



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

ELECTION PETITION NO. 02 OF 2017

**IN THE MATTER OF THE ELECTION ACT NO. 24 OF 2011 LAWS OF KENYA AND THE
ELECTIONS (GENERAL) REGULATIONS, 2012 AND ELECTIONS (PARLIAMENTARY AND
COUNTY ELECTION) PETITIONS RULES, 2017**

AND

IN THE MATTER OF THE GUBERNATORIAL ELECTIONS TANA RIVER COUNTY, HELD

ON 8th AUGUST, 2017

BETWEEN

TUNEYA HUSSEIN DADO..... PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION..... 1ST RESPONDENT

THE RETURNING OFFICER, TANA RIVER COUNTY..... 2ND RESPONDENT

DHADO GADDAE GODHANA..... 3RD RESPONDENT

JUDGEMENT

1. The petitioner in this petition, TUNEYA HUSSEIN DADO (hereafter referred to as the petitioner), vied in the Tana River County Gubernatorial election on Jubilee party ticket in the general elections conducted on 8/8/2017 and garnered 24,194 votes against the 3rd Respondent who was declared winner with 25,958 votes.

2. The petitioner has presented this petition against the three Respondents under the constitution of Kenya and the Elections Act No 24 of 2011.

3. The 1st Respondent, the independent electoral and boundaries commission (IEBC) (hereafter referred to as the 1st Respondent) is a commission established under Article 88 (1) of the constitution with powers to conduct the elections as prescribed by Article 88 (4) thereof and other written Laws and Regulations.

4. The 2nd Respondent (hereafter referred to as the 2nd Respondent), was the Returning Officer duly appointed by the 1st Respondent as it's official to conduct the said election in Tana River County.

5. The 3rd Respondent, DHADHO GADDAE GODHANA (hereafter referred to as the 3rd Respondent), was one of the candidates in the said elections for the Governor seat and he was the one declared the winner by the 2nd Respondent on 11/8/2017 and duly issued with a certificate. The 1st Respondent confirmed the said position in the Kenya gazette dated 18th August 2017.

6. The 1st Respondent announced the results of the Tana River Gubernatorial elections held on 8/8/2017 as follows;

(a) DHADHO GADDAE GHODHANA –	25,958
(b) TUNEYA HUSSEIN DADO –	24,194
(c) NUR NASSIR ABDI –	21,786
(d) DANSON BUYA MUNGATANA –	11,304
(e) ISMAEL JILLO ALGI –	4,181.
TOTAL	87,423

7. The petitioner alleges that the elections for the Governor seat was not conducted and carried out in accordance with the provisions of the constitution, the Election Act or Regulations nor in accordance with principle, laid down therein or in any law relating to such election.

8. The grounds under which the petition is brought are as follows;

(i) That the voting was disrupted by violence initiated by persons claiming to be the supporters of the 3rd respondent, particularly at Garsen Primary School and Mbandi polling stations, among others.

(ii) That the tallying of votes at Galole Constituency tallying center was disrupted by violence which began when a person claiming to be the supporter of the 3rd respondent fatally stabbed an election officer and subsequently resulted in the killing of three persons by the police.

(iii) That consequent upon the events stated hereinabove, the Petitioner's chief agent, his other agents, officers of the 1st respondent, voters and other people ran away and the tallying center was abandoned for several hours.

(iv) That the votes cast, the voting materials, gadgets and records at Galole tallying centre were left unattended after the melee thereby compromising their integrity and making their contents questionable. That there are 93 polling stations in Galole constituency, the only constituency where the 3rd respondent purportedly received most votes.

(v) That the petitioner's agents at Kipini Primary School polling station, which had two streams totaling to about 1,400 votes, as well as at Imani primary school were prevented from witnessing the manner of assisting illiterate voters by the election officials.

(vi) That many forms 37A contained alterations, were not properly filled in, were not witnessed and had incomplete and or inaccurate information.

(vii) That the petitioner was allegedly beaten by the 3rd respondent by approximately 2000 votes. The petitioner believes the election was not fairly conducted and the results did not reflect the true results of the voting.

(viii) That the petitioner contends that the election was not conducted in accordance with the law and the Constitution and failed to meet the threshold of a free and fair election.

(ix) That the integrity and outcome of the elections upon which the 3rd respondent was declared by the 1st and 2nd respondents as the winner was compromised and therefore the elections were not fair and lawful.

(x) That the Petitioner notes that in light of the foregoing it is illegal, unjust and improper for the 3rd Respondent to be allowed to wear a prize on whose behalf the contest has not been fairly won.

(xi) That by Reason of the contents of all and each of the foregoing paragraphs and by reason of non-compliance with the written law, relating to the said election, the Gubernatorial Election in Tana River County was not conducted and cannot be said to be substantially in accordance with the law or within the principles laid down in the said written laws and all and each of the foregoing breaches, violations, noncompliance and complaints against the Respondents collectively and each of them, of omission and commission affected the outcome and results of the said Election.

9. The petitioner is seeking the following orders

(i) A declaration that the 3rd Respondent was not validly elected as Governor Tana River County on the elections held on 8th August, 2017;

(ii) An order that the 1st respondent do conduct a recount of the votes cast in respect of the gubernatorial votes cast in the subject elections.

(iii) In the alternative, an order that the 1st respondent be ordered to conduct a fresh Gubernatorial election;

(iv) The Respondents be condemned to pay your Petitioner's costs and incidentals to this petition; and

(v) Such further, other and consequential orders as this Honourable court may lawfully make.

10. THE PETITIONER'S EVIDENCE

The petitioner called a total of 6 witnesses who included the petitioner himself. Their evidence was as follows;

11. PW1 FATUMA SOPHIA BAKARI deposed as follows in her affidavit sworn on 7/9/2017

Which she asked the court to adopt as her evidence in chief;

(i) THAT on 8th August, 2017, I was an agent of the Jubilee Party for the purposes of the general elections held on the same day. Annexed herewith is a copy of the letter of appointment marked 'FSB 1'

(ii) THAT I was deployed at Imani Primary school, a polling station within the county. The 1st respondent's presiding officer at that station was called Mohamed Galgalo (hereinafter called the presiding officer).

(iii) THAT the station opened shortly after 7am and voting commenced. There were two polling booths. Agents representing other parties and candidates were also present, totaling to about 12 in number.

(iv) THAT the presiding officer directed all the agents, myself included, to sit at a particular place within the classroom, far from the polling booths and the ballot boxes.

(v) THAT there were very high incidences of illiterate voters who requested to be assisted in identifying their preferred candidates. When I asked to be present to witness the manner of assistance by the election officers, the presiding officer refused and stated categorically that it was his exclusive responsibility to guide the voters who required help and threatened to evict all agents.

(vi) THAT I observed the presiding officer purportedly help many elderly and or illiterate voters. The presiding officer would personally cast the votes into the ballot boxes while the respective voters looked on.

(vii) THAT my own elderly father asked the presiding officer to allow me to help him vote but the presiding officer refused and purportedly helped him as he had been doing with others.

(viii) THAT I sincerely believe that the presiding officer was causing the voters he was allegedly helping to vote for a candidate or candidates of his choice while pretending to assist them. There can be no reasonable justification for the conduct of the presiding officer.

(ix) THAT I was disturbed by the conduct of the presiding officer and I informed my sister Hadija, who called the petitioner in my presence and informed him of the problem.

(x) THAT I am aware that the petitioner complained and the problem was solved by allowing agents to witness the assistance at about 11 am.

12. She said in cross-examination that she arrived at Imani primary school polling station at 6:30am on 8/8/2017. She said she had a badge and she had taken the oath of secrecy.

She signed the polling station diary.

PW1 said her work as an agent was to witness the voting. She said she was not allowed to witness how the illiterate voters were assisted to vote.

PW1 said she did not sign form 37A. She said it was Jillo who gained the most votes at Imani primary school station.

She said there were voters who were not assisted to vote who were illiterate such as her father MR. BAKARI. She said she was not satisfied with the voting at Imani primary school polling station.

13. PW2 HASSAN IBRAHIM GOLO also asked the court to adopt his Affidavit sworn on 7/9/2017 as his evidence in chief. He deposed as follows;

(i) THAT on 8th August, 2017, I was an agent of the Jubilee Party for the purposes of the general elections held on the same day.

(ii) THAT I was deployed at Imani Primary school, a polling station within the county. The 1st respondent's presiding officer at that station was one, Mohamed Galgalo, who I understand is a relation of one of the candidates for the senatorial position one Molu Shambaro, belonging to the Wiper Party, (hereinafter called the presiding officer).

(iii) THAT the station opened shortly after 7am, voters started streaming in and voting started. There were two polling booths. Agents representing other parties and candidates were also present, totaling to about 12 in number.

(iv) THAT the presiding officer directed all the agents, myself included, to sit at a particular place within the classroom, far from the polling booths and the ballot boxes.

(v) THAT there were very high incidences of illiterate voters who requested to be assisted in identifying their preferred candidates. The agents asked to be present to witness the manner of assistance by the election officers, but the presiding officer refused and stated categorically that it was his exclusive responsibility to guide the voters who required help and threatened to evict all agents.

(vi) THAT I observed the presiding officer purportedly help many elderly and or illiterate voters. The presiding officer would personally cast the votes into the ballot boxes while the respective voters looked on.

(vii) THAT the presiding officer behavior was unbecoming and it was apparent that he was biased

(viii) THAT I sincerely believe that the presiding officer was causing the voters he was allegedly helping to vote for a candidate or candidates of his choice while pretending to assist them. There can be no reasonable justification for the conduct of the presiding officer.

(ix) THAT I tried calling the applicant about the matter but did not get to him. It is another agent, SOPHIA, who succeeded in getting through to the petitioner.

(x) THAT I am aware that the petitioner complained and the problem was solved by allowing agents to witness the assistance at about 1 lam.

14. He said in cross-examination that he was at Imani primary school polling station from 6:30am until the votes were counted.

He said he had a break at 11am. He said at the polling station he was given a place to sit together with

other agents as they witnessed what was going on. He said the presiding officer assisted people who did not know how to read and write and who did not come with assistants.

PW2 said in paragraph six of his Affidavit he stated that there were people who were not assisted to vote. PW2 said the agents were not allowed to observe how the illiterate people were assisted to vote.

He confirmed that the petitioner gained 174 votes while Ismael Jillo was the winner at Imani primary polling station with 238 votes.

PW2 said the presiding officer did not do his work as the agents were not allowed to witness how the presiding officer was assisting the voters who do not know how to read and write. PW2 said he did not sign form 37A. He said he was an agent for the petitioner together with PW1.

In the re-Examination PW2 said he did not sign for 37A because he did not agree with the results.

15. PW3, SALIM MOHAMED DAME also asked the court to adopt his Affidavit sworn on 7/9/2017 as his evidence in chief. He deposed as follows in part in the said Affidavit;

(i) THAT on 8th August, 2017, I was a chief agent of the Petitioner for the purposes of the general elections held on the same day.

(ii) THAT the said election was held on 8th of August 2017 and the results of the election was declared on 11th August 2017 respectively.

(iii) THAT I was in charge of the whole the county to observe the voting process, transmission and tallying of the election results on behalf of the petitioner.

(iv) THAT on 9th August at around 5 pm, I was at Hola Secondary which was Galole Constituency tallying center to check on the tallying of the results after various complaints from the petitioner on delayed transmission of the results into the system yet all the results had been all submitted to the tallying center.

(v) THAT the petitioner's complaint was that his results in the areas where he was leading with a big margin were not being tallied while that of the third respondent only were being tallied.

(vi) THAT at around 4 pm, the petitioner also walked in into the center and went ahead to inquire from inquired why his results were being delayed while some results which the opponent had a big leading margin were being tallied into the system.

(vii) THAT the County Returning officer Mr. Mohamed Gonjobe Raka admitted the error and assured us that the same will be rectified.

(viii) THAT he immediately instructed an election clerk to start in feeding in our delayed results into the tally system.

(ix) THAT the petitioner after seeing that his request had been attended to, left the station.

(x) THAT after a while at the polling station, five men brandishing machetes and knives attacked the center. Two of the attackers were shot and killed by police, while the others reportedly escaped. One of the assailants had stabbed to death the election clerk who was tallying the

results.

(xi) THAT the attack resulted into a stampede where ballot boxes in the center were broken and the electoral materials damaged and election results forms scattered all over the place.

(xii) THAT after the attack I scampered for safety, ran out of the Centre fearing for our life. I never went back to the station.

(xiii) THAT I am aware that the violence affected the tallying process for the reason that all the respondent representatives also run away, the whole center was cordoned off hours later by the police until the next day.

(xiv) THAT the County Returning officer who had ran away did not show up the next day only to appear on the 11th August 2017 to declare the results.

(xv) THAT it's my assertion that the attack, which left the election materials spread all over compromised the electoral process and the same might have been manipulated to favor the 3rd respondent.

(xvi) THAT it's interesting to note that it is only in the constituency where the violence occurred that the 3rd respondent allegedly won in a bigger margin.

16. PW3 said in cross-Examination that he was the chief agent in charge of the whole county observing the transmission and tallying of election results on behalf of the petitioner. He said he had agents at each polling centre and he was communicating with them.

PW3 said the incident at the county tallying centre occurred on 9/8/2017 after voting had been done.

He witnessed the incident and he said he cannot say that it affected all the candidates.

17. PW3 said everyone fled from the County Tallying Centre at Galole as a result of the attack. He said a polling clerk was killed and two of the attackers were also shot dead by the security team.

He said the place was condoned by the security team and that is the time he suspected the votes were stolen. He said he did not sign the results.

He said Galole was a constituency Tallying Centre. He said he was an agent both for Jubilee and for the petitioner.

He said he had been at the Galole Tallying Centre for 3 hours before the attack occurred.

18. PW3 also said the petitioner had come to complain and the attack occurred after the petitioner left. He said the ballot boxes for all the candidates were scattered during the attack.

He said he saw five men who attacked the Tallying Centre in the presence of the police officers. He said he ran away when an IEBC officer was stabbed. He lost everything in the stampede including his phone and shoes.

In re-Examination, he said the Tallying was going on when the attack occurred. It caused a disruption at the Tallying Centre.

19. PW4 OMAR SHURIE asked the court to adopt his affidavit as his evidence in chief. He deposed as follows the said affidavit sworn on 7/9/2017;

(i) THAT the said election was held on 8th of August 2017 and the results of the election was declared on 11th August 2017 respectively.

(ii) THAT on 9th August at around 5 pm, I was at Hola Secondary which was Galole Constituency tallying center hall as a voter to observe how the tallying was being handled.

(iii) THAT while at the tallying center at around 5 pm, five unknown men attacked the tallying center, one of them stabbed the 1st respondent's clerk who was keying in results into the computer system. The clerk died instantly. The Police shot two of the attackers and three escaped.

(iv) THAT, I ran out of the hall fearing for my life.

(v) THAT the election materials that were being used by the clerk to key in results into the tally system were all scattered and spread on the floor where upon people stepped on them as they were running out of the hall.

(vi) THAT I personally went the following day and reported the incident at the Hola Police Station and is recorded under OB No. 6 of 10th August 2017.

20. PW4 said in cross-Examination that the voting had taken place on 8/8/2017 and the attack at the Tallying Centre occurred on 9/8/2017.

He said he was inside the hall at Hola Secondary school which was Galole Constituency Tallying Centre when he witnessed the attack. He said he had gone as a voter to witness the tallying. He said one person was killed by the attackers. He did not go back after the attack.

21. PW4 said the polling centre and the Tallying centre were in different rooms at the same place. He had voted on 8/8/2017 and he returned on 9/8/2017 to witness the tallying. He said he was an agent or an observer. He ran away after the attack. He first hid under his car and after the shooting was over, he ran away.

In re-Examination PW4 said he is a voter at Tana River County and there is nothing to stop him from going to a tallying centre to witness the tallying process.

22. PW5 HASSAN GALGALO stated as follows in his evidence in chief which was contained in his Affidavit sworn on 7/9/2017 which he asked the court to adopt as his evidence in chief.

(i) THAT on 9th August, 2017 at about 5pm, I accompanied the petitioner from his house to Galole tallying center because the petitioner wanted to lodge some complaints regarding the tallying of votes.

(ii) THAT also in our company were his security officers.

(iii) THAT the petitioner spoke to Mr. Moroa and Mr. Gonjobe and asked them why the tally of his votes was not changing and why many polling stations did not have their votes tallied.

(iv) THAT Mr. Moroa soon went out of the room talking on his phone and Mr. Gonjobe assured the petitioner he would rectify the problem. The petitioner left me to sort out the issue with the officer.

(v) THAT soon, a candidate for the position of member of Parliament, Hassan Abdi Dukicha, also came to complain about a similar issue. I gave him my seat and stood up.

(vi) THAT suddenly, I heard several gunshots outside the room. Everyone began to scream and scamper outside for safety, including police officers.

(vii) THAT the ballot boxes and other materials were scattered everywhere as we escaped. I jumped over the chain link fence and ran for about one kilometer to the main road and took a motor cycle to the petitioner's house.

(viii) THAT I later learnt that the results of Galole constituency were announced and the 3rd respondent had the majority votes. This announcement was made on the 11th August, 2017.

