



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ELECTION PETITION NO. 2 OF 2017

IN THE MATTER OF ELECTIONS ACT, 2011

AND

IN THE MATTER OF THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTION) PETITIONS RULES, 2017

AND

**IN THE MATTER OF THE ELECTION FOR MEMBER OF NATIONAL ASSEMBLY FOR BONCHARI
CONSTITUENCY (CODE 261)**

BETWEEN

ZEBEDEO JOHN OPORE.....PETITIONER

VERSUS

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

DAVID K. CHEROP.....2ND RESPONDENT

JOHN OROO OYIOKA.....3RD RESPONDENT

JUDGMENT

BACKGROUND

1. In the general elections held on the 8/8/2017 in the Republic of Kenya, John Oroo Oyioka was declared the duly elected Member of National Assembly for Bonchari Constituency and was subsequently gazetted under Gazette Notice No. 8239 published on 22/8/2017 as the Member of National Assembly for Bonchari Constituency.
2. Disatisfied with the outcome and the resultant declaration, Zebedeo John Opop lodged this petition in Court on the 5/9/2017 on the premise that the election was so badly conducted and marred with irregularities and the nature and extent of the irregularities significantly affected the results.
3. The results as declared were as follows;

(i) Atancha Jeremiah	-	256
(ii) Kiari Asiago Samwel	-	425
(iii) Mogaka Charles Ndege	-	226
(iv) Momanyi John Billy	-	7,028
(v) Nyagaga John Moenga	-	1,443
(vi) Omwanwa Dennis Mogire	-	75
(vii) Onyancha Charles	-	6,035
(viii) Opore Zebedeo John	-	9,281
(ix) Oyioka John Oroo	-	11,934
(x) Oyugi David Ogega	-	1,327
(xi) Ratemo Mary Kemunto	-	350

THE PETITION

4. The gist of the petition as gleaned from the grounds and the supporting affidavit of the petition is summarised in the following heads as hereunder;

Tallying and announcement of election results

5. It is the Petitioner's case that the 2nd Respondent made the declaration of Member of National Assembly elections results by filling, dating and signing the statutory form 35B without tallying the final results of each polling station. Only the agent of the declared winner signed the form 35B on a date that was after the date of declaration.

Violence and Intimidation

6. The Petitioner avers that the house of a member of his secretariat was vandalized for being the Petitioner's supporter. There was an attack on members of the community policing group. His agents were denied entry into the polling stations.

Bribery

7. It is alleged that the 3rd Respondent used his agents and supporters to bribe voters.

Improper sorting of votes

8. The Petitioner maintains that at Botoro Primary, Nyangiti Primary, Bogiakumu Polling Station, Nyamokenye Primary School and Gesero Primary Polling Stations, the presiding officers did not display the votes as required for the agents to confirm.

Campaigning at polling station

9. It is the Petitioner's case that operatives of the 3rd Respondent advised voters on the queue on whom to vote for advising them to vote for change.

Voters denied their right to vote

10. Many voters are alleged to have been turned away on ground that their fingerprints could not be detected on the electronic voter identification device. The alternative complementary system of voter identification was not employed.

Agents turned away

11. The Petitioner's agents at Botoro Primary and Kiamoiro Tea Buying Centre Polling Station were denied entry into the polling station.

Aiding of elderly by the presiding officer solely

12. It is alleged that the voters who needed assistance were so assisted without being witnessed by agents. This occurred in Nyamagundo, Bogiakumu, Chisaro, Gesero, Rianyapara, Nyamokenye, Genga.

Leaving ballot boxes open after counting

13. It is the Petitioner's case that at Nyamagundo Farmers Sacco, Nyamerako Primary and Kerina Polling Stations the presiding officers did not seal the ballot boxes in the presence of agents once the counting exercise was complete.

Vote discrepancy

14. It is alleged that the results recorded in form 35As do not match the results given to the Petitioner by his agents. The votes recorded in forms 35A do not tally with those in form 35B.

Undue influence

15. Under this head, it is alleged that the presiding officers at Ngeri Polytechnic and Gesero Primary Polling stations influenced voters on whom to vote for.

Stuffing of votes in ballot boxes

16. The officials of the 1st Respondent are accused of conspiring with the 3rd Respondent's agents whereby they plucked out ballot papers, marked them and added into the ballot box for member of National Assembly. This led to the number of valid votes exceeding the number of registered voters.

Conspiracy of opponents against the petitioner

17. The Petitioner contends that the 3rd Respondent, John Billy Momanyi, Onyancha Charles and their supporters wanted the Petitioner out of the seat by all means. During the nominations, they had backed Ratemo Mary Kemunto in the Jubilee nominations against the Petitioner. The opponent had a common bond as they supported the NASA presidential candidate.

Impartiality, neutrality, efficiency, accuracy and accountability

18. The Petitioner avers that despite a written protest, the 1st Respondent deployed persons who were employees or members of the secretariat of the 3rd respondent as election officials. The election was thus held in a manner that was partisan and prejudicial to the Petitioner.

THE 1ST AND 2ND RESPONDENTS' CASE

19. The 1st and 2nd Respondents' (hereinafter the Respondents) case is articulated in the response to election petition dated 15/9/2017 and filed in Court on 19/9/2017 and the replying affidavit of David Kipkemoi Cherop sworn on the 15/9/2017.

20. It is the Respondents' case that the election was conducted in a free, fair and transparent and verifiable manner and the 3rd Respondent emerged the winner.

21. The 2nd Respondent avers that he declared the winner after entering results from polling stations in form 35B. The results from the polling stations in forms 35A were duly signed by presiding officers and agents (where present). A bundle of the forms is exhibited.

22. All polling stations were under police security and the allegations of harassment and chasing away of voters by alleged goons is false as it could not have happened in such a guarded place.

23. The 2nd Respondent acknowledged receiving a complaint over appointment of election officials from the Petitioner. Though the objection was lodged late (6/8/2017), the 2nd Respondent dismissed one of the designated presiding officers and redeployed 5 others as deputy presiding officers. This was in the spirit of ensuring that the elections were free and fair.

24. The programming of the KIEMS kit could not allow double voting as the kit could not identify a voter twice. There was no double voting.

25. Any violence at polling stations is denied, and no agents were denied access and that assisted voters were helped in presence of agents or where they had a chosen guide, by that person without interference. Copies of forms 32 which indicate assisted voters are exhibited.

26. It is urged that there was no ballot stuffing.

THE 3RD RESPONDENT'S CASE

27. The 3rd Respondent's case is contained in the written response to the petition dated the 15th day of September, 2017 and the affidavit of John Oroo Oyioka (the 3rd Respondent) and the affidavits of 15 witnesses as listed in paragraph 19, of the petition.

28. It is the 3rd Respondent's case that the election conducted by the 1st and 2nd Respondent on the 8/8/2017 and which is subject to the petition herein was conducted in a credible, free and fair manner in conformity with the Constitution of Kenya, the Election Act and all Regulations made thereunder.

29. The counting and tallying of votes for Bonchari Constituency was carried out in an open and transparent manner and in compliance with the law save for a few arithmetic and clerical errors that affected all candidates but which do not affect the outcome.

30. All allegations of malpractice, bribery, violence, intimidation, violation of electoral code and conduct and illegal practices are denied.

31. Specifically, the 3rd Respondent denies knowledge and/or involvement of any of his authorised agents in the bribery incidents at the various polling stations listed. He avers that;

a). He did not visit Kebute Primary School Polling Station at 3.00p.m. and issued money to one Morara Oluoch alias 'mochumbe' to influence voters. Further, the said Morara Oluoch is unknown to him.

b). He did not give money to one Moses Mosomi (who is unknown to him) to influence voters to vote for him. He also contends

that he has never met him.

c). The 3rd Respondent further denies giving money to a Ms Edna Mokora to bribe voters at Ngeri Polytechnic Polling Station.

d). The 3rd Respondent denies that his agents and supporters bribed voters at Ngeri Polling Station, Gesero Primary School, Kebute Primary Polling Station, Kiamoiro Tea Buying Centre, Omwari Primary School, Chisaro Primary School, Botoro Primary Polling Station, and Nyangiti Primary Polling Station among others as alleged by the Petitioner and avers that if the same happened, the same was without his knowledge and consent.

