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Case Class:	Civil
Court:	Election Petition in Magistrate Courts
Case Action:	Judgment
Judge:	HON. M.SUDI
Citation:	Eliphas Nyaga Mbae v Wilson Nyaga Derebia & 2 others [2018] eKLR
Advocates:	Mutegi for Petitioner Kariuki for Petitioner-Mwilaria for 2nd and 3rd Respondents
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Meru
Docket Number:	-
History Docket Number:	-
Case Outcome:	Petition dismissed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT CHUKA

PETITION NO. 2 OF 2017

IN THE MATTER OF ARTICLES 1, 3, 38, 81, 86 & 87 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTIONS 75, 76, 78, 79, 80, 82, 84, 85, 86 & 87 OF THE ELECTIONS ACT

AND

IN THE MATTER OF THE ELECTIONS (GENERAL) REGULATIONS, 2012

AND

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

AND

IN THE MATTER OF GENERAL ELECTIONS HELD ON 8TH AUGUST, 2017

AND

IN THE MATTER OF THE ELECTIONS FOR THE COUNTY REPRESENTATIVE OF MUTHAMBI WARD

BETWEEN

ELIPHAS NYAGA MBAE-----PETITIONER

-AND-

WILSON NYAGA DEREZIA-----1ST RESPONDENT

OBADIAH KARIUKI-----2ND RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION-----3RD RESPONDENT

JUDGMENT

INTRODUCTION AND BACKGROUND

The Petitioner Eliphas Nyagah Mbae filed this petition against the Respondents on 5th September 2017. He was contesting the 1st Respondent Wilson Derebia Nyagah's win of the 8th August 2017. The date of

declaration was not indicated in the petition as required under Election rules 8(d) with respect to the particulars of a petition. However no interlocutory application was made and the matter went directly for the main hearing. In their petition the Petitioner prayed for:

- a. An order for scrutiny and recount of votes (this was abandoned and never pursued).
- b. A declaration that the improprieties, irregularities and non-compliance with the constitution and Election Laws that occurred in Muthambi Ward were substantial and affected the results.
- c. A declaration that the 1st respondent was not validly elected as the Member of the County Assembly (MCA) for Muthambi Ward on the 8th August 2017.
- d. An order for the 3rd Respondent to organise and conduct fresh elections for Muthambi ward in conformity with the Constitution and the Election Laws.
- e. A declaration that the non-compliance with the Constitution and Election Laws held on the 8th August 2017 render the results invalid, null and void.
- f. An order that the election offences and malpractices whether by omission or commission of the Respondents as disclosed before court be taken up by the Director of Public Prosecution for appropriate action.
- g. A finding that the 1st Respondent committed serious election offences and an order of barring him from participating in future elections for at least five years.
- h. Costs of the petition.

The petition is based on the grounds on Part E of the Petition that the 2nd and 3rd Respondents and their subordinate staff including the Presiding Officers, clerks and other officials conducted the election in a manner inconsistent with Articles 1, 3, 38 and 86 of the constitution. This in turn affected the validity, integrity, credibility and results of the election and compromised the electoral process. The Petitioner alleged on Part F of the Petition that there were electoral offences and irregularities that were committed by the Respondents including voter bribery and vote buying as well as undue influence at Kajiambaki, Maatha, Ntata, Iriga Tea Buying centre and Marima polling stations. He also alleged mass transportation of voters from their homes to the polling stations. He further stated that his agents were denied access at Nkundi and Kanoro Polling stations and the 1st Respondent agents acted as voting assistants. There was fraudulent tallying of votes by over declaring the 1st Respondents votes. He also alleged that his complaints were not acted upon and his agents did not fill in the forms as required by law.

The first Respondent filed his response dated 20/9/2017 in which he has denied all the allegations raised by the Petitioner and maintained that he was validly elected as the Member of County representative for Muthambi Ward. The 1st Respondent therefore prayed for a dismissal of the petition and a declaration to the effect that the 1st Respondent was validly elected. The grounded his response on paragraphs 1 to 3 that the 1st Respondent garnered the highest number of votes, the election was conducted in a fair transparent and efficient accurate and verifiable manner. He further denied any electoral offences having occurred as alleged.

The 2nd and 3rd Respondents filed their joint response made on the 18th September 2017 prayed for:

1. A finding that there was no breach of the Constitution or the election Laws.
2. A finding that the 1st Respondent was validly elected as the Member of the County Assembly for Muthambi Ward.
3. The Petition lacks merit and it be dismissed
4. Costs.

Their prayers are grounded on paragraphs 6 to 12 of the Response to wit the following: They adhered to all the provisions of the Constitution and Electoral Laws. That the court lacks jurisdiction to scrutinise presidential results as alleged under paragraph 12 of the Petition. The assertions as made by the Petitioner are vague, unspecified and couched in generalities. There were no irregularities or undue influence or bribery of voters as alleged. The Results were properly counted, captured and recorded in the form 36As. They denied any fraud in the tallying.

They prayed that the petition be dismissed with costs to them.

B) THE BURDEN AND STANDARD OF PROOF IN AN ELECTION PETITION

The 1st Respondent submitted that the Supreme court of Kenya in **RAILA ODINGA & 5 OTHERS VS. INDEPENDENT ELECTORAL and BOUNDARIES COMMISSION & 3 OTHERS (2013) eKLR** at paragraph 195 had this to say.

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

Further at paragraph 196, the court stated,

“...where a party alleges non-conformity with the electoral law, the Petitioner must not only prove that there has been non-compliance, but that such failure of compliance did affect the validity of the elections. Omnia praesumuntur rite etsolemniteresseacta; all acts are presumed to have been done rightly and regularly. So, the Petitioner must set out by raising firm and credible evidence of the public authority’s departures from the prescriptions of the law”.

In John **Kiarie Waweru vs Beth Wambui Mugo & 2 Others [2008] eKLR** it was held-

“The burden of establishing all these allegations regarding the conduct of the said election and the results announced thereafter is on the Petitioner”.

The evidential burden of proof equally lies upon the petitioner and will only shift when a Petitioner is able to establish that there was non-compliance with the law and that such non-compliance affected the validity of the election.

The Supreme Court at paragraph 203 in the case of **RAILA (2013)** stated;

“... but at the same time, a Petitioner should be under obligation to discharge the initial burden of proof,

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

The 2nd and 3rd Respondents reiterated the position above that the petitioner must establish and prove the irregularities and electoral malpractices which were so widespread that they rendered the said elections null and void and therefore subject to nullification by the Court. Section 107 (1) of the Evidence Act provides-

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

The court was referred to this provision in **William Kabogo Gitau vs George Thuo & 2 Others [2010] eKLR**, thus-

*“The burden of establishing that any election offence was committed to justify the nullification by this court of the election of the 1st Respondent as the Member of Parliament of Juja Constituency is on the Petitioner. To discharge this burden, the Petitioner must adduce evidence that establishes the alleged election offence and alleged electoral malpractices to a standard of proof that is **higher than that applied in ordinary civil cases of proof on a balance of probability.**”*

Therefore, the Standard of proof in election petition is higher than the Civil Standard of balance of probabilities, but lower than the criminal standard of proof of beyond all reasonable doubt. But, where an election offence is alleged to have been committed, the standard of proof is that of beyond all reasonable doubt.

