



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT NAIROBI

MILIMANI LAW COURTS

ELECTION PETITION NO. 20 OF 2017

IN THE MATTER OF THE VIOLATION AND CONTRAVENTION OF ARTICLES 10, 27,38,47,90  
AND 177(1) (b) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF CONTRAVENTION OF SECTIONS 34, 35 AND 36(1) (e) (4) (7) (9) OF THE  
ELECTIONS ACT, 2011

AND

IN THE MATTER OF ARTICLES 1, 3, 22(1) 23(1) (3), 165 AND 259 OF THE CONSTITUTION OF  
KENYA 2010

AND

IN THE MATTER OF THE GAZETTE NOTICE PUBLISHED ON 28<sup>TH</sup> AUGUST 2017 GAZETTE  
NO.8330 IN RESPECT TO GENDER TOP UP LIST WITHIN WAJIR COUNTY

MARIAM ABDI MOHAMUD.....PETITIONER

-VERSUS-

INDEPENDENT AND ELECTORAL

BOUNDARIES COMMISSION.....RESPONDENT

AND

PARTY OF NATIONAL UNITY.....1<sup>ST</sup> INTRESTED PARTY

JUDGEMENT

The petition before court is premised on the Constitution of Kenya 2010 and on among other provisions on Article 90 and Article 177 1(b) of the Constitution , article 90(1) of the Constitution provides for allocation of party list seats which must be done on the basis of proportional representation by use of party lists, article 90(3) of the constitution provides that the party lists seats shall be allocated to political parties in proportion of the total number of seats won by candidates of the political party at a general election.

While Article 177 1(b) of the constitution provides that a county Assembly consists of the number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender, article 177 (2) of the constitution provides that members contemplated under article 177(1)(b) and 1(c) that is the gender top up seats and marginalized seats in each case shall be nominated by political parties in proportion to the seats received in that election in that county by each political party under paragraph (a) in accordance with article 90.

This petition was further premised on sections 34 of the Elections Act No. 24 of 2011 dealing with nomination of party lists members, section 35 of the said Act which deals with submissions of party lists which is to be done at least 45 days before the date of the general elections and section 36(1) which requires that the party list submitted under article 177(1) (b) includes a list of the number of candidates reflecting the number of wards in the county, section 36(4) provides that the commission shall within 30 days after the declaration of the election results designate, from each qualifying list, the party representatives on the basis of proportional representation.

The petitioner sought for the following orders;

1. An order declaring that the Gazette Notice published on 28<sup>th</sup> August 2017, vide Gazette Notice No. 8380, Vol. CX1X-No. 124 in respect to the Gender Top Up List of Wajir County null and void
2. An order compelling the Respondent to forthwith reconstitute and Gazette the Gender Top Up List of Wajir County, including the name of the petitioner herein, in compliance with the law
3. Cost of this petition be awarded to the petitioner.
4. Any other relief that this honorable court may deem fit and just to grant.

