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Case Action:	Judgment
Judge:	Joseph Raphael Karanja
Citation:	Fredrick Kagosh Ogenga v Independent Electoral and Boundaries Commission & 2 others [2018] eKLR
Advocates:	Mr. Biko for the Petitioner, Mr. Orego for the 1st/2nd Respondents, Mr. Okong'o for the 3rd Respondent
Case Summary:	-
Court Division:	Civil
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County:	Homa Bay
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Case Outcome:	Petition Dismissed.
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**ELECTION PETITION NO. 2 OF 2017**

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

**AND**

**IN THE MATTER OF THE CHALLENGE OF THE VALIDITY OF THE NYATIKE CONSTITUENCY  
ELECTION**

**BETWEEN**

**FREDRICK KAGOSH OGENGA.....PETITIONER**

**VERSUS**

**INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT**

**THE RETURNING OFFICER, NYATIKE**

**CONSTITUENCY.....2<sup>ND</sup> RESPONDENT**

**HON. TOM MBOYA ODEGE.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

[1] Elections are said to be institutional mechanisms to elect the ruling elite in a country run under democracy. They enable the electorate (voters) to select leaders and hold them accountable for their performance in office. They serve as the filtering device for rejecting those who do not come up to the expectations of the popular electorate for any reason.

[2] Free and fair elections serve to legitimize the acts of those who wield power and guarantee continuity of democracy.

Most importantly, elections are the greatest tool of people empowerment and confirm the worth and dignity of individual citizens as human beings.

The right to vote not only reinforces an individual's self esteem and self respect but also gives him/her an opportunity to have a say in choosing those who will somehow decide his/her destiny.

[3] The right to vote is in essence, a direct exercise of the peoples' sovereign power granted under **Article (1) (i)** of the Constitution of Kenya, 2010, and is embedded under **Article 38** of the Constitution which entitles each and every citizen the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for any elective public body or office

established under the Constitution.

[4] Thus, free and fair elections and the right to vote are fundamental rights without which the democratic “engine” would halt with devastating effects on democracy.

Under **Article 4** of the Constitution, Kenya is a sovereign republic and a multi-party democratic state founded on the national values and principles of governance referred to in **Article 10**.

[5] These national values and principles bind all state organs, state officers, public officers and all persons whenever any of them applies or interprets the constitution, enacts, applies or interprets any law or makes or implements public policy decisions (**Article 10(i)**) and they include “inter-alia” patriotism, the rule of law, democracy and participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, good governance, integrity, transparency and accountability (**Article 10(2)**).

[6] Being a democratic state, Kenya held its second general elections under the 2010 Constitution on the **8<sup>th</sup> August 2017**. There were six (6) elective positions for public offices. These included the office of the President of the Republic of Kenya, the office of the County Governor and the office of Member of the National Assembly among others.

[7] The conduct of the elections was placed under the **Independent Electoral and Boundaries Commission [I.E.B.C]**, a public body established under **Article 88(1)** of the Constitution and granted the mandate to conduct elections to any elective body or office established by the Constitution. Its operations are governed by the **Independent Electoral and Boundaries Commission Act, 2011**.

[8] With regard to the election of the Member of the National Assembly (MP) for the **Nyatike Constituency** within the County of **Migori**, the candidates included **Fredrick Kagosh Ogenga** (herein, the **Petitioner**) and **Tom Mboya Odege** (herein, the **third Respondent**). Others were, Orem Zacharia Adendi, Samson Olima Obonyo, Alfred Okinyi Odero and Essau Elly Okello. Whereas the petitioner vied for the seat as an **independent** candidate, the third respondent vied under the auspices of the political party known as **Orange Democratic movement (ODM)**.

[9] The electoral system in Kenya is one which may be referred to as “**first past the pole**” system. This means that the candidate who receives the greatest number of votes would be declared the winner. Therefore, after the voting and counting of votes cast in the Nyatike parliamentary election by those who exercised their sovereign right, the third respondent was the first past the pole with **26,872 votes** followed by the petitioner with **22,815 votes**. The remaining four candidates received less than 1500 votes each with the last candidate, Orem Zacharia Adonali, receiving only **208 votes**.

[10] Based on the said outcome, the I.E.B.C (herein, **First Respondent**) through its Returning Officer for Nyatike Constituency (herein, the **Second Respondent**) declared the third respondent as the duly elected member of the National assembly for Nyatike Constituency.

