



REPUBLIC OF KENYA
IN THE SENIOR RESIDENT MAGISTRATE'S COURT AT GITHONGO

ELECTION PETITION NO. 1 OF 2017

RICHARD KATHURIMA MURIUNGI.....PETITIONER

VERSUS

INDEPENDENT ELECTROL AND BOUNDERIES

COMMISSION1ST RESPONDENT

HABIBA GODANA HILAMA C/O:

IMENTI CENTRAL2ND RESPONDENT

AYUB BUNDI SOLOMON.....3RD RESPONDENT

JUDGEMENT

INTRODUCTION

1. PETITION

THE HUMBLE PETITION OF RICHARD KATHURIMA MUGAMBI OF P O BOX 614-600 MERU within the Republic of Kenya is as follows:

DESCRIPTION OF THE PARTIES.

- i. The petitioner is a male adult, a registered voter and the Jubilee party Candidate for member of County Assembly ABOTHUGUCHI CENTRAL WARD whose address for service in the matter herein shall be KIOGORA MUGAMBI & CO. ADVOCATES Kirukuri Road P.O BOX 614-60200 and Meru.
- ii. The 1st Respondent is an independent Constitutional commission established under Article 88 of the Constitution 2010 by the Kenyan people in exercise of their sovereign will in accordance with Articles 1, 4 and 38 of the Constitution and a body corporate capable of suing and being sued on its own name.
- iii. The 2nd Respondent is a male adult and the Returning officer, Imenti Central Constituency.
- iv. The 3rd respondent is a male adult, party of National Unity Candidate and the MCA -elect ABOTHUGUCHI CENTRAL WARD as declared by the 2nd respondent on the 10th of August 2017.

2. BREIF OVER VIEW OF THE PETITION

- v. Article 1 of the constitution sets out the foundation and framework of the National Kenya and the social contract between the people and their elected representatives.
- vi. Articles 2(1) and 2(2) of the constitution of Kenya declares the supremacy of the constitution of Kenya and oblige every person to exercise state authority only as provided for in the Constitution.
- vii. Article 3(1) of the constitution of Kenya 2010 oblige the petitioner (and indeed all other persons) to uphold and defend the constitution and in particular to insist that all organs and or bodies of the Government of Kenya equally respect, uphold and defend the constitution.
- viii. Article 4 of the constitution establishes a republican system of governance, which is founded on the sovereignty of the people and under which the conduct of periodic elections is one of the mechanisms by which the people delegate their sovereign power to their representatives.
- ix. Article 38 of the constitution sets out the mechanism and framework by which the sovereign people of Kenya exercise their sovereign will under Article 1 and 4 of the Constitution.
- x. Article 10 and 73(2) of the Constitution of Kenya, 2010 declare the National values and principles of governance and obliges the 1st and 2nd respondents to, inter-alia, observe the rule of Law, human rights, non-discrimination, good governance, and integrity in exercise of their functions.
- xi. Article 81 of the constitution of Kenya, 2010 provides the principles that the electoral system shall comply with, *Inter-alia* freedom of citizens to exercise their political rights under Article 38.
- xii. THAT Section 83 of the Elections Act provides that where an election is not conducted in accordance with the Constitution and the written Law, then that election must be invalidated notwithstanding the fact that the result may not be affected.

3. Grounds for the Petition/Facts of the case

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

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

I. The petitioner avers that in all polling stations within the constituency the data entered into the KIEMS kits was not consistent with the information and data from the respective forms 36A.

II. The petitioner avers that the data that was being displayed publicly by the 1st Respondent at the sub county Tallying Centre was not consistent with the information and data in the respective Forms 36A.

III. As a result of the afore-going the 2nd respondent did not administer the Buuri parliamentary Election in an efficient, accurate and accountable manner as required under the Law and in contravention of Article 81 (e) of the constitution.

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

V. Therefore, whatever forms 36B were purported to have been relied upon by the 2nd respondent at the sub county tallying center and on the basis of which the final results of the Buuri parliamentary seat was declared were inaccurate as they were inconsistent with the forms 36A which were the primary documents from which they are required by law to be created.

VI. As a result of the immediately forgoing the forms 36B were not accurate and verifiable and consequently invalid.

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

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

a. The additions and figures do not add up.

b. The petitioner avers that the nature and extent of the inaccuracies and inconsistencies in the tabulations is not clerical but deliberate and calculated.

c. The petitioner avers that the inaccuracies and inconsistencies affect and account for at least 1,000 votes.

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

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

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

v) The grounds, information and evidence detailed in the supporting affidavits are indicators of a deliberate and/or systemic and systematic interference and manipulation of the results of the Abothuguchi Central Ward by the 2nd Respondent.

vi) The effect of the systemic and systematic manipulation and distortion of the results renders it impossible to determine who actually won the Abothuguchi Central ward seat and/or whether the threshold for winning the election under the constitution was met.

Vii) The purported results in the 1st Respondent's Forms 36B are materially different from what the 1st respondent public ally relayed and continues to relay as at the time of the filing in its website or portal.

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

ix) Notwithstanding the foregoing averments in respect of Forms 36B, the petitioners further aver that at the time of declaration of the result, the 2nd respondent did not have most forms 36B nor

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

4. CONTRAVENTIONS.

i) THAT the 1st and 2nd respondents conducted an election contrary to Article 81 of the constitution of Kenya, 2010 provides the principles that the electoral system shall comply with, inter-alia freedom of citizens to exercise their political rights under Article 38.

ii) THAT out of these actions the 1st and 2nd respondents abdicated their role and duty to exercise, protect and safeguard the sovereign will of the people of Buuri Constituency.

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

1v). THAT even so, although the petitioner aver that both the results and the conduct of the election were affected and rendered invalid, the petitioner's position is that the non-compliance with the constitution and the written Law is by itself sufficient to invalidate the parliamentary vote.

v). THAT the respondents have violated the provisions of the Constitution of Kenya, the Elections Act, the IEBC Act, Election (General) Regulations, 2010

5. PRAYERS IN THE PETITION

a) That this election court do order the recounting of all votes from all polling stations within **ABOTHUGUCHI CENTRAL WARD** in respect of the ward contest.

b) An order for scrutiny and audit of all the returns of the **ABOTHUGUCHI CENTRAL WARD** election including but not limited to forms 36A, 36b and 36C.

c) A specific order for scrutiny of the rejected and spoilt votes.

d) An order for scrutiny and audit of the system and technology used by the 1st respondent in the **ABOTHUGUCHI CENTRAL WARD** Election including but not limited to the KIEMS Kits, the Server(s); website/portal;

e) A declaration that the non-compliance, irregularities and improprieties in **ABOTHUGUCHI CENTRAL WARD** election were substantial and significant that they effected the result thereof:

f) A declaration that the **ABOTHUGUCHI CENTRAL WARD** election held on 8th August 2017 was not conducted in accordance with the constitution and the applicable law rendering the declared result invalid, null and void:

g) A declaration that the 3rd Respondent was not validly declared as the MCA elect and that the declaration is invalid, null and void:

h) An order directing the 1st Respondent to organize and conduct fresh ward election in respect to **ABOTHUGUCHI CENTRAL WARD** in strict conformity with the constitution and the Elections Act:

I) Cost of the petition: and

j) Any other orders that the Honourable Court may deem just and fit to grant.

6. AFFIDAVITS BY THE PETITIONER

PW1 stated that he was candidate for the position of member of County Assembly, ABOTHUGUCHI CENTRAL WARD within Imenti Central Constituency in the elections conducted on 8th August 2017 and annexed is a copy of nomination certificate and certificate of nomination marked RKM-2, RKM-3 respectively. He was vying through Jubilee party. PW1 reiterated that the 1st Respondent herein AYUB BUNDI SOLOMON was declared by the 2nd respondent on 10th August 2017 to be the validly elected MCA for ABOTHUGUCHI CENTRAL WARD, within Imenti Central Constituency. It was his aversion that on the 8th August 2017, the elections did not proceed as set out under the law. He held the view that pursuant to the advice by his Advocate on record that the supreme court in presidential election petition NO. 1 OF 2017 (*Raila Odinga & anor V/S IEBC & 2 others*) held that election is not an event but a process. PW1 argued that this Honourable court to be guided by the above Supreme Court decision. He averred that his witnesses will prove through their affidavit evidence many cases of voter bribery and intimidation perpetrated by the 1st respondent were reported. PW1 further averred that during counting on the night of 8th at around 8 O'clock in the evening got worse. i.e. The change, alteration and or doctoring or results were spear headed by 1st respondents agents while intimidating other agents including jubilee agents. The illiterate voters, very old men and women were being misled by the 2nd respondent agents and clerks to vote for the 1st respondent. That during the actual counting the 2nd respondents and his agents were not counting in a transparent manner, as in showing the ballot paper to all agents and announcing the vote whether valid, spoilt or otherwise. The agents who protested including Jubilee agents were intimidated harassed and sent out. That there were two candidates showing a middle name these were:-

(a) MURIUNGI RICHARD KATHURIMA

(b) MURIUNGI TONNY MUTUMA

During the counting the 2nd respondent and or his agents were only announcing the name "MURIUNGI" was used in favour of one MURIUNGI TONNY MUTUMA. It was his testimony that the trend in paragraph 10 above was most notorious at polling stations which are my strong holds and to a larger extent were spread thinly over the rest of the polling stations. PW1 stated that the results that were announced by the returning officer at the sub county tallying Center did not reflect the actual votes for the neither the 1st respondent nor myself. Annexed hereto and marked RKM-4 are some forms 36A showing different results, which shows a serious discrepancy of tallying. He contended that the democratic process was subverted and abused by the 2nd and 3rd respondents and or their agents and his constitutional rights have been in violated. He stated that he was aware of one incident in which his votes amounting to 175, were tied into bundles of 25 and instead of the same being tallied in his favour, they were instead tallied in favour of the 3rd respondent herein, hence giving him unfair advantage. He contended that in all the polling stations forms 36A were superficially (changed on paper, but the actual votes cast on the ballot boxes remain intact) and that incase of recounting of all the votes in the polling stations would solve the petition herein. He stated that on account of the above issues that he sought for a recount of all the votes cast in favour of member County Assembly ABOTHUGUCHI CENTRAL WARD within Imenti Central Constituency in the interest of justice but the 2nd respondent flatly refused advising that he file an election petition (he annexed hereto and marked RKM-5 is my protest letter). PW2 she was the chief agent of a Jubilee party ward-representative candidate one RICHARD KATHURIMA MURIUNGI, who vied in Imenti-Central Constituency, Abothuguchi-Central ward of Meru County. She stated that as the Chief agent, her role was to inspect the work of the other agents, taking care of their needs overseeing all they did and all for the interests of my candidate, the aspirant MCA Richard Kathurima Muriungi. PW2 further stated that her other roles as Chief agent also included detecting and reporting any malpractices or abnormalities to the constituency returning officer during the polling process. She stated that 7th of August 2017, while she trained our agents, they got disturbance from one AYUB BUNDI who was an opponent of my candidate, whereby he sought some of our agents immediately to influence them for the following day's outcome. PW2stated that she had to eliminate two of their trained agents instantly. She stated that another incident of this day of 7th August was a serious allegation that the opponent had

unlawful influence on the recruitment of two senior staff officers of IEBC, where one deputy tallying officer was alleged to be his relative and another was a P.O one Boniface Muthomi, also allegedly a relative of the same incumbent, that the latter had not qualified as a P.O as per the requirements of the IEBC interview. PW2 she had to see the Returning officer immediately and after investigations, who immediately dismissed the presiding officer. She stated that another nasty incident that took place on the 7th night with this same opponent who was buying of votes and bribing voters overnight with un-estimated high amounts of money and also buying of National identity cards to be retained until voting was through in my candidate's strongholds. PW2 stated that the 3rd respondent mobilized voters overnight, door to door giving a lot of cash, in Ruiga Murathi, Karimunga, Mwitumura, Nyweri, Kaugi, Mariene and Mukiria villages. God forbid, he had planned to use all the development money he may never have used in our ward to compensate to the people these two days or so she felt. PW2 stated that it was unfortunate for her candidate, who hadn't much money to compete or rather influence voters, to bear this inhumanity from the opponent. PW2 wondered how they could exchange their IDS with not less than Kshs.1,000/- for any willing voter. She stated that on this actual polling day, morning came and as the chief agent she had to commit herself to wake up her agents as early as at 5.00 am. She stated that her agent reported cases of bribery by Ayub as early as 5.00am. PW2 stated that her agent who would spend at Karimunga Primary encountered buyers already strategically placed at the gate to wait for sellers in this case voters to buy their votes. She stated that there was injustice in Kenya as similar cases were reported to her by agents form Mukiria Technical, Ruiga Primary Kiria Primary and Mariene Primary alongside coffee research. PW2 stated that by 9.00 am most of her agents had reported that they were not allowed into the polling stations to assume their duties by their respective presiding officers which became an issue to her and she decided to meet the returning officer immediately whereby she lodged the complaint and she opted to help. She stated that the returning officer kindly offered to give her the IEBC polling agents badges which she started circulating to all her agents immediately. She stated that she went around issuing these badges, that's when she started to face real hell of the day. She stated that very high levels of malpractice, inhuman behaviour, corruption and vote rigging-abnormal conducts of polling process which to this day haunts my mind. It was a bad experience for her. She stated that her agents at Ruiga primary & Kaugi primary reported to me that they really had a rough time in the region. She stated that along the way, these buyers never even minded to first study their behaviour but hurriedly asked them to show their, identity card so they could give them money. She stated that they asked them to negotiate with them any amounts they wanted provided they voted for Ayub. PW2 stated small groups of bribers, 2-3 were strategically placed along the equator-Ruiga-Kaugi-Gaitu road and all had one core business; to ensure no voters entered the station without their cash. It was like a pay-day. She stated that on entering Ruiga Primary polling stations the presiding officers acted to be serous but were somehow suspicious to have known all that was taking place right outside the center. PW2 stated that her agents were already so intimidated that she had to play her role of intervening for their comfort. She stated that on asking the police officers in charge, they told her they had noticed that behavior of disturbing the voters on the lines to first go for money on the road, but were now in control. They promised to keep order within the polling center. It was according to her hectic as the same was the situation at Kangi primary, Ruiga AIPCA CHURCH Mwitumiwa primary and Karimunga primary. She stated that felt helpless and had to seek for the help of the O.C.S KARIENE POLICE STATION who in the company of a few other officers came over. It was her testimony the police found one agent was already beaten up but fortunately sped away before themselves caught up with him. They

