional mandate to conduct elections to all the elective offices established under the constitution.

The 2nd respondent is the Returning officer Mathira Constituency duly appointed by the 1st respondent in respect of elections in the constituency while the 3rd Respondent was one of the candidates in the by-elections under the Jubilee Party ticket.

The Petition

The petitioners were aggrieved with the above stated results of the by-elections for the Ruguru Ward MCA and their said petition dated 15th may 2018 challenged the declaration of the 3rd respondent as the duly elected MCA Ruguru Ward and sought the following reliefs:-

- a) A declaration that the election of the 3rd Respondent which is questioned is invalid.
- b) An order that the 1st Respondent holds a fresh election in relation to Ruguru Ward, Member of County Assembly.
- c) This Honourable court be pleased to issue any other orders as may be appropriate in the circumstances.
- d) Costs of the Petition be provided for.

The petition was based on the following grounds:-

(A) That the 3rd Respondent the duly elected Member of the County Assembly engaged in voter bribery on diverse dates from the 15th to 18th April 2018 either by himself and through his agents and/or supporters in the following areas:-

- I. Kiamariga shopping centre, Ruguru ward.
- II. Ruare Primary School polling centre.
- III. Ndunduini Primary school polling station.
- IV. Iruri Primary school poling centre.
- V. Kabiru-ini Primary School Polling Centre.
- VI. Chieni Primary school polling centre.
- VII. Kahira-ini Primary school polling centre.
- VIII. Ngorano primary school polling centre
- IX. Sagana Primary school polling centre.

(B) That the 3rd Respondent campaigned outside the closure Period of the campaigns which were to end on the 15th April 2018 in the following areas:-

Chieni shopping centre, Kaagati, Kianjau trading centre and Mutaaga in Sagana.

(C) On 17th April 2018 the Honourable Rigathi the Member of National Assembly, Mathira Constituency a campaigner and supporter of the 3rd Respondent convened a meeting of voters at Iruri/Sagana where he bribed voters by way of giving them money and food as an incentive to vote for the 3rd Respondent.

(D) The 3rd Respondent in the company of Jubilee members of Parliament used government resources in form of relief food to campaign for the 3rd Respondent which relief food was distributed to the residents during the periods of 15th-17th April 2018.

(E) That the 3rd respondent through his agents engaged in voter

Intimidation in the following instances;

- i. On the 15th April 2018 the 3rd petitioner witnessed hired goons forcefully remove caps and burn t-shirts of Maendeleo Chapchap supporters, the political party one of the candidates in the by-elections was running under at Kiamariga shopping centre.
- ii. On the 18th April 2018, hired goons intimidated one of the IEBC accredited election observers by the name Martha Wanjiru Miano at Kiamariga police station by slapping her, molesting and shoving her which said complaint was reported and the accused persons charged at Karatina Principal Magistrate's court in Criminal case Number 173 of 2018, **REPUBLIC Vs. James Munuhe Wanjohi and Jackson Ndegwa Maina.**

iii. At Kiamariga, supporters of the 3rd Respondent in a political rally convened by Maendeleo Chapchap candidate were seen shouting and lifting placards and posters bearing the 3rd respondent's image.

iv. The supporters and agents of the 3rd respondents blocked the road at Kabiruini shopping centre in an entourage of the Maendeleo Chap Chap candidate.

v. The Honourable Rigathi Gachagua, the area member of National Assembly intimidated the Independent electoral Boundaries commission officials in performing their duties.

(F) The returning officer allowed the 3rd respondent to Campaign outside the timelines stipulated by the Independent Electoral and Boundaries Commission.

(G) A number of voters under the guise of assisted voters more so at Hiriga Primary School polling station and Ndundu-ini Primary school were literate and were being "assisted" by Jubilee party supporters to ensure that they voted for the 3rd Respondent.

(H) The elections for the Member of the County Assembly Representing Ruguru ward were not free, fair or transparent as they were tainted with voter bribery, intimidation, improper influence, malpractice and other irregularities contrary to the constitution of Kenya, 2010, the Elections Act 2011, the Elections/General Regulations 2012 as amended in 2017.

The 1st and 2nd Respondent filed a joint response to the petition dated 7th June 2018. They denied all the allegations by the petitioners and contend that they held free and fair elections in accordance with the constitution of Kenya, The Independent Electoral and Boundaries Commission Act, The Elections Act and Regulations there under. They sought that the petition be dismissed and a finding that Erastus Karanja Muriuki was duly elected and the by-election was valid.

The 3rd Respondent filed his response to the petition dated 6th June 2018. He denied all the allegations against him and contends that he was duly elected as the Member of County Assembly for Ruguru Ward, that the elections were conducted substantially in accordance with the Law and reflected the will of Ruguru people. He urged the court to dismiss the Petition.

INTERLOCUTORY APPLICATIONS

Three interlocutory applications were made before the commencement of the hearing. The 1st Application filed on 7th June 2018 was by the 1st and 2nd Respondents requesting the court to enlarge time for filing of their response to the petition and accompanying affidavit and deem the response and the accompanying affidavits filed on 7/6/18 to be properly on record. This application was not opposed and was allowed.

The 2nd application was filed on 12th June 2018 by the 3rd respondent seeking to dismiss the Petition on two grounds. That the Petitioners had failed to deposit the mandatory security for payment of costs within 10 days of filing of the Petition, and that the Petitioners did not serve the petition within 7 days as provided for under Rule 10(1) of the Elections (Parliamentary and County Elections) Petition Rules, 2017 or at all. The application was heard and dismissed by the court. The last application was made by James Kiberenge Gatere (**1st Petitioner**) and Samuel Mwangi Kariuki (**2nd Petitioner**) who sought to withdraw themselves as petitioners. The application was also allowed by the court, and consequently two petitioners remained whom we continued to refer as the 3rd and 4th petitioners respectively.

During pre-trial the petitioners indicated that they will call thirteen witnesses in total but only the two petitioners and seven other witnesses were called to support the petitioners' case.

The 1st and 2nd Respondent called six witnesses in total. The 3rd Respondent on his part testified and called three other witnesses in support of his case. I will advert to the evidence of witnesses as I consider the issues.

ISSUES FOR DETERMINATION

During the pre-trial conference the following were agreed as the issues for determination:

1. Whether the 3rd Respondent was validly elected and declared as the MCA for Ruguru Ward in its by-election held on 18th April 2018.
2. Whether the MCA by-elections for Ruguru Ward held on 18th April 2018 were conducted in a free, fair, transparent, and credible manner in compliance with the provisions of the Elections Act and all relevant provisions of the law.
3. What order should be made in regard to costs?

As earlier stated this petition is based on the claim that certain constitutional provisions, statutory principles and rules, and subsidiary regulations were violated in the conduct of the by- elections for the Ruguru Ward sufficient to warrant the nullification of the by-election. The petitioners made many factual allegations in support of his petition. Before delving into the analysis and evaluation of the allegations against the evidence presented, it is important for me to outline the general principals applicable in elections and the standards.

