



Case Number:	Election Petition 6 of 2017
Date Delivered:	16 Feb 2018
Case Class:	Civil
Court:	High Court at Kakamega
Case Action:	Judgment
Judge:	Janet Nzilani Mulwa
Citation:	Apungu Arthur Kibira v Independent Electoral & Boundaries Commison & 2 others [2018] eKLR
Advocates:	Mr. Odeny for Petitioner/Applicant, Mr. Musyoka for 1st & 2nd Respondents, Mr. Tollo for 3rd Respondent
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Kakamega
Docket Number:	-
History Docket Number:	-
Case Outcome:	Election 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 AT KAKAMEGA**  
**ELECTION PETITION NO. 6 OF 2017**

APUNGU ARTHUR KIBIRA.....PETITIONER

VERSUS

1. INDEPENDENT ELECTORAL

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

2. THE RETURNING OFFICER LUANDA , CONSTITUENCY,

SYLVESTER OUMA OMOLO.....2<sup>ND</sup> RESPONDENT

3. OMULELE CHRISTPHER.....3<sup>RD</sup> RESPONDENT

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

**THE PETITION , BACKGROUND AND PLEADINGS.**

1. The Second General Election held under the Constitution of Kenya 2010 was conducted on the 8<sup>th</sup> August, 2017 . The electorate of Luanda Constituency within Kakamega County turned out in their thousands to vote for their candidates of choice in the Six distinct elections.

Six Parliamentary candidates contested for the seat of Member of National Assembly for Luanda Constituency. They garnered the following votes :

- Omulele Christopher - 15,117 votes
- Alwaka Tom Oscar - 3, 546 votes
- Atemo Dishon Opolu - 1028 votes
- Atetwe George Dicks - 585 votes
- Obbuyi Albert - 4,857 votes
- Apungu Arthur Kibira - 11,304 votes

**Omulele Christopher** emerged the winner with majority votes, and was declared duly elected as the Member of the National Assembly for Luanda Constituency on the 10/8/2017.

2. **Apungu Arthur Kibira** the Petitioner was aggrieved by the Results prompting the filing of this petition on the 6/9/2017, together with his supporting affidavit and two witness affidavits.

Upon application, the court allowed him to file a Supplementary Affidavit, documents and further fifteen witness affidavits. They were filed on the 11/10/2017 .

3. In support of the Petition, the petitioner stated as the main ground for his dissatisfaction, **that the election was so badly conducted, administered and managed by the 1<sup>st</sup> Respondent that it failed to comply with the governing principles under the constitution of Kenya and the Election laws**

**and Regulations, contravention of the principles of a free and fair election under Article 81 (e) of the constitution and Section 39 of the Election Act and Regulations thereunder.**

He faulted the 1<sup>st</sup> Respondent for abdicating its role and duty to exercise, protect and safeguard the will of the people, stating that it became a law and institution unto itself and that the election was so badly conducted that it did not matter who was declared the winner as it was marred by massive irregularities that significantly affected the results to the extent that the 1<sup>st</sup> Respondent cannot accurately and verifiably determine what results any of the candidates got.

4. The petition is premised on the following grounds:-

**1. Contravention of the principles of a free and fair election under Article 81(e) of the constitution and section 39 of the Election Act and regulations there under citing the following:**

**2. Voter Bribery.**

**3. Irregularities, malpractices and systematic negative campaigns**

**4. Ballot stuffing and fraudulent manipulation of the ballot papers.**

**5. Violence against the petitioner, his agents and supporters before, during, and after the declaration of results.**

**6. Flawed tallying.**

**7. Failure of KIEM's Kit.**

5. The petitioner sought the following reliefs:-

(a) Immediately upon the filing and service of the petition, the 1<sup>st</sup> respondent do avail all the materials including electronic documents, devices and equipment for the election of the Member of National Assembly Election of Luanda Constituency within 72 hours;

(b) Immediately upon the filing and service of the petition, the 1<sup>st</sup> respondent do produce, avail and allow access for purposes of inspection of all the logs of any and all servers hosted by and/or on behalf of the 1<sup>st</sup> respondent in respect of the election of the Member of National Assembly Election of Luanda Constituency within 72 hours;

(c) Scrutiny and recount of all the ballots cast in all polling centres at the election of the Member of National Assembly Election of Luanda Constituency.

(d) An order for scrutiny and audit of the system and technology used by the 1<sup>st</sup> respondent in the election of the Member of National Assembly Election of Luanda Constituency including but not limited to the KIEMS Kits, the Server(s); website/portal;

(e) A declaration that the non-compliance, irregularities and improprieties in the election of the Member of National Assembly Election for Luanda Constituency were substantial and significant that they affected the result thereof;

(f) A declaration that the election of the Member of National Assembly Election of Luanda Constituency

held on 8<sup>th</sup> August, 2017 was not conducted in accordance with the Constitution and the applicable law rendering the declared result invalid , null and void;

(g) A declaration that the 3<sup>rd</sup> respondent was not validly declared as the Member of National Assembly elect of Luanda Constituency and that the declaration is invalid , null and void;

(h) A declaration that the Petitioner was validly elected the Member of National Assembly elect of Luanda Constituency on the election held on 8<sup>th</sup> August, 2017;

(i) In the alternative an order directing the 1<sup>st</sup> respondent to organize and conduct a fresh election for the Member of National Assembly of Luanda Constituency in strict conformity with the Constitution and the Elections Act;

(j) A declaration that each and all of the respondents jointly and severally committed election irregularities

(k) Costs of the Petition; and

(l) Any other orders that the Honourable Court may deem just and fit to grant.

6. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents in their Response and Replying affidavit by the 2<sup>nd</sup> Respondent, the Returning Officer denied the allegations against them and filed a bundle of documents –volume 1 and 2 together with witness affidavits on the 21/9/2017.