32. It is denied that the 3rd Respondent was privy to appointment of election officials by the 1st Respondent. He did not influence any appointment. None of the appointees was related to him and none was a member of his secretariat.

HEARING

33. At the pre-trial conference directions were taken that oral evidence be taken. The witnesses from both divides were to be introduced, adopt their affidavit evidence as their evidence in chief and be cross-examined on it. The Petitioner called a total of 34 witnesses. The 1st and 2nd respondents called 6 witnesses and the 3rd Respondent called 5. The respective evidence is in affidavits on record herein and I need not rehash it here.

SUBMISSIONS

34. Ms Ogetto, Otachi & Co. Advocates, Ms Abdullahi, Gitari and Odhiambo Advocates and Ms Morara Apiemi & Nyangito Advocates for the Petitioner, 1st and 2nd Respondent and 3rd Respondent respectively have all filed written submissions. I am greatly indebted to counsel for their industry and the clarity and depth of the exposition of the law and facts applicable in this matter. I have carefully considered each and every aspect of those submissions even what I may not directly refer to in my analysis hereunder.

ANALYSIS AND DETERMINATION

35. I have had occasion to consider the pleadings, the evidence and submissions on record. The issues for determination were framed and agreed as follows;

- 1. Whether the Petitioner has enjoined all parties he has complained against and the effect of such an omission.**
- 2. Whether the elections in Bonchari Constituency was conducted in accordance with the principles laid down in the Constitution and the electoral law.**
- 3. Whether the 3rd Respondent and/or his authorised agents were involved in electoral malpractices, bribery and breach of code of conduct and other illegalities.**
- 4. Whether there were irregularities committed during the entire electoral process.**
- 5. If there were irregularities and illegalities, what was their impact, if any, on the integrity of the election"**
- 6. Whether the 3rd Respondent was validly elected Member of National Assembly for Bonchari Constituency.**
- 7. Who bears the costs of this Petition and to what proportion"**
- 8. Whether the 4th Petitioner is entitled to scrutiny and recount as prayed. (This issue is spent orders having been given).**

I consider it a suitable beginning point to highlight the applicable general principles of law.

THE APPLICABLE CONSTITUTIONAL AND LEGAL PRINCIPLES

36. Kenya is a sovereign and democratic country based on the values of democracy, human rights and the rule of law. **Article 1(1)** of her **Constitution** provides that all sovereign power belongs to the people and shall be exercised only in accordance with the Constitution. **Article 1(2)** provides for the exercise of this power. It states;

“Article 1(2): The people may exercise their sovereign power either directly or through their democratically elected representatives.”

37. Such elections as envisaged under **Article 1(2)** above must conform to the provisions of **Article 38(2)** of the **Constitution** which provides;

“Article 38(2): Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors.”

38. **Article 81(e)** of the **Constitution** provides the principles which the electoral system shall comply with. It provides;

“The electoral system shall comply with the following principles-

(e) free and fair elections, which are-

(i) by secret ballot;

(ii) free from violence, intimidation, improper influence or corruption;

(iii) conducted by an independent body;

(iv) transparent; and

(v) administered in an impartial, neutral, efficient, accurate and accountable manner.”

Under **Article 86** of the **Constitution**, the IEBC is mandated to ensure the following;

“Article 86: At every election, the Independent Electoral and Boundaries Commission shall ensure that—

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

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

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

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

40. The will of the people expressed in an election is sacrosanct and cannot lightly be overturned and should be given effect

whenever possible.

In **Richard Kalembe Ndile & Another vs Patrick Musimba Mweu & 2 Others** [2013] eKLR, the Court observed that;

“Under our democratic form of government, an election is the ultimate expression of the people and the electoral system is designed to ascertain and implement the will of the people. The bedrock principle of election dispute resolution is to ascertain the intent of the voters and to give it effect whenever possible....”

41. **Section 83** of the **Elections Act** is a key provision setting the parameters within which an election can be voided. It provides;

“Section 83: No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election. ”

42. This section insulates the outcome of an election from nullification on the basis of errors or irregularities or non-compliance with the law which do not affect the result.

43. In addressing the issue, the Supreme Court of Kenya in **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others** [2014] eKLR acknowledged the practical reality that imperfections in the electoral process are expected; that the Court should not lightly overturn the election, especially where neither a candidate nor the voters have engaged in any wrong doing. The Court laid down the following principles.

“216. It is clear to us that an election should be conducted substantially within the principles of the Constitution, as set out in Article 81(e). voting is to be conducted in accordance with the principles set out in Article 86. The Elections Acts, and the Regulations thereunder, constitute the substantive and procedural law for the conduct of elections.

217. If it should be shown that an election was conducted substantially in accordance with the principles of the Constitution and the Election Act, then such election is not to be invalidated only on ground of irregularities.

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

44. Where it is shown that the IEBC has derogated from its duty under **Article 86** leading to a flawed election, the Court must step in to remedy the infraction to ensure that the ultimate expression of sovereignty of the people is ascertained and implemented. The intent of the voters must be ascertained. It is all about the will of the people and only a *clearly pleaded and proved* case will warrant the voiding of an election.

THE BURDEN OF PROOF

45. Learned counsels have very aptly submitted on the question of the burden of proof in election petitions. I sum up the applicable legal principles as hereunder.

46. It is trite law that “whoever alleges must prove.”

Section 107(1) of the **Evidence Act, Cap 80 Laws of Kenya** provides;

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

A Petitioner in an election petition therefore, has the duty to prove the grounds in support of the petition by showing that the facts on

which the petition is based exist.

47. Section 108 of the Evidence Act Provides;

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

48. The burden of proof in an election petition rests with the Petitioner. The Supreme Court of Kenya in Raila Odinga & Another vs IEBC and Others [2013] eKLR laid down the applicable principles. It stated;

“There is, apparently, a common thread in the foregoing comparative jurisprudence on burden of proof in election cases. Its essence is that an electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner, but, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting. Ultimately, of course, it falls to the Court to determine whether a firm and unanswered case has been made.”

49. At paragraph 203 of the said judgment, the Supreme Court held that a Petitioner should be under the obligation to discharge the initial burden of proof, before the Respondents are invited to bear the evidential burden. The Court cited with affirmation the Canadian case Opitz vs Wrzesnewskyj 2012 SCC 55-2012-10-256 where it was stated;

“An applicant who seeks to annul an election bears the legal burden of proof throughout...”

50. This burden once discharged by the Petitioner shifts to the Respondents to disprove the claims made. At **paragraph 196 and 197 in Raila case (supra)** the Court stated;

“Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondent bears the burden of proving the contrary. This emerges from a long-standing common law approach in respect of alleged irregularity in the acts of public bodies. Omnia praesumuntur rite et solemniter esse acta: all acts are presumed to have been done rightly and regularly. So the petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescriptions of the law.”

51. The gravity of the burden of proof shouldered by a Petitioner is aptly captured by the Supreme Court of India in Rahim Khan vs Khurshid Ahmed and Others; 195 AIR 290, 1975 SCR(1) 643 where the Court stated;

“We have therefore to insist that corrupt practices, such as are alleged in this case, are examined in the light of the evidence with scrupulous care and merciless severity. However, we have to remember another factor. An election once held is not to be treated in a light-hearted manner and defeated candidates or disgruntled electors should not get away with it by filing election petitions on unsubstantial grounds and irresponsible evidence, thereby introducing a serious element of uncertainty in the verdict already rendered by the electorate. An election is a politically sacred 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 wherein strict proof is necessary. The burden is therefore heavy on him who assails an election which has been concluded.”

THE STANDARD OF PROOF

52. The standard of proof in an election petition is above the balance of probability though not as high as beyond reasonable doubt.