also found the opponents car along that route KBN 565S that was allegedly circulating the cash. The OCS arrested the car but luckily enough, he told us there was no tangible evidence found in the car. They warned them and let them free. The car allegedly belonged to this opponent AYUB BUNDI. She stated that during the same hours, as the OCS decided to patrol and keep order he found and arrested one alleged to be a personal assistant of this opponent, one Kinyua Mboroti, in the act of bribing and destructing free and fair elections at Nkuene primary school. PW2 further stated that another incident that really irritated her was at Kiria Primary, where one presiding officer in room 2 was biased and decided to mislead voters deliberately. The presiding officer could hide the pictures of the Jubilee candidates and especially the one for RICHARD in favor of AYUB. He then made sure if it were not him that guided, it was then another equally influenced clerk and totally banned agents from witnessing what happened. She had to face them strongly and fought for the agents in the room. PW2 stated that in Kariene room 2 the presiding officer there too was very harsh to her agent and really harassed her to tears. Her agent could not play her role

hence was changed with another tougher agent. At kirirwa primary towards afternoon, there were serious cases of malpractice too. The police officer in charge, with the help of the local assistant chief harassed her agents in the favor of the opponent's agents. The police officer chased away our agents in the name of drunkenness and allowed the other agents to freely mobilize voters within the center. On intervention, they resolved the issue and both party agents were allowed to work. PW2 stated that she personally witnessed high levels of injustice and lack of integrity in the election process there. She stated that when she alighted from the car, the women voters who were waiting at the gate said "bibi" WA MHESHIMIWA Ayub amefika sasa, tutapigakura". On asking more they told me that they were told to wait until money was there before they could vote. On reporting the matter, the presiding officer ordered the police officer to go and close the gate as it was already past 6.00pm, and that is when they hurriedly entered and lined for voting that late. PW2 stated that another serious case was at Rware primary school where provoked mobilizers from her candidate's side decided to also fight for their rights when it was too much. One woman allegedly a sister to the opponent Ayub bundi was openly giving money in envelopes to people before they entered the polling center. She was caught, held up and before she was killed by the angry citizens, the police officer had to shoot in the air to scare away them. That how she was rescued. PW2 stated that at St immaculate polling center the agents also complained of cases of irregularities. The clerks in rooms 1 and 3 were said to have been issuing more than 2 ballot papers for one candidate to some voters. She stated that in the same center, one victim almost died in mob-justice, named Sauko, after he was caught re-handedly trying to buy votes outside the polling stations, and that the multi security officers there, being a tallying center too, rescued him and had him taken to Kariene police station and statements were recorded. She stated that she also suspected that counting was not fairly done. One incident was witnessed by the OCS kariene and the candidates himself, Richard, after they asked for a re-count at Ruiga Primary and imagine they recollected back around 7 votes that belonged to Richard from Ayub Bundi's ballot box. PW2 stated that in Mariene primary too it was suspected that unfair counting was done. Some ballot papers allegedly belonging to other candidates were counted for Ayub. PW2 stated that as a chief agent she was not pleased at all with the whole process in ABOTHUGUCHI CENTRAL WARD for the MCA seat election process and strongly feel that the results should be nullified. She could not explain what happened that figures not expected were entered in the form. She stated that in the afternoon of 9th her candidate had already decided to request for a re-count at the tallying center, which they did in writing to the returning officer who after consulting said it was not possible that to me it was total injustice. Ayub Bundi tortured us throughout the polling process by deciding to buy his way back to the ward seat unfairly. She stated that as a future leader and a lover of justice she felt frustrated and demanded for justice for my candidate, that innocent people of Abo-Central ward knew the kind of leader they wanted but corruption took its course. PW3 he was a registered voter within Abogeta Central ward and during the 2017 general elections he was an observer accredited by the Jubilee party. It was his testimony that his roles as an observer during the polling day was to co-ordinate agents, solve and report any vote anomalies to returning officer and to the OCS on matters of security. PW3 stated that on the 7th August during final briefing of presiding officer's, he realized that one of the presiding officer who was training polling clerks was not qualified fully and they complained to the returning officer and the said BONFACE MUTHOMI was disqualified from presiding the said elections. He was replaced by the returning officer. He stated that during the voting day at Kiria primary, Kariene primary, Kirirwa Primary, Rwanderi Primary jubilee agents who were acting for the petitioner were barred and only allowed late-on out of his intervention. He stated at around 11pm, he received a call from our agent at Nkuene primary that one Kinyua wa-bolt was buying identity cards and issuing voters with cash on behalf of Ayub to influence voters on how to vote and to make others abstain from voting after purchasing their identity cards. PW3 stated on arrival they called the OCS Kariene who came and arrested the said Kinyua wa bolt and took him away. PW3 stated that at around 1 pm he received information from their agent that at Kariene market votes were being bought by one **JACOB MUTHOMI** we went there and the area chief **MWONGERA** promised to act immediately. PW3 further stated that at around same time they were informed that the **chief Ntonyero** in company with one **MR GITONGA** an elder of **Ntonyero village** were harassed by youth from **Ntonyero** village who were supporting candidate **MR IRAKU**. PW3 stated that Mr. Gitonga was forced to run away for his life, his clothes having been torn and the chief was rescued by the administration police. He cautioned the chief and administration police to keep members of public 400 meters away from the polling station. That the chief had a note book which he was purportedly recording those who entered the polling station. PW3 further stated that he was called by the agent at Rware primary school that identity cards were being bought near Rware polling

station. On his way to Rware, he was informed that there was gun shot near Rware primary school where the sister to Ayub who was a candidate had been arrested by members of public and thus the police had to shoot to disperse members who intended to lynch her but fortunately or unfortunately she managed to hike a motor cycle and rode away. PW3 averred that on arrival he called the **OCS KARIENE** police station to prevail to the members of public who had already voted to clear away from the polling station. He went to Kariene polling station at stream 3 and met that voting had been stopped by the returning officer so as to delay the process till late at night. PW3 stated that on consulting the agent, he was informed that the returning officer had appointed an agent with instruction to spoil as much vote as possible in disguise of assisting voters who did not have knowledge of voting by marking a second mark. PW3 stated that he was called by **JULIUS KIMATHI MBAYA** a candidate for Member of Parliament Central Imenti that at Mukiria polytechnic identity card buying was ongoing being done by the area chief and assistant. That on arrival he met the said chief and sub-chief had gone to Nyweri Primary school where they were chased by supporters of MR IRAKU. He later learnt that Rwanderi polling station voting had been stopped and he had to call the county returning officer for him to be allowed entry. PW3 stated that it was his humble statement that the returning officer at Rwaderi was drunk, incoherent, inefficient and thus his deputy and one agent by the name pastor MUTHAURA were the ones working with the returning office in his drunk state. There were complainants of the biometric kit not working where he advised him to call for permission to use the manual system. He stated that the voters who were knowledgeable in terms of voting in my observation only pastor MUTHURI the appointed agent of the returning officer was the one assisting members of public and as such the process lost credibility. PW3 met one candidate by the name TONY whom he shared the information with. He later went to immaculate polling station on information that one-person nicknamed SYCO was buying identity cards where he called the OCS who managed to arrest the said SYCO but was released. PW3 stated that at KIRIA polling station and KARINDINE polling station only PNU agents were allowed to assist members of public where he advised that exercise ought to be done jointly. PW3 averred that NKUENE primary school he went to NKUENE polling centre where area chief had assisted a member of public who were resisting attempt to carry the ballot box for counting at Nkuene secondary school fact he assisted in resisting. It was his testimony that at RWANDERI at around 8.00 pm many voters had not voted an issue that brought anarchy especially many being supporters of MR IRAKU. That by the time the weather had changed and it started raining, police were used to disperse members of public. They managed to transport back some especially the older members to vote but many had already gone home without voting. That at RWANDERI polling center had many supports of MR IRAKU and thus it was a calculated move and scheme for the returning officer to behave and demonstrate drunkenness in disguise. PW3 stated that called the OCS Kariene police station to provide security for them to be able to penetrate the many polling stations which counting had not been completed. It was his testimony at Ruiga primary school/polling station all the agents were a sleep and the returning officer was counting alone and on scrutiny and observation they recovered 6 votes a similar issue arose at MARIENE coffee research polling center. However, they could not manage rescue the situation. PW3 stated that at MUGAMBONE polling station they were denied entry as the police had been called to the tallying center and as such no verification was ever done. They returned to RWANDERI polling center where Honourable AYUB BUNDI had entered with his supporters and miraculously the said SYCO unauthorized agent was busy counting the votes an extreme, improper and irregular upfront to tenet of law. He averred that violence was extremely imminent at the gate of the tallying center.

7.1st and 2nd affidavits

DW1 stated that she was the returning officer in Imenti Central Constituency, within Meru County. DW1 contended that the petitioner had not shown any proof that he was a registered voter in Abothuguchi Central. She contended that she declared the 3rd respondent to be validly elected M.C.A for ABOTHUCHUCHI CENTRAL WARD. DW1state that voting started at 6am and successfully ended at 6pm within many parts of the constituency without any incidences of bribery, intimidation and coercion. DW1 contended that no presiding officer was impartial. It was her testimony that the allegations herein were mere buffs which did not carry any probative value. DW1 denied having announced results which had discrepancies in form 36A and 36B as alleged by the petitioner. DW1 stated that all the votes were counted, form 36A filled correctly, where after were attested by the agents. It was her testimony that the true will of ABOTHUGUCHI CENTRAL WARD was reflected in the results declaring the election of the

3rd respondent.

8. 3rd RESPONDENTS AFFIDAVITS AND WITNESSES

DW1 denied the allegations as set out in the petition and contended that he was validly elected into the office of ABOOTHUGUCHI CENTRAL WARD, after garnering 7,750. He contended that he went to vote at Ruiga Primary School at 2pm on the 8th August 2017 before proceeding to go about inspecting how voting was going on in other polling stations within Abothuguchi Central. DW1 stated that he did not bribe any of the voters as claimed and denied any of the irregularities as alleged by the petitioner. DW2 denied any voter bribery, intimidation or any kind of incidents were reported to the police. DW2 further stated that he was declared elected on the 12/8/2007 with a vote difference of 274 from the petitioner. DW2 stated that he was an agent at Ruiga Polling station. It was his testimony that while counting votes at around 1am, the area O.C.S came with the petitioner in the hall. The petitioner indicated that he was comfortable with the counting and demanded a recount. The presiding officer started to recount but the petitioner and the area O.C.S left before the same was concluded. DW4 stated that he was an agent at St. Immaculate Primary Polling and denied any act of bribery as alleged by KENNEDY MURUINGI. He also denied knowing a person by the name SYCO. DW4 contended that he witnessed the voter identification, casting of the ballots, tallying of the results and he signed form 36A. DW4 contended that the ballot boxes were sealed and taken to the Constituency Tallying Centre together with other election materials and presented to the 1st respondent.

9. SUBMISSIONS FOR THE PETITIONER

Introduction

Following the General Election conducted on 08th August 2017, the 3rd Respondent was declared as the winner of the Abothuguchi Central Ward election and the MCA elect. The Petitioner being aggrieved by the conduct of the election and the declaration of the 3rd Respondent as the MCA has filed this petition pursuant to Article 81 of the Constitution of Kenya. The Petitioner is challenging both the conduct of the Abothuguchi Central Ward election and the validity of the result declared.

The underlying premise of the Petition is simple yet fundamental. The Petitioner contend that the Abothuguchi Central Ward Election was so badly conducted, administered and managed by the 1st & 2ND Respondents that it failed to comply with the Constitution and other laws relating to the election. Throughout these submissions, we shall demonstrate and prove that before the election, during the election and after the election not only did the 1st & 2nd Respondent fail prepare to deliver a free, fair and credible election, they deliberately set out to subvert the sovereign will of the Abothuguchi Central Ward people.

The facts supporting the Petitioners' claims are set forth in the Petition, the Supporting Affidavits, and the entire Petitioners' Applications made during the hearing of this petition, the report from placing of additional seals, the report from the partial scrutiny of select polling stations, the various anomalies found in all the forty four (44) forms 36A, the various anomalies found in all the forty four(44) poll diaries. The Petitioner further relies on the ubiquitous admissions contained in the Respondents responses, especially in regard to the late opening and closing of polling stations, shortage of seals, total denial of known facts.

The petitioner submits that the essence of Section 83 of the Elections Act is that for elections to be valid, they must comply with the 'principles laid down in the constitution', written law and regulations. The constitutional principles governing elections in Kenya are established by Articles 81, 86 and 38.

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

“The electoral system shall comply with the following principles: free and fair elections, which are: by secret ballot; free from violence, intimidation, improper influence or

corruption; conducted by an independent body; (iv) transparent; and administered in an impartial, neutral, efficient, accurate and accountable manner.”

The Constitution has elevated the principle of free and fair elections to the status of a fundamental right provided for under Article 38.