The petitioner's case was anchored on her petition and her supporting affidavit sworn on 15.9.2017 together with the annexures thereof, she averred that she is a citizen Kenya and even prior to the 8<sup>th</sup> August 2017 general elections and a registered voter within Wajir County and a member of Party of National Unity (PNU) the interested party herein, she annexed a copy of her national identity card to her affidavit and marked as MAM1 to prove her nationality, and to prove her membership to the interested party she annexed a copy of membership card annexed and marked MAM2, the petitioner averred that due to her dedication to her party she was nominated by the interested party of National Unity at position one (1) on the Gender Top Up in the party lists members for Wajir County Assembly as is required by the constitution of Kenya, to ensure that no more than two-thirds of the membership of the assembly are of the same gender, she further averred that the interested party (PNU) her party submitted its party list to the Respondent (IEBC) who confirmed the list and published it in the Sunday Nation Newspaper for 23<sup>rd</sup> July 2017 and in the IEBC online portal where the petitioner's name all through appeared in position one (1) of the Gender To Up List for Wajir County Assembly as evidenced by annexure MAM3 and MAM4 respectively, the allocation of seats was based on the number of elective seats that a political party including the interested party (PNU) had won, after the elections, the petitioner averred that PNU which is the interested party and the petitioner's party won three (3) elective seats of Member of county Assembly within Wajir County being a seat for Korondile ward whose the elected MCA was Hassan Mohamud Malim, Godoma ward whose elected MCA was Ahmed Hasan Mohamed and Township ward the elected MCA was Hussein Kassin Sheikh, other parties which won elective seats were Orange Democratic Movement (ODM) which won three seats in Bute ward, Danaba ward and Wargadud ward, Jubilee party won 5 seats in Barwago, Tarbaj, Burder, Dadaja Bulla wards, Wiper Democratic Movement-Kenya (WDM-K), won 3 seats in Gurar, Arbajahan, and Hadado Athibohol wards, Party for Development and Reform (PDR) won 6 seats in Batalu, Sarman, Eldas, Elnur Tula Tula, Habasswein and Lagboghohol south wards, Kenya African National Union (KANU) won 2 seats in, Malkagufu and Diif wards, and NARC- KENYA won 3 seats in Khorof Harar, Elba and Della wards all this is evidenced by annexure MAM5 a Kenya Gazette Notice dated 22.8.2017 declaring the persons elected as Members of the County Assemblies and by dint of the elective seats won by each political party, the respondent (IEBC) vide a gazette Notice published on 28<sup>th</sup> August 2017 gazette notice number 8380, Vol. CX1X-No. 124 allocated party list seats to the respective political parties that had qualified on the basis of the

elective seats won but failed to allocate to the interested party (PNU) any seats as a result affecting the legitimate expectations of the petitioner, in evidence the petitioner annexed as annexure MAM6 a gazette notice of the nominated Members to the County Assembly which clearly demonstrated the omission by the respondent, the petitioner avers that the omission is discriminatory, in the gazette notice for the nominated Members of County Assembly the respondent made the following allocations for the Gender Top Up seats ; Jubilee party which won 4 elective seats was allocated 3 seats, PDR won 6 elective seats and was allocated 3 seats, NARC-K won 3 elective seats and was allocated 2 seats, WDM-K won 3 seats and was allocated 2 seats, ODM won 3 seats and was allocated 2 seats, ANC won 2 seats and was allocated 1 seat, similarly KANU won 2 seats and was allocated 1 seat, the interested party PNU won 3 elective seats and was not allocated any seats unlike the other parties listed above which won 3 seats similar to the interested party and even some won less than 3 seats and were all allocated gender top up seats, the interested party PNU wrote to the respondent in its letter dated 30.8.2017 and received by the respondent on the same days seeking that the respondent reviews the list and corrects the error but the respondent IEBC failed to rectify the error prompting the filing of this petition and seeking the reliefs herein.

The respondent filed a response to the petition on 22.9.2017 and an affidavit sworn by Salome Oyugi the Legal Officer of the Respondent on 22.9.2017 in which the respondent admits that it has a duty under Article 90 of the Constitution of Kenya 2010, to conduct and supervise elections for seats provided for under Article 177(1) (b) and (c) of the Constitution which allocation shall be on the basis of proportional representation by use of party lists for gender and marginalized groups respectively, the respondent aver that it complied with Article 90 of the constitution and that political parties by notice were required to submit party lists by 24.6.2017, the respondent further averred that it applied the prescribed formula as prescribed in Regulation 56(2) of the Elections (General) Regulations 2012 in allocation of seats to respective political parties, the formula is the number of seats won by a political party divided by total number of seats multiplied by available seats for allocation in respective house and that allocation of special seats under article 177(1) (b) of the Constitution had to be in line with Regulation 56(2) of the Elections (General) Regulations, 2012, the Respondent admits that the interested party PNU submitted its party list which was published on the IEBC online portal and the Sunday Nation Newspaper for 23<sup>rd</sup> July 2017 and the petitioner's name appeared in position one (1) on the PNU party list, the Respondent averred that it allocated seats in accordance with section 36(4) of the Elections Act 2011 which required the Commission within 30 days after declaration of the elections results to designate from each qualifying list the party representative on the basis of proportional representation, the respondent averred that it complied with Regulation 56(2) of the Elections (General) Regulations 2012 which prescribes a formula to be used for allocation of party seats and it also complied with Article 90 of the constitution of Kenya in ensuring that no more than two-thirds of the membership of the assembly are of the same gender, and on the basis urged the court to dismiss the petition with costs.