However, being dissatisfied with the declaration the petitioner presented this petition in court on the 6<sup>th</sup> September 2017 on grounds that the conduct of the election was in violation of the principles of a free and fair election and electoral process as stipulated in **Article 81** of the Constitution read together with S.38 and 39 of the **Elections Act, 2011** and Rules 59, 66, 79 and 83 of the **Elections (General) Regulations, 2012**.

[11] The petitioner contends that the electoral process was devoid of impartiality, neutrality, efficiency,

accuracy, accountability and verifiability in that, fake and unlawful papers were used, invalid and unlawful ballot papers were introduced into the counting and tallying of votes, a new phenomenon involving agents working in shifts was invented, “dead voters” were allowed to cast votes, agents for the petitioner were physically excluded from certain polling stations and intimidated in others while being denied the chance to witness voter assistance.

[12] It is also contended by the petitioner that there was failure and malfunctioning of the electronic voting equipment and the electronic transmission of results in all polling centres as this was orchestrated and occasioned by the first respondent which failed to establish accurate, secure, verifiable, accountable and transparent systems thereby leading to declaration of results which in many instances had no relation to votes cast in a polling station. Instead, the first respondent developed methods which were opaque and intended to manipulate the results.

[13] The petitioner alleges that an illegality involving vote balancing was resorted to thereby causing inflation of vote totals for some candidates and ejection of the petitioner’s agents during the announcement of the results. He (petitioner) contends that the entire electoral process and announcement of the results did not meet the required standards of verifiability such that the information and results contained in the Forms 35A did not conform and/or march the information contained in Form 35B, that some of the Forms 35A in the custody of the IEBC did not march the Forms 35A issued to the petitioner’s agents by the presiding officers at various polling stations.

[14] The petitioner further contends that the counting and tallying of votes in some polling stations and tally centres was undertaken using fake, incomplete, unsigned and unverified Forms 35A and Forms 32A, that there was failure to make proper entries and to prevent strangers from signing statutory forms and that the results that were not easily verifiable were relayed by the IEBC due to lack of electricity, poor lighting and visibility in almost all the centres during the counting and tallying of votes. That, tallying of votes at **Kumoni** polling station proceeded upto midnight.

[15] The petitioner alleges and contends that the whole electoral process in Nyatike Constituency was laced with electoral malpractices, offences and irregularities committed by all the respondents acting in concert and that the integrity of the electoral process was egregiously violated by the first and second respondents either directly or indirectly through their officers and agents thereby depriving the petitioner of his legitimate expectation of a free and fair election. That, the third respondent committed or aided and abetted the commission of election offence or corrupt practice.

[16] It is also the petitioner’s allegation that the third respondent enticed, bribed and gave out monetary or other handouts to gullible registered voters so as to influence the outcome of the election and that the process of vote counting and tabulation was fundamentally flawed, contrary to the applicable laws and regulations and failed to meet the threshold set out in **Article 86** of the Constitution in that, the results in Forms 35A and 35B and those published in the IEBC official website as at 5<sup>th</sup> September 2017, showed that the election was marred with incurable irregularities such as failure to prepare accurate and complete returns, usage of unstamped, unsigned or illegally signed Forms 35A. Usage of different Forms 35A in submitting results and deliberately transferring results to new forms without the input of various agents in flagrant breach of Regulation 79 of the Elections (General) Regulation, 2012.

[17] All the foregoing facts and grounds represent the petitioner’s case against the three respondents either jointly or severally as fortified by the petitioner’s supporting affidavit dated 5<sup>th</sup> September 2017 and his witnesses’ affidavits also dated 5<sup>th</sup> September 2017 and deponed by **Joseph Keema Akoto, William Odundo Ogallo, Joseph Ochieng’ Aluoch, Samson Apoo Lego, George Onyango Omode, David Omondi Ater** Alias **Aneko**, and **Geoffrey Akoth Aguko**. Those who testified in court include Joseph

Akoto (**PW 1**), Geoffrey Aguko (**PW 2**), Samson Lego (**PW 3**), Joseph Aluoch (**PW 4**) and the Petitioner (**PW 5**).