7. In was their averments that the 8/8/2017 Parliamentary Election was conducted in accordance with the constitution, the Elections Act 2011, the Independent Electoral and Boundaries Commission Act and all Electoral Rules and Regulations, stating that the commission is mandated and enjoined by **Article 249 (2) of the Constitution** to exercise its powers subject only to the constitution and national legislation, and further that its roles and functions including appointment of all the Returning officers, the Presiding officers and their deputies and other Officers who conducted the 2017 election, among other functions, were done within the law.

8. In relation to the Petition, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents denied all allegations and termed them as generalized and lacking specificity.

Witness affidavits were filed to counter the specific allegations and grounds upon which the petition is premised.

The 2<sup>nd</sup> Respondent swore a detailed affidavit to counter the allegations and where necessary to explain certain issues.

9. The 3<sup>rd</sup> Respondent filed his Response to the petition as well as a Replying affidavit and witness affidavits on the 27/9/2017. He denied all the allegations and averred that the 8/8/2017 Election was free and fair and devoid of electoral malpractices. He specifically denied committing any electoral offences including voter bribery, negative campaigns, manipulation of ballot papers among others.

10. It was his averment in the Replying affidavit that on the 8/8/2017, he did not visit any polling centre/station within Luanda Constituency except Esibeye Polling Station where he voted at 8.00 AM after which he left the constituency all together for Siaya County (Le vic Hotel) and only went back the following day. He termed the Petitioner's allegations as fabricated, hearsay and urged the court to

dismiss the petition as baseless. I shall come to witness affidavits and testimony later in this Judgment.

#### **11. Interlocutory applications.**

The petitioner filed two applications.

**In the 1<sup>st</sup> Application** The Petitioner sought enlargement of time to file further 30 witness affidavits and a supplementary affidavit. Under the provisions of Rule 5(1) 12(9) and 19 of the (Parliamentary and County Elections) petition Rules 2017, I allowed him to file not more than 15 witness affidavits and his supplementary affidavit.

**The 2<sup>nd</sup> application** was for an order of scrutiny and recount of all ballots cast in the entire Luanda Constituency, 99 stations of the 62 polling centres. This application was heard after evidence by all parties had been taken. On the 21/11/2017 I disallowed the application for lack of specificity, and that the grounds upon which the petition was based would not be resolved through a scrutiny or recount but only by evidence .

**The 3<sup>rd</sup> application** was by the 3<sup>rd</sup> Respondent. He sought an order to strike out the petition or stay the hearing until the petitioner had paid purported unpaid costs arising from a 2013 Election petition between the two parties, on grounds that the petition was Res Judicata. Upon hearing and submissions by counsel, I disallowed the application paving way to the hearing of the petition on merit.

My rulings and reasons for the same are on record.

**12. Pre Trial Conferencing was held on the 17/10/2017.** Pursuant to Rule 15 of the 2017 Election Rules parties agreed on the issues for the Court's determination as hereunder:

#### **AGREED ISSUES.**

**1. Whether the election for the Member of the National Assembly for Luanda Constituency was conducted in accordance with the Constitution, the Elections Act 2011 and the Regulations made there under.**

**2. Whether non- compliance with any of the Constitutional or Statutory and regulatory Provisions affected the results of the election and if so, to what extent.**

**3. Whether the 3<sup>rd</sup> Respondent was validly declared as the winner for the position of Member of National Assembly for Luanda Constituency.**

**4. Whether a basis has been laid for scrutiny and recount of the ballots cast.**

**5. Costs.**

#### **13. Applicable Legal Principles**

I now turn to state the legal principles that this election court will draw from and be guided in the arduous task in the analysis of the evidence adduced and submissions by counsel with a view to determine whether each party has discharged its burden of proof to the required standard of an election petition .

**(a) Burden of proof : Legal and Evidential burden of proof .**

The Legal Burden of Proof in an election petition rests with the petitioner . This is so because a petitioner is the one desiring the election court to make findings on the allegations of non compliance with the law and the constitution in the petition. Likewise, Evidential burden rests with the petitioner. However it may shift to the respondents depending on the weight of the evidence given by the Petitioner during the hearing.

**In Raila Odinga Vs IEBC & others - Supreme Court of Kenya Election No. 5 of 2013** , the supreme court rendered “

“ ..... a petitioner should be under obligation to discharge the initial burden of proof, before the Respondents are invited to bear the evidential burden”.

The above principles were reiterated in the **2017 Supreme Court Presidential Petition No. 1 Raila Amolo Odinga & another Vs IEBC & 2 Others (2017) eKLR**. At Paragraphs 126 -133 thereof ,

The Honourable Judges stated that :-

“ ...Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and remains constant with the plaintiff however “ depending on the effectiveness with which he or she discharges this , the evidential burden keeps shifting its position and at any time is determined by answering the question as to who would lose if no further evidence were introduced”.

See also **Musikari Nazi Kombo Vs Moses masika Wetangla & 2 others (2013) eKLR, and Sections 107 -109 of the Evidence Act , cap 80 Laws of Kenya.**

**(b) Standard of proof.**

The controversy that has been lingering in legal minds as to the appropriate standard of proof in election petitions has now been laid to rest and settled. The Supreme Court in its **Presidential Election Petition No. 1 of 2017.( Supra)- at paragraph 151 -153** the court rendered.

“ **Electoral disputes ... are matters of great public importance and public interest in their resolution cannot be overemphasized ... the law requires that they be proved on a higher standard of proof than the one required to prove ordinary civil cases.....the standard of proof remains higher than the balance of probabilities but lower than beyond reasonable doubt and where allegations of criminal or quasi criminal nature are made , it is proof beyond reasonable doubt”.**

**(c) Section 107 (1) –of Evidence Act further provides that ,**

“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.

**Section 108: The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.**

That is the law and this court will be guided accordingly.

