



Case Number:	Election Petition 8 of 2017
Date Delivered:	16 Feb 2018
Case Class:	Civil
Court:	High Court at Kakamega
Case Action:	Judgment
Judge:	Ruth Nekoye Sitati
Citation:	Habil Nanjendo Bushuru v Independent Electoral and Boundaries Commission & 3 others [2018] eKLR
Advocates:	Mr. Akusala for Petitioner Mr. Rono for 1st and 2nd Respondents Mr. Busiega for 3rd Respondent Amasakha for 4th Respondent
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Kakamega
Docket Number:	-
History Docket Number:	-
Case Outcome:	Petition dismissed
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**ELECTION PETITION NO. 8 OF 2017**

**IN THE MATTER OF:- THE CHALLENGE OF THE VALIDITY OF**

**THE ELECTION OF MEMBER OF NATIONAL ASSEMBLY FOR**

**BUTERE CONSTITUENCY IN KAKAMEGA COUNTY**

**AND**

**IN THE MATTER OF: ARTICLE 1,2,4,10,23,38,47,81,86,88,**

**101 AND 105 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: SECTION 75 & 80 OF THE ELECTIONS ACT 2011**

**AND**

**IN THE MATTER OF: THE ELECTIONS ACT NO. 24 OF 2011 AS AMENDED**

**AND**

**IN THE MATTER OF: THE ELECTION (GENERAL) REGULATIONS, 2012**

**AND**

**IN THE MATTER OF: ELECTION (PARLIAMENTARY AND**

**COUNTY ELECTION) PETITIONS REGULATIONS, 2017**

**AND**

**IN THE MATTER OF: ELECTION (TECHNOLOGY) REGULATIONS 2017**

**BETWEEN**

**HABIL NANJENDO BUSHURU.....PETITIONER**

**AND**

**THE INDEPENDENT ELECTORAL AND**

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

**BEDI IYADI NANCY.....2<sup>ND</sup> RESPONDENT**

**(THE CONSTITUENCY RETURNING**

**OFFICER BUTERE CONSTITUENCY)**

**MWALE NICHOLAS SCOTT TINDI.....3<sup>RD</sup> RESPONDENT**

**ANDREW TOBOSO.....4<sup>TH</sup> RESPONDENT**

**J U D G M E N T**

**Introduction**

1. On the 8<sup>th</sup> August, 2017, Kenyans of all walks of life participated in the second general elections to be held under the Constitution of Kenya 2010. As it was in 2013, the electorate went out to cast their vote for President, governor, Senator, Woman Member of the National Assembly, Member of Parliament of the National Assembly and Member of the County Assembly. The instant petition concerns the election of the Member of Parliament for Butere Constituency which is located within Kakamega County. The petitioner herein Habil Nanjendo Bushuru was one of the contestants for Member of Parliament and fought it out with Mwale Nicholas Tindi, the 3<sup>rd</sup> Respondent in this petition. The 3<sup>rd</sup> Respondent was declared the winner of the elections by the 2<sup>nd</sup> Respondent. The other contestants were Andrew Toboso, 4<sup>th</sup> Respondent, Ibrahim Mukolwe, Julius Matendechere, David Mafuayia Acheru and Fred Aswani.

**The Petition**

2. In the petition dated 6<sup>th</sup> September, 2017 and filed on the same day, the petitioner's complaints are that the elections for Member of Parliament in Butere Constituency were not conducted in accordance with the letter and spirit of the Constitution of Kenya 2010 as read with the Elections Act 2011 and the Regulations and Rules made thereunder. The Petitioner also alleged that the elections were not held in accordance with the provisions of the Independent Electoral and Boundaries Commission (IEBC) Act and as a result thereof the will of the people of Butere Constituency was compromised. The petitioner further alleged that the results announced and declared by the 2<sup>nd</sup> Respondent, were inaccurate and invalid and the same amounted to unabashed subjugation of the democratic will of the residents and voters of Butere Constituency.

3. The Petitioner also alleged that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents abdicated their respective constitutional mandate in the conduct of the elections and thereby opened the election to unabated electoral misconduct, irregularities and inaccuracies which ultimately rendered the elections shambolic.

4. As against the 3<sup>rd</sup> Respondent, the Petitioner alleged that the said 3<sup>rd</sup> Respondent actively participated in similar electoral misconduct, irregularities and illegalities, and that in fact, 3<sup>rd</sup> Respondent was not validly elected. With regard to the 4<sup>th</sup> Respondent, the petitioner alleged that the said 4<sup>th</sup> Respondent stole a match on the petitioner by indulging in irregularities that suffered the petitioner undue disadvantage, by fraudulently duping the supporters of the petitioner and his political party.

5. In summary, the petitioner alleged that there was:-

*(a) Violation of the principle of free and fair elections and electoral process.*

*(b) Lack of impartiality, neutrality, efficiency, accuracy and accountability*

(c) *Lack of verifiability of results.*

(d) *Contravention of electoral regulations governing voting*

(e) *Substantive noncompliance, irregularities and improprieties*

(f) *Discrepancies in the statutory vote tallying documents leading to the declaration of manifestly wrong results.*

(g) *Irregularities and inconsistencies in the counting, tallying of votes and filling in of forms 35A and 35B*

(h) *Failure to properly record the votes display the same and avail the respective forms 35A to agents.*

(i) *Failure to seal the ballot boxes*

(j) *Failure to secure polling stations and their environs.*

(k) *Irregular appointment of polling clerks, and*

(l) *Failure to regulate access to the use of public resources.*

6. In light of the above alleged violations, the petitioner prays that it be determined that the 3<sup>rd</sup> Respondent was not duly elected and further that:-

(a) *This Honourable court be pleased to order a scrutiny, recount and verification of all the votes cast in the election of Member of the National Assembly for Butere Constituency in the elections held on 8<sup>th</sup> August, 2017*

(b) *This Honourable Court be pleased to find that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents jointly and severally abetted election offences in the course of the election for Member of the National Assembly for Butere Constituency.*

(c) *That this honourable court do find that the election for Member of the National Assembly for Butere Constituency was not free and fair and was vitiated by the illegalities stated above.*

(d) *An order do issue for a fresh election for the office of Member of the National Assembly for Butere Constituency*

(e) *The Respondents be condemned to pay costs of this petition*

(f) *This Honourable Court grant such other and further reliefs or orders as it may deem and just*

7. The petition was supported by an affidavit sworn by the petitioner on 6<sup>th</sup> September, 2017. The contents of the supporting affidavit are a replica of the petition.

**Response by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents**

8. The response by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents was filed on 22<sup>nd</sup> September, 2017. Apart from the descriptive parts of the petition, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents denied all the allegations levelled against them by the Petitioner, averring in turn that the election the subject of the petition was conducted in accordance with the Constitution, the IEBC Act, the Elections Act, The Regulations made thereunder and all other relevant provisions of the law. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents also averred that the petition, and in particular paragraphs 9 and 10 thereof, were couched in generalities and without any factual basis.

9. As regards alleged violation of the principle of free and fair election, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents averred that the said allegations lacked particularity of specific polling stations where data was not transparently or accurately entered as alleged. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents also challenged the petitioner's allegations of lack of impartiality neutrality, efficiency and accountability and countered the same by stating that the election was impartial, neutral, accurate and accountable with no tremendous illegalities and malpractices as alleged by the petitioner.

10. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents also refuted the petitioner's allegations touching on contravention of electoral regulations governing voting, substantive non-compliance, irregularities, and improprieties as well as alleged irregularities and inconsistencies in the counting, tallying of votes and filling in of forms 35A and 35B. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents also denied allegations that there was failure on their part to properly record the votes, display the same and avail the respective forms 35A to agents. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents challenged the petitioner to avail particulars of the polling stations in which no result of the vote count had been displayed as required by law.

11. On the issue of alleged irregular appointment of presiding officers and clerks, the 1<sup>st</sup> and 2<sup>nd</sup> respondents averred that the appointments made of the election officials was done in accordance with the mandate of the 1<sup>st</sup> Respondent which is an independent constitutional commission that is not subject to the direction and or control of any person. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents also dismissed as unfounded and baseless the petitioner's allegations at paragraphs 69, 70 and 71 of the petition.

12. In conclusion the 1<sup>st</sup> and 2<sup>nd</sup> Respondents urged this court to make a finding that there were no breaches of any of the provisions of the Constitution, the Elections Act or any other statute and further that the elections for Member of National Assembly for Butere Constituency was conducted in accordance with the Constitution and the Elections Act and all other relevant laws and to dismiss the petition for lack of merit and condemn the petitioner with the costs of the petition.

### **Response of the 3<sup>rd</sup> Respondent**

13. The 3<sup>rd</sup> Respondent's response to the petition is dated 29<sup>th</sup> September, 2017 and filed in court on 2<sup>nd</sup> October, 2017. The 3<sup>rd</sup> Respondent averred that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents conducted a free, fair and transparent election as a result of which he was declared the winner and consequently sworn into office as Member of the National Assembly for Butere Constituency. The 3<sup>rd</sup> Respondent also averred that the entire electoral process and subsequent processes until the declaration and announcement of results for Member of Parliament for Butere Constituency were done in accordance with the law and in a transparent manner. In particular, the 3<sup>rd</sup> Respondent contended that all voting materials including biometric voter verification kits and ballot papers were received at all polling stations in good time, the biometric voter verification kits were successfully used throughout the constituency. He also said that the voting process was smooth and uninterrupted, having commenced on time and closed on time; all candidates and their agents were allowed into polling stations to monitor the process of voting and counting of the votes, recording of the results and transmission of the same. The 3<sup>rd</sup> Respondent further contended that the ballot boxes were properly sealed at the appropriate time before the results in forms 35A were collated into form 35B upon which the Returning Officer announced the results and declared the winner.

14. In addition, the 3<sup>rd</sup> Respondent denied the generalized allegations made against him by the petitioner that the 3<sup>rd</sup> Respondent participated in unabated electoral misconduct and irregularities. The 3<sup>rd</sup> Respondent sought orders that:-

- 1. The petition dated 6<sup>th</sup> September, 2017 be dismissed*
- 2. A declaration that the election of 8<sup>th</sup> August, 2017 for the National Assembly for Butere Constituency was conducted in a free, and fair and transparent manner.*
- 3. A declaration that the election of the 3<sup>rd</sup> Respondent was valid.*
- 4. The 3<sup>rd</sup> Respondent be awarded the costs of the petition.*

### **Response of the 4<sup>th</sup> Respondent**

15. The 4<sup>th</sup> Respondent filed his response to the petition on 27<sup>th</sup> September, 2017 together with the supporting affidavit. He denied all the allegations made against him by the petitioner and in particular that he used the colours of the Orange Democratic Party (ODM) on whose ticket the petitioner was nominated, to vie for the seat of Member of National Assembly contending that none of such colours caused confusion among voters in Butere Constituency. The 4<sup>th</sup> Respondent's position was that the allegation on use of ODM colours was untenable and without any factual or legal basis. The 4<sup>th</sup> Respondent also averred that the symbol he used during the elections was duly approved by the Registrar of Political Parties as well as the 1<sup>st</sup> Respondent without any objection from the petitioner. It was the 4<sup>th</sup> Respondent's contention that the orange colour was not unique to ODM. Finally, the 4<sup>th</sup> Respondent stated that he was of the same view as the petitioner, that the 3<sup>rd</sup> Respondent was not validly elected as Member National Assembly for Butere Constituency on 8<sup>th</sup> August, 2017. The 4<sup>th</sup> Respondent wanted all the votes cast during the said election to be recounted.

16. The 4<sup>th</sup> Respondent's prayer was that the petition herein in so far as it related to the 4<sup>th</sup> Respondent should be struck out and or be dismissed with costs.

## **The Evidence**

### **(a) For the petitioner**

17. The petitioner's case rested solely on his own evidence as per the sworn affidavit dated 6<sup>th</sup> September, 2017. The Petitioner also testified as PW1. During his testimony, he reiterated his statement that after he defeated the 4<sup>th</sup> Respondent during the ODM nominations, the 4<sup>th</sup> Respondent who was the then sitting Member of Parliament decided to go independent though he (4<sup>th</sup> Respondent) did not give up the use of the ODM orange colour, and that all his election materials, namely the caps, T-shirts and banner, had the orange colour in them, thereby causing confusion among the voters as to whether it was the petitioner or the 4<sup>th</sup> Respondent who was the ODM candidate.

18. The petitioner also accused the 1<sup>st</sup> Respondent (the IEBC) of committing election irregularities and anomalies by failing to properly referee the elections process. In effect the petitioner reiterated all the allegations made against the respondents both in the petition and the supporting affidavit. The details of the rest of the petitioner's evidence and his responses during cross examination shall come out more clearly during the analysis and determination of the issues.