Article 86 goes further to stipulate additional principles that focus on the system of election; the casting, counting and tallying of the votes; the transmission of the results; and the appropriate structures and mechanisms for elimination of malpractices:

“At every election, the Independent Electoral and Boundaries Commission shall ensure that— whatever voting system is used, the system is simple, accurate, verifiable, secure, accountable and transparent;

the votes are counted, tabulated and the results announced promptly by the presiding officer at each polling station; the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and

appropriate structures and mechanisms to eliminate electoral malpractices are put in place, including the safekeeping of election materials.”

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

What is the meaning of the principles laid out in Article 86 of the Constitution that are relevant to this Petition?

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

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

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

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

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

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

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

The validity and integrity of any election is gauged upon the conduct of that election being in substantial

compliance with the electoral law of that election. Lord Denning succinctly stated this principle in *Morgan v Simpson*;

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

- i. If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result is affected, or not...***
- ii. If the election is so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by breach of the rules or a mistake at the polls...***
- iii. But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless, if there was a breach of the rules or a mistake at the polls and it did affect the result, then the result is vitiated.”***

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

“It is clear to us that an election should be conducted substantially in accordance with the principles of the Constitution, as set out in Article 81(e). Voting is to be conducted in accordance with the principles set out in Article 86. The Elections Act, and the Regulations there under, constitute the substantive and procedural law for the conduct of elections... If it should be shown that an election was conducted substantially in accordance with the principles of the Constitution and the Election Act, then such election is not to be invalidated only on ground of irregularities. Where however, it is shown that the irregularities were of such magnitude that they affected the election result, then such an election stands to be invalidated”

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

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

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

- a. The 1st & 2nd Respondents flouted the governing principles set out in Articles 1, 2, 4, 10, 35(2), 38, 81, 86, and 249 of the Constitution, the Elections Act and the Regulations

- b. There was undue or improper influence, corruption and irregularities in the conduct of the elections
- c. There was un-necessitated and untold delays in tallying ,counting and announcing of the results which to a larger extent depicts that the system may not have been simple as required by the law
- d. There were discrepancies in the seals used for the ballot boxes which is not only a contravention of the law but a key indicator of monkey business
- e. There were discrepancies in vote counts at the polling station whose illegal access had been awarded to the 3rd respondent
- f. Votes were tallied in the absence of agents which is a complete violation of the electoral laws.

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

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

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

(a) Before or during an election—

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

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

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

With regard to bribery, Section 64 provides:-

“64(1) A candidate who;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(j) directly or indirectly, in person or by any person on his behalf, in order to induce any other person to agree to be nominated as a candidate or to refrain from becoming a candidate or to withdraw if they have become candidates, gives or procures any office, place or employment to endeavour to procure any office, place or employment, to or for such other person, or gives or lends or agrees to give or lend, or offers or promises to procure or to endeavour to procure any money or valuable consideration to or for any person or to or for such other person on behalf of such other or to or for any person, commits the offence of

bribery.

In view of the above submissions, it is our case that the will of the people of Abothuguchi Central Ward was subverted as there was eminent buying of votes at various polling stations as demonstrated many times before this Honourable Court. At this point we would like to rely on the averments brought up in the affidavits of Richard Kathurima Muriungi, Lilian Ngugi & Kennedy Muriungi premising on the testimony subsequently adopted in court and we quote

‘it was Ayub Bundi who sent his agents to buy votes police were summoned and two people were arrested’

We would also like to draw the attention of the court to the affidavit of Lilian Ngugi who with this regard cited numerous instances of bribery where infact, herself was offered an amount of money to influence his choice of candidate and we quote’

‘I was being offered Kshs 1000-Kshs 2,000 to vote for Ayub’

Article 10 has integrity as one of the core national values and principles of good governance and Chapter Six of the Constitution requires State Officers to be persons of integrity.

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

The opposite of integrity is corruption. Sections 62 and 64 of the Elections Act quoted above include the term “corruption” in the acts that constitute the election offences of bribery and treating. Corruption is defined the act of **“dishonesty in return for money or personal gain.”** A person who bribes for anything cannot, by any stretch of imagination, therefore be said to be a person of integrity and should therefore not be allowed to hold any office depicting leadership. As such the 3rd Respondent in this case is short of the integrity test and should not be allowed to lead the Honourable people of Abothuguchi Central Ward, consequently, if one engages in bribery, treating or commits any other election offence, his election violates the electoral law principle of **“free and fair election”** contained in the Constitution, the Elections Act and the Election Regulations. Stating this point of freedom of choice in elections in the case of *Azhar Hussein v. Rajiv Gandhi* [the Supreme Court of India said:

“...the results of the Election are subject to judicial scrutiny and control ... to ascertain that the 'true' will of the people is reflected in the results

“...In order that the "true will" is ascertained the Courts will step in to protect and safeguard the purity of Elections, for, if corrupt practices have influenced the result, or the electorate has been a victim of fraud or deception or compulsion on any essential matter, the will of the people as recorded in their votes is not the 'free' and 'true' will exercised intelligently by deliberate choice. It is not the will of the people in the true sense at all. And the Courts would, therefore, it stands to reason, be justified in setting aside the election in accordance with law if the corrupt practices are established...” It is also our submission to this honourable court that should the 3rd respondent deny knowledge of the culprits arrested having been caught buying out leadership, and should the burden of proof be shifted to the petitioner to prove that indeed the said arrested persons were a direct representation of the 3rd Respondent, we would like to draw the Courts’ attention to the statement at Paragraph 113 of Halsbury’s Laws of England, Vol. 153rd Edition which succinctly expresses this point thus:

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

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

And now to the issue of improper influence, the Supreme Court in *Raila Odinga 2017* held that improper influence occurs when “there was interference or an attempted interference with the exercise of any electoral right (Paragraph 318 -321 citing *Chaan Lal Sahu & Others*) The Court noted that the **“test of undue influence is where the... Respondents” conduct created an impression in the mind of a voter that adverse consequences would follow as a result of their exercise of their political choices.”** ⁸See also *Anthony Luyundi Isayi v Independent Electoral & Boundaries Commission [2013] eKLR; Watson v Electoral Commission [2015] NZHC 666*. The Ugandan Supreme Court agrees. *Rtd Col Dr. Kiiza Besigye v Yoweri Kaguta Museveni & another Petition No. 1 of 2001*(where the Court stated that *“the entire election process should have an atmosphere free of intimidation, bribery, violence, coercion or anything intended to subvert the will of the people.”*) We would again like to refer to the affidavit of Lucy Ngugi where she avers that the Petitioner’s agents had been nearly attacked on their way to the polling station as well distraction in the queues to people who pledged allegiance to the petitioner which summarily amounts to intimidation and to large extent, undue influence

In the above context, Section 10 of the Election Offences Act provides:

Undue Influence

(1) A person who directly or indirectly in person undue influence or through another person on his behalf uses or THREATENS TO USE ANY FORCE, VIOLENCE including sexual violence, restraint, or material, physical or spiritual injury, harmful cultural practices, damage or loss, or any fraudulent device, trick or deception for the purpose of or on account of??

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

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

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

(2) ...

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

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

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

What then is the meaning of the term “*undue influence*” in the context of an electoral malpractice and particularly as used under Section 10 above? In India, the meaning of the term ‘*undue influence*’ is found in Section 171(C) of the Penal Code which defines the offence of undue influence at an election as:

Undue influence at elections

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

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

(a) THREATENS ANY CANDIDATE OR VOTER, OR ANY OTHER PERSON IN WHOM A CANDIDATE OR VOTER IS INTERESTED, WITH INJURY OF ANY KIND, OR

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

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

Although the wording of the Indian Penal Code quoted above is materially different from Section 10 of the Election Offences Act, the meaning injected into the above legal provisions, shows its applicability in the Kenyan context. The Supreme Court of India in the consolidated cases of *Charan Lal Sahu & Others v. Giani Zail Singh and Another; Nem Chandra Jain v. Giani Zail Singh; Charan Singh and Others v. Giani Zail Singh* [117] thus explicitly stated that the test was whether there was an interference or an attempted interference with the free exercise of any electoral right. Similarly, Section 10 above, whose marginal note is ‘*undue influence*’, forbids any impediment of a person’s exercise of the electoral right. In India, the electoral right of an elector, is defined under Section 171A(b) of the Indian Penal Code, as “the right of a person to stand, or not to stand as, or to withdraw from being, a candidate or to vote or refrain from voting at an election.” This is comparable to Article 38(3) of our Constitution which confers certain political rights on every citizen without any restrictions including the right to vote by secret ballot in an election.

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

It is our humble submission that the election for Abothuguchi Central Ward was conducted in an environment characterized by many systematic and systemic illegalities and irregularities that fundamentally compromised the integrity of the election, contrary to the principles laid down in the Constitution. The alleged illegalities and irregularities, ranged from blatant non-compliance with the law, to infractions of procedure, some of which were requirements of the laws and regulations relating to the election, while others, had been put in place by the 2nd respondent, for the management of the elections.

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

- (i) by secret ballot;
- (ii) free from violence, intimidation, improper influence or corruption;
- (iii) conducted by an independent body;
- (iv) transparent; and,
- (v) administered in an *impartial, neutral, efficient, accurate and accountable manner*.

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

(a) whatever voting method that is used, the system is simple, accurate, verifiable, secure, accountable and transparent;

(b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;

(c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer, and

(d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place including the safe keeping of election materials. [Emphasis supplied] *Delays*

At this point we would like to make reference to the Affidavit of Richard Kathurima Muriungi that the results were announced on 11/8/2017 depicting huge delays which consequently means that the process was in contravention of the provisions that the whole system ought to have been simple. Had it been simple, the delays would not have necessitated. *Article 86 focuses on system of election, and that most importantly, the Constitution imposes an obligation on the 1st respondent to ensure that the voting system used is simple, accurate, verifiable, secure, accountable and transparent. This is meant to avoid the possibility of manipulation of the system.*

Voting, Counting and Tabulation of Results

In the case of *Karanja Kabage v. Joseph Kiuna Kariambegu Nganga & 2 Others*^[108] Court observed that:

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

It is the testimony of the petitioner that he was another candidate bearing his surname and since only the surname was used to announce for both of their results, there is huge possibility that there were discrepancies between the results declared versus the actual results.

Also, the petitioner through his affidavit submits that at some point he found the agents asleep while the returning officer was counting votes which is in contravention of the provisions of the law and whose attempt to recount indeed showed a discrepancy.

Article 86 of the Constitution which requires that:

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

(a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;

(b) the votes cast are counted, tabulated, and the results announced promptly by the presiding officer at each polling station;

(c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and

(d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of elections materials.

FORM 36A DISCREPANCIES

Despite evidence to the contrary all the forty four (44) Form 36A's bear the 8th of August 2017 as the date when results were counted and announced.

Form 36A FROM Ruiga Primary school shows counting and announcement of results was done on the 8th of August though evidence from the petitioner and the respondents shows counting started at 2 a.m on the 9th of August 2017.

Form 36A from Rwangua Primary School was never signed by the Presiding officer and the 2nd respondent in her testimony admitted to not have been aware of same.

Form 36A from Kirigara Primary School was never dated by the presiding officer.

POLL STATION DIARIES WITH DISCREPANCIES

1. The poll station diary for St. Mary Immaculate stream 01 at page 16 shows no voters turned up to vote between 0900hrs and 1300hrs but a record turnout is recorded in the evening. Further at Page 26 the 2nd respondent signed the poll diary on the 10th of August 2017.

2. The poll station diary for Mariene Primary stream 01 at page 25 shows no tallying centre agents certified that all seals are intact and the polling station results are forwarded to the constituency returning officer. That further on page 25 the presiding officer did not date the time he declared the contents of the diary to be a true reflection.

3. The poll station diary for Kariene primary stream 05 at page 18 does not show the time at which the polling station closed. That further at page 25 no tallying center agents certified that all seals are intact and the polling station results are forwarded to the constituency returning officer. Further at Page 26 the 2nd respondent signed the poll diary on the 10th of August 2017.

4. The poll station diary for Ntonyero primary stream 01 at page 14 shows the polling station opened at 7.00 a.m since the KIEMS KIT was not working. Further at Page 26 the 2nd respondent signed the poll diary on the 10th of August 2017.

5. The poll station diary for Mariene Coffee Research Foundation-01 at page 24 it's reported that some agents had money to buy votes outside the polling station. That further at page 25 no tallying center agents certified that all seals are intact and the polling station results are forwarded to the constituency returning officer.

6. The poll station diary for Rwankware Coffee Factory stream 01 at page 25 no tallying centre agents certified that all seals are intact and the polling station results are forwarded to the constituency returning officer.

7. The poll station diary for Kibarii polling station stream 01 at page 18 does not show the time the polling station closed. That further at page 25 no tallying center agents certified that all seals are intact and the polling station results are forwarded to the constituency returning officer.

8. The poll station diary for Mukuune Nursery School at page 24 it is recorded that the KIEMS KIT experienced delays between 5.35 to 7.00. However, it's not indicated if voting started at this 5.35 since the polling station was closed at 6.56p.m as recorded at page 18.

9. poll station diary for Kirigara primary school stream 02 at page 18 it is not recorded the time at which the polling station closed.

10. The poll station diary for Kiria Primary school stream 02 at page 18 it is not recorded the time

at which the polling station closed. Further at page 25 no tallying center agents certified that all seals are intact and the polling station results are forwarded to the constituency returning officer and the PO never indicated the time he declared the contents of the diary to be true.

11. The poll station diary for Ruiga AIPCA Church(Old) stream 01 at page 18 it is not recorded the time at which the polling station closed. At page 23 it is recorded that no agents affirmed the serial numbers of the ballot boxes and seals used to seal the ballot boxes at the closure of counting since they had left for their homes. Further at Page 24 it is recorded that transmission of results failed.

12. The poll station diary for Ruiga Primary School stream 02 at page 25 no tallying center agents certified that all seals are intact and the polling station results are forwarded to the constituency returning officer.