14. Legal issues that emerged during the hearing:

- Defective affidavits
- Unpleaded Issues in the petition.

#### **Of Defective Affidavits**

Both the petitioner and the Respondents faulted affidavits sworn by the parties and their witnesses, citing irregularities in non-compliance with Provisions of the Oaths and Statutory Declarations Act and the Advocates Act. I shall highlight the alleged irregularities. Some of the petitioners witness could not recall before whom they had their affidavits sworn, but stated only at Kakamega, while others testified that their affidavits were prepared at the petitioners house, without naming who prepared them.

15. **Of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents affidavits**, the petitioner submitted that they are defective in that, whereas they are shown to have been attested before a Commissioner for Oaths at Kakamega, witnesses in cross examination testified that the affidavits were drawn and attested to at IEBC's offices at Luanda, within Vihiga County, which is not within Kakamega County.

16. **The 3<sup>rd</sup> Respondent's affidavit** in opposition to the Petition as well as his witness affidavits RW7 ,& RW8 do not show who drew the affidavits. They were attested to by a commissioner for oaths at Nairobi.

On Cross Examination, the 3<sup>rd</sup> Respondent who is an Advocate of the High Court of Kenya stated that he drew the affidavit himself and so did his witnesses.

17. The petitioner submitted that these affidavits are defective and ought to be struck out, citing **order 19 of the Civil Procedure Rules and Section 9 and 10 of the Oaths and Statutory Declarations Act**.

From the onset, it is evident that the affidavits, on their face, are properly drawn and attested to. The 1<sup>st</sup> Respondent's Offices for the Western Kenya Region are located at Luanda Vihiga County as clarified by the Returning Officer, the 2<sup>nd</sup> Respondent. The Commissioner for Oaths , going by the explanation given by Returning Officer was, that the affidavits were drawn by their **Advocates Muriu , Mungai & Co . Advocates of Nairobi** who then forwarded them to **IEBC Offices for Commissioning by Vivian. A. Shibanda, a Commissioner for Oaths , Kakamega** , as her stamp shows.

18. The 3<sup>rd</sup> Respondent's affidavits were attested to at Nairobi , but the drawer of the affidavits is not stated. They stated that they drew the affidavits themselves, and appeared before the Commissioner for oaths for attestation purposes .

It is not in contention by either party that the various affidavits were not drawn in accordance with the provisions of **order 19 of the Civil Procedure Rules and the Oaths and Statutory Declarations Act** nor is there contestation as to the competence of the Commissioners for Oaths who attested to them.

19. The issues that arose as I see them, are failure to state the drawer of the affidavits and the place where they were drawn and sworn.

#### **Section 4(1) Oaths and Statutory Declarations Act State:-**

**"A commissioner for oaths may, by virtue of his commission in any part of Kenya , administer any oath or take any affidavit for the purposes of any court or matter in Kenya ... Provided that a**

**Commissioner for oaths shall not exercise any of the powers given by this section in any proceeding or matter in which he is the Advocate for any of the parties to the proceedings or concerned in the matter..."**

#### **Section 5 states**

**" Every Commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the Jurat or attestation at what place and on what date the oath or affidavit is taken or made"**

20. A Commissioner for oaths is not restricted to Commission affidavits in the place stated in the rubber stamp, but in all places in the Republic of Kenya. It would not be expected that a Commissioner cannot attest to affidavits at " Malindi" for instance , if his/her stamp reads " Nairobi ". It is however prudent that the place where it is taken is shown. A party need not know the commissioner by name or personally. Suffice to state that the name is ordinarily shown on the stamp, but the party must appear before the said commissioner.

21. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents affidavits were sworn at IEBC's offices situated at Luanda. The commissioner for oaths stamp states Kakamega .

Would the irregularities cited then make the affidavits defective, to the extent of viciating the election results"

I say no , because , it made sense to have all the affidavits for IEBC's witnesses sworn at the same place , and no better place than at its offices at Luanda or anywhere else, where the commissioner for oaths would then visit and all deponents being present would then attest to the affidavit .

22. In my opinion, it should not be an issue as to who prepares an affidavit. A non legal person may draw the affidavit so long as they comply with the requirements under Rule 19 of the Civil procedure Rules. Failure to indicate the name of the drawer is but a minor irregularity that does not go into the substratum of the subject matter .The 3<sup>rd</sup> Respondents affidavits do not have the name and address of the drawer as required under **Section 35(1) of the Advocates Act**.

**Order 9 Rule 7 Civil Procedure Rules** provide a cure to such irregularities which do not go into the substantive merits of a case or subject matter .

23. I see the minor irregularities in all the parties affidavits as curable under **Article 159 (2)(d) of the 2010 Constitution as well as section 80 (i) (d) of the Election Act 2011.**

These are but undue technicalities that this Election Court shall ignore, as to accord all the parties a fair hearing interms of Article 25 of the constitution . I do not think they were deliberate made to mislead the court, nor do they go into the substratum of the petition.

See **Luke Cheruiyot & 32 others Vs National Oil Corporation (2015) eKLR** and **Hamzan Musuri Kenogo Vs IEBC & 3 Others (2017) eKLR**.

24. The court in the **Hamzan case**, held that defects in supporting affidavits are curable if it is established that the errors are not intended to mislead or prejudice the opposite party , and that the defects do not go to the substratum of the petition .



## 25. **Unpleaded Issues.**

I shall come to these issues later in this Judgment, but suffice to state that it is now a settled legal principle that all parties are bound by their own pleadings.

## 26. **PETITIONER'S CASE.**

The petition belongs to the petitioner. It is his duty to adduce clear, cogent and credible evidence to the satisfaction of the court, both as stated in his petition and his Supporting Affidavits to persuade the court that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents failed in their Constitutional and legal duties and responsibilities as mandated under Article 88(4) of the Constitution of Kenya and well captured in the **Gitarau Munya Vs Dickson Kithinji & 2 Others Supreme Court Petition No. 2B of 2014 ( paragraph 216 -219 )**.

