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Judge:	A.K.MOKOROSS SENIOR RESIDENT MAGISTRATE
Citation:	Hassan Jimal Abdi v Ibrahim Noor Hussein & 2 others [2018] eKLR
Advocates:	Mr. Muganda for the 1st Respondent Mr. Odhiambo for the 2nd and 3rd Respondents.
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Case Outcome:	Petition allowed
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Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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REPUBLIC OF KENYA

IN THE SENIOR RESIDENT MAGISTRATE'S COURT AT WAJIR

ELECTION PETITION NO.3 OF 2017

HASSAN JIMAL ABDI.....PETITIONER

VS

IBRAHIM NOOR HUSSEIN.....1ST RESPONDENT

RETURNING OFFICER, WAJIR NORTH

CONSTITUENCY.....2ND RESPONDENT

IEBC3RD RESPONDENT

JUDGMENT

BACKGROUND

1. This petition arises out of the General elections held on 8th August 2017 in which Ibrahim Noor Hussein was declared the elected Member of County Assembly for Batalu ward with a vote of 1099 against his closest rival who garnered 946 votes.

2. The other contenders in the race were Hassan JimalAbdi (the petitioner), IdhowAdan Ibrahim and Ali YussufAbdullahi whereas the race was superintended by the Returning officer, Wajir North Constituency acting as the agent for the Independent Electoral and Boundaries Commission. The later parties are duly represented in this suit as the 2nd and 3rd respondents.

PETITIONER'S CASE

3. Vide this petition, the petitioner challenges the validity of the 1st respondents election as the Member of County Assembly for Bataluand principally pleadsthat the elections for the said ward was tainted with illegality therefore not reflecting the overall will of the electorate.

4. In the particular, the petitioner contends that the 2nd and 3rd respondents by themselves and/or through agents acting under them committed election offences by failing to serve impartially, independently and in good faith and in performing their duties under the influence of the 1st respondent and the 1st respondent's political party.

5. The petitioner further pleads that the third respondent by itself and/or through its officers committed an election offence by succumbing to the 1st respondent's influence and declaring results which they knew or had reasonable cause to believe to be false or that they did not believe to be correct.

6. The petitioner further accuses the 3rd respondent of colluding with the 1st respondent for the purpose of giving an undue advantage to the 1st respondent and making an entry in the form 36A knowing it to be false.

7. The petitioner asserts that the Batalu polling station was open from about 7:30am to 10:30pm; That there was ballot stuffing at Batalu Polling Station and Basineja Polling Station; That in some instances the presiding officer of Batalu polling station was calling people to bring identification numbers of people who had not voted when counting of votes had already started in other polling stations; That the presiding officer of Batalu polling station blocked the petitioners agent from recording serial numbers of the seals used to seal the ballot boxes; that forms 36A were put in the ballot boxes and the ballot boxes reopened; that according to form 36A of Basinejapolling station, the number of valid votes was 439 whereas the 1st respondent was reported to have garnered 464 votes; that forms 36A for Batalu primary polling station and Basineja Centre polling station were altered in favor of the 1st respondent; that the alteration was aimed at triggering a win for the 1st respondent; and that the alterations were done after the agents had signed the said forms.

8. Attendant upon the enumerated grievances the petitioner prays for orders:

a) That the 1st respondent was not validly elected and that it is the petitioner who was validly elected; and

b) *Spent*;

c) That it be determined and ordered that the election of the 1st Respondent as member of County Assembly for Batalu Ward is null and void and that he was therefore not duly elected.

9. In the alternative, the petitioner prays for orders that:

a) The election of the 1st respondent as member of County Assembly for Batalu Ward was not free and fair and a fresh election be held; and

b) The respondents pay the costs of this petition; and

c) Such other relief or orders be made as may be just.

10. The petition is accompanied by supporting affidavits sworn by the Petitioner and Abdisirad Hajj.

11. In brief, the petitioner depones as follows. That he was vying for member of county assembly Batalu ward in Wajir North Constituency, Wajir County. That he allegedly came second with a return of 946 votes against the respondents 1099 votes; that forms 36A of Batalu Primary Polling station and Basineja Center polling stations were altered in favour of the 1st respondent. That the alterations were aimed at triggering a win for the 1st respondent. That the said alterations were made after the agents had signed the forms. That the election in Batalu polling station was held from 7:00am to 10:30pm. That in Basineja polling station the presiding officer was calling on people to bring ID numbers of people who had not voted after counting had already started elsewhere. That the results for Basineja, Batalu and Kurrow polling stations had not been transmitted to the Constituency tallying center at Bute by noon of the 9th of August 2017. That at about 3:00pm of the 9/8/2017 the ballot boxes for Basineja, Batalu, and Kurrow had arrived aboard the 1st respondent's car. That he lodged his protest over the conveyance of the same in the 1st respondent's car and was informed by the presiding officer that they didn't have transport. That the 2nd respondent was then informed that they had the results for Kurrow polling station but that the results for Basineja and Batalu polling stations were in a sealed ballot box. That the presiding officer for Basineja and the deputy presiding officer moved aside and conversed whereupon the Deputy presiding officer was given a notebook. That he objected to results being read from a notebook and demanded that they read the results from Form 36A. That he was then kicked out of the

tallying center. That the returning officer then came out of the hall accompanied by the chief agents for Orange Democratic Movement (ODM) and Jubilee. That they then had a meeting wherein he and the ODM agent protested the opening of the ballot boxes. That the 2nd respondent made a decision to open the ballot boxes. That the ballot box for Batalu was opened and, that he recorded the serial numbers on the broken seals as

- a) IEBC 167326
- b) IEBC 1762303
- c) IEBC 1762301
- d) IEBC 1761167
- e) IEBC 1762302
- f) IEBC 1762355

12. That he also recorded the new seals for the Batalu Ballot Box as

- a) IEBC 167326
- b) IEBC 1761852
- c) IEBC 1761167
- d) IEBC 1762398
- e) IEBC 1761504
- f) IEBC 1762399

13. That the Basineja polling station seals were;

- a) IEBC 171758
- b) IEBC 1762380
- c) IEBC 1762389
- d) IEBC 1762388
- e) IEBC 1762387
- f) IEBC 1761154

14. In his affidavit Abdisirad Hajj Ali depones that he was an agent at Batalu Primary School on 8/8/2017. That he arrived at the said polling station at 6:00am on the 8/8/2017 and voters started streaming in at about 6:30am. That the exercise of voting was smooth save for minor fracas caused by an MP representative dishing out money to voters. That between 5:00-6:00pm only one or two voters

were still coming in. That at about 7:10pm no more voters were coming in and he expected voting to close. That he approached the Presiding officer and enquired why voting had not stopped and was told that they were waiting for a motor vehicle carrying voters. That he protested to no avail. That at about 8:00pm more voters started to stream in. That he noticed that some were voting for the 2nd time. That he voiced a new protest and was then promised that the candidate for Member of Parliament that he favored would be awarded 5 votes. That he turned down the offer but the presiding officer nonetheless marked two ballot papers in favor of the said MP. That voting continued until about 10:30pm. That at about 11:00pm the seals to the ballot boxes were opened and the counting began. That the counting for the presidential, Governor's, Senator's, and Member of National Assembly's votes were counted by announcing the candidates in whose favor the votes had been cast whereas that of the Member of National Assembly were not announced. That at the end of the exercise the presiding officer announced that votes cast in favor of the 1st respondent was 487 and the other candidates garnered zero votes. That he refused to sign the form 36 A at the first instance but was directed to do so by the Presiding officer. That the crowd became hostile and he complied in fear for his safety. That the presiding officer put the said form in an envelope and the same was put in a bag labeled IEBC. That about 8:00am on the 9th of August 2017, the Presiding officer from Basineja came in the company of the 1st respondent, Dr. Kassim and two other persons. That they called the presiding officer at their station and moved aside for about 30minutes then left. That the presiding officer then returned to the hall and announced that they were leaving for the tallying center at Bute Arid Zone Primary School. That the clerks and security officers collected the voting materials and walked towards Batalu. That he accompanied them to Batalu with the other agents. That on reaching Batalu the voting materials were put in a house and the presiding officer directed that they leave as the voting exercise was at an end.