Did the Petitioner discharge the burden of proof as required under the law" The court will examine the material placed before it to determine this.

C) ISSUES FOR DETERMINATION

Each party filed their issues for determination but eventually settled and adopted the issues filed by the 2nd and 3rd Respondents on the 21st November 2017 which were narrowed down to the following questions:

- a. Whether the elections held on the 8/8/2017 were conducted in accordance to the constitution, the Election Act and the Election Rules.
- b. Whether there was undue or improper conduct, corruption or irregularities in the conduct of the elections"
- c. Whether there was substantive non-compliance with the Constitution, Election Act and Applicable rules and if so what was the effect of Non Compliance on the results.
- d. Is the Petitioner entitled to the prayers in the petition"
- e. Who should bear the costs of the suit

D) FACTS, EVIDENCE AND SUBMISSIONS

a) Was there favouritism, improper motives, bribery of voters or irregularities in the conduct of the election"

i) Voter Bribery and undue influence.

The Petitioner in his Affidavit on paragraphs 6 to 15 made these allegations. He stated that the 1st respondent undertook to give voters money on the Election day while wearing a shirt similar to the one on the ballot paper. There was therefore the intention to unduly influence the voters in contravention of Section 10 of the Election Offences Act. PW 4 (Stalin Njeru) in his evidence stated that the Personal Assistant to the 1st Respondent was seen on Motor Vehicle KCM 134D dropping off a lady called Wanja and gave her money thanking her for the job. He further stated that the 1st respondent was moving around in the Vehicle KCM 134D in contravention of the law. Aside from PW4, PW 3 and 2 also made similar allegations. He relied on the case of **MOSES MASIKA WETANGULA V MUSIKARI KOMBO and 2 OTHERS (2014)eKLR** where the court on its part felt a single act of corruption was enough to invalidate an election.

The first respondent in response stated Voter bribery is an election offence under Section 9 of the Election Offences Act. Undue influence is also an election offence under section 10 of the same Act. The Standard of Proof therefore, is that of beyond all reasonable doubt. They submitted that the allegations of bribery and undue influence were not proved to the requisite standard. The Petitioner and his witnesses only made allegations without providing any cogent evidence to prove the same. PW1 (Petitioner) admitted during cross-examination that he did not witness the 1st Respondent bribe any voter. He also admitted that he did not report any incident of voter bribery or undue influence at any one time before the 1st Respondent was declared the winner. PW2 (Mutwiri Nkonge) and PW 3 also admitted during cross-examination that he did not witness the 1st Respondent give money to any person. PW4 (Stalin Mwenda Njeru) also conceded that he did not witness the 1st Respondent give money to anybody. Although he alleged that he witnessed the 1st Respondent's 4th witness (Humphrey Mawira Miriti) give money to one Wanja, that allegation was disproved by the testimony of the 1st Respondent's 4th, 11th and 13th witnesses. He submitted that the totality of the testimony of the three witnesses is that there was no contact between Humphrey Mawira Miriti and the said Wanja on 8/8/2017, when the alleged bribery is said to have taken place.

The allegation by PW5 (Lawrence Njeru Kiraithe) that he witnessed the 1st Respondent bribe voters near Ntatua Polling Station was also raised. He alleged that the 1st Respondent's was in the company of the 14th witness (Paul Ngai M'Rithaa). Paul Ngai testified and disproved that he was an agent at Ntatua Polling Station where he spent the whole day. He submitted that it is impossible that he was ½ a Kilometer away from the polling Station bribing people and at the same time discharging his duties at the polling station. The 1st Respondent was also categorical in his testimony that he never visited Ntatua Polling Station and its environs on 8/8/2017 as alleged by PW5.

PW6 (Elias Njiru) stated that he witnessed the 1st Respondent bribe voters at Maatha Primary School Polling Station. It was submitted that the allegation was totally disproved by the 1st Respondent who stated he never visited the said polling station as alleged. PW6 alleged that he was an agent at the said polling station but the 1st Respondent doubted the fact as no steps to report the bribery to the police or to the 3rd Respondent were taken. Infact PW6 conceded that he was removed from the polling station for making phone calls while inside the polling station. He submitted that his testimony is unreliable and should be disregarded.

PW7 (Hawkins Mike Kirimi) an alleged Agent at Nkundi Polling station allegations were disproved by the testimony of Fides Gaaji who testified as the 1st Respondent's 3rd witness. She stated that she was not an agent of the 1st Respondent but for Jubileecandidates and that by the time she is alleged to have bribed voters at the said polling station (around 10.00 a.m.), she had already left the polling station.

PW8 (Fredrick Njagi Riungu) on his exam in chief alleged voter buying in his affidavit paragraph 20 to 27 that the Petitioner handed over Kshs 4,000/= to the youths to share out. The 1st Respondent submitted that, during cross-examination he conceded that he did not witness the 1st Respondent bribe anybody at Mururi and the said KAGWARI did not swear an affidavit to support the allegation of bribery at Mururi even after being featured in the video footage played in court. His evidence should therefore be disregarded.

PW9 (Kibaara Mutegi) alleged that an agent of the 1st Respondent one Kathugumi Derebia alias Chura was buying votes, the allegations were not substantiated during cross examination and was rebutted by the 1st Respondent's 2nd witness (Suleiman Kathugumi Rago) who denied vote buying at Iriga tea buying centre through assisting many illiterate voters but only one.

PW10 (CPL Stephen Busienei) was called to confirm the allegation of voter influence and confirmed during cross-examination that no report of voter bribery or undue influence was ever made at Marima Police Patrol base. Petitioner also admitted that he did not report any incident of voter bribery or undue influence at any one time before the 1st Respondent was declared the winner.

The 1st Respondent submitted that no evidence of voter bribery, vote buying and undue influence at Kajambaki and Marima Stage Polling Stations, whatsoever was led in that regard.