The petitioner's witnesses evidence comes to play only to Support what the petitioner has pleaded as his case in the petition, and by his affidavits.

I shall therefore state the petitioner's case and refer to the witness affidavits and oral evidence in the analysis of the evidence.

27. The petitioner called fourteen witnesses:

**PW1 was the petitioner Apungu Arthur Kibira**. He adopted his affidavits in support of the petitioner as his evidence.

On specific malpractices and irregularities, his testimony upon examination in chief and cross examination was as follows:-

28. **On Voter bribery.** The petitioner claimed that the 3<sup>rd</sup> Respondent was seen with his agents offering bribes on the voting day to sway voters in his favour at various polling stations including Luanda South, Luanda township, Emabungo, Wenilabi and Mwibona wards in Luanda Constituency.

Upon cross examination, his testimony was that he himself did not witness any such activities but relied on his witnesses and that no formal reports were made to the police or IEBC officials.

29. **Irregularities, malpractices and negative campaigns.** The petitioner testified that the 3<sup>rd</sup> Respondent's Billboard erected on the Kisumu – Busia junction had not been removed by the election date, that he made a report to the Returning Officer by a telephone call, and send a WhatsApp photograph of the Bill Board to him but nothing was done. He attached an image of a photograph of the Billboard to his affidavit in support of the petition. It was his evidence that after the election, on the 11/8/2017 he further sent a letter of complaint to the Returning Officer, but that it was not responded to.

30. The petitioner further complained about **coarsion of his agents by the 1<sup>st</sup> Respondents officials to vote for other candidates**. On cross examination, he testified that he did not witness any coarsion by anybody. It was his further evidence that the 3<sup>rd</sup> Respondent used numerous vehicles and motorbikes around the polling centres on the polling day to disseminate false information that he had stepped down to dissuade voters from voting for him but upon intense cross examination he stated that he did witness such activities by the 3<sup>rd</sup> Respondent or his agents.

31. **On violence**, the petitioner's evidence was that during the party primaries (nominations), **violence** was unleashed to himself and his supporters, by the 3<sup>rd</sup> Respondent and his

cronies who stoned his motor vehicle Reg. No KBK 097 G. On Cross examination, the Petitioner confirmed that he contested on Amani National Party (ANC) while the 3<sup>rd</sup> Respondent was an ODM Candidate, and therefore were not competing against each other. He further confirmed that he had no evidence of violence by the 3<sup>rd</sup> Respondent, or by his supporters against him before, during and after the election.

On the injuries to his supporters as a result, It was his evidence that he was not in the said vehicle alleged to have been damaged but his supports were therein and were injured, but none is a witness in the petition.

**32. On the matter of Ballot stuffing, and fraudulent manipulation of ballot papers.** The petitioner's testimony was that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents participated in the exercise, and targeted the illiterate and the old voters by some being given five ballot papers instead of six after which they would later mark the ballot papers for Member of National assembly in favour of the 3<sup>rd</sup> Respondent. Urged to substantiate on the allegation that the 3<sup>rd</sup> respondent was involved in the exercise the petitioner stated that he did not witness that happen to anyone and again that he relied on his witnesses evidence.

**33.** The petitioner too accused **the 1<sup>st</sup> respondents officers for allowing unauthorized persons at the polling stations and locking out his agents**. He stated that 46 of his 99 agents were locked out but could not give any of their names, nor a list of his agents, nor any that was locked out.

Taken through some Form 35A's for various polling stations, the petitioner confirmed that ANC party agents signed the forms but added that those agents were not his agents but his party agents. He however did not produce a list of his agents nor those of his party, ANC. He also did not have any evidence of reports of his agents being locked out by IEBC officials or by anybody else.

**34.** The petitioner questioned the 362 spoilt votes stated in both Form 35As and Form 35B, and his concern was that 362 spoilt votes were many. He could not substantiate why he thought the spoilt votes were many, and upon what measure he deemed them many.

### **35. Flawed tallying and Failure of KIEMs Kit**

The petitioner did not testify on the matter of Flawed tallying, failure of the KIEM'S **Kit** nor his allegation that the results announced at the polling stations did not tally with the data entered into Form 35B that was used to declare the results.

The petitioner's witnesses evidence will be captured in the analysis of the entire evidence.

### **36. THE 1<sup>ST</sup> AND 2<sup>ND</sup> RESPONDENTS CASE.**

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents urged their case by a Response to the petition, Replying affidavits and witness affidavits as stated at the commencement of this Judgment. They filed documents in two volumes. They set out to disapprove and contravert the petitioner's allegations of massive systematic and deliberate non compliance with the constitution and the law and irregularities and malpractices that would significantly affect the results of the Parliamentary election. Only one witness testified.

**37. RW1 was Sylvester Ouma Omolo**, the Returning Officer for Luanda Constituency. He adopted the contents of his Replying affidavit he swore on the 20/9/2017 together with bundles of his documents in volumes 1 & 2, including the 99 Polling Station Diaries, Form 35 As from the Polling Stations of the 62 Polling centres within Luanda constituency and Form 35B. He took the court through the electoral

process including recruitment of IEBC electoral officers, set up of the polling centres and stations and the officers who man them, their duties and management of the Polling Station Diaries at the Polling Stations, the parties /candidates agents and their duties, functions of the KIEM'S Kit and the Supplementary Biometric Voter Identification if the KIEM'S Kit fails and persons authorized and accredited to access the polling stations and the tallying centre, the manner of transmission and tallying of the results, and the final declaration of results.

38. It was his evidence that as the Constituency Returning Officer and duly gazetted, he met with all the candidates on 6/8/17 offices in the constituency prior to the 8/8/2017 Election and briefed them on what was expected, of their agents on the conduct of the election.