### **(b) For 1<sup>st</sup> and 2<sup>nd</sup> Respondent's**

19. The evidence for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents was anchored in the sworn affidavit of Nancy Bedi Iyadi dated 22<sup>nd</sup> September, 2017. She testified as DW1. According to the 2<sup>nd</sup> Respondent, the candidates and results for election of Member of National Assembly for Butere Constituency were as follows:-

No.	Name	Party	Valid Votes Obtained
1.	Habil Nanjendo Bushuru	ODM	14688
2.	Mwale Nicholas Scott Tindi	ANC	18235
3.	Andrew Toboso Anyanga	Independent	11684
4.	Mukolwe John Ninja	Independent	1208
5.	Julius Matendechere Hasira	Ford-Kenya	1381
6.	David Mufuaiya Acheru	UDP	129
7.	Fredrick Aswani Shisia	NDP	213

20. The 2<sup>nd</sup> Respondent further deponed that pursuant to the above stated results, she declared the 3<sup>rd</sup> Respondent who had the highest number of valid votes obtained the winner of the elections. With regard to the complaints raised by the petitioner the 2<sup>nd</sup> respondent averred that the election for Member of the National Assembly for Butere Constituency was conducted in accordance with the principles and dictates of the Constitution and the other laws and regulations. She denied that she inflated results in favour of any particular candidate; that there was doctoring or swapping of results and that the agents or anyone else was intimidated during the elections. She also deponed that no complaints whatsoever were raised with her or with the 1<sup>st</sup> Respondent, and that there were no instances of either selective or deliberate manipulation of counting of votes aimed at distorting the number of votes cast. She also stated that all officers who were hired for the election exercise were competitively recruited and were qualified in

accordance with the law and that the contrary allegations by the petitioner were not backed up with evidence. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents urged the court to find that the 3<sup>rd</sup> Respondent was duly elected and that the election was validly conducted, and to dismiss the petition as against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents with costs

**(c) For the 3<sup>rd</sup> Respondent**

21. Contemporaneously with the response to the petition, the 3<sup>rd</sup> Respondent, Mwale Nicholas Scott Tindi filed his supporting affidavit dated 2<sup>nd</sup> October, 2017 in which he deponed that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent conducted a free, fair and transparent election as a result of which he was declared the winner and consequently sworn into office as a Member of the National Assembly for Butere Constituency. He also deponed that the petition as filed in fatally defective for failure to comply with mandatory legal provisions. The 3<sup>rd</sup> Respondent deponed and also testified that the entire election process including availability of election material, time for opening and closing of polling stations, the actual voting, the counting and the tallying were done in accordance with the election laws, the regulations and the rules made thereunder, with no breaches irregularities or inconsistencies in the process. The 3<sup>rd</sup> Respondent therefore asked the court for orders that:-

1. *The petition dated 6<sup>th</sup> September, 2017 be dismissed*
2. *A declaration that the election of 8<sup>th</sup> August, 2017 for Member of the National Assembly Butere Constituency was conducted in a free, fair and transparent manner*
3. *A declaration that the election of the 3<sup>rd</sup> Respondent was valid.*
4. *The 3<sup>rd</sup> Respondent be awarded the costs of the petition.*

**(d) For the 4<sup>th</sup> Respondent**

22. The 4<sup>th</sup> Respondent, Andrew Toboso did not testify, but he swore an affidavit dated 26<sup>th</sup> September, 2017, in opposition to the petition and in support of his response to the petition. The 4<sup>th</sup> Respondent deponed that the orange colour of which the petitioner complained was not unique to the Orange Democratic Movement (ODM) since other parties and Independent candidates espoused the same colour in their campaign symbols. That in any event, and after approval of the 4<sup>th</sup> Respondent's symbol, the petitioner, being fully aware of the approval, should have lodged any objection or complaint with the 1<sup>st</sup> Respondent herein or with the 1<sup>st</sup> Respondent's Electoral Code of Conduct Enforcement Committee as by law provided and that it was now too late for the petitioner to raise such a complaint in an election petition. The 4<sup>th</sup> Respondent further deponed that this court had no jurisdiction to entertain a preliminary issue which should have been determined by the IEBC Electoral Code of Conduct Enforcement Committee and in any event, the 4<sup>th</sup> Respondent deponed, the claim was time barred. The 4<sup>th</sup> Respondent relied on the provisions of the Elections (General) Regulations 2012, Rev. Edition 2017 Regulation 10 which provides only for Independent Candidates name and symbol as follows:-

*“ Independent Candidate's name and symbol*

*(1) The commission shall by notice in the Gazette and through electronic and print media of national circulation and other easily accessible medium, publish the name and symbol approved for each independent candidate.*

*(1A) The name of the Independent candidate referred to in sub-regulation (1) shall be the same as the name appearing in the identification document used by the independent candidate to register as a voter.*

*(2) The symbols published under sub-regulation (1) shall be gazetted at the same time as the list of persons nominated to contest the election.*

*(3) The symbol of an independent candidate shall be submitted in an electronic and print format as prescribed by the Commission together with the candidates' details in form I1P set out in the schedule”*

23. It was thus the 4<sup>th</sup> Respondents contention that the petition ought to be allowed and a fresh election held in a fair and open manner for the election of Member of National Assembly for Butere Constituency.

## **Submissions**

### **(a) Petitioner's submissions**

24. The petitioner's final submissions were dated 2<sup>nd</sup> January, 2018 and filed in court on the same day. Reiterating the highlights of the petition, counsel for the petitioner submitted that the elections for Member of the National Assembly for Butere Constituency were held in gross violation of the law, namely the Constitution of Kenya, the elections statutes and all supporting legislation, including common law. It was the petitioner's contention that since the elections were so badly conducted the winner thereof could not be ascertained and therefore the declaration of the winner by the IEBC was not based on any legal premise and was akin to a toss of the coin.

25. The petitioner also contended that since the 2<sup>nd</sup> Respondent had been recently involved in an accident, she could not have effectively managed the elections thereby allowing proxies to take over her critical role of being in charge of the elections. The petitioner submitted that the laxity on the part of the 2<sup>nd</sup> respondent gave rise to voter bribery, campaigns past scheduled times and date and use of ODM party colours by an Independent Candidate.

26. It was also the petitioner's submission that out of 124 polling stations, only 48 form 35A's were supplied, 78 form 35A were not produced by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and that during the scrutiny, it transpired that most Form 35A's were missing. Regarding the agents, the petitioner submitted that most of the accredited agents were not permitted to verify the results and that the agents' absence was not explained by the respective presiding officers in the prescribed slots in the form 35A.

27. The petitioner also submitted that the date when the results were declared was not known since form 35B was anonymously signed on 10<sup>th</sup> August, 2017 while the 2<sup>nd</sup> Respondent signed the said form two days before. The Petitioner also complained that there was bias and discrimination because only agents of the Jubilee Party which did not even field a candidate for Member of the National Assembly, were allowed to sign form 35A, in addition to the 2<sup>nd</sup> Respondent allowing strangers into polling stations.

28. In his further submissions touching on agents, the petitioner submitted that though he had agents in all the 124 polling stations, only half of them signed form 35A's as the rest of the agents were either chased away or were not allowed to sign or failed to sign because they were not satisfied with the result reflected on the form 35A. The petitioner pointed out that no reasons were given for the agent's failure to sign the form 35A. He also submitted that of the form 35A's supplied to court by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent, some were not signed by agents and even those which were signed by agents had alterations that were not countersigned. The petitioner also pointed out that some of the form 35A's were not systematically dated, nor were they signed by election officials and that some of the form 35A's had no security features while others were photocopies instead of being originals.

29. Finally the petitioner submitted that he Polling Stations Diaries (PSD's) produced by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were incomplete, some were neither signed nor stamped, while some did not indicate the time for commencement and determination of the voting. The petitioner therefore asked that the elections be nullified.

### **(b) Submissions of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents**

30. In addition to the response to the petition and the replying affidavit sworn by the 2<sup>nd</sup> Respondent on behalf of both the 1<sup>st</sup> and 2<sup>nd</sup> Respondents the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed their final written submission on 12<sup>th</sup> January, 2018. It was submitted that:-

- *The Petition as read with the supporting affidavit did not disclose any legitimate grievance and that it was filled with speculation conjecture, baseless allegations and sensational statements that were not substantiated at the hearing by any evidence.*
- *The petition is filled with references to 201 polling stations in Langata Constituency in Nairobi as well as specific numbers garnered by candidates in the said Langata Constituency when the impugned election in this petition concerned the Member of the National Assembly for Butere Constituency.*

- *There was no tallying centre known as Multimedia University within Butere Constituency.*
- *The entire petition was full of classical plagiarism and unfortunate copy and paste of an election petition challenging the election of Member of National Assembly for Langata Constituency in Nairobi and not Butere Constituency.*
- *The petition as drafted and filed was a pollution of the court process.*
- *The petition as drafted and filed was lacking in specific particulars claims/allegations and in addition to there being no evidence to support the same.*
- *All the allegations raised by the petitioner were only of a general nature hence baseless computer generated allegations with no factual basis.*
- *The petition as drawn and filed was incompetent on grounds that the exact date on which the election results were declared was not pleaded.*
- *The petition was a mere gambling exercise with no material particulars.*
- *The petition as drafted and filed was in breach of Rule 8(1) of the Elections (Parliamentary and County Elections) Petition Rules 2017 which requires that an election petition must state the results of the election and however declared as well as the date of the declaration of the results of the election.*
- *The petitioner had failed to place before the court any personal analysis tabulations or audit to contradict the results declared by the 2<sup>nd</sup> Respondent*
- *The petition was accordingly incompetent.*

31. On the basis of the above submissions the 1<sup>st</sup> and 2<sup>nd</sup> Respondent urged this court to dismiss the petition with costs.

(c) **Submissions of the 3<sup>rd</sup> Respondent**

32. The 3<sup>rd</sup> Respondent's submissions were premised on the principle that “ *an election petition is not a matter in which the only persons interested are candidates who strive against each other in elections, the public are substantially interested in it and that is an essential part of the democratic process.*”

33. In his detailed submissions, the 3<sup>rd</sup> Respondent urged the court to find that the election for Member of the National Assembly for Butere Constituency was free, fair and transparent and “*whose results reflected the will of the electorate of Butere Constituency,*” and to dismiss the petition altogether as the petitioner had not established that the election was marred with such irregularities as would lead this court to the conclusion that the results did not reflect the true will of the electorate. The 3<sup>rd</sup> Respondent also submitted that the petitioner had failed to establish that there were massive irregularities whose magnitude negated the expression of the will of the people of Butere Constituency. In short, the 3<sup>rd</sup> Respondent urged the court to find and to hold that the petitioner failed to meet the threshold for the standard of proof in election petitions.

(d) **The 4<sup>th</sup> Respondent's submission**

34. These were dated 4<sup>th</sup> January, 2018 and filed in court on the same day. The 4<sup>th</sup> Respondent submitted that the elections for Member of National Assembly for Butere Constituency as conducted violated the principle of free and fair election and the electoral process. That there was lack of impartiality, efficiency, accuracy and accountability. That there was lack of verifiability of results in addition to substantive non-compliance, irregularities and improprieties. The 4<sup>th</sup> Respondent also submitted that there were discrepancies in the statutory vote tallying documents leading to the declaration of wrong results. He also submitted that there were irregularities and inconsistencies in the counting tallying of votes and filling in of Form 35A and 35B.

**Issues for determination**

35. Each party in this matter filed their own issues for determination as follows:-

**Petitioner's Issues**

1. What are the Constitutional and statutory standards of holding fair and free and credible election"

2. Was the election of 8<sup>th</sup> August, 2017 in line with or did they comply with the provisions of Article 86 of the Constitution" Did the 1<sup>st</sup> and 2<sup>nd</sup> Respondents ensure that:-

(a) *The voting method is used and the system used by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in the election on 8<sup>th</sup> August, 2017 [was] simple, accurate, verifiable, secure, accountable and transparent"*

(b) *The votes cast in the election of 8<sup>th</sup> August, 2017 counted, tabulated and the result announced in accordance with the Constitution and provisions of the Elections Act 2011 and the relevant subsidiary legislations; were the results from the polling stations openly and accurately collated and promptly announced"*

(c) *They put in place, use and deploy appropriate structures and mechanisms to eliminate electoral malpractices"*

3. *Were there any election malpractices, irregularities and illegalities in the election of 8<sup>th</sup> August, 2017 and if so, what was the magnitude and resultant effects thereof"*

4. *What is the outcome of the audit, scrutiny, recount and re-tallying of the election materials used/unused and the ballot cast on 8<sup>th</sup> August, 2017 for the election of the Butere Member of national Assembly"*

5. *Was the 3<sup>rd</sup> Respondent constitutionally, statutorily and validly returned as the duly elected Butere Member of National Assembly"*

6. *Is the petitioner entitled to the prayers set out in the petition herein"*

7. *Who bears the costs of this petition"*

#### **The 1<sup>st</sup> and 2<sup>nd</sup> Respondent's issues**

1) *What are the constitutional and statutory standards of holding a fair, free and credible election for a member of the National Assembly"*

2) *Was the election of the Member of National Assembly for Butere Constituency held on 8<sup>th</sup> August, 2017 in line with or in compliance with the provisions of Article 86(a) – (d) of the Constitution"*

3) *Were there any election malpractices, irregularities and illegalities in the election of the Member of National Assembly of r Butere Constituency held on 8<sup>th</sup> August, 2017, and if so, what was the magnitude and the resultant effects thereof"*

4) *Whether there is any basis established for an order of scrutiny, recount and re-tally of the election materials for the election of the Member of National Assembly for Butere Constituency" And if so whether the same should be conducted.*

5) *Was the 3<sup>rd</sup> Respondent constitutionally, statutorily and validly returned as the duly elected Member of National Assembly for Butere Constituency"*

