



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

ELECTION PETITION NUMBER 1 OF 2017

IN THE MATTER OF ARTICLE 87(2) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE ELECTIONS ACT NUMBER 24 OF 2011

AND

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

AND

IN THE MATTER OF THE ELECTION FOR GOVERNOR FOR TURKANA COUNTY

JOHN MUNYES KIYONGA. PETITIONER

VERSUS

JOSEPHAT KOLI NANOK. 1ST RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION. 2ND RESPONDENT

GEORGE OYUGI. 3RD RESPONDENT

J U D G M E N T

This is a petition filed by and the Petitioner **John Munyes Kiyonga** challenging the election and declaration of the 1st Respondent **Josephat Koli Nanok** as the duly elected Governor for Turkana County in the General Election held on 8th August, 2017. The 2nd Respondent IEBC is a constitutional body with the mandate to manage and conduct elections and referendum in Kenya pursuant to Article 88 of the Constitution of Kenya 2010. The 3rd Respondent George Oyugi was the County Returning officer appointed by the 2nd Respondent to conduct the elections and declare final results of the election in Turkana County. The petition is brought pursuant to: -

1. The petitioner is entitled to present this petition under Article 87(2) of the Constitution of Kenya, 2010 (“the Constitution”, the Elections Act No. 24 of 2011 (the Act”), the Elections (General) Regulations, 2012 (“the regulations”) and the Elections (Parliamentary and County Elections) Petition Rules, 2017 (“the Rules”).

2. The petitioner states that the election for the Governor for Turkana County was held in 8th August, 2017 (“the election”), where the Petitioner and the 1st Respondent were candidates and the 3rd Respondent declared the 1st Respondent, Josephat Koli Nanok as the winner of the Turkana Governor’s seat.

3. After the counting and tallying of the votes cast the 3rd Respondent declared the results on 11th August, 2017, at the Turkana University college at about 1.00 p.m., the 2nd and 3rd Respondents declared that the 1st Respondent had won the election and that the results were as follows: -

<u>Item No.</u>	<u>Candidate</u>	<u>Votes</u>
1.	John Munyes Kiyonga	53,306
2.	Josephat Koli Nanok	73,913

The grounds for challenging the election of the 1st Respondent are: -

a. Violence was witnessed in the following areas: -

At Kaeris Primary School, Makutano Primary, Koputiro Primary, Nakwamoru Primary, LKataruk/Loboi Ward Loima Constituency and violence against John Osing Ayapan the Chief Constituency Agent of the Jubilee Part in Loima Constituency.

b. As a result of the violence in the above areas, the elections could not be conducted in a fair, credible, transparent and verifiable manner therefore affecting the outcome of the results to the detriment of the Petitioner.

c. The 1st Respondent through his agents committed election offence of bribery contrary to Section 9 of the Election Offences Act in the following manner: -

i. Jackson Elipan of mobile number 079244561, a known blogger received Kshs.20,000/- from Jeremiah Ekamais Lomorukai the member of National Assembly for Loima Constituency elected under the ODM Ticket of mobile number 0712218440, an ODM Parliamentary aspirant of Loima Constituency of mobile number 0701218444 on the 17th day of June, 017 at 8.30 a.m. as an inducement to support the 1st Respondent’s campaign bid.

ii. Francis Imojong, a campaign agent for the 1st Respondent was arrested by members of the public bribing voters and Ksh.29,600/- was recovered from him. The matter was reported to Assistant Chief Nakalale sub-location Mr. Barnabas Eloilo who further reported the matter to the Chief Nakalale Location Mr. Alfred Locham on 8th August, 2017.

iii. On 7th August, 2017 at Kakuma Ward, Nayanae-Emeyen Village of Turkana West Constituency, Eliud Emoni a campaign agent for the 1st Respondent was arrested on claims of voter bribery and reported at Kakuma Police Station and booked under OB number 38 dated 8th August, 2017.

iv. Chris Aletea the County Executive Officer for Water and Irrigation in the Turkana County Government visited Nagis Polling Station at around 12.00 p.m. acting as the 1st Respondent’s agent and was seen bribing votes in the vicinity of the polling station.

v. The 1st Respondent on 6th August, 2017 went to Jamia Mosque and gave out Ksh.300,000/- to the congregation in order that they vote for him.

d. The 1st Respondent through his agents committed election offence of use of public resources contrary to Section 14 of the Election Offences Act in the following manner: -

i. A county Government driver, Michael Lokalel used a County Government vehicle whose number plate had been removed to ferry voters to Makutano Primary Polling Station, Naduat Polling Station and Moru-Angibuin Polling Station. Michael Lokalel

did the foregoing as an agent of the 1st Respondent.

ii. Kirya Andrew a Ward Administrator for Kanamkemer ward on 8th August, 2017 acting as an agent of the 1st Respondent was spotted moving from Lokori Primary School to other polling stations using a Turkana County Government vehicle registration number 23CG131A; and;

iii. Chris Aletea the County Executive Officer for Water and Irrigation in the Turkana County Government was spotted at Nagis Polling Station acting as an agent of the 1st Respondent driving vehicle registration number 23CG 001a.

e. The Respondent's agents committed election offence of participation in election by public officers contrary to Section 15 of the Election Offences Act.

John Loitaruk the Assistant Chief Kangakipur, Anthony Apalia the Director for Finance, Augustien Logiron the County Executive Officer Roads, Elizabeth Echukule Etuko is a cleaner with the Ministry of Energy, James Kaukon Eriton a CDF Clerk, David Ewoi a messenger Ward administrator's office Kanamkemer Ward, Captain Augustine Lakwang the County Security Advisor, Turkana Country Government, Emmanuel Ekai Ekeno the Chief Officer Roads in the Turkana County Government.

f. There was an apparent conflict of interest between the officers appointed by the 2nd and 3rd Respondents to conduct and supervise the elections in that the officers are employees of the Turkana County Government where the 1st Respondent was the Governor. Those who were appointed as presiding or polling clerks include: -

Mr. Mark Erot, Mr. Hose Kiapa Emeri, Mr. Nelson Nanak Lowal, Ms. Sheila Nakuruka. Ms. Josephine Silale, MS. Arukudi Lokipoi Sarah, Mr. David Kampala Omakada, Ms Nancy Akai Tatoi, Ms Longor Alice Ebei, Mr. Akila Epetet Isaiah, Ms. Eunice Longiti, Ms. Tioko Ann Lopong, Mr. Epapa Esekun Stephen, Mr. Francis Enuke Lorinyok, Mr. Henry Nalipan,

g. The 2nd and 3rd Respondents by themselves and/or through Officers and agents acting under them or under their direction further committed election offences by breaching their official duties and code of conduct by opening the following polling stations late and closing early without any justification. These stations include: -

Naurendria water point, Natapar polling station, Nabwel Ekorot primary School, Lorumor mobile polling station, Nakinomet Primary Polling Station, Lokumae Water Point Polling station,

h. The 2nd and 3rd Respondents opened the following polling stations late due to the fact that polling materials arrived late. No pro rata extension of time was made so as to enable the voters to exercise their rights. The polling regions are in Turkana North which are the strong holds of the Petitioner and thus disenfranchising the Petitioner. These include: -

a. Nabwel Ekoroti Primary School, Ekicheles Primary, Kalosep Polling station, Atapar Polling Station, Makutano Polling Station.

i. The 2nd and 3rd Respondents themselves and/or through officers and agents acting under them or under their direction failed to put appropriate structures and mechanisms for the safe keeping of the election materials in that: -

a. On 9th August, 2017 Mr. Etabo Ekiru Moru found a child playing with a ballot paper at Nadwat Trading Centre. He also picked another ballot paper on his way to Kaenyangaluk.

b. On 10th August, 2017 Mr. Etabo Ekiru Moru found torn ballot boxes that had been stuffed under a tank next to a toilet at Nadwat Primary school: and

c. On 15th August, 2017, a lady called Elizabeth Lokolio found a ballot box for the Officer of the Governor at Napelilin Junction.

j. The 2nd Respondent's officer, Mr. Julius Ekidor a Presiding Officer at Kanamkemer Ward, Turkana Central Constituency was charged and arraigned in court on 15th August, 2017 for making a false entry into a record/a return or other documents contrary to Section 6(a) of the Election Offences Act.