The interested party filed a response and a replying affidavit sworn by John Okemwa Anunda the Secretary General of the Party of National Unity (PNU) all filed on 8.11.2017 in which they averred that the petitioner Mariam Abdi Mohamud is an active and dedicated member of PNU and on that basis the interested party included her in the Gender Top Up List for Wajir County Assembly and PNU duly submitted its party list within time to the respondent who confirmed the list and published it in the Sunday Nation Newspaper of 23<sup>rd</sup> July 2017 and a further publication on the Respondent's online portal, the interested party confirmed that it won 3 elective seats in the 8<sup>th</sup> August 2017 General Elections and by dint of the said won seats it ought to have been allocated at least two party list seats as was the case with ODM, WDM, NARC-K which won three (3) elective seats each and each got two (2) nomination slots, the interested party in its letter dated 30.8.2017 asked the respondent to review and correct the mistake but the respondent declined and as a result the respondent's actions discriminated against candidates including the petitioner who was part of the PNU Party List for Gender Top Up which list was lawfully submitted and the respondent had not advanced any reason as to why it failed to allocate party list seats to the candidates whose names were submitted by the interested party, even after qualification for the said seats by the interested party, the interested party urged for the petition to be allowed, the affidavit reiterated averments in the response.

During the hearing the petitioner Mariam Abdi Mohamud testified and relied on her petition filed on

15.9.2017 and her supporting affidavit filed on the same day, in her testimony she reiterated averments in her petition and the affidavit as summarized above and sought for her petition to be allowed, the petitioner was not cross-examined by the respondent and by the interested party, the respondent on the other hand opted to rely on their response and affidavit they did not call any witnesses, the interested party similarly did not call any witnesses they relied on their affidavit.

The petitioner and the respondent opted not to file submissions but relied on their respective affidavits.

Mr. Gesicho Counsel for the interested made oral submissions in which he argued that the interested party PNU complied with the requirement of the law by submitting the party list so as to meet the gender threshold under the constitution and that the said party list was attached to the petitioner's affidavit, and according to regulations on party list and nominations a party that does not submit the party list in a proper manner is not supposed to participate in elections and the fact that PNU participated in elections in Wajir County meant that they fully complied with the requirement of submissions of party lists and that if the respondent had any issue with the party list as submitted by the interested party then it would have raised it way before elections and could not have proceeded and published the list in the Online portal on party lists and the Sunday Nation Newspaper of 23.7.2017 and that as per sections 34(7) of the Elections Act the list submitted is valid for the term of the county Assembly, and PNU won 3 seats and was entitled to 2 slots in the nomination since other parties like ODM, WDM-K and NARC-K won similar number of seats and KANU and ANC each got two elected seats and they all got nomination slots KANU and ANC were each awarded one nomination slot and those who won 3 elective seats were each awarded two nomination slots and denying the interested party nomination slots despite winning 3 elective seats was discriminatory as such the gazette notice of 28.8.2017 with respect to Wajir County Gender Top Up seats amounts to an illegality and should be declared null and void, the interested party told court that in compliance with section 37 of the Elections Act submitted its list 55 days to the General Elections and the interested party communicated to IEBC through its letter dated 30.8.2017 letter annexed as MAM7 on the petitioner's supporting affidavit which letter did not elicit any response from IEBC, based on the submissions the interested party urged the court to allow the petition.