The 2nd and 3rd Respondent evidence and submissions denied these allegations and added vide their testimony that not a single witness was led to show that they personally received a bribe from the first respondent. They further dismissed the evidence of the PW 3 as pure hearsay as he never witnessed the exchange of any monies. They also dismissed the evidence of the PW 4 as having seen the driver of KCM 134D handing out Kshs 200/=-, notes to two ladies as the purpose was not substantiated nor whether the two ladies were registered voters was ever established. PW 6 did not name the people allegedly bribed. The DCIO confirmed that no election offences were reported to him despite the offences falling under his docket as shown under the Annexure OKG 7 regarding a report of Ganga ward. No reports were made to the Presiding officer or the police. They submitted that the requirements under section 64 of the Election Act were not proved. The 2nd and 3rd Respondents relied on the cases of: **Karanja Kabage v Joseph Kiuna Kariambegu Nganga & 2 others** , the Hon Justice M. J. ANYARA EMUKULE stated... *'I will now consider whether the Second and Third Respondents carried out their mandate as per the law. Firstly none of the witnesses who testified in this court on the commission of the offences by the First Respondent reported to the Second Respondent. Secondly, the evidence shows that on bribery the allegations were very general and no facts were provided to the Second Respondent upon which he could act. I think that it would be unreasonable to expect the Second Respondent to conduct investigations without a proper basis...'*

In the case of **Simon Nyaundi Ogari & Another vs. Hon. Joel Omagwa Onyancha & 2 Others [2008] eKLR** the court held thus on a charge of bribery-

"Clear and unequivocal proof is required to prove an allegation of bribery. Mere suspicion is not sufficient. It is true that it is not easy to prove bribery, especially where it is done in secrecy. In such cases, perhaps bribery may be inferred from some peculiar aspects of a case but when it is alleged that the bribery took place publicly and in the presence of many people, the court cannot be satisfied by

anything less than the best evidence which is always direct evidence given first hand.”

In **Presidential Election No. 1 of 2001, Rtd Col Dr Kizza Besigye v. Y. K. Museveni and Electoral Commission**, the Supreme Court of Uganda held that the offence of *electoral bribery is not committed unless the gift, money or other consideration is given or received by a person who is proved to be a registered voter. Justice Katurebe JSC stated, thus;*

“.....It is therefore not enough for a Petitioner or any person to merely allege that agents gave money to voters; a high degree of specificity is required: (1)The agent must be named, (2)the receiver of the money must be named and (3) he/she must be a voter. (4)The purpose of the money must be to influence this voter”

They submitted that the Evidence of PW 4 was not conclusive as it failed to confirm if indeed these two were registered voters and the purpose of the monies. They also added that the DCIO Maara testified that no election offences were reported to him. It was not possible for the 2nd and 3rd Respondent to take action where no reports were made. The evidence of the PW 1 was based on hearsay and was not reliable. None of the ingredients of the offence of bribery under section 64 of the Election offences Act were proved.

ii) Transportation of voters.

The Petitioner in his pleadings alleged voter transportation. The allegation was remotely made by PW4 (Stalin Mwenda Njeru) who claimed that to have seen one Humphrey Mawira (1st Respondent's 4th witness) drop one Wanja and another lady from the voting exercise.

The 1st respondent submitted that this allegation was however disproved by the testimony of the 1st Respondent witnesses no. 4, 11 and 13. The witnesses confirmed that the said Wanja used a Motorcycle to and from the polling station and not a motor vehicle as claimed by PW4.

The Petitioner had alleged that there was widespread transportation of voters from their homes to the polling station, aside from the PW 4 no other witness confirmed this.

The 1st respondent submitted that there is no evidence to prove that there was transportation of voters. Not a single incident has been proved let alone widespread transportation of voters. The 2nd and 3rd Respondent also denied any proof of this allegation.

iii) Petitioner's agent denied entry at Nkundi and Kanoro Polling stations.

The Petitioner alleged that his agent at Nkundi Primary School Polling station the PW7 (Hawkins Michael Kiriimi) was denied entry into the polling station. He testified that on arrival at the polling station he found another agent, One Fides Gaaji, He later got approval to enter and the said Fides was asked to leave. His name was entered in the polling station diary. He submitted that the alleged absence of the agent at the polling station manifestly affected the end results.

The 1st Respondent submitted that Petitioner did not lead any evidence to the effect that his agent was denied entry at Kanoro Primary School polling station. Further, the allegation was discredited by the 1st Respondent's 7th witness (Jesse Gitonga Sebastian) who was an agent at that polling station. He confirmed that the petitioner's agent one KELVIN MWONGERA was present at the polling station and even signed from 36 A at the end of the voting exercise.

The 2nd & 3rd Respondent's 1st witness (Obadiah Kariuki) stated that PW 7 was present at the said Polling Station from as early as 6 a.m. The witness produced the polling day diary (OKG 3 (a) where PW7 signed as having arrived at the polling station at 5.45 a.m. Further, there is testimony of 1st Respondent's witnesses' number 3 and 10 who were agents at the same polling station. The two witnesses confirmed that PW 7 was granted entry into the polling station as early as 6. a.m. when the voting started. The PW4 also signed from 36A for Nkundi Polling Station in acknowledgement that the voting exercise had taken place in accordance with the law without any notable incident.

iv) Failure to Respond to Petitioner's Complaints.

Petitioner stated that he wrote a letter to the IEBC protesting the behaviour of the 1st Respondent on the election day as well as some IEBC officials. The letter was received and stamped but no action was taken which eventually affected the electoral victory which prejudiced the Petitioners hence the officials were not fit to declare the election.

The Respondent however submitted in his testimony during cross-examination, The Petitioner confirmed that he did not report any electoral malpractice or offence to the 3rd Respondent or the police before the 1st Respondent was declared winner of the election. It was not until 10/8/2017 (after declaration of the results) that the Petitioner wrote to the 2nd Respondent. The 2nd Respondent testified that upon receipt of the letter, he discussed the same with the Petitioner's agent and explained to him that the complaints raised therein had been overtaken by events.

In addition the 2nd respondent submitted that it is not true therefore that there was no response to the letter dated 10.8.2017, which was a pure afterthought.

vi) Failing to have voting assistants fill in the forms as required by law.

The Petitioner stated that his agents did not sign the forms 36 as required by law hence no credibility in the election results.

The 1st Respondent added that no evidence was led in support of this allegation.

The 2nd and 3rd Respondents indicated that the allegations by the PW 6 and 7 were controverted by the evidence of PW 7 himself as the polling station diary showed he entered the polling station at 5.45am not the alleged 10.00am. Further they relied on the regulation 62 (3) that the absence of the agents shall not invalidate the proceedings at the polling station.

v) Allowing agents of the 1st Respondent to act as voting assistants.

The Petitioner and his witnesses' testimony was that the agents of the 1st respondent were allowed to assist the illiterate voters at the polling stations. This assertion was specifically made by the PW9 (KIBAARA MUTEKI) that the brother to the 1st respondent (Suleiman Kathugumi) influenced the outcome of the votes where he approached voters who were to pretend to be illiterate and needed assistance, where the agent of the 1st Respondent would then assist them thereafter a call would be made as to which voter was to be paid. Thereafter after the agents who were filing in the voting assistance forms would abandon filing in the forms so that the agents could continue engaging in the acts of assisting the voters against the law.