He, therefore prayed to the court for orders that: -

i. A declaration that the Turkana County Gubernatorial Election carried out by the 2nd Respondent on 8th August, 2017 was not conducted in accordance with the principles laid down in the Constitution, the Elections Act, the Elections (General) Regulations, 2012 and the Elections (Parliamentary and Country Elections) Petition Rules, 2017.

ii. There be scrutiny and recount of all votes cast at Nadawat Primary School Polling Station in Kakalale Ward, Turkana Constituency, Lopangae Polling Station in Kalokol Ward, Turkana Central and Koyotoberu Mobile Polling station in Turkana West Constituency.

iii. A declaration that due to the widespread irregularities committed in the conduct of the gubernatorial election held on 8th August, 2017. The declaration that the 1st Respondent was the winner is invalid.

iv. A declaration that the 1st and his agents committed electoral malpractice during the Gubernatorial Election held on 8th August, 2017 which affected the integrity of the Elections.

v. A declaration be and is hereby made that Josephat Koli Nanok was not validly elected as the Governor for Turkana County in elections held on 8th August, 2017.

vi. A determination be and is hereby made that an electoral malpractice of a criminal nature has been committed by Josephat Koli Nanok.

vii. A declaration be and is hereby made that the Gubernatorial election held on the 8th day of August, 2017 is unconstitutional, illegal, null and void ab initio and an order that fresh elections be held.

viii. The Respondents be condemned to pay the Petitioner's cost of and incidental to this petition.

The 1st Respondent Josephat Koli Nanok filed his response to the Petition where he averred that on 11th August, 2017, the 2nd Respondent announced the he had won the gubernatorial election contest on the basis of the following results which were arrived at after the 2nd and 3rd Respondents had assured themselves that the results were accurate.

NAME	VOTES
Josephat Koli Nanok	73,913
John Munyes Kiyonga	53,306

He further avers that he actively participated in all aspects of the electoral process for the Gubernatorial position for Turkana County either directly or through agents of the NASA Coalition and unequivocally affirm that the 2nd Respondent and its staff including the 3rd Respondent conducted the entire process with remarkable diligence, efficiency and in full fidelity to the standards established in the Constitution and all the electoral laws. That the difference between the votes cast in his favour and those cast in favour of the Petitioner is an enormous 20,607 votes and in all humility the said difference is very significant and emphatically demonstrates the resolve of the people of Turkana to exercise their free and sovereign will.

The 1st Respondent contends that the Gubernatorial Elections for Turkana County were free, fair and transparent thus enabling citizens and voters to exercise their political rights in accordance with Article 38 of the Constitution of Kenya 2010. It was by secret ballot and it was free from violence, intimidation, improper influence or corruption on the part of the 1st Respondent and/or his agents. That it was administered in an impartial, neutral, efficient, accurate and accountable manner.

He further contends that the voting process and subsequent processes until the declaration and announcement of the Gubernatorial Election results were done in accordance with the law and in a transparent manner. That the election process was conducted by the 2nd and 3rd Respondents in a satisfactory manner that complied with the law in that: -

- a. The Election materials, including biometric voter verification kits and ballot papers were received in all polling station across the county:
- b. The biometric voter verification kits were successfully used in all polling stations and where they malfunctioned prompt action was taken to repair them.
- c. In the event that the biometric voter verification kit failed to identify a voter, the prescribed complementary identification mechanism was used.
- d. The voting process continued smoothly throughout the country and voting closed on time in a vast majority of polling stations across the county.
- e. Candidates and/or their agents and the agents of political parties were allowed at the polling stations to monitor the process of voting, counting of the votes and recording of the results and transmission of the results.
- f. Votes counting was done at the polling stations in the presence of the candidates and/or their agents the presiding officers of the polling station then recorded the count of the vote in a tallying sheet in Forms 35A sowing the number of rejected ballot papers with reasons. After the process of counting and the signing the Forms 35A, the presiding officers of the polling station sealed each respective ballot box.
- g. The presiding officer of each polling stations submitted the From 35A in electronic form in the presence of the candidates and/or their agents, keyed in results form the Forms 35 A and then submitted it to the Constituency Tallying Centre though scanning them to the returning officers at the Constituency Tallying Center. This was done before the hard copies of the Form 35A was taken to the Constituency Tallying Centre.
- h. At each constituency tallying centre, the Forms 35A received from the polling stations were collated by the returning officer and a declaration in the form of Forms 35B was signed by the retuning officer together with the candidates or their agents to confirm that the various Forms 35A received were a true reflection of the count recorded by the presiding officers at the polling stations.
- i. The signed Forms 35B were thereafter scanned and transmitted to the electronically and physical forms were delivered county tallying centre located at the Turkana University College.
- j. All transmitted Forms 35A and Form 35B were made accessible to all parties at the County Tallying Centre.
- k. The Gubernatorial Election results were declared and announced on account of the results declared in Forms 35A at the palling stations and tallied in forms 35B a the Constituency Tallying Centres. The 3rd Respondent announced the gubernatorial Elections results at the County Tallying Centre on 11th August, 2017 within the time stipulated by law.

The 1st Respondent further contends he denies contravening the Rule of Law and the Principles of the conduct of a free and fair election through the use of intimidation coercion of Public Officers and improper influence of voters as pleaded in paragraph 10 of the petition and put the Petitioner to very strict proof. In that he did not bribe any voters either before or on 8th August, 2017 as deponed by the Petitioner in paragraph 9 of his affidavit and the Petitioner is put to very strict proof thereof.

1st Respondent in his response to paragraphs 10 of the Petitioner's affidavit, he categorically avers that neither him nor any of his agents and/or proxies used public resources to further his political interest through campaigns as deposed therein.

Mr. Nanok avers that he did not collude with the 2nd and 3rd Respondents or any one for that matter to secure employment of some of his staff as election officers.

He further avers that the Petitioner has not proven that any election materials were mishandled and therefore the request for a scrutiny and recount is baseless and misconceived and the same should be dismissed forthwith. In totality he avers he is a stranger to the allegations in the Petition that the Gubernatorial Elections for Turkana County were not free and fair by reason of, among others, careless, irregularities, illegalities and impartiality and the Petitioner should be put to strict proof with regard to those unsubstantiated and ill-willed claims

The 2nd and 3rd Respondents opposed the petition. The 3rd Respondent George Oyugi in his response averred there were no bribing of voters in any polling station particularly Nakinonet Polling Station, Nakwamweki Polling Station, Makutano Polling Station, St. Mary's Primary School Polling Station, St. Monica Polling Station, Napuu Primary School Polling Station, Handcraft Polling station and Lorunga Polling Station. No such report was brought to the attention of the 2nd Respondent's officers.

He further avers that the polling stations diaries and Forms 37A confirm that petitioner's agents were present in all the polling stations.

Mr. Oyugi contends that the 2nd and 3rd Respondents deny the allegations that some votes were not included in the final tally particularly Maru Angibun Polling Station and state that all the results were announced and no results from any polling station were left out in the tallying process.

He further contended that the Petitioner must be interrogated on the allegation that KIEMS Kit filed to work particularly in Lowarengak Polling station and the Presiding Officer was forced to use manual voting. That the voters whose biometrics could not be detected were identified through alphanumerical search system. In any event, there was no discrepancy between the votes cast and the registered voters. All registered voters identified through the KIEMS Kit were allowed to vote.

Mr. Oyugi contended that the 2nd and 3rd Respondents deny the allegations by the Petitioner there was harassment or chasing away of agents by the Presiding Officers; that the 1st Respondent's and/or the County Government of Turkana vehicles were used to transport the ballot boxes particularly in Nadwat and Kobwin Polling Stations.

The 2nd Respondent used its own means to transport the ballot boxes all the polling stations within the county. That the ballot boxes were duly sealed with tamper proof seals and serial numbers were recorded by all the agents present and by the polling officials in the polling station diary witnessed by all agents.

Further Mr. Oyugi contended that no agents were denied the right to escort the ballot papers to the respective tallying Centre's as long as they organized their own means of transport as the 2nd Respondent's vehicles could only take election officials and the security details. That all agents obtained a copy of the results in all polling station particularly in Handicraft polling Station and Kawalese Polling station.

The 2nd and 3rd Respondent's avers that all ballot papers and their counterfoil were secured and put into the ballot boxes for future verification whenever necessary.

2nd and 3rd Respondents further avers that the allegation of violence by the supporters of the 1st Respondent has no basis at all. There was no report of violence reported to the 2nd Respondent's officers either before, during or after the election. That no other ballot papers used by voters apart from those that were supplied by the 2nd Respondent's and which had the 2nd Respondent's security features.

The 2nd and 3rd Respondents denied the allegation of results having been altered in favour of the 1st Respondent and avers that no votes were stolen added or misallocated to the 1st Respondent or any other candidate hence the process was credible and accurate. That none of its presiding officers altered the results in favour of the 1st Respondent particularly in Kaikol Polling Station and Lorengelup Primary School Polling Station.