23. PW5 said in cross-examination said when he arrived at the tallying centre with the petitioner on 9/8/2017 the activities were going on well.

He said he is the personal assistant to the petitioner and he was allowed to enter the Tallying Centre with the petitioner.

He said when the incident occurred at the Tallying Centre many boxes had not yet arrived but voting had already been done.

He said when the incident occurred he scampered for his life. After the incident, he did not go back to the Tallying Centre. He heard that the results were announced on 11/8/2017.

He said during the attack, the petitioner had left leaving him at the Tallying centre. He said he saw a group of five people who attacked the Tallying centre and one of the people who stabbed an IEBC clerk with a knife was wearing a white shirt.

24. The petitioner who testified as PW6 deposed in his verifying Affidavit which he asked the court to adopt as his evidence in chief as follows;

(i) THAT I am the Petitioner herein duly conversant with the facts of this matter thus competent to swear this affidavit.

(ii) THAT I have read and understood the Petition herein and confirm that the contents therein are true.

(iii) THAT in the general elections held on the 8th August, 2017, I was the candidate nominated by Jubilee Party for election for the position of the governor in Tana River County (the county) while the 3rd Respondent was nominated by the Orange Democratic Movement as their candidate.

(iv) THAT I voted at Furaha Primary School in Garsen Constituency. After casting my vote, I visited some other polling stations to see how the exercise was being conducted.

(v) THAT there are three constituencies in the county with a total of 307 polling stations

distributed as follows:-

a) Garsen- 113,

b) Galole-93and

b) Bura-101.

(vi) THAT at Garsen Primary School, I encountered a large crowd of people who, upon seeing me started shouting and chanting pro ODM/NASA songs. The crowd grew violent and I made a quick escape but not before my vehicle's window was broken with a stone. The police were present and tried to disperse the crowd.

(viii) THAT at about 9 am, I was called by my agent at Imani Primary School who informed me that my agents (and others) had been prevented from witnessing the assistance being given to the elderly and illiterate voters.

(viii) THAT I complained to the Returning Officer and asked him to solve the matter. The agents were allowed to witness the giving of assistance at about 1 lam.

(ix) THAT in relation to a polling station called Kipini Primary School, I was informed by my agents, Amina Nurio and Fatuma Yusuf, that they had been prevented from witnessing the voting exercise.

(x) THAT I again called the Returning Officer and complained whereupon my agents were allowed into the polling station at about 4pm.

(xi) THAT this problem was replicated in a number of other polling stations as well.

(xii) THAT on about 9th August, 2017, I was alarmed by the delay in the transmission of the results from various polling station to the constituency tallying stations, particularly Galole Constituency.

(xiii) THAT I visited Galole constituency tallying centre in the company of my agents Galgalo Hassan, Issac Lango, Salim Dame (chief agent) and my security officers.

(xiv) THAT at the centre, I found one Mr. Maroa, the 1st respondent's county 1CT Manager feeding some information into a computer. I found it unusual that the person in charge of the county was working at the constituency center and raised my protest with Mr. Maroa.

(xv) THAT I also complained that results from many polling stations had not been announced, especially from those areas perceived to be my strongholds. The county manager, one Mr. Gojobe, promised to address my concerns.

(xvi) THAT I immediately thereafter went to my house and left behind Galgalo Hassan, Salim Dame and my other agents to monitor the progress.

(xvii) THAT fifteen minutes or thereabout after I left the tallying station, I heard the sound of gunshots and screams coming from the direction of the said tallying center

(xviii) THAT I later learnt from the security agents that an alleged supporter of the 3rd respondent had fatally attacked an officer of the 1st respondent with a knife and that three other people had been killed in the ensuing fracas.

(xix) THAT the incident was a major security breach which caused all the agents, officers of the 1st respondent and others present the escape from the centre, leaving behind scattered and in disarray the ballot boxes, votes already cast, records of the 1st respondents and other material.

(xx) THAT the incident described above affected the outcome of the elections in a significant way for the following reasons:-

- a) The integrity of the tallying exercise was compromised by the violent disruption.
- b) The materials at the tallying station were left unattended for many hours and could have been tampered with to the detriment of the petitioner.
- c) My agents did not return to the tallying center for fear of their lives.
- d) The circumstances under which the officers of the 1st respondent subsequently returned to the tallying center to complete the tally are unclear, doubtful and questionable.
- e) The results subsequently announced emanating from that tallying center is questionable, doubtful and grossly inaccurate.

(xxi) THAT the results announced by the 2nd respondent from all the constituencies were as follows:-

- a) Bura - petitioner (7,252 votes), 3rd respondent (4,635 votes),
- b) Galole - petitioner (7,348 votes), 3rd respondent (13,186 votes) and
- c) Garsen - petitioner (9,279 votes), 3rd respondent (7,563 votes)

(xxii) THAT the grounds upon which I bring this petition are therefore the following:

- a) The voting was disrupted by violence initiated by persons claiming to be the supporters of the 3rd respondent, particularly at Garsen Primary School polling station, among others.
- b) The tallying of votes at Galole Constituency tallying center was disrupted by violence which began when a person claiming to be the supporter of the 3rd respondent fatally stabbed an election officer and subsequently resulted in the killing of three persons by the police.
- c) Consequent upon the events stated hereinabove, my chief agent, my other agents, officers of the 1st respondent, voters and other people ran away and the tallying center was abandoned for several hours.
- d) The votes cast, the voting materials, gadgets and records at Galole tallying centre were left unattended after the melee thereby compromising their integrity and making their contents and the announced results questionable.

e) The petitioner's agents at Kipini Primary School polling station, which had two streams totaling to about 1400 votes, were prevented from witnessing the manner of assisting illiterate voters by the election officials.

f) The petitioner was allegedly beaten by the 3rd respondent by approximately 2000 votes. The petitioner believes the election was not fairly conducted and the results did not reflect the true results of the voting.

(xxiii) Many forms 37A contained alterations, were not properly filled in, were not witnessed and had incomplete and or inaccurate information. Annexed herewith are copies of the said forms marked 'THD 1.

(xxiv) THAT it is illegal, unjust and improper for the 1st Respondent to be allowed to wear a prize on whose behalf the contest has not been fairly won.

(xxv) THAT I verily believe to be true that there was non-compliance of the law relating to the said election which has substantially affected the outcome and results of the said election.

25. In cross-Examination, the petitioner said he was the Jubilee candidate for the Tana River Gubernatorial seat.

He said he had a chief agent and agents in most of the polling stations who would update him on the progress of the elections.

The petitioner said he voted at around 9 to 10am at Furaha primary school at Garsen.

26. The petitioner said he went to complain at Galole Tallying centre because his results were delaying. He said it was not a network problem. He said he found the in charge of ICT at the county at Galole Tallying Centre feeding information into a computer. He said it was at the instruction of Mr. Gojobe that he went to Galole Tallying station on 9/8/2017 at 5pm.

27. The petitioner said he had worked with Mr. Maroa at the county but he had removed him. He said the breach of security occurred after he had left Galole Tallying Centre. He was at his house when he heard the gun shots. He said despite the challenges, IEBC (the 1st Respondent) still produced the results he is now challenging. He said his agents signed form 37A and he also said 1,300 votes were added to his opponent. He said he is disputing several forms 37As which were altered.

28. The petitioner said at Imani primary school and Kipini primary school polling centers, his agents were not allowed to witness voting by the voters who do not know how to read and write.

He said the person who stabbed the 1st Respondent's official was a supporter of the 3rd Respondent. He denied that the attack at the Tallying centre was as a result of his visit.

29. The petitioner said he had worked with Maroa and he did not like the way he worked with him. He said he was seconded to the county and initially he was working well but later the petitioner raised questions and Mr. Maroa was replaced. He denied that this petition is brought out of fear and hatred for Mr. Maroa.

30. THE 1ST AND 2ND RESPONDENT'S EVIDENCE

The 1st and 2nd Respondent called seven witnesses, DW1 MOHAMED GALGALO who was the presiding officer stated as follows in his Affidavit sworn on 15/9/2017 which he asked the court to adopt as his evidence in chief.

(i) **THAT** I have read the entire Petition filed herewith together with the Affidavit in support thereof and have had the same explained to me by my Counsel on record and wish to respond as herein below.

(ii) **THAT** I am well conversant with the facts giving rise to the instant Petition and as such I am duly competent to swear and depone to this Affidavit which I hereby do and I wish to state as follows;

(iii) **THAT** I have read and had explained to me the contents of the Affidavit sworn by MOHAMMED GONJOBE RAKA the 1st and 2nd Respondents Response filed herein and I wish to adopt the assertions therein and reiterate the same and I fully associate with them together with the annexures thereto.

(iv) **THAT** the 2nd and 3rd Respondents deny each and every allegation in the Petition of the Petitioner as if the same were set out herein below verbatim and traversed seriatim and the Petitioner is hereby put to strict proof thereof.

(v) **THAT** the polling station in question was opened as early as 7:30 O'clock wherein voting commenced in the presence of the various party and candidate agents and was closed at 6:30.

(vi) **THAT** the agents were all present in the room and never at any time did I direct any of them to move elsewhere as alleged by the Petitioner herein.

In Response to the Affidavit sworn by the FATUMA SOPHIA BAKAR in support of the Petition, I wish to respond further as follow;

(vii) **THAT** the deponent has not produced any evidence in support of the allegations that she is a registered voter in Tana River County. I am advised by my Counsel on record which advise I verily believe to be true that she cannot purport and make such allegations before this Honourable Court without adducing such evidence.

(viii) **THAT** I am advised by my Counsel on record which advise I verily believe to be true that under Regulation 63 of the Election (General) Regulations, it is the duty of a Presiding Officer to keep order at the Polling Station and this includes the giving of lawful instructions in order to secure the voting process.

(ix) **THAT** at Imani polling Station there were no incidences and/or occurrences and the voting and counting process was at all material times peaceful and in accordance with the Constitution, the Election Laws and Regulations. I annex polling station diary marked as "MG-1" to confirm no such incidences were recorded.

(x) **THAT** the deponent other than making generalized averments, does not produce any evidence in support of the assertions therein and neither does she specify the names of the alleged 'elderly' and 'illiterate voters' whom she claims requested to be assisted.

(xi) **THAT** the deponent has not adduced any evidence in support of her assertions that her

'father' asked me to allow her to help him vote and that I refused. Furthermore, the deponent has not specified the name of her alleged 'father' and neither has she adduced any evidence in support of the assertion that he is a registered voter and more importantly in Tana River. Additionally, the Petitioner has not adduced for instance an Affidavit or any evidence by the alleged 'father' and as such, taken in totality, the assertions remain mere generalized unsubstantiated averments and hearsay and I am advised by my Counsel on record which advise I verily believe to be true that the same does not meet the evidential threshold under the Evidence Act.

(xii) **THAT** without prejudice to the above averments FATUMA SOPHIA BAKAR an agent could not assist a voter in the voting exercise but could only witness the "assistance" of the voter by the presiding officer.

(xiii) **THAT** the Petitioner mainly relies on hearsay evidence and uses those generally without adducing any evidence and for instance, she makes reference to one 'HADIJA' whom she asserts she informed about the events that had occurred at Imani Polling Station. I am advised by my Counsel on record which advise I verily believe to be true that the hearsay evidence being relied upon by the deponent does not meet the evidential threshold set out under the Evidence Act.

(xiv) **THAT** I never at any time interfered and/or influenced the voting by the elderly and illiterate voters as alleged by the deponent.

(xv) **THAT** I at all material times ensured order at the polling stations and as required by the law, engaged and/or involved the different party agents where necessary in the spirit of transparency, openness and fairness of the process.

(xvi) **THAT** at no time did I prevent the Agents from witnessing the "Assisted Voters".

In Response to the Affidavit sworn by HASSAN IBRAHIM GOLO in support of the Petition, I wish to respond further as follow;

(xvii) **THAT** the deponent has not produced any evidence in support of the allegations that he is a registered voter in Tana River County. I am advised by my Counsel on record which advise I verily believe to be true that he cannot purport and make such allegations before this Honourable Court without adducing such evidence.

(xviii) **THAT** the deponent has also not adduced any evidence in support of the assertions that he was an agent of the Jubilee Party for the purpose of the general elections conducted on 8th August, 2017.

(xix) **THAT** in response to paragraph 3 of the Affidavit therein I wish to state that I am a stranger to the averments therein and the deponent is put to strict proof.

(xx) **THAT** the deponent other than making generalized averments, does not produce any evidence in support of the assertions therein and neither does he specify the names of the alleged 'elderly' and 'illiterate voters' whom he claims requested to be assisted.

(xxi) **THAT** I never at any time interfered and/or influenced the voting by the elderly and illiterate voters as alleged by the deponent.

(XXii) THAT I at all material times ensured order at the polling stations and as required by the law, engaged and/or involved the different party agents where necessary in the spirit of transparency, openness and fairness of the process. In general I wish to respond as follows;

(xxiii) THAT at all material times I acted as per the law and never did I exhibit any tendencies of bias as alleged by the deponent.

(xxiv) THAT I am advised by my Counsel on record which advise I verily believe to be true that under Regulation 65 of the Election (General) Regulations, no person other than an election officer or police officer on duty shall, except with the authority of the Presiding Officer, have any communication whatsoever with a voter who is in, or in the immediate precincts of, a polling station for the purpose of voting.

(xxv) THAT I am advised by my Counsel on record which advise I verily believe to be true that pursuant to Regulation 72 of the Elections (General) Regulations that it is the duty of the Presiding Officer to assist any such voter who may require such assistance during voting and the same is to be done in the presence of the agents. And as such, and without any prejudice to the foregoing, it is my averment that the voting process was conducted in accordance with the law and in the presence of all party agents.

(xxvi) THAT the claims expressed in the Petitioner's Petition and the Supporting Affidavits thereon and the prayers set out therein are misconceived, wishful and an attempt to arm twist the hands of justice by the Petitioner.

(xxvii) THAT I am advised by my Counsels on record which advise I verily believe to be true that the Petition is misconceived and aimed at subverting the will of the people of Tana River County and further denying them an opportunity to be served by their chosen representative.

(xxviii) THAT I am advised by my Counsel on record which advise I verily believe to be true that the Petition herein seeks to subvert the will of the people of Tana River County and to deny them the benefit of exercising their political rights as guaranteed under Article 38 of the Constitution as read with Articles 81 and 86 thereof and Section 83 of the Elections Act.

(xxix) THAT I urge this Honourable Court to decline the invitation by the Petitioner to illegally and through the back-door subvert the will of the people of Tana River County and deny them their rightfully chosen representatives.

(xxx) THAT I swear this Affidavit in opposition to the Petition and urge the Honourable Court to dismiss the same and let the will of the people of Tana River County as confirmed by choosing the 1st Respondent prevail.

31. The DW1 said in cross-Examination that the people who did not know how to read and write were assisted to vote in the presence of the agents.

He said, at Imani primary school polling station, Jubilee party had an agent called Hassan Galo (PW2). He said he did not see PW1. DW1 also said the absence of agents does not negate results according to Rule 62 (3) of the General Regulation.

32. DW2, AWADH ANNAH MLUWA said in his Affidavit which was adopted as his evidence in chief as follows;

(i) **THAT** I have read the entire Petition filed herewith together with the Affidavit in support thereof and have had the same explained to me by my Counsel on record and wish to respond as herein below.

(ii) **THAT** I am well conversant with the facts giving rise to the instant Petition and as such I am duly competent to swear and depone to this Affidavit which I hereby do and I wish to state as follows;

(iii) **THAT** I have read and had explained to me the contents of the Affidavit sworn by MOHAMMED GONJOBE RAKA, the 1st and 2nd Respondents Response filed herein and I wish to adopt the assertions therein and reiterate the same and I fully associate with them together with the annexures thereto.

(iv) **THAT** the 2nd and 3rd Respondents deny each and every allegation in the Petition of the Petitioner as if the same were set out herein below verbatim and traversed seriatim and the Petitioner is hereby put to strict proof thereof.

(v) **THAT** in respect of Kipini Polling Station the polling station Number 3 in question I wish to state as follows;

(vi) **THAT** all agents were present during the opening and during the time of closure.

(vii) **THAT** in response to paragraph 9 of the Petitioner's affidavit I wish to state that no agent was prevented from witnessing voter exercise.

(viii) **THAT** the agents present witnessed the counting of votes and signed the declaration results in form 37A that is annexed to the affidavit of the Returning Officer, Tana River County Mohammed Gonjobe Raka.

(ix) **THAT** no agent was prevented from witnessing the voting exercising and neither was the voting disrupted at Kipini Primary Station Number 3 and the averment at paragraph 9 of the Petitioner's affidavit are mere hearsay and I annex polling station diary marked as "AAM-1" to confirm no such incident to recorded.

(x) **THAT** the voting took place peacefully and no acts of violence or disruption took place.

(xi) **THAT** In Response to the Affidavit sworn by the Petitioner TUNEYA HUSSEIN DADO in paragraph 6, 7, 8,9,10 and 11 I wish to state that no such incident was brought to my attention and such averments are strange to me.