53. Where the allegations touch on commission of a criminal offence, the standard of proof is beyond reasonable doubt. The Supreme Court of Kenya made this distinction clearly in its decision in Raila 2013, where the Court stated;

“...the threshold of proof should in the principle, be above the balance of probability though not as high as beyond reasonable doubt... where there are criminal charges linked to an election, the party bearing the burden of proof must discharge it beyond reasonable doubt.”

54. I now proceed to evaluate the evidence and the law in support of each of the grounds in the petition as read against the responses and evidence adduced by the Respondents and proceed to make a finding on each of the issues for determination earlier set out herein.

55. On violence and intimidation, the evidence on record relates to 3 incidents;

1. Violence allegedly meted out on members of a community policing group.
2. Violence visited on Dolphine Nyaboke at her home and damage of the house.
3. Violence and intimidation at named polling stations.

56. Vincent Okeiga Ongeri's (PW6) evidence is that he is the Chairman of Community Policing at Bomariba Location. While on usual patrol on 7/8/2017, he encountered 3 groups of armed people who attacked them causing Vincent and one Stephene Makori serious injuries. A report was made at Gesonso Police Station. At the police station, PW6 found Honourable Charles Onyancha and his supporters who wanted to further assault him but police officers intervened. An OB record of the report is exhibited.

57. Arrests were effected and Eric Ombasa, Kevin Okeiga, Evans Gwaro and Isaac Magara have been charged with assault causing actual bodily harm.

58. PW3 Evans Guto and PW18 Thomas Gitaga Nyamweya corroborate the evidence of PW6. They confirm the attack on PW6. They saw many people armed with wooden dowels.

59. Dolphine Nyaboke (PW22)'s evidence is that she was attacked at home while making mandazi by a group who scolded them for being supporters of Zebedeo John Opore. She recognised Douglas Peter and Ronald Ntabo. Isaac Nyamete Ondeyo (PW21) states he was called by his wife and informed of the incident. He found the attackers had damaged his house.

60. On violence at polling stations Leona Nyanchama (PW18) testifies that she was attacked by a group led by Jared Onsase a supporter of John Billy. She was bundled into a car and driven to Gesonso Police Station where they wanted her arrested. She was freed by the OCS when cause for her arrest was not forthcoming from the captors. Tinah Bochere Ongeri in her evidence (page 228 Vol.1 Petitioner's bundle) states that she saw Leona being hijacked.

61. PW5 Evans Mwangi Orina states that at Biamoring'a Primary School Polling Station he saw Obure Okong'o, Omari Morande, David Ntabo and Evans Ondara supporters of 3rd Respondent among others armed with jembe handles chasing afer Vincent Keraa, a Jubilee agent.

62. William Omwoyo Machoka (PW14)'s evidence is that he was an agent of the Petitioner at Rianyapara Primary School. He was attacked at the tallying centre and water poured on him. The police came to his rescue.

63. George Morara (PW24) has testified via his affidavit that he witnessed 2 voters who were being chased away by the 3rd Respondent's agents but the presiding officer Nyangiti Polling station intervened and allowed the two to jump the queue and vote.

64. The 3rd Respondent is accused of perpetrating violence. PW12, Stephen Nyabwari states that the 3rd Respondent kicked him on his waist while at Nyangiti Primary School Polling Station.

65 It is the 1st and 2nd Respondents' case that all polling stations were tightly secured under the keen eye of the police and the allegations that the Petitioner or the voters were harassed and chased from polling stations by alleged goons is false and could not

have happened at such a guarded place. Neither the police nor chiefs reported any incidents of violence during election day. No complaints were lodged with the police.

66. In response to the allegations of violence, the 3rd Respondent has in his replying affidavit denied ever visiting Nyangiti Primary Polling Station where he is said to have made violent attacks on members of the public.

67. He rubbishes the allegations of violence and intimidation made against him and by his authorised agents as wholly untrue and tailored for the purpose of this petition.

68. Where the allegations raised in a petition border on criminal conduct, the standard of proof rises to beyond reasonable doubt. I restate the threshold to be met as stipulated by the **Supreme Court in Raila Amollo Odinga vs IEBC & Others 2013 eKLR**;

“The threshold of proof should, in principle be above the balance of probability, though not as high as beyond reasonable doubt, save that this would not affect the normal standards where criminal charges linked to an election, are in question...”

69. I have carefully considered the evidence before me. As regards the incident of the alleged attack of members of community policing on the night of 7/8/2017 concrete evidence is laid that an attack did actually occur leading to serious injuries on Vincent Okeiga Ongeru and Stephane Makori. The attack is confirmed by medical records as well as a report to the police and subsequent charges against known persons before a Court of law.

70. As regards the incidents of violence at the home of Dolphine Nyaboke Ouru and the destruction of the house as stated by Isaac Nyamete, the evidence fails the required test. It is stated that the attackers were known persons. No evidence of a report of this alleged heinous crime to the police is availed. Dolphine is said to have been injured. No medical evidence is tendered. The witnesses treated the whole matter casually and on the basis of the evidence adduced, the burden of proof is not discharged.

71. As regards the alleged incidences of violence against Leone Nyanchama, Vincent Keraa(as narrated by Evans Mwangi Orina), William Omwoyo Machuki, George Morara and Stephen Nyabwari at polling stations, doubts are cast when known perpetrators are not pursued within the law after committing what were not only serious criminal offences but ones that would impact heavily on the elections if found true.

72. When Stephen Nyabwari states that he was kicked by the 3rd Respondent, a person he well knew as a candidate in the election and failed to make a report of the incident, the Court has every reason not to believe him.

73. When Leone Nyanchama is hijacked in broad daylight and taken to a police station where she is not arrested, returns to vote and does not pursue the matter, the credibility of that claim is shaken.

74. Having found that there was violence meted on the community policing group on the 7/8/2017, the question that follows is the nexus of such violence to the 3rd Respondent or any other person and the effect of the same on the election.

75. Under **Article 38(3)** of the **Constitution**; it is provided;

“Article 38(3): Every adult citizen has the right, without unreasonable restrictions—

(a) to be registered as a voter;

(b) to vote by secret ballot in any election or referendum; and

(c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.”

76. **Article 81(e)** of the **Constitution** guarantees the right to a free and fair elections, which are;

“Article 81. The electoral system shall comply with the following principles

(e) free and fair elections, which are—

(i) by secret ballot;

(ii) free from violence, intimidation, improper influence or corruption;

(iii) conducted by an independent body;

(iv) transparent; and

(v) administered in an impartial, neutral, efficient, accurate and accountable manner.

77. 77. These constitutional guarantees will be contravened if there be rampant and widespread violence before or during the elections. It is the Court's duty to determine the extent of the violence and the perpetrators.

In our instant suit, and as stated earlier, I am satisfied there was an incident of violence and which targeted a community policing group. As to who the perpetrators were, it is stated that they were supporters of the 3rd Respondent and were NASA supporters. Arrests were made and the case is pending before Court.

78. Where an election offence is alleged, the Petitioner must show that the offence was committed and secondly that it is the returned (elected) candidate or his agents under his instruction who committed the offence. The allegations being of a criminal nature, the degree of proof is beyond reasonable doubt.

79. In the case of Jagdev Sngli vs. Pratap Singh Daulla, (A.I.R. 1965. S.C. 18), the Supreme Court of India faced with similar facts stated;

“It may be remembered that in the trial of an election petition, the burden of proving that the election of a successful candidate is liable to be set aside on the plea that he was responsible directly or through his agents for corrupt practices at the election, lies heavily upon the applicant to establish his case, and unless it is established in both its branches, i.e. the commission of acts which the law regards as corrupt, and the responsibility of the successful-candidate directly or through his agents or with his consent for its practice not by mere preponderance of probability, but by cogent and reliable evidence beyond any reasonable doubt, the petition must fail.”