13. The poll station diary for Mariene Primary School stream 01 at page 16 its recorded the number of voters on the queue after 17:00hrs was 110 and further that the record of voters identified by printed register of voters was 398. Further at page 25 the P. O failed to record the time he declared the contents of the poll diary to be true. At page 26 the 2nd respondent signed the poll diary on the 10th of August 2017.

14. The poll station diary for Murathi Primary School stream 01 at page 16 no voting is recorded in the voter turn- out column after 1500hrs, however the number of voters on the queue after 17:00hrs is recorded as 42. Further at page 18 the polling station is recorded to have closed at 6:32 p.m.

15. The poll station diary for Mwitumura Primary School stream 01 at page 16 no voting is recorded in the voter turn-out column after 1500hrs, however the number of voters on the queue after 17:00hrs is recorded as 20. Further at page 25 no tallying center agents certified that all seals are intact and the polling station results are forwarded to the constituency returning officer. At page 24 it is recorded that the KIEMS KIT had wrong settings of the date and time displayed.

16. The poll station diary for Kariene Primary School stream 04 at page 14 its recorded the polling station opened at 9:15. Further at page 16 no voting is recorded in the voter turn-out column at 1300hrs and after 1500hrs, though the number of voters on the queue after 1700hrs is recorded as 10. At page 25 no tallying Centre agents certified that all seals are intact and the polling station results are forwarded to the constituency returning officer.

17. The poll station diary for Rware Primary stream 01 at page 25 no tallying Centre agents certified that all seals are intact and the polling station results are forwarded to the constituency returning officer and further the P.O failed to indicate the time she declared the contents in the diary to be true. At page 24 it is recorded that one clerk did not report for work and this brought a lot of challenges.

18. The poll station diary for Nkuene Primary School stream 01 at page 16 indicates the number of voters on the queue after 1700hrs to be 129. At page 18 the Presiding officer did not indicate the time the polling station closed. At page 25 the P.O failed to indicate the time she declared the contents in the poll diary to be true.

19. The poll station diary for Gaitu Primary School stream 01 at page 25 the presiding officer declared the contents of her diary to be true on the 8th of August 2017 at 2.00am way before voting started. At page 26 the 2nd respondent wrote comments and signed on the diary on the 10th of August 2017.

20. The poll station diary for Kirirwa Primary School stream 01 at page 14 its recorded the polling station opened at 0555 hrs. At page 16 it is recorded the number of voters on the queue after 1700hrs to be 121 voters. At page 25 no tallying Centre agents certified that all seals are intact and the polling station results are forwarded to the constituency returning officer.

21. The poll station diary for Rwangua stream 01 at Page 16 no voting is recorded after 1300hrs in the record of voter turn-out column but the number of voters on the queue after 1700hrs is recorded as 10. At page 18 the time of closing the polling station is recorded as 8:30. At page 24 it is recorded that the KIEMS KIT broke down. At page 25 the P.O failed to record the time at which she declared the contents of the diary to be true.

4. Is the petitioner entitled to prayers in the petition

Yes. The petitioner has proved his case that there were illegalities and irregularities rendered in the election and as such the court should invalidate the election. In contemplation of the Respondent's arguments that the irregularities maybe trivial, we wish to adopt statements of The great Lord Stephenson who once held that even trivial breaches of the election law should alone vitiate an election. This is how he put it:

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

Nearer home, we adopt the concurring opinion of Justice Professor Lilian Tibatemwa Ekirikubinza issued in the case of *Col. DR Kizza Besigye v. Attorney-General*^[100] where, notwithstanding the conjunctive nature of the Ugandan provision, she opined:

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

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

It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce 'factual' evidence to prove his/her allegations of breach, then the burden shifts and it behooves the respondent to adduce evidence to prove compliance with the law. As the Tanzanian High Court stated in the old case of *Madundo v. Mweshemi & A-G Mwanza*^[71]:

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

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

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

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

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

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

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

Further,

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

Conclusion

In the end, the Petitioner submits that it does not matter who won or was declared as the winner of the Ward election in Abothuguchi Central; the validity of the Election was irredeemably marred and compromised.

10. SUBMISSIONS FOR THE 1ST and 2ND RESPONDENT

Counsel for the 1st and 2nd Respondents submits as follows in opposition to the Election Petition dated 6th September, 2017.

1. PLEADINGS

1. The **Petitioner** commenced this matter on 6th September, 2017 via an **Election Petition dated 6th September, 2017** challenging the election of the 3rd Respondent as the **Member of County Assembly, Abothuguchi Centra Ward** during the general elections held in Kenya on 8th August, 2017.

2. Paragraphs 1 – 3 of the Petition gave description of the parties followed by the sub –heading, **Grounds for the Petition / Facts of the Case** under which the Petitioner pleaded what he believed to have been breaches that vitiated the elections. In a nutshell he pleaded that the elections were not administered in an impartial, neutral, efficient, accurate and accountable manner contrary to **Article 81 (e) (5) of the Constitution** as read together with **Sections 39, 44 and 44A of the Elections Act, the Regulations** made there under and **Section 25 of the IEBC Act**. He further pleaded that data entered into the KIEMS Kits was inconsistent with data entered into forms 36A, that data that was being displayed publicly by the 1st Respondent at the Sub – County tallying centre was inconsistent with data in forms 36A, that information recorded in forms 36A is inconsistent with information recorded in forms 36B and that the results were not accurate or verifiable. He pleaded that tabulation of the results is inaccurate and internally inconsistent, that the inaccuracies and inconsistencies account for at least 1,000 votes, that the 2nd Respondent selectively manipulated, engineered and/or deliberately distorted the votes cast and counted in favour of the 3rd Respondent, that there was deliberate and / or systemic and systematic interference and manipulation of the results, that the results contained in forms 36A are materially different from what the 1st Respondent publicly relayed and continues to relay in its website or portal, that the 1st Respondent abetted and allowed electronic media and news channels to relay and continue to relay results which have no factual or legal basis in order to create a false narrative and national psyche in preparation to steal the election and that at the time of declaration of results the 2nd Respondent did not have most forms 36A.

3. At paragraphs 13 – 17 (both inclusive) of the petition the Petitioner set out what he believed to be contraventions of **Articles 38 and 81 of the Constitution, Section 83 of the Elections Act, the IEBC Act and Elections (General) Regulations, 2012.**

4. The **Petitioner** then **prayed for orders;**

a. That this Election Court to order the recounting of all votes from all polling stations within Abothuguchi Central Ward in the respect of the Ward contest.

b. An order for scrutiny and audit of all returns of the Abothuguchi Central Ward election including but not limited to forms 36A, 36B and 36C.

c. A specific order of scrutiny of the rejected and spoilt votes.

d. An order for scrutiny and audit of the system and technology used by the 1st Respondent in the Abothuguchi Central Ward election including but not limited to the KIEMS Kits, the server(s) and website /portal.

e. A declaration that the non – compliance, irregularities and improprieties in Abothuguchi Central Ward election were substantial and significant that they affected the results thereof.

f. A declaration that the Abothuguchi Central Ward election held on 8th August, 2017 was not conducted in accordance with the Constitution and the applicable law rendering the declared results invalid, null and void.

g. A declaration that the 3rd Respondent was not validly declared as the MCA elect and that the declaration is invalid, null and void.

h. An order directing the 1st Respondent to organize and conduct fresh ward elections in respect to Abothuguchi Central Ward in strict conformity with the Constitution and the Elections Act.

i. Costs of the Petition.

j. Any other orders that the honourable court may deem just and fit to grant.

5. The Petition was accompanied by a **Supporting Affidavit sworn by the Petitioner on 6th September, 2017.** In that affidavit the Petitioner largely regurgitated the averments contained in the Petition. Also filed contemporaneously with the Petition was list of **Petitioner's witnesses** and **witness affidavits** by **BRIDGET KAWIRA, KENNEDY MURIUNGI** and **LILIAN IKIUGU** all sworn on **6th September, 2017.** Suffice it to point out at the very outset that at the trial of the matter BRIDGET KAWIRA was not availed to testify as scheduled on 10th November, 2017 and pursuant to an oral application by the 1st and 2nd Respondents' counsel the said witness affidavit was struck off the record and does not form part of the evidence in the case.

6. The **1st and 2nd Respondents** opposed the Election Petition by filing **Response to the Petition** dated 22nd September, 2017 and filed in court on 25th September, 2017. That Response to the Petition was **supported by an affidavit of HABIBA GODANA HALIMA, the 2nd Respondent sworn on 23rd September, 2017.** In Response the 1st and 2nd Respondents conceded that they were the ones who bore the Constitutional and Statutory mandate of conducting general elections in Kenya, that in fact they had conducted the elections of 8th August, 2017 for Abothuguchi Central Ward but they contended that those elections were conducted in accordance with the Constitutional and statutory edicts to the required standards in order to give manifest effect to the will of the voters of Abothuguchi Central Ward. They totally denied the Petitioner's claim as pleaded in the Petition and the evidence filed together with the Petition. They further averred that if there were any inaccuracies the same were minimal and occasioned by inadvertent human error and were not calculated or deliberate as alleged by the Petitioner.

7. The **1st and 2nd Respondents** in their **Response** also drew the attention of the honourable court to the provisions of **Section 83 of the Elections Act** which reads as follows;

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 results of the election.

8. The **1st and 2nd Respondents** invited the **honourable court to find as follows** :

a. The 1st and 2nd Respondents were not in breach of and did not contravene the provisions of the Constitution, the Elections Act or any other statute.

b. The 3rd Respondent was validly elected as the Member of County Assembly in Abothuguchi Central Ward, Imenti Central Constituency.

c. *The Petition lacks merit and should be dismissed.*

d. *The Petitioner should bear the costs of the Petition.*

B. ISSUES

9. At the taking of pre – trial directions on 3rd October, 2017 parties agreed on five (5) issues which were later amended and expanded on 9th October, 2017 into ten (10) **agreed issues in the Election Petition** as follows;

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

ii. **Whether security deposit was made in accordance with the law and if not what are the consequences?**

iii. **Whether the court has jurisdiction to validate late deposit by the Petitioner?**

iv. **Whether payment of security for costs and service of the Petition are substantive or procedural matters?**

v. **Whether elections held on 8th August, 2017 were conducted in accordance with the Constitution of Kenya, Elections Act and the applicable Elections Rules and Regulations?**

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

vii. **Whether there was substantive non – compliance with the Constitution, Election Act and other applicable Rules and if so what was the effect of non-compliance of the results.**

viii. **Whether the elections held on 8/08/17 were conducted in accordance with the constitution of Kenya, election act and other applicable election rules.**

ix. **Whether the petitioner is entitled to the prayers in the petition?**

x. **Who should bear the costs?**

10. The 1st and 2nd Respondents are aware of emerging current jurisprudence that does not favour appeals on interlocutory decisions in election petitions because of the time bound nature of election petitions. Such jurisprudence being to the effect that a party dissatisfied with the outcome of the election petition would encompass all matters including those on decisions taken at interlocutory stages in an appeal. It is on that premise that the 1st and 2nd Respondents shall be submitting on agreed issues numbers (i) – (vi) notwithstanding that this honourable court has already pronounced itself on those four (4) issues.

C. EVIDENCE

11. The Petitioner, **Richard Kathurima Muriungi, (P.W.1)** testified that he was a candidate for the position of Member of County Assembly for Abothuguchi Central Ward. He vied for that position on the **JUBILEE PARTY TICKET**. However, he was not declared the winner.

12. The 1st Respondent, **THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (IEBC)** declared the 3rd Respondent, **AYUB BUNDI SOLOMON**, as the duly elected Member of County Assembly for Abothuguchi Central Ward.

13. The 2nd Respondent, **HABIBA GODANA HILAMA** was sued in her capacity as the Returning

Officer at the elections which are in issue.

14. According to the Petitioner, the results, were declared in gross contravention of the Constitution, the Elections Act and its Regulations. He contended that the agents of most of the candidates were denied entry into a number of polling stations, during the voting exercise.

The allegations he made broadly put relate to:-

- i. Violations of the Constitution and the Elections Act and Elections (General) Regulations, 2012.
- ii. Electoral Malpractices; and
- iii. Commission of electoral offences

“Pre-Election Malpractices and Breaches of the Law

15. The petitioner alleged that on the 7th August, 2017 the 3rd Respondent was buying votes by bribing voters overnight with un-estimated high amounts of money and also buying national identity cards to be retained until voting was through.

“Election Date Malpractices and Breaches of the Law”

16. The Petitioner alleged that at Kiria Primary, Kariene Primary, Kirirwa Primary and Rwanderi Primary Polling Stations jubilee agents who were acting for him were barred and only allowed in late.

17. The Petitioner also alleged that at St. Immaculate Polling Centre agents complained of irregularities as clerks in room 1 & 3 were said to have been issuing more than two ballot papers for one candidate to some voters.

18. The Petitioner also alleged that change, alteration and doctoring of results was being spearheaded by the 1st Respondent’s agents while intimidating other agents including the jubilee agent.

19. It was further his case that illiterate voters, very old men and women were being misled by the 2nd Respondent’s agents and clerks to vote for the 1st Respondent.

20. He testified that the results announced by the returning officer at the sub county tallying centre did not reflect the actual votes for neither the 1st Respondent nor the petitioner.

21. The Petitioner also said that there was another candidate named Muriungi and at the time of counting the votes the clerks were only mentioning Muriungi and it was possible that most of his votes were counted for the other Muriungi.

22. He also said that there was an anomaly as his opponents had sent his people to buy votes.

23. His other complaint was that at Gatimbi St. Immaculate, tallying centre the votes as per the IEBC screens and his agent’s collection was different.

24. PW1 under cross-examination confirmed that he did not complain about the names confusion to the 1st or 2nd Respondents.

25. On the alleged voter bribery, **PW1** on cross-examination said that he had no personal knowledge of the names of the people who were buying votes and that he got the news from his chief agent. He said that he complained to police but was not aware if anyone was charged. He could not avail any evidence of report booked to a police station as per his allegations. It is submitted that the Petitioner could not personally vouch for his assertion that there was voter bribery.