2nd and 3rd Respondent's further denies that the 1st Respondent committed any electoral offence or malpractice, particularly bribing of voters or campaigning at the polling station as alleged by the Petitioner as no such report was made to its officers. That the final tally of votes for Turkana County revealed that the Petitioner had garnered 53,306 votes while the 1st Respondent had garnered 73,913 votes hence the 1st Respondent was declared validly elected as the Governor for Turkana County.

The 2nd and 3rd Respondents avers further that no widespread irregularities were committed in the conduct of the Gubernatorial Elections held on 8th August, 2017. Any minor malpractices, if any, were not premeditated and did not affect the results of the election. That the election, polling and counting of the votes were free, fair, accurate, transparent and credible and the tallying was accurate and verifiable, the results declared reflected the will of the people of Turkana County.

PETITIONER'S CASE

The Petitioner John Munyes Kiyonga testified as PW 10 in this Petition. He adopted his affidavit sworn on 4th September, as his evidence in chief. He testified that in the Gubernatorial Election held on 8th August, 2017 he garnered 53306 votes and the 1st Respondent Josephat Koli Nanok garnered 73913 and was declared the winner. He testified that the election was marred by violence. He gave the instances of violence which occurred at Kaeris Primary School where the Presiding Officer was harassed by Anthony Apalia; at Makutano Primary School where one Horon Peer Ekingoi shot in the air, at Kaputo Primary School where the presiding officer chased away his agent Philip Maaruki at Nakwamoru Primary Polling Station where the Presiding Officer Joseph Longolea harassed and chased away his agent Simon; and in Loima Constituency where his chief agent was attacked and did not attend the counting at the Tallying Centre.

The Petitioner testified that there were cases of bribery of voters by the 1st Respondent. He gave instances of bribery which included one where Jackson Elipan received 20,000/- from Jeremis Ekamii an MCA vying under ODM ticket and from an ODM Parliamentary aspirant at Loima Constituency as inducement to support the 1st Respondent. Campaign agent of the 1st Respondent was arrested by Member of Public bribing voters and Ksh.29,600/- recovered from him and matter reported to the Chief Nakalale Location, Eliud Emmi a campaign agent of the 1st Respondent was arrested on allegation of voter bribery and booked at Kakuma Police station under OB No. 38/08/08/2017; Chris Alutei the County Executive Officer for Water was seen bribing voters near Nagis Polling Station. On 6th August, 2017 the 1st Respondent gave out Ksh.300,000/- to worshippers at Jamia Mosque in order to vote for him.

The Petitioner testified that the 1st Respondent used public resources more particularly county vehicles for his campaign. He gave an instance where Michael Lokalel a driver with County Governor used a county government motor vehicle which had no number plate to ferry voters to polling stations in Makutano, Naduat and Moru-Angibuin; that Andrew Kirya, a ward administrator used Motor vehicle registration No. 23CG131A while acting as an agent of the 1st Respondent and Chris Aletea the County Executive Officer of water was seen driving motor vehicle Reg. No. 23CG001A.

On use of public officers for campaign by the 1st Respondent, Petitioner gave the instances of John Loitaruk the Assistant Chief; Anthony Apalia Director of Finance, Augustine Logiron the County Executive for Roads who all campaign for the 1st Respondent. Some County Officers were appointed, as 1st Respondent agents in various polling stations. These included James Kaukon Eriton a CDF clerk whom was appointed ODM Party agent at Napuu Primary School; David Ewoi as and ODM Party agent at Naotin Primary School, Captain Augustion Lakeng County Security Advisor as 1st Respondent agent at Napuu Primary and Handicraft Polling Station and Emmanuel Ekeno as 1st Respondent agent at Napuu Primary School.

In respect for the 2nd and 3rd Respondent, the petitioner testified that they employed staff of the County Government as Presiding Officers. He testified that those staff were deployed at Kainuk Trading Polling Station, Kangakipur Primary School, Lokitaung Primary, Lokalobochia Water Point, Kalokol Girls, Handicraft Polling Station, Nangolipus, Nakurio, Nakwamekwi Lopangae, Namadak Primary, Kapedo Girls and Henry Nalipua a Surveyor with the County Government was appointed as Deputy Returning Officer Turkana Central Constituency.

In respect to 2nd and 3rd Respondent the Petitioner testified that they breached their code of conduct by colluding with the 1st Respondent to open the polling station late; this was particularly so in Naurendria Water Point where polling station opened at 2 p.m. and closed at 6 a.m. at Atapar Polling Station where it was opened at 6 p.m. and closed at 6 a.m. on 9th August; Nabwel Ekorot Primary School where voting started at 12 p.m. and closed at 5 p.m. at Lorumor Mobile where the polling station opened at 2.30 p.m. and closed at 8.00 a.m., Nakinomet Primary where it opened at 9 a.m. in 8th August, 2017 and closed at 10 a.m. on 9th August, 2017 and Lokumu Water Point it opened at 2.00 p.m. Petitioner testified that as a result of the late opening, the voter turnout in those polling station was affected and it recorded low voter turnouts. Petitioner finally testified that the 2nd and 3rd Respondent did not avail electoral materials in time which led to voting starting late in some polling station and closed early without giving adequate compensation for the lost time. These polling stations though starting late were closed at 5 p.m. They include Nabewel Ekoroti Primary, Ekicheles Primary, Kalosep, Atapar and Makutano Polling Station.

The petitioner testified that the 2nd and 3rd Respondent failed to safeguard voting material in that on 9th August, 2017 ballot papers were seen at Nadwat Trading Centre at Kaenyangaluk; in 10th August, 2017 one Etabu Ekiru Moru found torn ballot papers next to a toilet at Nadawat Primary School and on 15th August, 2017 one Elizabeth Lokolio found a ballot box at Napelilin Junction.

PW 1 James Akuye Ebei testified that on 15th August, 2017 at around 1.00 p.m. he received information from one Elizabeth Lokolio who informed him that he had seen a ballot box at Napelilin Junction in Loima. He and others went there where they found a ballot box lying beside the road and a lady selling charcoal nearby. The charcoal lady informed that she did not know who had dropped it there. On checking the ballot box was sealed and had a hole from where he would see ballot papers. He would not relate from which polling station it was from as it had both Lapargae and Kayotobera names on it. They took the ballot box and handed it to Hon. Akuja's driver who took it to the Petitioner.

PW 2 Etabo Ekiru testified that on 9th August, 2017 at 4.00 p.m. at Nadwar Trading Centre he saw a child playing with a ballot paper which he recovered from him and on the way he recovered another ballot paper when he went to Nadwar Primary School he found more torn ballot papers which were for election or Members of County Assembly. He took them to the Petitioner. **PW 3 Samuel Ekulani** testified that he voted at Kakuma Boys Secondary School where the Polling Station opened at 12.30 p.m. and closed at 10.30 p.m. he saw a vehicle belonging to County Government bring in voters.

PW 4 Epetet Milton Arepe testified that he was at Namorua Akwaa Water Point Polling Station at 5 a.m. when he saw a County Government vehicle bring ballot papers together with IEBC Officials. The vehicle also transported voters from that polling station to Nadwat Primary School and Kobwin Water Point. The vehicle had no registration number but he knew the driver.

PW 5 Boaz Lochodo testified that he was an agent of Jubilee Party at Nagis Primary School in Loima Constituency and noted that the 1st Respondent had more than two agents. He alerted the Presiding Officer who directed the extra agents to leave the polling station which they did. The agents who left then joined the queue of voters they bought drinks for the voters. He also noticed that Chris Aletea a County Executive Officer for Water was interacting with voters with the aim of influencing them to vote for the 1st Respondent. **PW 6 Esinyen Winson Ekitela** testified that he was a Jubilee Agent at Napuu Primary School Polling station and the polling station opened at 6.30 a.m. and closed at 5.30 p.m. he testified that after counting of the voters the Presiding Officer did not give them the results at the polling station though he signed the requisite forms. **PW 7 Albert Mio Rhiaman** was a Jubilee Agent at Nakinonet Primary School. He testified that on 6th August, 2017 the 1st Respondent agents brought foodstuff, Maasai beads, Maasai sheets and clothes to the residents of his village. One Abdulahi Ahmed also distributed maize and rice to the residents and the Wiper Aspirant for National Assembly and Member of County Assembly ferried the ballot boxes and voting materials. He also testified that Lorumor Mobile Polling Station materials were taken to Loruth Primary School where only 50 voters voted as others were not able to travel to the polling station. **PW 8 Ekidor Linus Namoe** testified that he was a Jubilee agent for Turkana Central Constituency. He stated that he observed several cases of bribery by agents of the 1st Respondent. He saw Augustine Logiron and Emmanuel Ekai soliciting and bribing voters at Napuu Primary School Polling Station. He saw Captain (Rtd) Augustine Lokwang speak to voters. At Kanamkemer he saw Ann Ajele Chief Executive for Health on the line soliciting voters; at Lodwar High School Tallying Centre an IEBC Official had committed an election offence and was arrested; he also noticed use of County Government vehicles and that most of the ODM agents were Turkana County Government Officials.