6) *Is the Petitioner entitled to the prayers set out in the petition herein"*

7) *Who bears the costs of this Petition"*

#### **The 3<sup>rd</sup> Respondent's issues**

1) *Whether the petition is hopeless, frivolous, vexatious and that it discloses no cause of action:*

- 2) *Whether the National Assembly Election in respect to Butere Constituency was conducted in accordance with and in strict compliance with the Constitution:*
- 3) *Whether the National Assembly Election in respect to Butere Constituency was conducted in accordance with and in strict compliance with the written law and national legislation:*
- 4) *Whether the 3<sup>rd</sup> Respondent was validly declared as the winner:*
- 5) *Whether the Respondents committed election irregularities and illegalities that affected the result of this election:*
- 6) *What are the appropriate orders to be made by the Court"*

#### **4<sup>th</sup> Respondent's issue**

- 1) *Whether the conduct of the elections of Member of Parliament for Butere Constituency [held] on the 8<sup>th</sup> of August, 2017 met the Constitutional principles as set out under Article 81 and 86 of the Constitution of Kenya.*
- 2) *Whether the results of the elections of the Member of Parliament for Butere Constituency were duly verified or at all.*
- 3) *Whether the process leading up to the declaration of the final results of the election of Member of Parliament for Butere constituency were fraught with fundamental irregularities and illegalities as to render the entire process anullity.*
- 4) *Whether the results of the elections of Member of National Assembly for Butere Constituency were duly declared or at all.*
- 5) *Whether the 4<sup>th</sup> Defendant's (sic) election symbol containing orange colours approved by IEBC in any way affected the votes of the Petitioner and if so who should bear the blame*
- 6) *Who should bear the costs in this petition"*

36. I note from the respective issues filed by parties that the issues as framed are cross –cutting. In that regard, I have collapsed the issues into the following:-

- 1) *What are the Constitutional and statutory standards of holding a fair, free and credible election"*
- 2) *Was the election conducted on 8<sup>th</sup> August, 2017 for Member of National Assembly for Butere Constituency held in line with the provisions of Articles 81 and 86(a) –(d) of the Constitution and other written Law"*
- 3) *Whether the process leading up to the declaration of the final results of the election of Member of National Assembly for Butere Constituency was fraught with election, malpractices, irregularities and illegalities as to render the entire process a nullity.*
- 4) *Whether there is any basis established for an order of scrutiny, recount and re-tally of the election materials for the election of the Member of the National Assembly for Butere Constituency and if so, whether the same should be conducted"*
- 5) *Whether the results of the election of Member of the National Assembly for Butere Constituency were duly declared or at all.*
- 6) *Whether the 3<sup>rd</sup> Respondent was Constitutionally, Statutorily and validly elected and declared as Member of the National Assembly for Butere Constituency.*
- 7) *Who should bear the costs of this Petition"*

37. As concerns issue number 4, the same has already been determined. By its ruling dated 23<sup>rd</sup> November, 2017 this court found that a basis had been established for an order of scrutiny only and accordingly granted the order for scrutiny for all the election materials. The initial scrutiny involving all the 124 polling stations was conducted on 27<sup>th</sup> and 28<sup>th</sup> November, 2017. However, due to certain pertinent concerns raised by parties, a repeat scrutiny was conducted on 15<sup>th</sup>, 16<sup>th</sup> and 18<sup>th</sup> December, 2017 following an order issued by this court on 11<sup>th</sup> December, 2017. As agreed among the warring parties the second scrutiny was conducted for only 31 polling stations.

38. To support their respective positions, the petitioner and the respondents called witnesses. The petitioner called one witness, and that was himself. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents called the 2<sup>nd</sup> Respondent, Bedi Iyadi Nancy as their only witness. The 3<sup>rd</sup> respondent testified but called no witnesses. The 4<sup>th</sup> Respondent relied only on his affidavit evidence in support of his Response to the petition.

39. I shall consider the remaining next issues in light of the evidence on record, the results of the scrutiny and the submissions by counsel, as well as the law.

### **General Principles applicable to elections**

40. The principles governing elections are now well settled in this country and the written submissions by all the parties have clearly set the same out. The fulcrum of the principles is found in Articles 1 and 38 of the Constitution. While Article 1 secures the sovereignty of the people of Kenya, Article 38 sets out the political rights to which the Kenyan people are entitled. Because of its centrality in the political process, it is imperative that the provisions of Article 38 are set out. It provides as follows;

*(38)(1) Every citizen is free to make political choices which include the right:-*

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

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

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

*(2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for-*

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

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

*(3) Every adult citizen has the right, without unreasonable restrictions-*

*(a) to be registered as a voter*

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

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

41. The Constitution further provides for the realization of the people's rights as secured under Article 38 through the provisions of Articles 81 (e) and 86(a) – (d) Article 81 which sets out general principles for the electoral system provides:-

*“ 81. The electoral system shall comply with the following principles:-*

- (a) freedom of citizens to exercise their political rights under Article 38;*
- (b) not more than two thirds of the members of elective public bodies shall be of the same gender;*
- (c) fair representation of persons with disabilities*
- (d) universal suffrage based on the aspiration for fair representation and equality of vote; and*
- (e) free and fair elections which are-*
  - (i) by secret ballot*
  - (ii) free from violence, intimidation, improper influence of corruption*
  - (iii) conducted by an independent body;*
  - (iv) transparent; and*
  - (v) administered in an impartial, neutral, efficient, accurate and accountable manner.*

42. Article 86 provides thus:-

“86 Voting

*At every election, the Independent Electoral and Boundaries Commission shall ensure that-*

- (a) whatever method is used the system is simple, accurate, verifiable, secure, accountable and transparent.*
- (b) the votes cast are counted, tabulated and the results announced promptly by the presiding Officer at each polling station.*
- (c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and*
- (d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.*

43. From the above provisions, it is clear to the court that the actualization of the provisions of Articles 1,38,81 and 86 of the Constitution comes to fruition during an election, and in that regard all the structures set in place are intended to ensure that the will of the people, expressed during the election is assured, remembering always that the election belongs to the people and not institutions and their officials. The role of the institutions and the officials is to ensure that the electoral process gives meaning to the will of the people.

44. Apart from the Constitutional provisions, other legal provisions intended to secure the will of the people are found in the Independent Electoral and Boundaries Commission Act (No. 99 of 2011) and the Elections Act (No. 24 of 2011) together with the regulations and rules made thereunder. Section 42 of Elections Act provides for accreditation of observers, agents reporters etc, while Section 83 of the Act provides:-

“83 Non – compliance with the law

*No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that*

*the election was conducted in accordance with the principles laid down in the constitution and in that written law or that the non-compliance did not affect the result of the election.”*

45. The aspirations of the Kenyan People for a government based on the essential values of human rights, equality, freedom democracy social justice and the rule of law, and those rights as set out under Article 38 of the Constitution are realizable only when an election is held.

46. The independent body for purposes of carrying out an election as envisaged under Article 81 is the Independent Electoral and Boundaries Commission (IEBC) which is created by the IEBC Act No. 9 of 2011. The duty of the IEBC in the electoral process is spelt out under Article 86 (supra)

47. It is thus the onerous duty of the IEBC to ensure that the people’s sovereign will during elections is not compromised by ensuring that nothing in the electoral process is left to chance. Once the people have made their choice, anybody who comes up seeking to nullify the results must be sure to place before the court sufficient evidence to clearly prove that the impugned election was not held in accordance with the Constitution and the Election Laws as well as the rules and regulations made thereunder. Any Petitioner must therefore prove his case to the required standard.

48. The above principles have had life breathed into them through a number of decisions both by the Supreme Court of Kenya and the Superior courts. A few of the principles deserve special mention.

#### **Burden of proof**

49. Section 107 of the Evidence Act, Cap 80 Laws of Kenya is worded as follows:-

*“107(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

*(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”*

In addition, Section 109 of the Evidence Act, provides thus:-

*“109 The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on my particular person.”*

50. On matters election petition, it is now trite that election petitions comprise a special category of cases which must be heard and determined within set timelines. The elections to which the petitions relate are expected to have been conducted in accordance with the Constitution and the election laws unless the contrary is proved by the person(s) seeking to nullify an election. Ordinarily. Therefore, an election court will not interfere with the result of an election unless and until a petitioner has established, through cogent evidence that alleged non-compliance with the Constitution and the election law affected the result. So the burden of proof rests on the petitioner.

51. In **Morgan & others – vs – Simpson & another [1974] 2 All ER 722**, a case that was cited with approval by the Supreme Court of Kenya in the case of **Raila Odinga & others – vs – Independent Electoral and Boundaries Commission & 3 others. SCK Petition No. 5 of 2013 [2013] eKLR**, the English Court stated inter alia,

*“An election Court was required to declare an election invalid-*

*(a) if irregularities in the conduct of an election had been such that it could not be said that the election had been conducted as to be substantially in accordance with the law as to elections or*

*(b) if the irregularities had affected the results.*

*“ Accordingly, where breaches of electoral rules although trivial, had affected the result that by itself was enough to compel the court to declare the election void and even though it had been conducted substantially in accordance with the law as to elections. Conversely, if the election had been conducted so badly, that it was not substantially in accordance with the law, it was vitiated irrespective of whether or not the result of the election has been affected.....”*

52. In SCK Petition No. 5 of 2013(Supra) (the Raila case 2013)the Supreme Court held inter alia,

*“ A petition seeking to nullify an election should clearly and decisively demonstrate that the conduct of the election was so devoid of merits and so distorted as not to reflect the expression of the peoples’ electoral intent and that the evidence should disclose profound irregularities in the management of the electoral process,”*

53. The Supreme Court in the same **Raila case 2013**(Supra) went further to say that:-

*“Where a party alleges nonconformity with electoral law, the petitioner must not only prove that there had been non-compliance with the law but that such failure and non-compliance did affect the validity of an election. It is on that basis that the respondent bears the burden of proving the contrary. This emerges from a long standing common law approach in respect of alleged irregularity in the acts of public bodies **Omnia Praesumuntur rite et solemniter esse acta** (All acts are presumed to have been done, rightly and regularly). So, the petitioner must set out by raising firm and credible evidence of the public authority’s departures from the prescription of the law*

54. With regard to the standard of proof, the court held at paragraph 203 of its judgment that-

*“203. 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.”*

55. The above principles on burden and standard of proof were also highlighted by Lenaola J (as he then was) in the case of **Bernard Shinali Masaka – vs -Bony Khalwale & others [2011] eKLR** where the learned judge stated thus-

*“It is now trite that election petitions are a special category of cases and reading the authorities submitted by parties, I am in agreement with **Maraga J in Joho – vs – Nyange & another (2008) 3KLR (EP) and Rawal J. in Onalo – vs – Ludeki & others [2008] 3KLR (EP) 507** where the learned judges held the view that the burden of proving any allegation made in a petition lies with the petitioner. Further I agree with the proposition grounded on the decision in **Mbowe – vs – Eliufoo [1967]E.A 240** that any allegations made in an election petition have to be proved to the “satisfaction of the Court.” Like Rawal J. in **Onalo**, I am certain that the standard of proof save in matters where electoral offences are alleged, cannot be generally beyond reasonable doubt, but the quasi criminal nature of some election petitions, it is almost certainly on a higher degree than merely on a balance of probabilities, the latter being the standard in civil cases.”*

56. In the case of **Charles Oigara Mogere – vs- Christopher Mogere Obure & 2 others [2013]eKLR**, the Court (Sitati J) citing with approval the Supreme Court of India in **Rahim Khan – vs – Khurshid Ahmed AIR [1975] SC 290** stated that-

*“An election once held is not to be treated in a light hearted manner and defeated candidates or disgruntled electors should not get away with it by filing election petitions on unsubstantiated grounds and irresponsible evidence, thereby introducing a serious element of uncertainty in the verdict already rendered by the electorate. An election is a political sacred public act, not of one person or of one official but of the collective will of the whole constituency. Courts naturally must respect this public expression secretly written and show extreme reluctance to set aside or declare void an election which has already been held unless clear and cogent testimony compelling the court to uphold the corrupt practice alleged against the returned candidate is adduced. The burden is therefore heavy on him who assails an election which has been concluded.”*

57. The above principles with which I am in total agreement, have also carved some space for themselves in Kyalo Mbobu’s book. *“The Law and Practice of Evidence in Kenya, Law Africa 2011,”* where at page 129 of the book, the learned author states: *“The burden of proof in election petitions lies on the petitioner to adduce evidence that establishes the alleged election offences and alleged electoral malpractice.”*

58. Before moving away from the conversation on the burden of proof, a word or two will suffice on pleadings. The law provides that parties are bound by their pleadings and this means that a petitioner who comes to court seeking to nullify an election will not be allowed to adduce evidence or make submissions on matters that have not been pleaded. His evidence must therefore go only to proving or supporting his pleadings. The Supreme Court of Kenya made this position very clear in **Raila Amolo Odinga and another – vs –Independent Electoral and Boundaries Commission & 2 Others – SCK Presidential Petition No. 1 of 2017 [2017] eKLR (the Raila Case 2017)** when it stated thus:-

*“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.”*

59. From the above, the position is that a party who comes to court and gives evidence completely unrelated to the pleadings is frowned upon by courts. In **Mahamud Muhumed Sirat – vs – Ali Hassan Abdirahman & 2 others – Nairobi EP No. 15 of 2008 [2010] eKLR**, Kimaru J. expressed his displeasure with the petitioner who adduced evidence and made submissions on unpleaded matters when he said:-

*“From the outset, this court wishes to state that the petitioner adduced evidence, and even made submissions in respect of matters that he had not specifically pleaded in his petition. It is trite law that a decision rendered by a court of law shall only be on the basis of the pleadings that have been filed by the party moving the court for appropriate relief. In the present petition, this court declined, the invitation offered by the petitioner that required of it to make decisions in respect of matters that were not specifically pleaded. This court will therefore not render any opinion, in respect of aspects of the petition which he adduced evidence[on]but which were not based on the pleadings that he had filed in court and in particular, the petition.”*

60. There is one final issue on which I wish to make a few comments. That is the issue of credibility of witnesses, for we cannot talk of burden of proof without considering the credibility of witnesses who come to court to testify in support of the allegations made in the petition. Even witnesses called by the respondents are subjected to the same test of credibility which depends on the following factors-

- his knowledge of the facts to which he testifies
- his disinterestedness
- his integrity
- his veracity and
- his being bound to speak the truth as he deems obligatory, or by such affirmation or declaration as may by law be substituted for an oath. The degree of credit his testimony deserves will be in proportion to the jury’s assessment of these qualities.” See **Archibald Criminal Pleading, Practice and Evidence (1997) page 1037**

61. It follows from the above that a witness, who during his testimony creates an impression in the mind of the court that he is not a straight forward person or who raises some suspicion about his trustworthiness, or who, during his testimony says or does something that indicates, that he is a person of doubtful integrity and therefore a witness who is unreliable, must be treated with circumspection by the court. Such a witness will of course not assist a petitioner in meeting the threshold of the burden of proof on the allegations in the petition. See **Ndung’u Kimanyi – vs –Republic [1979] KLR 282**.