15. Finally he depones that their continued protests were ignored and a direction made to the security officers to disperse them.

16. The petitioner further filed two supplementary affidavits, one dated 28th September 2017 introducing forms 35A and 34A for Basineja and another dated 13th December 2017 introducing the KIEMS report for Basineja and Batalu obtained pursuant to this court's order.

RESPONSE TO PETITION

17. The petition was opposed.

18. In his response to petition, the 1st respondent makes several assertions: he contends that the whole process of voting was conducted in compliance with the dictates of the constitution and all Electoral laws; that the people of Batalu ward turned up in large numbers and unequivocally made him their choice of representation for the Member of County Assembly for Batalu Ward; and that the elections in all 12 polling stations in Batalu ward and more specifically Batalu and Basinejapolling stations were conducted in a free and fair manner.

19. The 1st respondent contends that after the voting, tallying and announcement of results were done in a free and fair manner the returned results for Batalu ward were

a) Ibrahim Noor Hussein – 1099 votes

b) Hassan JimalAbdi – 946 votes

c) Adan Ibrahim Idhow -855 votes

d) YussufAbdullahi Ali – 788 votes.

20. It is thus the 1st respondent's case that he won the material election with 1099 votes against the petitioner's 946 votes.

21. It is pertinent to mention at this stage that the petition was filed simultaneously with a notice of motion application in which the petitioner reiterated his prayer for recount and scrutiny of the votes cast at Basineja and Batalu polling stations as well as the provision of KIEMS report for the two stations.

22. That application was canvassed at the early stages of this petition and the court having found merit in the prayers, granted the orders sought.

23. I mention the said application because whereas it was obviously intended as an interlocutory application, the issues pleaded therein were so intertwined with those in the petition as to make it indistinguishable from the main petition.

24. That lack of delineation carried to the Respondents responses with the consequence that I now find that most of what appears in the 1st respondents response is actually a response to the spent application and in my view a replication of the same here would be an unnecessary rehashing of the spent application.

25. As such I deem it sufficient to say that the 1st respondent was strongly opposed to the application for recount and scrutiny on grounds already considered by this court in its ruling dated 6th November 2017.

26. In specific response to the allegation that the Batalu polling station was kept open from 7:30am to 10:30pm, the 1st Respondent asserts that the said polling station was opened at 8:30am instead of 6:00am necessitating that the time lost between 6:00am and 8:00am be compensated.

27. The 1st Respondent asserts that the people of Batalu ward are nomads whose main economic activity is livestock rearing causing them to travel far from home during the day and only return in the evening. He argues that the named activity explains why more voters were recorded in the evening and contends that no voter was allowed to join the line after the official closing time—5:00pm.

28. In defence of the IEBC's neutrality, the 1st Respondent asserts that agents are assigned to each polling station to witness that the electoral process is free, fair and transparent; that each IEBC official swears an oath of office and is bound by the said office; and that the oath ensures the IEBC officials' neutrality.

29. The 1st Respondent avers that he could not have influenced the IEBC officials because he comes from the minority Degodie community and could not wield any influence in the Wajir North Constituency Tallying Center at Bute which was dominated by the Ajuran Community. In his words the said center was "by all definitions and purposes an enemy territory."

30. On the issue of ballot box reopening, the 1st Respondent asserts that if such unsealing occurred, then the main purpose was to retrieve Form 36A which had been erroneously sealed in the ballot box by the presiding officer and states that such human error should be excused. He asserts that the unsealing was done in the presence of the public including the petitioner which meant that the petitioner suffered no prejudice.

31. The 2nd and 3rd Respondents similarly assert that the election leading to the 1st Respondent's election

as Member of County Assembly for Batalu ward was conducted in a simple, free, fair, transparent and verifiable manner pursuant to the dictates of the constitution of Kenya 2010.

32. They assert that they adhered diligently and honestly to articles 81 and 86 of the constitution and the elections code of conduct and aver that in matters of elections the will of the people is paramount and ought not to be set aside unless it is shown that the electoral laws and the constitution were not followed.

33. They accordingly reiterate that the election was conducted in accordance with subsisting election laws

34. It is their assertion that the only voters who were allowed to vote past 5:00pm were the voters already on the queue; that no ballot stuffing occurred at Batalu polling station; that no adult citizen voted at the polling station after the counting of the votes at Batalu; that no alterations were made to form 36A; that no ballot boxes were opened and that the allegations made by the petitioner are a product of hearsay.

35. They therefor join the 1st Respondent in praying for a declaration that the election was valid and that the 1st Respondent was duly elected as Member of County Assembly for Batalu Ward.

ORAL TESTIMONY

36. As agreed at the pretrial stage, the affidavit evidence of all the witnesses were adopted for purposes of examination in chief and the deponents thereof subsequently cross examined.

37. The witnesses all stuck to their depositions with no notable or material variations despite vigorous cross examination. What the court considered to be of note will be discussed later in this judgment.

RECOUNT AND SCRUTINY

38. As earlier stated, the court allowed the interlocutory application seeking recount and scrutiny of the votes in Batalu and Basinejapolling stations. The recount and scrutiny exercise was carried out and a report on the same prepared by the court. The relevant part of the report is reproduced hereunder.

Findings

A. Basineja Center polling station.

The ballot box contained 2 unused ballot paper booklets. 9 completely used counterfoil booklets and one partially used ballot paper booklet of which 14 ballot papers had been used (leaving 14 counterfoils) and 36 unused ballot papers.

Other than the ballot paper booklets, the ballot box contained two packets explained as valid votes cast. There were no packets of spoilt votes, rejected votes or stray votes. There were also no statements either from the presiding officers or the agents.

Form 36A was also not within the box.

The findings on recount and scrutiny were as follows;

Total number of votes cast – 464

Total number of spoilt votes – nil

Total number of rejected votes – nil

Total number of rejected objected votes – nil

Votes garnered by each candidate

Ali YussufAbdullahi – 1 vote

Hassan JimalAbdi(Petitioner) – 0 votes

Ibrahim Noor Hussein (1stRespondent) – 463 votes

IdhowAdan Ibrahim – 0 votes

Ballot paper Sno. CA 00001135 had a line scribbled across the names of YussufAbdulahi and JimalAbdi (outside the voters mark box) and a clear tick in favor of Ibrahim Noor Hussein (inside the voters mark box). The court determined that the vote was clearly in favor of Ibrahim Noor Hussein.

Ballot paper Sno. CA 00000892 had the right upper corner torn off but bore a clear tick in favor of Ibrahim Noor Hussein (1st respondent). The same was cross checked against the counterfoil booklets and the missing part was found still attached to the counterfoil. The court thus determined that Sno. CA00000892 was a vote clearly cast in favor of Ibrahim Noor Hussein.

All the parties present confirmed that the ballot papers had the IEBC stamp at the back and as further confirmation of the authenticity of the ballot papers the court asked the agents to pick 15 ballot papers at random and each ballot paper was checked against its counterfoil. Ballot papers picked were

1. 00001129
2. 00001146
3. 00001141
4. 00001114
5. 00001176
6. 00000850
7. 00000843
8. 00000839
9. 00000844
10. 00000812
11. 00000837

12. 00000785

13. 00000710

14. 00001196

The serial numbers on the ballot papers perfectly matched those in the counterfoils.