(xii) **THAT** as a presiding officer I wish to state that voting at Kipini Primary school was peaceful and in accordance to the Laws and Elections Regulations.

(xiii) **THAT** I annex copy of polling station day diary and mark as "AAM-1" for the Kipini polling station No. 3 which confirms that no incident as alleged by the petitioner took place.

(xix) **THAT** I am advised by my Counsel on record which advise I verily believe to be true that under Regulation 63 of the Election (General) Regulations, it is the duty of a Presiding Officer to keep order at the Polling Station and this includes the giving of lawful instructions in order to

secure the voting process.

(xv) **THAT** at Kipini polling Station *there were no incidences and/or occurrences and the voting and counting process was at all material times peaceful and in accordance with the Constitution, the Election Laws and Regulations.*

(xvi) **THAT** I at all material times ensured order at the polling stations and as required by the law, engaged and/or involved the different party agents where necessary in the spirit of transparency, openness and fairness of the process.

(xvii) **THAT** I am advised by my Counsel on record which advise I verily believe to be true that under Regulation 65 of the Election (General) Regulations, no person other than an election officer or police officer on duty shall, except with the authority of the Presiding Officer, have any communication whatsoever with a voter who is in, or in the immediate precincts of, a polling station for the purpose of voting.

(xviii) **THAT** I am advised by my Counsel on record which advise I verily believe to be true that pursuant to Regulation 72 of the Elections (General) Regulations that it is the duty of the Presiding Officer to assist any such voter who may require such assistance during voting and the same is to be done in the presence of the agents. And as such, and without any prejudice to the foregoing, it is my averment that the voting process was conducted in accordance with the law and in the presence of all party agents.

(xix) **THAT** the claims expressed in the Petitioner's Petition and the Supporting Affidavits thereon and the prayers set out therein are misconceived, wishful and an attempt to arm twist the hands of justice by the Petitioner.

(xx) **THAT** I am advised by my Counsels on record which advise I verily believe to be true that the Petition is misconceived and aimed at subverting the will of the people of Tana River County and further denying them an opportunity to be served by their chosen representative.

(xxi) **THAT** I am advised by my Counsel on record which advise I verily believe to be true that the Petition herein seeks to subvert the will of the people of Tana River County and to deny them the benefit of exercising their political rights as guaranteed under Article 38 of the Constitution as read with Articles 81 and 86 thereof and Section 83 of the Elections Act.

(xxii) **THAT** I urge this Honourable Court to decline the invitation by the Petitioner to illegally and through the backdoor subvert the will of the people of Tana River County and deny them their rightfully chosen representatives.

(xxxiii) **THAT** I swear this Affidavit in opposition to the Petition and urge the Honourable Court to dismiss the same and let the will of the people of Tana River County as confirmed by choosing the 1st Respondent prevail.

33. DW2 said in cross-Examination that he assisted about 20% of the voters who did not know how to read and write to vote. There were three streams at Kipini Primary school and DW2 was in stream 3.

34. DW3 MOHAMMED B. SULEIMAN who was the presiding officer at Kipini primary school polling station stream 2 deposed in his Affidavit which was adopted as his evidence in chief as follows;

(i) **THAT** I am well conversant with the facts giving rise to the instant Petition and as such I am duly competent to swear and depose to this Affidavit which I hereby do and I wish to state as follows;

(ii) **THAT** I have read and had explained to me the contents of the Affidavit sworn by MOHAMMED GONJOBE RAKA, the 1st and 2nd Respondents Response filed herein and I wish to adopt the assertions therein and reiterate the same and I fully associate with them together with the annexures thereto.

(iii) **THAT** the 2nd and 3rd Respondents deny each and every allegation in the Petition of the Petitioner as if the same were set out herein below verbatim and traversed seriatim and the Petitioner is hereby put to strict proof thereof.

(iv) **THAT** in respect of Kipini Polling Station Number 2 the polling station in question I wish to state as follows;

(v) **THAT** all agents were present during the opening, voting and during the time of closure.

(vi) **THAT** in response to paragraph 9 of the Petitioner's affidavit I wish to state that no agent was prevented from witnessing voting.

(vii) **THAT** the agents present witnessed the counting of votes and signed the declaration results in form 37A that is annexed to the affidavit of the Returning Officer, Tana River County Mohammed Gonjobe Raka.

(viii) **THAT** no agent was prevented from witnessing the voting exercising and neither was the voting disrupted at Kipini Primary Station Number 2 and the averment at paragraph 9 of the Petitioner's affidavit are mere hearsay and I annex polling station diary marked as "MBS-1" to confirm no such incident was recorded.

(ix) **THAT** the voting took place peacefully and no acts of violence or disruption took place.

(x) **THAT** In Response to the Affidavit sworn by the Petitioner TUNEYA HUSSEIN DADO in paragraph 6, 7, 8,9,10 and 11 I wish to state that no such incident was brought to my attention and such averments are strange to me.

(xi) **THAT** as a presiding officer I wish to state that voting at Kipini Polling station was peaceful and in accordance to the Laws and Elections Regulations.

(xii) **THAT** I annex copy of polling station day diary and mark as "MBS-1" for the polling Station at Kipini Primary School which confirms that no incident as alleged by the petitioner took place.

(xiii) **THAT** I at all material times ensured order at the polling stations and as required by the law, engaged and/or involved the different party agents where necessary in the spirit of transparency, openness and fairness of the process.

(xiv) **THAT** the claims expressed in the Petitioner's Petition and the Supporting Affidavits thereon and the prayers set out therein are misconceived, wishful and an attempt to arm twist the hands of justice by the Petitioner.

(xv) **THAT** I am advised by my Counsels on record which advise I verily believe to be true that the Petition is misconceived and aimed at subverting the will of the people of Tana River County and further denying them an opportunity to be served by their chosen representative.

(xvi) **THAT** I am advised by my Counsel on record which advise I verily believe to be true that the Petition herein seeks to subvert the will of the people of Tana River County and to deny them the benefit of exercising their political rights as guaranteed under Article 38 of the Constitution as read with Articles 81 and 86 thereof and Section 83 of the Elections Act.

(xvii) **THAT** I urge this Honourable Court to decline the invitation by the Petitioner to illegally and through the backdoor subvert the will of the people of Tana River County and deny them their rightfully chosen representatives.

(xviii) **THAT** I swear this Affidavit in opposition to the Petition and urge the Honourable Court to dismiss the same and let the will of the people of Tana River County as confirmed by choosing the 1st Respondent prevail.

35. DW3 stated in cross-examination that voters who did not know how to read and write who came with assistants filled forms 32A. He said all the agents were present when the people who required assistance were assisted to vote.

DW3 said Fatuma Yusuf and Issack Aden were the two Jubilee agents who were at Kipini primary school stream 2 and they witnessed the votes who did not know how to read and write being assisted.

36. DW4 MSAMBALA SALIM KATANA also deposed in his affidavit which he asked the court to adopt as his evidence in chief as follows;

(i) **THAT** I am well conversant with the facts giving rise to the instant Petition and as such I am duly competent to swear and depose to this Affidavit which I hereby do and I wish to state as follows;

(ii) **THAT** I have read and had explained to me the contents of the Affidavit sworn by MOHAMMED GONJOBE RAKA, the 1st and 2nd Respondents Response filed herein and I wish to adopt the assertions therein and reiterate the same and I fully associate with them together with the annexures thereto.

(iii) **THAT** the 2nd and 3rd Respondents deny each and every allegation in the Petition of the Petitioner as if the same were set out herein below verbatim and traversed seriatim and the Petitioner is hereby put to strict proof thereof.

(iv) **THAT** in respect of Kipini Polling Station Number 1 the polling station in question I wish to state as follows;

(v) **THAT** all agents were present during the opening and during the time of closure.

(vi) **THAT** in response to paragraph 9 of the Petitioner's affidavit I wish to state that no agent was prevented from witnessing voting.

(vii) **THAT** the agents present witnessed the counting of votes but because of tiredness at the time of preparing the form 37A they had gone out hence they did not sign the declaration of

results in form 37A even after sending my Deputy Presiding Officer to look for them.

(viii) **THAT** no agent was prevented from witnessing the voting exercising and neither was the voting disrupted at Kipini Primary Station Number 1 and the averment at paragraph nine of the Petitioner's affidavit are mere hearsay and I annex polling station diary marked as "MK-1" to confirm no such incident was recorded.

(ix) **THAT** the voting took place peacefully and no acts of violence or disruption took place.

(x) **THAT** In Response to the Affidavit sworn by the Petitioner TUNEYA HUSSEIN DADO in paragraph 6, 7, 8, 9, 10 and 11 I wish to state that no such incident was brought to my attention and such averments are strange to me.

(xi) **THAT** as a presiding officer I wish to state that voting at Kipini Primary School Station 1 was peaceful and in accordance to the Laws and Elections Regulations.

(xii) **THAT** I annex copy of polling station day diary and mark as "MK 1" for the polling Station at Kipini Primary School, Garsen Constituency which confirms that no incident as alleged by the petitioner took place.

(xiii) **THAT** I am advised by my Counsel on record which advise I verily believe to be true that under Regulation 63 of the Election (General) Regulations, it is the duty of a Presiding Officer to keep order at the Polling Station and this includes the giving of lawful instructions in order to secure the voting process.

(xiv) **THAT** at Kipini polling Station there were no incidences and/or occurrences and the voting and counting process was at all material times peaceful and in accordance with the Constitution, the Election Laws and Regulations.

(xv) **THAT** I at all material times ensured order at the polling stations and as required by the law, engaged and/or involved the different party agents where necessary in the spirit of transparency, openness and fairness of the process.

(xvi) **THAT** I am advised by my Counsel on record which advise I verily believe to be true that under Regulation 65 of the Election (General) Regulations, no person other than an election officer or police officer on duty shall, except with the authority of the Presiding Officer, have any communication whatsoever with a voter who is in, or in the immediate precincts of, a polling station for the purpose of voting.

(xvii) **THAT** I am advised by my Counsel on record which advise I verily believe to be true that pursuant to Regulation 72 of the Elections (General) Regulations that it is the duty of the Presiding Officer to assist any such voter who may require such assistance during voting and the same is to be done in the presence of the agents. And as such, and without any prejudice to the foregoing, it is my averment that the voting process was conducted in accordance with the law and in the presence of all party agents.

(xviii) **THAT** the claims expressed in the Petitioner's Petition and the Supporting Affidavits thereon and the prayers set out therein are misconceived, wishful and an attempt to arm twist the hands of justice by the Petitioner.

(xix) THAT I am advised by my Counsels on record which advise I verily believe to be true that the Petition is misconceived and aimed at subverting the will of the people of Tana River County and further denying them an opportunity to be served by their chosen representative.

(xx) THAT I am advised by my Counsel on record which advise I verily believe to be true that the Petition herein seeks to subvert the will of the people of Tana River County and to deny them the benefit of exercising their political rights as guaranteed under Article 38 of the Constitution as read with Articles 81 and 86 thereof and Section 83 of the Elections Act.

(xxi) THAT I urge this Honourable Court to decline the invitation by the Petitioner to illegally and through the backdoor subvert the will of the people of Tana River County and deny them their rightfully chosen representatives.

(xxii) THAT I swear this Affidavit in opposition to the Petition and urge the Honourable Court to dismiss the same and let the will of the people of Tana River County as confirmed by choosing the 3rd Respondent prevail.

37. DW4 said in his cross-Examination that Kipini primary school stream one opened at 9 am and closed at 8pm.

He said at the time of closing the agents were not present. He said he did not receive any complaint that there was a voter who required assistance who was not assisted. He said he was required to record the reason the agents were absent. DW4 further said the absence of the agents did not invalidate the results according to Regulation 62.

38. DW5, STEPHEN KITSAO KARANI deposed in his Affidavit which he asked the court to adopt as his evidence in chief as follows;

(i) THAT I have read and had explained to me the contents of the Affidavit sworn by MOHAMMED GONJOBE RAKA, the 1st and 2nd Respondents Response filed herein and I wish to adopt the assertions therein and reiterate the same and I fully associate with them together with the annexures thereto.

(ii) THAT the 2nd and 3rd Respondents deny each and every allegation in the Petition of the Petitioner as if the same were set out herein below verbatim and traversed seriatim and the Petitioner is hereby put to strict proof thereof.

(iii) THAT in respect of Garsen Primary School Polling Stations, the three polling stations in question were opened within the required period wherein voting commenced in the presence of the various party and candidate agents and was closed in accordance with the regulations by the presiding officers manning the three stations.

(iv) THAT the voting took place peacefully and no acts of violence or disruption took place.

(v) THAT In Response to the verifying Affidavit sworn by the Petitioner TUNEYA HUSSEIN DADO in paragraph 6, 7, 8, 9, 10 and 11, I wish to state that no such incident was brought to my attention and such averments are strange to me.

(vi) THAT as a returning officer I wish to state that voting at Garsen Constituency was peaceful and in accordance to the Laws and Elections Regulations.

(vii) **THAT** I swear this Affidavit in opposition to the Petition and urge the Honourable Court to dismiss the same and let the will of the people of Tana River County as confirmed by choosing the 3rd Respondent prevail.

39. DW5 said in cross-Examination that he was the returning officer at Garsen primary school where there were three streams. He said he arrived at the Tallying Centre at 11am and there was no violence at the Garsen constituency Tallying centre.

40. DW6, MOROWA OMAR MOROWA deposed in his Affidavit which he asked the court to adopt as his evidence in chief as follows;

(i) **THAT** I am well conversant with the facts giving rise to the instant Petition and as such I am duly competent to swear and depose to this Affidavit which I hereby do and I wish to state as follows;

(ii) **THAT** I have read and had explained to me the contents of the Affidavit sworn by MOHAMMED GONJOBE RAKA, the 1st and 2nd Respondents Response filed herein and I wish to adopt the assertions therein and reiterate the same and I fully associate with them together with the annexures thereto.

(iii) **THAT** I was undertaking my duties as an ICT Manager and I was on stand-by within the County to be present at all the polling stations should there be any system and/or gadget failure in any of the polling stations.

(iv) **THAT** transmission of results within the county went on smoothly.

(v) **THAT** in response to paragraph 14 of the affidavit of TUNEYA HUSSEIN DADO I wish to respond and state as follows that I was not feeding any information at Galole Constituency tallying center, my role was to ensure all ICT systems were working in particular network connectivity, the laptops had access to power and the results streaming in from various polling stations were projected properly on a wall in the tallying center for all the agents, observers, media and candidates to see in line with the Election Regulations.

(vi) **THAT** in response to the affidavit of HASSAN GALGALO BARISA I wish to respond and state that the petitioner raised concerns with the Returning officer in regard to the tally of votes from Danisa Primary School in Garsen Constituency which had two polling stations and I was authorized by the Returning Officer to call the constituency ICT Clerk Garsen to verify if the results displayed on the systems conform with the results in Form 37A sent to the Garsen tallying center.

(vi) **THAT** I had to make the call outside the hall because at that time the results for Galole Constituency were being announced by the returning officer and it was noisy inside.

(vii) **THAT** after I made the call, I explained the findings to the petitioner and he was contented with my response.

(viii) **THAT** I swear this Affidavit in opposition to the Petition and urge the Honourable Court to dismiss the same and let the will of the people of Tana River County as confirmed by choosing the 3rd Respondent prevail.

41. DW6 said in cross-Examination that he is an ICT Manager working for the 1st Respondent. He said his office is at Hola and he was not the only ICT officer in Tana River County during the General elections. He said there were two ICT officers at Bura and two at Galole and two at the county Tallying centre with a clerk.

42. DW6 said he was stationed at Hola but he was coordinating activities in Bura and Galole constituency through phone. He said his team was able to handle technical challenges experienced during the voting. He said his work was basically maintaining computer and software and not transmission of results.

43. DW6, he said he was not involved in filling forms. DW6 said on 9/8/2017, the petitioner went to make an inquiry. DW6 said the petitioner went with a list of polling stations which he wanted to know the transmission status. DW6 said he used to work at the Tana River County office.

44. DW6 denied that entered any results at Galole constituency Tallying centre. He said the attack at the said Tallying centre occurred after the petitioner had left. He said the attack did not affect the elections because at the time it occurred, the voting had already been done. He said there was no ballot box which was broken. He said after the attack, tallying resumed and results were declared.

45. DW7 MOHAMMED GONJOB RAKA who was the returning officer in the Tana River Gubernatorial elections deposed as follows in his affidavit which was adopted as his evidence in chief.