APPLICABLE LEGAL PRINCIPALS AND STANDARDS

The general principals applicable in general elections are found in various Articles of the Constitution, Elections Act plus the regulations governing elections.

Article 38 of the constitution of the Kenya sets out the political rights of the Kenyan citizen and provides as follows:-

1. Every citizen is free to make political choices, which includes the right :
 - a) to form, or to participate in forming a political party;
 - b) to participate in the activities of, or recruit members for, political party; or
 - c) to campaign for a political party or cause
2. Every citizen has the right to free, fair and regular elections for:-
 - a) any elective public body or office established under this constituency, or
 - b) any office of any political party of which the citizen is a member
3. Every citizen has the right without unreasonable restrictions:-
 - a) to be a registered voter;
 - b) To vote by secret ballot in any elections 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

Chapter 7 of the constitution provides the framework for the electoral system and process, including the resolution of electoral disputes. The Elections Act, and the Regulations and Rules made there under are enacted pursuant to Chapter 7 of the constitution.

Article 81 of the constitution provides for the principles that apply to the electoral system, including the principle of free and fair elections which are to be held as follows:-

- a) by secret ballot
- b) free from violence, intimidation
- c) conducted by an independent body
- d) transparent; and
- e) administered in an impartial, neutral, efficient, accurate and accountable manner

The 1st Respondent the IEBC, is the Independent body established under Article 88(1) and Independent Electoral and Boundaries Commission Act (No. 9 of 2011) to conduct and supervise referendum and elections in accordance with the Elections Act, 2011 and the regulations made there under:

As regards the conduct of the voting Article 86 of the constitution imposes specific obligations in the IEBC in the following terms;

At every Election, the Independent Electoral and Boundaries Commission shall ensure that:-

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

In cases of allegations of election malpractices and other irregularities, the petitioner is not only required to establish that such electoral malpractice and irregularities actually occurred but that they were of such magnitude that they substantially and materially affected the results of the election.

The primary consideration is an Election Petition is whether the will of the electorate has been affected by the irregularities. This principle was analysed in the famous case of **MORGAN AND OTHERS VS.SIMPSON AND ANOTHER (1974) ALL ER. 722, 728**, Lord Denning stated as follows;

“ 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 so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls – provided that it did not affect the result 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 polls and it did affect the result , then the election is vitiated.”

The principle in Morgan and others Vs. Simpson is set in Section 83 of the Elections Act, 2011 which states 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 that election.”*

The Supreme Court of Kenya in **RAILA AMOLO ODINGA AND ANOTHER VS INDEPENDENT ELECTRAL AND BOUNDARIES COMMISSION AND 2 OTHERS IN ELECTION PETITION NO. 1 OF 2017** interpreted the threshold set by Section 83 of the elections Act as follows:-

“[211] in our respectful view, the two limbs of Section 83 of the Elections Act should be applied disjunctively. In the circumstances, a petitioner who is able to satisfactorily prove either of the two limbs of the section can void an election. In other words, 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 irregularities that affect the result of the election.”

Justice Professor Ngugi in **Election Petition No. 1 of 2017 in the High Court of Kenya in Kiambu in Clement Kungu Waibara Vs. Anne Wanjiku Kibeh and another [2018] eKLR** stated that the implication of the reading of Section 83 of the Elections Act by the Supreme court as above is that an election can be nullified under three different thresholds:

- i. Where the electoral system established or the conduct of the elections does not meet the clear standards enunciated in Article 81 and 86 of the constitution respectively; or*
- ii. Where the conduct of the election in question substantially violated written law; otherwise known as the “quantitative test” under Section 83 of the Elections Act, or*
- iii. Where there were irregularities or illegalities in the conduct of the impugned election that affected the outcome of the election; otherwise referred to as the “quantitative test”*

Quantitative requirements evaluate whether the environment in which the election was conducted was free and fair within the meaning of Article 81 of the constitution. Where a court reaches the conclusion that there was substantive non-compliance with the quantitative requirements the entire results will be rendered void. **Justice Kimaru in WILLIAM KABOGO GITAU VS GEORGE THUO AND 2 OTHERS [2010] eKLR**, set out the principles on which quantitative approach operates. He opined that the court should look more into the effect of malpractices upon the systems and processes employed in the conduct of the elections. The number of votes by which the candidate won will not be the issue, for it is the integrity of the process which has been fundamentally dented by the election malpractices which seriously impeach the process so also impeach the results coming from the process.

The quantitative requirements deal with the measurements or arithmetic calculations of results of the election, quantitative aspects relate to the counting, tallying, accuracy, verifying and transmission of results. It also deals with whether a vote cast was rightfully labeled as valid, invalid rejected or stray. In this contest the paper trail of the votes cast is critical in determining quantitative aspects of the electoral process .The quantitative requirements deal with numbers and figures.

The distinctions between the quantitative and qualitative approaches were quite aptly stated further by Professor Odek in a paper “Election technology and the concept on “Did the irregularity affect the results of the Election.” I will not delve into the same here but suffice to say that he also agreed that Article 81(e) and 86 represent the quantitative and qualitative principles of Kenya’s Electoral System Article 81 (e) being essentially qualitative while Article 86 is primarily quantitative.

Burden of proof

It is trite law and basic Rule of law that he who alleges must prove. The petitioners have alleged multiple violations of electoral laws and massive irregularities allegedly occasioned by the respondents hence to nullify the election results; it is upon the petitioners to prove those allegations to the required degree. The principle regarding burden of proof is a statutory requirement clearly spelt out **under Section 107 of the Evidence Act Cap 80 Laws of Kenya.**

Section 107 provides as follows:-

1) “ *Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist*

2) *When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.*”

Section 108 of the Evidence Act Provides that:-

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

The supreme court of Kenya has settled the question of who bears the burden of proof and the standard thereof in an Election Petition in **Petition No. 5 of 2013. Raila Odinga vs. IEBC and 3 others {2013} eKLR** after considering judicial approaches in various jurisdictions on the issue it laid down the law in the following words:

“Where a party alleges non-conformity with the electrical 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. It is 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 authorities, departures from the prescriptions of the law.”

With regard to the standard of proof it is now settled that Election Petitions are no ordinary civil suits but rather Sui generis (unique in nature) see *Joho vs. Nyange [2008] eKLR*. In that context, the degree or standard of proof laid upon the person alleging any omission or commission so as to vitiate an election must prove the same not in a balance of probability like in an ordinary civil suit, or beyond reasonable doubt as required in a Criminal Case, but above proof on a balance of probability and below proof beyond reasonable doubt. The degree therefore required is intermediate in nature.

