



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

ELECTION PETITION NO. 2 OF 2017

IN THE MATTER OF THE CHALLENGE OF THE VALIDITY OF THE MANYATTA MEMBER OF THE NATIONAL ASSEMBLY ELECTION, 2017

AND

IN THE MATTER OF ARTICLE 1(1); 2(2); 3(1); 4(2); 10; 21(4); 22(1); 23; 35; 38(3) (C) 47(2); 48; 81(a) & (e); 81(e); 82(2) (b); 84; 86; 87 (2) & (3); 88 (5); 165 (3) (a) & (e); 97 (1) (a); 99 (1) (c) AND (E);101 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTION 75, 76, 77, 78, 79, 80, 82, 84, 85, 86 AND 87

AND

IN THE MATTER OF PART XII AND XIII OF THE ELECTIONS (GENERAL) REGULATIONS, 2012

AND

IN THE MATTER REGULATIONS OF THE ELECTIONS (GENERAL) (AMENDMENT) REGULATIONS, 2017

AND

IN THE MATTER OF RULE 7, 8, 9, 12, 28 AND 29 OF THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES, 2017

JUSTUS KINYUA MUGO.....PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION (IEBC).....1ST RESPONDENT

THE RETURNING OFFICER, MANYATTA

CONSTITUENCY EMBU COUNTY.....2ND RESPONDENT

JOHN MUCHIRI NYAGA.....3RD RESPONDENT

J U D G M E N T

1. **JUSTUS KINYUA MUGO** (hereinafter to be referred to as the Petitioner) contested the Manyatta Constituency Parliamentary Seat (Member of National Assembly) in the last general elections held on 8th August, 2017 which elections were conducted by the 1st and 2nd Respondent herein pursuant to the provisions of **Article 88(1)(4) and (5)** of the Constitution and following those elections the 2nd Respondent declared **JOHN MUCHIRI NYAGA** (3rd Respondent) as the winner or the duly elected Member of National Assembly for Manyatta Constituency pursuant to **Regulation 37** of the Election (General) (amendment) Regulations, 2017.

2. In the declared results that were later contested by the Petitioner herein, the candidates in that elective seat in the order in which they performed were as follows namely:-

- (i) John Muchiri Nyaga - 33,962 votes
- (ii) Justus Kinyua Mugo - 32,972 votes
- (iii) John Gitonga Mwaniki - 8,234 votes
- (iv) Benard Njeru Ileri - 1,282 votes
- (v) Loyed Ileri Nyaga - 1,104 votes
- (vi) Patrick Mucangi Njue - 818 votes
- (vii) Danson M. Njoka - 808 votes
- (viii) Richard Njiru Mbogo - 665 votes
- (ix) Antony Njiru Njagi - 390 votes

3 Based on the above results the 3rd Respondent was declared the winner and duly gazetted as the Member of National Assembly through a gazette Notice No.8239 dated 22nd August 2017. The Petitioner states in his petition that the results were declared on 10th August, 2017 but later it transpired that the results were actually declared on 11th August, 2017 and I will come to that issue later in this judgment. The Petitioner herein felt aggrieved with the results declared and challenged the same through this petition and cited the following grounds as a basis for his petition namely:-

a) That the elections were conducted contrary to Article 81(e) and 86 of the Constitution of Kenya 2010, the Elections Act 2011, and the Elections (General) Regulations, 2012 together with other election rules and gave the following particulars as a basis for this claim namely:-

i. Karau Primary School Polling Station 1 of 1

- No agents, no reasons given for refusal to sign
- Form 35A stated that the registered voters were six Hundred and Twelve (612).
- Form 35B stated that they were Five Hundred and Ninety Eight (598)

- Form 35A referred at the declaration Clause as Embu Urban Primary School, is a forgery as the same Presiding Officer signed the form. The results data identical to the Embu Urban Primary School.

- The same Presiding Officer could not serve in two different polling stations.

ii. Embu Municipal Council Stadium Polling Station 4 of 4

- The Form 35A showed that agents refused to sign and the reasons indicated by the Presiding Officer were that there were no clerks whereas it is not normal for a polling station not to have clerks

iii. St. Andrews Old Stadium Polling Station 2 of 2

- According to Form 35A registered voters were Four Hundred and Twenty Two (422).

- According to the Form 35B the valid votes cast were Six Hundred and Ninety Nine (699).

- The Returning Officer ought to have disregarded the results as the same went contrary to regulations 83(b) of the elections (General) (Amendment) Regulations, 2017

iv. Kanjikeru Coffee Factory Polling Station 2 of 2

- There is a handwritten manipulation that erodes the accuracy of the tally as the Form 35A indicates the votes cast as Three Hundred and Twenty Six (326) while Form 35 B indicates the votes cast as Three Hundred and Forty Six (346)

v. Kamama Polling Station:

- The Form 35 A indicates the registered voters as Six Hundred and Twelve (612) while Form 35B indicates the number as Five Hundred and Ninety Eight (598).

vi. New Apostolic Church- Kwa Amos Polling Station

- The Form 35 A does not bear any IEBC official stamp.

vii. Embu County Day Secondary School Polling Station 2 of 2

- Form 35A's were not signed by the Agents and the reason given was that they had gone at the time of the vote counting which brings the conclusion that the votes were counted in absence of the Petitioner's representatives.

viii. Kiandundu Catholic Church Grounds Polling Station 1 of 1

- There is unnecessary cancellation on Form 35A

- The form is not signed by the Agents reason being that there were no clerks at the polling station at the time of vote counting. This is inconceivable as their absence is not explained

ix. St. Andrews ACK Old Stadium Polling Station 2 of 2

- The Form 35A does not tally with Form 35B

- The votes for the winner Mr. John Muchiri at Form 35B comprises the total number of votes cast in that particular station.

x. The Embu Urban Primary School Polling Station 4 of 4

- There were no agents
- No comments from the Presiding Officer

xi. Rukira Primary school Polling Station 2 of 2

- No agents/no comments the Deputy Presiding Officer did not sign nor is the Form 35A dated.

xii. St. Michael Primary school Polling Station 2 of 3

- Results entered in Form 35B did not reflect what was entered into the form 35A
- The Petitioner's agent did not sign

xiii. Kiaragana Polling Station 1 of 1

- Agents absent at the time of filing Form 35 A
- All agents were absent at the time of filing Form 35A whereas its certain from the comments of the Presiding Officer that the agents were present when votes were being counted and even during the voting process.

xiv. Embu County Day Secondary School Polling Station 2 of 2

- No agents at the time of vote counting

No explanations. The votes were counted in the absence of the Petitioner or his representatives

xv. Duplication of Results

(a) Kamiu Primary School Polling station 2 of 3 and polling station 3 of 3.

Only results in respect of 2 of 3 were duplicated into Form 35B in relation to polling station 2 of 3. The wrong tally in respect of Polling Station 2 was entered.

(b) St. Michael Primary School Polling Station 2 of 3 is identical with results of the Polling Stations 3 of 3.

(c) Manyatta Tea buying Center Polling Station 2 of 3 and Polling Station 3 of 3 is a duplication as entered in Form 35B.

(d) AIPCA Church Grounds- Majimbo Market Polling Station 1 of 2 and 2 of 2 .

Results for 1 of 2 is a duplicate of the results of 2 of 2 in Form 35B.

(e) Gatunduri Primary School Polling Station 1 of 1 and 2 of 2.

As Posted in Form 35B is a duplicate as the results posted show the same exact results for both Stations for all candidates and further, Form 35A does not bear the Presiding Officer (IEBC) stamp, Gatunduri Primary School.

Form 35 A does not bear the IEBC stamp

(f) Kiangima Primary School Polling Station 1 of 3 and Polling station 2 of 3 Duplication of results in respect of polling station 1 of 3 into the entry for polling stations 2 of 3 contrary to the record appearing in Form 35A.

xvi Forms without the Presiding Officer (IEBC) stamp

- a. New Apostolic Church- Kwa Amos Polling Station 1 of 1
- b. Kiangari Tea Buying Centre Polling Station 1 of 1
- c. Ndatu Catholic Church Grounds Polling Station 1 of 1
- d. Minai Coffee Factory Polling Station 1 of 1
- e. Mbuvari Primary School Polling Station 1 of 1
- f. Ngenwe Coffee Factory Polling Station 1 of 1
- g. Muvandori Primary School Polling Station 2 of 2
- h. Gatunduri Primary School Polling Station 2 of 2
- i. Kanyikenu Coffee Factory Polling Station 1 of 2
- j. Full Gospel Church Grounds Gititimo Polling station 1 of 1
- k. Janwa Bright Star Academy Polling Station 1 of 3
- l. Janwa Bright Star Academy Polling Station 3 of 3
- m. Embu Cultural Centre Polling Station 2 of 2
- n. Mosque Grounds- Dallas Polling Station 3 of 3
- o. Kathangari Nursery School Polling Station 1 of 1
- p. Rung'ang'a Primary School Polling Station 1 of 1
- q. Full Gospel Churches Grounds - Gitituri Polling Station 1 of 1.

xvii. Kairuri Primary School Polling Station 1 of 2

Votes counted in the absence of candidates and/or agents at the polling stations.

xviii. Ngimari Primary School Polling Station

- Form 35A the number of votes cast was Five Hundred and Seven (507) while Form 35B Five Hundred and Six (506) there is lack of accuracy in counting and tallying.

- The Presiding Officer did not indicate results as reflected in Form 35A.

xix. Kianari Day Secondary School Station

- Some candidates did not have results on Form 35A e.g Mbogo Richard Njiru, Njagi Anthony, Njiru and Njue Patrick Mukengi.

- There was erroneous entry of votes into Form 35B as in the case of John Muchiri. The 3rd Respondent whose votes entered as Eighteen (18) whereas he had Two Hundred and Eighteen (218) votes. There is a cancellation that rendered the entries questionable.

xx. Ruvere Tea Buying Centre Polling Station

- The Presiding Officer omitted to indicate the name of the Polling Station at the declaration part of the Form 35A.

xxi Kithimu Primary School Polling Station 1 of 2

- The form 35A is incomplete. It does not indicate total number of registered voters.

- Form 35B indicates the same total number of votes as in polling station 2 of 2 hence no certainty or clarity as to the total number of voters in that particular polling station.

xxii Ithangawe Primary School Polling Station

- The serial appearing on the Form 35A is different from the purported duplicate in Form 35B issued to the agent after the voting exercise.

xxiii. Kiandundu Catholic Church grounds Polling Station 1 of 1

- The same agent has appended his signature twice on the Form 35A and the names appear to have been authored by the same person, its not a coincidence that there are initials instead of signatures.

xxiv. Mvangua Kinindi Pond Polling Station

- The results as appearing in at Form 35A are not reflected in Form 35B and besides the same are not clearly ascertained hence not negligible.

xxv. Kibugua Primary School Polling Station Number 2 of 2

- No means of knowing who the Presiding Officer and Deputy were and their signatures are never ascertainable nor eligible.

- The votes against each of the candidates as appearing on the Form 35B appear to be guess work as the difference in the results in the two streams is so similar.

- The Forms 35A is incomplete with no record on the declaratory part of the forms.

- The details of agents seem to have been entered by the same handwriting.

xxvi. Gicharori Primary School Polling station 2 of 2

- The form 35A states that the voters number of valid votes case is Four Hundred and Forty Five (445) whereas Form 35B states that is Four Hundred and Twenty six (426).

- There are erroneous entries from Form 35A to form 35B e.g MUKUNJI JOHN GITONGA'S votes in Form 35A are indicates as Ninety Six (96) whereas as Form 35B they are indicated as Seventy Six (76).

xxvii. Muthigi Tea Collection Centre Polling Station

- The handwriting on the part of agents are the same, the agents did not sign the forms yet their names are entered. They were not involved and there was no reason.

- The results in respect of one of the candidates namely NYAGA IRERI have not been indicated yet in the Form 35B the same have been entered as Zero. This is not accurate.

- There is no reason given for the failure of agents to sign yet their names are entered.

xxviii. Kanga Tea Buying Centre Polling Station

- There were no agents of the candidates during the filing of Form 35A and no reason is given.

xxiv St. Hellena Karimari Primary school Polling station

- The Form 35A does not bear the name of polling station at the declaration part of the Form 35A.

xxx. Kagumori Primary School Polling Station

- Form 35A is incomplete on the declaratory part of the Form filled yet its so final as regards the results at the polling stations.

xxxii. Gachuriri Tea Buying Centre Polling Station

- The handwriting used to file in the Form 35A is by the same person and instead of signatures, its the names that have been initialized. The agent for the Petitioner did not participate in the filing of the form and no reasons advanced.

xxxiii. Kibugu Tea Buying Centre Polling Station 2 of 2

- No names of the Presiding Officer and Deputy Presiding Officer are present in Form 35A and their signatures are neither ascertainable nor eligible.

- The number of valid votes obtained by each candidate does not match what is entered in Form 35B entries on Form 35A are not authentic and/or verifiable. There are many cancellations, alterations of figures.

- The votes against each of the candidates as appearing on the Form 35B appear to be guess work as the difference in the results in the two streams is s similar.

- Form 35A of the above mentioned Kibugua Primary School Polling Station number 2 of 2 is incomplete with no record on the declaratory part of the forms and the details of agents seem to have been entered by the same handwriting.

- The Form is so untidy that no verification of results can be made from it.

- The entries in both Forms 35A and form 35B are characterized with inaccuracy.

xxxiii. Gatunduri Primary School Polling Station 2 of 2

- No verifiable results from the entire station.