B. Batalu Primary Polling Station

The ballot box contained 3 unused ballot paper booklets. 9 completely used counterfoil booklets and one partially used ballot paper booklet of which 40 ballot papers had been used (leaving 40 counterfoils) and 10 unused ballot papers.

Other than the ballot paper booklets, the ballot box contained two packets explained as valid votes cast. There were no packets of spoilt votes, rejected votes or stray votes. There were also no statements either from the presiding officers or the agents.

Form 36A was also not within the box.

The findings on recount and scrutiny were as follows;

Total number of votes cast – 487

Total number of spoilt votes – nil

Total number of rejected votes – 1

Total number of rejected objected votes – nil

Votes garnered by each candidate

Ali YussufAbdullahi – 1 vote

Hassan JimalAbdi(Petitioner) – 1 vote

Ibrahim Noor Hussein (1stRespondent) – 484 votes

IdhowAdan Ibrahim – 0 votes

Ballot paper Sno. CA 00000194 bore two 2 clear ticks within the 'voter mark box'. One in favor of Ibrahim Noor Hussein (1st respondent) and one in favor of Adan Ibrahim Idhow. It was unanimously agreed that this should be marked as a rejected vote.

Ballot paper Sno. CA 00000309 was in favor of YussufAbdullahi and it was unanimously marked as such.

Ballot paper Sno. CA00000011 was in favor of JimalAbdi Hassan (petitioner) and it was unanimously remarked as such.

All the parties present confirmed that the ballot papers had the IEBC stamp at the back and as further confirmation of the authenticity of the ballot papers the court asked that random ballot papers be picked and be cross checked with the counterfoils. By consensus it was agreed that 10 ballot papers be picked. Ballot papers picked were:

1. 00000348
2. 00000326
3. 00000350
4. 00000463
5. 00000452
6. 00000441
7. 00000447
8. 00000448
9. 00000476
10. 00000309

The serial numbers on the ballot papers perfectly matched those in the counterfoils.

It was brought to the attention of the court that whereas the counterfoils showed that 490 ballot papers had been used, only 487 could be accounted for. 3 therefore remained unaccounted for.

It is further worth noting that while doing scrutiny and recount for Batalu Primary Polling station it was realized that the ballot box labeled Batalu actually belonged to Basineja and vice-versa and all the parties present unanimously agreed that the ballot box labeled Basineja was actually the ballot box for Batalu and that the one labeled Batalu was actually the ballot box for Basineja.

The ballot box serial numbers were cross checked with serial numbers in the polling station diaries and the above position was confirmed

SUBMISSIONS

All the conclusion of the hearing all the parties filed submissions through their advocates.

The Petitioners submissions

39. The Petitioner prefaced his submissions with the issues as he perceived them and enumerated them as follows:

a) Whether there were irregularities, electoral mismanagement, malpractice and illegalities committed in the conduct of the Member of County Assembly election in Batalu ward" and

- b) Whether the Batalu Ward Member of County Assembly election was conducted in accordance with the principles laid down in the Constitution, the Election Laws and Regulations" and
- c) Whether the irregularities and illegalities impacted on the integrity and outcome of the elections" and
- d) Whether an order should be granted that the 1st Respondent was not validly elected and it is the Petitioner who was validly elected" and
- e) Whether an order should be granted that there be repeat of elections of member County Assembly" and
- f) Who should bear the costs of this Petition"

40. In support of the assertion that there were irregularities, electoral mismanagement, malpractice and illegalities the petitioner splits his submissions into five parts titled; "ballot stuffing", "KIEMS kit manipulation," "opening and closing of the polling station," "alterations of statutory forms in favor of the 1st respondent" and finally "security of the electoral material".

41. On ballot stuffing, the petitioner asserts that for Basineja polling station the Form 36A indicates that the 1st Respondent garnered 464 votes whereas the total number of valid votes cast is indicated in the same form as 439.

42. Further, that upon recount by this court the total number of votes cast was 464 with 463 being in favor of the 1st Respondent herein.

43. Further still, that pursuant to the KIEMS kit report, the total number of identified voters was 429 broken down as follows: 325 people identified by finger print (biometrics); 1 person identified by way of document search; and 103 voters identified alphanumerically.

44. He gives brief explanation of how each method of identification works and states that for finger identification the voter simply places his finger on a fingerprint reader and is identified biometrically. The document identification comes into play when the reader, for whatever reason, fails to read a voter's fingerprint. The petitioner explains that at this stage, the document reader in the kit is used to scan the barcode at the back of the voter's identity card and after the voter's data has been pulled out he is allowed to vote.

45. According to the Petitioner the alphanumeric identification (supervisor mode) kicks in when a voter cannot be identified via the previous two methods and entails the presiding officer overriding all system restrictions and keying in only the voters identification card in order to avoid disenfranchising a voter.

46. Using the above as a basis the Petitioner then casts doubts on the high number of people identified alphanumerically in Basineja polling station and urges the court to find that such a high number of people could not fail to be identified either biometrically or by document search.

47. The petitioner asks the court to take judicial notice of the fact that Kenya procured the KIEMS kits at an approximate cost of Ksh. 3 billion specifically to ensure "dead voters" or "voters not physically present" don't vote

48. To reinforce his arguments, the Petitioner quotes **section 44** of the **Elections Act no 24 of 2011** which provides:

(1) Subject to this section, there is established an integrated electronic system that enables biometric voter registration, electronic voter identification and electronic transmission of results.

(2) The commission shall, for purposes of subsection (1), develop a policy on the progressive use of technology in the electoral process.

(3) The commission shall ensure that the technology in use under subsection (1) is simple, accurate, verifiable, secure, accountable and transparent.

(4) The Commission shall, in an open and transparent manner—(a) procure and put in place the technology necessary for the conduct of a general election at least one hundred and twenty days before such elections; and (b) test, verify and deploy such technology at least sixty days before a general election.

49. The Petitioner submits that further safeguards to ensure accuracy, verifiability, security, accountability and transparency during voting is found in **Regulation 69** of the **Elections (General) Regulations, 2012** which provides:

(1) Before issuing a ballot paper to a voter, an election official shall

a. Require the voter to produce an identification document which shall be the same document used at the time of registration as a voter;

b. Ascertain that the voter has not voted in that election;

(c) Call out the number and name of the voter as stated in the polling station register;

d. Require the voter to place his or her fingers on the fingerprint scanner and cross out the name of the voter from the printed copy register once the image has been retrieved;

e. In case the electronic voter identification device fails to identify a voter the presiding officer shall—

i. Invite the agents and candidates in the station to witness that the voter cannot be identified using the device;

ii. Complete verification Form 32 in the presence of agents and candidates;

iii. Identify the voter using the printed Register of voters; and

iv. Once identified proceed to issue the voter with the ballot paper to vote.

50. The petitioner points out that during the recount and scrutiny the court was not shown either form 32A or a printed marked register.

51. On the matter of “opening and closing of the polling station” the Petitioner restates paragraphs 8,11,12,13,14,15,16,17 and 18 of the affidavit sworn by Abdisarad Hajj Ali who depones that the polling station at Batalu was closed at 10:30pm and that he had witnessed voters still streaming in at 8:00pm.

52. The Petitioner quotes **Regulation 66** of the **Elections (General) Regulations, 2012** which requires polling stations to be opened at 6:00O'clock in the morning and end at 5:00O'clock in the evening.