In this regard the Supreme Court in the **Raila Amolo Odinga and another Vs. IEBC and Others SCK presidential petition No. 1 of 2017 [2017]eKLR** held at paragraph 152 that:-

“We maintain that in electoral disputes the standard of proof remains higher than the balance of probabilities but lower than beyond reasonable doubt and where allegations of Criminal or quasi criminal in nature are made it is proof beyond reasonable doubt”

In establishing their case, the petitioners are bound by the matters which they have pleaded or set out in their petition. This was the holding in **Mahmud Muhamed Sirat Vs Ali Hassan Abdirahaman and 2 others Nairobi Election Petition No. 15 of 2008 by Justice L. Kimaru [2010] eKLR**. I shall accordingly limit my observations and judgment to what was pleaded in the petition and supported by the witness affidavits.

Analysis and determination

I will now proceed to apply the law and applicable standards to the facts of this case. I have found it unnecessary to rehash the allegations by the petitioners, the response by the respondents, the evidence and the submissions of the parties. I have chosen to enumerate all the allegations made by the petitioners and reviewed the evidence in support of the allegations as well as the response provided by the respondents. I then considered the submissions and made a determination on each allegation using the applicable legal standards whether the allegation was proved or not.

Although the facts and evidence in respect of issues No. 1 and No. 2 herein overlap I will deal with specific allegations of election malpractices, offences and other breach attributed to the 3rd respondent

Election Malpractices and Offences against the 3rd Respondent Voter Bribery

The Petitioners alleged that in numerous instances before and during the by-election day on 18th April 2018, the 3rd respondent by himself and through his agents and/or supporters engaged in bribery of voters.

Paragraph 59A of the Petition is specific on the areas where bribery of voters was witnessed, the areas mentioned are Kiamariga shopping centre, Ruguru ward, Ruare primary school polling station, Ndundu-ini primary school polling station, Iruri Primary school polling centre, Kabiru-ini primary school polling centre, Chieni primary school polling centre, Kahira-ini Primary school polling centre, Ngorano primary school polling centre, Sagana Primary school polling centre and at the home of Hon Rigathi the Member of national Assembly for Mathira constituency at Iruri/Sagana.

The evidence in support of the above allegations was also contained in the affidavits of various witnesses.

PW1Kenny Githogo who is the 3rd Petitioner deposed in paragraph 9 that after the jubilee Party rally at Kiamariga Shopping Centre people were told to gather at Kagati dam where they could be given money. on cross examination by counsel for the 3rd Respondent he stated that he had not given the names of those persons asking voters to gather at Kagati neither did he give the names of those being told and on further cross examination stated that he did not give names of any people who went to the dam.

At paragraph 12 of the affidavit the 3rd petitioner deponed that on the eve of the by-election on 17/4/18, the area member on National assembly Mathira constituency told residents of Ruguru ward to meet at his home in Iruri/Sagana where they were given money and told to vote for Erastus karanja Muriuki, on cross-examination by the counsel for 3rd respondent he failed to state from where the area member of National Assembly was making the announcements and stated that he did not go to his place nor witness what transpired at the Member of parliament's place. He also stated that he did not report to the police that bribery was taking place. In paragraph 20 of his affidavit he stated that he reported to IEBC through email and purported to annex a copy of the screenshot of the email but it was not annexed.

PW2 the 4th Petitioner deponed in paragraph 35 that “on 18th April 2018 at Kabiru-ini shopping centre, while driving past the shopping centre, I witnessed voter bribery by one “Hiuko” a known campaigner and supporter of Erastus karanja Kariuki who was dishing out money to the voters in denomination of Kshs. 100/=.” He deponed further that he took a short video and photos but stated on cross-examination that the photo was not attached to his affidavit. He further stated on cross examination that he did not make a report at the police station about Hiuko and stated that he was chased from the police station.

PW3 Geoffrey Mungai deponed in Paragraph 5 of his affidavit that he witnessed one Njamiu Maina a supporter of Erastus Karanja Muriuki bribe voters by way of dishing out money to women within the Polling station centre at Hiriga Primary school on 18/4/2018 with a view to enticing voters to vote for Erastus Karanja. On Cross Examination he stated that he did report to the police officer at the polling station but he did not inform the Presiding Officer.

PW1 deponed in paragraph 3 that on 15/4/18 James Simpson Ndegwa sent him to kabiribiri dam to witness acts of voter bribery and asked to take photographs. He deponed that he witnessed Hon. Moses Kuria and Hon Rigathi Gachagua giving money to residents telling them to vote for Erastus Karanja in the upcoming by-election. That the money was being given of Kshs. 2,000/= to a group of ten people.

PW5 Zacharia Njuguna deponed at paragraph 4 of his affidavit that on the election date he witnessed Douglas Muturi and Gerald Muchemi outside Ngorano primary school giving money to voters in denominations of Kshs. 200/= telling them to vote for Erastus Muriuki.

PW6 deponed at paragraph 5 of his affidavit that on 16/4/18 he witnesses the area Member of Parliament and Erastus Muriuki together with assistant chiefs giving maize in sacks telling residents to vote for Erastus Karanja at Hiriga Shopping Centre. He further deponed that on the voting day he witnessed voter bribery by the chief campaigners of Erastus Muriuki among them Tony Kidero and Wanjiru Gachari dishing out money to voters telling them to vote for Erastus Karanja. On cross examination by counsel for the 3rd Respondent he stated that he did not see Karanja giving out food to people nor the area member of parliament.

PW7 deponed in paragraph 5 of her affidavit that on the by-election day she received information of voter bribery at Ndundu-ini Primary school Polling Station but she did not witness the same.

PW7 also deponed in paragraph 30 of her affidavit that she witnessed voter bribery in various polling stations including Chieni primary school, Kabiru-ini Primary School, Kahira-ini primary school, Ngorano polling centre and Ruare primary school. She deponed that she reported to the Presiding officer, of the said stations and the police officer at the polling stations but did not go to report at the police station.

PW8 deponed in his affidavit in paragraph 23 that at Kabiru-ini Primary school polling station he met a lady who was directing and talking to voters and upon asking one of them what they were being told he was informed that the lady by the name Hiuko was wooing voters to vote for the Jubilee candidate.

PW8 also deponed that he witnessed voter bribery at Kahira-ini primary school, Kabitu-ini coffee factory polling station, Chieni primary school polling centre, Sagana primary school polling centre and Ruare Primary school polling centre. He also deponed that he witnessed voter bribery at Ndundu-ini primary school by one Njoki and that the said Njoki was arrested by the Police.

PW9 Rosemary Wanjiru Nderitu was the chief agent of Maendeleo ChapChap party in the by-elections she deponed at paragraph 65 of her affidavit that at the gate of Ndundu-ini primary school polling station, tea and mandazi were being given to voters and one of Erastus Karanja's supporters was bribing voters openly.

At paragraph 73 and 74 she deponed that she met Erastus Karanja's mobilizers sharing out money at Iruri Primary school polling station.

PW9 deponed of similar incidents of bribery at Ngorano primary school polling centre, Sagana Primary school polling centre and Chieni Primary school polling centre. On cross examination by Mr. Wahome for the 3rd Respondent she did not state who had made the complaints of voter bribery at Ngorano Primary polling centre, Chieni primary school and Hiriga primary polling centre.