- The Form 35A states that valid votes cast is Four Hundred and Forty Five (445) whereas Form 35B states that is Four Hundred and Twenty Six (426) hence no certainty or clarity as to the total number of voters in that particular polling station.

xxxiv. Catholic Cathedral Grounds - Mugoya Polling Station.

- Name of polling station is not indicated on Form 35A in respect of 1 of 1 at the declaratory part thereof.

- The number of registered voters is not indicated on Form 35A.

xxxv. Kambo Market Polling Station

- Agents were not involved in approval of the results.

- Ballot papers ran out in the middle of the voting exercise yet the Presiding Officer did not indicate so in the Form.

- Form 35A was filled by the same person and the cell phone contact of one agent Dennis Fundi is incomplete.

xxxvi. St. Paul Gakinduriri Primary School Polling Station

- The total number of votes cast are entered into Form 35A as Three Hundred and Twenty (320) but at Form 35B the number of votes is indicated as One Hundred and Thirty (130).

- The Petitioner's votes as entered in the Form 35A is Two Hundred and Eleven (211) whereas Form 35B reflects Twenty One (21) votes a difference of One Hundred and Ninety (190) votes. The entries are not accurate the same are not verifiable.

- The agents did not sign, no reason given.

xxxvii. Kimangararu Primary School Polling Station 1 of 2

- The Form 35A indicates the votes cast as Four Hundred and Fifty Five (455) while form 35B reflects the votes cast as Two Hundred and Fifty Five (255) .

- The difference of Two Hundred votes is not explained.

- 45% voters turn out goes against the trend witnessed in all polling stations within the Manyatta Constituency.

- The cell phone contact of the only agent whose name appears on the Form 35A is incomplete hence the authenticity of the entries therein Form 35A are suspect.

xxxviii. Kamiu Primary School Polling station 1 of 3

- The total number of registered voters in the form 35A is entered as zero (0) yet it is shown the three Hundred and Ninety Seven Persons voted.

- In Form 35B there are discrepancies between the votes entered therein and the votes appearing in the Form 35A as follows:-

(a) The Petitioner in Form 35 A has One Hundred and Thirty Two (132) whereas in 35B he has One Hundred and Forty (140).

(b) MUKUNJI GITONGA in Form 35 A has Thirty Four (34) votes whereas in 35B he has Sixteen (16) votes.

(c) NJAGI ANTHONY NJIRU in Form 35A he has Six (6) votes whereas in Form 35B he ha Two (2) votes.

(d) NJUE PATRICK he has Five (5) votes in Form 35A whereas in Form 35B it indicates as Four (4) votes.

(e) NYAGA JOHN MUCHIRI he has Two Hundred and One (201) votes as Form 35 A whereas Form 35 B he has two Hundred and Fourteen (214) votes

(f) NYAGA IRERI LOYED had ten (10) votes in Form 35A whereas he has Thirteen (13) votes in Form 35B.

- The total number of valid votes cast in Form 35A is indicated as Three Hundred and Ninety Seven (397) whereas Form 35B reflects Three Hundred and Ninety nine (399).

- There hence lack of accuracy.

xxxix. Mosque Grounds - Dallas Polling Station No. 3 of 3

- The results for polling station 3 of 3 were duplicated in 1 of 3 at the Form 35B hence inaccuracy.

- The 3rd Respondent, who actually according to Form 35A in polling station 1 of 3 had Two Hundred and Fifty Nine (259) votes, was indicated at Form 35B as having Two Hundred and Sixty Three votes.

- MUKUNJI JOHN GITONGA who got Thirty (30) votes as for Form 35A and got Forty Two (42) votes as per Form 35B.

- The Petitioner who got Seventeen (17) votes according to the Form 35A had an entry of One Hundred and Seventy Four (174) votes.

- There was a blank entry of the total number of rejected votes in Form 35B whereas Form 35A reflects Seven (7) rejected votes.

xl Jua Kali Offices Grounds Polling Station

- There were no agents during counting at the polling station as early indicated in the Presiding Officers comments.

- It is suspicious that one of the agents remained to count the votes even the Petitioners who was an Independent Candidate and also that despite the remark that most voters were drunk there was no rejected vote.

xli. Embu County Day Secondary Polling Station 4 of 4

- The Form 35A shows cancellations without initials by the Presiding Officer or the Deputy.
- The absence of clerks at the time of vote counting has not be explained.
- Absence of agents for all candidates is suspect.
- The results are therefore not verifiable

xlii Embu Municipal Council Stadium Polling Station 1 of 4

- There was an erroneous entrance of votes for some of the candidates as follows:-

(a) NJUE PATRICK MUCANGI garnered One Hundred and Ninety (190) votes according to Form 35A but the entry into Form 35B is Zero (0) votes.

(b) The Respondent in Form 35 A garnered Zero (0) votes whereas in Form 35B his votes were entered as One Hundred and Ninety (190).

- The Presiding officer and the Deputy Presiding Officers entered the dates of counting as 9th August, 2017.
- The inconsistency amounts to in accuracy.

xliii Embu County Day Secondary School Polling Station No.2 of 2

- There is alteration on original Form 35A as reflected in the space provided for comments. A close scrutiny shows that the Presiding Officer in the original entry had different comments and reasons away from the reason that the agents had gone by the time of counting.

- There were nine (9) candidates each with an agent with the explanation that they had gone by the time of counting votes.

xliv .Plan Social Hall - Dallas Polling Station 3 of 3

- The handwriting on the Form 35A and all signatures appear to be by the same person. The entries are therefore suspect.

- The identity number of the 2nd agent who purportedly signed has six digits numbers, which is inapplicable in Kenya identity card serialization

- The Form 35A does not appear as a carbon copy; hence alterations are a high possibility.

xliv. Nembure Polytechnic Polling Station 1 of 2 and 2 of 2

- Form 35A Polling Station 2 of 2 duplicated of results from polling station 1 of 2 and hence the results for 1 and 2 are omitted.

xlvi. Full Gospel Church Grounds Ndunduri

- The presiding Officer did not indicate the name of the constituency on the Form 35A as the part of declaration.
- The handwriting used to fill in all details on the Form was that of one individual.
- Only three (3) agents purportedly signed and there is no explanation for the absence of the rest.
- There are discrepancies between the votes the Petitioner had garnered in Form 35A and 35B as follows:

(a) Form 35 A shows that he garnered One Hundred and Eleven (111) votes

(b) Form 35B shows that he had garnered eleven (11) votes; He therefore was deprived of One Hundred (100) votes.

(c) The total number of valid votes cast as indicated in form 35 A is Two Hundred and Two (202) votes whereas the total number of valid votes cast in Form 35 B is One Hundred and Two (102) a discrepancy of One Hundred (100) votes.

xlvii - The agents were not supplied with copies of form 35 A after the counting of vote

(b) *That by acts, commissions and omission the 1st and 2nd Respondent violated the provisions of Article 81, 86 of the Constitution, the Elections Act 2011 and the Election (General) Regulations, 2012 as amended.*

(c) *That by making erroneous and inconsistent entries into Forms 35A and Form 35 B the 1st and 2nd Respondents failed in their duty under Article 86(c) to ensure simple, accurate, verifiable and accountable system of election.*

(d) *That by making erroneous and inaccurate transfer of data from Form 35A to Form 35B, the 2nd Respondent violated the principles underlying Article 81 (e) and 86 (c) of the Constitution of Kenya 2010.*

(e) *That by providing the Presiding Officer for the Kambo Market Polling Station, with inadequate ballot papers which ran out in the course of voting exercise, the 2nd Respondent contravened Regulation 61(1) of the Election (General) Regulations, 2012.*

(f) *That by opening ballot boxes, emptying contents and causing to be counted the votes in the absence of candidates or their duly appointed agents, the Presiding Officers contravened Regulation 76(1) of the Elections (General) Regulations 2012.*

(g) *That by omitting to sign completed declaration Form 35A the Presiding Officers contravened Regulation 79(1) of the Election (General) Regulations 2012.*

(h) *That by omitting to enter in Form 35B the votes cast in respect to some candidates for the National Assembly, the 2nd Respondent contravened Article 10 of the Constitution of Kenya 2010 and Regulation 83(e) (iii) of the Election (General) amendment Regulations, 2017.*

(i) *That by the acts, commissions and omissions aforesaid the member of National Assembly elections for Manyatta were marked with irregularities, electoral malpractices that rendered the entire exercise shambolic, null and void.*

4. By reasons of the above grounds the petition sought for the following reliefs/orders in this petition namely:-

(i) An order for scrutiny and/or recount of the ballots cast at the election of the Member of National Assembly for Manyatta Constituency (which prayer has since been spent).

(ii) A declaration that **JOHN MUCHIRI NYAGA**, the 3rd Respondent was wrongfully returned by the 2nd Respondent as the duly elected member of the National Assembly for the Manyatta Constituency.

(iii) A declaration that the Petitioner herein was validly elected the member of National Assembly for the Manyatta Constituency.

(iv) In the ALTERNATIVE, a declaration that a fresh election should be held by the 1st Respondent in respect of the Member of National Assembly for the Manyatta Constituency.

(v) Any other relief that the honourable court may deem just and expedient in the circumstances.

(vi) Costs of the petition.

5. The Respondents opposed this petition through their respective responses and affidavits filed. The 1st and 2nd Respondents on their part denied each and every allegation leveled against them. They have pointed out that the Petitioner did not contest the County Assembly post as pleaded under paragraph 6 of the petition but rather he contested the post of National Assembly Manyatta Constituency. I have noted this anomaly in the Petitioner's pleading but presumed it to be just a typographical error as this petition is about Member of National Assembly Manyatta Constituency not County Assembly.

6. The 1st and 2nd Respondent maintains that contrary to the Petitioner's claims, in their view the elections conducted in Manyatta Constituency were conducted properly and in accordance to the provisions of **Article 81 (e)** and **86** of the Constitution of Kenya, the Elections Act 2011 and the Election (General) Regulations 2012.

7. The 1st and 2nd Respondent deny the Petitioner's claim that his agents were denied access of some polling stations and aver that the Petitioner's agents were either absent at the time of vote counting in those stations or declined to sign and for that reason failed to sign Form 35As.

8. The 1st and 2nd Respondent while conceding that there were numerical errors in the entry of the number of votes in Form 35B from Form 35A, the error in their view did not affect the number of valid votes for each individual contestant. They maintain that the results reflected in all Form 35A were accurate and that the errors conceded were clerical and unintentional and did not aid or prejudiced any of the candidates in those elections. They have further pleaded that they did have power to force agents to remain in polling stations during the entire election exercise.

9. On the claims of duplication of results in respect to St. Michael Primary School polling station stream 2 and 3 as well as Kamiu Primary School polling station 2 of 3 and 3 of 3, the 1st and 2nd Respondent while conceding the anomaly state that error was unintentional and not aimed at prejudicing any of the candidates in that election.

10. The 1st and 2nd Respondents admitted the following errors or anomalies in the following stations namely;

(i) Manyatta Tea Buying Centre polling station.

Duplication of results in Form 35B in stream 1 and 2 and that the 3rd Respondent got 168 votes instead of 137 votes while the Petitioner got 126 votes instead of 130 votes. They claim that the error was unintentional and not intended to aid or prejudice any candidate.

(ii) In AIPCA Church grounds polling station the 1st and 2nd Respondent concedes that there were errors whereby the 3rd Respondent received 202 votes instead of 209 votes and denied some votes while the Petitioner received 90 instead of 84 votes thereby gaining 6 extra votes.

(iii) In Gatunduri Primary School polling station, the 1st and 2nd Respondent concedes that there was a mix up resulting in the Petitioner getting 196 votes instead of 188 votes while the 3rd Respondent got 77 votes instead of 81 votes. They have however denied that Form 35A of that station did not have the 1st Respondent's rubber stamp.

(iv) In Kiangima Primary School polling station, the 1st and 2nd Respondents admits that there was duplication of results where the 3rd Respondent got 136 votes instead of 130 votes while the Petitioner got 295 votes instead of 307 votes.

(v) The 1st and 2nd Respondent while admitting that vote counting took place at Kairuri polling station in the absence of candidates and/or their agents aver that the agents left the polling station before the process of counting started and the Presiding Officer could not force them to remain.

(vi) At Ngima Primary School polling station, the 1st and 2nd Respondent admit the discrepancies noted between number of votes cast in 35A (507) and 506 in Form 35B was a clerical error in keying in data from Form 35A to Form 35B and that the error was unintentional neither did it put any of the candidates at a disadvantage position.

(viii). At Kiandundu Catholic Church grounds polling station, the 1st and 2nd Respondent admit there was some handwriting on Form 35A where the Presiding Officer wrote down his name and appended her signature and at the same time wrote down the initials of the agents present in that polling station and the explanation given is that the agents were running late requested the Presiding Officer to simply put down their initials due constraints of time.

(viii) At Gicherori Primary School polling station, the 1st and 2nd Respondents admit there were discrepancies in that the number of valid votes cast in Form 35 A were 445 while in Form 35B the number of valid votes shown are 426. It is conceded that there were erroneous entry on the number of votes garnered by JOHN GITONGA MUKUNJI in Form 35B (76 votes) while in Form 35A it was 96 votes. The 1st and 2nd Respondent aver that those errors in that station were unintentional.

(ix) The 1st and 2nd Respondent admit that at Catholic Cathedral Grounds Mugoya, the name of the polling station is not indicated at the declaratory part thereof but state that the name of the polling station is indicated on top of the Form which identifies and distinguishes the polling station from the other stations. They also concede that due to an oversight the number of registered voters in that station is not indicated.