(i) **THAT the Petition together with the Affidavit as filed herein are incompetent and fatally defective for being an abuse of the court process given the fact that the Petitioner in his Petition has failed to prove by cogent and credible evidence all the allegations, if any, of irregularities, malpractices or breaches of the law cited in the Petition on the basis of which the election of the winning candidate/1st Respondent herein is sought to be nullified.**

(ii) **THAT the Petition is ill-conceived, lacks in merit and is bad in law given the fact that, the Petitioner has not only failed to prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the gubernatorial elections for Tana River County.**

(iii) **THAT the Petition herein is incompetent, misconceived and legally untenable given the fact that from the totality of the evidence adduced, the Petitioner has not only relied on hearsay evidence but the averments, depositions and prayers as couched amount to a fishing expedition contrary to rules of evidence on production and admissibility of documents.**

(iv) **THAT the entire process leading to the final declaration of the Gubernatorial results for Tana River was conducted in accordance with the Constitution and the Laws and Regulation governing elections and which led to the 3rd Respondent being declared the winner. *Annexed herewith and marked MMR-1A is a copy of the Statutory Instrument namely Form 37C used to declare the final results.***

(v) **THAT as a Returning Officer, I duly cleared the various candidates vying for the position of Governor for Tana River County. To wit, the various candidates such as the 3rd Respondent herein duly presented his various credentials for clearance together with the necessary academic papers after which he was cleared to vie for the aforesaid position. *Annexed herewith and marked MMR-1B are copies of the documents used to clear the candidates vying for the Gubernatorial position for Tana River County.***

(vi) **THAT** the foregoing notwithstanding, I wish to respond to the Petition as hereunder;

(vii) **THAT** the contents of paragraphs 1, 2, 3, 4, and 5 are admitted in as much as the same are merely descriptive of the Parties herein and the legal foundations of the Petition.

(viii) **THAT** I deny the contents of paragraph 6 of the Petition and wish to contend that those are not the results of the Tana River Gubernatorial Elections and are mere random numbers imposed by the Petitioner under the guise of "Results of the Gubernatorial Elections for Tana River County" in the circumstances, I am advised by my Counsel on record which advise I verily believe to be true that the Petition is incompetent, bad in law, incurably defective and the same ought to be struck out and/or dismissed in the *limine* on the basis that the Petitioner has failed and/or deliberately omitted to annex the results of the Gubernatorial election he is impugning, as required by law.

(ix) **THAT** I am advised by my Counsel on record which advise I verily believe to be true that it is trite law that a party seeking to have an election nullified and/or challenging the elections ought to annex the true and accurate results as declared for the position in question.

(x) **THAT** the 1st and 2nd Respondents admit the contents of paragraphs 7 and 8 of the Petition.

(xi) **THAT** in response to paragraph 9 of the Petition, I wish to state that the election for the Governor for Tana River County was conducted in a manner consistent with the Constitution of Kenya, 2010, Electoral statutes and Regulations, and in accordance with international standards on elections.

(xii) **THAT** in response to paragraph 9 (a), (b) (c) (d) (e) (f) and (g), I further wish to state that;

a) The Petitioner other than making a generalized statement and general allegations that voting was disrupted by violence; he does not produce any evidence in support of those assertions. The Petitioner does not for instance specify the names of the alleged 'persons claiming to be the supporters of the 3rd Respondent, at the alleged Garsen Primary School and Mbandi polling station, among others. The Petitioner merely makes general assertions without any iota of evidence and or any cogent evidence to substantiate those assertions.

b) The Petitioner does not produce any evidence and neither does he give the specific name of the alleged 'person' claiming to be the supporter of the 3rd Respondent who fatally stabbed an unnamed 'election official and un-named three persons who were allegedly killed by un-named police. The Petitioner merely makes generalized assertions without any specifications or evidence in support of the same. It is the 1st and 2nd Respondents' position that the issues raised by the Petitioner are of a serious criminal nature that ought to be proved with real and cogent evidence beyond reasonable doubt. The Petitioner does not for instance even produce OB reports where the alleged criminal offences were reported.

c) The Petitioner merely makes generalized assertions and does not produce any evidence and/or cogent evidence in support of the allegations therein. He does not even bother to name the affected polling station therein, the names of his alleged agents, the 1st Respondent's agents, voters and other people. He does not further specify the alleged 'several hours' which the 1st and 2nd Respondent deny in *toto*.

d) The 1st and 2nd Respondent aver that at no time were the votes cast, voting materials, gadgets

and records at Galole tallying centre left unattended.

e) Furthermore the 1st and 2nd Respondents, without prejudice to paragraph (d) above, state that strangers stormed the tallying centre and the situation was brought under control by the security agents seconded to the 1st and 2nd Respondent and the officers of the 1st Respondent, in particular the Returning Officer was able to resume tallying as per the Laws and Regulations and as such, there was no such violence and or 'melee' as alleged by the Petitioner and as such, at no time was their integrity compromised and the votes cast therein are a true reflection of the will of the people of Tana River County.

f) The 1st and 2nd Respondents deny in *toto* the assertions by the Petitioner that his agents at Kipini Primary School polling station and Imani Primary School were prevented from witnessing the manner of assisting illiterate voters by the election officials. Furthermore, the Petitioner has not produced any evidence for instance the names of the alleged 'illiterate voters' and or any of their Affidavits in support of those assertions.

g) The 1st and 2nd Respondents aver further that the Petitioner has not produced any cogent evidence and/or pleaded with specificity in regard to the generalized assertion he makes pertaining to alleged alterations and defects in regard to Form 37As.

h) The 1st and 2nd Respondent maintain that all Form 37As were filed and completed in accordance with the law and witnessed and signed by the Candidates agents.

j) In response to paragraph 9 (g), the 1st and 2nd Respondent assert further that the Petitioner cannot merely plead on unsubstantiated allegations and illusions and use such 'beliefs' to arm-twist the arms of the judiciary in an aim of subverting the will of the people of Tana River County.

(xiii) **THAT** in response to paragraph 10 of the Petition, it is the 1st and 2nd Respondents' position and affirmation that the Tana River Gubernatorial elections were conducted in a free, fair, transparent and open manner in accordance with the dictates of the Constitution and various electoral laws and regulations.

(xiv) **THAT** in response to paragraph 11 of the Petition, the 1st and 2nd Respondents affirm that at no point was the integrity of the said elections compromised and neither has the Petitioner adduced any evidence in support of those assertions.

(xv) **THAT** in response to paragraph 12 of the Petition, the 1st and 2nd Respondents aver that the elections were free and fair and they reflect the true will of the people of Tana River County and as such, the 3rd Respondent was duly and legally declared the winner as he deserved.

(xvi) **THAT** in response to paragraph 13 of the Petition, the 1st and 2nd Respondents reiterate that the Gubernatorial election process was backed by an elaborate electoral management system supported by various electoral laws, which included several layers of safeguards to ensure an open transparent, participatory and accountable system to guarantee free and fair elections pursuant to Article 81 as read together with Article 86 of the Constitution and Section 83 of the Elections Act.

(xvii) **THAT** further to the fore going and without any prejudice thereof, the 1st and 2nd Respondents aver further that in the absence of any irregularities and illegalities, the Petitioner cannot purport that the election was conducted illegally and in any event, if indeed there were

any violations of the law, which the 1st and 2nd Respondents deny, then the same did not at all affect and/or impact on the overall outcome and results of the elections.

In Response to the Affidavit sworn by the Petitioner in support of the Petition, I wish to respond further as follow;

(xviii) **THAT** paragraphs 1, 2, 3, 4 and 5 of the Petition are admitted in as much as they are not in dispute herein.

(xix) **THAT** the 1st and 2nd Respondents THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION and THE RETURNING OFFICER, TANA RIVER COUNTY deny each and every allegation in the Petition and Affidavits in support thereof as if the same were set out herein below verbatim and traversed seriatim and the Petitioners are hereby put to strict proof thereof.

(xx) **THAT** in response to paragraph 6 I wish to state that the Petitioner is merely making generalized allegations and has failed to produce any and/or cogent evidence in support of those assertions. He has not given the specific names of the persons he alleges became violent and neither does he produce any OB reports in support for instance indicating that he reported the assertions to the police.

In Response to the Affidavit sworn by the SALIM DAME MOHAMED in support of the Petition, I wish to respond further as follow;

(xxi) **THAT** the deponent has not produced any evidence in support of the allegations that he is a registered voter in Tana River County. I am advised by my Counsel on record which advise I verily believe to be true that he cannot purport and make such allegations before this Honourable Court without adducing such evidence.

(xxii) **THAT** the deponent has not further produced any evidence in support of his assertions that he was the Chief Agent of the Petitioner for the purposes of the Gubernatorial elections for Tana River County.

(xxiii) **THAT** the assertions in the deponent's Affidavit are mere generalized unsubstantiated allegations backed by no evidence.

(xxiv) **THAT** I wish to state that at no time was there any delay in the transmission of results and there was neither any complaint to that effect. That notwithstanding and without any prejudice, any such delay was only as a result of the clogged system as various polling stations were transmitting and uploading their results to the KIEMS kits and hence, such cannot be said to have been systematic and/or deliberate and/or occasioned by human interference. As such, the Petitioner's assertions are baseless and unfounded as he is simply trying to cast aspersions as to the integrity of the electoral process.

(xxv) **THAT** at no time did the deponent talk to me during the electoral process and neither did I interact with him at any time and hence the assertions in paragraph 8 of the Affidavit are unfounded and baseless.

(xxvi) **THAT** the averments in the Affidavit of the deponent are mere fabrication and a narrative just to taint and cast aspersions as to the integrity of the process.

In addition and without any prejudice to the foregoing, I wish to state further;

(xxvii) **THAT** no irregularities were noticed during the voting process save the incident that happened during the tallying which was contained and as such it cannot be said the election was compromised and/or in any way conducted outside the law.

(xxviii) **THAT** the Petitioner has failed to adduce evidence and or demonstrate that any irregularities he is contending affected the end result and declaration. *Annexed herewith and marked MMR-1C is a bundle of the Form 37As used to declare the results at the various polling stations.*

(xxix) **THAT** the standard of proof required to prove electoral offences and/or malpractices is proof beyond reasonable doubt and the Petitioner in this case has miserably failed to discharge that burden.

(xxx) **THAT** the claims expressed in the Petitioner's Petition and the prayers set out therein are misconceived, wishful and an attempt to arm twist the hands of justice by the Petitioner.

(xxxi) **THAT** I am advised by my Counsels on record which advise I verily believe to be true that the Petitioner is misconceived and aimed at subverting the will of the people of Tana River County and further denying them an opportunity to be served by their chosen representative.

(xxxii) **THAT** I am advised by my Counsels on record which advise I verily believe to be true that the Petition herein seeks to subvert the will of the people of Tana River County and to deny them the benefit of exercising their political rights as guaranteed under Article 38 of the Constitution as read with Articles 81 and 86 thereof and Section 83 of the Elections Act.

(xxxiii) **THAT** I urge this Honourable Court to decline the invitation by the Petitioner to illegally and through the backdoor subvert the will of the people of Tana River County and deny them their rightfully chosen representatives.

(xxxiv) **THAT** I swear this Affidavit in opposition to the Petition and urge the Honourable Court to dismiss the same and let the will of the people of Tana River County as confirmed by choosing the 1st Respondent prevail.

46. DW7 said in cross – Examination that he was managing the elections at Tana River county and he was also handling disputes.

He said he talked to the petitioner in the afternoon of 9/8/2017 concerning a complaint raised by the petitioner that his results from eight polling stations had not been transmitted.

47. DW7 said he stayed with petitioner for about 20 minutes at Galole Tallying centre. After he checked the eight polling stations and confirmed that the results had been transmitted, he left.

DW7 said a few minutes after the petitioner left, there was a commotion and DW7 heard gun shots and he saw people running away from the hall and there was a stampede.

DW7 said he also ran away. One of the polling station clerks was stabbed to death. When he returned, he learnt that around 3 people were killed around the compound.

DW7 also said the tallying process was not affected by the incident. He said he continued receiving forms 37As after the incident.

48. DW7 also said he was away for about one hour after the incident and he returned at six to seven pm and all the documents were recovered and the exercise resumed.

He said he prepared form 37Cs. He said on page 16 of his Affidavit the word Homabay was deleted and replaced with the word Tana River.

He said the intruders come almost at the tail end of the exercise and they did not interfere with the materials. He said no results were lost and there was no complaint of loss of results.

49. DW7 also said the clerk who was killed was not involved in the tallying but was watching proceedings in the Gallery. He said the Returning officer had power to suspend the tallying and that is what he did and he later resumed the exercise. He attached forms 37As to his Affidavit.

50. DW7 also said in re-examination that he did not have any authority to alter the forms from the polling stations. He said the results were compiled from forms 37As. He said he compiled forms 37Cs from 37Bs.

THE 3RD RESPONDENT'S EVIDENCE

51. 3RDW1 FAKHARI OMAR SHADIKI stated in her affidavit as follows;

(i) **THAT I was the agent of National Super Alliance but specifically appointed by ODM (Orange Democratic Movement) assigned to Garsen Constituency more specifically I was stationed at Kipini Primary School Polling center stream No. 1 of 3 for Garsen Constituency after being successfully trained on the 7th August, 2017.**

(ii) **THAT I was at the polling center by 5:00 am on the 8th August, 2017, but the ballot boxes arrived late.**

(iii) **THAT I am aware from ODM [Orange Democratic Movement) we were 6 agents, one inside and another outside for the purposes of alternation in case of anything.**

(iv) **THAT I am aware all agents were present in the stream and all agents were seated on a Bench in each polling station.**

(v) **THAT I am aware that when a person who needed assistance with voting, they were assisted by the Presiding Officer in the presence of all the present agents to witness the whole process by the presiding officer displaying the same to the agents to confirm.**

(vi) **THAT I am aware there were two agents of the Petitioner present one Abdala Athman and in stream one (1) when I entered, I was seated next to Amina Nurio until late when the votes were counted and transmitted to the Garsen Tallying Centre.**

(vii) **THAT I witnessed the counting and recorded the same in my books and reported to the Chief Agent Said Mohamed Hiribae.**

(viii) **THAT the results were scanned and remitted to the constituency tallying center, Garsen**

High School in our presence.

(ix) THAT in general Kipini Primary School, Polling Center was peaceful.

52. 3RD DW1 said in cross-Examination that she was an agent of the 3rd Respondent at Kipini primary school polling station stream one. She said she witnessed the presiding officer assisting voters who did not know how to read and write.

She said she was with Amina Noor who was a jubilee agent who was allowed in at 11.am because there was another agent called Abdalla also for Jubilee party.

3RD DW1 the voting at Kipini Primary school stream one went on well.

53. 3RD DW2 SAAID DIRIWO GAWAWA who was an agent for the 3rd Respondent at Kipini Primary School stream 2 also swore an Affidavit on 18/9/2017 which was adopted as his evidence in chief in which he deposed as follows:

(i) THAT I was the polling agent appointed by the Orange Democratic Party (ODM);

(ii) THAT I was stationed at Kipini Primary School, stream 2 of 3 in the polling station of Kipini East Ward, Garsen Constituency of Tana River County during the Election process of 8th August, 2017 general election;

(iii) THAT I was mandated to watch on behalf of above named candidates the entire polling process including and not limited to counting and recording the final tally at the polling station;

(iv) THAT prior to the commencement of the voting process, there was a misunderstanding as to the number of agents per political party to be admitted in the particular stream I was in;

(v) THAT the agents of the aspirants for the Jubilee Party namely Amina Nurio and Fatuma Yusuf wanted to be both admitted into the polling stream number 2 of 3 contrary to the directions given by the Presiding Officer that only one agent per candidate can be allowed access to the polling station and that they can only be allowed to alternate;

(vi) THAT this problem was resolved by the Presiding Officer at the polling station and one agent per party was later allowed entry to the polling stream;

(vii) THAT during the entire voting process, we were called from time to time by the Presiding Officer to witness the assistance given to the elderly and illiterate voters in the process of voting;

(viii) THAT all the party agents had the opportunity to do the witnessing as required by law and that at no particular time was any witness denied the opportunity to witness the same;

(ix) THAT I can confirm that no particular voter was coerced or influenced by the polling officials to vote in a particular way. The nature of the help was in accordance with the law;

(x) THAT I am in shock and disbelief to learn that the Form 37A annexed by the Petitioner does not bear my signature yet on the material day, I had duly signed the said form in the presence of the other agents;

(xi) THAT all in all, the election process was conducted in a manner that was free, fair transparent and independent;

54. 3RDW2 stated in cross-examination that he was an agent for the 3rd Respondent. He said he was with Fatuma Yussuf and Amina Nurio for Jubilee party.

DR DW2 said the petitioner had an agent and his party Jubilee also had an agent. He said they witnessed illiterate voters being assisted by the presiding officers. He said all the agents signed form 37A.

55. 3RDW3 SAMUEL ABAE MACHANGA who was a Nasa agent at Kipini primary school polling station centre stream 3 also deposed in his affidavit as follows;

(i) THAT I was the agent of National Super Alliance (NASA) representing Orange Democratic movement (ODM).

(ii) THAT I was stationed at Kipini Primary School stream 3 of 3 at Galole Constituency in Tana River County during the Election process of 8th August, 2017 general election.

(iii) THAT I was mandated to watch on behalf of my candidate, the 3rd Respondent the entire polling process including but not limited to the counting and recording of the final tally at the polling station. I was given a form to sign against the results that my candidate had gotten once they were announced.

(iv) THAT during the election process the Polling officer called all the agents of different parties to witness the helping of the elderly and the illiterate. The process was free and fair.

56. 3RDW3 said in cross-examination that he did not assist any voter as he was only a witness. He said he witnessed the presiding officer assisting those who required assistant. He said he did not sign form 37A as he had already left the polling station when it was filled.