### **Analysis and Determination**

#### **General Observations**

62. I have already set out in full the provisions of Section 83 of the Elections Act which defines the circumstances under which an election may be nullified or invalidated. The Supreme Court recently breathed more life into these provisions in the case of **John Harun Mwau & others – vs – Independent electoral and Boundaries commission- SCK Presidential Petition Nos. 2 and 4 of 2017 (UR) and also in the Raila case 1 of 2017** (supra) in which the court explained that Section 83 of the Elections Act comprises

two limbs which must be read and interpreted disjunctively. The first limb of the Section is a requirement for compliance with the Constitution, the Elections Law and Rules and Regulations made thereunder while the second limb deals with irregularities/Malpractices or illegalities that may, at the end of the day affect the result of the election. The Supreme Court expressed itself, thus at paragraph 203 of the Raila Petition 1 of 2017 (supra)

*“ 203 Guided by these principles and given the use of the word “or” in Section 83 of the Election Act, as well as some of our previous decisions, we cannot see how we can conjunctively apply the two limbs of the section and demand that to succeed, a petitioner must not only prove that the conduct of the election violated the principles in our Constitution as well as other written law on elections but that he must also prove that the irregularities or illegalities complained of affected the result of the election as counsel for the respondents assert. In our view, such approach would be tantamount to misreading of the provisions.”*

63. In its earlier decision in **Gatirau Peter Munya – vs – Dickson Mwenda Kithinji & 2 Others. SCK Petition No. 2B of 2014 [2014]eKLR** the Court pointed out that because an election is a process and not an event, mistakes are bound to be made and malpractices are likely to occur but such mistakes and or malpractices do not necessarily mean that the impugned election result must be nullified. The court was of the view, and I agree with the same, that nullification can only occur if the mistakes and/or irregularities are so grave that they substantially and materially affected the results of the election.

64. The precise position of the Supreme Court on various Constitutional and electoral law provisions was stated in the **Gatirau Peter Munya case** (supra) at paragraphs 216 – 220 of the judgment:-

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

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

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

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

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

65. The above shall apply as I go through the issues for determination, remembering all the time that the burden of proof rests entirely on the shoulders of the petitioner. That the standard of proof, except where the acts complained of are of a criminal nature, is one on a balance of probabilities and finally that any irregularities, illegalities or malpractices, complained of must be of such magnitude that they affected the election result.

#### **What are the Constitutional and statutory standards of holding a fair, free and credible election"**

66. First, I shall take another look at some of the constitutional and statutory provisions touching on elections. The petitioner specifically framed this as an issue probably for the purpose of emphasis with a view to showing in subsequent submissions that these provisions were violated by the respondents. In addition to other provisions already referred to there is Article 2(1) which provides that the constitution is the supreme law of the land and binds all persons and all state organs at both National and County Government level. Article 3(1) requires every person to respect, uphold and defend the Constitution, while Article 10 on National Values and Principles of Governance – requires all state organs , state officers and all persons to apply the national values and

principles of governance set out in sub- Article 10(2) in the application or interpretation to the Constitution.

67. The duty of ensuring compliance with the various Constitutional provisions cited above rests with the IEBC which is a creature of Article 88. In addition to the Constitutional provisions, Section 25 of the IEBC Act is also relevant as it requires the IEBC to ensure compliance with Article 38 which is at the heart of any election.

68. Relevant provisions of the Election Act, such as section 83 thereof have already been highlighted. Other sections mentioned by the petitioner in his submissions are section 2 –Interpretation – which defines the term “agent” to mean “a person duly appointed by-

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

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

69. Section 30 of the Elections Act, , Appointment of Agents – provides as follows:-

*“30(1) 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*

*(3) An independent candidate may appoint his own agent*

*(3A) .....*”

70. For the first time in the history of elections in this country, candidates for various elective positions stood as independents hence the propriety of Section 30(3) of the Elections Act (above). The 4<sup>th</sup> Respondent in this petition the impugned elections for Butere Constituency stood as an Independent candidate.

71. The petitioner also submitted that the courts have applied common law in determining whether an election is valid or not. In this regard counsel for the petitioner placed reliance on **Raila case No. 1 of 2017 (Supra)** as well as the Nigerian case of **Nana Addo Dankwa Akufo – Addo & 3 others – vs – John Dramani Mahama & 2 Others WRIT No. JI/6/2013** for the proposition that agents’ signatures are needed in terms of verification of results. Counsel also relied on the Ugandan case of **Rtd.Col Kizza Besigye – vs – Yoweri Kaguta Museveni & Electoral Commission Presidential Petition No. 1 of 2001** where the Supreme Court of Uganda gave a definition of free and fair elections to mean that *“the electoral process is free from intimidation, bribery, violence, coercion” and where “the results are announced in good time”* The Ugandan position is very similar to the Constitution of Kenya 2010 under Article 38(2) as well as Article 86 thereof.

72. I now move to consider the real issues in this petition.

**Whether the election for Member of the National Assembly for Butere Constituency was conducted in accordance with the Constitutional provisions in Articles 81(e) and 86(a) – (d) and other written law**

73. It was the petitioner’s case that the elections above stated were marred with irregularities and fraud. His position was that the election was rigged and manipulated in favour of the 3<sup>rd</sup> Respondent. He alleged that the voting, tallying and transmission of the results from polling stations to the tallying centre was not in accordance with the provisions of Article 81(e) of the Constitution, namely that the process was not simple, accurate, verifiable, secure accountable, transparent, open and prompt. The petitioner also alleged, as can be seen from paragraphs 4, 6, 22, 23 and 33 of his supporting affidavit that the process also contravened the clear and mandatory provisions of the electoral rules and regulations.

74. In order to appreciate better the petitioner’s complaints that the election breached the Constitutional and statutory provisions

governing elections, it is helpful to set out the malpractices, irregularities and irregularities alleged against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

75. From the pleadings, the Petitioner isolated twenty four (24) complaints in connection with the election for Member of the National Assembly for Butere Constituency as follows:-

*(i) Submitting inflated results of the 3<sup>rd</sup> Respondent in particular polling stations hence reflecting higher results for the said 3<sup>rd</sup> respondent.*

*(ii) Swapping lower results of the 3<sup>rd</sup> Respondent with his (petitioner's) results hence reporting and submitting different figures against the correct and true position represented by the counted ballots in the polling stations.*

*(iii) Reporting and submitting fraudulent and doctored results that are not a true and fair reflection of the counted ballots at the polling stations;*

*(iv) Amending of forms 35A at the tallying centres to reflect fraudulent and fictitious figures in favour of the 3<sup>rd</sup> respondent some of them recorded in video cameras.*

*(v) Intimidation of petitioner's agents by the presiding officers and the agents of the 3<sup>rd</sup> Respondent at various polling stations contrary to the fundamental constitutional and statutory requirements of freeness, fairness, transparency and accountability in the electoral process.*

*(vi) Use of acceptance and submission of forms 35A that were not signed by the agents in the declaration of the results.*

*(vii) Denying the petitioner's agents the opportunity to participate in the vote counting and tallying at various polling stations and tallying centre;*

*(viii) Accepting and including in the final tally/count forms 35A that were not signed by all the candidates' agents contrary to the express and implied provisions of the Elections Act.*

*(xi) Refusing to display the results of the elections on the doors of the polling stations;*

*(x) Succumbing to unlawful pressure, harassment and undue influence from the 3<sup>rd</sup> respondent*

*(xi) Refusing to address serious concerns and objections raised by the petitioner's agents and the petitioner himself in regard to the conduct of the electoral process.*

*(xii) Violation of the principle of free and fair election and electoral process*

*(xiii) Lack of impartiality, neutrality, efficiency, accuracy and accountability*

*(xiv) Lack of verifiability of the results;*

*(xv) Contravention of electoral regulations governing voting*

*(xvi) Substantive non-compliance, irregularities and unproprieties.*

*(xvii) Discrepancies in the statutory vote tallying documents leading to the declaration of manifestly wrong results.*

*(xviii) Same results for all the candidates in different polling stations.*

*(xix) Irregularities and inconsistencies in the counting tallying of votes and filling in of form 35A and 35B.*

*(xx) Failure to properly record the votes, display the same and avail the respective form 35A to agents;*

*(xxi) Failure to seal the ballot boxes;*

*(xxii) Failure to secure polling stations and their environs;*

*(xxiii) Irregular appointment of polling clerks; and failure to regulate access to the use of public resources.*

76. As stated elsewhere in this judgment, for the petitioner to succeed on any of the above allegations, he must discharge both the burden and standard of proof. The burden of proof rests squarely on the petitioner's shoulders, while the standard of proof is one of balance of probabilities except that in cases where any acts complained are of a criminal nature, then the standard of proof is one of beyond reasonable doubt.

77. For the petitioner to meet the set threshold for both burden and standard of proof, he must place evidence before the court to show that the election for Member of National Assembly for Butere Constituency was conducted in such a manner that it cannot be said to have been conducted substantially and strictly in accordance with the electoral laws governing the election. The applicable laws in this case are the Constitution, the Election Act, the IEBC Act and all the rules and regulations made thereunder. Section 83 of the Elections Act (above) is a particular significance, but as stated by the Supreme Court in the Raila Case, 2017, a Petitioner need prove only one of the two limbs of section 83 of the Elections Act for his petition to succeed.

78. The 1<sup>st</sup> and 2<sup>nd</sup> and 3<sup>rd</sup> Respondents argued and contended that the elections for Member of National Assembly for Butere Constituency were conducted in accordance with both the Constitution and the election laws governing that election. The respondents also contended that where there was non-compliance with either the Constitution or the election laws, such non-compliance did not substantially affect the results. The respondents also contended that from the totality of the evidence on record, the petitioner's allegations of electoral malpractices, irregularities, and/or illegalities were baseless and remained unsubstantiated and that for these reasons, the petition should be dismissed with costs. Because the allegations are numerous, it is useful to break the same down into chewable portions for ease of argument and clarity.

#### **Violation of the principle of free and fair election and electoral process**

79. The petitioner's allegation on the above is found at paragraphs 24, through to paragraph 30 of the petition, both paragraphs inclusive. The same allegation is made at paragraphs 6,7,8 and 9 of the petitioner's supporting affidavit in which the petitioner alleged that the process of relaying and transmitting of results from polling stations to the constituency tallying centres (sic) was not simple, accurate, verifiable secure, accountable, transparent, open and prompt, thereby contravening the provisions of Article 81(e) (iv) and (v). He also alleged that the date and information recorded in forms 35A at the individual polling stations was not accurately and transparently entered into KIEMS Kits to the 1<sup>st</sup> Respondent, as the same was not accompanied by an electronic picture or image of the prescribed form 35A.

80. Section 39 of the Election Act is the one that makes provision for transmission of results immediately after close of polling. It is the duty of the IEBC to determine, declare and publish the results of the election. The duty of tallying, announcing and declaration of the results for Member of the National Assembly is on the Returning officer, and for Butere Constituency, the returning officer was the 2<sup>nd</sup> Respondent. The tallying, announcement and declaration of the results must be in the prescribed form

81. Section 39 (IC) requires the IEBC to "electronically transmit, in the prescribed form, the tabulated results of an election for the President from a polling station to the Constituency tallying centre and to the national tallying centre," and to also "tally and verify the results, received at the national tallying centre and to "Publish the polling result forms on an online public portal maintained by the commission."