(x) At Kamiu Primary School polling station, the 1st and 2nd Respondents admit that there were discrepancies in votes entered in Form 35 due to clerical error that recurred during transposition of results from Form 35A to Form 35B. They hold that the error was not intended to deny any candidate their votes.

(xi) At Mosque Grounds- Dallas polling station, the 1st and 2nd Respondent admit that there were duplication of results in Form 35B of polling station 3 of 3 and 1 of 3 in which all candidates save for IRERI BENARD gained votes. They aver that the error was unintentional and deny that there is a blank in Form 35B in respect to rejected votes as opposed to Form 35A which shows that there were 7 rejected votes.

(xii) The 1st and 2nd Respondents further admit that at Jua Kali offices grounds polling station there were no agents during counting but aver that the agents in that station left before the counting process was over.

(xiii) At Embu Municipal Council Stadium polling station, the 1st and 2nd Respondents admit the votes for Njue Patrick Mucangi and the 3rd Respondent were swapped. They have also admitted that the date for counting is

erroneously reflected as 9th August, 2017 but have explained that counting process went on until the morning of 9th August, 2017.

11. The other allegations of irregularities cited by the Petitioner in the petition like issues of official stamp missing in some Form 35A are denied by the 1st and 2nd Respondent. Some of the stations affected and cited by the Petitioner were disowned by the 1st and 2nd Respondent on account that they did not have polling stations by those names.

12. On his part the 3rd Respondent avers that in his view the elections were free fair and transparent and the 1st Respondent acted in accordance with the constitution by protecting the sovereignty of the people.

13. The 3rd Respondent has admitted that upon going through the data in Form 35B and all Form 35A in respect to Manyatta Constituency, he together with his chief agent detected some errors but in his view the errors were human and there was no reason to believe that the same were premeditated or designed to assist any particular candidate given that the errors affected all candidates across the board. He has given the following polling stations where he detected some errors in entries made on transposing of results from Form 35A to Form 35B namely;

- (i) Manyatta Tea Buying Centre
- (ii) Kiriari Day Secondary School
- (iii) Karau Primary School
- (iv) Kibugu Tea Buying Centre
- (v) Kamiu Primary School (in all the 3 streams).
- (vi) Kiangima Primary School
- (vii) Gatunduri Primary School
- (viii) St Paul Gakinduriri
- (ix) AIPCA Church -Majimbo
- (x) St. Michael Primary School
- (xi) Embu Municipal Social Hall
- (xii) Mosque grounds – Dallas
- (xiii) St Andrews ACK Old Stadium
- (xiv) Nembure Polytechnic

14. The 3rd Respondent by own calculations and taking into account the erroneous entries, and reconciliation of results in Form 35B and Form 35A states that the Petitioner lost 263 votes while he himself lost 161 votes which in his view shows that he could still have won albeit with a smaller margin of 888 votes instead of 990 votes. He avers that the human errors in the nature of inadvertent wrong entries and misposting of results from Form 35A to Form 35B did not constitute substantial and/or significant infringements sufficient to warrant nullification of

elections because in his view the same did not amount to a breach of the constitution by the 1st and 2nd Respondent.

15. The 3rd Respondent denies that there was any polling station in Manyatta Constituency where the votes cast exceeded the registered voters contrary to Regulation 83 (b) of the Elections (General (amendment) Regulation, 2017.

16. The 3rd Respondent in response to the Petitioner's allegations, avers that the Petitioner failed to plead and prove substantial or significant breaches in the elections conducted in Manyatta Constituency and in his view the Petitioner did not disclose a reasonable cause of action to invalidate his election as the Member of National Assembly for Manyatta Constituency.

17. The 3rd Respondent opines that the Petitioner's prayer that he be declared as having been validly elected as Member of Parliament for Manyatta Constituency is an implicit admission that contrary to his allegations the Parliamentary Elections were held in accordance with the constitution and electoral laws.

18. The 3rd Respondent expectedly maintains that the elections were conducted in accordance with the constitution and the law and avers that he was validly elected and declared as the duly elected Member of the National Assembly for Manyatta Constituency.

The summary of oral evidence.

19. (a) Petitioner's evidence

In his evidence before this court, the Petitioner reiterated that the 1st and 2nd Respondent failed in their duty through acts of omission and commissions cited in his petition and thereby violated the provisions of Article 81, 86 of the Constitution and the Electoral Laws. According to him by entering erroneous and inconsistent entries in Form 35A and form 35B, the 1st and 2nd Respondents failed to ensure that the system of election deployed was simple, accurate, verifiable and accountable. He also maintained that by making erroneous entries in Form 35B, the 2nd Respondent violated the principles underlying Article 81 (e) and 86 (c) of the Constitution of Kenya 2010.

20. He further accused the 2nd Respondent of election malpractice by allegedly entering in Form 35B results showing a polling station where votes cast exceeded the registered voters and this is in his view violated Regulation 83(b) of the Election (General) (Amendment) Regulation 2017.

21. The Petitioner also opined that the Presiding Officers erred by opening ballot boxes and counting the ballots in the absence of candidates and/or their duly appointed agents and that by so doing contravened Regulation 76 (1) of the Elections (General) Regulations 2012.

22. The Petitioner stated, that in view of the irregularities and electoral malpractices witnessed during the election in Manyatta Constituency the entire exercise in his view was shambolic.

23. He conceded under cross-examination by Mr. Kathungu learned counsel for the 1st and 2nd Respondent, that due to confusion occasioned by fatigue he erroneously indicated in his petition that the winner was declared on 10th August, 2017 and elsewhere his affidavit on 22nd August, 2017 when the winner was actually declared on 11th August 2017. He also conceded that election officials worked for long hours without sleep and on account of that he appreciated why some errors did occur. He however maintained that despite that he still maintained that the results declared did not meet the aspirations of voters in Manyatta Constituency. He reiterated his position that he came to court due to the anomalies and errors detected in the elections and opined that the results ought to have been accurate and verifiable.

24. The Petitioner further told this court the errors in entries from Form 35A to Form 35B were made to his disadvantage and that the winner benefitted from the errors committed by the 1st and 2nd Respondent and gave examples of the polling stations as St. Andrews ACK Old Stadium and St Michael Primary School. He told this court that he tried to raise queries with the 2nd Respondent at the tallying centre but was advised to come to court. In his view the people of Manyatta were denied the right to choose their leader. He testified that he left the tallying centre before the final announcement deliberately because he did not want to sign the final declaration by the 2nd Respondent. He conceded that though elections is about numbers and though he came 2nd in the declared results the anomalies and irregularities detected showed that the elections were not transparent.

25. The Petitioner further testified that he ran as an Independent Candidate and had agents in all the polling stations but added that 20 of his agents were denied access to the polling stations. He however admitted that he had not pleaded about the specific agents denied access in this petition. He further testified after he had filed his petition, the 2nd Respondent supplied him with all Form 35A and Form 35B but in his view some were blank and other forms were difficult to read. According to him in the face of all the anomalies and errors pointed, only scrutiny would reveal the truth because the results declared were not accurate. He testified that upon doing his own calculations and analyzing the results supplied to him, the margin of victory of the 3rd Respondent went down to 500 votes while his tally remained constant. He expressed his fear that the results in respect to Kambo Market polling station may not be accurate because he had information that ballots ran out in the process of voting and was unsure of how the Presiding Officer got more ballots.

26. The witnesses called by the Petitioner, Joseph Munyua Mwangi (PW2), Eunice Kagendo Njogu (PW3), Emily Wanja Ndwiga (PW4), Justa Wawira Kiura (PW5), Evelyne Kagendo Musangi (PW6), Lucy Wawira Muriuki (PW7), Agnes Justa Wanja (PW8), Patrick Kariuki Ngondi (PW9) and Emilio Njeru Nyaga (PW10) all testified that apart from few anomalies generally the results in the respective polling stations were correct and that results in Form 35A supplied were correct according to them.

(b) The 2nd Respondent's evidence.

The 2nd Respondent testified that she was the Returning Officer in Manyatta Constituency during the elections of 8th August, 2017 and confirmed that there were 226 gazetted polling stations in that Constituency manned by Presiding Officers. She conceded that there were errors in the stations she had cited but that in her view she had provided explanations which centered on human error and general fatigue due to working for long hours without sleep. She however denied that the errors were intentional insisting that they were not and that the same did not favour any candidate or had any significant effect on the results she declared on 11th August, 2017. She added that after the declaration of the said results, she later on went through the entries made in Form 35B and realized that there were some errors which occurred when she was posting results from Form 35A to Form 35B and that upon correcting the errors using the Primary documents (Form 35A) the margin of victory of 3rd Respondent became bigger.

27. The 2nd Respondent further testified that agents add value in the electoral process because as the eyes of their respective candidates they ensure that elections are conducted in a free and fair manner. In her view agents participated in all the polling stations in Manyatta Constituency and signed Form 35A in 200 polling stations save for around 20 stations where agents were absent when the tallying process completed. She added that the Presiding Officers could not force the agents to be present throughout the exercise. She denied that accredited agents were denied access and stated that she received no complaint in that regard.

28. It was the 2nd Respondent's evidence that there was no complaint received in all 226 Form 35As in respect to data captured in those forms and that all candidates were satisfied that the information therein truly reflected the votes each candidates garnered in those polling station. She conceded that mistakes arose when clerks assisting transposed the results from Form 35A to Form 35B and to her this was due to fatigue as the clerks had continuously

worked for three days without sleep. She further added the transposition of results were repeated six times as there were elections in six elective posts in that general election and that they acted under pressure because the candidates were eager to have the results declared. She added that the mistakes were not deliberate and cut across without favouring any one particular candidate.

29. On illiterate or old voters who required assistance, the 2nd Respondent testified that assistants were required to fill Form 32 which is a declaration form indicating that the person had assisted one to vote. She further testified that Presiding Officers picked agents at random just to check that the will of the voter was respected in the exercise and that the voting system adopted was simple for everyone who turned up to vote.

30. On the mix up of results of Karau Primary School polling station and Embu Urban Primary School polling station, the 2nd Respondent explained that when the Presiding Officer Hellen Mutitu initially presented the results in Form 35A, they were faint and she was instructed to get a clearer form which she did and brought a clear one but the form she brought had been pre-printed Karau Primary School at the top but at the declaration part the form indicated that the results were for Embu Urban Primary School and so when the clerks entered the results on Form 35B they simply looked at the top corner of the Form 35A which was reflecting Karau Primary School and entered the results as such. In her view the mistake just like the other errors noted in her response were not deliberate but were just human errors. She agreed with the suggestions that having more staff employed to work in shifts could to some extent help matters but denied the suggestion that the elections she conducted were marred by irregularities because of the number of clerks she had. She maintained that despite the errors she had conceded there was a clear winner in the elections of Member of National Assembly Manyatta Constituency and that the Primary documents (Form 35A) showed that the 3rd Respondent won those elections. She added that despite the anomalies and errors she had admitted in her response, she stood by the officials results declared. In her view the errors she conceded was only in regard to 22 (Twenty polling stations) and the errors when rectified did not change who the winner was. She added that the Petitioner went to see her a month after she had declared the results and requested to be given Form 35B and that she explained that by that time she had sent Form 35B to the headquarters in Nairobi. She added that she told the Petitioner that she had noted some errors in the original Form 35B and gave him a fresh Form 35B with the rectified results indicating the winner had garnered 34,103 votes while the Petitioner had garnered 33,180 as opposed to the declared results which indicated that the Petitioner had garnered 32,972 votes while the 3rd Respondent (winner) had garnered 33,962 votes. She clarified that she had gazetted the initial results as per Form 35B which she had forwarded to the headquarters and that the results she declared were as per that form but the form 35B she later supplied to Petitioner which form was filed through his Supplementary Affidavit sworn on 4th December, 2017 reflects the results she had rectified and which results according to her did not change who the winner was.

31. The 2nd Respondent also testified that she declared the winner of election in Manyatta Constituency of Member of National Assembly on 11th August, 2017 as per Form 35B and stated that there were no such results declared on 10th August, 2017 as pleaded by the Petitioner in the petition herein. In her view she conducted the elections in Manyatta Constituency in accordance with the law.

32. The 2nd Respondent called a number of witnesses in support of her response to this petition. Eunice Gatari Johnson (DW2) testified that she was the Presiding Officer at Muthigi Tea Collection Centre polling station and according to her she captured the results of that station correctly in Form 35A after counting votes tallying the results. She added that agents were absent when she filed Form 35A and transmitted the results but despite their absence the submitted were correct as per the votes garnered by each candidate.

33. The witness (DW2) told this court that the results she posted in Form 35A shows that a candidate known as **Loyd Nyaga Ileri** got zero votes and that she left the space blank in the provided in the form against the candidate erroneously because she should have notified the candidate that he got zero votes instead of leaving it blank but added that none of the candidates raised any issue concerning the number of votes each had garnered in

her polling station.

34. Lilian Mukami Nyage (DW3) on her part testified that she was the Presiding Officer in Embu Municipal Council Stadium polling station and that she entered the results in Form 35A where she indicated that the Petitioner had garnered 180 votes while the 3rd Respondent had garnered 217 votes. She further indicated that she made a mistake when she indicated in the Form 35A that "*there were no clerks*" and that what she meant was that there were no agents present. She clarified that election clerks were present and that they are the ones who did the counting and tallying. She added that there was no way a polling station could conduct its business without clerks. She maintained that clerks were present and that despite the absence of agents no one raised a complaint that the results declared were not correct.