He denied any allegations by the petitioner of massive irregularities and breach of the electoral laws that would have affected the results.

On specific alleged malpractices and irregularities, he had the following to say on examination in chief and cross examination.

**39. Locking Agents out of Polling Stations.**

He denied that any accredited agent by IEBC with authority letter from the party were locked out and that, no reports reached him or were recorded in any of the Polling Station Diaries or at the tallying centre.

It was his testimony that IEBC officials were instructed to allow party agents, not candidate agents into the polling centres except agents for independent candidates.

It was his evidence that once the agents, entered the polling stations, they could leave as they desired, and that explains their failures to sign Form 35As at the end of polling.

It was his evidence that it is the agents themselves who recorded the time they arrived, their names and details.

40. **On failure by agents to sign Form 35As, RW1** testified that the agents ought to sign to confirm corrections of the contents and if they refused to sign, they ought to state the reasons for refusal and the failure could not be attributed to the Presiding Officers as they could not be forced to sign or give the reasons.

41. **On the various irregularities on figures, RW1** stated that they were unintended and not deliberate but only errors that did not affect the entries in Form 35As. This was in respect of spoilt and rejected votes, seven in number at Esinamtu polling station which he termed as a summation issue that did not affect the final tally and that the errors did not make any difference as the additions in the entries in the Form 35A's were correct as to each candidate's valid votes in all the polling stations, and did not alter any of the candidates votes.

42. **At the Tallying Centre, RW1** testified that all the candidates and their accredited agents were allowed entry and that the **petitioner's chief agent one Ainea** was present but no complaint was raised or recorded. It was his testimony that he announced results from all the 99 polling stations when and as they arrived and all were captured in Form 35B, against which no complaint was made by any of the candidates or their agents.

43. The Returning Officer denied receiving any complaint from the petitioner on the polling day about an alleged 3rd Respondents billboard having not been pulled down, nor a photograph of the same. He however acknowledged a letter of complaint dated the 11/8/2017 but received on the 14/8/17 and stated that he did not respond to the letter as it was received outside the election period.

44. In its totality, the Returning officer's evidence was that the minor irregularities on the part of IEBC officers were not deliberate but human errors that did not affect the results of the election in anyway, as there was no dispute over the final Parliamentary results in Form 35A's and 35B or in the petitioner's pleadings.

45. **3<sup>rd</sup> RESPONDENT'S CASE.**

**Omulele Christopher the 3<sup>rd</sup> Respondent testified as RW6.**

He adopted his affidavit evidence in opposition to the petition sworn on the 27/9/2017. He denied all allegations labelled against him by the petitioner, and his witnesses. He called three witnesses to support his case.

46. **On voter bribery** at Ebwiranyi Primary School polling station he denied having visited the station where **PW12** testified having seen him together with another candidate Tom Alwaka bribing voters and giving money to his agent, one Elkana at 11.00 Am or 12.30 pm or any other time or at all. It was his evidence that after voting at Esibeye polling station at 8.00 AM, with one Patrick Odero (RW7) they left for Le vic Hotel at Siaya County where they stayed upto 9.00 pm when the duo left for Maseno club and stayed there upto 4.00 AM from where they went to their homes. His testimony was therefore that he could not have being engaged in voter bribery at polling stations at the constituency when he was miles away. The 3<sup>rd</sup> Respondent further testified that no reports of voter bribery were recorded in the Polling Station Diaries nor reported to the police or IEBC officials. He rubbished evidence of **PW4**, **PW5** and **PW12** as fabricated and hearsay.

47. It was his testimony that his alibi having not been contraverted by cross-examination by the Petitioner, then, it must be taken to be the truth and credible. He urged the court to dismiss the Petition as lacking merit.

48. **Scrutiny and Recount of ballots cast:**

After close of the entire evidence, the petitioner revisited his application for an order of Recount and Scrutiny of all ballots cast in the entire 99 polling stations.

By the said Application dated 29/9/2017, and brought under **Rule 29 of the Elections (Parliamentary and County Elections) petition Rules 2017**, the petitioner sought, the following orders among others:

1. A recount and /or scrutiny of the ballots cast in respect of the general elections conducted on the 8/8/2017 and more particularly election of Member of National Assembly Luanda constituency in all the 99 streams of the 62 polling stations which include (all 99 stations stated).

2. That in the alternative to (1) above, an order of Recount and /or Scrutiny of the ballots cast in respect of the general elections conducted on the 8/8/2017 in respect of Member of National Assembly Luanda Constituency in the polling stations whose errors have been identified in the petition and Respondent's answer to the petition and errors identified during the trial and whose results of the election are disputed by the petitioner.

49. **Section 82 (1) of the Election Act 2011 and Rule 29 of the 2017 Election Rules** gives an election court discretion to order scrutiny and /or recount of votes cast but only if the court is satisfied that such exercise is necessary to enable it arrive at a just and fair determination of the petition.

50. The guiding principles are now settled in a myriad of judicial decisions among them **Gitarau Peter Munya Vs Dickson Mwenda Kithinji & 2 others (2014) eKLR, Raila Amolo Odinga & others Vs IEBC & 2 others (2017) eKLR Gideon Mwangangi Wambua & another Vs IEBC & 2 others (2013) eKLR, and Philip Osore Ogutu Vs Michael Aringo & 2 others (2013) eKLR.**

In the **Gitarau Peter Munya** case ( supra ), it is stated that an order of scrutiny or recount

**1. Is not automatic**

**2. Sufficient reasons for the scrutiny and recount must be established to the satisfaction of the court.**

**3. Scrutiny shall be confined to the polling stations in which the results are disputed.**

**4. It is not a fishing expedition for new or expanded evidence.**

51. In **Philip Ogutu case above**, the court held that :

“it is not sufficient for a petitioner to aver in the petition that he desires scrutiny and recount in respect of all polling stations in the electoral area that is the subject of the dispute. The petitioner must plead in sufficient detail why he requires the court’s intervention to order scrutiny ... the petitioner is required to state the specific polling stations that he alleges there were irregularities and therefore should be scrutinized.”