**[18]** It is on the basis of all the foregoing grounds and facts that the petitioner by this petition prays for several orders against the respondents for:-

- (a) Scrutiny of votes cast and recorded as having been cast.
- (b) Scrutiny of the rejected, void and spoilt ballot papers.
- (c) Scrutiny of the counterfoils of the votes cast and the counterfoils of all other ballot papers used, rejected or spoilt.
- (d) Scrutiny of the register of electors.
- (e) There be a availed all the kiems kits for all the polling stations in Nyatike Constituency.
- (f) There be an inspection of the ballot boxes and seals used in the election.
- (g) Order for production and inspection of all Forms 32A used in the identification of voters.
- (h) A recount of ballot papers cast at the election and the re-tallying of the total of votes cast in all the following polling stations:- Gunde Primary School, Sori polling station streams 1, 2, 3 and 4, Wachara, Sidika, Odendo, Bondo, Kosiemu, Opeya, Alendo, Nyatworo, Kikongo, Thimlich, Tuk, Diruma, Magunga, Mikei, Nyadiema, Aongedhiang',Olando, Kaweru, Miroche, Wangelongo, Olasi, Kea, bande, Nyakiringoto, Got Kachola, Sota, Mangu, Ratieny, Mirui, Bongu beach, Okayo, Aringo, Goglo, Modi, Iwalo, Rabuor, Angugo, Ndiwa, Odoyo, Akala, kabulo and Godbim.
- (i) The parliamentary election held on 8<sup>th</sup> August 2017 in Nyatike Constituency, be declared null and void.
- (j) That the third respondent was not validly elected as the Member of the National Assembly for Nyatike Constituency.
- (k) The said election of the third respondent be declared null and void.
- (l) A declaration that the mandatory statutory and constitutional forms were not duly and procedurally transacted hence rendering the election of the third respondent a nullity.
- (m) The Respondent to be condemned to pay the petitioner's cost of and incidental to the petition.
- (n) Such further and other consequential orders as the honourable court may lawfully make.

**[19]** Indeed, an election petition is the only way that the result of an election can be questioned.

The jurisdiction of this Court to determine this petition is anchored on the Constitution and the Elections Act 2011, which was enacted pursuant to **Article 87(1)** of the Constitution which provides that parliament shall enact legislation to establish mechanisms for timely settling of election disputes. Further to this provision, **Article 105**, provides that the High Court shall hear and determine any question whether a person has been validly elected as a Member of Parliament.

[20] Such question, in accordance with the law, shall be heard and determined within six (6) months of the date of lodging the petition. Parliament was mandated under Article 105(3) of the Constitution to enact legislation to give full effect to the Article.

S.96 of the Elections Act empowered the Rules Committee as constituted under the Civil Procedure Act to make rules generally to regulate the Practice and Procedure of the High Court with respect to filing and trial of election petitions. It was pursuant to the said provision that Election Petition Rules were formulated.

[21] This petition, is thus proper and competent before the Court although it was not signed personally by the petitioner but his advocate.

Rule 8(4) of the **Elections (Parliamentary and County Elections) Petitions Rules 2017**, provides that a petition shall be signed by the petitioner or by a person authorized by the petitioner. Hence, the petitioner's advocate, was his duly authorized agent for purposes of signing and presenting in court the petition.

[22] Be that as it may, the respondents are opposed to the petition on the basis of the grounds contained in their respective responses dated 19<sup>th</sup> September 2017 and 20<sup>th</sup> September 2017, as fortified by the supporting and witness affidavits deponed on behalf of the first and second respondents by **Neville Okumu**, the Deputy Returning Officer for Nyatike Constituency and a number of presiding officers in charge of some of the polling stations i.e **Joseph Ongutu Okoth**, **Sharon Heri Kadhilwa**, **Caroline Achieng' Omollo**, **Milcah Adhiambo Oguma**, **Adah Owuor** and **Grace Achieng' Jaketch**. They all testified in court as **DW 1, 2, 3, 4** and **5** save Sharon Heri Kadhilwa. The Deputy Returning Officer also testified as **DW 6**.

[23] The third respondent's response to the petition contained only his supporting affidavit. He did not testify in court due to a new development in this case which led to a new path being taken after all the parties expressed an intention to engage in discussions with a view to compromising the matter in one way or the other.