35. Joseph Nyaga Njagi (DW4) testified that he was the Presiding Officer of Embu Day Secondary School polling Station 2 of 2 and that voting process went on well but that by the time the exercise concluded at around 11 pm all agents had left and did not sign the space provided in the Form. He further testified he realized that the writings he had placed on Form 35A were a bit faint and had to use another pen to superimpose over the faint writings but did not alter anything on the form. He stated that when he was filling in the details of the election results on Form 35A and superimposing the writings to make them legible, the agents had already left and could not tell when they left the polling station. He however added that no one complained on the election results of that polling station.

36. Faith Marigu Ndwiga (DW5) on her part testified that she was the Presiding Officer at Kiandundu Catholic Church ground polling station during the elections of 8th August, 2017. She added that the agents present did not sign Form 35A but that instead she was the one who appended their initials after the agents allegedly made the strange request. She added that though other agents had left upon completion of voting exercise, two agents remained though the remaining agents also agreed that she writes down their initials.

37. Phylis Mwangi (DW6) on her part explained that she mistakenly indicated "*N/A*" in the space provided for agents in Form 35A instead of absent. She later realized that "*N/A*" indicated "*Not applicable*" but stated that that is not what she meant.

38. Hellen Mutitu Njeru (DW7) testified and supported the Returning Officer on the explanation given why the results of Karau Primary School were duplicated in Embu Urban Primary School. She confirmed that she was the Presiding Officer of Embu Urban Primary School polling station and that when she handed over the results at the tallying centre, she was told that the carbon copy of Form 35A was faint and was told to superimpose the entries with a pen to make them legible but when she tried to do so, the form became messy and she decided to go to the warehouse and get a fresh forms which she had handed over to the person manning the warehouse. When she was shown where the materials for her polling station had been kept, she quickly ran through the material and ended up picking a Form 35A which had everything indicating Embu Urban Primary School polling station except that it was headed Karau Primary School Polling Station. She did not notice the anomaly at the time and quickly copied the reports on it and took it to the tallying centre where the clerks there took it also without noticing the anomaly. She explained that she had no intention of prejudicing any candidate and that the error was unintentional.

39. Judith Nangoni Wafula Katumo (DW9) testified that she was the Presiding Officer of Karau Primary School Polling Station. She testified that she conducted elections in her station well without hitches and that upon completion of the exercise she filled Form 35A and took the results to the tallying centre where she handed them over to the officers at the tallying centre. When shown the results captured in Form 35B she conceded that the results entered were incorrect because according to her in her station the Petitioner had garnered 172 votes and not 217 votes shown in the Form 35B. The 3rd Respondent according to her results had got 206 instead of 221 votes. She confessed that she did not know about the anomaly until when she was informed about this petition.

40. **The 3rd Respondent's evidence**

The 3rd Respondent (RW1) testified during trial and of course not unexpectedly stated that he was the undisputed winner. He added that though there were few anomalies in terms of actual total votes garnered by both the petitioner and himself, his victory was unaffected nevertheless and based opinion on his own analysis of the results in all the polling stations in Manyatta Constituency.

41. The 3rd Respondent in his own assessment asserted that the errors noted in the elections affected him as well and that no candidate was disadvantaged. He reiterated that the petitioner's own calculations still showed he was ahead and noted he could be declared winner even if he has one more vote than his closest challenger. He further testified that in the Petition the Petitioner did not cite any malpractice on his part. He added that issues of errors and irregularities were well addressed by the 2nd Respondent and her witnesses.

42. Simon Gichovi Njiru (RW2) testified that he was the chief agent of the 3rd Respondent and a registered voter at Gakindu Coffee Factory offices polling station. He stated he as the chief agent he was at Kangaru Boys Secondary school which acted as the tallying centre for the elections in Manyatta Constituency. He also stated that he was a Constituency Officer Manager and helps the member of Parliament to serve the people of Manyatta Constituency and that he was on a government payroll. He further testified that that when they were at the tallying centre, the Petitioner complained to the Returning Officer and according to him, the results being announced by the Returning Officer did not tally with what the Petitioner had on his notebook. He agreed that there were errors in Form 35B but that the errors affected both the Petitioner and the 3rd Respondent. He reiterated that after factoring in the correction of errors, the 3rd Respondent still emerged victorious albeit with a different margin of victory.

43. At the conclusion of hearing, the parties in this petition through counsels filed their respective written submissions and oral submissions to highlight the main pillars of their respective positions in this petition. I will consider the submissions and some of the authorities cited as I address the issues for determination in this petition.

44. The following issues in this petition were framed by the Petitioner and agreed by the parties in this petition namely;

(a) What are the constitutional statutory and policy standards required of the 1st and 2nd Respondent in respect to the election of Member of National Assembly for Manyatta Constituency"

(b) Whether the method and system used in the election of member of National Assembly for Manyatta Constituency was simple, accurate, verifiable, secure, accountable and transparent"

(c) Whether the results in Form 35A were accurately copied and tallied with Form 35B"

(d) Whether the 1st Respondent is under an obligation to conduct and supervise elections strictly in accordance with Articles 1, 2, 4, 10, 38, 81, 82, 86, 88 and 249 of the Constitution among others and whether the same must be simple, verifiable, accountable, efficient, impartial, transparent and accurate."

(e) Whether there was massive systematic non-compliance with the required constitutional and legal standards"

(f) Whether the 1st and 2nd Respondents or their agents or employees committed any malpractices, misconduct, corrupt actions, irregularity and other actions of omissions contrary to the election laws.

(g) Whether the 3rd Respondent was properly elected as the Member of National Assembly for Manyatta Constituency"

(h) Whether this honourable court ought to order scrutiny and recount of votes cast in the elections of Member of National Assembly for Manyatta Constituency"

(i) Whether the Petitioner herein has established a prima facie case and/or laid basis for scrutiny and recount of votes cast on 8th August 2017 in respect of the election of Member of National Assembly for Manyatta Constituency"

(j) Who between the Petitioner and the 3rd Respondent was duly elected as Member for Parliament (National Assembly) for Manyatta Constituency in Embu County"

(k) What consideration should the court have in determining whether to uphold or invalidate the outcome of the Member of National Assembly elections for Manyatta Constituency"

(l) Whether this court has power to declare the petitioner as duly elected Member of National Assembly for Manyatta Constituency"

(m) Whether this honourable court ought to declare the Petitioner as the duly elected if it finds that he had garnered the highest number of votes in the elections held on 8th August, 2017 for Member of National Assembly for Manyatta Constituency.

(n) Who is to pay costs in this petition.

45. This court has gone through the drafted issues and my view is that the parties would have done better by summarizing the issues into cogent issues to avoid the apparent overlap that characterize the framed issues above. To begin with issues (h) and (i) above have been spent. Issues (a) and (d) are more less the same issues (b), and (c) and (f) can be handled together while issues (g) (j), refer to same issue really. So basically there were 3 main issues for determination with the last two issues dependant on the finding on the 3rd issues. The first 2 issues though not past of the agreed issues filed cropped up at the close of hearing during the submissions stage but I will address them as well. The following therefore are issues for determination in this petition namely:-

(i) Whether non compliance with rule 8(1) (d) Election (Parliamentary & County Elections) Petition Rules is fatal to this petition.

(ii) Whether the 3rd Respondent committed an election malpractice/offence by engaging a public officer as his agent.

(iii) Whether the 1st and 2nd Respondent in conducting the elections committed irregularities, illegalities and/or malpractices and if so whether the same affected the results of its credibility.

(iv) Whether the election conducted in Manyatta Constituency in respect to member of National Assembly met the Statutory and Constitutional requirements.

(v) Whether the 3rd Respondent was validly elected as member of National Assembly for Manyatta Constituency.

(vi) Who is to pay costs.

46. (i) **General Principles governing elections in Kenya.**

Kenya is a democratic state with a vibrant constitution that grants its people sovereign power to determine their governance and the persons to occupy various leadership position. The people therefore have a right to determine their political, economic and social destiny as it were. The right to make political choices and how to make them are imbedded in the constitution under **Article 38(1)** of the **Constitution**. That right is an expression of the sovereign power under **Article 1** of the **Constitution**. The manner in which that right is exercised is provided

again in the constitution under **Article 2** which provides that the sovereign power to the people shall inter alia be done directly through democratically elected representatives. That in my view are key issues that underpins the following general principles applicable to the electoral systems in Kenya as illustrated under **Articles 81, 83, 84, 86 and 232** of the Constitution namely;

- (a) Freedom of citizens to exercise their political rights under Article 38.
- (b) Gender parity (not more than two-thirds) of the member of elective public bodies shall be of the same gender.
- (c) Fair representation of persons with disabilities.
- (d) Universal suffrage based on aspiration for fair representation and equality of vote (one man/woman one vote)
- (e) Free and fair election characterized by;
 - (i) secret ballot, free from violence, intimidation, improper influence or corruption.
 - (ii) conducted by an independent body in a transparent, impartial, neutral, efficient, accurate and accountable manner.
- (f) Right to be registered as a voter.
- (g) Compliance with a code of conduct by candidates and political parties.
- (h) Whatever system or method of voting used, the system should be simple, accurate, verifiable, secure, accountable and transparent.
 - (i) The votes cast are counted, tabulated and prompt announcement of results at each polling station.
- (j) Results from Polling stations are openly and accurately collated and promptly announced by the Returning Officer.
- (k) Appropriate structures and mechanisms to eliminate electoral malpractice are put in place including the safekeeping of election materials.
- (l) High Standard of professional ethics
- (m) Accountability for administrative acts.
- (n) Transparency and provision to the public of timely accurate information.
- (o) Responsive, prompt, effective, impartial and equitable provision of services.
- (p) Efficient, effective and economic use of resources.

47. (ii) **The test applicable and/or standard of proof**

In civil cases the standard of proof is normally "*on a balance of probability*" while in criminal cases the standard is "*beyond reasonable doubt*". There has been a debate on the applicable standard of proof in election petition. This arises from the fact that ordinarily election petitions are in the category of civil suits where the standard of

proof is on a balance of probability. However owing to the special nature of the election petitions and the potential impact on the electorate, schools of thoughts have emerged placing the standard applicable to a hybrid one that is higher than balance of probability but slightly lower than beyond reasonable doubt. That standard is now settled largely as I have observed due to the sensitivity of election petitions and the fact that elections are in the first place an expression of the will of the people which as noted above is sovereign and guarded by the Constitution. The supreme Court of India in the case of **RAHIM KHAN-VS-KHURSHID AHMED & OTHERS 1975 AIR 290 1975 SCR (1) 643** expressed itself on the subject as follows:-

"An election is a politically secret public act, not of one person or of one official but of the collective will of the whole constituency. Courts naturally must respect this public expression secretly written and show extreme reluctance to set aside or declare void an election which has already been held unless clear and cogent testimony compelling the court to uphold the corrupt practice alleged against the returned candidate is adduced. Indeed election petitions where corrupt practices are imputed must be regarded as proceedings of a quasi-criminal nature where burden is therefore heavy on him who assails an election which has been concluded."

It is apparent, taking cue from above observations cited with approval in a number of decisions here in Kenya, that where election malpractices particularly those touch on election offences as defined under the Election Offences Act, No. 37 of 2016, the standard of proof applicable is clearly elevated to the standard beyond reasonable doubt. The other allegations made not necessary touching on election offences or criminal conduct are required to be proved on a hybrid standard that is higher than balance of probabilities but lower than beyond reasonable doubt. In the celebrated case of **RAILA ODINGA & 5 OTHERS -VS- IEBC & 3 OTHERS or RAILA [2013] eKLR**, the supreme made the following guiding principles on the standard of proof or test applicable in election petitions;

"..... this court should freely determine its standard of proof on the basis of the principles of the constitution and of its concern to give fulfillment to the safeguarded electoral rights. As the public body responsible for elections, like other public agencies, is subject to the "national values and principles of governance" declared in the constitution (Article 10), Judicial Practice must not make it burdensome to enforce the principles of properly conducted elections which give fulfillment to the right of franchise. But at the same time, a Petitioner should be under own obligation to discharge the initial burden of proof before the Respondent 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 to an election are in question. In the case of data -specific electoral requirements (such as those specified in Article 138 (4) of the Constitution, for an outright win in the presidential elections), the party bearing the legal burden of proof must discharge it beyond any reasonable doubt."

In the recent case of **RAILA AMOLO ODINGA & ANOTHER -VS- IEBC & 2 OTHERS or (RAILA II) [2017] eKLR**, the Supreme Court in upholding the above position on the standard of proof in election matter made the following observations.

"We maintain that, in electoral disputes, the standard of proof remains higher than, the balance of probabilities but lower than beyond reasonable doubt and where allegations of criminal nature or quasi-criminal nature are made, it is beyond reasonable doubt. Consequently we dismiss the Petitioner's submissions that the court should consider the now established legal principle, as discussed above and find that the standard of proof in election petitions is on a balance of probabilities. We recognize that some have criticized this higher standard of proof as unreasonable, however as we have stated, electoral disputes are not ordinary civil proceedings hence reference to them as 'sui-generis'. It must be ascertainable, based on the evidence on record that the allegations made are more probable to have occurred than not."

48. Drawing from the above authorities, which are binding to this court, it is clear that a Petitioner in an election

petition is under an obligation to place before court firm, cogent and credible evidence to establish and prove that the allegations or grounds upon which the petition is based shows that the conduct of the elections violated the principles laid down in constitution and the electoral laws and that the results declared lacked credibility and obliterated the will of the people.