PW 10 Chief Inspector Solomon Wamae the OCS Kakuma Police station confirmed receipt of a vehicle Registration No. KBM 988K Toyota Hilux belonging to an MCA which had in it a magazine and 8 rounds of ammunition, 2 smoke jackets and a rifle strap.

PW 11 Chief inspector Francis Njombo the OCS produced an OB extract of a report made to Lorgum Police Station on complaint of assault. **PW 12 IP Mike Tirop** of Lodwar Police Station confirmed arrest of Julius Ekodor on offence of making a false entry.

PW 13, Christopher Ekiru a Presiding Officer at Kaeris Primary School testified that in one of the streams at the polling station, the KIEMS KITS failed to work and as a result he was harassed by the MCA candidate and one Antony Apalia and other people and after consultation with his superiors he was allowed to use the manual system. **PW 14 Mohamed Al Haji Ali** testified that he received Ksh.1,000/- from one Yusuf and Mohamed Roba as an inducement to vote for 1st Respondent at the Jamia Mosque. **PW 16 Koech Wilberforce Ngetich** received a ballot box from Ngatia Advocate and took it to the IEBC Headquarters.

1st Respondents Case

The 1st Respondent **Josephat Koli Nanok** testified that the voting process in Turkana County was transparent and electoral materials were received in all polling stations, BVR Kits and KIEMS Kits were used and where they malfunctioned prompt action

was taken including use of complementally mechanisms, the candidates agents were allowed in polling stations, vote counting was done at polling station and appropriate Form 35A signed, tallying at the county tallying centre were done according to law and declaration of the winner done by the county Returning Officer. He denied bribing any Muslim faithful at Jamia Mosque or used public resources in particular county government vehicles and staff in his campaign. He denied that there was one collusion between him and 2nd and 3rd Respondent to recruit country staff as presiding officers or clerks in polling stations. He testified that the election was not marred by violence which had the effect of disenfranchise the voters. 1st Respondent testified that the electoral materials were safely kept and in his own assessment the gubernatorial election in Turkana County on 8th August, 2017 was free, fair and transparent.

RW 2 Abraham Losinyen the Chief of Staff Turkana County testified that he was not an agent of any political party or candidate; he did not participate in the campaign nor bribe voters to influence them to vote for the 1st Respondent. **RW 3 Augustine Logirun** the County Executive Officer Roads at Turkana County denied campaigning for 1st Respondent or engage in any political activity during the period. **RW 4 Joseph Emathe** denied ever bribing anybody to vote for 1st Respondent. **RW 5 Captain (Rtd) Augustine Lokwang** the Security Advisor, **RW 6 John Lotaruk**, **RW 7 Eliud Emoni**, all denied participating in the campaign or bribing voters. **RW 8 Francis Imojong** testified how he was attacked by people who took away his Ksh.2,900/- because they knew he was not supporting Jubilee. **RW 10 John Lochodo** too denied bribing voters.

RW 11 George Oyugi the 3rd Respondent testified that he was the County Returning Officer for Turkana County in the elections held on 8th August, 2017. He testified that after the tallying process he declared the 1st Respondent the winner having garnered 73,913 votes against the petitioner's 53306 votes. He denied that there were any instances of bribery, that the petitioner agents were chased away from the polling stations; that the results of all polling stations were included in the County Tallying Centre. He testified that the KIEMS Kit were used in most polling stations and where by malfunctioned, there was use of complementary mechanisms and all registered voters who came to vote voted. He testified that the election materials were secured and no ballot papers were used except those supplied by 2nd Respondent whose counterfoils were retained. Finally he testified that there were no widespread irregularities committed and any minor malpractices can or did not affect the results of the election and the results declared reflected the will of the people of Turkana County.

From the pleadings and evidence the issues that commends for determination in the petition are: -

- 1. Whether the Gubernatorial Elections for Turkana County held on 8th August, 2017 were marred with electoral irregularities, illegalities, improprieties and non-compliance with electoral law; which affected the results of the election"*
- 2. Whether there were election offences committed in the election of the Governor Turkana County and by whom"*
- 3. Whether the 1st Respondent was validly elected as Governor Turkana County"*
- 4. Which orders are to be issued by the court"*
- 5. Who bears the costs of the Petition"*

This court will determine the above issues which are the central ones running in this petition.

The **Constitution and Legal Principles Governing the Conduct of Elections in Kenya**. The Constitution and Electoral laws govern the Electoral process in Kenya. It has always been held that election is not an event but a process. Justice C. K. Thakker: Judicial Officer's Law Lexicon Vol. 4 Q-Z 2012 page 1634. He defines electoral process as hereunder: -

"Election – the expression "election" generally includes registration, nomination, voting and the manner in which votes are to be counted and result made known. Raghuni Nayak Vs District Magistrate. AOR 1059 Pat 7 at 8:1958 Bih LJ.

The Case of an election there are certain steps to be taken until the poll is taken. In the first place, there is an announcement about the holding of an election. This is followed by nomination of candidates. After the nominations are made, a scrutiny of the nominations are scrutinized, a list of validly nominated candidates is prepared. After the list of validly nominated candidates is prepared, there is a stage of withdrawal enabling a candidate to withdraw his candidature. After the withdrawal, if any, a

candidate may retire from contest and finally, there is the poll. Indeed, an election is one continuous process involving these steps. Y. B. Chavan V. K.T. Mangalmurti AIR 1958 Bom 397 at 399; ILR 1958 BOM 732: 60 Bom LR. 353: 13 ELR 122.

The word “election” has both a wider and a narrower meaning depending upon the scheme of the Act. In the narrower sense, the word ‘election’ means the final selection of the candidate by taking poll when polling is necessary and without taking poll when the candidate is returned unopposed. In the wider sense this word connotes the entire process culminating in a candidate being declared elected. When one talks of elections in a democratic country, the work ‘election’ bears this wide meaning.”

The constitutional basis of the Electoral Process in Kenya is premised on Article 1(2) of the Constitution which provides: -

(2) The people may exercise their sovereign power either directly or through their democratically elected representatives.

The exercise of this Sovereign power is exercised either directly or through the democratically elected representatives. This will be manifested in dectractically elected elections provided for under Article 38 of the Constitution.

The counsel for the parties filed their respective written submission. Mr. Katwa for the Petitioner submitted that the gravamen of the Petitioners challenge in this petition is on the quality of the election. He is challenging the process and to a very small extent the quantity of the votes. The petitioner’s petition is premised on the qualitative test of an election. He submits that the petition is premised on the constitutional qualitative test provided under Article 81(e) of the Constitution which is measured by determining whether the election was free and fair. Article 86 provides for qualitative criteria of an election.

Learned counsel submits that the integrity of the gubernatorial elections was severely compromised by the issue of lost ballot boxes, polling stations opening late and closing early, transportation of voters, bribery, use of public and county resources in the campaign, intimidation, failure of KIEMS Kits, violence, use of county staff as presiding officers and clerks. Counsel submitted that the Petitioner has adduced evidence to prove these malpractices.

Mr. Nyachoti learned counsel for the 1st Respondent Josephat Koli Nanok, he submitted that the quantitative test of the elections which encompasses the tallying of votes and/or the total number of votes garnered by the Petitioner and 1st Respondent was never challenged either in the petition or in the affidavit of the witnesses. He submitted that the malpractices complained of by the petitioner are election offences. He submits that bribery, use of public resources, participation in elections by public officer, transportation of voters and breach of the electoral code of conduct are all election offences which are criminal in nature and must be proved beyond reasonable doubt. Counsel submitted that election petitions cannot be based on generalization and speculation but on specific evidence.

Finally counsel submitted that the court is guided by the scope of the pleadings. A court, therefore, cannot go beyond the pleadings of the parties; reliefs not founded on pleadings, cannot be granted and in absence of pleadings evidence cannot be admitted or considered.

Mr. Yego for the 2nd and 3rd Respondent submitted that there is a rebuttable presumption that elections were conducted in accordance with the provisions laid down in the constitution, the Elections Act and Regulations. It is, therefore, the burden of the petitioner to prove that this was not so. The petitioner does this by demonstrating by evidence that there were irregularities and illegalities which had an effect on the integrity of the election or on the results of an election. He referred the court to the decision of the Supreme court in **Gatirau Peter Munya Vs Dickson Mwenda & 2 Others**, Supreme Court Petition No. 2b of 2014.