53. He builds his argument around the polling station diary (PSD) for Batalu primary polling station and highlights that out of the 502 people who allegedly voted at Batalu primary polling station, **135** had voted at 9:00am, **100** at 11:00am, **52** at 1:00pm, **120** at 3:00pm and **95** at 5:00pm which by the Petitioner's calculation tallies to 502. He then questions the PSD's indication that 73 voters were still on the queue at Batalu Primary Polling Station as at 5:00pm. The Petitioner concludes that the information contained in the polling station Diary cannot stand and urges the court to find that the evidence of Abdisarad Hajj Ali has not been controverted.

54. In support of this position, he relies on the case of **Raila Amolo Odinga & Anor Vs Independent Electoral and Boundaries Commission & 4 others & Attorney General & Another 2017 eKLR** where the court stated:

"It follows therefore that once the court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law...."

55. On the alterations of statutory forms in favor of the 1st respondent, the Petitioner submits that forms 36A for Batalu Primary Polling Station and Basineja Centre Polling Stations were altered to favor the 1st respondent. He relies on the copies of the said forms 36A annexed to the Petitioner's affidavit and states that pursuant to the Form 36A for Basineja Polling Station the votes garnered by the 1st respondent reads as 464 whereas the previous figure seems to be 439.

56. The petitioner once again reverts to the KIEMS report and points out that the said KIEMS report indicates the total number of identified voters in Basineja as 429 which contradicts the figure of 464 given in the form 36A.

57. He further submits that at Batalu Primary Polling Station the form 36A clearly shows alterations of the figure 487 to 502 and urged the court to find that in both stations the alterations added votes to the 1st respondent thus pointing to the fact that the alterations were done in order to favor the 1st Respondent.

58. The above arguments form the foundation stone for all the other sub-titled issues.

59. In addition, the Petitioner submits quite strongly that in election petition cases illegalities and irregularities should not be gauged in terms of quantity of votes alone.

60. He relies on the decisions in **Raila Amolo Odinga & Another Vs Independent Electoral and Boundaries Commission and 4 others & Attorney General and Another (eKLR 2017)** and **Dickson Mwenda Kithinji v Gatarau Peter Munya & 2 others, Civil Appeal No 38 of 2013.**

61. The respective portions of the judgments relied upon is reproduced below.

62. In the Case of **Raila Amolo Odinga & Anor (supra)** the supreme court stated

"On our part, having considered the opposing positions, we are of the view that, the contentions by the 1st and 2nd respondents ignore two important factors. One, that elections are not only about numbers as many, surprisingly even prominent lawyers, would like the country to believe.

Even in numbers, we used to be told in school that to arrive at a mathematical solution, there is always a computational path one has to take, as proof that the process indeed gives rise to the stated solution. Elections are not events but processes. As Likoti J.F opines [e]lections are not isolated events, but are part of a holistic process of democratic transition and good governance...”

63. The part of the decision in **Dickson Mwenda Kithinji** relied on reads:

“To determine whether the results as declared in an election ought to be disturbed, the court is not dealing with a mathematical puzzle and its task is not just to consider who got the highest number of votes. The court has to consider whether the grounds as raised in the petition sufficiently challenge the entire electoral process and lead to a conclusion that the process was not transparent, free and fair. It is not just a question of who got more votes than the other. It cannot be said that the end justifies the means. In a democratic election, the means by which a winner is declared plays a very important role. The votes must be verifiable by the paper trail left behind, it must be demonstrated that there existed favourable circumstances for a fair election and that no party was prejudiced by an act or omission of an election official.”

64. Finally, the Petitioner urges the court to adopt the construction given to article 83 by the supreme court in **Raila Odinga (Supra)** and find that the Petitioner need only prove one of two things to void an election petition, i.e. that the conduct of the election substantially violated the principles laid down in the constitution, or, that there were illegalities or irregularities which affected the result.

65. The Petitioner argues that they have proved that there was a breach of the constitution, illegalities and irregularities in the election of the 1st Respondent and urge the court to find that the same was not free and fair. They therefore pray that a fresh election be held.

1st Respondent's submissions

66. On his part the 1st Respondent submits that issues to be determined in an election dispute can only be derived from the facts and grounds pleaded specifically in the pleadings. He submits that the main issue pleaded by the Petitioner in his petition is whether the 2nd and 3rd respondent conducted the election in compliance with the law and urges the court to ignore any other un-pleaded issues more particularly issues pertaining to the polling station diary.

67. He relies on the decision of Hon. Majanja J. in **Election Petition no. 3 of 2017, Jackton Nyanungo Ranguma Vs The IEBC and two others** where the learned judge stated:

“ I shall accordingly limit my observations and judgment to what is pleaded in the petition and supported by the testimony and other evidence”

68. The 1st Respondent then crafts the issues as follows:

(a) Whether the officials of the 3rd Respondent irregularly conducted voting in Batalu polling station beyond the legally required time.

(b) Whether the officials of the 3rd Respondent engaged in acts of ballot stuffing in Batalu polling station and Basineja Polling Station in favor of the 1st Respondent.

(c) Whether the officials of the 3rd Respondent in Batalu polling station blocked the Petitioner's Agents

from recording serial numbers of the seals used to seal the ballot boxes.

(d) Whether the officials of the 3rd Respondent irregularly reopened the sealed ballot boxes for Batalu polling station and Basineja polling station to remove the results declaration forms 36A's

(e) Whether the officials of the 3rd Respondent altered results in Form 36A's in Batalu and Basineja polling station in favor of the 1st Respondent.

(f) Whether the 3rd respondent's officials engaged in malpractice by colluding with the 1st Respondent through using his motor vehicle to transport election materials.

(g) Whether the IEBC conducted the election in accordance with the law" and

(h) Who should bear the costs of this Petition.

69. However, before delving into the above issues, the 1st Respondent first challenges the jurisdiction of this court to determine this petition.

70. He argues that the present petition is incompetent and fatally defective as it does not state the results of the election in the petition and in the supporting affidavit. He asserts that this offends the provisions of **rule 8 of the Elections (Parliamentary & County Elections) Petitions Rules, 2017**.

71. The 1st Respondent submits that the only attempt to state the results of the election are contained in paragraph 9 of the Petition and paragraph 3 of the supporting affidavit and that the attempt is a failure in so far as it merely states the votes garnered by the petitioner and the 1st Respondent and omits the names and results of the other players in the contested election.

72. He argues that the requirement for the petitioner to state the results is spelt out in mandatory terms in the election petition rules and relies on the case of **Amina Hassan Ahmed V Returning officer Mandera County and 2 others [2013] eKLR** wherein it was stated:

“put differently, the provisions of Rule 10 and others aforesated, are not mere technical requirements. If they are technical in so far as they are procedural and spell out the form and content of intended petitions, they nevertheless, at the same time, are substantive and go to the root and substance of issues and matters prescribed upon. A further reason why the provisions of the Elections Act and/or Rules must be complied with fully is because the Act, and therefore the Rules, are special legislation. They are a legislation for the purpose, as already stated above, of efficiently prescribing the proper, efficient, expeditious and just conduct of election petitions. Every provision in them therefore, is intended to achieve a required result...”

73. In further support of the above proposition, the 1st Respondent quotes **John NjengaMuthutho v Jayne NjeriWanjikuKihara& 2 others [2008] eKLR** wherein it was observed:

“What would happen where, as here the results as envisaged by regulation 40, above are not included in the petition” In our view an essential element would be missing. The petition shall be incomplete as the basis for any complaint will be absent. Whatever complaints a petitioner may be having about an election may be regarded as having no legal basis. The law has set out what a petition should contain, and if any of the matters supposed to be included is omitted, then the petition would be incurably defective.