The issues for determination are as filed by the petitioner on 17<sup>th</sup> October 2017, the respondent and the interested party did not file their issues, from the petitioner's list, the issues for determination are;

1. Whether the petitioner is a Kenyan Citizen and a member of Party of National Unity and a female adult resident in Wajir county
2. Whether the interested party submitted the petitioner's name in its gender top-up list submitted to the Respondent and published in the Sunday Newspaper on 23<sup>rd</sup> July 2017 and in the Respondent's online portal of party list seats.
3. Whether at any point after the petitioner's name was submitted by the interested party to the Respondent, the later raised any objection in respect of the Gender Top Up List of the interested party/the petitioner's name before and after the 8<sup>th</sup> August general elections.
4. Whether the Respondent allocated party List seats to the other political parties ( apart from the interested party) which won elective seats in Wajir County and whether the interested party was allocated any party list seat either in the gender top up list or marginalized seat in Wajir County after the 8<sup>th</sup> August General elections.
5. Whether the interested party herein was entitled to party list seats in Wajir County and whether the Respondent discriminated the interested party and its members including the petitioner in failing to allocate any party list seats to the interested party
6. Whether the petitioner is entitled to any reliefs for the court
7. Whether the petitioner is entitled to costs of the petition

Whether the petitioner is a Kenyan Citizen and a member of Party of National Unity and a female adult resident in Wajir County

On this issue the petitioner attached a copy of her National identity card, and a copy of her membership card to prove respectively that she is an adult female and a Kenya citizen and a member of Party of National Unity (PNU) member no. P 918330, and that she comes from Danaba ward, Wajir County, Wajir North Constituency, these facts were reiterated by the petitioner in her testimony before court, similarly the facts were also corroborated by the interested party in their affidavit sworn by John Okemwa Anunda the Secretary General of the interested party, on this issue I find that the petitioner is a female adult and a Kenya Citizen and a member of the interested party, Party of National Unity (PNU) and a residence of Wajir County Danaba ward.

Whether the interested party (PNU) submitted the petitioner's name in its gender top-up list submitted to the respondent and published in the Sunday Nation Newspaper on 23<sup>rd</sup> July 2017 and in the Respondent's' online portal of party lists

On this issue the petitioner proved by way of attaching a copy of the Sunday Nation Newspaper of 23<sup>rd</sup> July 2017 and a print out of the party list from the respondent's online portal to prove that her name was indeed submitted by the interested party to respondent, facts corroborated by the interested party who in their replying affidavit averred that they submitted their party list to the respondent on 24<sup>th</sup> June 2017 which list was confirmed by the respondent and published as stated by the petitioner, and in their submissions the interested party argued that they submitted their party list to the respondent in compliance with section 35 of the Elections Act No. 24 of 2011 which requires party lists to be submitted by political parties at least forty-five days before the date of the general elections, the interested party informed court that it submitted its list 55 days to the 8<sup>th</sup> August 2017 general elections which facts the Respondent confirms in paragraph 11 of their response to the petition and admits that the party list was submitted by the interested party in compliance with the law, the said list was subsequently published as stated by the petitioner in the Sunday Nation Newspaper and the IEBC online portal for party lists seats, further the respondent admits that the petitioner's name appeared in position one (1) on the (PNU) interested party list, on this issue I find that the interested party submitted the petitioner's name in its gender-top up list to the respondent in compliance with section 35 of the Elections Act 2011 that is within the 45 days' time frame set by the Act, the respondent subsequently published the list and the petitioner's name appeared in position one (1) on the interested party's gender top up list.