82. It is to be noted from a reading of the above section 39(IC) that electronic transmission and publication of polling results in a public portal is only mandatory for the Presidential election and not for Member of National Assembly. The transmission of results

for Member of National Assembly and the other four elective positions is done manually by having the votes at the polling station counted and then recorded in form 35A. After the record is entered in form 35A, the form is then manually transmitted to the constituency tallying centre. In this case, the tallying centre was Butere Girls High School. Thereafter, the Returning Officer tallies all the results as received from polling station into form 35B, upon which the Returning Officer announces the results based on form 35C. This position was addressed by **Majanja J in Ranguma – vs – IEBC and 2 others – Kisumu High Court Election Petition No. 3 of 2017 [2018]eKLR**.

83. During his testimony, the petitioner did not give any particulars of the affected polling stations, and even if he had, the allegation is false because electronic transmission of results was required of the IEBC for Presidential election results. In the absence of uncontroverted evidence in support of that allegation and the law being what it is the allegation falls on its face and is dismissed. The case of **Joho – Vs – Nyange & another No. 4[2008] 3KLR 500** for the proposition that not every non-compliance at every act in breach of the election regulations or procedure can be the basis for invalidating an election for non-compliance with the law.

#### **Lack of impartiality, neutrality, efficiency, accuracy and accountability**

84. The petitioner set out at paragraphs 10,11,12 and 13 of his petition a number of allegations to the effect that the 1<sup>st</sup> Respondent selectively manipulated engineered and/or deliberately distorted the votes cast and counted in his favour thereby affecting the final results tallied, and further that he 1<sup>st</sup> Respondent manipulated and/or distorted those results in favour of the 3<sup>rd</sup> Respondent. The Petitioner also alleged that in a substantial and significant number of instances, the 1<sup>st</sup> Respondent grossly inflated the votes in favour of the 3<sup>rd</sup> Respondent thereby affecting the final results tallied and finally on this issue the petitioner alleged that the 1<sup>st</sup> Respondent's Presiding Officers forged form 35A after chasing away the Petitioner's agents from the polling stations.

85. The above allegations are supported by the petitioner's averments at paragraphs 10, 11, 12 and 13 of his supporting affidavit. The wording in the affidavit is exactly the same as it is in the Petition. The question that arises is whether the petitioner proved those allegations to the required standard. From the record, the only evidence adduced by the petitioner in this regard is his own evidence. The allegations were denied by the 1<sup>st</sup> and 2<sup>nd</sup> as well as the 3<sup>rd</sup> Respondent. In his testimony, the petitioner was asked about the alleged manipulation as set out at paragraph 10 of his supporting affidavit and this is the answer he gave. *"I now see paragraph 10 of my affidavit the wording of the said affidavit has an error. The votes were manipulated in favour of the 3<sup>rd</sup> Respondent. I am not able to say right now at which polling stations the votes were manipulated by IEBC."* So what was the petitioner saying" That he had no evidence to support his allegations which were couched in very general terms. As said elsewhere in this judgment any evidence given by a party must support specific allegations, and the allegations must also be clear and to the point. The Supreme Court has said so in its pronouncements in the **Raila Case (2013) and the Raila Case (2017) Supra**, Maraga J (as he then was) also made the point in the **Joho – vs \_ Nyange Case** (above). Reiterated the same principle

86. In summary, I find and hold that he petitioner's allegations were simply vague and embarrassing as the "numerous" "substantial and significant number of instances' were neither specifically pleaded nor proved by the evidence given by the petitioner. The petitioner did not call any of his agents to support, by way of additional oral and direct evidence, these allegations. The allegations are accordingly dismissed.

#### **Lack of verifiability of the results**

87. Allegations on this issue are found at paragraphs 14,15, 16 and 17 of the Petitioner's supporting affidavit. In these paragraphs he alleged as he did at paragraph 36,37,38,39,40,41,42,43,44,45,46,47, and 48 of the petition, that the returns made by the 1<sup>st</sup> Respondent did not comply with the law and regulations governing elections; that the information in forms 35A was not consistent with the information recorded in form 35B issued by the 2<sup>nd</sup> Respondent and therefore not verifiable, that the information in form 35B was not internally consistent and that the additions and figures do not add up and finally that even as late as 31<sup>st</sup> August, 2017, almost all polling stations had not transmitted the results to the 1<sup>st</sup> Respondent's portal, thereby denying the public the opportunity to access the results, and fueling the impression that the Presiding Officers had been compromised to distort forms 35A.

88. In answer to some questions put to him in cross examination, the petitioner stated in part: *"I see paragraph 44 of my affidavit (Witness reads) No, I was not present at those polling stations. I read this information from face boo. I also see paragraph 45 of my affidavit. No, I did not attend the meeting since I am not a professional. I see paragraph 46 of my affidavit. The 1<sup>st</sup> Respondent allowed these issues to continue despite my complaints. The IEBC could not hear me. I did not file any case with IEBC.....I have*

*no problem with the numbers. We are questioning the process. .... I cannot say whether the results were mine. I had agents there, but they were chased away and could therefore not sign form 35A."*

89. The above is the evidence on record in support of the allegations. The allegations are not only generalized but are also based on hearsay. None of the agents allegedly chased away by the 2<sup>nd</sup> Respondent was called to testify. It was the duty of the petitioner who is challenging the verifiability of the results and therefore the legitimacy of the election of Member of National Assembly for Butere to place before this court hard and cogent evidence to prove this claim. It was also his duty to plead with sufficient particularity the names of polling stations affected by the allegations and names of agents who were chased away by the 2<sup>nd</sup> Respondent. In my considered view, the petitioners generalized allegations, which are also unsupported by evidence, cannot stand and must therefore be dismissed for want of merit.

#### **Contravention of Electoral Regulations governing voting**

90. Paragraphs 18 and 22 of the Petitioner's supporting affidavit and paragraphs 41 through to 48 of the petition raised the issue of contravention of electoral regulations by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. The petitioner alleged that these contraventions were committed at various polling stations across Butere Constituency; that in a significant number of polling stations; the votes cast as captured in form 35A differed from results captured in 2<sup>nd</sup> respondents form 35B and also as displayed in the 1<sup>st</sup> Respondent's portal; that the results contained in form 35B in respect of the said election is not the result required under Article 86 and therefore a nullity; that the purported results announced by the 2<sup>nd</sup> Respondent were not openly and accurately collated and further that the results tabulated in form 35B were not and could not have been accurate thereby rendering the election and the electoral process fundamentally flawed and invalid.

91. It was also the petitioner's allegation at paragraph 22 of the supporting affidavit that:-

- *the petitioner's agents were not issued with badges despite their accreditation;*
- *incessant complaints by the said agents were disregarded and went unheeded with the result that voting in the said (") polling stations commenced in the absence of agents.*
- *the petitioner's agents were not provided with the serial numbers of the ballot papers used in the elections nor the serial numbers of the ballot boxes*
- *presiding officers "assisted" old and illiterate voters to cast their votes for the 3<sup>rd</sup> respondent, contrary to regulation 72(2) of the regulations*
- *presiding officers in various polling stations chased agents on various flimsy grounds leaving them counting votes without supervision.*

92. Regulation 72 of the Election (General) Regulations 2012(the Regulations) deals with assisted voters who apply to be assisted to vote by reason of inability to vote in the manner prescribed in the regulations. Once the application is made, the presiding officer shall permit such a voter to be assisted or supported by a person of the voter's own choice, and who shall not be a candidate or an agent. Sub regulation 2 thereof provides:-

*" (2) where the person who applies to be assisted is not accompanied by a person who is qualified to assist him or her, the presiding officer shall assist such a voter, in the presence of agents."*

93. Thus in the case of assisted voters, the agents must be present during the process of assisting the voter to vote if the assistance is given by the presiding officer. So, what evidence did the petitioner place before the court to prove these allegations" From the record, the petitioner did not place any type of evidence before court to prove the above allegations. Like all the other allegations the above allegations are generalized to a very great extent and the petitioner did not specify in the petition the polling stations that were afflicted by these grave allegations, nor did he call any witness such as agents who were either chased away by the presiding officers or those who were not issued with badges as alleged. It is also not possible, in my humble view that the petitioner could fail to call as witnesses person who had information about voters who were misled by the Presiding Officers as they were being assisted to vote. He did not also call any witness, especially his agents to testify to the allegations. All he said was that he could not make any report to IEBC because the Retuning Officer and other officials of IEBC were out of station. The court finds it strange that the petitioner could not report such a serious lapse on the part of the election officials. The petitioner did not also produce a letter he allegedly wrote to IEBC complaining about all these alleged contraventions, nor did he state in his affidavit that he had made his

complaints' to radio stations. In answer to a question by counsel for the 3<sup>rd</sup> Respondent, the petitioner simply stated that when IEBC refused to hear him, he filed this petition. When directed to the results of Manyala Primary School polling station, the petitioner stated that he did not dispute those results, and that his main problem was the refusal by the presiding officer to let the agents sign. The agent who was refused/ prevented from signing form 35A at Manyala Primary School polling station was not called to testify. The only inference the court can draw from the petitioner's failure to call crucial witnesses for his case is that the evidence of the said witnesses was adverse to the petitioner's case. The allegations are accordingly dismissed.

### **Substantive non-compliance, irregularities and improprieties**

94. These allegations are covered at paragraphs 49,50,51,52,53,54 and 55 of the petition as well as paragraphs 23,24,25,26,27,28 and 29 of the petitioner's supporting affidavit. The petitioner alleged contravention of regulations 79(2)(a) and 87(1)(a) of the Regulations. He also alleged that form 35B was demonstrably contradictory, defective and bore irregularities affecting at least 130 forms 35A and/or polling stations out of the 201. The petitioner also accused the respondents of lack of consistency, uniformity, neutrality, impartiality and manipulation of the results in favour of the 3<sup>rd</sup> Respondent. The petitioner also claimed that a substantial number of form 35A had been tampered with and that presiding officers of the 1<sup>st</sup> Respondent were caught fraudulently altering and tampering with forms 35A and signing the said forms at the Constituency tallying centre at Multi Media University.

95. At paragraph 29 of the supporting affidavit the petitioner made wide ranging allegations about the state of form 35A touching on

- *Lack of signatures*
- *Failure to indicate name of presiding officer*
- *Substantial number of the forms not bearing IEBC authentic stamps*
- *Failure by presiding officers to indicate the number of Form 35A handed over to them for the election*
- *Lack of candidates' agents' signatures on a substantial number of the forms*
- *Integrity of material used and the entire election process were compromised.*
- *Use of returns and forms unknown to the law*
- *Failure by presiding officers to send results to the portal.*

96. I have already dealt with some of the above allegations in the earlier paragraphs of this judgment such as the issue of lack of impartiality and sending of results from polling stations to the portal.

97. During the hearing and in their submissions, counsel for the respondent took the petitioner to task over what they called "a copy and paste" edition of a petition meant for Langata Constituency and its importation into Butere Constituency. The petitioner's reference to 201 polling station and to Multimedia University as a tallying centre were of particular concern to the respondents since, Butere Constituency had only 124 polling stations while Butere Girls High School was the tallying centre.

98. Having said the above, I find that the petitioner did not place before this court sufficient evidence to prove his allegations on the matters he pleaded under this head. The petition as filed refers to Langata Constituency as well as Butere Constituency. It is thus likely that those allegations were lifted from a petition that had been meant to challenge the results of an election within Langata Constituency in Nairobi without taking care to ensure that the allegations were relevant to the election for Member of the National Assembly for Butere. During cross examination, the petitioner admitted that there were errors in his pleadings. Generally also, the petitioner admitted he did not have any evidence to support the detailed allegations set out in paragraph 4 of his supporting affidavit which forms the backbone to his case. He admitted he was not present at the polling station where he alleged there were irregularities and improprieties and no agent from the said polling station was called to testify.

99. There was also no evidence to prove the allegations that presiding officers of the 1<sup>st</sup> Respondent were caught fraudulently altering and tampering with the forms 35A and signing of the said forms at the constituency tallying centre. Further, the petitioner pleaded the wrong number of polling stations, and he gave no evidence that his allegations concerning the 130 polling stations were true. I think I have said enough on this issue and will let the matter rest there as I dismiss the allegations.

### **Discrepancies in the statutory vote tallying documents leading to the declaration of manifestly wrong results**

100. The petitioner pleaded this allegation at paragraph 56 of the petition by averring that the results declared by the respective presiding officers in various polling stations as the valid votes in their favour(“”) and therefore entered in the respective form 35A differed substantially with the results in form 35B thereby bringing the tallying process by the 2<sup>nd</sup> Respondent into disrepute. He further averred that all form 35A’s total number of valid votes differed with the total number of valid votes in form 35B.

101. The above allegations were supported by paragraphs 30, 31 and 32 of his supporting affidavit, in which the petitioner deponed that the figures in the form 35A were tampered with either by the 2<sup>nd</sup> Respondent or by persons known to him and/or acting at his behest. During the hearing, the petitioner stated that most of the 11,000 votes garnered by the 4<sup>th</sup> Respondent were his but he did not say which polling stations yielded those votes which he alleged were his.

102. It is also to be noted that when the scrutiny was eventually conducted, it disproved the petitioner allegations, that the results in all the form 35As were different from those in form 35B. If this had been the case, the petitioner would not have agreed that the only polling stations about which he had concerns were 31 out of 124. More about the results of the scrutiny later in this judgment.