He submits that from the evidence adduced the Petitioner has not discharged the burden of proof and in particular failed to prove the election offences alleged against the 2nd and 3rd Respondent. Finally, he submitted that the elections were conducted in a free and fair manner and the electorate expressed their sovereign will by electing the 1st Respondent as their Governor.

The constitutional provisions underpinning elections in Kenya are premised on two criteria; the quantitative criteria and qualitative criteria of elections. Article 38 provides for the quantitative criteria of election. It will concern itself with the numbers of registered voters, number of valid votes cast; number of spoilt or disputed votes, counting and tallying of votes, information in election forms, and the votes garnered by each candidature and finally declaration of results. Any disputes in this can be resolved by scrutiny and/or recount of the votes cast or examination of the electoral records. Quantitative criteria is verifiable by numerical means.

The Petitioner in this petition is not concerned with this. Indeed in Paragraph 33 of the petition he stated: -

“That I am advised by my Advocates which advise I verily believe to be true that the only remedy available in this Honourable Court to order for a by-election as a recount of votes cannot stand. This is evident noting the ballot box discovered abandoned on the way and the various ballot papers recovered at Nadwal Primary School and Kaenyagaluk.”

This, therefore, removed the quantitative aspect of the election of 8th March, 2017 from the scope of this Petition as parties are bound by their pleadings, as he is not challenging the fact that the petitioner garnered 53,306 votes and the 1st Respondent garnered 73,913.

In *Dickson Daniel Karaba v John Ngatia Kariuki & 2 others [2010] eKLR* Wasarme J (as then was) opined as follows: -

“in determining whether non-compliance with or contravention of electoral laws affected results of an election in a substantial manner, the court has to apply either the quantitative or qualitative tests or both depending on the circumstances and facts of each case. The quantitative test is relevant where the numbers or figures are in issue, while qualitative test is relevant where the quality or standard of an election on the whole is in issue. In determining whether an issue raised by a Petitioner goes to the root of the election, it must be something substantial and calculated really to have affected the result of the election in a given manner.”

Article 38 and 81 sets out the parameters of qualitative aspect of elections it provides: -

“Article 38 (1) Every citizen is free to make political choices, which includes the right--

(a) to form, or participate in forming, a political party;

(b) to participate in the activities of, or recruit members for, a political party; or

(c) to campaign for a political party or cause.

(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 for--

(a) any elective public body or office established under this Constitution; or

(b) any office of any political party of which the citizen is a member.

(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

Article 81.

Article 81: the electoral system shall comply with the following principles--

(a) freedom of citizens to exercise their political rights under Article 38;

(b) not more than two-thirds of the members of elective public bodies shall be of the same gender;

- (c) *fair representation of persons with disabilities;*
- (d) *universal suffrage based on the aspiration for fair representation and equality of vote; and*
- (e) *free and fair elections, which are—*
 - (i) *by secret ballot;*
 - (ii) *free from violence, intimidation, improper influence or corruption;*
 - (iii) *conducted by an independent body;*
 - (iv) *transparent; and*
 - (v) *administered in an impartial, neutral, efficient, accurate and accountable manner.*

The distinction between these two is aptly stated by Prof. Otieno Odek in a Paper. – **Election Technology and the Concept on “Did the irregularity Affect Results of the Election”**

QUANTITATIVE AND QUALITATIVE PRINCIPLES OF KENYA’S ELECTORAL SYSTEM

“Articles 81 (e) and 86 represent the quantitative and qualitative principles of Kenya’s electoral system. Whereas Article 81(e) is essentially qualitative, Article 86 is primarily quantitative. The requirement for an accurate, verifiable and accountable electoral system imposes a quantitative assessment of the electoral results. The concept that elections must be free from violence, intimidation, improper influence and corruption buttresses the qualitative aspects of the electoral process. Equally, the requirement that the electoral process must be transparent and administered in an impartial, neutral and efficient manner is qualitative in nature. It is noteworthy that as a general principle, qualitative requirements cannot be measured quantitatively. The essence of qualitative requirements is to appraise the entire electoral process prior to and during the voting day. Qualitative requirements evaluate whether the environment in which the election was conducted was free and fair within the meaning of Article 81 (e) of the Constitution. Substantial non-compliance with the qualitative requirements render the entire electoral results void.

Justice Kimaru in William Kabogo Gitau -v- George Thuo & 2 Others[2010] eKLR, set out the principles on which qualitative approach operates. He opined that the court should look more into the effect of malpractices upon the systems and processes employed in the conduct of the elections. The number of votes by which the candidate won will not be the issue, for it is the integrity of the process which has been fundamentally dented by the electoral malpractices. Any malpractices which seriously impeach the process so also impeach the results coming from that process. Making the same observation, Lenaola, J. (as he then was) in Masaka -v- Khalwale & 2 Others(2011) 1 KLR 390 at 392 expressed that “...where there was no way of authenticating an election by use of statutory documents, the results were irrelevant because the whole process was as crucial as the final results”. In a qualitative context, the election results are as good as the process that led to those results.

The quantitative requirements deal with the mathematical or arithmetic calculations of results of the election. Quantitative aspects relate to the counting, tallying, accuracy, verifiability and transmission of results. It also deals with whether a vote cast was rightfully labelled as valid, invalid, rejected or stray. In this context, the paper trail of the votes cast is critical in determining quantitative aspects of the electoral process. The quantitative requirement deals with numbers and figures. In the Uganda case of Winnie Babihuga -v- Masiko Winnie Komuhambia & Others HCT-OO-CV-EP-004-2001, Justice Musoke Kibuka expressed as follows:

“The quantitative test was said to be most relevant where numbers and figures are in question whereas the qualitative test is most suitable where the quality of the entire election process is questioned and the court has to determine whether or not the election was free and fair”

Before the analysis of the evidence, it is important that the aspect of standard of proof in petition is clarified. While in civil cases the standard of proof is on balance of probability, in election petition the standard of proof is above the balance of probability but lower than beyond reasonable doubt.

The Supreme Court of Kenya in the case of **Raila Odinga & Another V. The Independent Electoral and Boundaries Commission and Others** [2017] eKLR wherein it held: -

‘In many other jurisdictions including ours, where no allegations of criminal or quasi-criminal nature are made in an election petition, an “intermediate standard of proof”, one beyond the ordinary civil litigation standard of proof on a “balance of probabilities”, but below the criminal standard of beyond reasonable doubt”, is applied. In such cases, this court stated in 2013 Raila Odinga case that the threshold of proof should in principle be above the balance of probability, though not as high as beyond reasonable doubt...’.

However, where there are allegations of a criminal or quasi-criminal nature, the standard of proof applicable is the one beyond reasonable doubt. In Khatib Abdalla Mashetani V Gideon Mwangangi Wambua [2014] Eklr, the Court of Appeal delivered itself thus: -

‘purely from the consequences that flow from the finding that a person is guilty of improper influence is serious conduct that has attributes akin to those of an election offence. It is now settled beyond peradventure that the standard of proof where an election offence or such conduct is alleged, is proof beyond reasonable doubt.’

Accordingly, in an electoral dispute such as the one before, me the standard of proof remains higher than the balance of probabilities but lower than beyond reasonable doubt and where allegations of a criminal or quasi-criminal nature are made, such as in this petition, the proof is beyond reasonable doubt.”

It is, therefore, clear from the authority that where the allegations in a petition are of a civil nature, the standard of proof is above balance of probability but not beyond reasonable doubt. Where however, the nature of allegations are of a criminal nature, then the standard of proof is beyond reasonable doubt.

On the burden of proof it is settled law that burden of proof is on the person who alleges. In **Moses Masika Wetangula Vs Musikari Nazi Kombo & 2 Others** [2015] eKLR the court stated: -

“[118] It is clear that the Court of Appeal was mindful of the foregoing principles, judging from their pronouncement in the following passage:

“Section 107 of the Evidence Act legislates the obvious principle that he who alleges a fact has the burden of proving his allegation. In election petitions, it is the petitioner who, on one or more grounds, seeks the nullification of an election. The burden is therefore, upon the petitioner to prove his allegations; and the standard of proof in election petitions is generally to the satisfaction of the Court, higher than a balance of probabilities but not to the level of beyond reasonable doubt. See Raila Odinga v. IEBC & Others and Joho v. Nyaga.

“However, if there are allegations of commission of election offences in an election, the law requires that those allegations be proved beyond reasonable doubt. In other words, the standard of proof required in allegations of commission of election offences made in election petitions is beyond reasonable doubt.”