Whether at any point after the petitioner's name was submitted by the interested party to the Respondent, the later raised any objection in respect of the Gender Top Up List of the interested party/the petitioner's name before and after the 8<sup>th</sup> August general election

On this issue it is not disputed that the interested party submitted a party list in compliance with section 35 of the Elections Act No. 24 of 2011, it is also not in dispute that the respondent confirmed the list and published it in the Sunday Nation Newspaper of 23<sup>rd</sup> July 2017 and on its online portal on the party list, it is further not disputed that the petitioner's name at all times appeared at position (1) on the interested party list on gender-top up, and by the fact that the interested party list was confirmed by the respondent and published it meant that at no time was any objection to the gender top up party list submitted by the interested party ever raised and I hold as such, that the respondent never raised any objection as regards the party list submitted under section 35 of the Elections Act by the interested party before the 8<sup>th</sup> August 2017 general elections.

Whether the Respondent allocated party List seats to the other political parties (apart from the interested party) which won elective seats in Wajir County

The respondent in their response and affidavit sworn by Salome Oyugi their legal officer averred that they used the prescribed formula as prescribed in Regulation 56(2) of the Elections (General) Regulations, 2012, in allocation of seats to respective parties, and from the Kenya Gazette Notice dated 22.8.2017 on the declaration of persons elected as members of the county assemblies various political parties won

elective seats as follows; **PNU the interested party** which is the petitioner's political party won three (3) elective seats of Member of county Assembly within Wajir County being a seat for Korondile ward the elected MCA was Hassan Mohamud Malim, Godoma ward elected MCA was Ahmed Hasan Mohamed and Township ward the elected MCA was Hussein Kassin Sheikh other parties which won elective seats were **Orange Democratic movement** won three (3) seats in Bute ward, Danaba ward and Wargadud ward, **Jubilee party** won (5) seats in Barwago, Tarbaj, Burder, Dadaja Bulla wards, **Wiper Democratic Movement-Kenya( WDM-K)** , won (3) seats in Gurar, Arbajahan, and Hadado Athibohol wards, **Party for Development and Reform** won (6) seats in Batalu, Sarman, Eldas, Elnur Tula Tula, Habasswein and Lagboghohol south wards, **Kenya African National Union( KANU)** won (2) seats in ,Malkagufu and Diif wards, and **NARC KENYA** won (3 ) seats in Khorof Harar, Elben and Della wards.

Based on the number of seats won by respective political parties the respondent in the Kenya gazette notice dated 28<sup>th</sup> August 2017 Vol. CXIX-No. 124 on the Elections (Party Primaries and Party List) Regulations, 2017 nominated members to the county assembly the respondent allocated special seats as follows;

**Jubilee party** won 4 seats and was allocated (3) special seats, **PDR** won 6 elective seats and was allocated (3) special seats, **NARC-K** won 3 elective seats and was allocated (2) special seats, **WDM-K** won 3 elective seats and was allocated (2) special seats, **ODM** won 3 elective seats and was allocated (2) special seats, **KANU** and **ANC** each won 2 elective seats and each was allocated (1) special seat, **PNU the interested party** where the petitioner is a party won 3 elective seats and was not allocated any special seat.

Based on the above facts it is apparent that all political parties that won elective seats in Wajir county based on the two gazette notices stated above were allocated special seats including the political parties like KANU and ANC which won fewer seats compared to the interested party still got special seats while the interested party was not allocated any special seat, on this issue I find as such and further find that even the name of the interested party did not even feature in the gazette notice of 28<sup>th</sup> August 2017 declaring those nomination slots.

Whether the interested party herein was entitled to party list seats in Wajir County and whether the Respondent discriminated the interested party and its members including the petitioner in failing to allocate any party List seats to the interested party.

The Respondent averred in their response to the petition and in their affidavit that they complied with Article 90 of the constitution with respect to allocation of seats under Article 177(1) (b) and (c) of the Constitution and relied on regulation 56(2) of the Elections (General) Regulations 2012 in which it used the formula being the number of seats won by a political party divided by the total number of seats multiplied by available seats for allocation in the respective house.