... We say so advisedly. The provisions of the National Assembly and Presidential Elections Act, have been held, to provide a complete code of the law and rules on elections and election petitions. As rightly pointed out by Mr. Kilonzo for the appellant, that law has no provision for amendment of pleadings after 28 days stipulated for lodging petitions. In view of the conclusions we have come to on that aspect, it follows that the term “shall” as used in Rule 4 must be read as having a mandatory import. Reading it otherwise will render the provisions of that rule otiose.”

74. The petitioner further relies on the decision in **Election Petition No. 3 of 2017 JacktonNyanungoRanguma V IEBC and two others** in which the learned judge stated:

“ related to the burden of proof is the fact that the petitioner is bound to prove the case it has pleaded. A petitioner is not permitted to make a case outside the pleadings and his affidavits and testimony must be consistent with and support the case pleaded.”

75. To close his argument on jurisdiction of this court or the lack thereof, the 1st Respondent observes that the issue of jurisdiction can be raised at any point. He supports this proposition with the case of **Mwalolechappumbwana v Independent Electoral and Boundaries Commission & 4 Others [2017] eKLR**

76. It's the first Respondents submission that even if this petition were to be determined on its merits it would not stand.

77. He argues that under section 83 of the elections Act, the Petitioner was under duty to show that not only did irregularities occur during the elections but that the said irregularities affected the electoral will of the people.

78. He submits that the Petitioner has failed to prove any of the allegations and further asserts that the affidavits accompanying the petition are made up of hearsay, falsehoods and imaginations.

79. He reminds the court of the position in **RailaOdinga& 5 others v Independent Electoral and Boundaries Commission & 3 others [2013] eKLR** and urges that the standard of proof in election petitions must be above the balance of probability but not as high as beyond reasonable doubt.

80. He denounces the Petitioner's claims that the polling station was kept open beyond the stipulated time; that there was ballot stuffing or that the officials of the 3rd Respondent in Batalu polling station blocked the Petitioner's agents from recording the serial numbers of the seals used to seal the ballot boxes.

81. The 1st respondent asserts that in each of the above claims, the Petitioner merely made allegations without tendering any proof or corroborations.

82. On the issue whether the officials of the 3rd Respondent irregularly reopened sealed ballot boxes for Batalu polling station and Basineja Polling Station, the 1st Respondent concedes that the said ballot boxes were indeed reopened but asserts that this was necessary to cure an administrative error that had been occasioned by the polling officials at the respective polling stations.

83. In particular, he explains that the form 36As had been sealed in the ballot boxes by error and the only way the same could be retrieved was by reopening the ballot boxes at the tallying center.

84. He asserts that since the opening had been done in the presence of the public and after the votes

had been verified and counted no prejudice was occasioned to any party.

85. On the claimed alterations in forms 36A for Basineja and Batalu, the 1st respondents was firm that the same were done in the presence of all the agents and had been countersigned.

86. He submits that what the petitioner claims as alterations were basic administrative errors which, by the petitioners own admission during cross examination, could occur due to human error.

87. He submits that the scrutiny and recount exercise revealed that he was still the lead in the race for Batalu ward and the errors were not done out of malice or with the intention of favoring him.

88. He cites ***Joho v Nyange (2008) 3 KLR 500*** where it was held that ***“some errors in an election petition are nothing than what is always likely in the conduct of human activity. If the errors are not fundamental, they should be excused or ignored. But when deliberate irregularities or forgeries are committed, different considerations should be given to the effect.”***

89. He also cites ***Gatirau Peter Munya V Dickson Mwenda Kithinji & 2 others [2014] eKLR*** where it was held that

“ By way of example, if there would be counting or tallying errors which after scrutiny and recount do not change the result of an election, then a trial court would not be justified, merely on account of such shortfalls, to nullify such an election. However a scrutiny and recount that reverses an election result against the candidate who had been declared a winner would occasion the annulment of an election.”

90. finally, he cites ***Opitz C V Wrzesneswkyi (2012) 3S.C.R 76 Rothstein and Moldaver JJ*** where the court stated:

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

91. The other case cited in support of the proposition that errors should be excused were ***Mercy Kirito Mutegi v Beatrice Nkatha Nyaga and 2 others [2013] Eklr*** where the learned judges cited ***Fitch vs Stephenson and three others 2008 EWITC 501 QB*** with approval and held:

“ These cases clearly establish that the courts will strive to uphold an election as being substantially in accordance with the law, even where there has been serious breaches of the Rules, or of the duties of the election official providing that the result of the election petition was unaffected by those breaches. The availability of proportionate judicial remedy for rectifying the result and declaring the true result of the election of the election following scrutiny and a recount prevents the necessity to choose between vitiating an entire election and allowing the erroneous result to stand.

thus... it is inappropriate for the court to declare that an election should be avoided where breaches of the Rules at the counting stage have not, in fact affected the result.”

92. The first Respondent concludes with the decision in **JacktonNyanungoRangumaVs IEBC and two others, Election petition No. 3 of 2017** where the court stated

“What the supreme court recognized is that the election is a process where mistakes will be made and malpractices may occur but in order to succeed in annulling the election the petitioner must establish either that there was non-compliance with the constitution and the law governing election or that election malpractices and irregularities that took place were of such magnitude that they substantially and materially affected the results of the election.”

2nd and 3rd Respondents submissions

93. The 2nd and 3rd Respondents submissions adopted the same timbre as that of the 1st Respondent.

94. They submit that the alterations highlighted by the petitioner were made in the presence of agents and countersigned and similarly urge the court to excuse the said alterations.

95. They support their plea with the case of **William OdhiamboOduol v IEBC & Others, Election Petition 2 of 2013** where the court ruled that:

“Each petition has to be decided on its own merits. It would depend for instance, on the number of the forms in question in relation to the total forms in the petition. It would also depend on the explanations given by the electoral officials, whether or not the agents signed the Forms or what questions they (the agents) raised about them. But the correct thing should always be that every alterations and/or cancellations be countersigned and stamped by the maker.”

96. They submit that the errors pointed out by the petitioner were honest mistakes and not out of malice. To buttress their point they thenset out a raft of cases which speak to that point.

97. I find it relevant to reproduce the authorities relied upon.

98. In the case of **Medhurst - vs – Lough and Gasquet (101) 5 O’M & H 120,17 TLR 201,230** where it was held

“An election ought not to be held void by reason of transgressions of the law committed without any corrupt motive by the returning officer or his subordinates in the conduct of the elections where the court is satisfied that the elections was, notwithstanding those transgressions, an election really and in substance conducted under the existing election law, and that the result of the election was not and could not have been affected by those transgressions.”

99. In the case of **WavinyaNdetiVs IEBC & 4 others Machakos High Court Petition No. 4 of 2013** the court held:

“An election is a human endeavour and is not carried out by prograded machines. Perfection is an aspiration but allowance must be made for human error. Indeed the evidence is clear that the counting and tallying was being done at night and in less than ideal conditions hence errors, which were admitted, were bound to occur particularly in the tallying of results. What is paramount is that even in the face of such errors, whether advertent or otherwise is that the

ultimate will of the electorate is ascertained and upheld at all costs.”

100. In **Henry OkelloNadimo V Independent Electoral and Boundaries Commision& 2 Others [2013] eKLR** it was held:

“Similarly, no single candidate was disadvantaged by all the errors. The anomalies do not seem designed to benefit or prejudice any candidate. More importantly the variations make a minute difference to the outcome of the results. Even if the errors were to be corrected, it would fail to significantly close the big gap between the winner and the runners up. It also needs to be noted that the mistakes were in the results of 4 out of 64 polling stations. The errors were neither systemic nor pervasive. I accept the explanation by the commission that the mistakes were not deliberate or intended to advantage the 3rd respondent.