The burden, therefore, is on the Petitioner to prove to the satisfaction of the court the grounds upon which he desires the court to find that the elections did not comply with the constitution and other electoral laws, in that there were irregularities and illegalities which affected the outcome of the election.

This petition is premised on two broad grounds: -

1. Commission of election offences.

2. Irregularities and illegalities present during the elections.

It is important to distinguish them because the standard of proof in each of the categories are different.

The Petitioner in his petitions stated that the 1st Respondent and/or his agents committed the following offences under the Election Offences Act.

- 1. Bribery of voters Contrary to Section 16(4) of his election offences Act.**
- 2. Transportation of voters. Contrary to Section 16(4) of the Election Offences Act.**
- 3. Use of Public resources contrary to Section 14 of the Election Offences Act**
- 4. Participation in election by public officers contrary to Section 15 of the Election Offences Act**
- 5. Breach of Electoral Code of Conduct contrary to Section 20 of the Election Offences Act.**

The second category of complaints by the Petitioner are basically directed to the 2nd and 3rd Respondent. These are:-

- a. Failure to keep good care of the election materials including ballot boxes.**
- b. Late opening of the polling stations mostly in Turkana North and other places.**
- c. Using Turkana County Government employees to campaign for 1st Respondent and to use public resources at their disposal including motor vehicles.**
- d. Chasing and excluding the Petitioner's agents form polling station.**
- e. Sealing ballot boxes at tally centre rather than at the polling stations.**
- f. Failing to use KIEMS kit in the course of the elections and without good cause.**

Analysis of the Evidence

1. Bribery

PW 5 Boaz Lochodo testified that on 8th August, 2017 he was at Nagis Primary polling station when he saw 1st Respondents agents talking to people on the queue and one John Ekomo was buying drinks and food while shouting ODM slogans. This witness depones that he was an agent of Jubilee at Nagis Primary School at Loima Constituency. He has further deponed that he saw Chris Aletea a County Executive Officer for Water who was not a registered voter driving his official car 23CG001 who interacted with voters with the aim of influencing voters to vote for the 1st Respondent.

On being cross-examined by Nyachoti of the 1st Respondent; the witness stated

“In paragraph 7, I stated that agents were talking to the people on the queue. They had intention of persuading the people to vote for 1st Respondent. In paragraph 8, I stated that John Ekomot Lochodo was buying drinks because he was chased away the by police. He also uttered slogans of ODM. There is no evidence of that in my affidavit. I have not annexed evidence in my affidavit to show John Lochodo was wearing ODM attire. In my affidavit I have not annexed evidence of John being thrown out. I know Chris Aletea. We have not interacted. I know him since 2013. I have not annexed evidence in my affidavit that he is not a registered voter. I had not seen him before.”

On being cross-examined by Yego for the 2nd Respondent, and being shown form 37A for Nagis Primary; he admitted that he did not sign as a Jubilee agent as the Jubilee agent was One Joseph Nakai Osienyi and not him. He further confirmed that John Ekomwa Lochodo was not an ODM agent at the polling station.

John Ekomwa Lochodo gave evidence as Respondent witness stating that indeed he was a voter at Nagis Polling Station and that he voted at around 8 a.m. and went home. On being cross-examined by Katwa for the Petitioner he confirmed that the Boaz Lochodo he is a maternal uncle of and that they have a dispute over a plot lodged before the elders. He denied that he bribed anybody as alleged by the witness.

The 2nd limb of the bribery allegation is that on 6th August, 2017 and 8th August, 2017 the 1st Respondents agents visited Kaikor and Nakinonet villages and supplied foodstuffs, Maasai beads, Maasai sheets and clothes to residents in order from to vote for 1st Respondent.

The allegation is based on the evidence of PW 7 Albert Mio Rhaiman. On being cross-examined by Nyachoti for 1st Respondent this witness stated that the 1st Respondents agents he was referring to were Paul Ekwani Nabuin and Charles Lokioto. He confirmed that they were the only ones he saw. He also confirmed that Paul Ekwani Nabin was also a candidate vying for election as Member of Parliament for Turkana North and that Charles Lokioto was his agent.

The 3rd limb of the bribery allegation is that the 1st Respondent on 6th August, 2017 went to Jamia Mosque and gave out Ksh.300,000/- to the congregation in order that they vote for him. The evidence in support of his allegations is that deponed by Mohamed Ali Haj Ali (PW 4). He deponed as follows: -

“5. That, I recite my prayers at Jamia Mosque within Lowdar Town.

6. That I have read and had been explained by the Petitioner’s advocates the affidavit sworn by Khalif Mohamed confirm that the same is true and a reflection of what transpired at Jamia Mosque on 6th August, 2017.

7. That I was given Ksh.1,000/- by Hon. Yusuf and Mohamed Roba. After I got my money, I went home. I knew that the amount was intended to influence and/or induce me to vote for the 1st Respondent.

On being cross-examined by Nyachoti for the 1st Respondent, the witness testified that he had read Khalif Mohamed’s affidavit. He, however, did not know where Khalif was. He admitted he knew it was an election offence to receive the bribe but stood by the statement but confirmed that his voting was not influenced by the bribe he received. The Respondent admitted in cross-examination by Katwa that on 6th August, 2017 he visited Jamia Mosque for prayers and met worshippers. He stated that he addressed the gathering but did not give out any money and not even tithes. In his address he asked the worshippers to pray for peaceful elections. He did not ask for votes in his address.

Section 9 of the Elections Offences Act provides:

(1) A person who, during an election period—

(a) directly or indirectly offers a bribe to influence a voter to—

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

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

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

(c) directly or indirectly, in person or by any person on his behalf, in order to induce any other person to agree to be nominated

as a candidate or to refrain from becoming a candidate or to withdraw if they have become candidates, commits an offence.

(2) A person who, during an election period, accepts or agrees to accept a bribe that is offered in the circumstances described in subsection(1) commits an offence.

(3) A person who commits an offence under this section shall be liable, on conviction, to a fine not exceeding two million shillings or to imprisonment for a term not exceeding six years or to both.

The election offence of bribery must not only be pleaded but must also be particularized in the petition and proved beyond reasonable doubt. Where an offence of bribery is alleged to have been committed, the petitioner must state specifically the persons who gave the bribes; the people who received the bribes, any report made to any authority in respect of the bribe; for instances, the presiding officers, or polling staff, or agents and recording of the same in polling day diaries or forms, or even report to police at earliest opportunity.

This trial not only shows consistency but also reinforces the credibility of the witness. I agree with the observation of Gikonyo J in **Moses Wanjala Lukoye Vs Benard Alfred Wekesa Sambu & 3 Others (2013) eKLR** where he stated: -

“Apart from the foregoing, at least specific details should have been provided about those who received the bribe and the general surrounding of corrupt transaction to prove that bribery took place. That demonstration and specificity is needed for a party to satisfy the high standard of proof-beyond reasonable doubt. The evidence tendered must be of a stature that leads to an inescapable conclusion that the 1st Respondent committed the offence of bribery.”

In respect of the bribery allegations at Nagis Primary School there is no indication in the evidence as to who received the bribes; it further turned out during cross-examination that Boaz Lochodo the person who made the allegations was not a jubilee agent at the polling station as he claimed in his affidavit and evidence in court. On the allegations that on 6th and 8th August, 2017 the agents of 1st Respondent distributed food stuffs and clothes to villagers, PW 7 Albert Mio Rehama conceded that he based his information on information he was given by villagers. Indeed he admitted that the person who was doing so was Paul Ekwam Nabuim who was vying for MP Turkana North Constituency. Even if I were to accept that the food stuff and clothes were distributed by Paul the MP candidate for Turkana North how does it connect the 1st Respondent in this petition”

The 3rd aspect of the bribery allegations is that the 1st Respondent attended prayers at Jamia mosque where he gave Ksh.300,000/- to the worshippers. The evidence relied on by the Petitioner is that of PW 14 Mohamed Ali Haji Ali whose evidence was relying on the affidavit of one Khalif Mohammed, who did not testify. The explanation given by the Petitioner is that the witness was compromised by the 1st Respondent and recanted his evidence. Though his witness statement was filed, he did not testify and in my view that affidavit is not part of the evidence adduced upon which a court can rely on.