Article 90 of the Constitution of Kenya 2010 on allocation of party lists provides as follows;

90(1) Elections for the seats in Parliament provided for under Articles 97(1)(c) and 98(1)(b), (c) and (d), and for the members of county assemblies under article 177(1)(b) and (c), shall be on the basis of proportional representation by use of party lists. 90(2) The Independent Electoral and Boundaries Commission shall be responsible for the conduct and supervision of elections for seats provided for under clause (1) and shall ensure that— (a) each political party participating in a general election nominates and submits a list of all the persons who would stand elected if the party were to be entitled to all the seats provided for under clause (1), within the time prescribed by national legislation; (b) except in the case of the seats provided for under Article 98(1)(b), each party list comprises the appropriate number of qualified candidates and alternates between male and female candidates in the priority in which they are listed; and (c) except in the case of county assembly seats, each party list reflects the regional and ethnic diversity of the people of Kenya.90 (3) The seats referred to in clause (1) shall be allocated to political parties in proportion to the total number of seats won by candidates of the political party at the general election.

Article 177 (1) (a), (b) and (c) of the Constitution on the Membership of the County Assembly provides as follows;

*177 (1) (a) members elected by the registered voters of the wards, each ward constituting a single member constituency, on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year; 177(1) (b) the number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender; 177(1) (c) the number of members of marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament;*

While regulation 56(2) of the Elections (General) Regulations, 2012, provides as follows;

*56(2) The formula for allocation of seats to the respective political parties from the party lists shall be the number of seats won by a political party divided by the total number of seats multiplied by the available seats for allocation in the respective house.*

The respondent averred that it applied the above formula to allocate the special seats in Wajir county to the various political parties, based on the formula, I find that the *total number of seats* and the *number of seats available for allocation* is constant what *varies* is the number of *seats won* by each political party, thus if Jubilee party won 4 seats and was allocated 3 seats, PDR won 6 seats and was allocated 3 seats, ODM, WDM-K, and NARC-K each won 3 elective seats and applying the above formula each was allocated 2 special seats , similarly going by the said formula KANU and ANC won each 2 seats and each was each given each 1 nomination slot, thus going by the above formula the interested party having won 3 elective seats the number of total seats and available seats remaining constant then the interested party was entitled to at least (2) nomination slots like what the parties who won similar elective posts being ODM, WDM-K and NARC-K were allocated, further the respondent in their response and affidavit did not deny that the interested party was entitled to two nomination slots or that it was entitled to nomination slots based on the number of seats won in the 8<sup>th</sup> August 2017 general elections, it is apparent that by failing to allocate any seats to the interested party the Respondent discriminated the party including the petitioner by failing to allocate special seats to the interested party.

Whether the petitioner is entitled to any reliefs from the court

Before I delve on this issue, the respondent in their response at paragraph 7 averred that the petition was defective and incompetent by dint of the petitioner's failing to enjoin the gazetted members of the county Assembly for Wajir County, who stand to be adversely affected by the outcome of this suit, none of the parties submitted on this issue however being an issue of Law I will proceed and determine it, in the case of LESRIMA SIMEON SAIMANGA V INDEPENDENT AND ELECTORAL BOUNDARIES COMMISSION & 2 OTHERS ( 2017) e KLR

Justice R.P.V Wendoh while citing the case of M' NKIRIA PETKAY SHEM MIRITI V RAGWA SAMUEL MBAE & 2 OTHERS (2013) e KLR

In which Justice Lessit stated that the non-inclusion of the running mate (a deputy Governor) in a Governors election petition brings to the fore the question of fair hearing as enunciated in Article 50 and 25 (c) of the constitution....prima facie non-inclusion of the running mate to the 1<sup>st</sup> respondent is not fatal to the petition as the court has powers under section 80(1) (b) to compel the attendance of any person as a witness....the court did not conclusively deal with the issue at the interlocutory stage.