57. 3RDW4 MOHAMED GOLO NDOGO deposed as follows in his Affidavit which was adopted as his evidence in chief.

(i) THAT I was the polling agent for DHADHO GADDAE GODHANA being the duly nominated Orange Democratic Movement (ODM) candidate;

(iii) THAT I was stationed at Imam Primary School Polling station of Garsen Central Ward, Garsen Constituency of Tana River County during the Election process of 8th August, 2017 general election.

(iii) THAT I was mandated to watch on behalf of my candidate the entire polling process including and not limited to counting and recording the final tally at the polling station;

(iv) THAT during the entire voting process, we were called from time to time by the Presiding Officer to witness the assistance given to the elderly and illiterate voters in the process of voting;

(v) THAT all the party agents had the opportunity to do the witnessing as required by law and that at no particular time was any witness denied the opportunity to witness the same.

(vi) THAT I can confirm that no particular voter was coerced or influenced by the polling officials to vote in a particular way. The nature of the help was in accordance with the law;

(vii) THAT all in all, the election process was conducted in a manner that was free, fair transparent and independent;

58. 3RDW4 said in his cross-examination that the presiding officer was assisting the voters who required assistance in the presence of the agents at Imani Primary school polling station where he was an agent for the 3rd Respondent.

59. 3RDW5 STEPHEN OTOI deposed in his affidavit as follows;

(i) THAT I was the chief agent of National Super Alliance but specifically appointed by ODM (Orange Democratic Movement) assigned to Garsen Constituency more specifically I was stationed at Garsen High School the tallying center for Garsen Constituency after being successfully trained.

(ii) THAT I was at the Tallying center by 2:00 am on the 8th August, 2017, I was there early to monitor the proceedings at the polling station to ensure that all was running smoothly.

(iii) THAT I was in charge of the Garsen Primary School polling station which had 5 streams with a total of 10 agents from the Orange Democratic Movement. One was inside and the other was outside for alternating purposes. I checked and coordinated all the five streams in Garsen Primary School.

(iv) THAT after confirming everything was fine and running smoothly, at around 6:30 pm I went to the tallying center at Garsen High School.

(v) THAT as I was at the Garsen High School, the Tallying center, I received a call from one of my agents that a politician specifically the Petitioner wanted to enter into a polling station at Garsen Primary School.

(vi) THAT I rushed to Garsen Primary School and as I arrived I found that the Petitioner was already allowed in stream No. 1 at Garsen Primary School, Polling Station. I engaged one of the election officers to explain why they allowed the petitioner into a polling station, they stated that the Petitioner was aggressive towards the security officers and that is why he was allowed into observe what was happening.

(vii) THAT the above raised anxiety and a crowd formed at the gate exit chanting and complaining, why was a politician allowed inside a polling station.

(viii) THAT as the Petitioner was leaving the Garsen Primary School he snared abusive gestures towards the crowds and that is when some rowdy boys within the crowd started throwing stones and the Petitioner's car was hit and the car window broke. All this was happening outside the gate of the polling station.

(ix) THAT thereafter I returned back to Garsen High School the main Tallying Center for Garsen Constituency and as the results were being announced, I confirmed the same with my agents' books.

(x) THAT despite the above fracas caused by the Petitioner, the election was peaceful and the Tallying exercise went on smoothly.

(xi) THAT the exercise was conducted well and the counting went on well until the results were announced.

(xii) THAT in general Garsen Constituency was peaceful.

60. 3RDW5 said in his cross-examination that he was the chief agent for Nasa at Garsen High school Tallying centre.

He said at 6.30pm on 8/8/2017, he was called by his agent at Garsen primary school polling centre and he drove to the polling station where he saw the petitioner coming towards the gate.

3RDW5 said the petitioner entered the polling station and that raised anxiety. 3RDW5 said he reported the matter to the police officer at the gate and also to the election officers.

61. 3RDW6 NICKSON MWAMBURI MUNGONGOO deposed in his Affidavit as follows;

(i) THAT I was the polling agent appointed by the Orange Democratic Movement (ODM).

(ii) THAT I was stationed at Garsen primary school polling station of Garsen Constituency of Tana River County during the Election process of 8th August, 2017 general election.

(iii) THAT I was mandated to watch on behalf of my candidate the entire polling process including and not limited to counting and recording of the final tally at the polling station. I was given a form 37 A to sign against the results that my candidate had gotten once they were announced.

(iv) THAT during the election process the Polling officer called all the agents of different parties to witness the helping of the elderly and the illiterate. The process was free and fair.

(v) THAT after the voting ended the Petitioner came and tried to force himself into the polling station which he was later allowed but he only entered stream 1 of the polling station to check the progress.

(vi) THAT the coming of the Petitioner drew attention of the community members who were in the field and they started complaining about his forceful entrance into the polling station.

(vii) THAT the petitioner angrily insulted the community members while addressing them outside the polling station by telling youths from Garsen, Pokomo and Waredy that they will pay for their actions once he took oath of office.

(viii) THAT after the insults of the Petitioner to the community it is when his car which was parked outside the polling station window was broken with a stone.

(ix) THAT at no point was the crowd chanting pro ODM/NASA songs. The crowd was composed of supporters of all the different aspirants.

62. 3RDW6 said in cross-examination that he was outside the gate at Garsen primary school polling

station when the petitioner forcefully entered the polling station at around 6.30pm after the voting was over.

He said the petitioner's vehicle was stoned after the petitioner insulted the community who had complained after he entered the polling station.

63. 3RDW6 said he saw the petitioner making gestures at the members of the public outside the polling station. He said the incident occurred when voting was still going on. He said there was security at the polling station and the incident did not affect the counting of votes.

64. 3RDW7 BAKARI ALI KOMORA who was the chief coordinator appointed by the National Super Alliance (NASA) at Galole Tallying centre deposed in his affidavit as follows;

(i) THAT I was the Chief Agent appointed by the National Super Alliance (NASA) representing Orange Democratic movement (ODM).

(ii) THAT I was stationed at Galole Tallying Center which was in Hola Secondary School at Galole Constituency in Tana River County during the Election process of 8th August, 2017 general election.

(iii) THAT I was mandated to watch on behalf of my candidate the entire Tallying process. I was given a form to sign against the results that my candidate had gotten once they were announced.

(iv) THAT prior to the election I was the Chief Co-ordinator of Galole Constituency. I was deputized by Mahamud Makoma from Wayu Ward.

(v) THAT I trained Agents of Kinakomba, Mikinduni Chewani wards while my deputy trained agents in Wayu ward. The training was on 5th -6th August 2017.

(vi) THAT I also did posting and facilitating of Agents to the various wards I carried out training. My deputy also did the same in Wayu Ward.

(vii) THAT on 8th August, 2017 I voted at Bondeni Primary School. Thereafter, I started moving around other polling stations checking their progress and solving any emerging issues.

(viii) THAT I moved to Hola Secondary School which was the county's tallying Centre around 1400hrs. The tallying and collation of results was done up to the next day 9th August, 2017 and the tallying Centre was incident free.

(ix) THAT I asked my assistant Miss Jane Mukyandera to release me on the 9th August, 2017 around 1630hrs to go home, take shower and change my clothes. I heard gunshots while changing at home and rushed out to check what was happening. I met youths coming from the direction of the town, unhappy and frustrated who said they wanted to go to the school and see what had happened. The youth stated that wouldn't tolerate any stupidity. I tried to plead with the youth to calm them down, but my efforts did not bear fruit.

(x) THAT I decided to go to the tallying Centre and see what had happened. At the gate I saw GSU officers warding people off, I refused to go away and after pleading with the officers I was allowed into the school.

(xi) THAT after having been allowed into the school compound I saw two men gunned down around the gate area.

(xii) THAT I saw vehicles leaving the tallying (2 land cruisers, Police land cruiser and around 3 probos) heading towards the gate.

(xiii) THAT after passing the classrooms heading to the dining hall which was the tallying I met other police officers. They asked me where I was heading and ordered me to lay down but I refused challenging them to shoot me since I wasn't armed.

(xiv) THAT I managed to talk to Deputy County Police commander and asked him if I could help in any way. He asked me to talk to the youth who were rioting and had already destroyed the school's fence.

(xv) THAT I personally talked with the youths trying to calm them down and after some time I was finally successful and they settled down.

(xvi) THAT afterwards the police and IEBC officials took the boxes left by the Presiding officers as they ran for their lives and kept them on different side of the tallying Centre.

(xvii) THAT after sometime, being satisfied that there was enough security, I on the left the tallying center at around 1900hrs.

(xviii) THAT I went home and came back to the tallying center in the next morning the 10th August, 2017 to check my notebook which I had been left with my assistant during the fracas.

(xix) THAT on arrival I was not allowed to access the tallying center but was told that the items collected after the fracas have been taken to the police station.

(xx) THAT I thereafter went to the police station to check for my notebook. I was categorically informed that it was not there and I had to go back to the tallying center to check again.

(xxi) THAT I was allowed to access the tallying center around 0930hrs. I saw the returning officer and other IEBC officers cleaning blood in the place and this made me stay outside until it was over.

(xxii) THAT I saw the returning officer resumed tallying on 10th August, 2017 and all the agents of different parties were present.

(xxiii) THAT no agent of any party complained about tampering of the boxes when tallying resumed.

65. 3RDW7 said in cross-examination that after the disruption at the Galole Tallying Centre, the police officers who were keeping security did all they could to return things to normalcy and the tallying process resumed and results were announced.

66. 3RDW8 IBRAHIM OMAR WAYU who was the chief agent of Ford Kenya deposed in his Affidavit as follows;

(i) THAT I was the polling Chief Agent of Ford Kenya Political Party duly appointed as such by the

party;

(ii) THAT my jurisdiction covered Galole Constituency within Tana River County;

(iii) THAT my duties entailed coordinating the work of all our agents within the constituency to ensure that the same moved on smoothly;

(iv) THAT towards the conclusion of the voting process and for the purpose of tallying of the votes, I moved to Galole Constituency tallying centre situated at Hola Secondary School where all the agents of the main political parties were present namely, ODM, Wiper, Ford Kenya (myself) and Jubilee;

(v) THAT there was indeed violence at the Constituency Tallying Centre which took the following trail of transaction:

a) While the tallying process was about half way, the then incumbent governor one H.E Tuneya Hussein Dado arrived in three cars whose windows were tinted. One of the three cars was parked right closer to the dining hall where the tallying process was underway. I was inside the tallying hall during this time but had clear vision of what was transpiring from outside;

b) The governor went to the Constituency Returning Officer to inquire about the results which was being streamed live on a giant TV screen in the dining hall. The constituency R.O informed the governor that the figures streaming were provisional as not all the ballot boxes had arrived from the polling stations.

c) The governor while responding to a call likely from a senior person (due to the nature of the responses he was eliciting i.e. 'yes sir', 'yes mkubwa') walked out of the dining hall to one of his two cars that was waiting next to the main exit gate of the school. The 3rd car remained *in situ* with the occupants not showing face at all;

d) In a time span of about 2mins or less from the time the governor left the constituency tallying centre, I heard gunshots being fired with bullets spiraling in from the western side of dining hall;

e) In the ensuing melee and while everybody was scampering for their safety, an unknown male adult from the H.E the governors' 3rd car came into the tallying hall and fatally stabbed one of the IEBC officials.

f) The Administration Police officers who were stationed in the constituency tallying centre then went after the assailant who was now on the run, shooting him on the leg and on the waist destabilizing him instantly;

g) Upon interrogation by the said AP officers, the assailant said that he was from the Oroma clan/community and that he was sent by one Dr. Nur Nassir Abdi, a Wiper Democratic Movement candidate;

h) The officers while still questioning the assailant sought to establish the nexus between orders to stab emanating from Dr. Nur Nassir Abdi, from the Wardei community and the deceased who was also a Wardei community member;

i) The assailant was then carried away in the nearby parked (Hola Police Station) vehicle. To date,

I have not heard nor seen the whereabouts of the assailant;

j) While still in the state of confusion and fear, another unknown assailant from the 3rd car came to the dining hall where the counting had been going on earlier and attempted to grab one of the IEBC officials' computer gadget. His attempts were however repelled by the Constituency Returning Officers' driver-a Prison officer;

K) Immediately then, the entire Tana River county security team comprised of the County Commissioner, Deputy County Commissioner, OCPD and officers from the NSIS arrived to assess the security situation and dressed the R.O in an AP jacket/uniform. We then helped the security officials to load the IEBC gadgets to the waiting OCPD official government vehicle. All the ballot boxes were taken into the dining hall, locked;

l) A heavy contingent of joint security officials from the AP, GSU and the regular police were left behind to guard the building until the following day.

(vi) THAT on Thursday 10th September, 2017, we were called to continue the counting process. The agents of the then governor, H.E Tuneya Hussein Dado were not present at this exercise.

(vii) THAT the tallying exercise ended on Friday 11th September, 2017 where we concluded by signing the Form 37B which we were issued with a copy thereof;

(viii) THAT the constituency Returning Officer [R.O] declared the results of Galole Constituency and ordered that the materials used for the elections at the constituency be taken to the County tallying centre;

(ix) THAT I am convinced beyond reasonable doubt that the violence was planned and instigated with the knowledge, support and the blessings of the now out gone governor H.E Tuneya Hussein Dado when he sensed defeat from the results as were streamed in the Galole Constituency tallying centre - a stronghold of his strongest opponent and fiercest critic, the now governor, H.E Dhado Gadae Godhana;

(x) THAT all in all and apart from the violence as deposed herein, the election process was conducted in a manner that was free, fair, transparent and independent;

67. 3RDW8 said in cross-examination he was an agent for Ford Kenya party. He said his party did not have a candidate for the Gubernatorial seat.

He said he saw the petitioner arriving at the Galole Tallying centre with a convoy of 3 vehicles and the petitioner talked with the returning officer.

3RDW8 said one of the petitioner's cars had remained at the Tallying centre after the petitioner had left. He said it was a black Prado Reg. No KCL 086J with tinted windows.

68. 3RDW8 said the attacker was arrested and interrogated and he said he had been sent by Nuh Nassir Abdi, one of the candidate for the Gubernatorial seat.

He said the incident occurred on 9/8/2018 after the voting had been done while the tallying was on-going.

He said the incident did not affect the results. He signed form 38B after the tallying was completed.

69. 3RDW9, DHADO GADDAE GODHANA (the 3rd Respondent) asked the court to adopt his Affidavit as his evidence in chief. He has deposed as follows in the said affidavit.

(i) THAT I was duly nominated by the Orange Democratic Movement (ODM) Political Party, which is a duly registered political party within the meaning of Article 91(1) of the Constitution of Kenya, the Section 3(1) of the Political Parties Act, 2011, as the said Party's Candidate to vie for the Tana River County Governor elective position under Section 29(1) of the Elections Act, 2011 and issued with a nomination certificate;

(ii) THAT as a consequence of the above, I was approved by the 1st Respondent through the 2nd Respondent to be a candidate for the position of County Governor of Tana River County in the general elections conducted by the 1st Respondent on August 8th 2017 pursuant to Article 180(1) and (2) of the Constitution of Kenya and Section 25 and 31 of the Elections Act, 2011;

(iii) THAT my competitors for the gubernatorial seat for Tana River County held on 8th August, 2017 were Tuneya Hussein Dado, Nur Nassir Abdi, Danson Buya Mungatana and Ismael Jillo Algi;

(iv) THAT I am the lawfully elected Governor to represent the people of Tana River County and I won the elections held on the 8th August, 2017 and I emerged the winner with 25, 958;

(v) THAT I appointed polling agents whom I issued with a letter of appointment after administering an oath of secrecy to each, to assist in watching the entire election process including and not limited to counting and recording the final tally in their respective polling stations;

Annexed and marked "GDG 2" are copies of the letters of appointment of the various agents.

(vi) THAT I am advised by my advocates on record which advise I verily believe to be correct that I fully complied with the Elections Act, 2011 and regulations there under in every aspect in the period ante and post August 8th 2017, as well as the Electoral Code of Conduct.

(vii) THAT I am aware the 1st Respondent announced the results for the election held on the 8th August, 2017, for the Gubernatorial seat were declared at the County's Tallying Centre at Mau Memorial Girls Primary School as follows;

FORM 37 C

No.	NAME
VOTES	
(i) 21,677	ABDI NUH NASSIR
(ii) 4,193	ALGI ISMAEL JILLO
(iii) 24,466	DADO TUNEYA HUSSEIN

(iv) **GODHANA DHADHO GADDAE**
25,958

(iv) **MUNGATANA DANSON BUYA**
11,339

TOTAL **87,633**

The Petitioner's analysis of the results does not reflect the true results as announced by the 1st Respondent;

(viii) THAT the said vote counting and tallying for Gubernatorial elections in respect of Tana River County was carried out in accordance with the provisions of the Act, the Regulations, in accordance with the principles laid down therein and in accordance with any law relating to such election including the common law principles where applicable;

(ix) THAT I am advised by my advocates on record, which advise I verily believe to be true that according to Article 86 of the provides 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 Candidates for election and political parties to comply with code of conduct.