26. On the issue of discrepancies with the results, the Petitioner alleges that the alterations were being done on form 36A but on cross-examination he could not tell the polling stations were the form 36A had anomalies. He also did not avail evidence of altering. He confirmed that he was only basing his claim on a strong belief that all the forms 36A were altered. He further testified that he did not report the incident nor confront any of the presiding officers and that he was not aware how many of his agents were denied the right to sign the results. We submit that the Petitioner's claim in this respect is generalized and unsupported by evidence.

27. **PW2** was the chief agent of the Petitioner. By his affidavit, **PW2** said that the 3rd Respondent was buying identity cards from voters to bar them from voting. He also said that agents were being barred from the polling stations by presiding officers. His other complaint was that at the tallying centre he witnessed confusion in entering the results.

28. On the issue of alleged voter bribery, **PW2** on cross-examination said that he had not seen the voter bribery happening and he could not identify the names of the briber. He further stated that he did not report the malpractices to the police nor to the 1st Respondent's offices in Meru. It therefore follows that the report of voter bribery allegedly received by P.W.1 from P.W.2 is unfounded and unsubstantiated.

29. On the issue of agents being denied entry to polling stations, **PW2** on cross-examination could not enumerate the polling station in which the agents were denied access. The agents did not report to the presiding officers. That claim too stands unsubstantiated and unproved.

30. On the issue of the tallying process on cross-examination **PW2** stated that he did not have evidence of any differences in forms 36A and the electronic display.

31. **PW3** testified that he was the observer for jubilee party. By his affidavit, **PW3** said that there were incidents of people buying identity cards. On cross - examination **PW3** stated that he had no personal knowledge of the names of the people who were buying votes and that he did not report the electoral malpractice. The evidence by this witness too is mere conjecture which cannot prove any electoral offence or malpractice.

32. **RDW1** testified that she, as the **Returning Officer** for Imenti Central Constituency. That all stations started work very well. That all electronic transmission of the result was done 100%.

33. She testified that all that an agent needed was accreditation letter, identification documents and an oath of secrecy to be allowed to enter the polling station.

34. She confirmed that she did not receive any report on commission of any election offence or complaints on performance of staff duties whether by her or by her team of electoral officials.

35. She confirmed that in filling form 36B she relied on the physical forms 36A and not the electronically displayed results. After collating the results she declared **AYUB BUNDI SOLOMON** who got **7,750** as the **elected Member of County Assembly for Abothuguchi Central Ward after he had garnered the majority votes.**

36. On the issue of seals **RDW1** on cross - examination testified that all the ballot boxes were intact at the time of delivery and there were no seals un-accounted for.

37. **RDW1** confirmed that she did not make any correction to forms 36A as the same could only be done at the polling station. That the forms 36A are capped with ballot papers and so are genuine IEBC documents.

Burden of proof

38. The burden of proof is on the Petitioner to prove the allegations he makes to satisfy the court that the elections as held were not free and fair. The Supreme Court in **Raila Odinga & 5 Others v The IEBC &**

3 Others Election Petition No. 5 of 2013,

“...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 authority’s departures from the prescriptions of the law.”

And further that:

“...it behoves the person who thus alleges, to produce the necessary evidence in the first place – and thereafter, the evidential burden shifts, and keeps shifting.

39. It is clear that the Petitioner has the duty to show that the breaches complained of went to the substance of the election. It is not enough to simply point out that there were breaches of the law. The twin elements must be established for a petition challenging an election to succeed. This obligation also points out to the standard of proof required. Judicial pronouncements have given insight in this regard, most recently by the Supreme Court in the case of *Raila Odinga & 5 others v The IEBC & 3 Others* (Supra). The Court observed that:

“...judicial practice must not make it burdensome to enforce the principles of properly-conducted elections which give fulfillment to the right of franchise. But at the same time, a petitioner should be under obligation to discharge the initial burden of proof, before the respondents are invited to bear the evidential burden. The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable-doubt – save that this would not affect the normal standards where criminal charges linked to an election, are in question. ..”

40. The degree of proof varies depending on the nature of allegations made. This is because where election petitions are concerned, certain allegations may only be of the civil kind, thus, the normative standard of balance of probabilities suffices. Whereas, where allegations made amount to criminal offences, being electoral offences under the laws, then the higher standard of proof is required.

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

41. The Respondents filed an application dated 2nd October, 2017 seeking for orders:-that the Petitioner’s Petition dated 6th September 2017 and filed in this Honourable Court on the same day, challenging the election of the 3rd Respondent as the Member of County Assembly for Abothuguchi Ward, Imenti Central Constituency be dismissed for want of compliance with mandatory statutory requirements on time, service and *deposit of security*.

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

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

a. Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.

b. Petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and

Boundaries Commission.

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

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

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

- a. Delivery at the constituency, county or head office of the Commission.
- b. *Delivery at such other office as the commission may notify.*
- c. An advertisement that is published in a newspaper of national circulation

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

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

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

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

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

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

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

46. It is imperative to note that the affidavit of service was only filed after the Respondents filed an application to strike out the petition for want of service. This appears to have been clearly an afterthought. In the case of ***JUSTUS M. OMITI V WALTER ENOCK OSEBE NYAMBATI KISII ELECTION PETITION NO.1 OF 2008***, Mohammed J as he then was when dealing with a similar situation stated as follows:

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

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

SECURITY FOR COSTS

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

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

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

50. It is not in dispute that the petition herein was filed on 7/09/2017. It is also not in dispute that the security by deposit of money had not been completed until eight days after the ruling of 24/10/2017. The relevant provisions of the law governing the security by deposit of money are found in Section 78 of the Act which provides as follows:-

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

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

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

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

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

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

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

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

before it.”

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

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

Bribery and Treating

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

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

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

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

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

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

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

56. **PW2** in his testimony claimed that on 07/08/17 he was informed by his agents that the 1st Respondent was buying identity cards from voters to bar them from voting. It is therefore evident that **PW2** could not personally vouch for his assertion that there was voter bribery.

57. Bribery on the Polling Day itself, in the affidavit in support of the Petition, the Petitioner, **PW2** and **PW3** state that there was an anomaly as the 1st Respondent had sent his people to buy votes. **PW1** on cross-examination said that he had no personal knowledge of the names of the people who were buying votes and that he got the news from his chief agent. That he complained to the police and he was not aware if anyone was charged.

58. The seriousness of the charge of bribery calls for firmness in the evidence given by the petitioner since the name of the giver is as important as the name of the receiver. Evidence given by **PW1** lacks firmness and falls short of the standards required by the Law.

59. **PW2** on cross-examination said that he did not witness and he was only informed by people. **PW3** on cross-examination also stated that he was informed of the vote buying and he didn't record statement of the vote buying.

60. It is evident that **PW2** and **PW3** could not vouch for their assertion that there was voter bribery as they failed to give the names of any voter who had been bribed by the 3rd Respondent.

61. Even if it had been proved that the Assistant Chief and Syco had bribed voters as stated by **PW3** the Petitioner had not provided any proof that the voter bribery was being done in the knowledge and consent or approval of the 3rd Respondent.

62. The Petitioner must prove voter bribery by cogent, reliable evidence and establish the twin limbs – that the malpractice took place on the one hand and the criminal act was done by the 3rd Respondent, directly or indirectly on the other hand. Where the alleged act is said to have been done by agents of the 3rd Respondent, that connection must be comprehensibly established. It is not enough for the Petitioner to show that the alleged proxies were the kinsmen of the 3rd Respondent; the Petitioner had the duty to show that they indeed engaged in voter bribery and they did so as agents of the 3rd Respondent or with his consent.

In **MAHMUD SIRAT V ALI HASSAN ABDIRAHMAN & 2 OTHERS [2010] eKLR** the court stated as follows:-

“The petitioner and his witnesses did not adduce any evidence to connect the persons who were allegedly bribing voters with the 1st respondent. The credibility of the petitioner’s case on the allegation of bribery would have been boosted if the petitioner procured a voter or voters to testify in support of his case in regard to the allegations of bribery. Having evaluated the evidence adduced in this regard, this court is of the considered view that the allegation of bribery of voters by the 1st respondent was not proved”.

Misdirection of assisted voters

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

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

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

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

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

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

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

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

“1.

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

To Act against this declaration is to commit a crime.

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

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

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

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

68. We submit that the petitioner did not adduce sufficient evidence on the allegations that the presiding officer was working in collaboration with agents to favour the 3rd respondent by spoiling the votes of the illiterate voters. On cross examination PW3 stated that he saw a mark and a dot in the ballot paper but he did not see the agent who marked it.

69. This clearly shows that **PW3** assertions lacked basis and was founded on mere allegations as he could not give the name of the agent who marked the ballot paper.

AGENTS

70. The 1st Respondent has stated that agents needed to have “Oaths of Secrecy” letters, before they could be admitted into the polling stations.

And agents of all parties or candidates are to be accorded the same treatment by the IEBC, in that respect.

In any event, **Regulation 62(3)** makes it clear that;

“The absence of agents shall not invalidate the proceedings at a polling station.”

71. It was also the Petitioner’s case that the Petitioner’s party agents were barred by the Presiding Officers from entering the polling stations. The Petitioner did not call any witness to testify in support of

this assertion. He did not in his own testimony mention the names of his agents so barred. We submit that there is no basis upon which to find the truth in the above assertions.

72. The Petitioner further told the court that he had agents in polling stations. But notwithstanding the said agents, the petitioner went on to testify, that he had no evidence of the difference in the votes in form 36A and the final tallying.

Although the petitioner had agents, he did not demonstrate that the votes allocated to him or to any of the other candidates were not accurate.

In **JOHN KIARIE WAWERU Vs BETH WAMBUI MUGO & 2 OTHERS, ELECTION PETITION NO. 13 of 20087**, Kimaru J. said;

“I accept the explanation given by the 1st Respondent that any diligent candidate was expected to have tallied the results from the various polling stations before the results were finally officially announced by the 2nd Respondent, as a returning officer, at the tallying centre. The petitioner could not give a single figure of the votes that he secured in any of the 28 polling centres. It was therefore, incomprehensible that the petitioner could expect the court to arrive at a decision in his favour.....”

ALTERATIONS IN FORM 36A

73. The Petitioner alleges in his Petition that there were alterations in Forms 36A in all polling stations which were superficially changed on paper. On cross-examination he testified that he could not tell the polling stations where the form 36A had anomalies and that he did not avail evidence of the altering though he had a strong belief that the form 36A was altered. He further testified that he did not report the incident nor confront any of the presiding officers and that he was not aware how many of his agents were denied the right to sign the results.

74. The matters raised by the Petitioner can only be established by scrutiny. In order for the Court to look into allegations of unjustified alterations in electoral forms, and thereby determine the effect of the same, a scrutiny exercise must be done. The scrutiny must have been specifically requested for or the Court would have pursuant to **Section 84** of the **Elections Act** on its own motion ordered for scrutiny. Scrutiny was carried out and all parties were present.

75. The purpose of scrutiny as discussed in the case of ***Dickson Daniel Karaba v. Hon. John Ngata Kariuki, & 2 Others Civil Appeal (Application) No. 125 of 2008*** is to ascertain whether there exists any material discrepancies between the results captured in Form 36A which necessitates the determination of the number of votes cast and obtained by each candidate. It is only after this exercise that the court can form an opinion whether the results obtained in the forms are correct.

Scrutiny and recount

76. The results from the scrutiny clearly showed that the **results in 10 polling stations were accurate and corresponded with what was recorded in form 36A**. However in **Mariene Primary School the 3rd Respondent garnered 132 votes during recount which was different from the 131 votes recorded in form 36A**. In **Mugambone Primary School the 3rd Respondent garnered 260 votes contrary to the 261 votes recorded in form 36A** and in **Murathi Primary School the 3rd Respondent garnered 363 votes during recount which was different from the 362 votes recorded in form 36A**.

77. From the foregoing it is clear that there were no alterations on form 36A as alleged by the petitioner. The allegations by the Petitioner lack any basis. **The 3rd Respondent garnered the majority of the votes and was therefore validly elected as the winner of Member of the Member of County Assembly for Abothuguchi Central Ward.**

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

78. In the case of *Morgan & Others v. Simpson & Another* (1974) 3 All ER the Court, in summing up the standard to be considered in determining whether or not an election should be declared invalid reasoned that,

“...an election court was required to declare an election invalid (a) if irregularities in the conduct of elections had been such that it could not be said that the election had been conducted as to be substantially in accordance with the law as to election, or (b) if the irregularities had affected the results. Accordingly, where breaches of the election rules, although trivial, had affected the results, that by itself was enough to compel the Court to declare the election void even though it had been conducted substantially in accordance with the law as to elections. Conversely, if the election had been conducted so badly that it was not substantially in accordance with the law, it was vitiated irrespective of whether or not the result of the election had been affected...”

79. These sentiments have been captured and are codified in our laws under **Section 83** of the **Elections Act** which provides 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.”

80. The Petitioner has not gone a step further to prove that any irregularities pointed out materially affected the outcome of the results that were declared by the 2nd Respondent. In spite of the complaints, the Petitioner has not made a case on how those alleged alterations affected the integrity of the results in any way. We submit that if there was non-compliance with the provisions and principles of the law, it must be established that such non-compliance affected the results in a substantial manner.

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

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

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

82. The Petitioner had the obligation of proving the allegations and going a step further to demonstrate how he was substantially prejudiced as a result of the cited contraventions. The Petitioner has not shown that the 1st and 2nd Respondents failed to comply with **Article 86** of the **Constitution** and all other relevant provisions of the law in the conduct of the elections.