49. **Analysis and findings**

Having set out the legal principles governing elections and the standard of proof applicable in election petitions this court shall now address the issues in this petition. This court shall first look at the issues that cropped up during submissions which are;

(i) Whether the Petition is incompetent and defective by reason that that date pleaded on the declaration of results is incorrect.

(ii) Whether the 3rd Respondent committed an election offence by engaging a public officer as his chief agent.

50. (i) **Whether non-compliance with Rule 8(1) (d) Election (Parliamentary and County Elections) Petition Rules is fatal to this petition.**

The 1st and 2nd Respondents in their written and oral submission made through learned counsel Mr. Kathungu pointed out that the Petitioner at paragraph 9 of the petition states that the 3rd Respondent was declared duly elected on 10th August 2017 and that in this Supporting Affidavit he states that the 3rd Respondent was declared as duly elected on 22nd August, 2017. Mr. Kathungu submitted that the **Election Rules (8(1))** provides for a mandatory requirement that date of declaration of the results must be stated. It is argued that failure to state the date in the petition is fatal and on that ground this petition ought to be dismissed. He relies on the authority of **MWAMLOLE TCHAPPU MBWANA -VS- IEBC & 4 OTHERS [2017] eKLR** where the court held as follows:-

"By proceeding with a petition in which the date of declaration of the results and the results have not been pleaded this court will run the risk of abandoning its role as an independent and impartial arbiter and descend into the arena of conflict. In the circumstances, I find that the petition is incompetent for not having stated the date of declaration of the election. Though the failure to state the results was not one of the issues in the Preliminary Objection, the court cannot shut its eye to the omission."

In response to this issue, the Petitioner dismissed the 1st and 2nd Respondent's contention terming it a technical requirement under **Rule 8(1)** and a procedural issue which does not go into the substance of the petition and cited rule 5 of the Election (Parliamentary and County Elections) Petition Rules 2017 as a refuge to the anomaly in his petition.

51. Looking at the petition herein, the Petitioner in paragraph 9 states that the 3rd Respondent was *"declared the duly elected on the 10th August, 2017"* while in his Supporting Affidavit sworn at Embu on 16th September 2017, the Petitioner under paragraph 5 depones that *"the declaration of the 3rd Respondent as the winner on the 22nd August 2017."*

The evidence tendered in court shows that the results of the election of Member of National Assembly in Manyatta Constituency was actually declared on 11th August 2017 as per annexure **JMNI** (From 35B) in the affidavit of the Respondent (John Muchiri Nyaga) sworn on 25th September, 2017 at Nairobi. It is not disputed that the Petitioner gave wrong dates in his petition and affidavit about when the results he is challenging was declared. During the hearing of this petition, he admitted during cross-examination that he was aware that the date of the declaration of the winner in an election is crucial and that the winner in that election was actually declared on 11th August, 2017 and that at the time he presented this petition he was confused and only came to learn about the error much later.

52. It is true that the date of the declaration of results of the election like the results themselves, is important and crucial in an election petition for two reasons.

(i) Election Petitions are time bound. The Constitution and the Electoral Laws provide strict timelines which start from when the results are declared.

(ii) A winner of an election is based on election process which culminate in the declaration of results on a given specific date. A winner therefore draws legitimacy on the declared results on a specific date.

53. For purposes of clarity let us look at the constitutional provisions under **Article 87 (2)**. The constitute state as follows:-

"Petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission". (emphasis added)

The above shows that the date of the declaration of the results is indeed crucial because it indicates when time begins to run in so far as filing an election petition is concerned. The provisions of **Section 76(1)** provides that a petition challenging the validity of an election shall be filed within twenty eight days after the date of declaration of the results of the election. The statute provides under subsection two that a petition questioning a return of an election upon the ground of a corrupt practice and specifically bribery of any other illegal practice must be filed within 28 days after the publication of the election results in the gazette.

54. The importance of the declaration date is imbedded in the constitution and the Election Act and this underlie the reason why election rules make it mandatory for a petitioner to state in the petition and the Supporting Affidavit the date of the declaration of the results Rule 8(1) of the Election (Parliamentary and County Elections) Petition Rules, 2017 states as follows:-

" An election petition shall state: -

(a) the name and address of the Petitioner

(b) the date when the election in dispute was conducted.

(c) the results of the election, if any and however declared,

(d) the date of the declaration of the results of the election,

(e) the grounds on which the petition is presented and

(f) the name and address of the advocate, if any, for the Petitioner which shall be the address for service.

Rule 12(1) and (2) of the same regulation clearly state that a petition must be supported by an affidavit and that affidavit shall among other things state the date upon which the election in dispute was conducted and the date of the declaration of the results in that election.

55. The Petitioner herein as I have observed above was clear in his mind that the date of the declaration of the results in the elections is important. However in his petition, he has indicated 2 different wrong dates that is 10th August 2017 and 22nd August, 2017 as the dates when the declaration of the winner was made but the Petition herein centers around the results declared by the 2nd Respondent on 11th August, 2017 and the question posed is

whether citing a wrong date is synonymous with omission on the part of the petitioner and what are the consequences" The Petitioner has cited Rule 5 of the Election (Parliamentary and County Elections) Petition Rules 2017 as a shield. Rule 5 (10) provides as follows:-

"The effect of any failure to comply with these Rules shall be determined at the court's discretion in accordance with the provisions of Article 159(2) (d) of the Constitution."

The provision of **Article 159 (2)(d)** popularly referred to as the oxygen rule for good reason provides as follows:-

" justice shall be administered without undue regard to procedural technicalities."

56. So is failure to comply with Rule 8(1) of the election rules a procedural issue and a technicality as contended by the Petitioner and therefore curable under Article 159 (2) (d) of the constitution" To answer this question, it is perhaps useful to see recent decisions on the subject. The cited decision of *Mwamlole Tchappy Mbwana (supra)* held that non compliance with the above rule rendered the petition incompetent. In the case of *AMINA HASSAN AHMED -VS- RETURNING OFFICER MANDERA COUNTY & 2 OTHERS [2013] eKLR* the court held as follows:-

"..... put differently, the provisions of Rule 10 (which is now rule 8(1) in the amended 2017 Rules) and others aforesated, are not mere technicalities. If they are technical in so far as they are procedural and spell out the form and content of intended petitions, they nevertheless at the same time, are substantive and go to the root and substance of issues and matters prescribed upon".

57. Similarly in the recent case of *Martha Wangari Karua & Another, -vs- Independent Electoral and Boundaries Commission and 3 Others [2017] e KLR* held that non compliance with Rules 8(1) (c) and 8(1) (d) is fatal to a petition. That court made the following observations:

"The date of declaration is crucial in determining the dispute. I am of the view that a petition which has not complied with rule 8(1) (c) and 8(1) (d) even remotely is not compliant. The definition given of results talks of outcome, effect and consequences. It is not sufficient to talk of results without giving numbers. It is an outcome based on numbers which made her to come to court and the date when the results were declared. The omissions are fatal."

58. In the case of *MOSES MWICIGI & 14 OTHERS -VS- IEBC & 5 OTHERS [2016] eKLR* the Supreme Court made the following observation about rules of procedure;

"..... this court has on a number of occasions remarked the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the court would not hesitate to declare the attendant pleadings incompetent. Yet procedure, in general terms is not an end in itself. In certain cases, insistence on a strict observance of a rule of procedure, could undermine the cause of justice. Hence the pertinence of Article 159(2) (d) of the constitution which proclaims that justice be administered without undue regard to technicalities. This provision, however, is not a panacea for all situations befitting judicial intervention, and inevitably a significant scope for discretion devolves to the courts."

I have in brief laid out the legal position in regard to the omission by the Petitioner herein to comply with rule 8(1) (d) and how different courts have dealt with the issue including the important observation made by the Supreme Court regarding the shield which the Petitioner here has used against the onslaught by the 1st and 2nd

Respondent but I consider it appropriate to now pose there for a while before coming back to render my decision on this subject after considering the other issues in this petition.

59. (ii) **Whether the 3rd Respondent committed an electoral malpractices/ offence by engaging a public officer as his chief agent**

The Petitioner has submitted that the 3rd Respondent's chief agent, **Simon Gichovi Njiru** is a public Officer and that he committed an election offence by participating as an agent for the 3rd Respondent. He points out that the said chief agent testified in court and confirmed that he was a Constituency Manager of Manyatta Constituency paid by the exchequer and therefore was a public officer. It is submitted that **Section 15** of the **Election Offences Act** prohibits public officers from engaging in political activities and that is an offence to do so. The Petitioner submits that **Simon Gichovi Njiru** is a public servant as defined under **Article 260** of the **Constitution** that define a public servant as follows:-

" Public officer means;

(a) Any state officer; or

(b) Any person, other than a state officer who holds a public office."

60. The Petitioner has cited the decision in **Fredrick Otieno Outa - vs- Jared Odoyo Okello & 4 Others [2014] eKLR** to support his contention that **Simon Gichovi** occupies a public office which is defined in the constitution as an office in the National Government, a County government or the Public Service if the remuneration and benefits of the office are payable directly from the consolidated fund or directly out of money provided by Parliament.

61. The Petitioner has accused the 3rd Respondent for knowingly aiding a public officer to act as his chief agent in the election of 8th August, 2017 in contravention of **Section 15(2) (a)** of the **Election Offences Act** and submits that pursuant to the provisions of **Section 15(3)** of the **Election Offences Act**, the 3rd Respondent was and is not eligible to contest the election of 8th August, 2017 and any other subsequent elections. The Petitioner has relied on a **Supreme Court decision in the case of Fredrick Otieno Outa - vs- Jared Odoyo Okello and 4 Others (Supra) No. 6 of 2014** where the court held as follows:-

"The principle thus conveyed is that the pleadings must be clear, the allegations elaborate and the evidence adduced, focused and clear cut. The foundation is clear; Election Offences bear the mark of a criminal conduct within the framework of an election petition, yet outside the normal criminal jurisdiction. Election Offences are, therefore quasi- criminal in nature and the court ought not to enter a finding of guilt, if the evidence adduced is not definitive and cannot sustain such a finding, or if there is any doubt as to whether such an offence was, indeed committed or by whom. The commission of an offence of proved, will not only lead to the election being set aside, but also to the disqualification of the perceived culprit, from standing as a Parliamentary election candidate given the terms of Article 99(2) of the Constitution. The offender is also liable to criminal penalty under the Elections Act. In these circumstances the person alleging the commission of the offence is required to prove the ingredients of the offence. And such proof of an offence takes a higher level than the mere preponderance of probabilities."

62. The Petitioner has further cited the decision in the case of **MOSES MASIKA WETANGULA -VS- MUSIKARI NAZI KOMBO & 2 OTHERS [2014] eKLR** where the Court of Appeal stated as follows:-

" In the case of corruption by the candidate himself, you do not require a multiplicity of acts of corruption to void an election. What is condemned in this vice is one's mental altitude or personality. Proof of corruption therefore suffices to demonstrate that one is a corrupt person or one is lacking in integrity. As we have

emphasized, our constitution demands that state officers should be persons of integrity. Moreover, besides statutory provisions, it is also an established case law that corruption affects the will of the people and if the will of the people is affected then the election cannot be said to have been free and fair and should be set aside. So if one engages in bribery, treating or commits any other election offence, his election violates the electoral law principle of free and fair election contained in the constitution, the Elections Act and the Election Regulations."

63. The Petitioner submits that under **Section 80(4) (b)** of the **Elections Act** proof of an election offence should automatically result into nullification of the election regardless of its impact on the result of the elections.

64. The 3rd Respondent has in response to this allegation, submitted through learned counsel Mr. Kibe that at the time of elections Simon Gichovi was not a public officer as according to him he had not been employed at the time of campaigns. His contention is that he was employed after the elections were over.

65. The 3rd Respondent also contended that Simon Gichovi was not a party in this petition and that on account of that the court does not have jurisdiction to try and determine if an election offence was committed by Simon Gichovi. He also contends that Gichovi was an informal chief agent without a legal status because he was appointed by Jubilee Party under whose ticket he was running. The 3rd Respondent also cited the decision in the cited of *Fredrick Otieno Outa - vs- Jared Odeyo okello & 4 Others [Supra] eKLR* to support the contention that where one alleges electoral offence(s), it must be clearly pleaded. He contends that the Petitioner did not plead any electoral offence committed by Gichovi or any other agent acting on his behalf.

66. While conceding that a court cannot shut its eyes in the face of an illegality, the 3rd Respondent contends the right to a fair trial kicks in because in his view, Mr. Gichovi was not accused and required to defend himself as provided under Article 25 of the Constitution. He further contends that it would be unfair to return a finding of guilt against Gichovi in the absence of any pleading. The case of *Global Motors- vs- Lenana Road Motors [2015] eKLR* is cited in support of this argument.

67. It is not in dispute that the Petitioner herein did not plead that the 3rd Respondent and his chief agent committed an election offence in the manner in which he has submitted here. This issue cropped during submissions when the Petitioner picked up parts of the evidence tendered by Simon Gichovi Njiru (RW2) and the question posed here is whether this court can address such a matter because the 3rd Respondent has urged me to turn the other way contending that this court lacks jurisdiction to address unpleaded matters in a petition. He further argues that if this court addresses a matter that had not been pleaded, his right to a fair trial would be infringed.