101. Finally, in **Joho v Nyange (2008) 3 KLR** the court stated:

“There were two kinds of election errors namely deliberate and innocent, even though negligent. Error is to human. Some errors in an election like this conducted under a frenetic schedule are nothing more than what is always likely in the conduct of any human activity. If they are not fundamental, they should be excused and ignored. It is not every non-compliance or every act or omission in breach of the electoral regulations or procedure that invalidates an election for being non-compliant with the law.

102. The 2nd and 3rd respondents cap their submissions by stating that the elections were free and fair and asks the court to uphold the results of the election as announced.

ISSUES FOR DETERMINATION

103. The issues for determination were not formally agreed upon at the pretrial stage, but it is easy to distil the same from the pleadings and submissions filed by the parties. As I see it therefore, those issues are:

- (a) Whether this court has jurisdiction to determine this matter;
- (b) Whether the officials of the 3rd Respondent irregularly conducted voting in Batalu polling station beyond the legally allowed time.
- (c) Whether the agents of the 3rd Respondent engaged in acts of ballot stuffing in Batalu polling station and Basineja Polling Station in favor of the 1st Respondent.
- (d) Whether the officials of the 3rd Respondent irregularly re-opened sealed ballot boxes for Batalu Polling Station and Basineja Polling Station
- (e) Whether the officials of the 3rd Respondent altered results in Form 36As in Batalu Polling Station and Basineja Polling Station in favor of the 1st Respondent;
- (f) Whether the irregularities and illegalities if any, impacted on the integrity and outcome of the election
- (g) Whether the orders sought should be granted; and
- (h) Who should bear the costs.

(a) Jurisdiction

104. As seen from the summary above, the issue of jurisdiction arose at the submission stage and was raised by the 1st respondent who asserts that the petition is fatally defective for failing to disclose all the participants in the race for Member of County Assembly for BataluWard, the votes each candidate got and the final results as announced. It is alleged that this was an infraction to rule 8 of the Elections (Parliamentary & County elections) Petitions Rules, 2017.

105. That section reads:

“8 (1) an election petition shall state—

(a) the name and address of the petitioner;

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

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

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

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

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

106. Clearly then, the alleged infraction is against paragraph (c) of the stated section.

107. My understanding of that section is that the Petitioner is simply required to state what the result of the election was and the manner in which it was declared. In the present instance, the petitioner at paragraph 8 of the petition states **“on the 10th of August 2017 the 2nd Respondent had announced that the 1st Respondent had garnered more valid votes cast in favor of the 1st Respondent,”** whereas at paragraph 11 of the said petition he states **“the 2nd respondent declared and certified that the 1st respondent was the winner of the county election having garnered the highest number of votes cast”**.

108. Admittedly, the sentence structure at paragraph 11 leaves a lot to be desired, but I believe the import is clear to all and sundry. Indeed, it is clear that the respondents, including the 1st respondent so plainly understood the intent of the Petition that they were in no doubt as to the results being challenged thus enabling them to mount their responses.

109. I take particular note of paragraph 4 of the 1st Respondent's response to petition where he states that **“after the voting and announcement of results was done in a free and fair manner, the following were the results of Batula Ward, Wajir County....”** He then proceeds to name all the candidates in that ward and the respective votes garnered.

110. Further to the above, I note that paragraph (c) above does not give the format in which election results should be pleaded, it does not specify whether one should just mention the winner (such as was done in this Petition) or plead the whole list of contestants (such as is proposed by the 1st Respondent). To hold the petition fatally defective in the face of such ambiguity is thus, in my view, untenable. In any event, I am of the considered opinion that this issue ought to have been brought to the fore at the onset

of this case and not at its conclusion. Bringing it up now when the parties have clearly shown that they understood what the petition was all about merely clouds the issues and does not go into the root of this petition. This court therefore finds no merit in the objection to its jurisdiction on the stated ground.

(b) Whether the officials of the 3rd Respondent conducted the elections beyond the time stipulated by law at Batalu polling station.

111. The main proponent of this assertion was Abdisarad Hajj Ali who stated that on the 8/8/2017 he was at Batalu polling station and that he had witnessed voters streaming into the station until about 10:30pm when the polling station closed. He was extensively cross examined on this issue and whereas he maintained that, that is what he witnessed no further oral corroboration was adduced to show that indeed that was the position.

112. Instead, the petitioner latches on the polling station diary for Batalu and makes an argument that as at 5:00pm the Polling station Diary showed that all the 502 people who had allegedly voted at Batalu had already voted thus there was no plausible reason why 73 more people were indicated as being on the queue.

113. I have looked at the Polling station diary cited and whereas it is indeed true that 73 people are listed as being on the queue beyond 5:00pm, that in itself does not show that voting was allowed to go on beyond the time allowed by law. As rightly pointed out by all the parties Regulation 66 of the Elections (General) Regulations, 2012 contemplates such a scenario and allows polling stations to be kept open after 5:00pm to accommodate those voters who were still on the queue at the stated time.

114. He who asserts must prove his assertion and, again, as rightly pointed out by all the parties, the standard of proof in election cases must be above balance of probability and just below beyond reasonable doubt.

115. Mere assertions without concrete proof cannot thus suffice and I am compelled to agree with the Respondents that the Petitioner has failed to prove that the polling stations were kept open beyond permitted hours.

(c) Whether the agents of the 3rd Respondent engaged in acts of ballot stuffing in Batalu polling station and Basineja Polling Station in favor of the 1st respondent

116. Again, the main proponent of this assertion was Abdisarad Hajj Ali and in the relevant parts of his affidavit he states:

“Para 19 – “ that the voters were surrounding the KIEMS gadget with a number of them holding pieces of paper which I have reason to believe that they were identification card numbers.”

Para 20- “that I moved closer to see what was happening where the presiding officer instructed me to go back and have a seat in an authoritative or forceful manner.”

Para 22- “ that the presiding officer after a while stood from where he was seated, collected the ballot papers and went to the voting booth where he started marking the said ballot papers.”

117. He was extensively cross examined on his depositions and it became clear that despite allegedly seeing the said voters with the said papers he had not been close enough to see what was written therein or confirm that they were indeed identity card numbers as alleged by the Petitioner.

118. To buttress his assertion that ballot boxes were stuffed, the petitioner relies on the KIEMS kit report for the said station and points out that according to the KIEMS report the number of identified voters in the said polling station was 429 whereas according to the announced results the number of valid votes cast was 464.

119. According to him therefore the extra 35 votes is clear evidence of ballot stuffing.

120. This is naturally refuted by the respondents who rely on the notice in the KIEMS report to wit; that **“results might differ due to lack of validation”**. It is thus the respondents’ argument that the results reflected in the KIEMS kit differed because the polling clerks who were responsible for aiding the voters did not validate and complete the process.

121. I have gone through the KIEMS report and note that indeed matters stand as stated by the Petitioner. The identified number of voters is reflected as 429 against the higher figure reported of 464. I will go so far as to say the difference in figures is suspicious but I am reluctant to take that suspicion yet further and claim as fact that there was ballot stuffing. On the face of the notice in the KIEMS report that differences in results might occur due to lack of validation, and on the further recognition by the higher courts that errors and mistakes do occur due to human folly I am content to let my suspicions quietly simmer without making any concrete pronouncement thereon.

122. I therefore find that for purposes of this petition it has not been proved to the required standards that there was ballot stuffing.