Towards that end and with the approval of the court which was very much alive to the fact that elections are an exercise in facilitation of the democratic rights of the people to select persons of their choice to represent them and that election petitions are not ordinary civil disputes of a private nature between the parties as the outcome is bound to affect an entire constituent of people and their right to vote, the parties recorded a consent on the 18<sup>th</sup> December 2017.

[24] The consent or compromise did fast-track this petition in a unique and commendable manner in the spirit of Article 159(2) (c) and (d) of the Constitution. It was made in the following terms:-

***“By consent, the petition be and is hereby limited to prayer “h” only. In that regard there be a recount of the votes in all the polling stations referred to in prayer “h” of the petition as may be directed by the court. Further, the conclusion of the petition do abide the outcome of the recount with necessary orders from the court. The recount exercise shall commence on 20<sup>th</sup> December 2017 and be concluded hopefully on the 23<sup>rd</sup> December 2017 under the supervision of the Deputy Registrar of this Court who shall file the necessary report on or before 29<sup>th</sup> December 2017. The report be supplied to the parties through their respective counsel on or before 3<sup>rd</sup> January 2018. Thereafter, the matter be mentioned in court on 4<sup>th</sup> January 2018 for necessary orders. As indicated by Counsel for the 1<sup>st</sup>/2<sup>nd</sup> Respondents the recount exercise maybe undertaken at the IEBC's County warehouse in Migori town. Each party be represented by three (3) agents together***

***with their lawyers during the recount exercise.”***

**[25]** In essence, the compromise had the effect of narrowing down if not altering the agreed issues for determination which were:-

(1) Whether the parliamentary election for the Member of the National Assembly for Nyatike Constituency held on 8<sup>th</sup> August 2017 was conducted in accordance with the constitution and electoral laws.

(2) Whether there was non-compliance with the law by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in the conduct of the said elections or if so, whether such non conformity materially or fundamentally affected the results.

(3) Whether the 3<sup>rd</sup> Respondent was validly declared by the 1<sup>st</sup>/2<sup>nd</sup> respondent as the duly elected Member of the National Assembly for Nyatike Constituency and if not, whether the petitioner should have been declared as validly elected.

(4) Whether the petitioner is entitled to the orders sought in the petition.

**[26]** With the consent order, the recount of votes in the polling stations referred to in prayer “h” of the petition became the sole issue for determination and therefore a final determination of the petition in view of the consensus that the conclusion of the petition would abide the outcome of the recount with necessary orders from the court.

**[27]** Indeed, the recount exercise was undertaken and concluded as directed by the Court under the supervision of the Court’s Deputy Registrar who filed the necessary report on the 2<sup>nd</sup> January 2018, which indicated that in the disputed fifty three (53) polling stations the candidate with the majority of the votes was the third respondent who garnered **10,222** votes against the petitioner’s **9923** votes. The vote margin between the two was **299** votes.

**[28]** As it were, the third respondent was the “first past the pole” and was thus declared the duly elected Member of the national Assembly for Nyatike Constituency after all the votes were counted and tabulated in all the one hundred and thirty eight (138) polling stations in Nyatike Constituency.

**[29]** Both the petitioner and the respondents agreed and were satisfied with the report of the Deputy Registrar which in effect became a finding of this Court on the recount of the votes in the specified polling stations even though the petitioner through his learned counsel **Mr. Biko**, wished to have a similar exercise extended to the remaining eighty five (85) polling stations.

Nonetheless, the petitioner prayed for the petition to be allowed and for the court to consider suitable consequential orders.

**[30]** Learned Counsel, **Mr. Nyakwamba**, holding brief for **Mr. Orego**, for the first and second respondents prayed for the dismissal of the petition with costs. He also prayed for issuance of the necessary certificate to the third respondent and contended that the results in the remaining eight five polling stations were not contested. Similar contention was shared with the learned counsel for the third respondent, **Mr. Okong’o**, who submitted that no other polling station was identified in prayer “h” of the petition for purposes of the recount and that it was the results in the specified fifty three polling stations which were disputed and not the results in the remaining eighty five polling stations.

**[31]** Mr. Okong’o, further submitted that the numbers realized in the recount speak for themselves in

showing that the will of the voters was clearly captured in the disputed polling stations. That, the recount more or less returned the same results declared by the IEBC in which the third respondent emerged as the winner.

Learned counsel, urged the Court to dismiss the petition with the usual consequential orders unless it was withdrawn by the petitioner.