IEBC and the returning officer denied the allegations of bribery and availed the presiding officer of Kabiru-ini primary school polling centre, Ndundu-ini primary school, Hiriga Primary school and Ngorano primary school, they all stated that they did not witness any acts of bribery nor were any reports of bribery made to them. The returning officer also stated that no acts of bribery were witnessed. On cross examination he stated that Rosemary Nderitu made a complaint of voter bribery by a certain lady and he called the OCPD to arrest the suspect.

The 3rd respondent as well denied the allegations of bribery. He stated that he never bribed anyone in the whole ward and neither did his agents.

In Mohamed Ali Mursal –Vs- Saadia Mohammed and others [Garissa Election petition No. 1 of 2013 (unreported)] Justice Mutuku described bribery in the context of an election petition as follows;

“Bribery is an electoral offence, it is also a Criminal offence in ordinary life, and being such, proof of the same must be by

credible evidence and in my view, nothing short of proving this offence beyond reasonable doubt will suffice. There is no distinction as far as I am concerned, and rightly so between bribery in criminal cases and one in an election Petition. Bribery involves offering, giving, receiving or soliciting of something of value for the purpose of influencing the action of the person receiving. Under the Act, Bribery is an election offence under Section 64 (now Section 9) and both the giver and taker of a bribe in order to influence voting are guilty of this offence upon proof...

Where bribery is alleged, a high degree of proof is required. Halsbury's Laws of England, 4th Edition Vol. 15 on Elections gives an insight as to the nature of evidence required to prove bribery. Under paragraph 695, on proof of bribery, it is stated:-

“Due to proof of a single act of bribing 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, such as they can allow in certain conditions in cases of treating or undue influence by agent. 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”.

The above position was reiterated in the case of **Simon Nyaundi Ogari & another –Vs- Joel omagwa Onyancha and 2 others Kisii Election petition No. 2 of 2008 [2008] eKLR.**

Analysis of evidence of bribery in pleaded areas(paragraph 59 A) Kiamariga shopping centre Ruguru Ward

No evidence was given by any witness of bribery in this place and therefore despite being pleaded it was not proved.

Ruare primary school polling centre

PW7 and PW8 were the only witnesses who testified on bribery at this place, their evidence was purely superficial to amount to any meaningful testimony. They stated that they witnessed voter bribery and people talking to voters but did not give the particulars of the people giving or receiving bribes and did not connect them to the 3rd Respondent.

Ndundu-ini Primary School Polling Station

Three witnesses gave evidence on bribery at this Polling station. PW7 Martha Wanjiru Miano who stated that she was an Election observer stated that on the Election Day she received information that there was a case of voter bribery at Ndunduini primary school. She stated that she proceeded there and was informed by voters that the culprit had been arrested. She did not give the name of the voter who informed her of the bribery, she did not witness the bribery and her evidence was thus hearsay. She also did not link the alleged incident to the 3rd respondent.

PW8 Kevin Munene also testified of voter bribery at the same polling station during the election date, he stated that on the Material day when he visited the polling station they met a lady called Njoki a supporter of Erastus Karanja giving out money with a view to entice the voters to vote for Erastus Karanja. He stated that he reported to a lady he was told was the Deputy OCS of Kiamariga Police station and that Njoki was arrested as a result.

PW9 Rosemary Wanjiru also testified that she received information that a lady had been arrested in Ndundu-ini and confirmed that the lady was later charged with the offence in court. The returning officer 1st and 2nd respondents' witness No. 6 on cross examination stated that Rosemary (PW9) called him and informed him of an incident of voter bribery he then called the OCPD who went and arrested the lady.

Kevin Munene PW8 appears to have been the only witness to the alleged bribery by Njoki who testified. He however did not identify any single voter who was given money by Njoki and did not state how much was given to the voters. He testified that the OCS told him that the lady who was arrested was found with some money and a number of names with cash against their names but this is hearsay evidence that is of no value. The OCS ought to have been called to confirm this allegation.

In **Moses Wanjala –Vs- Bernard Alfred Wekesa Sambu & 3 others [2013] eKLR** it was held that

“Apart from the foregoing at least specific details should have been given about those who received the bribes and the general surrounding of corrupt transactions to prove that bribery took place. That demonstration and specificity is needed for a party to satisfy the high standard of proof beyond reasonable doubt. The evidence in turn must be of a stature that leads to an inescapable conclusion that the 1st respondent committed the offence of bribery”.

In **John Munyes Kiyonga – Vs- Josphat Nanok & 2 other [2018] eKLR Justice S. Riechi** also stated that where an offence of bribery is alleged to have been committed, the petitioner must state specifically the persons who gave the bribe, those who received and reports made to the authority. In respect of voter bribery in Ndundu-ini primary polling centre there is no indication in evidence as to who received the bribe.

In the case of **Thomas Malinda & 2 Other –vs- IEBC & 2 others Election Petition 2 of 2012 Machakos** the court ruled that where allegations are made of bribery against a party concrete evidence must be tendered of what makes the witness associate the person he alleges to have been bribing voters with the respondent or his party. The allegation must in addition be confirmed by another party.

In this case Kevin Munene did not give any evidence linking the lady who was arrested to the 3rd Respondent herein or to show that she was

acting on the behest of the 3rd respondent. The fact that this lady was arrested is not enough the above stated tests must have been passed. There must have been evidence as to who was bribed and that he was bribed to vote for the 3rd respondent.

I find that the alleged bribery at Ndundu-ini Primary school has not been proved.

Iruri Primary school

Voter bribery at this polling station was mentioned by PW9 in her affidavit. She stated that when she went to the Polling centre she found guys sharing money near a class but they ran away on seeing her. On cross examination she stated that she did not know their names. She stated that she inquired from one of their supporters who told her that the people who ran away were Erastus karanja's supporters, she did not give the name of their supporter who gave her that information nor was that person called to testify, again I find this to be superficial evidence with no particulars of the people giving or taking bribes and no connection to the 3rd Respondent established.

Kabiru-ini Primary School

Voter bribery at this polling centre was mentioned by Roy Onyango (PW2), Martha Miano (PW7), Kevin Munene (PW8) and Rosemary Wanjiru (PW8)

Roy Onyango Pw2 stated in paragraph 35 of his affidavit that he witnessed voter bribery by one "Hiuko" whom he said was a known supporter of Erastus Karanja dishing out money to voters. On cross examination by Counsel for the 3rd Respondent he stated that he attempted to report at Kiamariga polling station but was prevented by the Police. Roy did not give evidence as to who specifically was given money by the lady called Hiuko and did not give any evidence to connect Hiuko to the 3rd respondent. He stated that she was a known supporter of Karanja but did not demonstrate this to the satisfaction of the court. Roy Onyango claimed to have taken photos of Hiuko bribing voters and a video. On cross examination he admitted that photos were not attached to his affidavit. As regards the video the same was not played in court to corroborate his testimony. In any event the videos attached to the affidavits of the witnesses in this case were of no probative value as I will explain shortly.