In **Moses Wanjala Lukoye v. Benard Wekesa Sambu & 3 Others [2013] eKLR**, Gikonyo J. held:-

“The only safeguard design of the law is either the Court does not consider such evidence at all or exercises its discretion under section 80 (1) and (2) of the Elections Act and summon the witnesses. It must be appreciated that rule 12 of the election rules was deliberately tailored that the affidavits filed in an election petition are by persons whom the petitioner intends to call as a witness. As an election petition is not an interlocutory application, but a substantive cause, affidavit evidence should be tested in cross-examination unless the parties consent to the admission of the evidence without calling the maker. If, therefore, it bears repeating, the petitioner does not call the deponents to testify; their evidence should not be considered, ... The court will not consider the evidence of witnesses who were not called to testify.”

In Noah Makhalang'ang'a Wekesa v. Albert Adome & 3 Others (supra) the court held that:-

“In as much as the rest of the petitioner’s witnesses who deponed supporting affidavits were not availed in court for cross-examination for purposes of testing the veracity of their averments, their evidence though forming part of the petitioner’s case may be treated as being inconsequential and devoid of probative value ...”. (Emphasis added).

In the absent of that witness, the evidence of Mohamed Ali Haji in the question of bribery at the Jamia Mosque is wholly inadequate to prove the allegations.

(ii) Use of Public Resources including staff in Campaign.

The Petitioner gave evidence on this allegation. He testified that he was informed that County Staff were deployed as ODM agents in various polling stations. Those who actively campaigned for the 1st Respondent include John Loitaroka, Assistant Chief Kangikepoi, Antony Apalia, Director of Finance, Augustine Logiron, County Executive Roads, Abraham Losinyen Chief of Staff and Michael Lokalei a driver at the County Government. Others who were deployed as ODM agents in polling station included Elizabeth Losanyana Etuko, James Kauka Eriton a CDF Clerk and David Ewoi a messenger.

On use of County government vehicles, the Petitioner testified that on 8th August, 2017 County Government vehicles were used by officers. These included Andrew Kirya, Ward Administrator using motor vehicle No. 23CG 131a, Chris Atela County Executive for water driving Motor vehicle Registration No. 23CG001A and another County Government vehicle which was seen at Naromua-Akwala Water Point carrying ballot materials and IEBC officials.

The 1st Respondent denied assigning any of his staff to campaign for him. However, he would not know whether some supported his candidature. He testified that even during the campaign period country services were going on normally and he would not know the whereabouts of all the vehicles at the time. RW 2, Abraham Losinyen, RW 3 Augustine Tioko Logiron all testified denying that they used county resources in the campaign.

PW 7 Epetu M Erupe testified on 8th August, 2017 he saw a county government vehicle without number plates drop election materials and IEBC officers and also transported voters. On being cross-examined he was unable to say how he would know it was a county government vehicle when it had no number plates.

Section 14 of the Election Offences Act provides: -

“14. Use of public resources

1. Except as authorised under this Act or any other written law, a candidate, referendum committee or other person shall not use public resources for the purpose of campaigning during an election or a referendum.

2. Deleted by Act No. 34 of 2017, s. 12. [Rev. 2017] Election Offences No. 37 of 2016 13

3. For the purposes of this section, the Commission shall, in writing require any candidate, who is a Member of Parliament, a county governor, a deputy county governor or a member of a county assembly, to state the facilities attached to the candidate or any equipment normally in the custody of the candidate by virtue of that office.

4. A person who is requested to supply information required under subsection (3) shall submit the information within a period of fourteen days from the date of the notice.

5. The provisions of subsection (3) shall apply with necessary modifications, to an employee of a statutory corporation or of a company in which the Government owns a controlling interest.

6. A person who fails to comply with the provisions of this section commits an offence and is liable on conviction to a fine not exceeding two million shillings or imprisonment for a term not exceeding six years or to both.

7. A member of the Commission, any person designated by the Commission or any authorised agency shall have the power to impound or to order the impounding of any state resources that are unlawfully used in an election campaign.

Section 2 of the Elections Act defines Public Resources as: -

“public resources include: -

a. Any vehicle or equipment owned by or in the possession; or

b. The premises owned by, any government, stage organ, statutory corporation or a company in which the government owns a controlling interest....”

The Petitioner in these allegations of use of public resources must establish that the resources alluded to belong to the state. He must, therefore, establish ownership. He must also establish that they were being used for the purpose of campaigning during election or referenda. The use of Government or county vehicles for legitimate Government or County business during the campaign period cannot be said to be illegal. It must be shown it was used for campaign. Carrying or ferrying ballot boxes or electoral materials or IEBC staff to polling stations cannot be anything but legitimate use of public resources for public use. In **Moses Wanjala Lukoye Vs Benard Alfred Wekesa Sambu & 3 Others (2013) eKLR** the court stated: -

“As I stated earlier, the claim for use of public resources for purposes of campaigns in an election is a criminal offence which must be proved beyond reasonable doubt. More cogent evidence is needed to specifically prove that the 1st Respondent committed the offence. The Petitioner must show by way of evidence; that indeed the buses used were school buses and, therefore, public resource; that they were used by the 1st Respondent; that they were used for campaign purposes of the 1st Respondent. Proof of ownership of those buses is a critical matter. No formal document that was tendered to prove ownership of those buses by public schools stated in the petition. Likewise, there was no evidence to show that the buses were used by the 1st Respondent for campaign purposes except that the Petitioner wrote protest letters and he saw the buses ferrying voters. Those voters were not identified or called as witnesses in this case. There was no evidence that the passengers in those buses were being ferried at the behest of the 1st Respondent to register as voters or to vote. The particular registration centres and polling stations to which the alleged voters were transported were not stated in the Petition, supporting affidavit or in his evidence during the hearing of the petition. In sum, the allegation has not been proved at all beyond reasonable doubt. It fails and is rejected.”

I find no evidence that the named officers were campaigning for the 1st Respondent. Their presence in a polling station for the purpose of voting cannot in my view be deemed to be campaigning for 1st Respondent, as they too as Kenyans had a right to vote in their registered polling stations.

The second set of complaints by the Petitioner are complaints against the 2nd and 3rd Respondents. They include as hereunder: -

a. Late opening and early closing of polling stations.

The petitioner stated in his petition that the 2nd and 3rd Respondents deliberately opened the polling station late and closed early in polling stations in Turkana North which were his stronghold with the aim of disenfranchising his supporters. His witnesses testified as to how Kakuma polling Station opened at 12 p.m., Namoris Akwak Water Point at 9 a.m., Kanangum Primary School at 3 p.m. Makutano Polling Station at 11.30 p.m. and closed at 5.30 p.m. Delayed opening of the polling station was readily admitted by Mr. George Oyugi RW 11 the County Returning Officer who explained that polling stations started late due to rain and floods which forced them to hire a helicopter to transport materials to some polling station. He testified that the law requires that the polling station open for 11 hours and where they opened late time was extended to compensate for the delay. To illustrate the difficulty in accessing some polling station he confirmed that 2 polling station including Nakinoment Primary School polling station voting spilt over to next day 9th of August, 2017 to enable all the voters to vote.

Regulation 66 provides that: -

66. (1) Subject to regulation 64, voting shall commence at 6 o'clock in the morning and end at 5 o'clock in the afternoon on the polling day. Polling time. (2) Notwithstanding subregulation (1), a person who is on a queue for the purposes of voting before 5 o'clock in the afternoon shall be allowed to vote despite the fact that the voting time may extend to after 5 O'clock.

Regulation 64(4) of the General Regulations 2017 provide: -

4. Where hours of polling have been extended as contemplated under subregulation (3), the presiding officer shall give a detailed report on the clear facts justifying such extension of hours.

The times of opening and closing can be verified by the printing of information of the KIEMS Kit, and the physical examination of polling day diaries. It is in the polling day diaries where the Presiding officer would give a detailed report on the facts justifying the late opening and any extension of time to compensate for the lost time. These material were in the possession of the 2nd Respondent and were never requested for in the pleadings to be availed either to the Petitioner or the court. As the court cannot go beyond the pleadings, the explanation given by the 3rd Respondent is in my view satisfactory. It is important to note that even where there was allegations of late opening the voter turnout in those polling stations were impressive and compared well with the county average. There is, therefore, no evidence that though the voters were inconvenienced they were disenfranchised.

b) Violence and intimidation

The Petitioner in his evidence testified that he was informed of incidents of violence in various polling station. He was informed that at Kaeris primary School Antony Apalia harassed the Presiding Officer, at Makutano Primary School Lorot Peter Ekingi shot in the air, at Kaputiro Primary School the presiding officer chased away his agent and his Chief campaigner at Loima Constituency was attacked and assaulted by one Jeremia Ekanesis and, therefore, he did not attend the tallying. He testified that these incidents were reported to police. The Petitioner called PW 10 Chief Inspector Solomon Wamae, the OCS Kakuma Police Station who confirmed that a KPR Officer recovered a vehicle belonging to an MCA Aspirant which had army materials; PW 11 OCS Lorgun Police Station confirmed receipt of a report from one John Ekal of assault. There was no report made in respect of shooting at Makutano Polling Station or harassment of officials. Indeed PW 3 Christopher Ekiru the IEBC officer at the Kaeris polling station stated that he was harassed because the KIEMS Kits had failed and people were not voting and he had failed to make a decision to use complementary means. When he finally made the decision and voting started the pressure eased. The allegation of violence made by the Petitioner did not occur at the polling station. The incidences of violence alluded to were in my view isolated, occurred far from the polling stations and in my view did not affect the conduct of or disrupt the voting exercise.

c. Failure to keep good care of electoral materials including ballot boxes.