83. The law is alive to the fact that the holding of elections may not be picture perfect and errors may occur. The mere presence of irregularities does not vitiate an election. The burden remains on the petitioner to prove his allegations, and only then will the burden shift. We submit that the Petitioner did not discharge the evidential burden.

84. The objective of **Section 83** is to insulate the electoral process from abuse and frivolous claims. We submit that the elections in question did meet the credibility test. The Petitioner has not proved any election offence or malpractice against the 1st and 2nd Respondents.

Whether the petitioner is entitled to the prayers in the petition

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

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

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

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

Who should bear the costs of the suit?

We submit that it is the Petitioner who has brought everyone in this Petition to court. We urge the honourable court to find that the Petitioner has not discharged his mandatory evidential burden of proving the allegations contained in the Petition to any or any of the required standards. The honourable ought to further note that owing to the Petitioner’s baseless allegations which are the pillars upon which the Petition rests, the 1st and 2nd Respondents have defended the Petition at tremendous expense and inconvenience, inclusive but not limited to supplying to the parties copies of electoral materials including such materials as were readily available to the candidates agents at the polling stations and tallying centres, transport subsistence and accommodation by counsel from Nairobi, transport and subsistence by the 2nd Respondent. In addressing its mind to costs the honourable court is urged to further take into account the strain and stress which a strictly time – bound litigation inevitably exerts upon counsel appearing in the matter. Consequently we humbly submit that the 1st and 2nd Respondents be awarded costs of the Petition to be assessed by the honourable court.

The learned counsel for the 1st and 2nd Respondents prays that this Honourable Court finds and holds that:-

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

The Petitioner should bear the costs of the Petition

10. SUBMISSIONS FOR THE 3RD RESPONDENT

The learned counsel for the 3rd respondent submitted under the following heads.

- A. Burden of proof
- B. Standard of proof
- C. Non-compliance with the law
- D. Evidence by witnesses
- E. Conclusion

The learned counsel on burden of proof submitted that; as regards who ought to bear the burden of proof and what the burden is, we can do no better than to cite and rely the Supreme Court decisions petition Nos. 3, 4 and five of 2013 RAILA ODINGA & OTHERS –VERSUS- IEBC at paragraphs 195 and 196. The court stated as follows;-

[195] there is, apparently a common thread in the fore going comparative, jurisprudence of burden of proof in election cases. Its essence is that an electoral cause is established much in the same way a Civil cause, the Legal burden rests on the petitioner, but depending on the effectiveness with which he or she discharges this. The evidential burden keeps shifting, ultimately of course it falls to the court to determine whether a firm and un answered case has been made.

[196] we find merit in such a judicial approach as is well exemplified in the several cases from Nigeria, where a party alleges non conformity with the electoral law, the petitioner must not only proof 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 soleminiter esse acta”; all acts are presumed to have been done rightfully and regularly so, the petitioner must set out by raising firm and credible evidence of the public authorities’ departure from the prescriptions of the law.

Simply put, the legal burden rests with the petitioner to show that there was non-conformity with the law on the part of the respondents. The petitioner must raise firm and credible evidence of department on the part of the respondents from the prescriptions of the law. The said supreme court decision reflects the general position which has been taken in election matters, even in the old electoral regime such as the case of **NTWIGA –V- MUSYOKA & 3 OTHERS NO 2 2008 KLR (EP) The court cited MOHAMED JAHARI-VS-SHARIF NASSIR A. TAIB ELECTION PETITION No 9/1983**, where it was held **“the burden of proof throughout rests with the petitioner and the quality of evidence that is advanced is to be considered with a thoroughness and gravity which is commensurate with the dire consequences that can follow by virtue of the provisions of section 6 of the National Assembly and presidential elections Act and section 35 of the Constitution.”**

B. STANDARD OF PROOF

The Supreme Court in Raila Odinga & others VS IEBC also laid to rest the debate as to what standard of proof ought to be applied in election matters. In paragraph 203 of the Judgement in the following words.

“[203] The lesson to be drawn from the several authorities is in our opinion that this court should freely determine its standard of proof, on the basis of the principles of the constitution, and of its concern to give fulfillment to the safe guarded electoral rights. As the public body responsible for elections, like other public agencies, is subject to the national values and principles of governance declared in the constitution. [Article 10] Judicial practice must not make it burdensome to enforce the principles of properly conducted elections which give

fulfillment to the right of franchise. But at the same time a petitioner should be under obligation to discharge, the initial burden of proof before the respondents are invited to bear the evidential burden. The threshold of proof should in principle be above the balance of probability, though not as high as beyond reasonable doubt –save that this would not affect the normal standards, where criminal charges linked to an election are in question”.

In case of data specific electoral requirements such as those specified in Article 38 (4) of the constitution, for an outright win in a presidential election, the party bearing the legal burden of proof must discharge beyond any reasonable doubt. The Supreme Court also stated as follows in paragraph 300 of the judgement.

“[300] it follows that the court must hold in reserve, the authority, legitimacy and readiness to pronounce, on the validity of the occupancy of that office if there is any major breach of the electoral law as provided for in the constitution and the governing law”. He urged the court to adopt, the above standard which he submitted is the correct standard. The threshold of proof should be in principle, above a balance of probabilities, though not as high as beyond reasonable doubt. As regards Criminal Charges linked to the elections the same should be proved beyond reasonable doubt. He submitted that the averments of the petitioner in the affidavit in support of the petition sworn on 6th September 2017 and in all other witnesses’ affidavits in support of the petition herein-allegations border on Criminal charges linked to this election must be proved beyond reasonable doubt. Allegations of bribery, treating, intimidation, voter buying e.t.c **MUST BE PROVED BEYOND REASONABLE DOUBT.** Once again, the petitioner has woefully failed. the learned counsel for the 3rd respondent Mr. Ondari in his submission raised the grounds upon which this petition is based as hereunder; -

- 1. The petitioner avers that in all polling stations within the constituency the data entered into the KIEMS Kits was not consistent with the information and data from the respective forms 36A.**
- 2. The petitioner avers that the data that was being displayed publicly by the 1st respondent at the sub county tallying center was not consistent with the information and data in the respective form 36A.**
- 3. As a result of the foregoing the 2nd respondent did not administer the Abothuguchi Central ward Election in an efficient, Accurate and accountable manner as required under the law and in contravention of Article 81(e) of the constitution.**
- 4. The information in forms 36A is not consistent with the information recorded in forms 36B as required and legitimately expected.**
- 5. Therefore, whatever forms 36B were purported to have been relied upon by the 2nd respondent at the sub county tallying center and on the basis of which the final result of the parliamentary seat was declared were inaccurate as they were inconsistent with forms 36A, which were the primary documents from which they were required by law to be created.**
- 6. As a result of the immediately foregoing the forms 36B were not accurate and verifiable and consequently invalid.**
- 7. As an ultimate result declared by the 2nd respondents on the basis of impugned forms 36B was rendered invalid a nullity.**
 - i. The computation and tabulation of results in a significant number of forms 36B is not accurate, verifiable and internally consistent.**
 - 1. The additions and figures do not add up.**

2. The petitioner avers that the nature and extent of the inaccuracies and inconsistencies in the Tabulation is not clerical but deliberate and calculated.

3. The petitioner avers that the inaccuracies and inconsistencies affect and account for at least 100 votes.

i. The petitioner avers that in numerous instances the 2nd respondent selectively manipulated, engineered and or deliberately distorted the votes cast and counted in his favour thereby affecting the final results tallied.

ii. The petitioner avers that in numerous instances the 2nd respondents selectively manipulated, engineered and or deliberately distorted the votes cast and counted particularly in favour of the 3rd respondent thereby affecting the final results tallied.

iii. The petitioner avers that in a substantial and significant number of instances the 2nd respondent grossly inflated the votes cast in favour of the 3rd respondent thereby affecting the final results tallied.

iv. The grounds, information and evidence detailed in the supporting affidavits are indications of a deliberate and or systematic interference and manipulation of results.

v. The effect of the systematic manipulation and distortion of the results renders it impossible to determine who actually won. Whether the threshold for winning the election under the constitution was met.

vi. The purported results in the 1st respondent forms 36B are materially different from what the 1st respondent publically relayed and continues to relay as at the time of filing in its website or portal.

vii. The petitioner avers that the 1st respondent abetted and allowed the electronic media and news channels to relay and continue relaying the purported results which the 1st respondent was aware had no legal or factual basis.

HAS THE PETITIONER PROVED THESE ALLEGATIONS?

The answer to this question is in the NEGATIVE. The petitioner has totally failed to discharge his duty to prove the allegations on the required standard. The petitioner made an application for scrutiny and recount, which the court allowed and subsequently the exercise was conducted on 16th November 2017, at the IEBC Warehouse. The court and the parties herein had the opportunity to scrutinize, recount and make observations.

Having participated in the said exercise, we can comfortably submit without fear of any contradiction that the system of relaying of the results, tallying was conducted with utmost accuracy and precision

	POLLING STATION	IEBC'S	RESULT AFTER SCRUTINY	
1	St Immaculate	257	256	
2	Ntonyero	202	202	
3	Murathi	363	362	

4	Mariene	126	125
5	Mariene Primary	131	132
6	Kariene Primary	126	126
7	Kariene	127	127
8	Karimonga primary	141	141
9	Gaitu (034)	113	113
10	Kirigara	176	176
11	Mugambone	261	260
12	Kirirwa	69	69

From the scrutiny conducted and the tabulation above, twelve polling stations out of the total 44 polling stations it can largely be concluded that the tallying was proper, accurate, fair, accountable and proper.

It may further be remembered that the 3rd respondent had won by 7,750, votes against the petitioners 7476 votes. The margin is 274 votes.

OBSERVATIONS FROM THE SCRUTINY EXERCISE

1. No single form 36A, was changed, altered, manipulated in favour of the 3rd respondent or any other contestant.
2. The entries and datas in all Form 36A were fairly accurate.
3. No error or mistake was observed in all form 36A, and no evidence of tampering was noted.
4. The entries were verifiable, additions and Tallying correct save for very minor differences of one to 2 votes at most.
5. There was a difference of one vote noted in St Immaculate (1) Murathi (1) Mariene Primary (1), Mugambone (1).

The total number of votes could not exceed 5 votes at most. THIS IS A FACT If the petitioner alleges non-compliance with aspects of the Law, the petitioner ought to have shown that if the non-compliance had not occurred, he might have won the elections. To make a case for nullification, of an election the petitioner needs to go further and prove that the breach of the provision resulted in the election not being conducted substantially with the principles laid down both in the constitution and the Act. (Olusola Adeyeye -vs- Simeon Oduoye). A petitioner cannot file a petition and allege non-compliance with provisions of the Act without more and expect a verdict in his favour. Such a verdict is not granted as a matter of course. Such non-compliance must be proved specifically and it must also be established that the non-compliance has affected the result of the election substantially. The petitioner has woefully failed to establish his case. [Josph Olujimi Kolawole-Vs- Babatunde Raji Fashola & others] The petitioner was unable to produce his own tabulation of results or give authentic figures of

his own votes, and clearly he couldn't have been able to place before the court, the authentic figures scored by the parties in the elections. For in proving falsification of result in an election petition, it's basic that there should be existence of at least two results of which one is genuine while the other considered falsified. Section 83 of the Election Act No 24/2011 states and I quote. " 83 No election shall be declared to be void by reason of non- compliance with any written Law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the constitution and in that written Law or that the non-compliance did not affect the result of the election."

THE EVIDENCE OF THE PETITIONER AND HIS WITNESSES

In very precise terms, the evidence of the petitioner and his witness is shaky, unreliable, based on hearsay and cannot sustain the test of cross examination. The testimony of the petitioner, and his witness to wit; - chief agent LILIAN NGUGI PW2, PW3 KENNEDY MURIUNGI were deeply shaken during cross examination by Counsel for the respondents. Their evidence did not add any value to the petitioner's case. The testimony fell short of expectations. The evidence can't be relied upon.

EVIDENCE BY RESPONDENTS

The 1st, 2nd and 3rd respondents took to the witness box to testify. Their evidence was simple, but accurate and straight. The 1st respondent clearly amplified the procedure and the practice relating to conduct of elections, more particularly;

- a. She put forth the law relating to observers.
- b. She amplified law and practice relating to agency.
- c. The conduct of elections particularly of Abothuguchi Central ward.
- d. In conclusion she gave a thumbs up to the whole exercise of elections within Abothuguchi Central ward.

All allegations facing the 3rd respondent for any wrong doing, i.e. vote buying, bribery, intimidation and treating, were all not proved as required by law. At best they remained mere allegations and un substantiated claims.

SECURITY DEPOSIT AND PERSONAL SERVICE COMPLIANCE

The 3rd respondent for all purposes shall rely on the submissions to the application dated 2nd October in open court and all the legal authorities relied on and restate that, any security deposited was deposited out of time and the court had no jurisdiction to extend time as purported.

In these submissions, we have heavily and ably relied on the following legal authorities;-

1. Supreme court decisions in petition Nos 3,4,5 of 2013 (Kenya) We have provided particular relevant pages for reference by court (instead of the whole bulk Judgement).
2. Olusola Adeyeye-VS- Simeon Oduoye EPT No. 67/08 (Nigeria)
3. Joseph Olujimi Kola Wole-VS- Babatunde Raji Fashiola EPN/ 01/2007 (Nigeria)
4. Ochwada-vs-Ojiambo 2008'KLR (Kenya)
5. Wekesa-vs- Ongera & another

6. The elections Act No 24 of 2011.

13. ISSUES FOR DETERMINATION

Parties herein on the **3rd of October 2017** agreed on the issues for determination being

- a. Whether elections held on the 8th August 2017 were conducted in accordance with the Constitution of Kenya, Election Act and other Applicable Election Rules?
- b. Whether there was undue or improper influence, corruption and irregularities in the conduct of the Election?
- c. Whether there was a substantive non-compliance with the Constitution, Election Act and other applicable rules and if so what was the effect of non-compliance with the results
- d. Is the petitioner entitled to prayers in the petition?
- e. Who should bear the costs?