In her affidavit at paragraph 30 Martha Miano made a general statement that she witnessed voter bribery in many polling stations on the voting day including at Kabiru-ini primary school Polling station but she did not state who was bribing voters or who was being bribed.

As for Kevin Munene (PW8) he stated in his affidavit (Para 23) that he met a lady at Kabiru-ini primary school polling centre directing and talking to voters and on asking one of them, what the lady was telling them he was told that she was wooing them to vote for the Jubilee candidate. From his statement he did not understand the language being used on the ground and had to ask someone to translate. He did not give the name of the person he asked and that person did not testify and therefore his evidence was mere hearsay. He also did not give any credible evidence to link the lady allegedly wooing the people to the 3rd Respondent.

PW9 Rosemary stated in her affidavit (paragraph 44) that their supporters had complained about one Hiuko who was dishing out money to Voters. She did not mention who those supporters who complained were and which voters were bribed. The allegations of bribery at this polling station were thus not proved.

Allegations of bribery were also made at Chieni Primary school polling centre, Kahira-ini Primary school polling centre and Sagana Primary School polling centre. The allegations were made by PW7, PW8 and PW9. PW7 Martha Miano made a sweeping statement that she witnessed voter bribery and people taking bribes and mentioned the above polling stations at paragraph 30 of her affidavit on cross examination she admitted having not mentioned the names of the persons who were bribed or who were giving bribes in the polling stations.

A similar statement was made by PW8 Kevin (at Paragraph 26) without giving the particulars of the people the chief was allegedly bribing. The chief agent of Maendeleo chapChap PW9 also made similar statements in paragraph 54. The evidence of these three witnesses falls short of the standards required in Law as they could not vouch for their assertions in regard to the bribery allegations.

Iruri/Sagana

The Petitioners alleged that on 17th April 2018 the Honourable Rigathi the Member of Parliament for Mathira Constituency a Campaigner and supporter of the 3rd respondent convened a meeting of voters at Iruri/Sagana where he bribed voters by giving them money and food as incentive to vote for the 3rd Respondent. In this respect PW1 Kenny Githongo swore in paragraph 12 of his affidavit that some people were told by the area Member of Parliament to meet at his home and they were given food and money. He did not give a name of any single person who went to the MP's home and given money and food. On cross examination he stated that he did not go to the Hon Rigathi's home and did not witness what transpired and did not report to the police. The evidence of Kenny Githongo in respect of the alleged bribery by the Member of Parliament at his home remains an allegation as it was not proved by any credible evidence. In his evidence Kevin Munene (PW8) deponed (paragraph 17) that one of their agents called him and informed him that the area member of parliament was hosting the locals and had cooked for them and they were being given money. He did not state which agent gave him this information and therefore whatever he was told was hearsay. He averred that he drove to the area member of parliament's place and found many people but did not get in. He did not state that he found people being given money or food. He did not mention that the 3rd respondent was present nor did he hear the Member of Parliament asking people to vote for the 3rd respondent. In totality of the evidence given the allegations of bribery and treating of voters at the home of Honorable Rigathi was based on suspicion and speculation it was not proved by any credible and believable evidence.

From the forgoing discussion it is the finding of the court that none of the several allegations of bribery have been proved and therefore the ground fails. Before moving to the next ground i must mention that during the hearing the petitioners' witnesses mentioned other

incidents of bribery in some areas which were not pleaded in the petition including at Kagati dam ,kabiribiri dam, Hiriga shopping centre, Kianjau primary school polling centre, Kabiruini coffee factory polling center and Hiriga primary school polling center. My analysis dealt with the areas pleaded in paragraph 59 of the petition but suffice to say that even in the areas not pleaded mentioned above the evidence tendered was general, uncorroborated and far below the standard of proof.

Voter intimidation

The Election offences Act creates the offences of use of force or violence during the election period under Section 11. The section provides as follows;

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

a) So as to induce or compel that person to support a particular candidate or political party;

b) On account of such person having voted or refrained from 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 2 million shillings or to imprisonment for a term not exceeding six years or to both’.

Just like the offences of bribery therefore the standard of proof in relation to the offences of use of force, violence or intimidation, is proof beyond reasonable doubt.

PW1 Kenny Githongo Migwi averred at paragraph 6 of his affidavit in support of the petition that on 15/4/18 he witnessed goons in jubilee T- shirts hired by the member of county assembly and the Hon Rigathi Gachagua engage in acts of voter intimidation at Kiamariga shopping centre by forcefully removing their caps and t-shirts and burning them. He averred that the goons burnt t-shirts and caps worn by supporters of James Simpson Ndegwa Macharia who was running under the Maendeleo Chapchap ticket. On cross examination by counsel for the 3rd respondent he admitted to not having given the names of the alleged goons or the people, whose T-shirts and caps were burnt, he did not know who hired the goons and the mode of payment or for how much they were hired. He also admitted that he did not report the incident to the police station.

The returning officer denied receiving any information of voter intimidation. PW4 one Antony Maina Kinyua deponed in his affidavit in support of the Petition (Paragraph 5) that on 15/4/18 his cap was burnt by goons hired by Erastus Karanja Muriuki and that he also witnessed goons burning caps and t- shirts which they had forcefully taken from James Simpson Ndegwa Macharia’s supporters. It is instructive to note that he too did not give any evidence identifying the so called goons and to prove that they were hired by the 3rd respondent. He also did not report the incident to the police.

The complaints by PW1 and PW4 relate to a date before the by-election, there was no evidence given whether the alleged threats were meant to induce them to support the 3rd respondent or his party neither was evidence tendered to show that the acts complained of were meant to induce or compel them vote in a particular way or refrain from voting. The evidence fails short of the required standards.

PW7 Martha Wanjiru Miano stated that she was informed while at Ndundu-ini primary school polling station on the by-election day that a certain lady had been arrested and taken to Kiamariga police station and therefore she proceeded to the said station and that while at the Police station the area member of parliament Hon. Rigathi upon seeing her started shouting at her and asked one of his henchmen called jack to organize goons to have her and those from outside Ruguru ward to be forcefully evicted. She stated that consequently the Honourable member’s men descended upon her and one James Wanjohi slapped her and others started touching her and molesting her while shoving her around in the presence of the OCPD Mathira west and other Police officers, she stated that she was shielded by Kevin Munene, that she reported the incident at the same police station and later issued with a P3 form. She stated that the culprits were later arrested and arraigned at Karatina Law courts in PMCC 173/18 Rep –Vs- James Munuhe & Jackson Ndegwa. She produced a copy of the charge Sheet as evidence.

PW8 Kevin Munene testified that he witnessed Hon Rigathi giving orders and instructions for Martha Miano (PW7) and others not from Ruguru to be evicted from the police station and pursuant to those Orders some two goons attacked her, got hold of her and shoved her around. He also stated that Hon Rigathi threatened IEBC officials by demanding that they take Martha’s badge. The fact that Martha Miano reported at Kiamariga Police station that she was assaulted and a suspect arraigned before Karatina Principal Magistrates court is not disputed. The incident was well documented. From the evidence it was stated that the case had not been concluded and was pending in court. According to Martha, she was an elections observer accredited by the Political parties Liaison Committee (PPLC), this fact was contested by the respondents. She did not produce any document to show that she was an observer as claimed. Whether an Observer or not, the question is whether the alleged acts of intimidation and assault against her affected, the elections and the answer is No.