68. This court has spent quite some time brooding over this question because it is a moot question which I should address before deciding whether I should consider the merits. It is true that parties should be bound by their pleadings because the purpose of pleadings is really go give the other party/parties a chance to respond and be heard. One of the tenets of natural justice is a right to be heard and that principle is well imbedded in our Constitution under **Articles 25(c)** and **50(1)**. This right in my view ensures that once pleadings are closed, save where a party successfully seeks for an amendment, a party is precluded from building up his case and changing goal posts in the course of hearing for purposes of pulling a fast one against the adversary. In the case of *Benjamin Ogunyo Andama -vs- Benjamin Andola Andayi & 2 Others [2013] eKLR Hon. Justice George Dulu* stated that:

" The affidavit evidence relied upon by the Petitioner however sought to expand the scope of the petition by adding complaints which were not pleaded in the petition. It is trite, in my view, that parties are bound by their pleadings. A party cannot be allowed to come to court and attempt to prove complaints which are not pleaded unless a request for amendment of pleading is considered and granted by the court. In my view, the evidence whether by affidavit or otherwise is meant to support what is contained in a party's pleadings and not to expand

the cause of action. Affidavits being evidence cannot attempt to bring evidence of allegation or complaints not contained within the ambit of the petition, or the answers to petition as the case may be."

The above position taken, by the above decision is similar to the position taken in the case of Ferdinand Ndungu Waititu -vs- IEBC and 8 others [2013] eKLR where Hon.Mwongo J in relevant part stated as follows;

" the 3rd principle is that, as in all litigations, a Petitioner is bound by his pleadings. It is common that a Petitioner will file a petition and will in the course of the proceedings veer away from the initial track. This puts the opponents into a difficult position in knowing what the real case they must answer is, and what the court must determine....." In the same decision, the Judge cited in approval the decision of Hon. Justice Luka Kimaru in Mohammed M. Sirat -vs- Ali Hassan Abdirahman and 2 Others [2010] eKLR. In that case the court had this to say:

"From the outset, this court wishes to state that the Petitioner adduced evidence, and even made submissions in respect of matters that he had not specifically pleaded in his petition. It is trite law that a decision rendered by a court of law shall only be on the basis of the pleadings that have been filed by the party moving the court for appropriate relief. In the present petition this court declined the invitation offered by the Petitioner that required of it to make decision in respect of matters that were not specifically pleaded. This court will therefore not render any opinion in respect of aspects of the Petitioner's case which he adduced evidence but which were not based on the pleadings that he had filed in court, and in particular the petition."

69. On the other hand, there is another school of thought that elections courts enjoys a special jurisdictions which is inquisitorial in nature. This school displaces Mr. Kibe's assertion that this court lacks jurisdiction to address and to determine an issue not plead. In the case of ODD JOBS-VS- MUBIA [1970] EA 476 the Court of Appeal held as follows;-

"..... a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision..... pleadings should contain a concise statement of the material facts on which the party pleading relies.....Generally speaking, pleadings are intended to give the other side fair notice of the case that it has to meet and also arrive at the issues to be determined by the court. In this respect a trial court may frame issues on a point that is not covered by the pleadings but arises from the facts stated by the parties or their advocates and on which a decision is necessary in order to determine the dispute between the parties."

70. In the case of Clement Kungu Waibara -vs- Benard Chege Mburu and 2 Others [2011] eKLR the Court of Appeal emphasized this position in the following observations;

"In our view, the issue was pleaded though not expressly. Even assuming it was not, on the authority of Odd Jobs -vs- Mubia [1970] EA 476, the issue was canvassed at the hearing of the petition and a decision thereon was necessary."

71. The above position is evident in the case of Hassan Abdalla Albeity -vs- Abu Mohammed Chiaba & Another [2013] eKLR where Hon. Lady Justice C.W Githua stated as follows:-

" though ordinarily parties in civil suits are bound by their pleadings and the court ought not to entertain or make determination on matters not covered by the party's pleadings, I am of the view that an election court enjoys special jurisdiction which is inquisitorial in nature. An election court and indeed this court has clear mandate to inquire into and determine whether a disputed election was conducted in accordance with the law, whether it was free, fair and transparent and lastly whether the winning candidate was validly elected. It therefore follows that any ground which is relevant to a determination concerning the validity of results whether

pleaded or not in the petition ought to be considered by the court of course after ensuring that no prejudice would be occasioned to the opposing parties. It is my considered view that an election court should be flexible in its approach in the conduct of its inquiry as this is the only way that it can make a fair and substantive determination of all issues raised in an electoral dispute. Such an approach would be in tandem with Article 159 (2) (d) of the Constitution and Section 80(1) of the Election Act which enjoins court to administer substantive justice."

72. The two approaches as I have noted above are moot and may take some time before the position is well settled but my considered view is that parties should as matter of good practice and compliance with the law and the constitution particularly in regard to according the adverse party a fair chance to reply, be bound by their pleadings to avoid the mischief of parties either hiding some cards under the table in order to pull a surprise in the last minute or changing goal posts midway to accommodate exigencies of his petition as the trial unfolds. Allowing or entertaining the same in my view would compromise the cardinal principle of a fair trial. If however an unpleaded issue arises particularly touching on the integrity and conduct of election during the course of trial before hearing concludes, a party would be in order to invite the court to address the issue and the court in my view in the letter and spirit of **Article 159 (2) (d)** and **Section 80 (1) (d)** would not be precluded from interrogating the issue further by of course giving the parties a fair chance to be heard. This flexible approach is at times necessary because a court in my view would not be administering justice if it turns the other way in the face of a glaring illegality especially where an issue of such nature crops up in the course of hearing. Of course courts should exercise great restraint and abundant caution so as to avoid descending into the arena of the litigants as they engage in a given case. This task is not an easy one but a court should be able to balance the scales of justice substantively in addressing circumstances of each case. This court finds that this issue though not pleaded was well canvassed during submissions and must be addressed by this court.

73. Having given an insight into the legal position of this court, in this petition as I have already pointed, the issue of using a public servant by the 3rd Respondent only cropped up expressly at the stage of submission though the Petitioner's learned counsel Mr. Nyamu during cross-examination roughly touched on the issue when he inquired from Simon Gichovi if he was drawing salary from the government as a Constituency Office Manager. Mr. Nyamu never questioned the 3rd Respondent during cross-examination if he had engaged a public servant in his campaigns or during the election period. That issue in my view was not canvassed well at the trial but the issue came out clearly during submissions when the Petitioner apparently changed tact and put a lot of weight on this issue. I say so because looking at the Petitioner's written submissions and the oral submissions one would notice that the main thrust of the Petitioner's case hinges on this fact. Why the Petitioner never saw it fit to plead this important fact and tender evidence is difficult to understand because when one goes to hunt or battle he is expected to carry with him the best arsenal available to him. But if he leaves behind his best arsenal it is unlikely that he can have a good opportunity to come back for it when the hunt or battle begins.

74. Having said that looking at the evidence tendered before me in this petition in regard to the above cited illegality, this court finds that there is deficiency in the evidence before me to make a conclusive finding even assuming that I was to make one because as I have noted above the Petitioner did not plead it in his petition or affidavit. He did not address it when tendering evidence and none of his witnesses touched on this aspect of the electoral malpractice. The Petitioner only came out forcefully on this issue at the submission stage through counsel by which time the train had already left the station. A party alleging an election offence has a higher burden of proof as I have indicated above. A mere allegation is not enough especially, the allegation was denied with equal measure by the 3rd Respondent's counsel at submission's stage and the questions lingering in the mind of this court are;

(i) When was Simon Gichovi employed as Constituency Manager" I put this question across to the Petitioner's counsel when oral submissions were being canvassed and his answer was that Simon Gichovi was in employment prior to 8th August 2017. Of course this court could not take that answer seriously coming from the bar. When put

the same question to the 3rd Respondent's counsel his answer was that Simon Gichovi was employed after elections of 8th August, 2017. Again for the same reason I could not take that answer seriously because it came from the bar but luckily for him at the end of the day the party carrying the burden of proof is the one who alleges.

(ii) Is Simon Gichovi a public servant within the meaning of Article 259 of the Constitution of Kenya 2010.

There is no way the above questions can be answered clearly with the sketchy and inconclusive evidence tendered before me on the subject and it is a tall order for the Petitioner to ask this court to find beyond reasonable doubt, which is the standard applicable here, that the 3rd respondent contravened **Section 15(3)** and is guilty of aiding Simon Gichovi to commit an electoral offence. The consequences of such finding is grave and far-reaching that for a court to make such a definitive finding, the evidence must be cogent and beyond doubt. In the cited case of **Fredrick Otieno Outa -vs- Jared Odoyo Okello & 4 Others [supra] eKLR** the supreme court held as follows:-

" the principle thus conveyed, is that the pleadings must be clear the allegations elaborate and evidence adduced focused and clear-cut. The foundation is clear; election offences bear the mark of a criminal conduct within the framework of an election petition, yet outside the normal criminal jurisdiction. Election Offences are, therefore quasi-criminal in nature; and the court ought not to enter a finding of guilt, if the evidence adduced is not definitive and cannot sustain such a finding, or if there is any doubt as to whether such an offence was, indeed, committed, or by whom" the commission of an election offence if proved, will not only lead to the election being set aside, but also to the disqualification of the perceived culprit from standing as a parliamentary- election given the term of Article 99 (2) (h) of the Constitution. The offence is also liable to criminal penalty under the Elections Act. In these circumstances, the person alleging the commission of the offence, is required to prove the ingredients of the offence. And such proof of an offence takes a higher level than the mere preponderance of probabilities."

This court as an election court as observed above is clothed with inquisitorial jurisdiction and this court invokes its inquisitorial jurisdiction in this instance for the ends of justice to met and pass a message that a court of law would not turn a blind eye or look at the other way on a possible illegality/ wrong doing, crime or any other mischief that may have taken place.

This court has used the word "*may*" here very deliberately because as I have observed, there is no concrete or sufficient evidence placed before this court to sustain a finding that an offence was committed by the 3rd Respondent or his chief agent.

75. However, having found that the allegations made does not met the threshold, the issue raised by the Petitioner is serious enough to warrant further investigation to establish if an illegality was indeed committed. The court's position is informed by the decision in the Supreme Court decision in the case of **Moses Masika Wentangula -vs- Musikari Zazi Kombo & 2 Others [2015] eKLR** where the court held as follows:-

" Section 83 of the Elections Act empowers the election court to declare an election to be valid or invalid, following an election petition, on the basis of certain conditions. The court cannot appear to condone illegality in the election process and would therefore investigate any alleged breaches of the law even where these were not in the pleadings but arose in the course of the trial. The office of Director of Public Prosecution becomes relevant in so far as evidence of general offence may emerge in election petition proceedings and the court then has the duty to forward this further investigations and possible charges. The election court, thus, affords the criminal prosecution office a special opportunity to take up the relevant matter for possible criminal trial."

76. **Simon Gichovi Njiru (RW2)** swore an affidavit on 25th September, 2017 and deposed that on 8th August, 2017 he was the chief agent of the 3rd Respondent. He also told this court that he was a Constituency Officer Manager of Manyatta Constituency and if he was acting as such when he was appointed as chief agent by the 3rd

Respondent during the elections of 8th August, 2017 for Member of National Assembly for Manyatta Constituency and carried out that role as admitted, an offence under **Section 15(1)** of the Election Act may have been committed. Again I am using the word "*may*" deliberately for good reason. The Sections reads;

" A Public Officer who-

(a) engages in the activities of any political party or candidate or act as an agent of a political party or a candidate in an election.....

(e) engages in political campaigns or other political activity.....commits an offence and is liable on conviction, to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years or to both.

(2) A person who knowingly aid in contravention of subsection (1) commits an offence and is liable on conviction to a fine not exceeding one million shillings or to imprisonment for a term not exceeding 3 years or to both such fine and imprisonment."

In light of the above provisions and the observations made the answer of whether this court should turn a blind eye or look at the other way in the face of a possible electoral offence is in the negative. The provisions of **Section 87 (2)** of the **Elections Act No. 24 of 2011** provides as follows:-

" where the election court determines that an electoral malpractice of a criminal nature may have occurred, the court shall direct that the order be transmitted to the Director of Public Prosecution."(Emphasis added)

77. This court finds that although there is a insufficient evidence to make a definitive conclusion that an electoral offence was committed, there is sufficient basis based on what I have observed above to invoke which I hereby do the provisions of **Section 87 (2)** of the **Elections Act No.24 of 2011**. This in my view will afford an opportunity to the office of Director of Public Prosecutions to carry out further and proper investigations and establish whether evidence exist to prefer any charges against any person found culpable.

78. (iii) **Whether the 1st and 2nd Respondents committed irregularities, other malpractices and illegalities and if so whether the same affected the results.**

There is no doubt that election officials in Manyatta Constituency in some instances committed errors of omissions and commissions in the course of their duties during the elections of 8th August, 2017 for member of National Assembly for Manyatta Constituency. The numerous errors ranging from wrong posting of results from Form 35A to Form 35B to alterations of entries in Form 35A without signing, mathematical errors and others were many as pointed out by the Petitioner above and conceded by the 2nd Respondent. The Petitioner has submitted that this court should determine the validity of elections in Manyatta Constituency based on both a qualitative and quantitative approach. Mr Nyamu referred me to the case of **ROZAA AKINYI BUYU -VS- IEBC & 2 OTHERS [2013]** where the court held inter alia as follows;

" this court is therefore enjoined to look not only at the end result but the process as well. The respondent's perspective apparently seemed to suggest that the end justifies the means."