80. Of note is that satisfactory evidence linking any of the parties in this petition to the persons charged is not forthcoming. It is the evidence of Vincent Okiega that when he went to the police station to report he found one Honourable Charles Onyancha and his supporters. The group wanted to further assault him but police restrained them. Even though he says that the group included persons supporting the 3rd Respondent, when cross-examined by Mr. Morara he says, the 3rd Respondent was not there when he was assaulted. He did not know whether it is the 3rd Respondent who sent the attackers and the 3rd Respondent was not charged. In these circumstances, I would find no basis upon which to attach any culpability on the 3rd Respondent. Needless to add, the very act of violence is deplorable and must be condemned in the strongest terms possible and when the Court seized with the matter ultimately establishes the actual perpetrators, then the full force of the law must be applied against anyone found guilty to deter this retrogressive conduct in future.

81. Even where the culpability of the perpetrators has not been finally established, having found for a fact that there was violence, it is the duty of the Court to determine if the said violence affected preparations for the polls, the voting (turnout) and the counting in such a manner as to lead to the conclusion that the elections were not free and fair and free from violence or intimidation.

82. The pertinent questions that arise are whether;

- (i) The violence was rampant and widespread causing fear and anxiety and compromising the security situation and safety of voters.
- (ii) Whether as a result there was a low voter turnout.
- (iii) Whether overall the atmosphere created was conducive for a free and fair election.
- (iv) Was the violence perpetrated by the returned (elected) candidate or by his agents under his instruction.

83. I am quick to note that the incidence of violence aforesaid was an isolated one on the night preceding the election day. No evidence is laid before Court to demonstrate a resultant low voter turnout due to the violence. I have had occasion to peruse by random sampling forms 35A declaring results at the polling stations and I note an average turnout of about 74%.

84. In reality, it is impossible to achieve 100% voter turnout in any election and no wonder democracy is predicated on the will of the majority. As held in the Indian decision **Kalyan Kumar Gogoi vs. Ashutosh AgmiHotn & Another, Civil Appeal No. 4820 of 2007** quoted with approval by this Court (*Githua J*) in **Sarah Mwagudza Kai vs. Mustafa Idd [2013] eKLR**;

“..... All the voters do not always go to the polls. Voting in India is not compulsory and therefore no minimum percentage of voters has been prescribed either for treating an election in a constituency as valid or for securing the return of the candidate at the election. The voters may not turn up in large numbers to cast their votes for variety of reasons such as agitation going on in the state concerned on national and/or regional issues or because of boycott call given by some of the recognised state parties, in the wake of certain political developments in the state or because of disruptive activities of some extremist elements etc. It is common knowledge that voting and absentention from voting as also the pattern of voting depend upon complex and variety of factors, which may defy reasoning and logic.”

In this case therefore it is not possible to conclude that the voters who did not turn up failed to do so solely because they feared for their safety. One cannot speculate that the votes not cast belonged to a particular candidate. No one can tell the mind of a voter.

85. In our instant case, I am not persuaded that the 25% to 30% or so voters who did not turn up failed so to do as a result of the violence and consequent fear of their safety.

86. Having evaluated the evidence before me I am persuaded that the incidence of violence was isolated and the security situation in Bonchari Constituency on the 8/8/2017 was not compromised to an extent that the IEBC was unable to hold a free and fair election.

ELECTORAL OFFENCES, OTHER ILLEGALITIES/IRREGULARITIES AND MALPRACTICES

87. The Petitioner has raised a number of complaints under this head. I propose to deal with all together as hereunder.

88. As regards bribery, the incidents complained of were allegedly at Chisaro Primary School where James Nyabuto Ayieko who described himself as an unofficial agent of the Petitioner states he inquired from persons coming from a certain location and they told him they were receiving money. The other incident is claimed to have been at Kiamoiro Polling Station where Fredrick Omwega states that one Richard Nyangabasi, a supporter of 3rd Respondent was dishing out money to voters. PW10, Joseph Mochama Ongoro states that Kaunda Osiemo bribed votes at Gesero Polling Station.

89. These allegations are denied by the 3rd Respondent, Kaunda Osiemo and Thomas Oibuki.

90. The standard of proof in an election petition where allegations border on the commission of a criminal offence is beyond reasonable doubt. The evidence before me is certainly way below that standard. The allegations by the witnesses are not corroborated. No report of incidents is made to police. Indeed none of the witnesses gives tangible evidence of how much money was given and to whom.

91. As held in **Ali Mursal vs Saadia Mohamed and Others, Garissa EP No. 1 of 2003**;

“Bribery is an electoral offence. It is also a criminal offence in ordinary life. Being such, proof of the same must be by credible evidence and in my view, nothing short of proving this offence beyond reasonable doubt will suffice. There is no distinction as far as I am concerned, and rightly so, between bribery in a criminal case and one in an election petition. Bribery involves offering, giving, receiving, or soliciting of something of value for the purpose of influencing the action of the person receiving. Under the Act, bribery is an election offence under *Section 64* and both the giver and the taker of a bribe in order to influence voting are guilty of this offence upon proof. The penalty found under Part VIII – General Provisions of the Act, specifically *Section 106(1) of the Act* is a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years or to both.”

The evidence before me falls far short of this standard.

92. On improper sorting of votes, at paragraph 18 & 19 of the Petitioner's supporting affidavit, he states that the presiding officers were not displaying the ballot paper to people in the room for confirmation. He names the affected polling stations as Botoro, Nyangiti, Bogiakumu, Nyamokenye and Gesero. Other than Gesero, all the other named stations had more than 1 stream. It is not clarified which polling station was affected by the omission. Again, the agent of the Petitioner signed the form 35A at Botoro (1 & 2), Nyangiti, both streams at Bogiakumu 1 and 2, two streams of Nyamokenye (1 & 3), leaving only the form at Gesero and 1 stream at Nyamokenye. Within this background, I find it is not proved to the required degree that ballots were not displayed.

93. The evidence of Grace Kwamboka (PW23) and that of George Morara (PW24) agents at Nyangiti Polling Station and Gesoro Stream 2 respectively, is that the presiding officers at Gesoro Stream 2 and Nyangiti Polling Stations did not display ballots to the agents during counting. The agents do not give any evidence of action taken to remedy the situation.

94. The agents were empowered by **Regulation 80** of the **Elections (General) Regulations 2012** to ask for a recount of the votes not once, but twice. No evidence is led that such a request was made and denied. No formal complaint was lodged with the 1st and 2nd Respondent.

95. This was a serious illegality (if at all) as it was contrary to **Regulation 76(b)** of the **Elections (General) Regulations 2017**. Despite the seriousness of this issue, the allegations herein were not reported to any authority or any other available interventions taken. The Court is now left with the word of the witnesses only. The burden of proof is not discharged.

96. On the campaigning at polling station, the available evidence is that of Fredrick Nyagaka Omwenga who swore an affidavit but did not testify and that of PW13, John Obiri Miranga who says he saw Nahashon Juma campaigning for 3rd Respondent between (7.00 – 9.00 a.m.). PW13 says he called Eric, an assistant chief who removed Nahashon. Eric is not called as a witness. Further evidence is from PW24, George Morara Kombo who says he heard Charles Chweya and Makarios Onyoni tell people to vote for the 3rd Respondent. This incident is said to involve a known person. No action is taken by the agents.

97. The allegations herein by PW13 and PW24 are not corroborated. These allegations are denied. Allegations of a similar nature by Evans Mwangi Orina (PW5) remain uncorroborated. Being an allegation of a criminal nature, the standard of proof is higher and is not achieved.

98. On undue influence of voters to cast their vote to a particular person, the Petitioner at paragraph 37 and 38 of the supporting affidavit states that presiding officers could be heard interrogating voters once a voter indicated their preferred choice. He asserts that affidavit of Cecily Momanyi and Joseph Mochama Ongoro elaborate on this malpractice.