The 1st Respondent submitted that he rebutted the evidence by PW9, that the 1st Respondent's witness No. 2, was assisting illiterate voters to vote at Iriga Tea buying Centre. In his testimony he explained that

the illiterate voters were being assisted by the presiding officer and not the agents. The role of the agents was merely to witness that the presiding officer had marked the correct choice of the assisted voter. He only assisted one illiterate voter.

The 2nd and 3rd Respondents added that no evidence was led to prove that the Presiding officer restricted that Petitioners agent from witnessing the marking on the ballot papers on behalf of illiterate voters. They relied on Regulation 72.

vi) Substantive non-compliance of the law

a. Party Colours

The petitioner alleged that the 1st Respondent by wearing the green and red shirt with the markings '*Muisraeli*' imprinted on the front part of the shirt and going to vote with the said shirt at the polling station was in breach of the electoral laws. The said colours were associated with Narc Kenya, as confirmed by the Presiding officer. The said 1st Respondent further showed voters to vote for the person in the green shirt, which affected the voting pattern. He had used the same party colours during the campaigns hence unlawful for him to adorn such clothing, more so after going to two polling stations, Kajiambaka and Iriga polling stations. The dressing was shown in the video captured at Mururi(SNM 1).

The 1st Respondent submitted that the 1st Respondent witness 8, Superintendent Joseph Ongere testified that no election offences were committed in Muthambi ward. The shirt worn by the 1st respondent was not a party shirt and did not have any party name, party symbol, slogan or image of any person on it. The colours do not exclusively belong to the Narc Kenya party. It was not shown how the shirt affected the outcome of the results.

The 2nd and 3rd Respondents submitted that Political parties are registered with the registrar of political parties when they submit a party symbol and name. The allegation by the Petitioner on wearing green colour making it an election offence lacks basis in law. There are other political parties that share a colour hence the contention that green colour relates only to Narc Kenya Party without adducing further evidence to ascertain the exact political party being represented remains but a mere allegation.

b Petitioner's votes under declared while the 1st Respondent's votes over declared/ Transposition errors.

The Petitioner alleged that there were 362 votes that were hanging and were added to one Alexander Mwai at Kajiunduthi Polling station. They submitted that the 1st Respondent votes of 4588 over those of the petitioners 4415 with the margin being a mere 173 votes that means that the nothing should be overlooked. The results on form 36 A and 36 B for Kajiunduthi differ. They submitted that had the 362 votes been added to the Petitioner's votes he would have emerged winner. They relied on the case of **RAILA ODINGA & ANOTHER V IEBC And 2 OTHERS**; that the court should not overlook irregularities where of such a nature or magnitude as to have affected the results of the election, or to have negatively impacted the integrity of the election. They further submitted that the quality of the election is just as important as the quantity.

The 1st Respondents submitted that the allegation was equally not proved. According to them not a single incident was pointed out of under declaring or over declaring of the parties results in this case. He contended that the "Hanging Votes" at Kajiunduthi polling station affected the votes of ALEXANDER MWAI KITHINJI who garnered 4 votes Instead of 366 votes appearing on Form 36 B.

The 2nd respondent submitted that 2nd Respondent witness 1 The Returning officer explained that this was an error of transposition from 36A to 36B. The error was explained by the 2nd Respondent that this was purely a human error which occurred in the process of manual transfer of data from form 36 A to form 36 B. The error did not affect the Petitioner in any way or manner whatsoever and neither did it affect the outcome of the election. Adding the additional votes would mean 768 votes which was above the required numbers in law. Such an error is curable by dint of the provisions of section 83 of the Election Act and cannot form the basis for vitiating the election. They submitted that form 36A was the primary results for MCA used to announce the results for Kajiunduthi, form 36B arises from collating the results after ascertaining them from 36A. They relied on the case of **JOHN KIARIE WAWERU Vs BETH MUGO and 2 OTHERS EP NO 13 of 2007**, Where Kimaru J, accepted the explanation that “ *Any diligent candidate was expected to have tallied the result from various polling stations before the results were finally officially announced by the 2nd Respondent, as a returning officer at the tallying centre...*”

The 2nd and 3rd Respondent submitted that, the Supreme Court of Kenya in **Raila and Others v. IEBC and Others, Presidential Petitions Nos. 3, 4 and 5 of 2013** adopted the standard that non-compliance must affect the results when the Court held, thus;

“Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections.”

The further relied on the case of **Rishad Hamid Ahmed Amana vs. IEBC & 3 Others H.C. at Malindi E.P No. 6 of 2013** where the **materiality test** was stated to be -

“Apart from that, the Petitioner is required to establish that the errors and irregularities were either occasioned by outright negligence or deliberate action on the part of the guilty party. Irregularities which can be attributed to an innocent mistake or an obvious human error cannot constitute a reason for impeaching an election result. This court is mindful of the fact that at the stage where election officials are required to tally the results, some of them would have stayed awake for more than thirty-six (36) hours and therefore simple arithmetical mistakes are bound to happen.

The court applied the decision by Maraga J (as he then was) in **Joho –Vs- Nyange (2008) 3KLR (EP) 500** stating “*What Section 83 of the Elections Act simply provides is that in any election, because it is conducted by human beings, there are bound to be errors which can be explained. There is no election which can be perfectly conducted. However, it is only when such errors, which constitute non-compliance with the law, materially affect the outcome of the results that the court will have no option other than to nullify the said results.*”

They further relied on Section 83 of the Elections Act on the results versus validity of the elections.

E) ANALYSIS AND FINDINGS

I noted that the petitioner albeit submitted on most of the contested issues, he however went on to frame his own which he termed as **ON THE LAW** and diverted from the agreed ones. The court will only isolate the agreed issues to avoid digressing and in the interest of justice.

A. Whether the improprieties, irregularities and non-compliance with the constitution and Election Laws that occurred in Muthambi Ward were substantial and affected the results.

Election offence refers to an illegal act or conduct that is proscribed under the Election Disputes laws

and attaches a consequence. While irregularities refer to administrative or logistical lapses and breaches of election laws that do not amount to an offence or malpractice of a criminal nature. The latter only connotes procedural failures on the part of election officials, often arising from poor training, incompetence or fatigue (The Judiciary Bench Book on Electoral Disputes Resolution ,2017, pg 124.

A court handling a petition only needs to determine whether an electoral malpractice of a criminal nature may have occurred as per section 87(1) of the Elections Act 2011 which suggests that the court can use the civil standard to determine whether such malpractices affected the validity of the election.