(d) Whether the officials of the 3rd Respondent irregularly re-opened sealed ballot boxes for Batalu Polling Station and Basineja Polling Station

123. The fact that the ballot boxes for Batalu polling station and Basineja polling station were opened is admitted by the respondents who argue that this was necessary in order to retrieve forms 36A which were locked in those boxes.

124. As seen from the summary, they blame human error for the opening and strongly contend that no prejudice was occasioned to the other parties arising from the said opening.

125. They further contend that the said opening was carried out in the presence of members of the public and the parties herein further supporting the supposition that no prejudice was suffered.

126. Luckily for this court, this exact matter was made a subject in **AhmedAbdullahi Mohamed and anor V Hon. Mohamed Abdi Mohamed and 2 others Election Petition number 14 of 2017 eKLR**.

127. That petition related to the gubernatorial elections for Wajir and incidentally, expressly, addressed the opening of the ballot boxes at Basineja and Batalu polling stations.

128. The Learned Judge rendered himself thus on the issue of ballot boxes opening.

“A reading of regulations 81,83,86 and 93 of the regulations will show that, once the ballot boxes are sealed at the polling station, there is no authority whatsoever to break open those ballot without an order of the court. The attempt by the 2nd respondent and R2W5 to rely on what they called “the training manual and guide for returning officers” cannot do. The 3rd respondent cannot arrogate to itself power which it does not have under the law. It cannot amend the law through internal manuals. If that is its intention, it should lay those amendments before the

people's representatives in parliament for enactment. By attempting to allow the returning officer to break open the ballot boxes at the tallying center after they had been properly sealed at the polling station, the 3rd respondent and its returning officer acted Ultra vires.

129. The learned judge goes on to state:

"I hold that once ballot boxes have been sealed at the polling station, no amount of consensus by electoral officers and agents/candidates can validly lead to their opening without a court order. The act of voting is an exercise of the sovereign will by the citizen which once exercised and the process finalized at the polling station, no one is allowed to tamper with the material that contains that sovereign act unless by authority of a court of law. In this regard, it does not matter that the returning officer only wanted to retrieve the results from the ballot boxes.

130. The findings of the judge are succinct and unambiguous. They speak directly to the issue at hand and leave no room for this court to wiggle. I am bound by the decision of the superior court and I therefore find and hold that the opening of the ballot boxes for Batalu and Basineja polling stations has been proved and was not warranted by a court of law.

(e) Whether the officials of the 3rd Respondent altered results in Form 36As in Batalu Polling Station and Basineja Polling Station in favor of the 1st respondent

131. It seems to me that this was the pillar of this petition. As seen from the pleadings and the above summary, the Petitioner contends that the Forms 36A for Basineja and Batalu polling stations were altered in favor of the 1st respondent herein. This matter was briefly addressed by the court in its ruling on the interlocutory application and the court already made a finding that indeed there were alterations apparent on the face of the said forms. This court rendered itself thus:

"The petitioner has annexed forms 36A for both the subject stations to his affidavit and having examined the same it is indeed discernable at face value that the numbers appearing as the valid votes obtained have been tampered with. Both documents show that there were initial numbers underneath which was then superimposed with other number. In the one pertaining to Basineja I can clearly see the number 6 superimposed over the number 3 and a number 4 superimposed over an indistinct number. The final figure therefore appears as 464 but is unclear what the original figure was.

In Form 36A pertaining to Batalu it is clear that the figure 5 has been superimposed over a number 4 and the number 0 superimposed over the number 8. It is equally discernible that the number 2 has been superimposed over the number 7.

I have gone through the forms 36A for Basineja and Batalu annexed to the respondents affidavits and the alterations are equally clear on those forms"

132. My second examination of those documents as I prepared to write this judgment has not changed that impression. The alterations and superimpositions remain as they were.

133. The respondents argue that the same are as a result of human error and further argue that they would not materially alter the final result.

134. I agree to the extent that they do not mathematically alter the overall winner but I would disagree on the materiality of the alterations.

135. As was stated in **Dickson Mwenda Kithinji v Gatarau Peter Munya & 2 others, Civil Appeal No 38 of 2013.**

“To determine whether the results as declared in an election ought to be disturbed, the court is not dealing with a mathematical puzzle and its task is not just to consider who got the highest number of votes. The court has to consider whether the grounds as raised in the petition sufficiently challenge the entire electoral process and lead to a conclusion that the process was not transparent, free and fair. It is not just a question of who got more votes than the other. It cannot be said that the end justifies the means. In a democratic election, the means by which a winner is declared plays a very important role. The votes must be verifiable by the paper trail left behind, it must be demonstrated that there existed favourable circumstances for a fair election and that no party was prejudiced by an act or omission of an election official.”

136. As pointed out by the Petitioner, when the alterations in forms 36A for Basineja and Batalu are analysed against the KIEMS report and the findings from the recount and scrutiny several pertinent issues arise that cannot be answered as an innocent error.

137. Beginning with the form 36A for Batalu primary polling station, it is clear from its face that the final result is given as 502, all of which were tallied in favor of the 1st respondent herein. As the court already observed, when one looks keenly at the figure “502” it is possible to see that it was superimposed over the figure 487.

138. During the recount and scrutiny conducted by the court the total number of votes cast at Batalu were found to be 487. Out of the 487 the 1st Respondent had garnered 484 votes whereas the Petitioner who had initially gotten a score of zero votes in that polling station was found to have one.

139. The KIEMS report also shows that the total number of identified voters at Batalu Primary Polling Station were 487.

140. Where then did the additional 15 votes come from in the final form 36A and what sort of error could have caused an inflation of the number of valid votes cast beyond that recorded at the station" Is it possible to ascribe innocence or human error to the said inflation"

141. I think not, to the contrary, the alteration and attendant inflation point to a deliberate scheme to alter results in favor of the 1st Respondent herein.

142. There is also the inexplicable miscounting of the votes and ascribing of two votes validly cast for different candidates as belonging to the 1st respondent. When the court conducted its scrutiny and recount of the votes, it was unanimously remarked by all who were present at the exercise that the two votes could not have belonged to the 1st Respondent and the fact that they were ultimately counted in favor of the 1st respondent in spite of that fact gives a very strong impression that the presiding officer and/or his subordinates had already made a foregone decision of who should win the Election for Member of County Assembly at that station. Once again, I am unable to ascribe any innocence to their actions.

143. The valid votes cast at Basineja were indicated in the form 36A as 464 and it is equally discernible that the figure 464 had been superimposed over the figure 439.

144. The respondents made valiant attempts to explain the alteration as an error on the part of a clerk who had slept during the counting exercise but having gone through the KIEMS report and the courts

report on scrutiny and recount I find myself assailed by doubts.

145. The KIEMS report shows that the total number of voters identified at the said station were 429 which sharply contradicts the figure of 464 and whereas the court had initially cast this as merely suspicious, it now finds itself questioning why there would be three different sets of figures deriving from the same polling station i.e. 439 (indicated in form 36A as the total number of valid votes cast), 429 (indicated in the KIEMS report as the total number of voters identified) and 464 (indicated in Form 36A as total number of votes cast and garnered by the 1st Respondent). To my mind the differences are irreconcilable and point to serious mischief at the polling station.

146. This is particularly so if one considers that the same alterations appear on Forms 35A and 34A from the same station. In both those forms it is clearly discernible that the results were altered to arrive at the figure "464".