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

(x) THAT based on the detailed analysis of the results I won the Gubernatorial Election of Tana River County as appearing in the Form 37Bs for Galole, Garsen and Bura Constituency that were used by the 1st and 2nd Respondent;

(xi) THAT I am aware and it has been shown to me that the results from Mau Mau Memorial Girls Primary School the County's tallying Centre were as follows:

a) Bura- Petitioner (7,539 votes), 3rd Respondent (4,931 votes)

b) Galole- Petitioner (7,427 votes), 3rd Respondent (13,184 votes)

c) Garsen- Petitioner (9,500 votes), 3rd Respondent (7,843 votes)

(xii) THAT I know of my own knowledge that I defeated the Petitioner with 1,492 votes, and I believe the election was free and fairly conducted and the results reflected the true results of the voting of the people of Tana River County;

(xiii) THAT I know of my own knowledge and was informed by my appointed Chief Agent, Garsen Constituency STEVEN OTOI that there was no violence at Garsen Primary School until the Petitioner made an appearance and demanded to access one of the Polling Stations;

(xiv) THAT I know of my own knowledge and was informed by my appointed Chief Agent, Garsen Constituency STEVEN OTOI is that he received information from one of my duly appointed Polling Agents on the ground NICKSON MWAMBURI MUNGONGO, that the Petitioner wanted to access one of the polling stations at Garsen Primary School;

(xv) THAT I was informed by my Chief Agent herein above that the Petitioner was allowed access to Stream No. 1 of 3 of the Garsen Primary School, Polling Station and this was after he had harassed and argued with the 1st Respondent's Personnel;

(xvi) THAT by this time a crowd had already gathered at the gate of the Polling Station complaining why a politician was allowed inside a polling station. This was at around 6:30 pm, counting was going on, the petitioner left the Polling Station and as he was at the gate the crowd started chanting and enquiring why was he allowed access to a polling station and that is when the Petitioner hurled abusive gestures towards the crowd;

(xvii) THAT in my knowledge and as informed by my agents the crowd got angry after the Petitioner hurled abuses and rowdy boys started throwing stones towards his car and that is how his car window broke;

(xviii) THAT the Petitioner escaped and thereafter, Garsen Primary School returned to normalcy and the counting and remitting of votes to Garsen High School, the tallying Centre progressed peacefully;

(xix) THAT it is therefore evident that the Petitioner has not approached this court with clean hands to warrant grant of any orders sought in the Petition herein. The law of Equity demands that if a party comes to court they should come with clean hands. The Petitioner is misrepresenting facts before this court, by stating that the violence was occasioned by my supporter whilst it is important to note that all evidences are presented to this court will show that he is the culprit;

(xx) THAT I am aware that there is no polling station by the name "Mbandi Polling Station. "Mbandi is a village in Garsen Constituency, Tana River County:

(xxi) THAT I have been verily advised by my lawyer which advice I verily believe to be true that the provisions of the Elections (General) Regulation, 2012 in particular Rule 72 (1) relating to assisted voters, on application by such a voter, they are to be assisted by a person of their choice but such a person shall not be a candidate or an agent of any candidate or political party;

(xxii) THAT I know of my own knowledge and was informed by my appointed Polling Agent, at Imani Primary School Garsen Central Ward, Garsen Constituency, MOHAMED GOLO NDOGO, that in case there was a voter who needed assistance, they were called from time to time by the Presiding Officer to witness the assistance given to the elderly and illiterate voters in the process of voting, if such a voter was unaccompanied by such person as to assist them vote;

(xxiii) THAT I am aware and from the information received from the polling agent at Imani Primary School, party agents had the opportunity to do the witnessing as required by law and that at no

particular time was any witness denied the opportunity to witness the same;

(xxiv) THAT I have been advised by my Advocates on record which advice I verily believe to be true that the provisions of the Elections (General) Regulation, 2012 Regulation 74 permits a Returning Officer to decline admission to authorized agents to the tallying Centre if there are more than one agent per candidate or political party at the tallying Centre. That Section 30 of the Elections Act No 24 of 2011 provides that a political party may appoint one agent for its candidates at each polling station;

(xxv) THAT in my own knowledge and as informed by Polling Agents FAKHARI OMAR SWADIKI and SAID DIRIWO GAWAWA is that the Presiding Officer for Kipini Primary School was only allowing one agent at a time inside the Polling Station;

(xxvi) THAT in my own knowledge and as informed by Polling Agents at Kipini Primary School is that the agents of the Petitioner were allowed access to the Polling Station at the same time all agents were allowed inside the polling station, and this the morning before the voting exercise began. That my agents herein above remember seeing the two agents present at the Polling Centre and believe that the Petitioner is lying by stating that his Agents Amina Nurio and Fatuma Yusuf were denied access. To be particular my polling agent FAKHARI OMAR SWADIKI states that she sat next to Amina Nurio in Stream No. 1 of 3 at Kipini Primary School, Polling Station;

(xxvii) THAT I know of my own knowledge and was informed by my appointed Polling Agents, that at Kipini Primary School; FAKHARI OMAR SWADIKI and SAID DIRIWO GAWAWA who were both representing me that, in streams 1 and 2 of 3 at Kipini Primary School they confirmed that all party agents present were allowed to witness the assisting of illiterate voters and the elderly;

(xxviii) THAT I have been advised by my Advocates on record which advice I verily believe to be true that the provisions without prejudice to the foregoing, Regulation 62 (3) of the Elections (General) Regulations, 2012 clearly states that the absence of agents at a polling station does not invalidate the proceedings at the polling station;

(xxix) THAT I know of my own knowledge and was informed by my appointed agents from Galole Constituency namely BAKARI ALI KOMORA, IBRAHIM OMAR WAYU and SALIM GODHANA MARO. Galole Constituency was peaceful throughout the 8th and 9th of August, 2017 up until 4:30 pm when all hell broke loose;

(xxx) THAT I know of my own knowledge and was informed by one of the appointed agents from National Super Alliance Coalition (NASA) IBRAHIM OMAR WAYU the violence at Galole Constituency Tallying Centre situated at Hola Secondary School took the following chronology:

a) While the tallying process was about half way, the former governor one H.E Tuneya Hussein Dado, the Petitioner herein, arrived in three cars whose windows were tinted. One of the three cars was parked right closer to the dining hall where the tallying process was underway;

b) The Petitioner went to the Constituency Returning Officer to inquire about the results which were being streamed live on a giant TV screen in the dining hall. The constituency's Returning Officer informed the Petitioner that the figures streaming were provisional as not all the ballot boxes had arrived from the polling stations;

c) The Petitioner while responding to a call likely from a senior person (due to the nature of the responses he was eliciting i.e. 'yes sir', 'yes mkubwa') walked out of the dining hall to one of his two cars that was waiting next to the main exit gate of the school. The 3rd car remained *in situ* next to the tallying hall with the occupants not showing face at all;

d) In a time span of about 2 minutes or less from the time the Petitioner left the constituency tallying Centre, gunshots were heard and bullets fired spiraled in from the western side of dining hall at Hola Secondary School;

e) In the ensuing melee and while everybody was scampering for their safety, an unknown male adult from the Petitioner's 3rd car came into the tallying hall and fatally stabbed one of the IEBC officials;

f) The Administration Police officers who were stationed in the constituency tallying Centre then went after the assailant who was now on the run, shooting him on the leg and on the waist thereby destabilizing him instantly;

g) Upon interrogation by the said AP officers, the assailant said that he was from the Oroma clan/community and that he was sent by one Dr. Nur Nassir Abdi, a Wiper Democratic Movement candidate for Tana River Gubernatorial contest;

h) The officers while still questioning the assailant sought to establish the nexus between orders to stab emanating from a Dr. Nur Nassir Abdi, of the Wardei clan/community and the deceased who was also a Wardei community member;

(i) The assailant was then carried away in a nearby parked (Hola Police Station) vehicle. The assailant has never been seen nor his whereabouts known to date.

(j) While still in the state of confusion and fear, another unknown assailant from the 3rd car came to the dining hall where the counting had been going on earlier and attempted to grab one of the IEBC officials' computer gadgets. His attempts were however repelled by the Constituency Returning Officers* driver-a Prison officer;

(k) Immediately then, the entire Tana River county security team comprised of the County Commissioner, Deputy County Commissioner, OCPD and officers from the NSIS arrived to assess the security situation. The security officials then loaded the IEBC gadgets to the waiting OCPD official government vehicle. All the ballot boxes were taken into the dining hall and locked. A heavy contingent of joint security officials from the AP, GSU and the regular police were then left behind to guard the building until the following day.

(l) On Thursday 10th September, 2017. All the agents were called back to continue the counting process. The agents of the then Governor, H.E Tuneya Hussein Dado were conspicuously absent and or missing at this exercise.

(m) The tallying exercise ended on Friday 11th September, 2017 where the agents present concluded by signing the Form 37B which they were then issued copies thereof;

(n) The Constituency Returning Officer (R.0) declared the results of Galole Constituency and ordered that the materials used for the elections at the constituency be taken to the County tallying Centre.

(xxxii) THAT I know of my own knowledge and was informed by one of the appointed agents from National Super Alliance Coalition (NASA) we are convinced beyond reasonable doubt that the violence was planned and instigated with the knowledge, support and the blessings of the Petitioner H.E Tuneya Hussein Dado when he sensed defeat from the results as were streamed in the Galole Constituency tallying Centre - a stronghold of his strongest opponent, and fiercest critic, the now governor, H.E Dhado Gadae Godhana the 3rd Respondent herein;

(xxxiii) THAT without a shadow of doubt, the choice of an Oroma clan member as the assailant to stab a member of the Wardei clan was meant to elicit tribal animosity and emotions leading to ethnic violence which plan did materialize except for the stabbing of the deceased IEBC official;

(xxxiv) THAT I know of my own knowledge and was informed by my appointed Polling Agents, SALIM GODHANA MARO. Indeed Galole Tallying Centre was peaceful until the Petitioner arrived at around 4:30 pm and the stabbing of an IEBC official and shooting occurred. The Agent confirms to us that the Tallying Centre was not abandoned, and that most people present at the Tallying Centre had to take cover within the Tallying Centre;

(xxxv) THAT I know of my own knowledge and was informed by my appointed Polling Agents, SALIM GODHANA MARO, the Returning Officer asked the Police Officers present to safeguard the votes casts, the materials, gadgets and records at the Tallying Centre. Nothing of the items mentioned herein were tampered with, during the shooting;

(xxxvi) THAT I know of my own knowledge and was informed by my appointed Chief Agent and Polling Agents, that indeed due to the security concern of every person in the Tallying Centre, the agents and the IEBC officials were asked to leave BUT it is important to note that a heavy contingent of Police remained behind to guard the votes casts, the materials, gadgets and records at the Hola Secondary School, Tallying Centre;

(xxxvii) THAT I wholly deny the Petitioner's contention that the Declaration of results by the 2nd Respondent was invalid because of the allegation that the Galole Tallying Centre was abandoned for several hours and that the votes cast, the voting materials, gadgets and records at Galole Tallying Centre were left unattended;

(xxxviii) THAT I know of my own knowledge and was informed by my appointed Chief Agent, BAKARI ALI KOMORA indeed he had left the Tallying Centre to go home to freshen up, since his home is not far from the Hola Secondary School the Tallying Centre, and he had gunshots coming from that direction;

(xxxix) THAT I know of my own knowledge and was informed by my appointed Polling Agents, BAKARI ALI KOMORA, he rushed back to the school and was allowed access after pleading with the Police and that he was the last to leave and he saw the boxes and election materials being locked away as people ran for their lives;

(xl) THAT I know of my own knowledge and information received from my Chief Agent and various agents from Galole Constituency namely BAKARI ALI KOMORA, IBRAHIM OMAR WAYU and SALIM GODHANA MARO, on the 10th August, 2017, normalcy returned to the Tallying Centre and the tallying of votes and collating of the same for remission to the County Tallying Centre, MAU MAU MEMORIAL GIRLS PRIMARY SCHOOL;

(xi) THAT I therefore believe that despite the scuffle caused by the Petitioner, the integrity of the

votes cast, voting materials, gadgets and records at Galole Constituency were not compromised making the results announced from that constituency to be truthful and be deemed to be free and fair.

(xli) THAT I have been advised by my Advocates on record which advice I verily believe to be true that Article 81(a), (d) and (e) of the Constitution provides that the electoral system shall comply with the following principles: (a) freedom of citizens to exercise their political rights under Article 38; (d) universal suffrage based on the aspiration for fair representation and equality of vote; and (e) 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.

(xlii) THAT the Petitioner in this case tried to intimidate people and caused the violence at Galole Constituency Tallying Centre and if there is a person to be blamed and to shoulder the burden of responsibility, that should be the Petitioner himself.

(xliii) THAT I believe as Tana River County we were lucky that the Petitioner did not succeed and the election process continued to finality with the announcement of I, the 3rd Respondent herein, as the winner for Governor's seat Tana River County.

(xliv) THAT the case before the Honourable court is based on the validity of the election of me, as Tana River County Governor. The Petitioner has not proved a basis before this court for the Honourable court to order for a recount of the votes and a fresh Gubernatorial elections;

(xlv) THAT I am aware and have been verily advised by my Advocates on record that Forms 37 A did not contain any alterations and the Petitioner herein is put to strict proof thereof and this alone cannot invalidate an election;

(xlvi) THAT I have been advised by my Advocates on record which advice I verily believe to be true that, Regulation 79(6) & (7) of the Elections (General) Regulations, 2012 provides that the failure and/or refusal to sign a declaration form shall not by itself invalidate the results announced;

(xlvii) THAT I have been advised by my Advocates on record which advice I verily believe to be true that, Section 83 of the Elections Act clearly provides that no election shall be declared 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 of the Constitution and in that written law or that the non-compliance did not affect the result of the election.

(xlviii) THAT it is legal and right for the 3rd Respondent herein to be Governor of Tana River as he was duly elected by the People of Tana River County as he won fair and square;

(xlix) THAT there was total compliance with the law relating to the said election and the results are a true reflection of the sovereign will the people for the person voted in as the Governor, that being the 3rd Respondent;

(l) THAT in fact the behavior of the Petitioner amounted to an election offence as he intimidated Election Officers, members of the public and orchestrated the violence at Galole Constituency. That in order for this court to understand further and see that all the violence was orchestrated by the Petitioner, there are further affidavits from observers and other agents who were present

at the Mau Mau Primary School, Tallying Centre;

(li) THAT I know of my own knowledge and information that the perpetrators involved with the killing of the IEBC personnel and people at the Tallying Centre have been reported to the Police and the Perpetrators will be duly charged in a court of law, the matter has been booked at Hola Station OB No. 7 of 10th August, 2017 by the IEBC Returning Officer. That at no time did the people shooting and killing identified themselves as my supporters or shown to have any connection with me.

The Police Report as well does not associate the shooting with me the 3rd Respondent herein

(lii) THAT in order for this Honorable court to hold that the election of the 3rd Respondent as the Tana River County Governor was invalid; the petitioner must prove massive irregularities in the electoral process. Mere minor and unfounded allegations of irregularities in less than 10 polling stations in a County that has over 300 polling stations are not sufficient to invalidate the entire Tana River County Governor elections;

(liii) THAT the standard of proof which ought to apply in determining whether the Petitioner herein has established the allegations made in respect of electoral irregularities and malpractice is that the Petitioner must not only prove that there has been non-compliance with the law but that such failure of the compliance did affect the validity of the elections;

(liv) THAT despite the fracas and violence caused by the Petitioner, I emerged the winner of the seat for the Governor Tana River, County;

(lv) THAT in view of the foregoing, the Petitioner has not laid any basis for scrutiny and recount of the Ballot papers in respect of the Gubernatorial votes cast in the elections held on the 8th August, 2017;

(lvi) THAT the Petitioner has not provided any particulars in the Petition and neither has he done so in his Verifying Affidavit attached thereto;

(lvii) THAT the allegations made by the Petitioner do not prove that the elections in Tana River County culminating in my declaration as the Governor, Tana River County were invalid so as to warrant the grant of the orders sought in the Petition by this Honourable court;

70. The 3rd Respondent stated in cross-examination that he was entitled as a candidate to enter any polling station in the course of voting. He said that what he deposed is what he gathered from his agents. He said he did not conduct the elections but he participated as a candidate.

71. THE PETITIONER'S SUBMISSIONS.

The petitioner submitted in writing as follows;

(i) That from the above testimonies it is clear that there was violence of a great magnitude at the Galole Constituency Tallying Center. This violence is likely to have affected the results of the Gubernatorial Elections of Tana River County which elections were closely contested. That the Petitioner has proved that there was violence. As stated in section 65 of the Elections Act, the standard of proof is beyond reasonable doubt and the Court cannot interfere with an elections based on this allegation unless this standard of proof is met. This violence was propagated,

premeditated and designed to achieve the electoral result that it indeed achieved. Allegation of violence therefore has been proved by the Petitioner on a standard of beyond reasonable doubt. The Petitioner only lost the election at Galole Constituency. He won in all other Constituencies. It is clear that the violence was instigated to ensure that the Petitioner loses in Galole Constituency. The 1st and 2nd Respondents failed to crack the whip on the violence that occurred. 1st and 2nd Respondents were being untruthful in averring that they did not hear or receive any information pertaining the violence. They were being dishonest. They did not even invoke their statutory powers to deal with the situation as mandated by the Elections Act and the Regulations there under. The tallying center was generally left unattended. Violence went to the very root of this election!