The standard of proof of irregularities is higher than the civil standard of balance of probabilities but lower than the criminal standard of proof of beyond reasonable doubt (**RAILA ODINGA V IEBC & 3 OTHERS Supreme court petition no 5 of 2013**) . The court further added that a mere proof or admission of electoral irregularities, without more, will not automatically vitiate an election. This is because Election offences attract serious sanctions and proof of any breach of electoral laws and procedures has to be clear and without equivocation.

The Court of appeal in **Mohamed Ali Mursalv Saadia Mohamed and 2 others (2014 eKLR** added that “ ***the standard of proof in such instances is no doubt beyond reasonable doubt, the threshold cannot be any lower...***”This court will apply this standard as guided.

The petitioner must show that the irregularities were of such a nature or magnitude as to substantially affect the results or integrity of the election. This is called the “Materiality test” which envisages to give effect to the will of the electorate. The court further puts in mind that an election may not be fool proof of mistakes.

a. On Voter Bribery and undue influence

Section 9 of the Election Offences act makes it an offence to bribe in a bid to influence a voter. Section 10 on undue influence makes it an offence to threaten or use any force, violence or damage including compelling a voter not to vote for a candidate or party or even inducing another to vote commits an offence. The thresh hold of evidence required here is beyond balance of probability but below reasonable doubt as stated in the court of appeal case of **Mohamed Ali Mursalv Saadia Mohamed and 2 others (2014 eKLR**.

The evidence of the PW 1 himself on cross examination is that he did not see nor witness any voter bribery. He also did not witness any voter transportation as alleged. PW 4 indicated he saw youth holding cash at Muiruri and youth having blocked the first Respondent. The youths were alleging that the 1st Respondent was buying votes but he did not himself witness the vote buying at the scene, That Kshs 4000/ was handed over to the youth specifically one Kagware to share amongst themselves. The said Kagware, though well known did not swear an affidavit nor tender testimony in court. The photos and Video of the scene at Mururi (SMN 2A TO D) do not necessarily show any vote buying. The court saw a man probably the said Kagware posing at the back holding a bunch of kshs 1000/ notes. According to the evidence of PW 4 (Stalin Mwenda) as shown and heard in the video footage (SMN 1) someone in the background is heard saying “go near him”. None of the witnesses testified that they saw the 1st Respondent hand over the cash to the voters at Mururi. This was after the 1st Respondent “*ameachiwa vijana*”by the Petitioner. No other witness confirmed this fact, yet there was a group of youth present. The easiest and most credible witness would have been the one holding the cash to share out being the alleged accomplice.

The only allegation that the two ladies Wanja were given Kshs 200/- each by the personal assistant to

the 1st Respondent. The court in the case **Hosea Mundui Kiplagat V Sammy Komen Mwaita and 2 Others EP Eldoret No 11 of 2013** the court stated that *where the election offence is allegedly committed by the agents of a candidate, the connection must be established. It is not enough to show kinship or proxies but go further to show that they perpetrators were agents of the candidate and engaged in the acts with the candidate's consent.*

The 1st RW 4, Humphrey Miriti Mawira the Personal Assistant to the 1st Respondent stated that Wanja is the grandmother, who lives at Ntutua village. He never visited the grandmother that day. The relationship between the Personal assistant and the said Wanja was proved as kinship, as to whether the 1st respondent gave any if at all consent for the bribe was not proved more so on the basis that they are related as grandmother and grandson. 1st Respondent W 11 stated that she is the mother to 1st RW 4 and he was not at home when they arrived from voting at Marima polling station and no money was exchanged.

PW 5 (Lawrence Njeru Kiraithe) alleged that at the scene at Mbari a Mburi he saw the 1st Respondent, together with Karwitha and Ngai with the Motor vehicle registration KCM 134D. 1st Respondent separated the voters who had voted from the ones that did not and handed over Kshs 500/= to the ones who had not and were told to see the T shirt in the ballot paper, but he did not get any. That after he dished out the cash he left. His testimony was not corroborated yet the alleged incident happened in an open place and in a fashioned manner. The court in its rightful mind cannot just take the evidence of this one witness to be the truth without further proof knowing that the witness was categorical that he was a supporter of the Petitioner, hence had interest in the outcome. The court Again Elias Njiru (PW6) alleged that the 1st Respondent handed over Kshs 200/= to five people who were unknown to him at Maatha polling station, approximately 30 meters from the polling station. He was allegedly an agent at the station. On cross examination showed that his name did not appear in the form 36 A and had allegedly misplaced his agency form. He further mentioned 4 other people as agents who again were not in the form 36A. He despite his training on voting did not inform the Presiding officer to disperse the crowd nor reported the alleged bribery. He was later allegedly removed from the polling station after making a phone call. Again the court doubts the veracity of this witness and the testimony appears couched and without any cogent proof.

The 1st Respondent indicated that he did not visit Maatha polling station and he only garnered 57 votes while the petitioner got 189 votes. At Ntutua the Petitioner again got more votes with 137 while the 1st Respondent got only 27 votes as per the forms 36A. At Muiruri he saw the Petitioner vehicle KAR 785K which tried to block him briefly when the 1st Respondent dodged it and drove ahead. Later he saw another vehicle KBK 770Q belonging to Mutegi who now blocked the road and the petitioner came and they faced each other. He talked with the petitioner and the group of youth who had blocked him. They were the Petitioner's supporters. He refuted having handed over any money to the youth. The assistant chief arrived and asked for evidence of bribe the youth did not give any. He indicated that Paul Ngai was an agent at Ntutua polling station and did not stay with him that day. The five unknown person at Maatha primary polling station mentioned by the PW 6 were also unidentified and not proved to the required standard.

The 1st RW 4, Humphrey Miriti Mawira stated he hired the vehicle KCM 134D as per the agreement (HMM 1) . They went to Kajambaki polling station with the 1st Respondent, when on coming back, they were trailed by 2 motor cycles and saw a vehicle KAR 785K and later KBK 770Q. He further corroborated the evidence of the 1st Respondent. He never saw any money at Muiruri or the young man holding the money. They never went to any other polling station that day including Mbariamburi. This court is alive to the fact that electronic evidence can be subject to manipulation hence the requirements of the law under section 106B of the Evidence act which in this case was not met.

The Petitioner is required to prove by clear and unequivocal evidence allegations of bribery (case of **Wilson Mbithi Munguti Kabiti and 5 others V Patrick Makau King'ola and Another High Court Machakos, Election Petition Number 9 of 2013**).