99. Cecily Momanyi states that one Nyanchoka Mokora was persuaded by the presiding officer to vote for the 3rd Respondent at Ngeri Polytechnic. Joseph Mochama Ongoro states in his affidavit at paragraph 4 that he witnessed a number of events that amount to election offences and irregularities. Among them was an incident when a deputy presiding officer marked a ballot against the wishes of the voter.

100. Badgering voters to vote for a particular candidate is an election offence by dint of **Section 10 (1) (a)** of the **Election Offences Act**. The degree of proof is thus elevated from above balance of probability to beyond reasonable doubt. That Section provides:

“Section 10(1) A person who, directly or indirectly in person undue influence or through another person on his behalf uses

or threatens to use any force, violence including sexual violence, restraint, or material, physical or spiritual injury, harmful cultural practices, damage or loss, or any fraudulent device, trick or deception for the purpose of or on account of-

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

commits the offence of undue influence.”

The evidence available makes interesting reading. Joseph Mochama Ongoro is clear in his mind that he witnessed election offences. He makes no effort to document evidence neither does he make a report to investigation agencies. Is the uncorroborated word of the two witnesses adequate in the circumstances" The emphatic answer is no since the existence of allegations of a criminal nature required proof beyond reasonable doubt.

101. In regard to voters being denied the right to vote, lined up is the evidence of PW10, PW14, PW15, PW16, PW27, PW28, PW29, PW30, PW31 and PW32 and PW33. These allegations are of a very serious nature and amount to contravention of **Article 38 3(b)** of the **Constitution** which guarantees every citizen the right to vote by secret ballot in an election or referendum.

102. The act of turning away voters thus denying them their right to vote is an election offence under **Section 6(d)** of the **Election Offences Act**. The Section provides;

“Section 6: A member of the Commission, staff or other person having any duty to perform pursuant to any written law relating to any election who -

(d) wilfully prevents any person from voting at the polling station at which they know or have reasonable cause to believe such person is entitled to vote;

commits an offence and is liable on a conviction, to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years or to both.”

The degree of proof required thus is one beyond reasonable doubt.

103. I have with great care particularly considered the evidence of PW27, PW28, PW29, PW30 and PW32 who all state they went to their respective polling stations to vote but were turned away when the biometric identification kit could not pick their details and they were told to go home. It is trite law that whoever alleges proves.

104. The first and fundamental fact these witnesses needed to establish was that they were registered voters. They state that their names were in the list posted at the polling station. No evidence of this list is tendered. The witnesses in my view needed to ascertain 3 things.

1. That one went to the polling station.
2. That one was a registered voter.
3. That one was turned away and denied the right to vote.

105. Without prove of 2 above (that one was a registered voter), their claim must come a cropper. While the witnesses have persuaded me that they left their homes and went to the polling station and were sent away, the essential element that they were registered voters remain unproved. Nothing could have been easier than to seek their registration details from the electoral body or better still to take snap shots of the list of voters posted at the polling stations in support of their case. It is not lost on me that the Petitioner herein has been a very pro-active Petitioner, who when the IEBC dithered to give him necessary material in support of his case, moved the Court through a Constitutional petition to achieve that end. The evidence of registration of these citizens should have been obtained. On the evidence before me, I find that it is not proved beyond doubt that the 1st Respondent denied duly

registered voters the right to vote.

106. On the issue of participation of agents, the Petitioner has pleaded that his duly appointed agents were denied access into the polling station yet he was legally entitled to appoint them, his political party having not appointed party agents. This denied him representation at the counting of votes as required under **Regulation 74** of the **Election (General) Regulations 2012**. No particulars of such agents are given in the petition but in the supporting affidavit, he states that most of his agents at various polling stations including Botoro Primary and Kiamoiro Tea Buying Centre Polling Station were denied entry into the polling room yet they had appointment letters.

107. Evidence has been adduced about denial of entry of agents at Isamwera and Kerina. These 2 stations were not pleaded and cannot be raised as parties are bound by their pleadings.

108. Fredrick Nyagaka Omwega in affidavit states he was the agent of the Petitioner at Kiamoiro Polling Station – Stream 1. He arrived at 6.30 a.m. He was told agents were too many and there was no space. An MCA Jubilee Agent had been allowed in so he could not get in. Fredrick doesn't say what action he took if any. He appears to have been content and remained in the vicinity of the polling station.

109. John Obiri Maranga states in his affidavit that he was stationed at Botoro Stream 2. He reported at 5.00 a.m. At paragraph 7 he states that when he went to the door of stream 1, he submitted his appointment letter but he was denied entry since a jubilee agent had already been admitted into the room. He remained at the polling station compound. He was allowed in at 5.30p.m.

110. These 2 witnesses appear just content to state they were locked out of the polling stations without corroboration of their evidence. It is inconceivable that an agent trained in his duties and mandate would be locked out yet spend the whole day at the polling station without seeking tangible intervention from his principals or authorities. I find their evidence uncorroborated and unworthy of believe.

111. It was incumbent upon the Petitioner to demonstrate, first, that the agents said to have been chased away or ejected were duly appointed and had the necessary documentation to allow entry into a polling station. In **Seif Ramandan Kajembe vs. The Returning Officer & Others** [2013] eKLR the Court held;

“It was incumbent upon the Petitioner to adduce evidence to show that in those polling stations it was his agents who were locked out therefrom with documentary evidence showing that they were accredited agents for the Petitioner. This was evidence which was peculiarly within the knowledge and possession of the Petitioner and by not adducing the same the Petitioner has deprived the Court of the crucial evidence on the basis of which the court can make a finding in favour of the Petitioner with respect to the scrutiny sought. Whereas the Petitioner has submitted that he has identified 27 polling stations in which his agents were absent, that submission is not supported by the evidence on record so far as I have held elsewhere in this ruling it was incumbent upon the Petitioner to peruse the record to see whether based on the documents filed pursuant to Rule 21 of the Rules there was a need to seek the Court's leave to adduce further affidavit evidence.”

112. In respect of aiding of elderly voters solely by the presiding officers, the general thread is that presiding officers denied agents the opportunity to witness the assistance of voters who needed assistance and were not accompanied by persons qualified to assist them. We have the evidence of PW4, PW15, PW17, PW19, PW20, PW23 and PW26.

113. **Regulation 72(2)** of the **Elections (General) Regulations 2012** provides;

“Regulation 72(2): Where a person who applies to be assisted is not accompanied by a person who is qualified to assist him or her, the presiding officer shall assist such voter, in the presence of the agents.”

This regulation is crystal clear that the assistance must be in the presence of agents.

114. This complaint, which again, is a very serious one brings to the fore and into sharp focus the role of agents during elections. When a witness like PW26, Thomas Mauti Bikondo testifies that at Gesero Stream 2 about 100 voters were not properly assisted, it becomes an issue of concern when such an agent's efforts at remedying the situation are limited to protests to the presiding officer.

Such, am sure, would not be the training that he was given and he becomes an unhelpful aid in enabling the court resolve an otherwise very grave matter.

115. Matters get compounded when an agent like Margaret Nyaboke Nyakundi, an agent at Ngeri Polytechnic claims that she witnessed improper assistance of voters yet she dutifully signed the form 35A declaring the result which is found at page 139 of the Petitioner's bundle. The same applies to Petro Otieno an agent at Nyamagundo Farmers Polling Station and Florence Nyamute (PW20) an agent at Nyamerako ELCK Primary School Polling Station 2 of 2.

116. So what does the Court make of the evidence in support of irregular voter assistance to voters" To begin with, it is clear in my mind that agents are not mere observers during elections. They are a key cog in the wheel of the election process in ensuring the integrity, transparency, accuracy, impartiality and accountability of the election.

117. To borrow the definition of agent from the Black's Law Dictionary, an agent is one who is authorised to act for or in place of another. Such agents in an election will act with authority on behalf of appointing political parties or candidates.

118. An agent in the election process is not just another busy body. His position is anchored in law. **Section 2** of the **Elections Act** defines him thus;

“Section 2.