### **Irregularities and inconsistencies in the counting, tallying of votes and filling of forms 35A and 35B**

103. The petitioner’s case on this issue was set out at paragraphs 57 through to 62 of the petition and paragraphs 33 through to 38 of the supporting affidavit. His complaint was that the 2<sup>nd</sup> Respondent failed and/or neglected to count votes cast in the election in accordance with Regulations 83 of the Regulations thereby giving inaccurate results in respect of the election of the Member of the National Assembly for Butere Constituency. He particularly alleged that the 2<sup>nd</sup> Respondent totally failed to disregard results where it was obvious that the votes cast were more than registered voters, which meant in the petitioners view that the 2<sup>nd</sup> Respondent doctored results in favour of the 3<sup>rd</sup> Respondent.

104. Regulation 83 provides as follows:-

*“83.(1) Immediately after the results of the poll from all polling stations in a constituency have been received by the returning officer, the returning officer shall, in the presence of candidates or agents and observers, if present-*

*(a) tally the results from the polling stations in respect of each candidate, without recounting the ballots that were not in dispute and where the returning officer finds the total valid votes in a polling station exceeds the number of registered voters in that polling station, the returning officer shall disregard the results of the count of that polling station in the announcement of the election results and make a statement to that effect,*

*(b) in the case of an election, publicly announce to persons present the total number of valid votes cast for each candidate in respect of each election in the order provided in regulation 75(2);*

*(c) complete form 34 and 35 set out in the schedule in which the returning officer shall declare, as the case may be, the-*

*(i) name of the respective electoral area;*

*(ii) total number of registered voters;*

*(iii) votes cast for each candidate or referendum side in each polling station;*

*(iv) number of rejected votes for each candidate in each polling station*

*(v) aggregate number of votes cast in the respective electoral area; and*

*(vi) aggregate number of rejected votes; and*

*(d) sign and date the form and-*

(i) give to any candidate, or agent present a copy of the form; and

(ii) deliver to the commission the original of form 34 and 35 together with form 36 and Form 37 as the case may be.

(2) *The results of the presidential election in a constituency shown in form 34 shall be subject to confirmation by the Commission after tally of all the votes cast in an election.*

(3) *The decision of the returning officer on the validity or otherwise of a ballot paper or a vote under this regulation shall be final except in an election petition.”*

105. In light of the above, the petitioner was required to place such evidence before this court as to show, among other things that the votes cast in some polling station exceeded the number of registered voters. During his testimony, the petitioner did not adduce any such evidence, on these allegations, but he complained both in his evidence in chief and on cross examination that his agents were not allowed to sign certain form 35A's. He also testified that on some forms there were more signatures of agents than there were names and further that some of the form 35A's did not have genuine IEBC stamps and also that in some polling stations, strangers were permitted to sign the forms.

106. What I can say on this issue for now is that the petitioner's pleadings and testimony did not give names of specific polling stations where these irregularities occurred. Having considered the overall picture on form 35A's, I am satisfied that this allegation has no basis and must fail, and that being the case, the results recorded in form 35A's reflected the will of the people of Butere Constituency.

#### **Failure to properly record the votes, display the same and avail the respective form 35A to agents.**

107. These allegations against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are contained in paragraphs 63, 64 and 65 of the petition and supported by the petitioner's depositions at paragraphs 39,40 and 41 of the supporting affidavit. The petitioner's allegations were that the presiding officers did not-

- diligently record the votes as counted onto form 35A
- avail copy of form 35A to the agents present
- display the results at a prominent and public place within the respective polling stations.

108. The petitioner also alleged that the presiding officers failed and/or neglected to allow the petitioner's agents to sign the respective form 35A's and /or state the reasons for their refusal to sign the same.

109. At paragraph 39 of the supporting affidavit, the petitioner alleged that his agents were never furnished with Forms 35A in 122 polling stations and at paragraph 40, he alleged that “ in about 38 polling stations out of 201 polling stations within Butere Constituency, the presiding Officers failed and/or neglected to allow I's (sic) agents to sign the respective Forms 35A and/or state the reasons for their refusal to sign. These figures are significant for the reason that Butere Constituency had only 124 polling stations and not 201. Apart from this error, of copying and pasting, the petitioner did not call any of the agents who were alleged to have been denied the opportunity to sign the form 35A to testify, nor did he specify which polling station were affected in this regard. It is thus doubtful to the court whether the petitioner really knew what his petition was about.

110. When the petitioner was questioned about these allegations, he stated in part:- “ *Yes, I have seen the bundle of documents for respondents, but I have not read through the same to enable me say which polling stations had discrepancies. Yes, my agents were refused to sign form 35A in some polling stations, though none of them has sworn an affidavit to that effect*” He went on to state:- “ *The votes were manipulated in favour of the 3<sup>rd</sup> Respondent. I am not able to say right now at which polling stations the votes were manipulated by IEBC.*”

111. In summary, I find the petitioner's evidence on this point to have been hearsay or absent altogether, and the allegations therefore remained unsubstantiated. In any event, Regulation 79(6) and (7) of the Regulations speak to this issue in a way that, “79(6) *the refusal or failure of a candidate or an agent to sign a declaration form under sub regulation (4) or to record the reasons*

*for their refusal to sign as required under this regulation shall not by itself invalidate the results announced under sub-regulation 2(a)” and “79(7) reads the absence of a candidate or an agent at the signing of a declaration form or the announcement of results under sub regulation (2) shall not by itself invalidate the results announced.”*

112. The courts have pronounced in the past and I join them now in saying that, unless the errors of commission and/or omission are so grievous and intended to benefit a particular or specific candidate, or unless the errors were so deliberate as to leave no doubt in the mind of the court as to what the officers’ intentions were, then the results should not be disturbed. Even if it were to be believed that the petitioner’s agents were denied access into polling stations (an allegation which the petitioner did not prove), the denial alone would not invalidate the results. In this petition, the evidence given by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and which evidence is supported by the petitioner’s own admission is that no reports were made to the 1<sup>st</sup> Respondent touching on the issue. Further, the petitioner’s allegation that he made reports of the same to radio stations was not proved as no witnesses were called from any of the radio station to testify on the same, nor was any documentary proof of the reports placed before me.

113. It also came out during the hearing of the petition that though the petitioner testified that he had agents in all the polling stations, he was not able to visit each and every polling station to confirm whether or not his agents had reported for duty. Further, he did not avail a list of his accredited agents to assist the court in determining whether or not the “alleged strangers” who signed some of the form 35A’s were not his agents; leave alone even just confirming to the court how many of his agents were denied access and what their names were. It is therefore my finding that the petitioner needed to do much more than make general allegations without substantiating them.

114. In the case of **Nana Addo Dankwa AKufo – Addo & 3 others (above)** an authority that was cited with approval by the Supreme Court in the **Raila Case, 2017**, the court dealt with the thorny issue of the failure of presiding officers and agents to sign election forms such as form 35A, and held that this failure did not render the forms null and void as to do so would take away the right of the voter in his or her choice of the person to represent them. As it were, the court was saying that the sins of the election officials ought not to be visited upon the voter. The view of the court in this regard was that: “.....signature in itself has no magic about it. It is judicially acknowledged that failure to sign an official document could be due to administrative error,” and that “this category of irregularity is outside the domain of the voter, as it is caused solely by an error or omission on the part of the presiding officer.”

115. So, even in this case, it is important to make a clear distinction between administrative errors of election officials and irregularities committed by such officials. As stated elsewhere in this judgment, the petitioner had the singular duty to prove that the failure complained of was intended to undermine the electoral process with a view to depriving the voters of their democratic right to choose their preferred leader through the ballot, and further that the errors so complained of affected the integrity and validity of the election. Unfortunately for the petitioner no such evidence was adduced. To drive this point further, I would like to associate myself with the words of the court in **Mercy Kirito Mutegi – vs – Beatrice Nkatha Nyaga & 2others [2013] eKLR**, for the proposition that “It is not sufficient to show that, certain forms were not completed as required. Their negative effect to the credibility of the elections must be demonstrated to the required standard, and where this is not done, it is presumed that the election officials acted in good faith.” In this petition the petitioner failed to discharge his burden of proof, and this court can only presume that the election officials acted in good faith.

### **Irregular appointment of Presiding Officers and Clerks**

116. The petitioner alleged at paragraphs 66, 67 and 68 of the petition as well as paragraphs 42 and 43 of the supporting affidavit that the 2<sup>nd</sup> Respondent allowed ungazetted officers to run the elections. He singled out the Deputy Presiding Officer and some unnamed personnel in the IT Department. According to the petitioner, this irregularity denied the various political parties the opportunity to have a list of all the persons appointed as polling Clerks, prior to the date of the general election.

117. All that the court can say on this allegation is that no evidence was laid before the court by the petitioner to support these allegations. He also did not give the name of the alleged ungazetted person who was allowed to work in the IT department. The name that was thrown at the court by the petitioner during cross examination ought to have been pleaded and not simply mentioned in cross examination. There is no doubt that evidence on matters that are not pleaded is inadmissible.

### **Failure to regulate the campaign process**

118. Complaints on this issue are set at paragraphs 44, 45, 46 and 47 of the petition as well as at paragraph 44 and 45 of the supporting affidavit. The petitioner alleged bribery of voters in Eshikulu, Marama on 28<sup>th</sup> July, 2017 and pointed at the 1<sup>st</sup> Respondent for failing to take action. The petitioner also alleged that even after the campaign period ended, the 3<sup>rd</sup> Respondent continued to campaign, purporting to be holding meetings with professionals. At paragraph 46 of the petition, the petitioner alleged that the 1<sup>st</sup> Respondent permitted the 4<sup>th</sup> Respondent who stood as an Independent Candidate to campaign using the party colours for ODM and that by doing so the petitioner's potential voters got confused and voted for the 4<sup>th</sup> Respondent; thereby allowing the results of the election to tilt in favour of the 3<sup>rd</sup> Respondent because of the petitioner's lost votes to the 4<sup>th</sup> respondent.

119. From the record, the only available evidence on this issue is hearsay. The person who allegedly captured the 3<sup>rd</sup> Respondent engaging in bribery was not called as a witness to support the claims and to produce the anticipated documentary evidence of the same. The petitioner admitted that he himself did not attend the said meeting, and further that no report of the incident was made either to the IEBC or the police. Since these allegations were denied by the 3<sup>rd</sup> Respondent the petitioner was under a duty to place hard and direct evidence before the court to support the same. The petitioner having failed in this duty, the allegations must fail.

120. As regards alleged use of ODM colours by the 4<sup>th</sup> Respondent, again the Petitioner did not avail the requisite evidence to prove the same. In any event, under Section 109 of the Elections Act, the 1<sup>st</sup> Respondent is required to make regulations to govern elections and to ensure that the electoral code of conduct is observed by all political parties and Independent Candidates, any breach of the regulations by the 3<sup>rd</sup> or 4<sup>th</sup> Respondents should have been reported by the petitioner to the appropriate entity dealing with the same. Failure by the petitioner to do so can only mean that he had no complaints to make. Though the petitioner claimed that the 4<sup>th</sup> Respondent's use of colours similar to those of ODM helped to "steal" his votes, he had not shown how that was done and at which polling station(s) the votes were stolen.

121. In a nutshell, and concerning the whole issue of whether the process leading up to the declaration of the final results for Member of National Assembly in Butere Constituency was fraught with election malpractices, irregularities and allegations, it is my abundantly that the evidence on record does not support the allegations to the required standard, since it has not been shown that the malpractices, irregularities and breach of electoral procedures complained of went to the root of the results. As was so clearly stated in the case of **Steven Kariuki – vs – George Mike Wanjohi & others [2013] eKLR**, "*.....there is a rebuttable presumption in favour of the respondents that the election was conducted properly and in accordance with the law.*" It has also been noted by the Supreme Court and other courts that "*Elections are not always perfect. Consequently, not all malpractices will lead to nullification of the results.*" The evidence by both the petitioner and the 4<sup>th</sup> Respondent fell far short of proving that the impugned elections were not free and fair.

### **C. Whether the results of the election of Member of the National Assembly for Butere Constituency were duly declared or not at all**

122. The Petitioner's case was that with all the malpractices, irregularities and illegalities, the impugned results were never declared at all. In paragraph 4 of the Petition, the petitioner stated that the 3<sup>rd</sup> Respondent was returned by the 2<sup>nd</sup> Respondent as the duly elected Member of the National Assembly for Butere Constituency and was declared as such by the 1<sup>st</sup> Respondent vide the Kenya Gazette of 22<sup>nd</sup> August, 2017.

123. In her evidence, DW1, Bedi Iyadi Nancy the 2<sup>nd</sup> Respondent herein testified that she declared the results of Member of National Assembly for Butere Constituency on 9<sup>th</sup> August, 2017 at about 10.00pm in the presence of the ODM chief agent. She also testified that after the declaration of the results much excitement was experienced and most of the people who were present at the tallying centre, including many party agents left. She further stated that on 10<sup>th</sup> August, 2017, some of the agents who had left the tallying centre before signing the form 35B returned to her office and signed the form.

124. There was no other evidence from the petitioner to controvert the 2<sup>nd</sup> Respondent's testimony that the results were declared. I also find that though the petitioner had framed this issue, he did not pursue it in his written submissions.