[32] With regard to the request or suggestion by the petitioner to extend the recount exercise to the remaining eighty five polling stations, this Court would only say that the issue ought to have been raised during the discussion of the parties intended to have the petition compromised so that the consent order would have been framed to capture recount in the remaining eighty five polling stations hence, all the polling stations in Nyatike Constituency.

[33] Extending the recount to the remaining eighty five polling stations after completion of the recount in the disputed fifty three polling stations would have been unreasonable and tantamount to indulging the petitioner in a roving inquiry with a view to fish material to support his case which basically turned on breach of technical processes required by the Constitution and the law on the part of the first and second respondents.

[34] It would not therefore be farfetched for this Court to opine that the consent order herein was somehow an acknowledgement or a tacit admission by the petitioner that the impugned election was substantially conducted in accordance with the constitution and electoral laws but with some error and irregularities in the counting, tallying and even transposition of votes in some of the polling stations particularly those referred to in prayer “h” of the petition.

[35] The qualification in the admission aptly resonates with the earlier agreed second issue for determination in this case “to wit” whether there was non-compliance with the law by the first and second respondents in the conduct of the election or if so, whether such non-conformity materially or fundamentally affected the results. Indeed, the petitioner’s case was essentially grounded on allegations of non-compliance with the electoral laws in the counting and tallying of votes in some polling stations.

[36] Other allegations pertaining to electronic transmission of the results and commission of electoral offences and fraud by the respondents were more or less afterthoughts and devoid of proof as demonstrated in the testimony of the petitioner and his witnesses.

The allegations of errors and irregularities in the counting and tallying of the votes brought into the fore the application of the “**quantitative irregularity test**” in the determination of this petition as the recount undertaken herein was meant to prove or disprove those allegations.

[37] Proof is a question of evidence presented in court be it direct or indirect. The petitioner was thus required to provide cogent evidence to establish not only the effect of non-compliance with the law or irregularities but also to satisfy the Court that the effect on the results was substantial.

A petitioner in an election dispute is always under obligation to discharge the initial legal burden of proof before the respondent bears the evidential burden (see, **Raila Odinga & Others Vs. IEBC & Others SC PETITION NO. 5 of 2013**).

[38] The question must therefore be whether the departure from the prescribed method of elections is so great that the court would be satisfied, as a matter of fact, that the election was not an election under the



existing laws. It is not enough merely to say that great mistakes or errors were made in the conduct of the election under the law as a minor or insignificant irregularity in the conduct of the election would not render it void if it is shown to have been conducted substantially according to the provisions of the electoral laws (see, **Woodward Vs. Sarsons [1875] LR. 10 CP.**)

[39] In the Raila case 2013 (supra), the Supreme Court clearly stated that there is a rebuttable presumption that elections are conducted properly in accordance with the law and that it is incumbent upon a person challenging that presumption to present to court some material evidence in rebuttal.

[40] Thus, the satisfaction of the court would be a finding by the court that a fact or issue has been proved to the required standard and that is to say – **above balance of probabilities though not as high as beyond reasonable doubt.** This standard was affirmed by the Supreme Court of Kenya in the Raila case of 2013 and the Raila case of 2017 i.e **Raila Odinga & Another Vs. IEBC & Others SC Petition No. 1 of 2017.**

[41] In Raila 2013, it was succinctly stated that where a party alleges non-conformity with the electoral law, he 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 (see also, **Gitau Peter Munya Vs. Dickson Mwenda Kithinji & Others (2014)e KLR.**)

[42] **S. 83 of the Elections Act 2011,** 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.”***

In the Munya case (supra) it was stated that this S.83 of the Elections Act is the definitive statement of the standard that an election court must apply in verifying the election results. It is also a statement on the burden of proof resting upon the petitioner in an election petition.

[43] In this petition, as it were, the presupposition is that the election process in the impugned election was substantially in compliance with the law even though there were errors and irregularities in the counting and tallying of votes. It was therefore incumbent upon the petitioner to prove that the errors and irregularities were of such a gravity as to vitiate the results. The best and reasonable way to do this was by numerical analysis to provide a basis for holding that the election was indeterminable. Indeed, an election cannot be indeterminable without a mathematical analysis.

[44] The recount order in this case provided the best opportunity for numerical analysis in establishing whether or not the errors and irregularities alluded to by the petitioner were of such a nature to affect the final results of the impugned election as declared by the first and second respondents in favour of the third respondent.