There were additional issues raised by the 1st and 2nd respondent but the same had been subject of a ruling by this court on the 24th October 2017. The ruling is subject to an appeal of which this court cannot purport to make another determination as the same will be tantamount to hearing its own appeal.

14. PETITION BACKGROUND

An election is a formal group decision-making a process by which a population chooses an individual to hold public office. Elections have been the usual mechanism by which modern representative democracy has operated since the 17th century. Elections may fill offices in the legislature, sometimes in the executive and judiciary, and for regional and local government. Electoral reform describes the process of introducing fair electoral systems where they are not in place, or improving the fairness or effectiveness of existing systems. Electoral systems are the detailed constitutional arrangements and voting systems that converts the vote into a political decision. The first step is to tally the votes, for which various vote counting systems and ballot types are used. Voting systems then determine the result on the basis of the tally. While openness and accountability are usually considered cornerstones of a democratic system, the act of casting a vote and the content of a voter's ballot are usually an important exception. The secret ballot is a relatively modern development, but it is now a considered crucial in most free and fair elections, as it limits the effectiveness of intimidation. When elections are called, politicians and their supporters attempt to influence policy by competing directly for the votes of constituents in what are called campaigns. In most elections, there are difficulties; in many countries with weak rule of law, the most common reason why elections do not meet international standards of being "**free and fair**" is interference from the incumbent government among other reasons. Election all over the world are comprised due these practices which are usually disguised;

- a. Lack of open political debate or an informed electorate
- b. Unfair rules
- c. Interference with campaigns
- d. Tampering with the election mechanism

The contrary notion of 'electoral malpractice' refers to contests violating international standards and global norms. Problems can arise at every stage of the process, from electoral and ballot access laws favouring incumbents to lack of a level playing field in money and media during the campaigns to inaccurate voter registered, flawed counts and partial electoral management bodies. Against this

background of examination, this petition determination will focus on the evolving nature of election petitions around the world with no limit to the provisions therein.

15. STATUTORY PROVISIONS

The following laws directly govern the electoral process in Kenya;

- a. Elections Act, 2011
- b. The Election Laws(Amendment)Act, 2016
- c. Elections Offences Act, 2016
- d. The Political Parties Act, 2011
- e. The independent Electoral and Boundaries Commissions Act, 2011
- f. The constitution of Kenya, 2010

Having laid the basis behind the whole system of elections in Kenya. I must note that the Constitution grants 4 cadres of right to participate in the electoral process. These rights include; -

- a. Right to be registered as a voter**
- b. Right to vote by secret ballot in any election or referendum**
- c. Right to be a candidate and if elected, right to hold a public office**
- d. Right to join and participate in a political party.**

It is against these constitutional thresholds that forms the key grounds in which an election petition is held. The basis behind every election is to ensure that the process is conducted in a fair and free environment. **Under Article 1(1) of the Constitution of Kenya**, provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.

Article 1(2) provides that the people may exercise their sovereign power either directly or through their democratically elected representatives.

Under Article 22 of the Constitution which provides that “every person has the right to institute court proceedings claiming that a right or fundamental freedom in the bill of rights has been denied, violated or infringed or is threatened. **Under Article 38(2) of the Constitution of Kenya** provides that “**every citizen has the right to free, fair and regular elections based on the universal suffrage and the free expression of the will of the electors for-**

- a. Any elective public body or office established under this Constitution or
- b. Any office of any political party of which the citizen is a member.

Article 50 of the Constitution provides that “**every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.** Under **Article 50(2)** provides that **every accused person has a right to a fair trial-----**. Under **Article 87 of the Constitution of Kenya** provides that “**parliament shall enact legislation to establish mechanism for timely settling of electoral disputes**”. Under **Article 159(1)** provides that judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.

In my determination I will also be guided by the Elections Act, No 24 of 2011 and more particularly the following provisions of the law;

Under **Section 76(1) of the Act**, which provides that **“to question the validity of an election shall be filed within twenty-eight days after the date of declaration of the results of the election and served within fifteen days of presentation”**. Under **Section 80 of the Act**, which provides the powers of the Election Court in dealing with the Election petition. Under **Section 83** which provides 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 results of the election”**.

Under **Elections(General) Regulations, 2012** this court will examine the following;

Under **regulation 66(1)** subject to regulation 64, voting shall commence at 6 o'clock in the morning and end at 5' o'clock in the afternoon on the polling day. Under regulation 66(2) it provides that **“notwithstanding sub regulation(1), a person who is on queue for the purposes of voting before 5 o'clock in the afternoon shall be allowed to vote despite the fact the voting time may extend to after 5 o'clock”**.

Under regulation 80 on recount provides that **“a candidate or agent, if present when the counting is completed, may require the presiding officer to have the votes rechecked and recounted or the presiding officer may on his or her initiatives, have the votes recounted; provided that the recount of votes shall not take place more than twice”**.

Having laid a basis of statutory provisions covering the issues raised in this petition this court now turns to the petition to determine whether the petitioner had laid a credible ground for the prayers sought. In determination of these issues this court will make a distinction of every issue raised.

12. whether the election on the 8th August 2017 were conducted in accordance with the constitution?

In determination of the issue raised by the petitioner this court will seek an interpretation of the section of the law that is said to have contravened. To make a fair determination this court must bear in mind the guiding principles as was stated in the **PETITION NO 56 OF 2017, COUNCIL OF COUNTY GOVERNORS VERSUS ATTORNEY GENERAL AND ANOTHER**. It was held that under Article 259 of the Constitution, the court is enjoined to interpret the constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the bill of rights and in a manner, that promote good governance. In exercising its judicial authority, this court is obliged under Article 159(2)(e) of the Constitution to protect and promote the purposes and principles of the Constitution. It is important to note as amply put by the learned Judge in the above quote case, that Constitutional questions must be determined in formidable terms guided by some constitutional principles that transcend the case at hand and which are applicable to all comparable cases. Court decisions cannot be had adhoc but must be justified and perceived as justifiable on more general grounds reflected in previous case law and other authorities that apply to the instant case. A constitutional order is a document sui generis to be interpreted according to principles suitable to its particular character and not necessarily according to the ordinary rules and presumptions of statutory interpretation. It is important to give full recognition and effect to the fundamental rights and freedoms. A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. The recognition of the sanctity of the Constitution and its special character calling for special rules of interpretation was captured in the decision of the High Court of Kenya in the case **ANTHONY RITHO MWANGI AND ANOTHER VS ATTORNEY GENERAL** where the court stated that **“our constitution is citadel where good governance under the rule of law by all three organs of the state machinery is secured. The very structure of separation of powers and independence of the three organs calls for judicial review by checking and supervising the functions, obligations and the powers of the two organs namely the executive and the legislature. The judiciary though seems to**

be omnipotent is not so, as it is obligated to observe and uphold the spirit and the majesty of the Constitution and rule of law”. Ringera J put it more clearly in *NJOYA AND OTHERS VS ATTORNEY GENERAL* where he observed that *“the constitution is a living document and not like an Act of Parliament with a living soul and consciousness, it embodies certain fundamental values and principles and must be construed broadly, liberally and purposely or teleologically to give effect to those values and principles”*. Reverting back to the instant case, the petitioner has alleged that the 1st and 2nd respondent contravened the Constitution in the manner in which they conducted the election on the 8th day of August 2017. The petitioner in his petition raised the following grounds as the area in which he felt that the same had been infringed. According to the Petitioner under **Article 81(e) of the Constitution** it is guaranteed that the election shall be free and fair; which are free from violence, intimidation, improper influence or corruption. Under Article 86, the petitioner contends that the system of the election, the casting, counting and the tallying of votes, transmission of the results; and the appropriate structures and mechanisms for eliminating malpractices. He relied on the principles as enunciated in the case *Morgan vs Simpson* by Lord Denning in which he laid the principles which was cited in the case of *Kakooza John Baptist vs. Electoral Commission & another* that “collating all these cases together, I suggest that the law can be stated in these propositions:-

- a. if the elections were conducted so badly that it was not substantially in accordance with the law as to elections, the elections is vitiated, irrespective of whether the results is affected or not
- b. if the election is so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by breach of the rules or mistakes at the polls—
- c. but, even though the elections was conducted substantially in accordance with the law as to the elections, nevertheless, if there was a breach of the rules or a mistake at the polls and it did affect the result, then the result is vitiated.

87. The petitioner in support of claim has contended that there was flouting of the governing principles as set out in Article 1,2,4,10, 35(2),38,81,86 and 249 of the Constitution, the Elections Act and the Regulations. In support of this claim, the petitioner contends in the submission by the learned counsel that there was undue or improper influence, corruption and irregularities in the conduct of the elections, untold delays in tallying, counting votes in the absence of the agents, discrepancies in the seals and discrepancies in the votes tallies. In rebuttal the 1st and 2nd respondent submitted by relying on the case of *The Supreme Court in Raila Odinga & 5 Others v The IEBC & 3 Others Election Petition No. 5 of 2013*,

“...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 authority’s departures from the prescriptions of the law.”

And further that:

“...it behoves the person who thus alleges, to produce the necessary evidence in the first place – and thereafter, the evidential burden shifts, and keeps shifting.”

The 3rd respondent also in rebuttal relied on the Supreme Court in *Raila Odinga & others VS IEBC* also laid to rest the debate as to what standard of proof ought to be applied in election matters. In paragraph 203 of the Judgement in the following words.

“[203] The lesson to be drawn from the several authorities is in our opinion that this court should freely determine its standard of proof, on the basis of the principles of the constitution, and of its concern to give fulfillment to the safe guarded electoral rights. As the public body responsible for elections, like other public agencies, is subject to the national values and

principles of governance declared in the constitution. [Article 10] Judicial practice must not make it burdensome to enforce the principles of properly conducted elections which give fulfillment to the right of franchise. But at the same time a petitioner should be under obligation to discharge, the initial burden of proof before the respondents are invited to bear the evidential burden. The threshold of proof should in principle be above the balance of probability, though not as high as beyond reasonable doubt –save that this would not affect the normal standards, where criminal charges linked to an election are in question”.

In determining this issue on constitutional contravention, I must state that the legal framework for Kenya’s electoral system is contained in Article 81 and 86 of the Constitution. In addition, **Section 39(1) (c) and Section 44(4)(5) and (7) of the Elections Act** as amended in 2016 make provision for technology. **Article 81(e) of the Constitution** establishes the principles of “**free and fair election**” as the cornerstone of the electoral system in Kenya. The article constitutionalizes and describes the environment in which elections are to be conducted. The election must be conducted in a free and fair environment and the voting must be by secret ballot. Free and fair elections is defined to include an election that is free from violence, intimidation, improper influence and corruption; the electoral process must be transparent and administered in an impartial, neutral, efficient and accurate manner. The atmosphere in which the elections are conducted determines the quality, integrity and the credibility of the electoral results. Suffice to note that an election court must determine each and every allegation pleaded in the petition. In doing so, the court must make a determination on the contested issues of fact as was decided in the case **STANLAUS RUBAGA KASUSURA & THE ATTORNEY GENERAL VS PHARES KABUYE(1982) TANZANIA LAW REPORTS AT PG 338** that “*a judgement that leaves contested material issues of fact unresolved is fatally defective because it decides nothing in so far as material facts are concerned; it is not a judgement which can be upheld or upset; it can only be rejected; the only course is for an appellate court to set it aside*”. In the case of **WILLIAM KABOGO GITAU VS GEORGE THUO & 2 OTHERS(2010) e KLR** set out the principles on which qualitative approach operates vis a vis the quantitative approach in an electoral system; **Justice Kimaru** held 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 electoral malpractices. Any malpractices which seriously impeach the process so also impeach the results coming from that process*”. The same position was also shared by **Lenaola J** in the case of **MASAKA VS KHALWALE & 2 OTHERS**. In the instant case the petitioner has broadly raised issues of conduct by the 3rd respondent which did not give a free and fair environment for the conduct of the election. It is trite law that the facts testified to by a witness must only be those which have occurred within his own personal knowledge, i.e. which he has himself seen, heard or otherwise perceived. This rule, which dates back to modes of trial long preceding the jury, and has been said to have no exceptions whatever, must be distinguished from the hearsay rule, which is of later growth and has many. Each rule, however, to some extent implies the requirements of the other; though it generally be proved by a witness who actually heard it and so has personal knowledge of the fact that the statement was made, though he may have none of the facts to which it relates. In the Kenya Supreme Court in **RAILA ODINGA VS I.E.B.C & OTHERS S.C PETITION NO 5 OF 2013** expressed itself on the burden of proof in election petitions as follows; “*there is apparently, a common thread in the foregoing comparative jurisprudence on burden of proof in election cases. Its essence is that an electoral cause is established much in the same way as a civil cause; the legal burden rests on the petitioner, but, depending on the effectiveness with which he or she discharges this the evidential burden keeps shifting. Ultimately, of course, it falls to the court to determine whether a firm and unanswered case has been made*”. Reverting to this case, there was claim on the part of the petitioner that the voters were bribed, but whereas that was a serious allegation the evidence by PW2 was mere hearsay with no exceptions. She focused on allegations which did not have a sound backing of the law. At one point she gave a narration of how her agents called her with information that voter bribery had started at around 5.30am but did not mention the names of those agents who reported to her, or were those agents summoned. PW2 who was the chief complainant also indicated that at one time, she was moving around and was asked to give up her vote for **Kshs 1000** or any amount, it was his testimony that the police were called in and after a search nothing was found in the car which could lead to the arrest of the culprit who were let off. I have considered this assertion which clearly raises doubts as to her recollection of facts. The petitioner did not avail any witness who could

attest to the fact to the fact that indeed he was bribed into giving his vote on that day. It remained an allegation which is a claim or assertion that someone has done something illegal or wrong, typically one made without proof. In this claim it only remained an allegation as the petitioner also called it as such which this court could hold against any of the respondents. On undue influence under Election Offences Act is defined as **“a person who directly or indirectly in person or through another person on behalf uses or threatens to use any force, violence including sexual violence, restraint, or material, physical or spiritual injury, harmful cultural practices, damage or loss, any fraudulent device, trick or deception for the purposes of or on account of-**

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

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

c. Impeding or preventing a person from being nominated as a candidate or from being registered as a voter

Commits the offence of undue influence

In the instant case, the petitioner has raised various grounds in which he asserts pointed at undue influence;

i) PW2 stated that the 3rd respondent infiltrated the agents she was training to get crucial information which prompted her to dismiss some of them instantly. She did not elaborate as to how she came to that conclusion and who were these agents. It remained unproved as even upon being taken to task by the learned counsel **C.B. MWONGELA** and **LEORNARD ONDARI**, she was at pains to clear doubts of such assertions.

ii) PW2 stated that the 3rd respondent influenced the recruitment of a presiding officer namely **PATRICK MUTHOMI** who was not qualified to be one. She stated that she went to the Returning Officer who dismissed the said person immediately. I was not able to know the role played by the 3rd respondent in recruitment of the said person. Further still PW2 and even 3 did not elaborate the qualification of which the said person was devoid of to warrant such a conclusion. It pointed at PW2 and 3 interfering with the constitutional duty of the 1st and 2nd respondent, which was an overstretch of their powers as citizen of this country.

iii) PW3 on his part as an observer of the Jubilee party contended that he received information that votes were being bought in the form of identity cards. When taken to task about the allegation he did not bother inform this court as to the source of his information which made the same a hearsay. The same witness from his own affidavit did not at any time blame the 3rd respondent but was claiming to have received information from a parliamentary contender which clearly shows that the information was his own perception.