### **Outcome of the scrutiny exercise of all the election materials as ordered by court on 23<sup>rd</sup> November, and 11<sup>th</sup> December, 2017 respectively**

125. By the orders of this Honourable Court dated 23<sup>rd</sup> November, 2017 and 11<sup>th</sup> December, 2017, the Petitioner was granted his prayer for scrutiny for all the election materials. On 14<sup>th</sup> December, 2017, the parties appeared before the Deputy Registrar for directions before commencement of the scrutiny exercise and they all agreed to carry out scrutiny in only 31 out of the 124 polling stations within Butere Constituency. These stations were:

1. Eshitari Primary School 2 of 2
2. Iranda Primary School 1 of 2
3. Ituti Primary School 1 of 2
4. Ituti Primary School 2 of 2
5. Emunuku Primary School 1 of 1
6. Eshikangu Primary School 2 of 2
7. Bumamu Primary school 3 of 3
8. Manyika Primary School 1 of 1
9. Emukangu Primary School 1 of 1
10. Shiyiro Primary School 2 of 2
11. Mutoma Primary School 1 of 2
12. Shinamwenyuli Primary School 1 of 2
13. Nyenyesi Primary School 1 of 2
14. Shitsitswi Primary School 1 of 3
15. Matawa Primary School 2 of 2
16. Shikunga Primary School 1 of 2
17. Emarenyo Primary School 2 of 2
18. Muyundi Primary School 2 of 2
19. Eshirumba Primary School 1 of 1
20. Manyulia Primary School 1 of 1
21. Shianda Primary School 2 of 2
22. Emusunguri Primary School 2 of 2

23. Shirakalu Primary School 1 of 1
24. Shiraha Primary School 1 of 2
25. Shiraha Primary School 2 of 2
26. Lukohe Primary School 1 of 2
27. Lukohe Primary School 2 of 2
28. Shikomere Primary School 1 of 1
29. Eshibimbi Primary School 1 of 1
30. Ebukhokoro Primary School 1 of 1
31. Manyala Primary School 2 of 2

#### **Missing original form 35A of 6 Polling Stations**

126. Out of the 31 original form 35As, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents availed only 35, which means that they failed to produce 6 originals though the petitioner did not make any specific submission on this and other errors revealed during the scrutiny. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents as well as the 3<sup>rd</sup> Respondents submitted that the failure to avail the 6 original form 35As was not fatal to the results of the elections since their carbon copies which were not disputed were availed. In his submissions, the 3<sup>rd</sup> Respondent relied on the provisions of section 65 of the Evidence Act and in particular, subsections 3 and 4 thereof to the effect that where a document is executed in counterpart or where a number of documents are made by one uniform process, then each is primary evidence of the contents of the rest. It is worth noting that there is no complaint by the petitioner that the contents of the carbon copies availed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent had any adverse effect on the result. Infact during the first scrutiny, all the 124 form 35A's in carbon copy were scrutinized and no issues arose from the same.

127. On this point, I am in agreement with what Chitembwe J observed in **Nathan Obwana – vs – Robert Bisakaya Wanyera & 2 others [2014] eKLR** when the learned Judge said:-

*“I have had the advantage of handling three other election petitions involving two Parliamentary positions and one gubernatorial position and all the forms that were produced by the IEBC were photocopies. There was no objection to those forms. There is also no evidence that the IEBC officials were favouring a specific candidate in the elections for Lwandanyi Ward County Representative. There is no evidence that he forms that were produced had nothing to do with the elections at Lwandanyi ward. I am therefore satisfied that the forms that were produced were the same forms that were used during the elections in Lwandanyi ward.”*

128. The position stated, above applied on all fours to the situation in all the three petitions that I have handled arising out of the 2017 elections. The forms that were produced by the IEBC in each of the petitions were copies of originals and in this petition, the petitioner saw all the 124 copy form 35A during the earlier scrutiny. If there had been an issue concerning these forms, I am certain that the petitioner would have made a demand for production of the originals.

129. A look at Rule 29(4)(c) of the Election Petition Rules reveals that a scrutiny or recount shall be confined to polling stations in which the results are disputed and may include the examination of *“the copies of the results of each polling station in which the results of the election are in dispute.”* There is thus no requirement that original form 35A's were required for the scrutiny exercise, and no adverse imputation has been made by the petitioner against the 1<sup>st</sup> and 2<sup>nd</sup> Respondent as a result of the missing original form 35A's

139. In effect therefore, the fact that certain of the forms whether they were 35A or 35B or 35C were photocopies did not have any

adverse effect on the results, and the law did not require originals.

131. Closely connected with the 6 missing original form 35As, it was found out that the original form 35A for 4 polling stations were found in the ballot box. Again, in the absence of any specific malpractice being associated with such an error, I find that the presence of the 4 form 35A in the ballot boxes had no adverse effect on the results.

**Failure to stamp some form 35As with the IEBC stamp and failure by agents to sign form 35A and/or lack of comments**

132. The scrutiny also revealed that some of the form 35As were not stamped with IEBC's authentication stamp, while some were not signed either by candidates or agents while in some other cases, no reasons were given for lack of signature by whoever was supposed to sign. It was contended in the petition and the affidavits of the petitioner and the 4<sup>th</sup> Respondent that these errors of omission meant the 3<sup>rd</sup> Respondent stole a match on them. I have already said enough about these errors as seen in the eyes of Regulation 79 of the Regulations as well as the cited authorities. The position is that the mere absence of a stamp or signature would not automatically lead to nullification of election results, as long as the presiding Officer has signed the forms. Further, where, as in the present case, the evidence given does not support a pleading, such evidence is of no consequence. The petitioner in this case did not specify in his petition which polling stations had these errors. There is also a possibility that some polling stations may not had had agents, so that to expect every form to be signed by an agent who may not have been there in the first place in order for an election to be valid would be setting the bar too high and would clearly disenfranchise the innocent voter who had cast his/her vote in support of his/her preferred candidate.

133. On this issue of unstamped and unsigned form 35As and other material such as the polling station diaries, I am in agreement with what Gikonyo J in the case of **John Murumba Chikati – Vs – Returning Officer Tongaren Constituency & 2 Others [2013] eKLR** in the following words:-

*“What about Form 35A which had not been stamped” The court takes the view that affixing the official stamp is important, but, lack of it does not invalidate the form. The requirement of the law under regulation 79 of the Elections (General) Regulations, 2012 (hereafter General Regulations) is that the Presiding Officer signs the statutory form. Under Regulation 5 of the General Regulations, Presiding Officer includes the Presiding Officer and Deputy Presiding Officer duly appointed by IEBC. The statutory Form is valid once it has been signed by the Presiding Officer; both the Presiding Officer and the Deputy Presiding Officer or by either of them. The forms were signed by the Presiding Officers appointed for the polling stations in question and therefore, lack of the official rubber stamp does not invalidate the form or the results thereto. It is only one Form 35 for Milele FYM Primary School which had not been signed by either the Presiding Officer or Deputy Presiding Officer. The form had been stamped, but that is not sufficient in law. The results for Milele FYM primary school were invalid and should not form part of the overall results. The question, however, is if the exclusion of those results would affect the results announced. Certainly it does not. In the same vein, Regulation 79 does not require that the statutory form must be signed by agents. It states clearly in Regulation 79(6) and (7) that absence of candidates or agents or failure to sign the form by candidates or agents does not invalidate the results declared in the Form. In sum, the allegations impugning the Form 35 on grounds of lack of a stamp, signatures of all agents and statutory comments fall short of the required thrust for it to be a basis for nullification of an election results. Much more is needed say, how the lapses affected the results. That is lacking in this case. The ground is not proven and it fails.”*

134. In this petition, there is not even a single form 35A that was not signed either by the Presiding Officer or Deputy Presiding Officer, and in the circumstances, the errors complained of by the Petitioner touching on form 35As are not fatal to the results. I have elsewhere in this judgment said that the 2<sup>nd</sup> Respondent adequately explained why some agents did not sign the forms.

135. In 3 polling stations, neither the Presiding Officer nor the Deputy Presiding Officer signed the polling station diary. Apart from those missing signatures, no other complaint was raised by the petitioner concerning the 3 polling stations at Eshikangu Manyulia and Shianda Primary Schools. This court is prepared to accept the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' admission that these were minor errors which did not affect the results. In addition to the above, the petitioner admitted that at no point did he raise any complaint of electoral malpractice to the 1<sup>st</sup> and 2<sup>nd</sup> respondents. If such complaints had been raised they would have been recorded in the Polling Station Diary and as such if the Presiding Officer or Deputy Presiding Officer had failed to sign the polling station diary, the court would be right in drawing the inference that the failure to sign was intended to serve the interests of particular candidates. The petitioner and the 4<sup>th</sup> Respondent also failed to demonstrate through evidence how the lack of signatures on the various forms and the polling station diary affected the results of the election of Member of National Assembly for Butere Constituency. Clearly, nothing turns on the anomaly.

**Failure to indicate election date in 1(one) polling station and time of opening and closing of polling station in 8 out of 124 polling stations.**

136. What I can say about the above is that the petitioner did not adduce any evidence to confirm how the above errors, which clearly are human affected the results of the elections. It is accepted that the 2017 general elections involved six elections and long working hours for the officials without sleep. It is expected that in such circumstances, errors are bound to occur and where the petitioner does not show that such errors were deliberate and intended to serve the interests of a particular candidate, this court is not prepared to hold the occurrence of those errors against the respondents.

**Missing counterfoils in one (1) polling station**

137. The 4<sup>th</sup> Respondent complained that the missing counterfoils at Emunuka Polling station should lead to nullification of the election. Apart from that single complaint, neither the petitioner nor the 4<sup>th</sup> Respondent pleaded and/or proved any other allegation concerning Emunuku Polling Station; nor did they demonstrate how the missing counterfoils affected the result in favour of the 3<sup>rd</sup> Respondent

138. In the **Nathan Obwana case** (above) the court stated that- *“Other irregularities noted involved lack of counterfoils in polling station number 64 Kaburweti Primary School in the ballot box. The court also found the same polling station and polling station number 75 had different seal numbers on the ballot boxes. My view is that even if a seal is replaced with another one the most important thing is whether the contents of the ballot box were interfered with. When the elections were conducted, there were other elective positions being conducted at the same time. It is possible that the counterfoil could have been put in another ballot box for Women Representative, Member of Parliament, Governor or Senator. What is important is to compare the results of the scrutiny against form 35 produced in court. I do not find that anomaly to be fatal.”*

139. In the instant case, the detailed scrutiny report indicates that for the affected polling station, namely Lukohe Primary School 1 of 2 all the ballot papers were stamped and properly marked. I therefore find that the anomaly complained of was not fatal to the 3<sup>rd</sup> Respondent's win.

**Mismatch between forms 35A and 35B in five (5) polling stations.**

140. The mismatch arose from transposition of figures but in which there was no subtraction from the total tally obtained by the petitioner. I have stated elsewhere in this judgment that where errors are alleged, it must be proved by the petitioner that those errors were deliberate and that they affected the results. From the record, there is no evidence by both the petitioner and the 4<sup>th</sup> Respondent to prove that the errors complained of were deliberate or that they were intended for the benefit of the 3<sup>rd</sup> Respondent. Further the mismatch covered different little omissions in the 5 polling stations from the votes garnered by the 3<sup>rd</sup> Respondent, rejected votes and total valid votes cast. My view on this matter is that the mismatch is that it was not deliberate and that it did not affect the results. In the **Paul Gitenyi Mochorwa case** (above) the Judge noted that *“the transposition errors have therefore no effect on the eventual outcome of the election even though they do affect the results in the final figures scored by the respective candidates.”* In the present case, the transposition did not even affect the final figures scored by the various candidates.

**Jubilee agent's signing some form 35As and polling station diaries**

141. It is an admitted fact that as a party, Jubilee did not field any candidate for Member of National Assembly for Butere Constituency. The question to ask is whether the presence of these agents who appear to have been many in number had any negative effect on the election results, and whether the law allowed them to be present within the constituency. The petitioner referred to these agents as strangers who signed form 35As and PSDs in 11 polling stations.

142. I have checked the relevant forms and find that the Jubilee agents as well as Petitioner's agents signed the forms in the 11 polling stations. Further, from the record, the petitioner stated that he had no dispute with the results he got in those 11 polling stations. It follows therefore that the petitioner as well as the 4<sup>th</sup> Respondent did not demonstrate in what way the signatures of the Jubilee agents affected the results. I am also of the view that if the signatures by these agents had in any way compromised the results in favour of the 3<sup>rd</sup> Respondent either the petitioner or the 4<sup>th</sup> Respondent would have called one of their party agents to demonstrate to the court how the Jubilee agents' presence had compromised the results. In the absence of such evidence, I find that

those signatures were of no consequence to the final results; and accordingly this court concludes that the will of the people of Butere in those 11 polling stations was not affected. In any event, the Jubilee agents were not barred from accessing those 11 polling stations as long as they met the criteria for agents.

#### **Alterations and tallying errors**

143. The scrutiny exercise revealed a number of alterations that were not countersigned on form 35As in polling stations. The alterations related to votes cast, names of two of the contestants, total votes garnered by the petitioner, total registered voters and total valid votes, as well as rejected votes, though no specific submission was made on the issue by the petitioner.

144. In the petitioner's final submission as well as his case throughout the trial was that these errors amounted to electoral malpractice resulting in compromised results in favour of the 3<sup>rd</sup> Respondent, as the right tally of votes could not be ascertained.