First and foremost the alleged act did not take place at any particular polling station but a Police station and voting was not disrupted or affected by the incident. Secondly Martha Wanjiru was not a registered voter in Ruguru ward and there was no evidence to show that the act was meant to induce or compel her to vote for a particular candidate or not to vote or to punish her for voting in a particular way. In any event she alleged to be an election observer and therefore not eligible to vote. It is my finding that the petitioners failed to show how the alleged intimidation and assault of Martha Miano affected the elections.

The only other person who claimed he witnessed and scared of the violence at the police station was PW8 Kevin Munene Njagi, he however stated that after leaving the police station he and their supporters proceeded to several polling centers to check what was going on. Just like PW7 he was also not a voter and therefore his right or anyone’s right to vote was not breached according to his evidence.

PW9 Rosemary Wanjiru the chief agent of Maendeleo Chapchap also testified that she witnessed the incident at Kiamariga Police station regarding Martha Miano but for the same reason given above find that her evidence on what transpired at the police station adds no value.

PW9 also deponed in her affidavit at paragraph 6 and 7 that on 7/4/18 during campaigns Erastus karanja's supporters and campaigners started heckling and lifting posters and burning karanja's images at a rally by the Maendeleo Chapchap party leader. She deponed that Karanja's supporters were ferried by hired Nissans to disrupt the rally. She however did not give evidence identifying the hired supporters and their connection to the 3rd respondent and did not give evidence showing that the 3rd Respondent or any of his supporters was involved. No evidence was given to show that what transpired on that day prevented any particular voter from voting or that the alleged intimidation affected the voter exercise on 18th April (Eleven days later).

PW9 also deponed that after their rally on 7th April 2018 at Kiamariga they headed towards Karatina but at Kabiruini shopping centre they found a multitude of people who blocked the road, there was no evidence to confirm that the 3rd respondent's supporters were the ones who had blocked the road and in any event no evidence was tendered to show that the act of blocking the road on 7/4/18 during the campaigns, affected the by-election that was conducted on 18/4/18 in any way. The Petitioners also complained that there was heavy police presence in Ruguru ward on the eve of the by-election and that most shopping centers and businesses were ordered closed on the eve of the elections. It was not clear how this affected the elections but if it did, it must have affected both candidates equally. Having evaluated the evidence on the issue of violence and intimidation I am persuaded to find that the security situation in Ruguru ward during the by-election period was not compromised to the extent that it was not possible for the 1st respondent to hold a free and fair election. The voting process was not disrupted in any significant way. There was no evidence that the 3rd respondent stood to gain or gained any advantage by reason of any violence or intimidation.

I find that the Petitioners have failed to establish to the required standard of proof that there was violence and intimidation on the eve and the day of the by election which would have affected the conduct of a free and fair by- election. **This ground thus also fails.**

Assisted Voters

The Petitioners claimed that a number of Voters under the guise of assisted voters more so at Hiriga Primary school polling station and Ndundu-ini primary school were literate and were being "assisted" by Jubilee Party supporters to ensure that they voted for the 3rd Respondent.

According to Kenny Githungo (Pw1) who was a polling agent for James Simpson Ndegwa as Ndundu-ini primary school polling station 2 many assisted voters in the polling station were led to the polling booths by known Jubilee supporters contrary to the law, he stated that infact many of the so called illiterate voters were not illiterate but they pretended so that the Jubilee supporters could confirm that they voted for Erastus Karanja. On cross-examination he stated that he did not complain about the issue officially to the Presiding officer or agent. He also confirmed on further cross-examination that he signed form 36A because he was satisfied with the voting and counting process that day. The Presiding officer of the same polling station Faith Waithera was called by the 1st respondent as a witness, she stated that an assisted voter is one who is unable to mark the ballot paper for himself or herself and is allowed to come with someone to assist him or her and if no person is available the person is assisted by the presiding officer in the presence of all agents. She stated that the Maendeleo Chapchap agent at the station (pw5) did not raise any issue with her about assisted voters but an issue was raised by Rosemary Wanjiru the chief agent of Maendeleo Chapchap who claimed that assisted voters were too many.

Rosemary (PW9) confirmed in her affidavit (Paragraph 63) that she was called by Kenny Githungo and informed that the assisted voters were too many.

The allegations that the assisted voters who were being escorted to vote at Ndundu-ini primary school polling centre were actually literate and were being led merely to confirm that they voted Karanja was not proved . PW1 alleged that he knew many of the assisted voters but he did not give even one name of the assisted voter and prove that he or she was literate and did not qualify to be an assisted voter.

Rosemary Wanjiru (PW9) also claimed that she was informed by their agents at Hiriga Primary school polling centre that the issue of assisted voters was not being handled well as the presiding officer was allowing those who were assisting the voters to vote and/or mark the ballots for them. The Maendeleo Chapchap agent for this polling centre was not called as a witness and did not file an affidavit and Rosemary having not witnessed the alleged abnormality, the same can only be treated as hearsay. The 1st respondent however called the presiding officer Hiriga primary school polling station 2 who stated that Rosemary appeared at the station and inquired about the process of assisting voters who needed assistance. She stated that the Maendeleo Chapchap agent raised no complaint with the process and that she signed form 36A and the polling station diary. She stated that the proper procedure in relation to assisted voters was followed.

The law regarding assisted voters is found in Regulation 72 of the General Regulations. Regulation (1) thereof provides that;

“on the application of a voter who is by reason of a disability or being unable to read and 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 voters own free choice and who shall not be a candidate or agent”.

The law provides that where the person applying to be assisted is not accompanied by a person who is qualified to assist him or her presiding officer is to assist such voter in the presence of the agents. In my view the regulations do not touch on number of assisted voters. The presiding Officers in the two polling stations complained of in regard to assisted voters have in my view satisfactorily explained the process followed in regard to assisted voters, it was incumbent upon the Petitioner to adduce evidence to show which aspect of Regulation 72 was flouted, the Petitioners did not discharge this burden and the irregularity alleged was not proved. This ground is therefore dismissed.

Illegal Campaigns and use of relief food to influence voters.

The above two issues are intertwined in that the alleged distribution of relief food was partially done after the close of the campaign period but just before the by- elections.

It is the petitioners case that the 3rd respondent conducted illegal campaigns well past the date set and that during this illegal campaigns the jubilee side used the distribution of relief food selectively with a view to influence the voters to vote only for the Jubilee candidate.

On the issue of use of relief food to influence voters, evidence was given in this regard by PW1, PW2, PW3, PW5, PW6 and PW9.