In the case of **TwahirAbdulkarim V Mwathethe Adamson Kadenge and 2 others HC Malindi EP Appeal No 1 of 2014**, the Court quoted on bribery as follows;

*Due Proof of a single act of bribery by or with the knowledge and consent of the candidate or by its agents, however insignificant that act may be, is sufficient to invalidate the election, the judges are not at liberty to weight its importance, nor can they allow any excuse...such as they can allow in certain conditions in cases of treating or undue influence by agents. For this reason clear and unequivocal proof is required before a case of bribery will be held to have been established. Suspicion is not sufficient, and the confession of a person alleged to have been bribed is not conclusive. Bribery may be implied by the circumstances of the case and the court is not bound by strict practice applicable to criminal cases, but may act on uncorroborated evidence of an accomplice....a corrupt practice must in **all cases be strictly proved**. A corrupt motive in the mind of the person bribed is not enough..."*

This court is not convinced that the allegation was strictly and unequivocally proved as required under the law. The other ideas seem to be stage managed and are not sufficient to prove the said allegations. The court will reject the allegations where they are scanty, or where based on speculation, suspicion and guesswork (**Muliro v Musonye and another (2008) 2 KLR (EP) 52 at 65**) as was in this case. These allegations require clear supportive evidence.

b. Use of Force or violence

The evidence of all the witnesses indicated that they voted peacefully and there was no violence witnessed during the election. The allegation made by the Petitioner is therefore baseless. Indeed the confrontation at Mururi was cut short by the arrival of the chief and no violence of any nature was reported. The only reported was on the damage to the 1st Respondent's vehicle which issue was actually reported by himself. The court therefore finds that there was no violence was experienced in Muthambi ward at all.

c. Voter Transportation

The PW 1 was categorical that he did not witness any voter transportation let alone mass. His evidence is mainly hearsay and he was never in one place with the petitioner at the material times if at all. The evidence of PW 4 that he saw the 1st respondent's Personal assistant transport Wanja, was disproved by the said Humphrey Miriti (1st RW 4) and the 1st RW 11 and 14. 1st respondent witness 11 testified that 1st RW 4 is the son and Wanja is the mother and she took her to the polling station. The 1st respondent Witness 4 never took the grandmother to vote and it was confirmed that she used a motor cycle. The law does not further disallow one to ferry a relative, let alone elderly to go and vote. 1st Respondent W 13 was the rider of the motor cycle. Further the alleged 7 seater vehicle does not prove mass, if not demonstrated who was ferried.

d. Petitioner's agent denied entry at Nkundi and Kanoro Polling stations.

The Petitioner's allegation that his agent at Nkundi Primary School Polling station the PW7 (Hawkins Michael Kirimi) was denied entry into the polling station on arrival. He testified that he found another agent, One Fides Gaaji which events manifestly affected the end results. He later got approval to enter and the said Fides was asked to leave. His name was entered in the polling station diary.

The 1st Respondent denied the allegation and discredited by the 1st Respondent's 7th witness (Jesse Gitonga Sebastian) who was an agent at that polling station. He confirmed that the petitioner's agent one KELVIN MWONGERA was present at the polling station and even signed from 36 A at the end of the voting exercise.

The 2nd & 3rd Respondent's 1st witness (Obadiah Kariuki) stated that PW 7 was present at the said Polling Station from as early as 6 a.m as shown in the polling day diary (OKG 3 (a) which he signed as having arrived at 5.45 am. The PW4 also signed from 36A for Nkundi Polling Station in acknowledgement that the voting exercise had taken place in accordance with the law without any notable incident. Fides Gaaji's name was later cancelled and it was explained that she was chucked from the polling station by the Petitioner's agent. Section 30(1) of the Election Act which provides; *A political party may appoint one agent for its candidates at each polling station.*

(2) *Where a political party does not nominate an agent under sub-section(1) a candidate nominated by a political party may appoint an agent of the candidate's choice.* The said Fides Gaaji was an agent of Jubilee for the presidential and MP thus representing different candidates as allowed by law.

The evidence of the PW 2 (Nkonge) stated that he was late in issuing some of the letters of appointment as late as after 7.45 am when the exercise had already began. At the conclusion of vote counting none of the agents indicated any discontent over the exercise, none. Further to this the Petitioner got 309 votes against 110 of the 1st Respondent of the 526 votes cast at Nkundi Polling station. Clearly this did not affect the results.

At Kanoro Polling station the Petitioner garnered 70 while the 1st respondent got 127 out of the 240 votes cast. All the polling station diaries in issue provided in evidence OKG 3a- 3e showed that Jubilee agents were in the polling station.

Regulation Section 62 of the Election Act states that aside from the candidates, their authorised agents are allowed into the polling station and the Presiding officer was allowed to admit not more than one agent for each candidate or political party. That notwithstanding, more agents for Jubilee were allowed in the 31 polling stations as they allegedly represented different candidates as shown in the polling day diaries annexed.

Of utmost importance on this issue is Regulation 62(3) states that *"the absence of the agents shall not invalidate the proceedings at a polling station"*. I am satisfied that the Petitioner's Party was more than adequately represented during Polling day at the Polling Stations.

e. Failure to Respond to Petitioner's Complaints.

Petitioner stated that he wrote a letter to the IEBC protesting the behaviour of the 1st Respondent on the election day as well as some IEBC officials. The letter was received and stamped but no action was taken. According to him this eventually affected the Petitioner's electoral victory hence protesting the fitness of the officials to declare the election.

The respondents however stated it was not until 10/8/2017 (after declaration of the results) that the Petitioner wrote to the 2nd Respondent (Petitioner's exhibit ENM 2). He complained that the 1st respondent was wearing a Narc Kenya Party Shirt and was allegedly bribing voters on the 8/8/2017 but was never disqualified. The 2nd Respondent testified that upon receipt of the letter, discussed the same with the Petitioner and his agent and explained that the complaint had been overtaken by events. He could therefore proceed to court.

Looking at the issues holistically, the court finds that the complaints made way after the 8/8/2017 date was overtaken by events and were a mere after thought in a bid to add substance to the issues before court. It is a wonder no complaint was made to the police or the 2nd Respondent on the 8/8/2017 immediately after the altercation between the parties at Muiruri. The court finds the reports made as sham.

f. Failing to have voting assistants fill in the forms as required by law.

The Petitioner stated that his agents did not sign the forms 36As as required by law hence no credibility in the election results.

The 2nd and 3rd Respondents indicated that the allegations by the PW 6 and 7 were controverted by the evidence of PW 7. PW 7 was an agent of the Petitioner at Nkundi Polling station. He, himself stated that at the end of the day he was the first agent to sign the form 36 A at about 9.00pm. He was part of the counting process and he gave no reasons in the comments section as they were all in agreement. He left the tallying centre after midnight when the results had already been declared. He also signed the polling station diary as having been present since 5.45am and not the alleged 10.00am which he duly confirmed as per the diary produced as OKG 3A and 3E. Whichever the case Nkundi polling station produced the Petitioner as the overall winner with 309 votes against the 110 of the 1st respondent. This shows that the results were not affected by the alleged irregularity. No basis was laid for the voting assistants failure to sign any forms as no discontentment was ever recorded or raised during the voting process.