52. In **Wavinya Ndeti vs IEBC & 4 others (2013) eKLR, and Ledama Ole Kina Vs Samuel Kirutai Tunai & Co. Others(2013) eKLR, Majanja and Wendo JJ** respectfully rendered that

**Manja J:-**

“ ... the petitioner must not be permitted to launch a fishing expedition under the guise of an application for scrutiny in order to discover new evidence upon which to foist his or her case to invalidate an election”.

53. **Wendo J rendered that:-**

“ An application for scrutiny of all Narok South Constituency lacks specificity , is a blanket prayer that, in my view , cannot be granted. The applicant needed to be specific on which polling stations he wanted scrutiny ...if he wanted scrutiny in all the polling station, then a basis should have been laid for each of the polling stations. The rational is clear, the process of scrutiny is laborious time consuming and the applicants cannot be let at liberty to seek ambiguous prayers and waste precious court’s time and incur unnecessary costs . They must be specific.”

54. Further, the Supreme Court in **Gitarau Munya case (Supra) and quoted in Musikari Nazi Kombo Vs Moses Masika Wetangula ( 2014 ) eKLR**, Bugoma Petition No. 26 of 2014 by **Gikonyo J** reiterated the above principles and found that there was no evidence that all the polling stations in the entire constituency were affected by irregularities and malpractices. He denied an order for scrutiny and

recount in all the polling stations at Bungoma County .

55. In the petition before this court, the petitioner named only ten( 10) polling stations that he alleged were affected by malpractices, namely voter bribery. The other stated irregularities were not attached to any specific polling stations but were generalized. Ballot stuffing and fraudulent manipulation of ballot papers was but a general complaint. Violence was said to have been experienced in the petitioner's strongholds that were not named in the petition or in the supporting affidavits .

Fraud tallying was a general complaint. No single polling station was named where votes were not counted, tabulated or not accurately collated.

56. **The Supreme Court in Raila Odinga (2017)** presidential Election petition reiterated that

“ ... Lack of specificity in a petition is a cause to disallow an order of scrutiny and recount ...that under Rule 29(4) of the Election Rules , Scrutiny is to be confined to specific polling stations and cannot be ordered in an entire constituency unless irregularities are disclosed in the pleadings in all the polling stations”.

57. I took the liberty to quote the learned Judges observations to buttress my findings that the petitioner's application for Scrutiny and recount was without merit as it was not supported by his pleadings , being aware that a party is bound by its pleadings and that unpleaded matters cannot be raised in interlocutory applications or in submissions . See **Nyeri Court of Appeal No. 48 of 2013 Mercy Kirito Mutegi Vs Beatrice Nkatha Nyaga & 2 others**.

58. The petitioner's pleadings as crafted “ and/or, and in the alternative”(prayer No.2)

“ ...to order a recount and/or scrutiny of the ballot cast in respect of Luanda Constituency in the polling stations whose errors have been identified in the petition and Respondents answers to the petition and errors identified during trial and whose results of the election are disputed by the petitioner”

are to say the least a fishing expedition. The court was being asked to find for itself which polling stations it may identify from the respondents documents and during the hearing. On the above grounds, I disallowed the application by my ruling dated 21/11/2017.

#### **ANALYSIS OF EVIDENCE, AND SUBMISSIONS AGAINST THE ISSUES FOR DETERMINATION:-**

59. **ISSUE NO.1.**

**Whether the election for Member of the National Assembly for Luanda Constituency was conducted in accordance with the Constitution, the Election Act 2011, and Regulations made thereunder.**

The guiding Constitutional Provisions in respect are **Article 81(e) , 38 , 86 and 138 (3) ,** together with **Section 83 of the Election Act , 2011**

60. **Article 38 (2)** of the Constitution provides that every citizen has the right to free , fair and regular elections based on universal suffrage and the free expression of the will of the people. This is repeated **under Article 81(e)**, which election is by secret ballot , free from violence or corruption. The election ought to be conducted by an Independent body and should be transparent and administered in an impartial, neutral, efficient, accurate and accountable manner.

61. **Article 86** sets out the parameters that the Independent Electoral and Boundaries Commission ( 2<sup>nd</sup> Respondent) must meet in the conduct of a free and fair election :-

It shall ensure that:

- a. Whatever voting 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. That 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 malpractices are put in place, including the safe keeping of election materials.**

62. **Section 83 Election Act 2011, provides that**

**“ 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.”**

The Supreme Court of Kenya in **Presidential Petition No. 1 of 2017 ( Supra), at Paragraph 208 rendered that**

**“ ...if it should be shown that an election was conducted substantially in accordance with the principles of the Constitution and the Election Act , then such election is not to be invalidated only on ground of irregularities”**

It continued to render that

**“ ... Procedural or administrative irregularities and other errors occasioned by human imperfection are not enough by and of themselves , to vitiate an election ...”**

See also **Masika Wetangula VS Musikari Nazi Kombo & 2 Others (2014) eKLR**

63. From the above Provisions , it is evident that for a court to void an election , it must satisfy itself that

- a. The election was not conducted in accordance or there was non – compliance with the Principles laid down in the constitution and the written law or**
- b. The non- compliance affected the results.**

64. Against the above backdrop, it is the Petitioner who has both the evidential and legal burden to prove that the election for the Member of National Assembly for Luanda Constituency was not conducted in accordance with the Principles stated above , together with the Provisions of Section 107 -109 Evidence Act .