(ii) The petitioner invited the Court to take judicial notice of the fact that in Tana River County, the illiteracy percentage are very high and that there were so many assisted voters. Forms 32A were not produced to show that assisted voting was done in accordance to the laid down law and procedures. Regulations 72 (2) calls upon the Presiding Officer to assist a voter, in the presence of the agents. This Regulation was not followed at all. Under Regulation 72(6) the Presiding Officer is expected to note in the register the fact that a certain voter has been assisted. This never happened. It was evident from evidence adduced in regard to the manner which persons who illiterate.

(iii) That the principle of the secrecy of the ballot was thrown out of the window. The Regulations were never followed. The petitioner submitted that it was not even clear as to whether the 1st and 2nd Respondent had conducted civic education which would address the peculiar needs of the people of Tana River, in view of their literacy levels.

(iv) The Petitioner submitted that there was rampant breach of Regulation 79. That under Regulation 79 (4) if a candidate or agent refuses to sign the declaration form, the candidate or agent is required to record the reasons for such refusal. Although under regulations 79 (7) such refusal may not alone invalidate the declared results. Regulations (79)(5) requires that if a candidate or agent refuses or fails to record the reasons for refusal or failure to sign the declaration form, the Presiding Officer shall record the fact of their refusal or failure to sign the declaration form. **THIS CAN LEAD TO AN INVALIDATION OF THE RESULTS AS IT IS THE DUTY OF THE PRESIDING OFFICER.** This Regulation was observed more on breach than adherence.

(v) The Petitioner submitted that there were massive irregularities observed in Form 37C. That the said form was from Homa Bay County code 043. There were alterations in the said form which the County Returning Officer admitted that they could lead to invalidation of the election as not being carried out in accordance to the Constitution and the written laws. That no proper/satisfactory explanation was given for the irregularity. The 1st and 2nd Respondents did not discharge the evidentiary burden of proof regarding the irregularities pointed out in form 37C. The County Returning Officer was generally evasive and inconclusive. That it was only after thorough cross-examination that he told the truth regarding one or the other aspect of the Election in dispute. Elections are normally carried out separately and independently. Tana River County Election was a separate election from the Homa Bay County Election. The prescribed Forms are not meant for cosmetic purposes but for strict compliance with the law. The election carried out in absolute noncompliance is a mockery of our Constitution which envisages that an election shall be credible, transparent and verifiable. The Form in dispute was therefore not authentic and as such serious doubts must be raised on the results. The said Form 37C was not in compliance with Article 86 of the Constitution. The results in Form 37C do not reflect the

results of Tana River County Gubernatorial Elections. Homa Bay County is on the far West of the Country while Tana River is on the far East, it cannot even be argued for a second that there was a mix up during the packaging. In *WILLIAM KABOGO GITAU V GEORGE THUO & 2 OTHERS [2010]* eKLR Justice Kimaru stated as follows:-

"There are other complaints which were raised by the petitioner that are in the genre addressed by the court. They relate to form 16 as where specific results of specific candidates [were cancelled] altered the 3rd respondent explained away the alteration to be on account of once again, human error which, according to him, was to be expected in the circumstances. Having evaluated the forms 16 A it was clear to the court that whereas the regulations did not specify what ought to be done where there are cancellations and alterations, common sense dictates that where there is a cancellation and alteration in a statutory form the same should be countersigned by the concerned official. In electoral documents it is important that the statutory forms which contain results that will invariably be required to be verified by other parties, including the members of the public, should be written without any alterations or cancellations. The cancellations and alterations in forms 16A produced in this court raise question regarding the veracity and authenticity of the said results. The said form 16As cannot in the circumstances be said to contain valid results of the polling stations in question."

(vi) Section 83 of the Elections Act Provides that:

"No election shall be declared to be void by reason of non-compliance with any with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in that written law, or that the non-compliance did not affect the results of the elections "

The Court of Appeal recently had occasion to interpret this section in light of the evidence regarding electoral malpractices that had been established in an election petition. *In James Omingo Magara versus Manson Onyongo Nyamweya & 2 others Civil Appeal No. 8 of 2010. Omolo J A held at page 17 of his judgment that the election Court must ask itself several questions before it can reach a determination that even though there were breaches of the law, such breaches did not affect the results of the elections. He states thus;*

...the court must still ask questions similar to those asked by the learned trial judge. In which polling stations were those voters cast" Who presided over the poll in the stations" How many of them, actually voted" How many votes die each candidate get in each polling station" I agree with the learned judge that the matter must go beyond simple arithmetic and certain basic question such as ones listed must be easily available"

(vii) It was further submitted that forms 37A's for several polling stations were attached to the Response by the 3rd Respondents which were not signed by agents. They reveal the authenticity of various claims made by the Petitioner as regards their due execution, completion by the election officials and attestation by agents for the candidate as well as the data entries there on regarding the record of the election.

(viii) The petitioner referred to the Supreme Court case of *Raila vs I.E.B.C & Others, Presidential Petitions No.'s 3, 4 and 5 of 2013*, where the Supreme Court said that; *"I.E.B.C is a constitutional entity entrusted with specified obligations, to organize, manage and conduct elections, designed to give fulfillment to the people's political rights (Article 38 of the Constitution). The execution of such a mandate is underpinned by specified constitutional principles and mechanisms, and by*

detailed provisions of the statute law. While it is conceivable the law of elections can be infringed, especially through incompetence, malpractices or fraud attributable to the responsible agency, it behooves the person who thus alleges, to produce the necessary evidence in the first place - and thereafter, the evidential burden shifts, and keeps shifting."

(ix) In view of the above decision, the Petitioner submitted that Forms 37A presented by the Petitioner and the 3rd Respondent were incomplete and not signed by the Presiding Officers of the Polling Stations concerned. Form 37C was generally wanting in all material aspects. No Forms were presented by the I.E.B.C to contradict the Forms produced by the Petitioner and as such the Petitioner has discharged the burden of proof that the election was not carried out in accordance with the Constitution or any written law.

(x) It was further submitted that the signing of statutory forms by presiding officers is a critical step in the electoral process. This was highlighted in the case of Manson Onyongo Nyamweya (Supra) where it was held (inter alia) that:

"Form 16A (now Form 35) not signed by agents or Presiding Officer cannot be accepted computing final results;

Where the law requires a document to be signed by a particular person, it is not so signed or not signed at all such a document so worthless and ought to be rejected"

72. Finally, the Petitioner submitted that in view of the undisputed violence that took place at Hola Secondary School and Galole Tallying Centre this election cannot be said to have been "free from violence". They said that the Respondents in total lack of candor denied the violence both in their responses and their affidavits while the same was admitted when the witnesses testified. That the massive irregularities observed in this election can only point to the direction of the said election being nullified and they prayed that this Petition be allowed with costs.

73. The 1st and 2nd Respondents submitted in writing as follows;

(i) That the Petition herein together with the Affidavits in support are incompetent and fatally defective for being an abuse of the court process given the fact that the Petitioner in his Petition has failed to prove by cogent and credible evidence all the allegations of irregularities, malpractices or breaches of the law cited in the Petition on the basis of which the election of the winning candidate/3rd Respondent herein is sought to be nullified.

(ii) The 1st and 2nd Respondents further submitted that the Petition is ill-conceived, lacks in merit and is bad in law given the fact that, the Petitioner has not only failed to prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the gubernatorial elections.

(iii) Further, the 1st and 2nd Respondents submitted that the Petitioner has failed to discharge the burden of proof as expected of him in election Petitions such as the present one.

(iv) That the Independent Electoral and Boundaries Commission (IEBC) was created by Article 88 of the Constitution, for the management of the country's electoral processes. It is conferred with the responsibility for conducting free, fair and transparent elections.

(v) They also submitted that owing to the special nature of election petitions, Parliament enacted

Section 83 of the Elections Act which is to the effect 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; and the non-compliance did not substantially affect the result of the election."

(vi) That the foregoing provision is to be read alongside the provisions under Articles 81 and 86 of the Constitution and was rightly interpreted by the Supreme Court of Kenya in the case of **GATIRAU PETER MUNYA V DICKSON MWENDA KITHINJI & 2 OTHERS [2014] Eklr** thus

"[217] if it should be shown that an election was conducted substantially in accordance with the principles of the Constitution and the Elections Act, then such election is not to be invalidated only on the grounds of irregularities.

[218] When however, it is shown that the irregularities were of such magnitude that they affected the election results, then such an election stand to be invalidated. Otherwise procedural or administrative irregularities and other errors occasioned by human imperfection are not enough by and of themselves to vitiate an election."

(vii) The Supreme Court of Kenya furthermore in **RAILA ODINGA VS IEBC & 3 OTHERS S.C. PETITION NO. 5 OF 2013** noted that: *"Where a party alleges non conformity with the electoral law, the Petitioner must not only prove that there was non-compliance with the law but that such failure of compliance did affect the validity of elections"*.

(viii) They also said that it is now trite law that an alleged irregularity and/or noncompliance with the law must in the first instance be proved by the Petitioner and consequently the Petitioner must prove that the irregularity and/or non-compliance affected the election results. What affects election results was explained by Maraga J (as he then was) in **JOHO VS NYANGE & ANOTHER [2008] 3 KLR 500** as quoted with authority in the case of **CHARLES NYAGA NJERU V INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & ANOTHER [2014] eKLR** thus

".... and the result of an election is affected when the cumulative effect of the irregularities reverses it".

(ix) On the question of the burden and standard of proof in election petitions, the 1st and 2nd Respondents submitted that, in election petitions, the burden of proof rests with the party making the allegations at challenging the outcome or alleging, misconduct on the other. The standard of proof in election petition cases has been held to be higher than the proof on balance of probability. Therefore, a petition as compared to other matters of a civil nature has to be proved on a much higher standard of proof. Such higher standard was expressed by the High Court in **JOHN KIARIE WAWERU VS BETH WAMBUI MUGO & 2 OTHERS, ELECTION PETITION NO. 13 OF 2008** at page 6 as follows: -

"As regards the standard of proof which ought to be discharged by the Petitioner in establishing allegations of electoral malpractices, there is consensus by electoral courts that generally the standard of proof in electoral petition cases is higher than that applicable in ordinary civil cases i.e. that proof on a balance of probabilities. The standard is higher than proof on a balance of probabilities but lower than the standard of proof beyond reasonable doubt required in

establishing criminal cases. Allegations of electoral practices, like for instance bribery, require higher proof"

(x) In RAILA ODINGA & OTHERS VS INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & OTHERS, S.C. PETITION NO. 5 OF 2013 the Supreme Court of Kenya stated thus:

"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."

(xi) The Court in the case of JACOB KAZUNGU KAHINDI VS I.E.B.C & 2 OTHERS [2017] eKLR cited with approval the decision in JOHO VS NYANGE & ANOTHER [2008] 3 KLR 500 at page 507 where Maraga J, (as he then was) made the following observation: -

"Election Petitions are not ordinary suits. Though they are disputes in rem, fought between certain parties, elections petitions are nonetheless disputes of great importance... This is because when elections are successfully challenged, by-elections ensue which not only cost the country colossal sums of money to stage but also disrupt the constituents' social and economic activities. It is for these reasons that I concur with the Elections Court's decision in Wanguhu Nganga & Another Vs George Owiti & Another, Election Petition No. 41 of 1993, that election petitions should not be taken lightly. Generalized allegations as the ones made in this petition are not the kind of evidence required to prove election petitions. As I said, they should be proved by cogent, credible and consistent evidence."

(xii) Based on the foregoing, it is apparent that election petitions are by themselves special cases and are a matter of greater public interest which directly and indirectly affect the electorate. The burden of proof is thus higher than normal civil suits and the burden rests upon the Petitioner to prove the allegations he or she is making. Has the Petitioner herein discharged that burden"

(xiii) The 1st and 2nd Respondents submitted that the Petitioner herein has failed to discharge the burden of proof and neither has he established that the irregularities, if any, that he is complaining of have in any way affected the results of the election herein.

74. The 3rd Respondent also submitted in writing as follows;

(i) That the Petitioner has a plethora of allegations in his Petition, he accuses the 3rd Respondent's supporters of violence, accuses the 1st and 2nd Respondents of not complying with the law in regards to Elections. That the Petitioner has not satisfied the burden of proof as required in Election Petitions. That there is no evidence before the court to substantiate the Petitioner's claims in his Petition dated 7th September 2017.

(ii) That the burden and standard of proof is very pertinent in all election petitions. The 3rd Respondent submitted that the court is obliged to determine whether the Petitioner has discharged the evidentiary and legal burden to prove all the grounds in support of the Petition.

(iii) That 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 behooves the person who thus alleges, to produce the necessary evidence in the first place - and thereafter, the evidential burden shifts, and keeps shifting."

(iv) The 3rd Respondent also submitted that 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 is beyond the balance of probabilities suffices. Whereas, where allegations made amount to criminal offences, being electoral offences under the laws, then the proof is beyond reasonable doubt.

(v) The 3rd Respondent said that in this instant case there are allegations of violence by the Petitioner leveled against the 3rd Respondent that have not been proved, the Petitioner has not proved to this court that indeed it was the 3rd Respondent's supporters who caused havoc. To add on, violence being a serious criminal offence under Section 11 of the Election Offence Act with up to a six years sentence, the Petitioner ought to have established *mens rea* and the *actus reus* as against the 3rd Respondent.

(vi) The Incidence and Burden of Proof are the fundamental principle and is based on the Latin Maxim '*ei qui affirmat, non ei qui negat, incumbit probatio*' applies, that is 'The Burden of proof lies upon he who affirms and not upon he who denies.' In this case therefore the burden lies with the Petitioner to prove the allegations made in the Petition. The court should consider the substance of the issue(s) asserted, not just the form in which it has been presented, and determine, whether the Petitioner has been able to first and foremost establish that the acts or omissions complained or alleged were indeed committed, and then secondly whether he has proved that these acts or omissions did affect either the outcome and/or validity of the elections.

(vii) The 3rd Respondent will also rely on the decision in the case of Joho vs. Nyange & Another (No.4) 2008 3KLR (Election Petitions) 500 at page 507 Maraga]; held that, "*Election petitions are no ordinary suits. Though they are disputes in rem fought between certain parties, election petitions are nonetheless disputes of great public importance Kibaki v Moi. Civil Appeal No.172 of 1999. This is because when elections are successfully challenged by-elections ensue which not only cost the country colossal sums of money to stage but also disrupt the constituents' social and economic activities. It is for these reasons that I concur with the election court's decision on Wanguhu Ng'anga and Another v George Owiti and Another, Election Petition No. 41 of 1993 that election petitions should not be taken lightly. Generalized allegations as the ones made in this petition are not the kind of evidence required to prove election petitions. As I have said, they should be proved by cogent, credible and consistent evidence."*

(vii) In the instant Petition, the 3rd Respondent submitted that the Petitioner has not provided this court with any proof that indeed the violence he complains of was orchestrated by the

supporters of the 3rd Respondent and if indeed there was any incitement from the 3rd Respondent. The Standard of Proof, in election Petitions will depend on whether the affirmation made is based on allegations of quasi criminal nature, in which case proof must be above preponderance of probability but below proof beyond reasonable doubt. That will be the Standard of Proof that should be adopted in determining the allegations of violence as claimed by the Petitioner. In the case of all other issues not of quasi criminal nature the Standard of Proof will be on a balance of probabilities. In the case of Benard Shinali Masaka -vs- Boni Khalwale & 2 others (2011) eKLR, the Court held:

"Further, I agree with the proposition grounded on the decision in Mbowe vs Eliufoo [1967] E.A. 240 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 petitions, it is almost certainly on a higher degree than merely on a balance of probabilities, the latter being the standard in civil cases."

(ix) It was further submitted that the Petitioner in this Petitioner has merely made generalized allegations and has failed to produce any and/or cogent evidence in support of any assertions. This Petition should be dismissed with costs as the has not adduced any evidence before this court for any allegations be it the violence neither has he demonstrated any irregularities in the that affected the end results and the declaration of the 3rd Respondent as the duly elected Governor, Tana River County. The Petitioner has the burden to adduce evidence to support his assertions in the petition as was shown by Justice L. Kimaru in John Kiarie Waweru Vs Beth Wambui Mugo & 2 others [2008] eKLR at page 4 when he stated thus: *'The burden of establishing all these allegations regarding the conduct of the said election and results announced thereafter is on the Petitioner....'*

(x) In the case of *Charles Ong'ondo Were v Joseph Oyugi Magwanga & 2 others [2013] eKLR* the Judge states: *"The evidence adduced by the Petitioner to prove that the elections were not free, fair and credible and hence not in conformity with the law falls far short of the standard required. As I have shown it was contradictory, inconsistent and untrustworthy. He also appeared to shift theburden of proof to the court and the respondents. His advocate also shifts the burden of proof when he submits that the 1st Respondent and his witnesses failed to demonstrate that the elections were free, fair and credible and instead went on a mission to assassinate the character of the Petitioner. He also submitted the 2nd and 3rd Respondents' witnesses were mechanical in their evidence and did not seek to unravel or dispute the allegations raised by the Petitioner. As I have stated one must establish a prima facie case before calling on the other person to make a rebuttal."*

(xi) The 3rd Respondent submitted that it was for the Petitioner to establish a prima facie case and he therefore cannot shift the burden to either the court of the Respondents.