Regulation 62 (3) states that the absence of the agents shall not invalidate the proceedings at the polling station. This allegation is rejected.

g. Party Colours and visiting polling stations:

The petitioner alleged that the 1st Respondent by wearing the green and red shirt with the markings "Muisraeli" imprinted on the front part of the shirt. Going to vote with the said shirt was unlawful especially after visiting two polling stations, Kajambaki and Iriga polling stations. The dressing was shown in the video captured at Mururi and the photos produced as SNM.

Did the shirt affect the results"

The Allegations was that the 1st respondent went to Kajambaki to access his agent, where he scored 83 votes against the 221 votes garnered by the Petitioner being over 2/3 of the votes. This court does not find that the results were necessarily affected by the visit.

The 1st Respondent confirmed that he voted at Iriga tea buying centre and garnered 386 votes against the Petitioners' 127 votes as per the form 36A. According to the evidence of the 2nd and 3rd Respondent Witness 2, the 1st Respondent had a green shirt, blue jeans and a black leather Jacket which was half fastened as it was cold that morning. He did not spend muchtime greeting people just normalpleasantries; this was his home polling station. He did not see him talking to anyone outside the polling station. He further confirmed that the 4 or 5 who exchanged pleasantries people were not deemed to be a crowd. He was given priority to vote and left. The PW 9 was an agent in stream 2 not 1 where the 1st Respondent voted, he added he did not mention any names of the people who were communicating with the 1st respondent at the polling station nor report any irregularities yet attained a training.

Regulation 62 (6) under the Election Act specifically states “ *No person shall be admitted into a polling station if that person is wearing a badge or has any dressing, signifying symbols or other indication of support for any political party a candidate in the election...*”

The Presiding officer stated in his testimony that did not note anything significant as to warrant him to write it down in the polling station diary. Infact he took no action as he felt that the said issue of clothing was a non-issue whether due to ignorance or lack of knowledge. In the case of **Mohamed Ali Mursalv Saadia Mohamed and 2 others (2014 eKLR)**, the Court of appeal upheld the election where the agent posted to a polling station failed to report alleged irregularities including bribery and wearing an ODM T shirt...the Agent was also ejected for being troublesome.

The court quoted “*What I find incredible is that no evidence that anyreport was made to the Security personnel or to the police. This court doubt that a presiding officer can blatantly wear a T-shirt with one party colours at a polling station he was in charge of and get away with it*”

The court in **Charles Maywa Chetodum and Another V IEBC and 2 others (2014)eKLR**, stated that in areas with large assisted voters the candidates can be identified by their party symbol colours or name. The shirt as shown in the video footage and the Photos produced as SMN 2A to D show green shirt written *Muisraeli* which is not a party name. It does not bear the political party name NARC KENYA. I do note the colour green of the shirt and some red, but I am left with a lot to wonder.The allegation that the colour green signifies NARC Kenya was not adequately proved more so that even the Presiding officer noted but failed to indicate in his diary as to give the issue more weight. Further the extent and propensity of the Ward to be largely assisted voters was not proved but only alleged.

This notwithstanding the same cannot be true that at your home polling station wearing a green shirt while partially covered would affect the results.A comparative analysis of **MOHAMED MURSAL V SAADIA MOHAMED and 2 OTHERS (2014) eKLR** where the court dealt with the issue of clan and voter influence the court said, “*...these clan dynamics notwithstanding, at the end of the day, it is the individual voter who, in his unfettered right to vote, casts a ballot that helps...nor does it impede or otherwise prevent a voter from voting for a candidate of his own choice. The voter exercises his constitutional rights of expression and association freely and cast his ballot in favour of the person he deemed best. ...it is ultimately his Individual choice that matters*”

The court could not connect the green shirt to other campaign or ballot as no sample was produced to tie the competitive advantage if any.On the other polling stations ie Marima, Kagongo, Maatha or Ntatu polling station on the 8/8/2017 aside from the disputed fact that he visited some polling stations, it was not shown clearly how the alleged non- compliance affected the results of the candidates.

h. Allowing 1st Respondent’s agents to Assist voters

The Petitioner and witnesses testimony was that the agents of the 1st respondent were allowed to assist the illiterate voters at the polling stations specifically by PW9 (KIBAARA MUTEGI) statedthat the brother to the 1st respondent (Kathugumi) influenced the outcome of the votes. 1stRW 2 (Suleiman Kathugumi) denied assisting illiterate voters with an exception of one which he witnessed to vote at Iriga Tea buying Centre. He stated that illiterate voters were being assisted by the presiding officer and not the agents whose role was merely to witness that the presiding officer had marked the correct choice of the assisted voter.

The 2nd and 3rd Respondents added that no evidence was led to prove that the Presiding officer restricted that Petitioners agent from witnessing the marking on the ballot papers on behalf of illiterate

voters. Regulation 72 permits assisted voters to be assisted or supported by the person of their own free choice and who shall not be a candidate or agent. The evidence brought before court was that the Presiding officer assisted few voters in the presence of the agents. Witnessing by agents is not assisting. This court was not even shown the alleged number of assisted voters that would eventually have affected the results, especially since all the candidates had some agents in the polling station and should have taken and produced proper records to validate their claims. This court cannot presume these facts without proper evidence and unsubstantiated claims. This allegation therefore fails.

i. Petitioner's votes under declared while the 1st Respondent's votes over declared/ Transposition errors/ Vote Tallying

The Petitioner alleged that there were 362 votes that were hanging and were added to one Alexander Mwai at Kajiunduthi Polling station. They submitted that the 1st Respondent votes of 4588 over those of the petitioners 4415 with the margin being a mere 173 votes should not be overlooked. The results on form 36A and 36 B for Kajiunduthi differ. They submitted that had the 362 votes been added to the Petitioner's votes he would have emerged winner. They relied on the case of **RAILA ODINGA & ANOTHER V IEBC And 2 OTHERS**; that the court should not overlook irregularities where of such a nature or magnitude as to have affected the results of the election, or to have negatively impacted the integrity of the election and the quality as well.

The 2nd respondent submitted that 2nd RW 1, The Returning officer explained that this was an error of transposition from 36A to 36B which purely a human error which occurred in the process of manual transfer of data from form 36 A to from 36 B. This error is curable by dint of the provisions of **section 83** of the Election Act and cannot form the basis for vitiating the election. They referred to the case of **JOHN KIARIE WAWERU Vs BETH MUGO and 2 OTHERS EP NO 13 of 2007**, noted above. the 2nd and 3rd Respondent submitted that, argued that the standard was that that non-compliance must affect the results as stated in **Raila and Others v. IEBC and Others, Presidential Petitions Nos. 3, 4 and 5 of 2013**, noted above and adopted by this court.