65. If however the Petitioner adduces sufficient evidence to the Court's satisfaction, the Respondents will have the burden to controvert the evidence sufficiently to demonstrate that there was substantial compliance with the law and the constitution to the required standards in an election petition, and that even if there were irregularities, they were not so substantive as to affect the result of the election.

### **SPECIFIC ALLEGATIONS**

#### **66. VOTER BRIBERY**

The petitioner ( paragraph 22-26 and paragraph 11 of his affidavit) alleged that the 3<sup>rd</sup> Respondent was seen engaging in bribery, and offering bribes to voters to sway them from voting for him at the following Polling Stations Luanda South, Luanda Township, Emabungo, Wemilabi and Mwibona wards. On Cross Examination he denied having seen any acts of bribery being committed by the 3<sup>rd</sup> Respondent or his supporters or agents. He stated that he relied on his witnesses, PW4, PW12 and PW14.

67. **PW4 Earnest Amutete** testified that bribery took place at Ebbiba polling station at a Kiosk at the gate of the school, 70 metres away by ODM agents, who were giving money to illiterate voters. He did not see the 3<sup>rd</sup> Respondent at the station. He stated that he reported the incident to a Police Officer at the Polling Station but did not inform the Presiding Officer, and that nothing was done. He testified that the Petitioner got more votes than the 3<sup>rd</sup> Respondent. This Polling Station was not pleaded or named by the petitioner in his Petition or in his supporting affidavit.

68. **PW12** was an agent for the Petitioner at Ebwiranyi Primary School Polling Station. Her evidence was that about 12.30 PM she witnessed the 3<sup>rd</sup> Respondent and another candidate Tom Alwaka give to his agent Elkana money to give to voters. She did not know how much was given except to say that it was Sh. 50 notes from a distance of 40 meters. She did not report the bribery incident to the Police Officers who were at the compound nor to the Presiding Officer. In her own words she said that she did not indicate when she reported to the Polling Station which she indicated as 12.30 pm in her affidavit. Yet it was her evidence that she came out of the polling station to receive a phone call at 11.00 AM. Further this witness did not report the persons allegedly given the bribe yet she stated she knew them. Upon intense cross examination, she stated that she wished to withdraw her affidavit as she could not support her averments therein and asked the court to believe her oral testimony instead. Ebwiraji polling station was not among stations stated (paragraph 24 petition) by the petitioner where the 3<sup>rd</sup> Respondent was allegedly seen bribing voters. It is clear that **PW12's** evidence was not only contradictory but also unreliable, and not credible at all.

69. These are the only witnesses who allegedly testified on the bribery allegations against the 3<sup>rd</sup> Respondent. On the specific polling stations stated by the petitioner, no witness testified on the allegations of bribery.

70. The 3<sup>rd</sup> Respondent in his Response denied visiting any other polling station and centre except Essibeye where he voted at 8.00 AM and left the Constituency all together and travelled to Siaya Constituency at le Vic Hotel and later at 9.00 Pm went to Maseno club upto 4.00 Am the following day when he went to his home.

The petitioner did not, in his own wisdom, cross examine the 3<sup>rd</sup> Respondent on his alibi on the polling day, more so after his witnesses (PW4 & Pw12) alleged to having seen him bribe voters at 12.30 Pm at Ebbiba and Ebwirangi Polling Stations.



Further none of these two witnesses reported the bribery claims to the Presiding Officer, any IEBC Officer or to the Police Officers who they confirmed were within the compound.

71. Bribery is a **Criminal Offence under the Election Offences Act No. 37 of 2016**. It must be proved beyond reasonable doubt. It attracts heavy penalties if proved.

**Section 9 states:-**

**1. A person who, during an election period**

**1. Directly or indirectly offers a bribe to influence a voter to Vote or refrain from voting for a particular candidate or political party...commits an offence.**

**2. A person who commits an offence under this section shall be liable, on conviction to a fine not exceeding two Million Shillings or to imprisonment for a term not exceeding six year or both.**

From the narration, it is very doubtful that such serious bribery incidences took place and were not reported to the police or the Presiding Officers at the stations.

72. In the case **Fredrick Otieno Outa Vs Jared Odoyo Okello & 4 Others (2014) eKLR**, it was held that evidence of bribery must be clear cogent and credible, that it should not leave or create doubt that the offense was committed and by who. "The law places a higher level of proof than upon mere preponderance of probabilities. I must state here that the evidence linking the 3<sup>rd</sup> Respondent to the alleged bribery of voters was muddled up, not cogent and contradictory. It cannot be said it was credible at all.

73. **PW12** did not establish a nexus of bribery between the 3<sup>rd</sup> Respondent and the alleged agents nor the bribed voters who she failed to name, yet it was her evidence that she knew them. I find her evidence as a fabrication and untruthful. **As to PW4**, I find him to be a liar a fraud and an unreliable witness. I say so because his mother who testified as **PW5 Tabitha Areyo Omwongo** expressly stated in court that she did not sign her witness affidavit and that **PW4** who is her son signed for her. This witness affidavit was struck out as being incompetent. That is the witness that the petitioner relied upon to prove bribery allegations against the 3<sup>rd</sup> petitioner. I do not believe his evidence at all. It is tainted with criminality.

74. **PW14** alluded to a meeting called by the 3<sup>rd</sup> Respondent on the eve of the elections with an intention to bribe voters. The parties who attended the meeting, the venue of the meeting and what took place at the said meeting remained unidentified. This witness did not attend the said meeting. Her evidence can only be described as merely speculative and hearsay.