Justice Wendoh in LESRIMA SIMEON SAIMANGA V INDEPENDENT AND ELECTORAL BOUNDARIES COMMISSION & 2 OTHERS (2017) e KLR

Went ahead and cited Rule 2 of the Elections (Parliamentary and County Election) Petition Rules 2017 which states that an election petition is brought against the person whose election is complained of or any other person whose conduct is complained of in relation to an election, the court further stated that in Rule 9 of the Rules the IEBC is the only party that is mandatorily required to be a respondent in every

election petition .....the court further stated in relation to enjoining a deputy Governor to an election petition challenging the election of Governor that flowing from Rule 2 and 9 unless there are specific allegations made against the Deputy Governor during the election of the Governor then it would not be necessary for him to be made a party to the election petition filed against the Governor.

Rule 2 of the Elections (Parliamentary and County Elections) Petitions Rules 2017 defines a respondent as

- a) The person whose election is complained of;
- b) The returning officer'
- c) The commission
- d) Any other person whose conduct is complained of in relation to an election

While Rule 9 of the rules states

That the commission shall;

- a) Be a respondent in every petition filed under these Rules and
- b) be served with a petition filed pursuant to these Rule in the manner provided under Rule 12(2)

Based on the above cited cases and the cited provisions of the Law I find that the petitioner's complain is against the Respondent who violated constitutional provisions under Article 90 and 177(1) (b) while allocating the party list seats and omitted the interested party who was entitled to special seats by dint of having won 3 elective seats in the general election, the petitioner did not have any complain against the gazzetted members of Wajir county on the gender top up seats since they did not themselves participate in the allocation of the special seats but the Respondent did, as such their non-inclusion was not fatal to the petition.

As regards to the main issue as to whether the petitioner is entitled to the reliefs sought, before making final orders as to whether the petitioner is entitled to the reliefs sought I will have to satisfy myself as to whether the burden of proof has been discharged and if the standard of prove has been met, courts have held that in election disputes the burden of prove lies and remains with the petitioner throughout this is as envisaged in section 107(1) of the Evidence Act cap 80 Laws of Kenya, and as was held in the case of **RAILA ODINGA V INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 3 OTHERS SUPREME COURT PETITON NO. 5 OF 2013**

The court however in the same cited case the court went ahead to find that at the trial the burden of proof keeps shifting between the petitioner and the respondent , a similar position was held in **RAMADHAN SEIF KAJEMBE V RETURNING OFFICER, JOMVU CONSTITUENCY & 3 OTHERS ELECTION PETITON (MOMBASA) NO. 10 OF 2013**

The court held that a court must consider the totality of the evidence adduced by all parties instead of dwelling solely on the petitioner's evidence, a similar position held in **DICKSON MWENNDA KITHINJI V GATIRAU PETER MUNYA & 2 OTHERS CIVIL APPEAL (NYERI) NO. 38 OF 2013,**

With respect to the standard of proof in election dispute resolution is as laid down in section 83 of the Elections Act 2011 and which the court looked at in the case of **HASSAN MOHAMMED HASSAN & ANOR V INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & 2 OTHERS ELECTION PETITION ( GARISSA) NO. 6 OF 2013**

Section 83 of the Election Act 2011 states that *no election shall be declared to be void by reason of non-*

*compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the constitution and in that written law or that the non-compliance did not affect the result of the election.*

The court in the above cited case held that the implication of section 83 of the Elections Act was that the court will not interfere with the free choice of voters unless the irregularities and malpractices proved by the petitioner are such that they actually interfere with the free choice of the voters.

**In RAILA ODINGA V INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 3 OTHERS SUPREME COURT PETITION NO. 5 OF 2013,**

The court held that the standard of proof required in Election petitions is higher than the civil standard of balance of probabilities, but lower than the criminal standard of proof beyond all reasonable doubt.