79. It is the Petitioner's contention that the electoral irregularities had the effect of ensuring that the impugned elections were not conducted in accordance with the constitutional principles enshrined under **Article 81** and **86** of the Constitution and more so by failing to ensure that the conduct of the elections was simple, accurate, verifiable, secure and accountable. He also contends and rightly so that the 1st and 2nd Respondent have an obligation imposed by the constitution and Election Laws to ensure that each principle enunciated therein is

adhered to and none of the principle is trivialized. He also contends that one of the aspects of accuracy is mathematical precision in counting and tabulation of results citing incidents where results were incorrectly transposed to Form 35B from Form 35A. This court has already pointed out the affected stations where results from Form 35A were not correctly captured in Form 35B. I will not repeat them here. The Petitioner contends that because the results declared were at variance with actual results the elections were badly conducted that it cannot be termed free and fair or conducted in accordance with **Articles 10, 81** and **86** of the constitution and other electoral laws.

80. It is true that the Constitution of Kenya 2010 reading from **Article 81** and **86** requires a high democratic standard from the electoral body (IEBC) in the conduct of elections in Kenya. The law requires that the elections are conducted in a free, fair and transparent manner and at the same employ a system that is accurate, verifiable, secure, accountable and transparent. When you talk of accuracy the constitution refers to a system to be employed for example KIEM Kit and other apparatus used during the elections. In my view contrary to the Petitioner's contention though the law expects election officials to generally comply with the principles articulated under **Articles 10, 38, 81** and **86**, it is too much to expand the term "*accuracy*" as used under **Article 86** to mean mathematical precision in counting and tallying of results. This is because election officials are human beings and unlike the tools employed to assist them for example KIEMS Kit and computers they are prone to error and so long as the errors are not deliberate and aimed to mislead, an election cannot be invalidated on account of some insignificant errors arising due to human error.

81. This court heard the petitioner and his nine witnesses keenly during trial and what came out clearly was that the results captured in form 35As from the polling stations they were deployed were correct. In fact the nine witnesses called by the Petitioner told this court that they were the Petitioner's agents in the respective polling station and that the Form 35As filed in court were a true reflection of what each candidate garnered in those polling stations. The Petitioner himself confirmed that mistakes and errors only occurred when the results from Form 35A from various stations were transposed to Form 35B at the tallying centre and that is where some errors were committed. In his own view the mistakes or errors done cut across and did not favour any one particular candidate. He also stated under cross-examination that in his own estimation, errors or irregularities affected 21 polling stations out of 226 polling stations in Manyatta Constituency.

82. The errors noted by this court were minor for example the erroneous entry of results belonging to Embu Urban Primary School and Karau Primary School was well explained in my view. The Presiding Officer Hellen Mutitu (DW7) explained that she presented a form (35A) which was a bit faint and when she went to get a another form at the warehouse she did not check to realize the form though blank had been pre-printed Karau Primary School. She said she was tired and given that she had worked for 2 days with little or no sleep at all one would excuse for being in a hurry to fill a form and hand it over to the tallying centre. The effect of the error is that the results of Embu Urban Primary School were duplicated in Karau Primary School. The error in my view was unintentional and the scrutiny and recount provided answers to any query on the anomaly. The scrutiny ordered by this court in relation to that polling station apart from the inconsistency of the results in Form 35B with that from Form 35 A did not reveal any other anomaly or discrepancy. It is clearly seen that on the declaration part of Form 35A she clearly indicated that the results she was entering and signing for were from Embu Urban Primary School oblivious at the time that the form was headed Karau Primary School at the top right corner. This led to duplication of results of Embu Urban Primary School polling station in Karau Primary School.

83. The Returning Officer also noted that the errors she noted after declaration of the results did not affect who the overall winner in Manyatta Parliamentary Elections was. She explained that the mistakes were simple errors not premeditated which I find credible because one can actually tell from the same errors committed that they did not benefit or prejudice any particular candidate. This is seen for example in St. Andrews ACK Old Stadium the Petitioner in Form 35B was denied 101 votes while 3rd Respondent got 151 votes extra but in St Michael Primary School 2 of 3 Petitioner got 36 extra and 3rd Respondent got 26 votes less. In most of the stations the results in

Form 35A were accurate but there were errors when transposing the results to Form 35B. This was also evident on Kamiu Polling Station (code 092), Manyatta Tea Buying Centre, AIPCA Church ground polling station (code 107), Gatunduri Primary School polling station (code 103) 2 of 2 Kiangima Primary School 2 of 3 (code 094), St Paul Gakinduri Primary School (code 105) Kiriari Day Secondary School (code 031), Kibugi Tea Buying Centre (code 083), Mvangua Kamindi polling station (code 052), Nembure Polytechnic 1 of 2 code (063), Full Gospel Churches Ndunduri (code 158) and Embu Municipal Stadium polling station (code 124). In all the above stations the errors were well explained and the scrutiny and recount I ordered in respect to most of the above stations vindicated the 1st and 2nd respondent against the petitioners accusations that they were biased against him or that they favoured the 3rd respondent. The scrutiny did not support the petitioner in that regard because scrutiny and recount done only revealed errors in transposition of results from Form 35 A to Form 35B. The 2nd Respondent's explanation that the errors were down to fatigue and human error is understandable given the circumstances under which they worked. In Embu Municipal Stadium polling station Code 124 for example, the Form 35A filed did not show the number of votes garnered by the 3rd Respondent. The entry in Form 35B showed that he had got 190 votes. Challenged to explain where she got the votes from, the Returning Officer stated that she got the results from Kiems Kit and when scrutiny and recount was done by the Deputy Registrar the number of valid votes found for the 3rd Respondent were 190 votes. This in my view also vindicated the Returning Officer and her officials. The error committed was not intentional. This court finds that the evidence given by the Returning Officer while testifying in court was consistent with the findings of the Deputy Registrar during the partial scrutiny and recount. It is evident that the errors pointed out by the Petitioner were well responded to and the results on who won the elections in my view were unaffected. The only difference as I have indicated only touched on the margin of victory and as Mr. Kibe submitted elections of Member of Parliament and others save for Presidency are really won on a simple majority so where one wins by one vote or 1000 votes like in this case does not really matter. The errors were not of such magnitude to obliterate the will of the will of voters in Manyatta in any way.

84. The Respondents have submitted that the Petitioner herein is not challenging the entries in Form 35A in any of the polling station which is true. What the Petitioner adduced in this court is that in some instances there were erasures, alterations and over writings and cancellations in some of the Form 35A but apart from that he and his witnesses, as I have indicated, had no problem with the results as reflected in those Form 35As which are primarily documents in any election of member of National Assembly in a given Constituency. Form 35A is the heart of an election of Member of National Assembly because it captures primarily the will of the voter at the grassroots level. The Returning Officers cannot alter the entries in those primary documents and no evidence was tendered to show that the forms were altered at the tallying centre in this petition. The 2nd Respondent gave evidence that she did not alter any Form 35A given to her by Presiding Officers. All indications from the evidence tendered therefore show that there was no tampering with the results either in the polling station or at the tallying center. In the case of *IEBC -vs- Maina Kiai & 5 Others [2017]* the Court of Appeal underpinned the importance and the finality of the results recorded at the polling station and stated as follows:-

" It is clear beyond peradventure that the polling station is the true locus for the free exercise of the voter's will. The counting of the votes as elaborately set out in the Act and the Regulation, with its open, transparent and participatory character using the ballot as the primary material, means, as it must, that the court there is clothed with a finality not to be exposed to any risk of variations or subversion. It sounds ill that a contrary argument that is so anathema and antithetical to integrity and accuracy should fall from the appellant's mouth....."

85. This court heard in detail from the 2nd Respondent the explanation given about the erasures, alterations and why some of the Form 35A were faint. This court is satisfied that the anomalies appearing in some of the forms are attributed to simple human error for example where a Presiding Officer makes a tally of the valid votes cast and notices shortly thereafter that he/she has made a mistake and corrects the mistake through a cancellation and putting the correct figure like for example in the case of Kibugu Tea Buying Center polling station. The

cancellation in Form 35 A does not show that the Presiding Officer wanted to mislead anyone but to show what each candidate correctly garnered. Furthermore the Presiding Officer in that station counter signed against the cancellation which is a sign of good faith. That in my view given the fact that none of the witnesses impugned the cancellations or alterations shows that the same were just down to human error. The 2nd Respondent told this court that she and her staff worked for long hours without sleep and she attributed some of the errors to fatigue and no one can blame them really because the electorates or Kenyans in general expect the results fast and no one really pays attention to the fact that election officials are the same people expected to work at times for up to 72 hours without sleep. It is therefore expected that due to human limitations errors sometimes occur and if they are not fundamental or deliberate in anyway, they are excusable. In the case of *Philip Osore ogutu -vs- Michael Onyura Aringo & 2 Others [2013] eKLR and Lenno Mwambuna Mbaga Mbaga -vs- IEBC & Another [2013] eKLR*, the court noted that errors were apparent in some parts but attributed the same to human error and held that because they were not fundamental they should be excused and ignored. The erasures, cancelling and/or alterations noted in some Form 35As in some stations in this petition, such as Kianari Day Secondary School polling station in my view were not deliberate or fundamental in any way.

86. The Petitioner raised an issue concerning the fact that some Form 35A supplied to him did not bear official stamp but this court confirmed that some of the affected stations like New Apostolic Church- Kwa Amos polling stations (code 056) the IEBC stamp was there but faint. The explanation given by the 2nd Respondent in my view is satisfactory because she explained that some of the copies were carbon copies where the IEBC stamp appeared faint. Assuming that the Forms supplied to the petitioner lacked IEBC stamp does that make the forms invalid". The law is silent on the issue of stamping of IEBC forms and this court takes it that the 1st Respondent does it out of caution but there is no legal requirement. In the case of *IEBC & Another -vs- Stephen Mutinda Mule & 3 Others [2014] eKLR* the Court of Appeal held as follows:-

"There is no stamping requirement in the case of Form 35. All that is required with regard to Form 35 as provided for in Regulation 79 is the signature of the Presiding Officer and the agents of the candidate."

This court therefore takes the position that though stamping is important in terms of authenticating a document lack of it does not invalidate the form. The declaration part in Form 35A is what is critical and so long as the Presiding Officer duly signs the document, on the declaration part the same suffices for all purposes. This court find that no irregularity was established by the petitioner on account of lack of IEBC stamp on some form 35As supplied to him and filed in this court.

87. The Petitioner also made allegations that some of his agents were denied entry into some polling stations forcing him at time to personally intervene and that this was an irregularity which is informed by the fact that some Forms 35A were not signed by agents. The 2nd Respondent denied this allegations stating that all accredited agents were allowed into the polling station. The importance of agents in any elections cannot be underestimated. They are the eyes of the candidates and ensure that elections are conducted in free and fair manner in accordance with the law. Regulation 74 of the Election Regulations 2017 provides a process of accreditation of agents and give power to the Presiding Officer to bar any unauthorized agent from a polling station. The Petitioner in this petition failed to establish that any of his accredited agent was denied access because no agent came to court to say that he was denied access to any polling station. He should have first proved that his agents had complied with the legal requirements cited above before faulting the 2nd Respondent for any wrong doing. Stating that there were number of polling stations such as Embu County Day Secondary School is not enough. The Petitioner ought to have summoned specific agents from ordered access specific polling stations where agents were not present or denied access. In the absence of the same I find that his allegations in regard to denial of access of some of his agents do not meet the threshold required to convince me that there was any denial and such denial was an irregularity in the elections of Member of National Assembly in Manyatta Constituency.

88. Furthermore from the evidence adduced by the 1st and 2nd Respondent it is apparent that each Presiding Officer

was given two booklets of Form 35As which had copies each. When filling the original form automatically the contents would be impressed on the other forms being carbon copies. The agents present were the ones that appended their signatures of the forms. In some instances agents of some candidates were absent while in others all agents were absent. The 3rd Respondent explained that some agents left before the exercise of tallying was over and they could not be forced to remain behind. That explanation in my view was satisfactory because really if an agent desires to leave a polling station at any given time, he/she cannot be forced to remain at the polling station because there is no legal provision empowering the Presiding Officer to do so.

89. The Petitioner has submitted that in the face of numerous cases of irregularities and anomalies in Form 35As and 35B, the 3rd Respondent could not have been declared as validly elected. As I have observed above, it is true that there were some errors noted especially in Form 35B such as St. Paul Gakinduriri Primary School polling station (code 105), Mvangua Kandindi Pond polling station (code 052) and others. It is on that basis that this court on its own motion invoked the provisions of **Section 82(1)** of the **Election Act** and ordered for partial scrutiny and recount of valid votes in 18 polling stations that in my view were affected by the irregularities and anomalies. The exercise in my view addressed all the concerns raised by the Petitioner about irregularities and anomalies raised in his petition and what came out during trial. Again in the interest of time, I will not go into the details of what the exercise revealed in all the 18 polling stations namely; Kibugu Primary School, Karau Primary School, Embu Municipal Council Stadium, St. Paul Gakinduriri Primary School, Kiriari Day Secondary

School, St. Michael Primary School, Mosque Grounds- Dallas (2 streams), Kibugu Primary School, Mvangua Kamindi Polling station, Kibugu Tea Buying Centre polling station, Embu Urban, Kamiu Primary School (2 streams), Nembure Polytechnic polling station, AIPCA Church Grounds Majimbo, Embu Municipal Social Hall and Ngimari Primary School polling station. The report of the Deputy Registrar dated 26th January, 2018 and filed in this petition did not unravel any electoral malpractice or impropriety on the part of 1st and 2nd Respondent. In summary in the recount revealed what all the candidates garnered in the elections of Member of National Assembly Manyatta Constituency and for purpose of this petition the total votes garnered by both the Petitioner and the 3rd Respondent are as follows:-

(i) The Petitioner from the results of recount and scrutiny of 18 polling stations named above got **3084**. Results in Form 35A shows the same total of **3084** votes. Form 35B showed he had garnered **3036** votes.