147. The concerned presiding officer Mahat Bishar Hassan (R2W1) explained in his affidavit that the alterations visible on Form 36A were occasioned by one of the clerks sleeping on some of the voting papers necessitating an alteration to accommodate the votes initially omitted but curiously when put to the stand and confronted with the alterations in the presidential and Member of National Assembly results he could not give a clear answer. He was twice asked in cross examination whether the clerk had also slept on the presidential and MP results or whether the said clerk had slept again and both times he stated that this was not the case leaving the alterations on the results of the presidential and member of National Assembly unexplained. In the end therefore, his explanation that the alterations were caused by a sleeping clerk does not pan out.

148. That said, it is also an inescapable fact that the alterations made in Basineja were clearly done in favor of the 1st respondent herein.

149. The respondents insist in their submissions that the alterations were made in the presence of all the agents and that they were countersigned but having gone through the forms 36A a second time, I still cannot see any countersigning against the alterations.

150. My understanding of countersigning, especially in cases of this nature, is that the signature or signatures is/are appended immediately against the alterations where they occur. At the very least it requires additional signatures to be placed against the alterations. To my mind, this is the only way for those in charge to signal full responsibility for the alterations made. The documents in this case being election documents I would even expect that if any alterations were to be made, then the same would be countersigned by the agents.

151. I reiterate that having checked the Forms 36A for Basineja and Batalu polling stations again and again, I cannot see any countersigning against the alterations and I therefore have no reason to depart from my earlier finding that the alterations were not countersigned.

152. As this court had highlighted in its ruling leading to the recount and scrutiny, similar concerns were noted in the case of *William Kabogo Gitau V George Thuo & 2 others [2010] eKLR* where Justice Kimaru observed:

"There are other complaints which were raised by the petitioner that are in the genre addressed by the court. They relate to form 16 as where specific results of specific candidates were either altered or cancelled without the presiding officer countersigning the cancellation or alteration. The 3rd respondent explained away the cancellations and alterations to be on account of, once

again, human error which, according to him, was to be expected in the circumstances. Having evaluated the questioned form 16As, it was clear to the court that whereas the regulations do not specify what ought to be done where there are cancellations and alterations, common sense dictates that where there is a cancellation or alteration in a statutory form, the same should be countersigned by the concerned official. In the case of electoral documents, it is important that the statutory forms which contain results that will invariably be required to be verified by other parties including members of the public, should be written without any alterations or cancellations. The cancellations and alterations in the Form 16As produced in this court raised questions regarding the veracity and authenticity of the said results”

153. The situation facing the High Court is replicated in this case and I therefore find and hold that the alterations were irregular and raised serious questions regarding the veracity and authenticity of the material results.

154. The alternate way of looking at the alterations as proposed by the respondents is that all the alterations, or “overstressing,” arose out of human error.

155. As captured in the summary, the respondents have relied on a multitude of cases both domestic and foreign in their bid to have this court excuse the alterations as human error and having gone through the said authorities it seems to me that one clear thread runs through all of them, that is, that errors should be excused and/or ignored as long as they do not undermine the integrity of the electoral process.

156. What impact then, if any, do the irregularities noted have on the integrity of the material electoral process" this portent question comprises the last issue for discussion

(f) Whether the irregularities and illegalities, impacted on the intergrity and outcome of the election

157. Of concern here are two key issues. First the fact that the ballot boxes for Basineja and Batalu were irregularly opened and secondly that alterations were made in the form 36A for Basineja and Batalu polling stations in favor of the 1st Respondent herein.

158. The first issue was again disposed of by the learned judge in **Ahmed Abdullahi Mohamed and AnorV Hon. Mohamed Abdi Mohamed and 2 others, ElectionPetition number 14 of 2017 eKLR** wherein the judge concluded:

“To my mind, the opening of the ballot boxes interfered with the integrity and credibility of the results from the said two polling stations.”

159. I can do no better than the learned judge and therefore find and hold that on that first issue the opening of the ballot boxes at Basineja and Batalu polling stations did indeed impact on the integrity of the electoral process.

160. On the issue of the alterations, I am equally drawn to the conclusion that the said alterations did impact on the integrity of the electoral process. I say so for two main reasons, Firstly because in both instances where the alterations were made, the said alterations were clearly made to favor the 1st respondent. Secondly, because it is impossible to ignore the fact that the said alterations were made in the stations which can only be referred to as the 1st respondents bastion. More accurately, the votes he garnered as reflected in the 2nd and 3rd documents were as follows. **502** votes in Batalu, **464** in

Basineja, **128** in Kurrow, **0** in Buna primary, **0** in Funambua, **2** in Garseake, **0** in Buna Dispensary, **0** in Cherate, **0** in Buna secondary, **1** in Beramu primary, **0** in Salacentre and **2** in Beramu 2 centre.

161. Unlike in the cases quoted by the respondents where the courts were dealing with a large number of polling stations, it should be noted that Batalu ward which is the subject of this petition had only 12 polling stations wherein the 1st respondent garnered 5 votes combined in 9 stations and got all the votes that allowed him to win in the remaining 3 polling station. Two of those polling stations are the ones impugned in this petition and represent about $\frac{3}{4}$ of his winning votes. The effect of illegalities and irregularities arising out of the said polling stations cannot thus be gainsaid.

162. Based on the foregoing it is my finding that the elections at Batalu ward cannot be said to answer to the constitutional dictates of a simple, accurate, verifiable, secure, accountable or transparent election. In the same manner, it cannot be termed as credible, free and fair.

163. The petition is therefore found to be merited and is allowed.

(g) Who bears the cost"

164. I have considered this issue at length and it appears to me that the party most culpable for bungling the elections at Batalu ward is the 2nd and 3rd respondents herein. It is the agents of the third respondent who irregularly decided to open the ballot boxes at Batalu and Basineja Polling station and it is the same agents of the 3rd respondent who caused the offending alterations on the forms 36A for Basineja and Batalu polling station. The 3rd respondent failed in its mandate to conduct an election that adhered to the constitutional and legal standards and it therefore seems just that they should shoulder the costs arising from their blunders. Accordingly, I order that the costs of this matter shall be borne by the 3rd respondent herein

165. Before making the final orders, I will touch on one final matter and that is whether criminal offences have been disclosed against the 1st respondent or any other party in this case. It was claimed by the Petitioner in his submissions that several election offences were committed by both the 1st respondent and agents of the 3rd respondent herein but having combed through the evidence, and being alive to the fact that the assertion was made mostly based on the evidence of Abdisirad Hajj Ali (Pw2), and having further already observed that most of Pw2's evidence had been uncorroborated. I hereby make a finding that no criminal offence has sufficiently been disclosed against any party.

FINAL ORDERS

166. The petition succeeds and I therefore make the following final orders.

(a) That the election of the 1st respondent as Member of County Assembly for Batalu ward was not free and fair

(b) That the election of the 1st Respondent as the Member of County Assembly for Batalu Ward is hereby declared null and void.

(c) That the 3rd Respondent is hereby ordered to hold fresh elections for Member of County Assembly for Batalu Ward pursuant to the Constitution and the electoral laws

(d) That the petitioner and the 1st respondent shall have the costs. The costs to be borne by the 3rd respondent.

(e) That costs payable is hereby capped at Kshs.300,000/= for the petitioner and Kshs.100,000/- for the 1st respondent.

(f) That pursuant to section 86 of the Elections Act, a certificate of determination of this petition to issue to the Independent Electoral and Boundaries Commission (IEBC)

JUDGMENT dated, signed and delivered in open court on this 2nd day of February 2018 in the presence of;

Mr. Noor for the petitioner

Mr. Wanyoike h/b for Mr. Muganda for the 1st Respondent and for Mr. Odhiambo for the 2nd and 3rd Respondents.

Mr. Nuh:- Court assistant

A.K.MOKOROSS

SENIOR RESIDENT MAGISTRATE



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