In this Act, unless the context otherwise requires—

“agent” means a person duly appointed by—

(a) a political party or an independent candidate for the purposes of an election under this Act; or

(b) a referendum committee for the purposes of a referendum under this Act, and includes a counting agent and a tallying agent;”

He is an important insider in the process and for that he is required under **Regulation 5(5)** of the **Elections (General) Regulations 2012** to take oath of secrecy to safeguard information that comes to him in the cause of duty.

The agent witnesses the opening of a polling station, inspects voting material, witnesses the identification of voters, witnesses voting, witnesses the counting of votes (with a right to seek a recount under regulation 80), witnesses sealing of ballot boxes, signs the results declaration form, collects a copy of the same and for agents at tallying centres, witnesses the tallying of results from each polling station.

It is imperative that an agent who discovers an anomaly at any state of the electoral process must formally raise a complaint capable of escalation to the 1st Respondent for action and which formal complaint can form part of the evidence in Court should there be need to challenge the election. It would also be even more helpful if an agent was equipped with tools to take and gather evidence eg. recording paper, or electronic devices, evidence which could be presented to Court at a later date.

119. Where an agent accepts or acquiesces to an outcome but wishes to challenge it at a future date, such an agent must give concrete reasons. It is pertinent that when an agent raises a complaint about the general conduct of the electoral process, such an agent cannot escape the duty to specifically show the steps taken to seek intervention and correct the anomaly. A mere statement that a protest was raised with a presiding officer who did not act would not suffice noting that it is the duty of such an agent to prove that the conduct complained of happened. Indeed, where the infractions by the electoral body are as serious as in the allegations of irregular assistance herein involving 100 people as stated by PW6, where the election officials(s) persists in wrong doing, a formal complaint is necessary and no option is closed to such an agent and/or his candidate including a boycott of the election. So much that when the matter comes before a Court of law for resolution, there will be evidence to show that the misconduct happened, it was not condoned and specific action was taken.

120. Noting that it is trite law that whoever alleges proves and further alive to the heavy burden of proof on a petitioner in an election petition, I am of the very considered view that it is not enough for an agent who is in law the eyes of the political party, candidate and indeed the public to casually state there were irregularities and illegalities in an election without backing that with tangible evidence that the Court can rely on.

121. Where the agent, like in our instant case is/are guilty of inaction, the credibility of the complaint and its sustainability becomes rather dicey. The presiding officers and returning officers managing the election process are not the agents' bosses. It is the responsibility of the agents to keep those officers in check to ensure that they operate within the law. It is not in vain that the agents are trained before the elections. Where there is non-compliance with the law or any form of irregularities then the duty of the agents to collect, preserve and present cogent evidence before court cannot be gainsaid. The burden of proof must be born in mind throughout.

122. Having evaluated the evidence on assisted voters as presented, I am persuaded that the same falls short of proof above the balance of probability as necessary and make a finding that the ground is not proved. I hasten to observe that a more proactive approach by agents is needed if elections have to attain credibility. More tools and proper training and proper reporting lines need to be established if reliable evidence is to be secured. I opine that the need to document evidence as the election progresses is a sure guarantee of an effective challenge to the outcome of an election.

123. On the question of unsealed ballot boxes, we have the evidence of PW15, Petero Otieno Mogere and PW20 Florence Nyamute who state that after counting the presiding officers at Nyamagundo and Nyamerako did not seal ballot boxes. These 2 agents signed the forms 35A denoting that they were satisfied with the results. Whereas I may agree with them that the ballot boxes were not sealed after counting, this aspect, though irregular, did not affect the results.

VOTE DISCREPANCY

124. The Petitioner depones at paragraph 34 of his supporting affidavit that there was discrepancy in the votes garnered and those in form 35A as per the numbers given to him by his agents. Forms 35A and 35B do not tally.

125. Looking at the table at page 37 of the petition, the errors in transposition and which are admitted by the 1st and 2nd Respondent show the Petitioner loosing 138 votes while the 3rd Respondent loses 105 votes. The errors thereon affected all candidates and none benefits from them. They do not change or affect the results and the 3rd Respondent retains a comfortable lead.

126. No concrete evidence of a record of votes garnered by the Petitioner for comparison with forms 35A to show the disparity is given. In any event most of the results are confirmed by the signing of forms 35A by the Petitioner's agent.

127. The report from the scrutiny and recount from 12 polling stations requested by the Petitioner confirms the accuracy of results in those polling stations and clears questions arising from polling station diaries. I make the inevitable conclusion that the magnitude of the errors complained of is negligible and one that does not affect the results.

128. In the case of **Philip Mukwe Wasike vs James Lusweti and 2 Others [2013] eKLR**, the purpose of scrutiny and recount was clearly spelt out. The Court observed as follows;

“The purpose of scrutiny is:-

- 1. To assist the court to investigate if the allegations of irregularities and breaches of the law complained of are valid.**
- 2. Assist the court in determining the valid votes cast in favour of each candidate.**
- 3. Assist the court to better understand the vital details of electoral process and gain impressions on the integrity of the electoral process.”**

129. I am satisfied that the partial scrutiny done in this matter investigated the allegations and irregularities and breaches of the law, assisted the Court in determining the valid votes cast in favour of each candidate and most importantly, assisted the Court to better understand the vital details of the electoral process and the Court gained impressions on the integrity of the electoral process. Overall, the report from the scrutiny and recount gave the electoral process a clean bill of health.

130. On ballot stuffing, the Petitioner depones in his affidavit that there was ballot stuffing which resulted in the number of votes cast exceeding the registered voters. He asserts that he relies solely on the evidence of Albert Okemwa an agent. On his part Okemwa states that he was an agent of the Petitioner at Kerina Stream 1. Despite arriving at 5.00 a.m. at the polling station, he was not allowed entry when station opened at 6.10 a.m. By the time he entered, he found an agent of 3rd Respondent, one Josephat Kenyaga inside. The ballot box for MP had more ballot papers than others. He saw agents of 3rd Respondent passing notes through the windows guiding voters on whom to vote for. He signed the form for presidential results and he was told he could not sign the one for the MP now that he had signed the other.

131. Looking at this evidence, it is not shown beyond conjecture that ballots were stuffed in the ballot box as alleged. It is not clear how Okemwa determined that the votes were more in the MPs ballot box. He was present at the counting and he doesn't state that the vote count exceeded registered voters. From the totality of evidence available the allegation is not sustainable.

132. On conspiracy of opponents against the Petitioner, it is averred that the Petitioner's opponents were allied to the NASA political outfit and they wanted the Petitioner out of the seat by whatever means. On the evidence before me, I find this a generalised claim lacking in particulars and prove. Same must fail.

133. On the issue of hiring of persons allied to candidates as election officials, the petitioner has exhibited a letter of protest to the returning officer over the appointment of Obaga John Nyamwange said to be the Principal of a college owned by the 3rd Respondent, Obwocha Alexander Okeiga, a campaigner of John Billy Momanyi, Orwaru Moribe James, a campaigner for 3rd Respondent, Mboro Daniel Keombe, a campaigner for John Billy Momanyi, Kerage Stephane, a campaigner for 3rd Respondent and Onchagwa Antony Ayega, a campaigner for 3rd Respondent.

134. In rejoinder, the 2nd Respondent avers that the Petitioner raised his protest late, 2 days to the elections but nevertheless, the 2nd Respondent dropped one of the presiding officers and 5 others were deployed as deputy presiding officers.

135. The appointment of election officials must of necessity be tempered with a high degree of neutrality of the persons picked. Where the existence of a semblance of bias can be established then such a person should not be considered for duty as an election official.

136. To achieve this **Regulation 5(2)** of the **Elections (General) Regulations 2012** provides;

“Regulation 5(2): Prior to appointment under subregulation (1), the Commission shall provide the list of persons proposed for appointment to political parties and independent candidates at least fourteen days prior to the proposed date of appointment to enable them make any representations.”

137. The obligation by the 1st Respondent is to furnish political parties with the list 14 days before elections. In our instant case, it was incumbent upon the Petitioner to show that the 1st Respondent had not supplied the list to his political party.