Based on the above set standards and for the case before this court the petitioner proved that the party list for special seats was submitted in accordance to section 35 of the Elections Act 2011, which the respondent confirmed and published the list as is required by law, no objection was ever raised by the respondent as regards the party list, these facts were confirmed by the respondent in their response to the petition and affidavit, it is also not disputed that the petitioner's name was on the list submitted by the interested party and the name appeared at position (1) on the said list, it is further not disputed that the interested party won 3 elective positions in Wajir County following the 8<sup>th</sup> August 2017 General Elections, it is further not disputed that other political parties who won 3 seats similar to the interested party were allocated each 2 special seats and those parties who won 2 seats were allocated 1 seat each and those who won over 3 seats were allocated 3 seats each, but despite the interested party winning 3 elective seats it was not allocated any special seat and were it that the interested party had been allocated the seats then the petitioner would have benefited by being nominated by the Respondent by virtue of being in position one (1) on the gender top-up list of the interested party in Wajir county, the respondent on its part aver that they applied the formula in Regulation 56(2) of the Elections (General) Regulations, 2012, which provides thus;

*56(2) The formula for allocation of seats to the respective political parties from the party lists shall be the number of seats won by a political party divided by the total number of seats multiplied by the available seats for allocation in the respective house.*

Based on the evidence by the petitioner and considering the responses by the respondent and the interested party together with the oral submissions by counsel for the interested party and the Law applicable I find that the burden of proof in this case shifted to the respondent to demonstrate to the court that as much as the interested party won 3 elective seats in the 8<sup>th</sup> August 2017 General elections and by applying the above prescribed formula that the interested party was not entitled to allocation of special seats despite other parties who won similar number seats and even those who won fewer seats having been allocated special seats, the respondent did not discharge this burden as such I find that the respondent violated the proviso of Article 90(3) and 177(1)(b) with respect to the rights of the interested party and by extension the interested party's members including the petitioner by failing to allocate to the interested party the party list seats in proportion of the number of seats that the interested party had won on the 8<sup>th</sup> August 2017 to which the interested party won 3 seats and was not allocated any special seats, further the respondent violated Article 177(1)(b) of the Constitution by failing to allocate special seats to interested party, as a consequence the petitioner's name which was in position 1 on the interested party gender top-up list was omitted in violation of the constitutional requirement that no more than two-thirds of the membership of the assembly are of the same gender and the violation of the constitution the respondent acts are retrogressive and they do not promote the purpose of the constitution which is to protect the rights of women, in the **Supreme court in Advisory opinion No. 2 of 2012 in the matter of the Principle of Gender Representation in the National Assembly and the Senate**

The court in its advisory opinion held that it is the duty of the state to progressively implement the two-thirds gender rules as a way of protecting the right of women to access elective office.

Judging by the respondents acts the acts are not geared towards realizing the two-third gender rules as anchored in the constitution.

All Considered I find that the petitioner has discharged the burden of proof and standard of proof required in Election Disputes and is entitled to reliefs from the court.

Who bears the costs of the petition

In section 84 of the Election Act costs are awardable and they follow the cause.

As I sum up, my final orders are that;

1. The petition is allowed
2. An order is issued declaring that the Gazette Notice published on 28<sup>th</sup> August 2017, vide Gazette Notice No. 8380, Vol. CX1X-No. 124, in respect to the Gender Top up List of Wajir County null and void.
3. The Respondent to forthwith reconstitute and Gazette the gender Top up List of Wajir County, including the name of the petitioner Mariam Abdi Mohamud in compliance with the Law.
4. The respondent to bear the costs of the petition payable to the petitioner the costs are capped at 500,000/=.

Dated at Nairobi this 14<sup>th</sup> day of December 2017

E. Wanjala

Senior Resident Magistrate

In the presence of;

.....Court Assistant

.....for petitioner

.....for Respondent

.....for Interested party.