Kenny Githogo Migwi (pw1) stated in Paragraph 10 and 11 of his affidavit that on 16/4/18 at Kagati village he witnessed supporters of Erastus Karanja Muriuki mobilize residents to go and receive government relief food. He did not name the said supporters and how he knew they were Karanja's supporters. He stated that he was told by Eunice Kibe that the residents went and received the food He was not present during the alleged distribution and could not state who was distributing the food and to whom. He was not privy to what transpired during the exercise if at all it happened. His evidence was hearsay and thus of no value.

On his past Geoffrey Mungai (PW3) stated in his affidavit (paragraph 3) that he witnessed supporters of Erastus karanja distributing maize and rice on 16/4/18 at Hiriga centre he also stated that they were addressed by Hon Gachagua and Erastus Karanja and told that once they receive the maize they should vote for Erastus Muriuki.

The evidence of PW3 contradicted the evidence of PW2 Roy Onyango who also testified that he was at the same meeting. According to Roy Onyango on cross- examination by Mr. Ngigi for 1st respondent the 3rd Respondent did not speak and ask for votes but it was the master of ceremony asking people to vote for Karanja. Upon further cross examination by Mr. Wahome for the 3rd Respondent PW2 once again changed his account of proceedings and stated that the Master of ceremony did not actually ask people to vote for Karanja but it was the crowd that was mentioning Karanja. The upshot of the above is a finding that PW2 Roy Onyango was not consistent and believable in his testimony. His evidence also contradicted PW3 on what transpired in an event they both claim they attended. To me this is a material contradiction that goes to the credibility of the two witnesses who in my view were not honest and credible.

In his evidence PW2 Roy Onyango purported to rely on photographs and video recordings which he allegedly took during the food distribution as Hiriga. They were attached in his affidavit and marked "ROO2".

The admissibility of electronic evidence is provided for in Section 106A to 106 (I) of the Evidence act Cap 80 laws of Kenya.

Section 106 (B) 1states as follows;-

"Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as "computer output") shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible."

Section 106 B (2) gives the standard conditions as follows'

(a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer.

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the Ordinary course of the said activities.

(c) throughout the material part of the said period, the computer was operated properly or if not, then in respect of any period in which it was not operating properly or was out of operation, during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities."

Where a party wishes to rely on electronic evidence under the foregoing provisions the one who undertook the actual work of processing that electronic evidence must prepare a certificate whose contents are provided for in Section 106 B (4) as follows;

a) Identifying the electronic record containing the statement and describing the manner in which it was produced.

b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purposes of showing that the electronic record was produced by a computer.

c) Dealing with any matters to which conditions mentioned in sub-Section (2) relate; and

d) Purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the

certificate and for the purposes of this subsection it shall be sufficient for a matter to be stated to the best of the knowledge of the person stating it”.

Upon cross-examination by Counsel for the respondents on the process of production of the photographs, videos and screen shots Roy Onyango stated that the computer used to process them was not his but belonged to a person who used to operate a cyber in Nyeri. He did not give the full names of that person. Looking at the above stated Legal Provisions and certificates of production by Roy Owiti and Timothy Kamina there is no difficulty in finding that the certificates have not attained the required legal bar. PW3 handled the matter so casually, he did not state in the certificate the date he took the photographs, the videos and screen shots, he did not state when and how he got the computer used to process them, he did not state the serial number of the computer used, he did not state the process used in processing the photographs the screenshots referred to in his affidavit and the videos, he did not give evidence that he ran cyber business or was trained in photography or cyber operations or a qualified photographer. Having stated that the computer was not his, I do not think he had the capacity to confirm that it was regularly used in production of similar material neither could he affirm what information or material was regularly fed into the computer in Ordinary course of business.

The said videos were not also played in court for the witness to explain the contents of the video and neither did the witness explain the various pictures attached to connect them to the evidence he had given. It was left for the court to play the videos on its own and examine the photographs and start making deductions, it was tantamount to throwing evidence at the court and ask the court to start speculating on the evidence. There was no explanation from the witness as to what was portrayed in the photographs. A certificate of translation was attached done by Rosemary Wanjiru Nderitu but it was not clear from her certificate of translation which videos she was translating and from where she got the videos for translation.

In Suleiman Kasuti Murunga -Vs- IEBC & 2 others [2018] eKLR the High Court in Bungoma stated as follows of electronic evidence.

“... Suffice to say that there is every reason and need to strictly comply with the law when dealing with electronic evidence in this era of technological advancement. I take judicial notice of the fact that through technology, one can easily come up with anything “ real” be it still or a video more so when a fictitious one it is just that easy. That is why for such evidence to be admissible the certificate must strictly pass the test laid by the law”

As found in the above mentioned case I find and hold that the photographic evidence in this case did not pass the legal test as the certificates were not in accordance with the law, though the photographs and videos were produced as evidence they were not of any probative value.

It is a conceded fact that relief food was being distributed on 15th and 16th April 2018 in Mathira west and that the Cabinet Secretary, Ministry of devolution launched the food distribution exercise on 15/4/18.

Though the 3rd Respondent admitted that relief food was being distributed, he however denied that he was primarily involved in the food distribution and denied that he used the relief food as a campaign tool and stated that as an area leader he was entitled to witness the food distribution exercise by the national government just like the area member of parliament. The 3rd Respondent produced evidence in form of letters from the National Government to the sub-county Heads confirming that the relief food was from the National Government and was to be distributed through the chiefs though some leaders like the area member of parliament and women Rep were invited. Godfrey Mungai pw3 and Zachary Njuguna pw5 admitted on cross examination that the area was just coming out of drought at the time and that it was not the first time that relief food was being distributed in the area. Attending a relief food distribution exercise by the 3rd Respondent in my view was not an offence and it behooved the petitioners to prove beyond reasonable doubt that it was used to influence people to elect the 3rd respondent in the by- election. The petitioners did not avail any credible evidence to show that the 3rd respondent personally distributed the relief food and no clear evidence was given to show that the people distributing the food tried to influence people to vote for the 3rd respondent. It is not sufficient for the Petitioner to allege that the 3rd respondent distributed relief food it must be proved that he actually distributed the food and that he did so to influence voters to vote for him or to refrain from voting for the other candidate a presumption does not arise that because relief food was distributed during the election period then it was a campaign tool. It must be proved by cogent, reliable, precise and unequivocal evidence. According to PW3 Godfrey Mungai the relief food was being distributed to only those who were to vote for the Jubilee candidate, if indeed food was used to entice voters I do not see how this goal would be achieved if food was being distributed selectively I also do not see how the one distributing the food would distinguish between jubilee and Maendeleo Chapchap supporters The 3rd Respondent in my view gave sufficient evidence in rebuttal. More importantly I find that the main ingredient of the offence which is **“to influence a voter to vote or refrain from voting”** was not proved. This ground of the Petition therefore fails.

As regards unlawful campaigns it is on record that the official campaign period as directed by the IEBC was to end on 15th April 2018.

PW2, PW5, PW8 and PW9 referred to campaigns at Hiriga where the food distribution exercise I have discussed above was taking place on 16/4/18.