138. Despite the late protest the 2nd Respondent still took some remedial actions literally demoting the appointees to deputy presiding officers and dropping one.

139. Granted, given the short time before election when the protest was lodged, one wonders whether it was possible to do any better and since there is no evidence from the Petitioner's political party that they had not been supplied with the list of intended appointees, the best I can do is to delve into the issue whether the participation of the said officers prejudiced any party in the election thus affecting the results.

140. I rely on the decision in **Mokwaledi Bagwasi vs Seabe Morueng & Another, Misc. Application No. F228 of 2004** the **High**

Court at Botswana where it was held;

“Where a Petitioner asserts that an election official is biased against him, he should adduce evidence to show the manner in which the election official was biased. In the present case the Petitioners made what amounted to bald allegations and did not adduce evidence to prove those allegations.”

141. No acts or omissions of the named persons are shown to have prejudiced any candidate or interfered with the choice of the people.

TALLYING AND ANNOUNCEMENT OF ELECTION RESULTS

142. Under this head, it is the Petitioners case that the results were declared on 8/8/2017 as seen from the form 35B signed by the returning officer long before the tallying was concluded. It is common ground that the form is dated 8/8/2017 at the place where dating is provided. The Petitioner, however, is of the position that the results were irregularly declared as there appears to be 2 forms 35B, a fact conceded by the returning officer in cross examination.

143. Looking at the record of Court, the Petitioner did discharge his burden of proof on this issue and the same shifted to the 1st and 2nd Respondent to disprove the same.

144. In his evidence the 2nd Respondent (DW1) readily admits the existence of 2 forms 35B. One is signed by an agent when the other is not. He indicates that the entries made in form 35A are what are captured in the form 35B. It is his testimony that he declared the results on the night of 9/8/2017.

145. Cross examined by Mr. Otachi for the Petitioner, he stated that he started the process of tallying at the tallying centre at 11.00 p.m. on 8/8/2017 and the process proceeded to up to 9/8/2017. If there was a query, agents would raise it. He could not alter what the presiding officers presented. He could only change if he read incorrectly. As the exercise went on 4 candidates were present at the constituency tallying centre. At the close of the tally only 1 candidate was present and 1 agent. The public was there. Of the other candidates, none of their agent was there.

146. He acknowledges that the dating of 8/8/2017 (the date on the form which he says was pre-printed) is a mistake and anomalous. Re-examined by Mr. Odhiambo, he states he forgot to change the date from 8/8/2017 to 9/8/2017. Cross-examined by Mr Morara, he states that the returning officer prints the form 35B signs and dates it. Same is issued to candidates, agents and at times the press. Because of the many printed forms one may sign some and not others. In terms of figures of the votes, there was no variance.

147. I have anxiously considered the evidence herein noting the ready admission that the form in question is dated 8/8/2017 and actually 2 forms were exhibited before Court during hearing. And while this Court takes judicial notice of the circumstances, pressure and associated fatigue resultant from the heavy task electoral officials have to bear with in a very limited time and resources, the electoral body and its officials must endeavour at all times to strictly comply with **Article 86** of the **Constitution**, the Election Act and the rules and regulations made thereunder.

148. As regards the evidence of the 2 forms, I have had an advantage of perusing the data content thereon and I confirm that the forms are similar in content. The explanation given by the returning officer about the production of the form and why there could be multiple forms is plausible as it is clear that once data is captured, the form is printed and signed. It is thus possible to have many print out copies of the form. I have carefully studied the forms on record. All the entries are the same and therefore this is one and the same form.

149. In my considered view the elephant in the room is “when were the results declared”

150. Relying on the form dated 8/8/2017, the Petitioner's position is that the results were declared on 8/8/2017 and this was when all results had not been received at the tallying centre.

151. The returning officer explains that he did tallying from 11.00 p.m. on 8/8/2017 to the night of 9/8/2017. He attributes the date 8/8/2017 on the declaration as an oversight on his part the date on the form was pre-printed.

152. Other than relying on the date 8/8/2017 recorded on the form 35B, the Petitioner offers no other evidence of the declaration on 8/8/2017. Suffice it to note that the Petitioner or his chief agent were allowed by law (**Regulation 83** of the **Elections (General) Regulations 2012**) to be present throughout the tallying process at the tallying centre.

153. Indeed Osogo Geoffrey Nyamanya (PW2) the chief agent of the Petitioner confirms in paragraph 29, 31 and 32 of his affidavit that he was at the tallying centre at 1.00 a.m. On 9/8/2017, left and returned at 12.00 p.m. of 9/8/2017 and that John Oroo was announced the winner at around 9.00 p.m. on the same day (9/8/2017).

154. Despite the stress of the long hours of work monitoring the voting, counting and tallying which obviously would lead to fatigue, it is the responsibility of a candidate or his agent to be present at the tallying centre. That way, a Petitioner would be able to address with certainty the going ons at the tallying centre and provide evidence of wrong doing if at all. When the Petitioner states that the declaration of results was made on 8/8/2017 at a time unknown to the Petitioner, who would be expected to know this time" Is this not a serious dereliction of duty which would end up hurting no one else other than the Petitioner"

155. The fact that Osogo Geoffrey Nyamanya, the chief agent of the Petitioner is aware that the 3rd Respondent was declared the winner on 9/8/2017 at around 9.00 p.m. gives credence to the evidence of the returning officer that he made the declaration on 9/8/2017.

156. This leaves the Court with the question of the effect of the dating on the form '8/8/2017'. This failure by the returning officer to indicate the correct date is a breach of **Regulation 83** of the **Elections (General) Regulations 2012** which required him to sign and date the form 35B. He attributes this to a mistake or oversight.

157. It will be appreciated that the first level of declaration of results is at the polling station. The results so declared are final. The form filled at the polling station is the primary election form and all other forms are tallies of the final results at the polling station rather than confirmation forms. The **Court of Appeal** sums this succinctly in **IEBC vs. Maina Kiai & 5 Others [2017] eKLR** thus;

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

158. **Section 83** of the **Elections Act** provides;

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

This section requires a party to show that an irregularity occurred and that such irregularity affected the results. The **Supreme Court** posed the necessary question in **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others [2014] eKLR** at **paragraph 210 B** when it stated;

"In this case, as in other election matters coming up before the Courts, the question as to the nature or extent of electoral irregularities, and as to their legal effect, repeatedly arises. The crisp issue is: how do irregularities and related malfunctions affect the integrity of an election"

159. The will of the people as expressed in an election is not one to be easily disturbed. The **Supreme Court of India** in **Jeet Mohinder Singh vs. Har minder Singh Jassi, AIR 2000 SC 256** stated;

“The success of a candidate who has won at an election should not be lightly interfered with. Any person seeking such interference must strictly conform to the requirements of the law. Though the purity of the election process has to be safeguarded and the court shall be vigilant to see that people do not get elected by flagrant breaches of law or by committing corrupt practices, the setting aside of an election involves serious consequences not only for the returned candidate and the constituency, but also for the public at large in as much as re-election involves an enormous load on the public funds and administration.”

160. This Court (*Muriithi J*) in Paul Gitenyi Mochorwa vs Timothy Moseti E. Bosire & 2 Others [2013] eKLR at paragraph 24 cited with approval the case of John Fitch vs Tom Stephenson & 3 Others, QBD [2008] EWHC 501 emphasized the need to uphold the will of the people where it was held;

“The decided cases, including those which Lord Denning considered in *Morgan vs Simpson*, established that the courts will strive to preserve an election as being in accordance with the law, even where there have been significant breaches of official duties and election rules, providing the results of the election was unaffected by those breaches.”

161. The position is amplified in the decision of *Maraga J*, (as he then was) in Joho vs Nyange (2008) 3 KLR EP 500. He stated;

“Irregularities which can be attributed to an innocent mistake or an obvious human error cannot constitute a reason for impeaching an election result. This court is mindful of the fact that at the stage where election officials are required to tally the results, some of them would have stayed awake for more than thirty-six (36) hours and therefore simple arithmetic mistakes are bound to happen.”