For the outcome of the election to be rendered null and void, the recount had to show that the winning margin was significantly narrowed down or obliterated altogether.

[45] In the celebrated case of **Morgan Vs. Simpson [1975]1 QB 151,** the essence of **S.37** of the **Representation of People’s Act, 1949,** which was similar to our S.83 of the Elections Act 2011, was summarized in the following terms:-

**(a) If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not.**

**(b) If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by breach of the rules or a mistake at the polls - provided that it did not affect the results of the election.**

**(c) But even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls – and it did affect the result - then the election is vitiated.**

[46] In the Canadian case of Opitz vs. Wrzesnewsky (2012)3 SCR 76, it was observed that the practical realities of election administration are such that imperfections in the electoral process are inevitable, and on this account, elections should not be lightly overturned, especially where neither a candidate nor the voters have engaged in any wrongdoing.

In the Ugandan case of Katwiremu Betegama Vs. Musheneza Election petition No. 1 of 1996, it was held that:-

***“Although the petitioner has in many instances proved to the satisfaction of the court that there were irregularities in the process of conducting the parliamentary elections, he has not gone beyond that as the law requires. He had to show that those irregularities affected the result of the election in a substantial manner.”***

[47] In other Ugandan cases, Kiiza Besigye Vs. Electoral Commission & Yoweri Kaguta Museveni, Presidential Election No. 1 of 1996 and Mwiru Vs. Nabera & Others Election Petition No. 3 of 2011, the courts observed that courts ought to disregard irregularities for no election can be impeccable and totally free of any mistake. However, the gravity and extensiveness of the mistake would determine the substantiality of the non-compliance complained of and inform the decision on whether or not any election should be nullified.

[48] In Ghana, in the case of Nana Addo Dankwa Akufor & Others Vs. John Dramani Mahama & Others [2013]SGL, it was held that:-

***“To nullify an election conducted in substantial compliance with the constitution and written law would amount to “putting the power of unscrupulous presiding officer” in some polling stations to nullify the solemn act of the whole constituency by his act or omission.”***

This holding was a clear indication that the electorate should not be disenfranchised solely on the basis that there was some act or omission on the part of an electoral official.

Indeed, in John Fitch Vs. Tom Stephenson & Others [2008] EWNC 501, the court observed that where possible the courts seek to give effect to the will of the electorate even where there have been significant breaches of official duty or election rules.

[49] Herein, even if the petitioner had succeeded in showing that there were some errors and irregularities in the counting and tabulating of the votes, he was clearly unable to prove to the required standard and to the satisfaction of this court that the errors and irregularities were of such a gravity as to vitiate the results. This fact was demonstrated by the recount of votes in the disputed polling stations and was not even proved by the evidence presented by the petitioner and his witnesses even if the

recount was to be extended to the polling stations whose results were not substantially disputed as there would have been no significant impact on the final results.

**[50]** It would appear from the recount that it was not difficult to ascertain the winner of the impugned election on account of the errors alluded to by the petitioner in the counting, tallying and transposition of the results. The recount was indeed the only sure way to ascertain the truth of the allegations made by the petitioner against all the respondents and once it was done no reason to invalidate the impugned election existed. Therefore, this court must find and hereby finds that the third respondent was validly declared as the duly elected Member of the National Assembly for Nyatike Constituency by receiving the greatest number of votes simpliciter.

**[51]** In the end result, it is hereby ordered that this petition is dismissed and that the necessary certificate be issued in accordance with S.86 of the Elections Act, 2011.

While a petition manifestly involves the contestants at the poll, the electorate (voters) always have a stake in the ultimate determination of the dispute, hence, the public interest (see, Munya case). On this basis and the fact that the petition was expeditiously concluded due to the consent order prompted by all the parties, each of the parties shall bear their own costs of the petition. **GOD bless the Republic and People of Kenya.**

**[Delivered and signed this 10<sup>th</sup> day of January 2018].**

**J.R. KARANJAH**

**JUDGE**

**In the presence of**

Mr. Nyakwamba holding brief for

Mr. Biko for the Petitioner

Mr. Oregu for 1<sup>st</sup>/2<sup>nd</sup> Respondents

Mr. Okong'o for the 3<sup>rd</sup> Respondent

CC Maureen Ojala



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