145. In response to the Petitioner's allegations, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent testified and also submitted that the highlighted mistakes did not compromise the integrity of the result of the elections, the reason being that the said forms were signed by agents as well as election officials present in all the affected polling stations.

146. After carefully scrutinizing the forms in the said polling stations and applying the principles already outlined above, especially in **Moses Masika Wetangula's case** (above) and **Paul Gitenyi Mochorwa case** (above), I do find and hold that the errors complained of are normal human errors which are expected in any election. I also find that the petitioner did not place any evidence me to demonstrate that the errors complained of hampered the electoral process in such a manner, that the result of the election cannot be said to have been a true reflection of the will of the people of Butere Constituency regarding their choice of Member for National Assembly.

147. Additionally, the figures of the votes garnered by each of the contestants show that the votes margin between the 3<sup>rd</sup> Respondent and the Petitioner was over 3,500, so that even if the minor errors were to be considered in favour of the petitioner, that vote difference would not reduce to any appreciable extent.

#### **Dates contained in Form 35A and polling station Diaries as well as forms 35B and 35C**

148. The case of the 4<sup>th</sup> Respondent was that some Form 35A's indicated 9<sup>th</sup> August, 2017 when the election was held on 8<sup>th</sup> August, 2017. Both the petitioner and the 4<sup>th</sup> Respondent alleged that not all the agents signed the requisite forms. Enough has already been said on the issue of agents and it is that not all agents need to sign any of the forms. As regards the dates, the 2<sup>nd</sup> Respondent testified and told the court that though the elections were held on 8<sup>th</sup> August, 2017, the counting and tallying of votes went on into the night, so it was not strange that 9<sup>th</sup> August, 2017 features on those forms. That was the date for the declaration of the results.

149. Form 35C was the declaration form by which the 2<sup>nd</sup> Respondent declared the 3<sup>rd</sup> Respondent winner of the election held on 8<sup>th</sup> August, 2017 for Member of National Assembly for Butere Constituency. The 3<sup>rd</sup> Respondent was declared the winner on 9<sup>th</sup> August, 2017 after all the votes had been counted and tallies done. Nothing therefore turns on the complaint touching on form 35C. Other allegations touching on form 35B by Petitioner and 4<sup>th</sup> Respondent were not substantiated. A case in point was the petitioner's allegations that the ballot boxes were not secured. A personal scrutiny of the forms has not revealed anything to what the contrary of the 2<sup>nd</sup> Respondent told the court during her testimony.

150. It is also on record that there is no evidence showing that the errors complained of were deliberate and intended for the benefit of the 3<sup>rd</sup> Respondent or some other candidate. I am therefore satisfied that the scrutiny exercise has cleared my mind concerning the allegations made by the petitioner who, in his petition alleged massive and irredeemable flaws and further that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had abdicated their respective constitutional mandate in the conduct of the elections.

151. By way of conclusion on this issue of scrutiny, there was no specific allegation that legal votes were rejected or illegal votes were allowed into the tally for the 3<sup>rd</sup> Respondent. In **Gatirau Peter Munya case** (above) the Supreme Court quoted from the Canadian court in *Opitz vs Worzesnewsy* the following "----- elections held at the proper time and place and under the supervision of competent persons will not be overturned for irregularities in the manner the election was conducted unless the

*contestant proves that the legal votes were rejected, illegal votes were allowed, or a combination in a number sufficient to change the results or render them uncertain.*” There was no uncertainty in the results in this election for Member of National Assembly for Butere Constituency.

152. I have also stated elsewhere in this Judgment that administrative mistakes remain just that and cannot form the basis for invalidating the will of the people. The duty of this court was to ensure that the will of the people of Butere Constituency was protected especially where each of the contestants wanted to win. As was held in **William Odhiambo Oduol – vs – IEBC & others [2013]eKLR**, that inspite of breaches, malpractices and non-compliance with the law, “ *Section 83 foresees all these, and asks the court dealing with a petition to look at the bigger picture .....and consider whether the election, with all its imperfections, was substantially conducted in accordance with the principles enshrined in the Constitution and the electoral law. The court will determine whether the imperfections compromised the process so much that an ordinary man cannot say that the win as declared was a valid one.*”

153. I can say that the outcome of the scrutiny exercise has shown that the election for Member of National Assembly for Butere Constituency was conducted by a competent body and in accordance with the Constitution and the relevant election laws, and in my considered view, no ordinary man in Butere can say the win as declared was not valid.

**Whether the 3<sup>rd</sup> Respondent was constitutionally, statutorily and validly elected and declared as Member of the National Assembly for Butere Constituency and whether the Petitioner is entitled to the prayers sought in the petition.**

154. It was the petitioner’s case, as well as the case of the 4<sup>th</sup> Respondent that the 3<sup>rd</sup> Respondent was not validly elected and declared as Member of the National Assembly due to breaches of both the Constitution and the electoral laws and regulations made thereunder.

155. It has been stated elsewhere in this judgement that elections are not an event but a process, and it is not the duty of the election court to usurp the power of the voters in electing the person of their choice to lead them for the period of such person’s political term. In **John Kiarie Waweru – vs – Beth Mugo & 2 others [2008] eKLR**, the court stated the following.” *This court will not therefore interfere with the democratic choice of the voters.....unless it is established to the required standard of proof that there were irregularities and electoral malpractices that rendered the said elections null and void and therefore subject to nullification. It will not be sufficient for the petitioner to establish that irregularities or electoral malpractices did (not) occur; he must establish that the said electoral malpractice was of such a magnitude that it substantially and materially affected the outcome of the electoral process in regard to the election.*”

156. In this regard, an election court will find the election to have been held in accordance with the constitution and electoral laws if the evidence shows substantial compliance with the laws. This is the only way in which a court can affirm the will of the electorate. That is the position in this petition.

157. The Supreme Court also held in the **Gatirau Peter Munya case (above)** that an election cannot be nullified unless the allegations made by the petitioner are supported by cogent evidence. From an analysis of the evidence on record in this petition, I find that a substantial part of the petitioner’s allegations remained unsubstantiated. The petitioner sought to rely on hearsay evidence to support other allegations and in instances where the court has found some non-compliance, especially from the scrutiny report, the said non-compliance was not of such magnitude as to affect he results. It has been acknowledged the world over that since elections are a human endeavor, mistakes are bound to be made by those who are charged with the responsibility of superintending over such elections, whether it is recording or keying in data into the forms. The 2<sup>nd</sup> Respondent testified that contrary to the petitioner’s allegations of non-compliance with the Constitution and the law, she complied with the law in the conduct of the elections for Member of National Assembly for Butere Constituency, I have accepted that evidence by the 2<sup>nd</sup> Respondent.

158. In this case also, the petitioner needed to show that indeed as alleged his votes were actually stolen. Unfortunately, he made general allegations that the illiterate and elderly voters who were assisted to vote cast their votes for the 3<sup>rd</sup> Respondent. He also made a general allegation that the use of ODM colours on the 4<sup>th</sup> Respondent’s election symbol confused the voters in such a way that those unnamed voters cast their votes for the 4<sup>th</sup> Respondent. No particulars of stolen votes and the polling stations at which the theft occurred were pleaded or proved. From the declared results, the petitioner was beaten by the 3<sup>rd</sup> Respondent to the tune of 3547 votes, and without proof of the votes stolen from him, the court has made a presumption that this vote difference was genuine

based on the choice made by the voters during the voting on 8<sup>th</sup> August, 2017. This was their democratic right enshrined in Article 38 of the Constitution and expressed through secret ballot.

159. I agree with Majanja J in his remarks on the principle of the will of the people during an election in **Kalembe Ndile & another – vs – Patrick Musimba Musau**[2013]eKLR: “ *Under our democratic form of government, an election is the ultimate expression of sovereignty of the people and the electoral system is designed to ascertain and implement the will of the people. The bedrock principle of election dispute resolution is to ascertain the intent of the voters and to give it effect whenever possible.*” I hasten to add that a petitioner who seeks to undo the above stated principle must do much more than simply making allegations without proof, or even where proof has been given, without showing that the non-compliance went to the root of the election results. The petitioner in the instant case failed to do both; and in any event, this court would only have been moved to find for the petitioner on this issue if there was serious reason to believe that the results would have been different if the irregularities had not occurred. In this case the difference in votes among the first three candidates confirms that the voters of Butere Constituency knew who they wanted to represent them in the National Assembly for the coming 5 years, and there is no serious reason for this court to believe that the results would have been different if the errors had not occurred.

160. Just one final point before I sign off from the issue of whether or not the 3<sup>rd</sup> Respondent was validly elected Member of National Assembly for Butere Constituency. The 1<sup>st</sup> and 2<sup>nd</sup> as well as the 3<sup>rd</sup> Respondent submitted that this petition is incompetent, frivolous, vexatious, hopeless and only fit for dismissal. This argument was promised on grounds that the petition is lacking in specificity of any of the alleged illegalities irregularities and malpractices and that this was contrary to rule 8(c) of the Election Petition Rules, 2017.

161. It was argued by the Respondents that the petitioner failed to indicate the results of each candidate and the date when the results were declared. The 3<sup>rd</sup> Respondent placed reliance on the case of **John Michael Mututho – vs – Jane Njeri Wanjiku Kihara & 2 others** [2008] KLR as well as **Hamzah Musuri Kevogo – vs – IEBC & 3 others** [2018]eKLR in urging the court to dismiss the petition.

162. It is true that the petitioner did not indicate the votes garnered by each candidate during the election held on 8<sup>th</sup> August, 2017. It is also true that the petitioner’s allegations were general in nature, without any specific details to give the Respondents the opportunity to effectively respond to the petition. As it were, the petitioner wanted to ambush the Respondents, even with allegations concerning a totally different electoral area.

163. For the above reasons, the petition was incompetent, frivolous and vexatious. If this issue had been brought up as a preliminary issue, clearly the petition would have been dismissed and left the 3<sup>rd</sup> Respondent’s win unchanged.

## **Conclusion**

164. After all the above analysis of the law and the evidence, I find no merit in this petition. The evidence on record shows that the election for Member of the National Assembly for Butere Constituency was substantially conducted in compliance with the Constitutional and statutory principles for elections. It is further clear from the evidence that the results as announced by the 2<sup>nd</sup> Respondent, declaring the 3<sup>rd</sup> Respondent winner of the elections were obtained from forms 35A and form 35B as by law required. The petitioner’s unproved allegations have strengthened the 1<sup>st</sup> and 2<sup>nd</sup> as well as the 3<sup>rd</sup> Respondents’ cases that the petition had no basis in the first place, drawn as it was partly in respect of an election for Langata Constituency in Nairobi and partly in respect of an election within Butere Constituency. The petition is hereby dismissed.

165. Effectively therefore, this court is satisfied that the 3<sup>rd</sup> Respondent was validly elected as Member of the National Assembly for Butere Constituency. It follows from this finding that the petitioner is not entitled to the reliefs sought in the petition except for the prayer for scrutiny which was granted after the court had taken evidence from all the parties in the matter.

## **Who should bear the costs of this petition**

166. The provisions as to award of costs at the conclusion of an election petition are found in Section 84 of the Elections Act and Rule 30(1) of the Elections Petition Rules. Section 84 of the Elections Act provides that:-

“An election court shall award the costs of and incidental to a petition and such costs shall follow the cause.” Rule 30(1) of the Election Petition Rules provides that “30(1) The election court may at the conclusion of a petition, make an order specifying –

(a) the total amount of costs payable;

(b) the maximum amount of costs payable

(c) the person who shall pay the costs under paragraph (a) and (b) above, and

(d) the person to whom the costs are payable under paragraphs (a) and (b) shall be paid.

167. The conclusion in this matter is that the petitioner did not prove his numerous allegations against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as well as against the 3<sup>rd</sup> Respondent. He is therefore to bear the costs of the petition in respect of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as well as the 3<sup>rd</sup> Respondent.

168. Since the 4<sup>th</sup> Respondent walked on the same side with the petitioner, he is not entitled to any costs.

### **Final Orders**

169. The final orders in this petition are as follows:-

1. The petition dated 6<sup>th</sup> September, 2017 and filed in court on the same day be and is hereby dismissed.
2. Mwale Nicholas Scott Tindi was constitutionally statutorily and validly elected and declared Member of the National Assembly for Butere Constituency
3. The Respondents are awarded costs as follows:
  - a) Instruction fees for 1<sup>st</sup> and 2<sup>nd</sup> Respondents are capped at Kshs.3,500,000.00
  - b) Instruction fees for the 3<sup>rd</sup> Respondent are capped at Kshs.3,500,000.00
  - c) No costs are awarded to the 4<sup>th</sup> Respondent
  - d) The costs shall be taxed by the Deputy Registrar of this Honourable Court.
4. A certificate as provided under Section 86(1) of the Elections Act, 2011 shall issue to the Independent Electoral and Boundaries Commission and the Speaker of the National Assembly.

Judgment delivered, dated and signed at Kakamega in open Court on this 16<sup>th</sup> day of February 2018

RUTH N. SITATI

JUDGE

In the presence of :-

Mr. Akusala (present).....for Petitioner

Mr. Busiega holding brief for Mr. Rono.....for 1<sup>st</sup> and 2<sup>nd</sup> Respondents

Mr. Busiega.....for 3<sup>rd</sup> Respondent

Mr. Akusala holding brief for Amasakha.....for 4<sup>th</sup> Respondent

Polycap and Erick.....Court Assistant



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