(ii) 3rd Respondent from the results of recount and scrutiny got **3320** votes while Form 35 A showed that he had **3236** votes while Form 35B showed that he had been given **2955** votes.

The above shows that while the Petitioner had been given **48** votes less in the results declared the 3rd Respondent had been given **365** votes less and this really shows that the Petitioner cannot validly accuse the election officials for manipulating results in favour of the 3rd Respondent.

90. The results overall after taking into account the results coming out of the scrutiny and recount shows the following;

(i) The Petitioner garnered a total of **33,124** votes

(ii) The 3rd Respondent garnered a total of **34,152** votes. This shows that as the respondents indicated, the margin of victory of the 3rd Respondent was even higher by 1028 votes against the declared margin of **990** votes. So the error noted on the margin of victory between the declared results and the results after partial scrutiny and recount in the stations where problems were noted in my view shows that the errors and irregularities were not of such high magnitude to obliterate the general will of the voters in Manyatta Constituency.

91. The Petitioner has contended in his submissions that there were 2 other stations namely;

(i) St. Andrews A.C.K. Old Stadium and

(ii) Kimangaru Primary School where scrutiny and recount was not done and in his view that left a dark cloud looming on the manner in which the elections were conducted.

I am not persuaded that there is any basis for that for two reasons;

(i) In his pleadings at paragraph 60 of the petition the petitioner cited a nonexistent polling station known as KIMANGARARU PRIMARY SCHOOL polling station. The 2nd Respondent in response denied having a polling station in Manyatta Constituency by that name. The Petitioner did not amend his pleadings to correct the name if he had gotten the name wrong.

(ii) The Petitioner did not adduce any evidence concerning any of the above polling station to establish and prove that there were irregularities and that the same affected the results significantly declared by the Presiding Officers in those stations.

The evidence adduced in my view did not meet the required threshold. In regard to St Andrews A.C.K. Old Stadium polling station 2 of 2, for example the 2nd Respondent explained that the error or discrepancy was in regard to total number of valid votes in Form 35B and that the error did not affect the votes garnered by each candidate. The results in the primary documents (Form 35A) were accurate and this was not contested. The Petitioner of course had the initial burden of proof before the same shifted to the Respondents. In this instance the Petitioner has failed to prove that he has valid grievances that the results in St. Andrews ACK Old Stadium and Kimangaru Primary School polling stations were riddled with irregularities.

92. This court finds that the errors and anomalies pointed out by the Petitioner generally were well responded to by the 2nd Respondent. The mistakes and errors were due to fatigue and human error and this is clearly illustrated in the case the results of Karau Primary School polling station being duplicate from the results of Embu Urban Primary School polling station. The explanation offered as I have observed above was satisfactory and if there was any lingering doubt, the recount and scrutiny I ordered addressed those doubts and adequately put the matter to rest. Of course this court during trial noted some instances where the aptitude of some Presiding Officers in election matters left a lot to be desired. This clearly calls for a re-thinking in the policy and the manner in which these officers at the ground are employed. In my view, a Returning Officer should ensure that only competent personal are engaged and I do not think that Embu County and Kenya at large has shortage of competent and skilled people. A case in mind is a Presiding Officer employed to be in charge of Kiandundu Catholic Church grounds. She told this court upon prodding by court that she did not know how she ended up being employed as a Presiding Officer because apart from applying she did not attend any interview. I am sure if she had attended one she may not have been engaged because the level of incompetence and ignorance exhibited while answering questions should have even embarrassed her employer because she told this court that she signed on behalf of agents by writing down their initials and did not find anything wrong with that. Of course this was an illegality though the same did not affect the results captured in that polling station. What saved her and the 1st and 2nd Respondent is that she actually correctly captured what each candidate garnered in that station and no candidate complained about the same. Another Presiding Officer from Kairuri polling station (code 007) wrote down "N/A" on the space provided for agents to sign thinking that "N/A" was synonymous with absence. Another example is a Presiding Officer in Embu Municipal Council Stadium polling station 4 of 4 (code 124) wrote "no clerks" present instead of no agents in the space provided for agents present in Form 35A. Those anomalies were insignificant in so far as results of those polling stations were concerned but these examples are an indictment on the policy of recruitment and those given responsibility to employ temporary electoral officials. There is need for a review in order to ensure that credibility is maintained and standards required are attained. This is not to say that the court closed its eyes on the anomalies detected in the some cases because as I have observed I directed that scrutiny and recount to be done where irregularities and anomalies were cited and noted.

93. Having made the above observations which I believe administrative measures to be considered by the 1st Respondent, the issues at hand is whether the cited irregularities and anomalies in this petition are sufficient both qualitatively and quantitatively to have altered the overall results of the elections of member of National Assembly for Manyatta Constituency. The provisions of **Section 83** of the **Elections Act** adequately answers the Petitioner's concern on the cited irregularities. The law states:-

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

In *Gatirau Peter Munya- vs- Dickson Mwendu Kithinji & 2 Others [2014] eKLR* the Supreme Court held as follows:-

" The court observed that the practical realities of election administration are such that imperfections in the electoral process are inevitable and on this elections should not be lightly overturned especially where neither a candidate nor the voters have engaged in any wrong doing election was substantially in accordance with the principles of the Constitution and the Elections Act, then such election is not to be invalidated only on ground of irregularities." (emphasis added). In my view the cited anomalies and irregularities were not sufficient to alter the results declared by the 2nd Respondent.

94. This court well guided by the above decision and the evidence tendered before me finds that the 1st and 2nd Respondent conducted the elections of Manyatta Constituency in accordance with Constitution (Articles 38, 81, 86 and 88) and the electoral law. This finding, clearly answers the issue (iv) positively. The constitutional and statutory requirements, despite hitches and anomalies, were met by the 1st and 3rd Respondent. Again my answer to the fifth issue (v) for determination which is whether the 3rd Respondent was validly elected as member of National Assembly for Manyatta Constituency, is in the positive based majorly on the report of the Deputy Registrar upon partial scrutiny and recount of the polling stations cited to have had anomalies and/or irregularities.

In *Philip Osoke Ogutu -vs- Michael Onyura Aringo & 2 Others [2013] eKLR* the court held that:-

" The erasures, cancellations, alterations and overwriting were attributed to human error and fatigue on the part of the poll officials. The court was told that the commission had to conduct and managed an exceptionally involving election. It has not been shown that errors were deliberate work of fraud. For this reason I would be sympathetic as Maraga J (as he then was) Joho -vs- Nyange & Another [2013] KLR where he noted "error is to human. Some errors in an election like this conducted under frenetic schedule are nothing more than what is always likely in the conduct of any human activity. If they are not fundamental they should always be excused and ignored."

It is therefore now well settled that mere erasures, cancellations, alterations and overwriting especially where it is shown that same are nothing more than human error and not aimed at misleading or any other mischief, cannot be ground to invalidate an election. Quite obviously a Petitioner has a burden to prove that same were deliberate and affected the results. In this petition that is lacking. Although there were alterations and cancellation noted in stations such as Kiriari Day Secondary School and Ndunduri Tea Buying Centre and others the same were counter-signed and no complaint was raised. In stations like Manyatta Open Air Market, Kiandundu, Rukira and others the alterations as I have observed only were in respect to total valid votes cast and it is obvious that they were mathematical errors not affecting any particular candidate adversely .

95. The role of an election court is not to decide who an MP of a particular constituency is. That role is for the people or electorates in the exercise of sovereign their will. The role of an election court is to determine when petitions are presented if the process employed in electing the representative is beyond reproach and elections were

conducted in accordance with the constitution and the statute. If the process and the conduct of the elections captured the will of voters as expressed then courts have no business interfering notwithstanding hitches or irregularities that do not substantially affect the will of the people. The will of the people in my view is supreme and should be safeguarded as provided for in the constitution. In the recent case of **JACKTON NYANUNGO RANGUMA-VS- IEBC & 2 OTHERS [2018] eKLR** Hon. Majanja J. held;

" Since an election is the ultimate expression of sovereignty of the people, the electoral system is designed to ascertain and implement the will of the people. Thus the bedrock principle of election dispute resolution is to ascertain the intent of the voters and to give it effect to the fullest extent while upholding the principles that underlie a free and fair elections. An election petition is not a do-over of the just concluded election. It is not an opportunity to conduct another election through the court as every election conducted in accordance with the law is presumed valid unless it is set aside by the court. The burden of establishing the allegations of non-compliance with the constitution and the law, electoral malpractice and misconduct which would result in the election being declared invalid rest on the petitioner. The court will not interfere with the results of the elections unless it is established to the required standard of proof that such non-conformity with the constitution and the law, the irregularities and electoral malpractice complained of render the said elections invalid."

96. This court on the basis of the observations I have made and the authorities I have cited finds that the Petitioner has failed to discharge the burden of prove in all the allegations and/ or the grievances presented before me. The grievances serious as they may be have not met the standard of proof aforementioned. The same must fail in its entirety for lack of merit.

97. But before I conclude, there is a small matter I left in suspense and that is whether failure by the Petitioner to comply with Rule 8(1) (c) and 8(1) (d) of a Election (Parliamentary & County Elections) Petitions Rules 2017 is fatal. In my view, the rules of procedure are made to facilitate justice and are handmaiden of justice and therefore should not be an end in itself. However, certain rules such as rule **8(1) (c)** and **(d)** are core to a petition in court because they embody the cause of action. A party aggrieved by election results approaches court because of that declared result. The converse is if the declared results were favorable certainly he/she would not go to court. The declared results and the date of declaration forms a key component in an election petition particularly having regard to the constitutional dictates under **Article 87(2)** and **Statutory Provisions** under **Section 76(1) (9)** of the **Elections Act**. The omission of that key component in an election petition in my view is not one of those flaws curable under **Article 159(2) (d)** of the Constitution. The omission by the Petitioner to state the correct date of the declaration of the results he is challenging rendered his petition incompetent and misleading because the date cited is certainly not the date when the results of the elections of member of National Assembly for Manyatta was declared. The Petitioner ought to have moved quickly to amend the petition to reflect the correct date if he realized that he had inadvertently made a mistake. The failure to do so left his petition at the risk of being struck out for incompetence. In the premises this petition is liable to be struck out with costs but because it can only suffer one fate I dismiss it with costs because of lack of merit.

98. On costs it is trite law that costs follow the event. **Section 84** of the **Election Act No. 24 of 2011** provides that *"an election court shall award costs of and incidental to a petition and such costs shall follow cause."*

I invited the parties herein to make representations on costs and the parties contended that instructions fees should be capped at a figure between 5 million and 7 million shillings. The capping of costs is intended to promote the right to access justice under **Article 48** of the **Constitution**. This is aimed at ensuring that costs awarded to not invoke fear to genuine Petitioners who wish to challenge flawed elections and in the process become an impediment to the rule of law. Costs should be reasonable and realistic. So taking everything into consideration including the number of witnesses and the resource by all the parties to have the trial resolved timely I hereby accordingly cap instructions fee to the 1st and 2nd Respondents at **Shs.1.5 million** (one million five hundred thousand only) and **Kshs.1.5 million** (one million five hundred thousand only) to the 3rd Respondent

respectively. The other incidental costs shall be agreed or be taxed and certified by the Deputy Registrar of this court.

99. Finally I wish to appreciate and thank all the counsels in this petition for their input in this petition and service to their respective clients and the administration of justice in general. I also wish to thank the parties for conducting themselves with decorum and respect. Last but not least to the staff of this court for their sacrifices which involved at times sitting up to late in the evening to ensure that the petition was timely heard and determined despite the challenges of space.

100. **Final Orders:**

For avoidance of doubt the following are my final orders in this petition;

- (a) This petition is dismissed in its entirety with costs for lack of merit.
- (b) The declaration by the 2nd respondent that the 3rd Respondent was validly elected as Member of National Assembly for Manyatta Constituency is upheld.
- (c) The Respondents are awarded costs as follows:-
 - (i) Instruction fee for 1st and 2nd Respondent is capped at one million five hundred shillings only (**Kshs.1.5 million.**)
 - (ii) Instructions fee for the 3rd Respondent is capped at one million five hundred thousand only (**Kshs.1.5 million.**)
- (d) The total costs payable shall be agreed and/or taxed and certified by the Deputy Registrar of this court.
- (e) The money deposited in court as security shall be applied in payment of taxed costs on *pro-rata* basis.
- (f) A certificate of this determination in accordance with **Section 81(1)** of the **Elections Act** shall issue to IEBC and the Speaker of National Assembly.
- (g) A copy of this judgment enclosing the order I made to Director of Public Prosecution be forwarded to the office of Director of Public Prosecution for further investigations and appropriate action.
- (h) Right of Appeal 30 days from today.

Dated, signed and delivered at Embu this 27th day of February, 2018.

R. K. LIMO

JUDGE

27/2/2018

Judgment signed, dated and delivered in the open court in the presence of Petitioner, Kathungu for 1st and 2nd Respondent and Kibe for the 3rd Respondent

R. K. LIMO

JUDGE

27/2/2018



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