PW 1 James Kuya Eyebe testified that on 15th August, he was informed that a ballot box had been seen near the road at Napelilin junction in Loima Constituency. He went there and found a ballot box lying beside the road where there was lady selling charcoal. He had been informed about its contents by one Elizabeth Lokolio. He took the box to the Petitioner who directed it to be taken to Ngatia Advocate who released it to the IEBC Headquarters.

PW 2 Etabo Ekiru Moru testified that on 9th August, 2017 at Nadwat Trading Centre and at Kaenyangaluk he found children playing with ballot papers and when he went to Nadawat Primary School he found more torn ballot papers which he collected and they were handed over to the Petitioners.

Mr. George Oyugi in response to the ballot box stated that on 15th August, 2017 ballot boxes were being transferred from Turkana West Tallying Centre to the IEBC warehouse in Lowdar when it was noticed that are ballot box had fallen out and got lost. They reported the matter to Kakuma Police Station.

There is no doubt that a ballot box was recovered on 15th August, 2017 at Napelilin Junction same was handed over to the IEBC Headquarters in Nairobi. PW 1 examined the box and found that it had seals intact except for a small hole. From the information he would not ascertain the station or whether it contained ballot papers for President, Governor, MP or MCA. He however, confirmed that it was recovered on 15th August, 2017 while the elections, counting and tallying had been done on 8th August, 2017. It, therefore means that the recovery was after the election. This being a post-election incident, it did not in my view affect the result which had been declared on 8th August, 2017. The discovery of torn ballot papers which were never handed over IEBC is in my view not an issue in this petition as the issue was not reported to nay authorities or the ballot papers produced in court.

iv) Recruitment of County Staff by IEBC.

The Petitioner submits that the 2nd and 3rd Respondent employed 1st Respondent staff in the elections and though collusion to assist in the elections. The petitioner gave names of officer of Turkana County who were employed as Presiding officers, Deputy

Presiding Officers or clerks in the polling station. He gave 17 names of officers who were so employed. Counsel for the petitioner submits that this was contrary to Section 15 of the Elections Act and that such deployment was meant to assist the 1st Respondent and was done in collusion with 2nd and 3rd Respondents. Mr. Oyugi for the 2nd Respondent denied that there was any collusion but stated that the staff employed by the 2nd Respondent were impartial and professional.

The issue raised under this head is whether public officers can participate in elections as staff employed by the IEBC. Section 15 of the Election Offences Act states: -

“1. 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;

(b) publicly indicates support for or opposition against any party, side or candidate participating in an election;

(c) engages in political campaigns or other political activity; or

(d) uses public resources to initiate new development projects in any constituency or county for the purpose of supporting a candidate or political party in that constituency or county, 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.

The gist of this provision is forbidding participation of public officers in activities of a political party, indicating support for or opposition against any party, or candidate, engaging in political campaign or political activity or use of public resources for supporting a candidate. The prohibition here is participation of public servant in campaigns, or support for parties or candidates. Does this include serving as staff of IEBC as presiding Officers and Polling Clerks”

I do not think so. A public servant deployed to perform a public duty by a public body cannot be said to be participating in partisan or campaign activity. It is well known that public service is a reservoir of human resource which is often tapped and used in public service programmes. At the county level it will include staff of Ministries and Departments, Teachers, Security Officers who are often deployed in legitimate public activities including the IEBC activities during elections. In my view even if the named 17 Officers were deployed as presiding officers, Deputy Presiding Officers or Polling Clerks (which has not been proved) that would not be an election offence.

Mr. Katwa for the Petitioner in his submission raised the issue of the inconsistency in Form 35A and that same of the form provided by IEBC did not have the signature of either the Presiding Officer or the Deputy Presiding Officer. He submitted that the fact that they did not sign was in breach of the code of conduct and that the court should find that the total tally was compromised. It is now settled that where a presiding officer or the Deputy has not signed the form, the information in that form is null and void and cannot be included in the final tally. These developments came during the cross-examination of the 3rd Respondent.

I have considered the submission. In the petition no ground of inconsistency in signing of the forms is pleaded. It is, therefore, an issue which is being raised in submissions which was not pleaded; In **Bwana Mohamed Bwana V Silvano Buko Bonaya & 2 others [2013] eKLR** finding itself in a similar situation the court stated: -

“It is established law that parties must confine themselves to their pleadings. A court of law will be seen to deviate from disputed issues if it engages in matters that are not specifically pleaded in the plaint. The court is, therefore, not bound to render any opinion on any new issues raised in the submissions.

The Supreme has guided the courts on this legal principle in the case of Raila 2017(supra), the Court cited the Supreme Court of India in the case of Arikala Narasa Reddy V Venkata Ram Reddy Reddygari & Another, Civil Appeal NOs. 5710-5711 of 2012; [2014] 2 S.C.R and stated:

‘In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in

support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.”

In view of the law, I decline the invitation to make an opinion on this issue except to state that even if the results in the forms were not taken into account, there will be no difference in the outcome as was margin of 20,607 votes.

From the above analysis it is clear to me with the petition has not discharged his burden of proof in the grounds upon when he wants this petition allowed. As was stated by Maraga J (as he then was) in **Joho Vs Nyange & another (2008) 3KLR ep 500** where he stated: -

“Election Petitions are not ordinary suits. Though they are disputes in rem, fought between certain parties, elections petitions are nonetheless disputes of great importance - Kibaki Vs Moi, Civil Appeal No. 172 of 1999. This is because when elections are successfully challenged, by-elections ensue which not only cost the country colossal sums of money to stage but also disrupt the constituents’ social and economic activities. It is for these reasons that I concur with the Elections Court’s decision in Wanguhu Nganga & Another Vs George Owiti & Another, Election Petition No. 41 of 1993, that election petitions should not be taken lightly. Generalized allegations as the ones made in this petition are not the kind of evidence required to prove election petitions. As I said, they should be proved by cogent, credible and consistent evidence.”

An election court can only disturb the outcome of an election where the petition has sufficiency proved that the election was conducted in a manner that violates the constitution and the law or that there were irregularities and allegations which affected the integrity of the electoral process. As was stated in **Gatirau Peter Munya Vs Dickson Mwenda & 2 Others**, Supreme Court Petition No. 2b of 2014; -

“[216] It is clear to us that an election should be conducted substantially in accordance with the principles of the Constitution, as set out in Article 81 (e). Voting is to be conducted in accordance with the principles set out in Article 86. The Elections Act, and the Regulations 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 result, then such an election stands to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection, are not enough, by and of themselves, to vitiate an election. In this regard, we stand on the same plane as the learned Judges in Morgan, Opitz and Nana.

[219] By way of example, if there would be counting or tallying errors which after scrutiny and recount do not change the result of an election, then a trial Court would not be justified, merely on account of such shortfalls, to nullify such an election. However, a scrutiny and recount that reverses an election result against the candidate who had been declared a winner, would occasion the annulment of an election. Examples of irregularities of a magnitude such as to affect the result of an election, are not however, closed.

[220] Where an election is conducted in such a manner as demonstrably violates the principles of the Constitution and the law, such an election stands to be invalidated.”

After evaluating the petition, the response, the evidence and submissions. I am satisfied that the gubernatorial election held on 8th August, 2017 in Turkana County was conducted substantially in accordance with the principles of the Constitution and the Electoral laws. Any irregularities noted did not affect the outcome of the elections.

Under Rule 30 of the Election (Parliamentary & County Elections) Petition Rules, 2017 this court is mandated to determine on the issue of the maximum amount of cost payable and by who. As costs follow the event, the Petitioner will pay the costs. I have carefully considered the submissions of counsel on this issue. I make the order as costs to follows. The Petitioner will pay the costs

to the 1st Respondent not exceeding 2.5 million and for the 2nd and 3rd Respondent the costs are capped at one Million each.

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

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S N RIECHI

JUDGE



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