PW8 and PW9 actually did not witness the same but stated they were informed by Roy Onyango (PW2). The only witnesses at the scene were PW2, PW3, PW5 and PW6 according to their evidence but as earlier stated PW2 Roy Onyango and PW3 Godfrey Mungai gave conflicting information on what was going on at the function. While Roy Onyango stated that Erastus Karanja did not speak and ask the people to vote for him PW3 on cross examination stated that Erastus Karanja campaigned by speaking and asking the people to receive the relief food and vote for him in the forthcoming by-election. As I have already found supra which I maintain the evidence of the two witnesses was not credible on this point.

As for PW6 Michael Mugo Mwai he stated that he witnessed the area Member of Parliament and the 3rd respondent giving out maize and sacks of rice on 16/4/18 while asking people to vote for the 3rd Respondent. His evidence was that everyone was being given food and thus contradicting PW3 who stated that only jubilee supporters were being given food. He also contradicted PW2 and PW3 who stated that the 3rd respondent did not primarily distribute food. He also contradicted PW2 who said the 3rd respondent never spoke at the same function. Infact

on cross-examination PW6 stated that Roy Onyango (PW2) was not seen at the meeting at Hiriga and once again the credibility of the evidence of all these witnesses is brought to question and their evidence on what transpired on 16/4/18 is not believable. Pw5 did not state in his affidavit where he saw Hon. Rigathi and Erastus Karanja campaign. PW6 also stated that on 16/4/18 he saw a lorry registration Number KBQ 187A that was full of posters of the Jubilee candidate Erastus Karanja Muriuki during the food distribution exercise. He was not clear from his evidence whether there was any message in the posters or just pictures of the 3rd respondent, there was no evidence tendered to prove that the said posters induced voters to the extent that the by election results were affected to the detriment of the loser.

PW2 also made reference to active campaigns by Honourable Rigathi through his face book account. He attached photographs allegedly downloaded from Hon. Rigathi's face book account. It could not be ascertained whether the postings were from Hon Rigathi's real account or a fake account. I have already dealt with the issue of electronic evidence presented by the Petitioners including this evidence which I found to have no probative value considering the manner it was allegedly processed. The evidence by PW2 touching on the face book postings suffers the same fate and is found to have no probative value.

The 3rd Respondent in his replying affidavit and evidence in court denied that he conducted campaigns as alleged but stated that he exercised his constitutional rights of freedom of Association and movement despite close of the campaign period without conducting political campaigns. He gave oral evidence in court giving account of and the reason for his movements and also called witnesses.

The returning officer on his part testified that he received a complaint from the Maendeleo Chapchap party candidate Kevin Munene who complained of campaigns by the 3rd Respondent after the close of the campaign period. He advised the Maendeleo Chapchap candidate to report the matter to the police to investigate. He stated that he was able to communicate with the OCPD over the same issue and the OCPD confirmed to him that there was no campaign taking place but relief food distribution was taking place at the places the campaigns were allegedly taking place.

I am alive to the fact that illegal or unlawful campaigns are a breach of Electoral code of conduct and a Criminal offence under Section 20(2) of the Elections Offences Act. The standard of proof therefore is proof beyond reasonable doubt. Having looked at the evidence by the Petitioners and their witnesses in regard to the allegations of unlawful campaigns out of the official time and the response by all the respondents and their witnesses, I come to the conclusion that the petitioners have not proved that the 3rd respondent campaigned outside the approved campaign period. His presence during relief food distribution exercise within the ward on 16/4/18 does not translate to campaigns and has not been demonstrated to have affected the results. This ground of the petition is dismissed.

In conclusion, upon careful evaluation and analysis of all the evidence presented by the petitioners and respondents and the applicable law, I find that the disputed by-election of Ruguru ward was conducted and supervised by the 1st and 2nd respondent in a manner that substantially complied with the Constitution and the law and in a manner that was free, fair and transparent I am satisfied that the results declared reflected the people's choice and will of the people of Ruguru Ward. Any irregularities that may have occurred in the conduct of the election were insignificant and could not have altered the outcome.

It is therefore my findings that the 3rd Respondent Erastus Karanja Muriuki was duly and validly elected as the member of County Assembly Ruguru ward in the by- elections held on 18/4/18.

In the premises I find that the petition lodged by the petitioners herein lacks merit and is hereby dismissed.

COSTS

Pursuant to Section 84 of the Act costs follow the cause and an election Court can award such costs. The Court's jurisdiction is further provided for under Rule 30 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 where in making an order for costs a Court may specify the total or maximum amount payable and the person by whom the costs are payable. The Court may also make orders on costs in respect to specific instances during the matter. Costs can also be taxed in the event the Court does not determine the issue.

In Kalembe Ndile and Another vs Patrick Musimba and Others (2013) eKLR it was held that costs ought to be adequate to compensate the work done on one hand and not to be so high as to unjustly enrich the parties or cause unwarranted dent on the public purse or injure the body politic by undermining the principle of access to justice as enshrined in Article 48 of the Constitution on the other hand.

The petitioners sought payment of ksh.1, 000,000 as costs while the 3rd respondent sought ksh.2, 000,000. The 1st and 2nd respondents did not submit on the amount of costs payable. Having heard the petition from the beginning to the end, my view is that the issues were fairly straight forward as evidenced by the pleadings, evidence and submissions. The petition went on without unnecessary interruptions and took only five days. Doing the best I can and being guided by other decided cases especially MCA election petitions in particular **Kisumu H.C Election Appeal No.5 of 2018 Odongo Victor Robert vs IEBC and 2 others [2018]eKLR** I will award the respondents the costs of this petition which are capped as follows;

i. 1st and 2nd respondent's ksh. 300,000/=

ii. 3rd respondent ksh.300, 000/=

I have taken into account that the 1st and 2nd respondents have an employer and employee relationship, filed a joint response presented common witnesses and were represented by same counsel. The costs will be assessed later.

Lastly, I wish to thank all counsels for their decorum in court and diligence in prosecuting and defending this petition and thus ensuring that the matter was concluded within the limited time that was available. Their submissions and the authorities referred to were truly useful. If I

have not expressly referred to any authority cited, that it is not out of disrespect or lack of appreciation for their industry. I must also thank the litigants for their patience, cooperation and calmness during the entire hearing and finally appreciate the good work of my court assistant Jackson Maina.

Pursuant to section 86(1) of the Elections Act, a Certificate of determination of this Petition shall issue to the Independent Electoral and Boundaries Commission and the Speaker of the County Assembly of Nyeri.

B.M OCHOI

PRINCIPAL MAGISTRATE

Dated signed and delivered in open court at Mukurwe-ini

This 19th Day of October 2018

In the presence of:

Court Assistant: Jackson Maina

Mr. Silas Ombati Ombongi for the 3rd and 4th petitioners.

Mr. Simon Munene for the 1st and 2nd Respondents

Mr. Wahome Gikonyo for the 3rd Respondent.