(xii) Finally the 3rd Respondent submitted that he was validly elected as theGovernor for Tana River County having garnered 25,958 votes. That the Petitioner was second with 24,466 votes. The Petitioner and/or his agents having not disputed theresults as declared in all polling stations in Tana River, the 3rd Respondent was validly elected as Governor. He said that it was therefore right to say that there are no *illegalities and/or irregularities that affected the outcome of the instant elections*.

THE COURT'S FINDING

75. I have carefully considered the evidence adduced by the parties in this petition. The affidavits sworn by the witnesses were adopted as their evidence in chief. I have also considered the written submissions filed by the parties. The issues which were agreed on for determination in this petition are as follows;

a) Whether the elections of the governor Tana River County held on 8th August, 2017 were conducted in accordance with the Constitution, the Elections Act and the regulations made there under.

b) If the answer to (a) above is in the negative, whether the illegalities and/or irregularities affected the outcome of the said election.

c) Who should bear the costs of the Petition"

(i) It is the duty of the petitioner to prove that the elections of the governor Tana River County held on 8th August, 2017 were NOT conducted in accordance with the Constitution, the Elections Act and the regulations made there under *and* further that such failure affected the validity of the said elections. The petitioner is accordingly duty bound to adduce cogent evidence in support of the petition.

In the case of **Joho Vs Nyange and Another (2008) 3 KLR (EP) 500** the learned Maraga J. (as he then was) held as follows;

"The burden of proof in election petitions lies with the petitioner as he is the person who seeks to nullify an election".

(ii) The standard of prove required in election petitions was also stated as follows in the same case of **Joho Vs Nyange & Another** (supra);

"A collary to that principle is that Election Petitions are disputes in rem of great public importance and therefore not ordinary suits. They should not be taken lightly and generalized allegations are not the kind of evidence required in such proceedings. Election Petitions should be proved by cogent and consistent evidence."

(iii) The High Court also held in **JOHN KIARIE WAWERU VS BETH WAMBUI MUGO & 2 OTHERS, ELECTION PETITION NO. 13 OF 2008** at page 6 as follows: -

"As regards the standard of proof which ought to be discharged by the Petitioner in establishing allegations of electoral malpractices, there is consensus by electoral courts that generally the standard of proof in electoral petition cases is higher than that applicable in ordinary civil cases i.e. that proof on a balance of probabilities. The standard is higher than proof on a balance of probabilities but lower than the standard of proof beyond reasonable doubt required in establishing criminal cases. Allegations of electoral malpractices, like for instance bribery, require higher proof"

(iv) Article 81 and 86 of the constitution of Kenya states as follows;

81. GENERAL PRINCIPLES FOR THE ELECTORAL SYSTEM

The electoral system shall comply with the following principles--

- (a) Freedom of citizens to exercise their political rights under Article 38;**
- (b) Not more than two-thirds of the members of elective public bodies shall be of the same gender;**
- (c) Fair representation of persons with disabilities;**
- (d) Universal suffrage based on the aspiration for fair representation and equality of vote; and**
- (e) 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.**

86. VOTING

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

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

(v) I find that the grounds upon which the petition is filed are as follows;

(1) That the voting was disrupted by violence initiated by persons claiming to be the supporters of the 3rd respondent, particularly at Garsen Primary School and Mbandi polling stations, among others.

(2) That the tallying of votes at Galole Constituency tallying center was disrupted by violence which began when a person claiming to be the supporter of the 3rd respondent fatally stabbed an election officer and subsequently resulted in the killing of three persons by the police.

(3) That consequent upon the events stated hereinabove, the Petitioner's chief agent, his other agents, officers of the 1st respondent, voters and other people ran away and the tallying center was abandoned for several hours.

(4) That the votes cast, the voting materials, gadgets and records at Galole tallying centre were left unattended after the melee thereby compromising their integrity and making their contents questionable. That there are 93 polling stations in Galole constituency, the only constituency where the 3rd respondent purportedly received most votes.

(5) That the petitioner's agents at Kipini Primary School polling station, which had two streams totaling to about 1,400 votes, as well as at Imani primary school were prevented from witnessing the manner of assisting illiterate voters by the election officials.

(6) That many forms 37A contained alterations, were not properly filled in, were not witnessed and had incomplete and or inaccurate information.

(7) That the petitioner was allegedly beaten by the 3rd respondent by approximately 2000 votes. The petitioner believes the election was not fairly conducted and the results did not reflect the true results of the voting.

(8) That the petitioner contends that the election was not conducted in accordance with the law and the Constitution and failed to meet the threshold of a free and fair election.

(9) That the integrity and outcome of the elections upon which the 3rd respondent was declared by the 1st and 2nd respondents as the winner was compromised and therefore the elections were not fair and lawful.

(10) That the Petitioner notes that in light of the foregoing it is illegal, unjust and improper for the 3rd Respondent to be allowed to wear a prize on whose behalf the contest has not been fairly won.

(vi) On the 1st ground that there was violence that disrupted the voting which was initiated by persons claiming to be the supporters of the 3rd respondent, particularly at Garsen Primary School and Mbandi polling stations, among others, I find that first and foremost, the petitioner has not shown by production of evidence that there is a polling station known as Mbandi. Where is Mbandi polling station and what transpired at that the said Mbandi Polling station" No such evidence has been ventilated in the affidavits in support of the petition or even the evidence before this court.

(vii) Secondly on the allegation that there was violence at Garsen Primary school polling station that was initiated by persons claiming to be supporters of the 3rd Respondent, I find that the Petitioner deposed as follows in his affidavit which was adopted as his evidence in chief;

"THAT at Garsen Primary School, I encountered a large crowd of people who, upon seeing me started shouting and chanting pro ODM/NASA songs. The crowd grew violent and I made a quick escape but not before my vehicle's window was broken with a stone. The police were present and tried to disperse the crowd".

(viii) In cross-examination, the petitioner said the incident occurred after the voting when he went to make a complaint. I find that there is no evidence that the said incident was initiated by the 3rd Respondent or that the same affected the voting. The said supporters of the 3rd Respondent are unknown and despite deposing that the said incident took place in full view of the police, there is no reason advanced by the Petitioner why he did not take up the issue with the police officers who were present at the scene.

(ix) I find that there is no evidence that the said incident at Garsen primary school polling Centre affected the voting which had already taken place and the same cannot be a basis to seek to nullify the elections when the purported actions by unknown people which amount to a criminal offence were never investigated by the police and the same were never proved in any court of law despite that the Petitioner had the opportunity to pursue the matter as a complainant.

(x) On the issue that the tallying of votes at Galole Constituency tallying center was disrupted by violence which began when a person claiming to be the supporter of the 3rd respondent fatally stabbed an election officer and subsequently resulted in the killing of three persons by the police, again I find that this incident occurred on 9/8/2017 when the voting had already been done on 8/8/2017.

(xi) I find that the Petitioner and his witnesses (PW3, PW4 and PW5) did not go back to the Tallying centre after the violence. The evidence on record is that the violence erupted shortly after the Petitioner who went to launch complaints had left the Tallying centre. PW3, PW4 and PW5 who were at the Tallying centre during the attack said they fled and never returned to find out what transpired. I find that the Petitioner's testimony that the said violence affected the outcome of the elections is hearsay as he did not go back to witness what happened. The agents of the Petitioner did not also return to the Tallying centre.

(xii) I also find that there is no evidence that the said incident was orchestrated by the 3rd Respondent. Again I find that there were police officers at the scene who managed to bring the situation to normalcy. There is evidence that the person who fatally stabbed an official of the 2nd Respondent was arrested.

(xiii) I find that the incident amounts to a serious criminal offence which must be investigated and the perpetrators brought to book. At this moment, in the absence of evidence as to the identity of the perpetrator and the motive of the attack, this court has no basis for making a finding that the said perpetrator was a supporter of the 3rd Respondent. I also find that the incident could not have affected the voting which had already taken place on 8/8/2017 and the incident took place on 9/8/2017.

(xiv) On the issue that the Petitioner's chief agent, his other agents, officers of the 1st respondent, voters and other people ran away and the tallying center was abandoned for several hours, I find that the evidence on record is that the Petitioner and his agents did not go back to the Tallying Centre after the incident. The Petitioner's agents chose not to go back after normalcy resumed to witness the tallying of the votes and they cannot now ask this court to nullify the elections on that basis.

(xv) I rely on the celebrated case of **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others (2014) eKLR where** Justice Mutunga held as follows:

"If party agents are required to be present, sign statutory forms, and undertake any other legitimate duty that is imposed upon them as part of the political process in an election, then they are under obligation to do it. To fail to do so is not only to fail one's party, but also to fail our democracy. The Courts must frown upon any such inaction, reluctance, or delay. It is, therefore, time for us to develop our election-petition litigation: We must depart from the current practice in which a petitioner pleads 30 grounds for challenging an election, but only proffers cogent evidence for 3. A candidate, or her agent, cannot abscond duty from a polling station, and then ask the Court to overturn the election because of her failure to sign a statutory form. Every party in an election needs to pull their own weight, to ensure that the ideals in Article 86 are achieved: that we shall once and for all have simple, accurate, verifiable, secure, accountable, transparent elections. The election belongs to everybody, and it is therefore, in everybody's collective interest, and in everybody's collective and solemn duty, to safeguard it."

(xvi) I therefore find that the petitioner has not proved that the violence at Galole Tallying Centre affected the elections. The Petitioner and his agents were duty bound to be present when normalcy resumed and the process of tallying continued and the results announced.

(xvii) I also find that the allegation that it was the 3rd Respondent responsible for the violence is based on mere suspicion without an iota of evidence to support the same. Suspicion no matter how strong cannot be a substitute for cogent evidence.

(xviii) On the issue that the votes cast, the voting materials, gadgets and records at Galole tallying centre were left unattended after the melee thereby compromising their integrity and making their contents questionable, I find that this court has already made a finding that the testimonies of the Petitioner and his witnesses amount to hearsay as the petitioner and his agents did not find it necessary to return to the tallying centre after the unfortunate incident.

(xix) I find that the testimony of DW7, MOHAMMED GONJOBÉ RAKA who was the returning officer is that after the strangers stormed the Tallying Centre, the situation was brought under control by the security agents who were present and the tallying resumed. Therefore the petitioner and his agents who were not at the Tallying centre have no basis for alleging that the materials were unattended for a long time. There is no evidence that any materials were damaged or that any materials got lost.

(xx) On the issue that the petitioner's agents at Kipini Primary School polling station, which had two streams totaling to about 1,400 votes, as well as at Imani primary school were prevented from witnessing the manner of assisting illiterate voters by the election officials, the Petitioner called only two witnesses (PW1 and PW2) who said they were both at Imani primary school.

(xxi) PW1, FATUMA SOPHIA BAKARI said her elderly father asked the Presiding officer to allow her to assist him to vote but the presiding officer refused. I find that the duty of the agents was not to assist illiterate voters but to witness the voting. I find that there is no evidence that her father was not assisted to vote for a candidate of his choice since he was not called as a witness. She deposed in her affidavit as follows;

"THAT my own elderly father asked the presiding officer to allow me to help him vote but the presiding officer refused and purportedly helped him as he had been doing with others."

(xxii) I also find that the other witness (Pw2), HASSAN IBRAHIM GOLO who was also an agent for the petitioner at Imani primary school polling Centre did not name even one illiterate voter who was not assisted. PW2 confirmed that the Petitioner garnered 174 votes and that the winner at Imani primary school polling Centre was Ismael Jillo who garnered 238 votes.

(xxiii) I therefore find that the allegation that the petitioner's agents were prevented from witnessing several illiterate voters being assisted at Imani primary school polling center did not translate into votes in favor of the 3rd Respondent who only garnered 3 votes at the said Centre. In the circumstances, the Petitioner has not proved that the said action affected the elections or that it was for the benefit of the 3rd Respondent.

(xxiv) I also find that the petitioner did not adduce any evidence on how his agents were prevented from assisting illiterate voters at Kipini primary school polling centre. The Respondents witnesses DW 2, DW3 and DW4, who were Presiding officers at Kipini Primary School, in streams 1, 2 and 3 testified on oath, that they assisted all those illiterate people who did not have anyone to assist them, in the presence of the agents.

(xxv) I also find that the 3rd Respondent's witnesses 3RDW 1, 3RDW 2, 3RDW 3 and 3RDW 4 all testified on oath, being agents for various candidates that they did witness the Presiding officers at Kipini Primary School assist illiterate voters who required assistance in their presence.

(xxvi) I therefore find that the Petitioner and his witnesses failed to discharge the burden of proof. Furthermore, they have failed to adduce cogent and credible evidence. The Petitioner further failed to call crucial witnesses to corroborate the evidence adduced and the same amounts to hearsay and generalized allegations.

(xxvii) Finally, on the issue that many forms 37A contained alterations, were not properly filled in, were not witnessed and had incomplete and or inaccurate information, again no single form 37A was specifically pleaded by the petitioner in the petition or in the affidavits in support of the petition or even in his evidence before this court. I find that the Petitioner did not specifically dispute any results as captured in form 37As.

(xxviii) I find that the Petitioner's contention was a generalized assertion that the said forms "**contained alterations, were not properly filled in, were not witnessed and had incomplete and or inaccurate information**". The Petitioner has not specifically dispute the results in any form 37As.

(xxix) On that aspect, I rely on the case of **JACKTON NYANUNGO RANGUMA VS THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION, KISUMU ELECTION PETITION NO. 3 OF 2017**, where Justice Majanja stated as follows;

"....the legal position remains that the votes as recorded in Form 37A are final. Unless Forms 37A are disputed, any errors in electronic transmission of results or publication in IEBC public portal cannot, of themselves and without more, invalidate Forms 37A. Where the results are electronically transmitted from the polling station to any other portal as the IEBC may direct, such results can only be termed as provisional thus understanding the primacy and finality of Form 37A..."

(xxx) Similarly in the current case, the Petitioner having not disputed any of the results in the Form 37As, has no basis for seeking the nullification of the elections herein as he has not demonstrated in what ways his allegations have affected the results of the election.

(xxxi) The petitioner stated as follows in his written submissions;

".... that there were massive irregularities observed in Form 37C. That the said form was from Homa Bay County code 043. There were alterations in the said form which the County Returning Officer admitted that they could lead to invalidation of the election as not being carried out in accordance to the Constitution and the written laws. That no proper/satisfactory explanation was given for the irregularity. The 1st and 2nd Respondents did not discharge the evidentiary burden of proof regarding the irregularities pointed out in form 37C. The County Returning Officer was generally evasive and inconclusive. That it was only after thorough cross-examination that he told the truth regarding one or the other aspect of the Election in dispute. Elections are normally carried out separately and independently. Tana River County Election was a separate election from the Homa Bay County Election. The prescribed Forms are not meant for cosmetic purposes but for strict compliance with the law. The election carried out in absolute noncompliance is a mockery of our Constitution which envisages that an election shall be credible, transparent and verifiable. The Form in dispute was therefore not authentic and as such serious doubts must be raised on the results. The said Form 37C was not in compliance with Article 86 of the

Constitution. The results in Form 37C do not reflect the results of Tana River County Gubernatorial Elections. Homa Bay County is on the far West of the Country while Tana River is on the far East, it cannot even be argued for a second that there was a mix up during the packaging."

(xxxii) I find that the said issue was not raised in the Petitioner's pleadings. The Petitioner is seeking to introduce new grounds at the submission stage. I also find that on the said issue, MOHAMED GONJOBE RAKA the Returning Officer for Tana River testified that a template for the Form 37C was sent to him from IEBC headquarters for the purpose of printing and the said template could be modified and altered and I find that the said anomalies in form 37C cannot invalidate the elections.

(xxxiii) Finally on the determination of the three issues in this petition, I find that on the first issue to "**Whether the election of the governor Tana River County held on 8th August, 2017 were conducted in accordance with the Constitution, the Elections Act and the regulations made there under**", I find that in the absence of cogent evidence that the violence disrupted the elections, the answer is in the affirmative.

(xxxiv) In the case of **Benson Maneno v Jacob Machekele and Others Malindi EP No. 14 of 2013 (Unreported)**, Kimaru J., stated as follows;

"For the Petitioner to sustain the claim that violence disrupted the election, he was required to establish that the Respondents were either responsible for the violence or condoned or connived in the perpetration of violence." The petitioner must also establish that the violence was so pervasive that it affected the right to vote (See Kajembe v Nyange and Others [2008] 2 KLR 1). "

(xxxv) I accordingly find that this petition lacks in merit and I dismiss it with costs to Respondents.

(xxxvi) The costs are capped at Kenya shillings two million only.

Dated, signed and delivered at Malindi this 26th day of January, 2018.

ASENATH ONGERI

JUDGE.



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