I am satisfied in the same vein that an oversight regarding the changing of the pre-printed date by a returning officer may occur for the same reasons. Where the results posted from the polling stations are verifiable such an oversight may not necessarily be a basis for annulling the election where it is shown that the results are not affected.

162. And what does “affected the result” mean” *Georges CJ* in the *Tanzanian Case* of Mbowe vs Eliufoo [1967] EA 240 interpreted this to mean;

“In my view in the phrase “affected the result”, the word 'result' means not only the result in the sense that a certain candidate won and another candidate lost. The result may be said to be affected if after making adjustments for the effect of proved irregularities the contest seems much closer than it appeared to be when first determined. But when the winning majority is so large that even a substantial reduction still leaves the successful candidate a wide margin, then it cannot be said that the result of the election would be affected by any particular non-compliance of the rules.”

163. The question that comes into focus is whether the wrong date in the form which the returning officer readily admits to have forgotten to change affects the result.

164. On the material before me, I consider the error on the date an administrative one and which does not affect the result. I am fortified in that finding by the holding in Morgan vs Simpson [1974] 3 ALL ER where the Court stated;

“...We are dealing here with a challenge based on administrative errors. There is no allegation of any fraud, corruption or illegal practices. Nor is there any suggestion of wrongdoing by any candidate or political party. Given the complexity of administering a federal election, the tens of thousands of election workers involved, many of whom have no on-the-job experience, and the short time frame for hiring and training them, it is inevitable that administrative mistakes will be made. If elections can be easily annulled on the basis of administrative errors, public confidence in the finality and legitimacy of election results will be eroded. Only irregularities that affect the result of the election and thereby undermine the integrity of the electoral process are grounds for overturning an election.”

165. The duty of the returning officer and indeed of all election officials to properly fill the forms cannot be taken lightly. But where a mistake arises out of their advertent, inadvertent, negligent, incompetent or careless act, it would in my view, be a travesty of justice and a defilement of the sacred expression of the will of the people expressed at the ballot to allow such acts or omissions to vitiate the election when the vote count is verifiable and not successfully challenged.

166. Without an effective challenge on the results declared all the way from the polling station, the attack on a derivative form 35B in regard to the date it was signed and which anomaly is plausibly explained cannot be a basis to annul an election.

167. Regarding errors in filling of statutory forms this Court (*Majanja J*) In Wavinya Ndeti vs. IEBC & 4 Others [2013] eKLR, stated;

“There was also criticism as to the form 36 which was used to announce the election results. The returning officer announced the results from a handwritten form 36. That form contained results that was transposed from forms 35 from various polling stations. This Court has already considered some of the errors that occurred in the transposition. Looking at the handwritten form 36, one notes that it was not dated by the returning officer. Secondly it gave results of only 2 candidates were entered. Thirdly the results were signed by only agents of 2 parties. Interestingly, one of them was an agent of the LPK party which did not have a candidate for the National Assembly seat and could not therefore have been an agent for that election. Clearly the manner in which the form 36 was completed was irregular and unsatisfactory. Nevertheless in respect of the final tally for each candidate the results were on the front page of form 36. This Court is not told that those results are inaccurate or do not reflect the true count of the ballots from the various polling stations. The form 35 is the primary document which contains the result as tallied and announced at the polling station. The Petitioner has been unable to impeach the integrity of the forms 35 that were used in that election. What then would matter is whether the results entered in the handwritten form 36 was an accurate transposition of the results from form 35A from the polling stations..... For these reasons, the Court finds that the irregularities in form 36 were not substantial enough for the Court to annul the outcome of the election.”

168. I come to the conclusion that the Returning Officer made a serious oversight by failing to align the date on the form with the date on which he declared the results. I am persuaded, however, based on the evidence adduced, that this was a genuine mistake which does not affect the results. The form 35B has entries of all the polling stations from the constituency. PW2 confirms the tallying process was going on even on 9/8/2017. The will of the people is discernable. I choose to give effect to the will of the people.

169. On the question whether the Petitioner enjoined all necessary parties, I note various persons have been mentioned in connection with commission of criminal offences and other malpractices. There has been a change in the law in that the **Election Laws (Amendment) Act, 2017**, took away the power of the Court to find a person guilty of an election offence. The law as currently constituted empowers the Court to make a finding that an electoral malpractice of a criminal nature may have occurred and refer the matter to the Director of Public Prosecutions. The DPP is then required to initiate investigations and commence criminal prosecution if deemed appropriate. In that case therefore the joinder of such a person to the petition is not mandatory.

170. This Court (*J. Ngugi J*) in Clement Kungu Waibara – vs. Anne Wanjiku Kibe and Another [2017] eKLR (Election Petition No. 1 of 2017 at **Kiambu paragraph 29** of ruling dated 30/10/2017), while addressing a similar scenario stated;

“What this development means is that an election Court can no longer make a finding that a person has committed an election offence during the hearing of an election dispute. All that the Court can do is to refer a finding to the DPP for further investigations. This, in my view, lessens the need to have a party against whom the Court may ultimately find to have propagated an electoral malpractice which is criminal in nature to be a necessary party in the election Petition.”

CONCLUSION

171. Having considered the pleadings herein and the available evidence as presented by the parties as well as the learned submissions by Counsel, I come to the inevitable conclusion that the election of Member of National Assembly for Bonchari Constituency was conducted within the Constitution and the electoral law. There is no prove of irregularities and where minor errors have been shown to exist and where acts of violence are shown to have occurred, the same did not affect the conduct and results of the election.

COSTS

172. Costs follow the event. Section **Section 84** of the **Elections Act** provides that;

“An election Court shall award costs of and incidental to a petition and such costs shall follow the cause.”

Rule 30(1) of the **Election Petition Rules** provides as follows;

“30(1) The Court shall at the conclusion of an election petition, make an order specifying-

- (a) The total amount of costs payable.**
- (b) The person by and to whom the costs shall be paid.”**

173. . Placing reliance on the case of **Kalembe Ndile and Another vs Patrick Musimba and Others [2013] eKLR** where the Court stated;

“Costs awarded should be fairly adequate to compensate for work done but at the same time should not be exorbitant as to unjustly enrich the parties or cause unwarranted dent on the public purse or injure the body politic by undermining the principle of access to justice enshrined in Article 48 of the Constitution.”

and noting that the petition was not complex and the issues were generally straight forward, I make a finding to cap the instruction fee at Kshs. 2.5 million.

174. With the result that based on the pleadings and evidence on record and learned submissions by Counsel, I come to the unhesitating conclusion that the Petitioners have failed to prove any of the grounds upon which the petition was predicated. The Petition is dismissed.

ORDERS

175. The final orders of Court are as follows;

- (a) The petition herein is hereby dismissed.
- (b) The 3rd Respondent was validly elected as the Member of National Assembly for Bonchari Constituency.
- (c) The Respondents are awarded costs as follows;
 - (i) Instruction fees at Kshs. 2.5 million for the 3rd Respondent.
 - (ii) A global sum of Kshs. 2.5 million in instruction fees for the 1st and 2nd Respondents whose defence was mounted jointly.
 - (iii) The costs shall be taxed and total costs certified by the Deputy Registrar of this Court.
- (d) A certificate of this determination in accordance with **Section 86(1)** of the **Elections Act 2011**, shall issue to the Independent Electoral and Boundaries Commission and the Speaker of the National Assembly.

JUDGMENT SIGNED, DATED AND DELIVERED AT KISII THIS 27TH DAY OF FEBRUARY, 2018.

A. K. NDUNG'U

JUDGE

In the presence of:

Otachi & Moenga for the 1st Petitioner

Mr. Odhiambo for the 1st and 2nd Respondent

Morara for the 3rd Respondent

N. Limo Court Assistant

A. K. NDUNG'U

JUDGE



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