In a nutshell this court cannot find any undue influence on the part of any of the respondents and so that ground will fail.

On delay in counting of votes and or tallying votes in the absence of the agent; the petitioner has raised this issue without elaborating how that could have affected the voting and the entire electoral process. I have also analyzed the forms 36A tendered for all the 44 polling stations and clearly the same was signed by the agents of the petitioner. There was no remark by any of the agent about the delay in vote counting or tallying. The polling station diaries also did not have such remark which made the claim herein an allegation. Under Section 3(2), (3) and (4) of the **Evidence Act (chapter 80 Laws of Kenya)** states that **“a fact is proved when, after considering the matters before it, the court either believes it exist, or considers its existence so probable that a prudent man ought, in the circumstances of the particular**

case, to act upon the supposition that it exists”. *“Conversely, a fact is disproved when, after considering the matters before it, the court either believes that it does exist or considers its non-existence so probable that a prudent man ought, in the circumstances of that particular case, to act upon the supposition that it does not exist”*. In the case of **BRIGINSHAW VS BRIGINSHAW (1938) 60 CLR 336** the High Court cautioned against a purely mechanical comparison of mathematical probabilities and stated at pages 361-2 that the balance of probabilities test required the tribunal to **“feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of mere mechanical comparison of probabilities independently of any belief in its reality---- common law---it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal”**. The allegations raised by the petitioner only remained allegations which did not meet the threshold to make a finding in the possibility of their existence. In the case of **BERNARD SHINALI MASAKA VS BONNY KHALWALE & 2 OTHERS** Lenaola J held that *“further, I agree with the proposition grounded on the decision in MBOWE VS ELIUFOO (1967) that any allegations made in an election petition have to be proved to the “satisfaction of the court”. Like Rawal J in Onalo, I am certain that the standard of proof, save in matters where electoral offences are alleged, cannot be generally beyond reasonable doubt, but because of the quasi-criminal nature of some election petition, it almost certainly on a high degree than merely on a balance of probabilities, the latter being the standard in civil cases”*. On result transmission, the petitioner has raised grounds that the results relayed publicly was different from the ones contained on form 36A in the case of **IEBC VS MAINA KIAI & 5 OTHERS CIVIL APPEAL NO 105 OF 2017** had occasion to discuss the rationale for electronic transmission of *election results as provided for in the Election Act. It was expressed “the electronic transmission of results was intended to cure the mischief that all returning officers from each of the 290 constituencies and 47 county returning officers troop to Nairobi by whatever means of transport, carrying in hard copy the presidential results which they announced at their respective constituency tallying centres. The other fear was that some returning officer would in the process tamper with the announced results”*. In this case the petitioner has alleged that the results in the transmission device at the tallying centre was different from the one’s contained in the form 36A. In prosecuting their case, they never gave an example of such results with the difference noted. I have been supplied with all the form 36A’s and KIEMS kit print out and the same are tallying and so the allegation was unfounded.

I do reject the issue in which the constitutional breach was sought vis a vis the conduct of the election for **ABOTHUGUCHI CENTRAL WARD**.

c. Whether the concept of “did the irregularity affect the result of the election

I share the sentiments of **PRO OTIENO ODEK, JJA** that Success of an election petition hinges the legal effect of violating the provisions of Article 81(e) and 86 of the Constitution and the impact of non-compliance with the provisions of election technology law. In the case of **GATIRAU PETER MUNYA VS DICKSON KITHINJI MWENDA(S.C PETITION NO 2B OF 2014)** at paragraph 210B of its judgement alluded to the concept and expressed as follows *“in this case, as in other election matters coming up before the courts, the question as to the nature or extent of electoral irregularities, and as to their legal effect, repeatedly arises. The crisp issue is; how do irregularities and related malfunctions affect the integrity of an election.”* In the case of *Morgan vs. Simpson (1975) 1 QB 151* Lord Denning summarized the essence of the concept “did irregularity affect the result. This court in its ruling on the 15/11/2017 made an order for recount for ¼ of the polling stations. The decision was not out of proven fact but just to be sure that everything was done above board. The decision in that ruling clearly stated that the petitioner had not made a case for a recount but it was necessary for the court to be sure that everything fits the Ceaser’s wife on integrity. In making that decision this court was guided by the importance of an electoral process with the need to be sure that the person announced as the winner was actually the right one. In the Supreme Court of India in the case of **JEET MOHINDER SINGH VS HARMINDER SINGH JASSI AIR 2000 SC 256** stated that *“the success of a candidate who has won at an election should not be lightly interfered with. Any person seeking such interference must strictly conform to the requirements of the law. Though the purity of the election process has to be safeguarded and the court shall be vigilant to see that people do not get elected by flagrant breaches of law or committing corrupt practices, the setting aside of an election involves serious consequences not*

only for the returned candidate and the constituency, but also for the public at large in as much as re-election involves an enormous load on the public funds and administration". In the case of **MASAKA VS KHALWALE & 2 OTHERS(2011) 1 KLR 390** it was expressed that the courts would strive to preserve an election as being in accordance with the law, even where there had been significant breaches of official duties and election rules, provided the results of the election were unaffected by those breaches. The above statements are expressed under Section 83 of the Elections Act which stipulates 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"***. In summary of the report which this derived from the re-count and scrutiny it ordered scrutiny and recount;

STATION	NAME OF CANDIDATE	VOTES GARNERED	DISCREPANCIES
Kariene primary school 3/5	1. Muguna Henry	6	Nil
	2.Muriungi Richard. K	337.	Nil
	3. Muriungi Tonny. M	15	Nil
	4. Mwongera Mary M	1	Nil
	5. Riungi Kenneth	1	Nil
	6.Solomon Ayub Bundi	126	
Mariene Primary School 1of 2	Muguna Henry		Nil
	Muriungi Richard K		Nil
	Muriungi Tonny M	3	Nil
	Mwongera Mary M	23	Nil
	Riungu Kenneth	210	Nil
	Solomon Ayub Bundi	3	Nil 132 instead of 131 +1
Mariene Primary 2 of 2	Muguna Henry	1	Nil
	Muriungi Richard K.	28	Nil
	Muriungi Tonny M.	218	216-2
	Mwongera Mary M.	5	5.

			20 126
		Riungu Kenneth 20 Solomon Ayub Bundi 126	
Murathi School 1 of 1	Primary	Muguna Henry 1 Muriungi Richard K. 19 Muriungi Tonny M. 11 Mwongera Mary M. 4 Riungu Kenneth 40 Solomon Ayub Bundi 363	Nil Nil Nil Nil Nil 362 (1 torn with no stamp hence the reduction)
Ntonyeru School 1 of 1	Primary	Muguna Henry 0 Muriungi Richard K. 230 Muriungi Tonny M. 2 Mwongera Mary 0 Riungu Kenneth 4 Solomon Ayub Bundi 202	Nil Nil Nil Nil Nil Nil
St. Immaculate Primary School 1 of 3		Muguna Henry 1 Muriungi Richard K. 68 Muriungi Tonny M. 25 Mwongera Mary M. 4 Riungu Kenneth 35 Solomon Ayub Bundi 257	Nil Nil Nil Nil Nil Nil
Kariene School 5 of 5	Primary	Muguna Henry 5 Muriungi Richard K. 333	Nil Nil

	Muriungi Tonny M.	12	Nil
	Mwongera Mary M.	1	Nil
	Riungu Kenneth	2	Nil
	Solomon Ayub Bundi	127	Nil
Gaitu Primary School 02	Muguna Henry	3	Nil
	Muriungi Richard K.	148	Nil
	Muriungi Tonny M.	55	Nil
	Mwongera Mary M.	2	Nil
	Riungu Kenneth	1	Nil
	Solomon Ayub Bundi	113	Nil
Mugambone Primary School 1	Muguna Henry	3	Nil
	Muriungi Richard K.	90	+1= 91
	Muriungi Tonny M.	29	Nil
	Mwongera Mary M.	4	Nil
	Riungu Kenneth	15	Nil
	Solomon Ayub Bundi	261	_ 1=260
Kirirwa Primary School	Muguna Henry	0	Nil
	Muriungi Richard K.	397	Nil
	Muriungi Tonny M.	13	Nil
	Mwongera Mary M.	07	Nil
	Riungu Kenneth	04	Nil
	Solomon Ayub Bundi	69	Nil
Karimonga Primary School 1 of 1	Muguna Henry	0	Nil
	Muriungi Richard K.	29	Nil
	Muriungi Tonny M.	5	Nil
	Mwongera Mary M.	0	Nil

	Riungu Kenneth	1	Nil
	Solomon Ayub B	141	Nil
Kirigara Coffee Factory	Muguna Henry	0	Nil
	Muriungi Richard K.	149	Nil
	Muriungi Tonny M.	33	Nil
	Mwongera Mary M.	2	Nil
	Riungu Kenneth	13	Nil
	Solomon Ayub Bundi	176	Nil
Rwangwa Primary 1 of 1	Muguna Henry	0	Nil
	Muriungi Richard K	174	Nil
	Muriungi Tonny M	2	Nil
	Mwongera Mary M.	1	Nil
	Riungu Kenneth	1	Nil
	Solomon Ayub Bundi	47	Nil

In the petition there an allegation that votes in **Mariene** which were meant for the petitioner was tallied for one **MURIUNGI TONNY M.** I went to those ballot boxes and no such thing happened as the results were accurate. The petitioner again alleged that his votes being a bundle of 50 being 3 in number was given to the 3rd respondent, but no such thing was unearthed. The petitioner alleged that he wrote to a letter to the returning officer demanding for a recount at the tallying centre but I must agree with the returning officer recount can only be done by the presiding officer at the source. After carefully assessing the issues raised by the petitioner only 5 votes were contested with margin of 274. In those votes that the petitioner could only lay to 2 votes, the 3rd respondent 2 and **MURIUNGI TONNY M** 1. Clearly as was held in the case of **CHABANGA M HASSAN DYAMWALE VS ALHAJI MUSA SEFU, 1982 TANZANIA LAW REPORTS AT 69**, the Tanzania High Court observed that; *“although a few irregularities had been proved, they could not be said to have affected the results of the Election because even if the adversely affected votes were added to the petitioner, the first respondent would still have won the election by a big margin”*. I share the sentiments of **Justice Otieno Odek** that an arithmetical error that does not fundamentally alter the outcome of the result cannot lead to the nullification of an election result. In the Indian Supreme Court case of **MARKIO TADO VS TAKAM SORANG CIVIL APPEAL NO 8260 OF 2012** considered the issues of affect the results and expressed as follows; *“at best, the case of the first respondent was that there were double entries of voters in 1304 names. The allegations were only with respect to two polling stations. In those polling stations, the appellant had received 1873 votes. Even if these votes 1304 votes were to be deleted, it would not affect the result materially since the appellant had won with a margin of 2713 votes”*. The errors of 5 votes could not be extrapolated to other polling stations and it is a misdirection to presume that an error in one polling station is pointer to possibility of similar errors in other polling stations. In this case, the petitioner did not convince this court that he actually triumphed over the 3rd respondent.

d. Whether the petitioner is entitled to the orders sought

The petitioner having failed to meet the thresh hold of this claim loses the petition as the same is

dismissed on all grounds which only bordered on hearsay evidence.

e. Who is entitled to costs

The petitioner having been unable to prove his claims ought to pay costs which shall be assessed to the respondents.

15. CONCLUSION

I do therefore make the following orders;

- a. The petition challenging the Member of County Assembly for Abothuguchi Central Ward is hereby dismissed
- b. The election of the 3rd respondent is upheld
- c. The petitioner shall meet the costs of the petition which shall be assessed.

It is so ordered

MAYAMBA.C.A

SENIOR RESIDENT MAGISTRATE

JUDGEMENT is read and signed in the open court this 20TH day of **DECEMBER** 2017 in the presence of:

Petitioner: -----

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

3rd Respondent: -----

Petitioner Advocate's: -----

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

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

Court Clerk:

C.A. MAYAMBA: SENIOR RESIDENT MAGISTRATE