The court agrees with the case of **Rishad Hamid Ahmed Amana vs. IEBC & 3 Others H.C. at Malindi E.P No. 6 of 2013** on the materiality test that mistakes and errors are bound to happen and must be shown to be occasioned by the guilty party by his deliberate actions or omissions. If the mistake is innocent, human errors would not constitute a reason to nullify the election putting in mind the time and duration of the exercise and the fatigue that may ensue.

The above was also strengthened in the Maraga J (as he then was) Decision in **Joho –Vs- Nyange (2008) 3KLRI (EP) 500**. *“What Section 83 of the Elections Act simply provides is that in any election, because it is conducted by human beings, there are bound to be errors which can be explained. There is no election which can be perfectly conducted. However, it is only when such errors, which constitute non-compliance with the law, materially affect the outcome of the results that the court will have no option other than to nullify the said results.”*

The errors was in form 36B not 36A and was clearly explained. I accept the explanation given by the 2nd respondent that the form 36 B is just a transposition from form 36A, the latter which is the primary document used in the announcing of the results. Form 36 B showed the registered voters as 506 again the 1st Respondent garnering 251 and 100 for the Petitioner. The addition was made to Alexander Mwai from 4 to 366 which would clearly give more votes than those required in each stream to over 700 voters.

The court further agrees with the ruling in **Peter Munya** case that “ ... *The court has to consider whether*

the errors and irregularities sufficiently challenge the entire tallying process and lead to a legal conclusion that the tallying was not transparent, free and fair. It is not just a question of who got more votes than the other. The votes must be verifiable by the paper trail left behind”

I have personally taken the initiative to compare and contrast all the returns in the form 36As and 36B (OKG 4) for Muthambi ward in a bid to establish the paper trail. The totals reflected for the Petitioner and the 1st respondent are true reflection of the voters will. The declaration by IEBC also showed that the 1st Respondent won with 4588 votes (ENM 1). The Petitioner closely followed with 4,415 which clearly was the epitome of the petition, due to the proximity of the votes by a mere 173 vote difference. The other candidates took the dismal balance. The total votes cast were 9899 with valid votes of 9838 while those rejected were 61. There was an additional vote of 366 as reflected in the form 36B for Alexander Mwai at KAJIUNDUTHI Polling station which was a mistake as the form 36A, the primary document for announcing results, showed he only garnered 4 votes in the said polling station. I don't accept the argument that the difference of 322 should be added to the Petitioner's. Further even if the 362 votes were to be removed the difference will be 9537 as total votes cast. This does not significantly affect the results more so for the two parties before court.

Since no vote recount was done, and the mistaken additional votes did not affect any of the returns for the Petitioner or the 1st Respondent. This court does not find that the additional votes actually affected the validity of the election. The court is guided by the case of **Harun Meitamei Lempaka v Lemanken Aramat & 2 others [2013] eKLR**; High court Nakuru 2013; where the court faced with similar allegations and on examination of the paper trail stated

“...I found no evidence that any vote was added to the First Respondent's aggregate final. ... I accept the explanation by the 2nd Respondent and I find that there was no manipulation of the votes cast and received by the candidates in the Form 36.”

Further parties are bound by their pleadings, the over declaration as pleaded was a comparison between the presidential vote, a difference of 635 votes with the MCA seat under paragraph 12 of the Petition. This comparison was not followed up during the hearing after the response by the 2nd and 3rd Response but took a different turn when a discrepancy was seen in form 36B. The allegation was therefore not proved as pleaded. That notwithstanding as supported by section 83 of the Election Act, this allegation is dismissed.

B) Whether the elections held on the 8/8/2017 were conducted in accordance to the constitution, the Election Act and the Election Rules.

According to the Petitioner this touches on the Articles 81 which deals with poll violence free elections, secret ballot, by a transparent and independent body administered in an impartial, neutral efficient, accurate and accountable manner. The petitioner alleged that among others there should be the transparent counting and announcement of the result and there should be no violence. He relied on the case of **KIZA BESIGYE V YOWERI KAGUTA MUSEVENI PRESIDENTIAL PETITION 1 of 2001 UGANDA**. The Respondent averred otherwise that there were no electoral offences committed.

In **Morgan V Simpson [1974] 3 ALL ER 722** the court confirmed, *if the election was so conducted that it was substantially in accordance with the laws as to elections, it is not vitiated by a breach of rules or a mistake at the polls – provided that it did not affect the results of the election* The alleged breaches are substantial enough to vitiate the election or were mere breaches of the **rules and mistakes** that did not vitiate the election outcome.

The court has made its observations in the above-mentioned analysis and will not reiterate these issues here. The court further notes that the majority of the issues complained of fall under the Election regulations not sections.

The court is further guided by the case of **Charles Maywa Chetodum and Another V IEBC and 2 others (2014) EKIr** where the Judge expressed;

*‘...in a few polling stations not exceeding five (5) they did not go beyond that as the law requires. They had to show which they had not that said irregularities affected the results of the election in a **substantial manner** thereby rendering the entire election exercise null and void ab initio’*

The court finds that the validity, integrity, credibility and results of the election was **not** compromised specifically in Kajambaki, Maatha Ntata, Iriga Tea Buying centre and Marima polling stations. The irregularities complained of by the Petitioner did not at all affect the results of Member of County assembly for Muthambi Ward. The election was consistent with Articles 1 (sovereignty of the people), 38 (political rights to make a choice) and 86 (voting) of the constitution. The election of the ward representative at Muthambi ward was free and fair and verifiable and accurate as shown in the form 36As hence complied with the substance of the law and the Constitution.

CONCLUSION

There evidence produced was not glaringly fundamental that the alleged illegalities and irregularities affected the results. The petitioner did not discharge the burden of proof as required under the law. There is no doubt in my mind that the First Respondent won the election and was validly declared as the Member of the County Assembly Muthambi Ward.

The upshot of all the foregoing is that:-

i. The Petition is hereby dismissed with costs.

ii. The 1st Respondent is declared as the validly elected Member of County Assembly of Muthambi Ward as the will of the people was expressed on the 8th August 2018.

iii. The certificate of declaration shall issue to the IEBC in accordance with Section 86 of the Elections Act, 2011 (No. 24 of 2011), that the First Respondent, Wilson Nyaga Derebia was validly elected as a Member of the County Assembly for Muthambi ward.

iv. The reasonable costs shall be awarded and paid by the petitioner subject to taxation by the taxing master.

v. Right of Appeal.

DATED SIGNED and DELIVERED at CHUKA this 1st February 2018.

HON. M.SUDI

SRM

In the presence of: The Petitioner, 1st Respondent

Mutegi for Petitioner; N/A

Present: Kariuki for Petitioner- Mwilaria for 2nd and 3rd Respondents



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