75. In the case **Arthur Kibira Apungu VS IEBC & 2 Others( 2014) eKLR**, arising from a petition in 2013 Election between these same parties, the Court of Appeal held that:

**"... as a general rule where evidence is presented in proof of bribery, even a single Act with the knowledge and approval of a candidate or a candidate's agent, that alone would be sufficient basis to invalidate the election ..."**

76. In **Machakos Election Petition No. 4 of 2013 Wavinya Ndeti Vs IEBC & 3 Others, (2013) eKLR** the court stated, in determining whether there were aspects of bribery or not, held that

- a. The Petitioner has to plead with particularity the allegations of bribery against the 3<sup>rd</sup> Respondent.
- b. Evidence should be sufficient to show that money exchanged hands with the intention of influencing voters either to vote ...or refrain from voting for the petitioner.
- c. Evidence of witnesses should have casual connection with the 3<sup>rd</sup> Respondent and his agents.

77. In the Petition at hand , it cannot be said even remotely , that the petitioner met the above threshold. The pleadings on voter bribery were very generalized save to state that voter bribery was witnessed in Six stated polling stations with no specificity in the manner of bribery in the Six Polling stations. Indeed, the petitioner did not call witnesses to testify on the allegations except , **PW4 PW12**, and **PW14** whose evidence I have found to be untruthful and not credible . None of them were able to establish a nexus between the 3<sup>rd</sup> Respondent, his supporters or agents to the alleged voter bribery, not even one act of bribery was proved against the 3<sup>rd</sup> Respondent, nor was any act proved to have been done with his approval. **I am satisfied that the petitioner did not bring any credible evidence to meet the threshold of proof beyond reasonable doubt that the 3<sup>rd</sup> Respondent by himself, or with his knowledge or approval, his agents were involved in or participated in voter bribery.**

#### 78. IRREGULARITIES, MALPRACTICES AND SYSTEMATIC NEGATIVE CAMPAIGNS

**The petitioner alleged that the 3<sup>rd</sup> Respondent was declared the winner of the election through collusion with employees of the 1<sup>st</sup> Respondent, the Presiding Officers and Polling agents.**

The petitioner, other than stating as such in the petition and the supporting affidavit, no evidence was called. No witness testified on this.

In his examination in Chief and Cross Examination , the petitioner failed to name any of the 1<sup>st</sup> Respondents employees or agents , nor did he witness any coursing agents or those he stated had colluded to deny him a win in the election. **It is trite law that he who alleges must prove – section 107 – 109 of the Evidence Act. None of his witnesses testified on this allegation.**

There being no evidence, the allegation remains as such . A mere assertion . It is disregarded and dismissed in its entirety.

#### 79. **Denial of petitioner's Agents to polling Stations and Tallying Centre.**

The petitioner alleged that 46 of his agents were denied entry to various polling stations. He failed to produce a list of his agents or their letters of accreditation by IEBC authorizing them to access a Polling Station and the Tallying Centre . Persons so authorisd are stated under **Regulation 85 of the Elections ( General ) Regulations 2012 as follows:**

- **The Presiding Officers and other election officials on duty ,**
- **A candidate a person nominated as a Deputy to the candidate where applicable**
- **A member of the Commission ,**
- **Authorized Agents ,**
- **Police Officers on duty ,**
- **Duly accredited election observers and duly accredited media persons.**

80. **Section 13(h) of the Election Offences Act 2016**, creates an offence for a person who enters or remains in an Election Centre or area designated by IEBC for electoral purposes without authority.

Thus for an agent to be allowed into a polling centre, he ought to have a letter of accreditation from IEBC and the letter of appointment by the candidate or party and to have taken the oath of secrecy -**Regulation 94 (5)**.

81. The petitioner did not name any of his accredited agents who may have been locked out of any named polling station.

**PW2 Joel Okonji** the Chief agent of the petitioner, despite stating that he had received complaints of lock out of agents in five polling stations and intimidation he failed to give the agents names nor the ANC party agents nor the petitioners agents names.

82. At the Tallying Centre, **PW3 Alexander Ainea** confirmed that he was at the tallying centre and confirmed having seen Form 35B after the results were declared, and that the results were correctly captured and agreed upon in Form 35As. He had no questions at all over the results.

**PW2** confirmed that at Mumboha Primary School Polling Station – 1 one **Boaz Ndayi** was the petitioner's agent, **PW9** confirmed that one **Dishon Kundu** was the petitioners agent at Emunua Polling Station and signed Form 35A. At Luanda Nursery School Station 2, **PW13** confirmed that an ANC agent one **Wilson Ambukuju** was present at the station from 6.00 AM.

83. The 1<sup>st</sup> Respondents Presiding Officers testified in Support of their affidavits that no accredited and authorized agent was denied entry into any Polling station at the Constituency.

**RW1** the Returning Officer, Presiding Officers **RW2, RW3, RW4** and **RW5** were consistent in their testimony that only Independent Candidates were allowed to have their own agents and that the 1<sup>st</sup> Respondent allowed party agents, not candidates agents into polling stations. This evidence was not controverted by the petitioner. **PW2** confirmed that ANC agents, being the Petitioners Party, were allowed into the Polling Centres and particularly in the selected stations as seen above.

84. The **Court of Appeal at Nyeri, C.A No. 48 of 2013 Mercy Kirito Mutegi Vs Beatrice Nkatha Nyaga, IEBC & another (2013) eKLR** the learned Judges commenting on **Section 30 of the Elections (General) Regulations 2012** rendered thus,

**Regulation 30 (1) “ A Political Party may appoint one agent for its candidates at each Polling Station.**

**30(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 candidates choice”.**

It further stated that **“It is not mandatory** that a candidate / party must have an **agent in every** polling station and failure to have an **agent cannot be a ground to nullify an election “**

85. It is my considered findings that the petitioner's failure to comply with **Regulations 74, and 85 (i) (e)** by providing his agents list and names 48 hours to the election to IEBC and to prove which polling stations they were denied entry and the effects of such denial, then it goes without a doubt that he has failed the test, to prove to the required standard, that his agents were denied entry to the polling stations it is not enough to state. A party ought to prove the allegations if he desires the court to find in his favour. In all the selected stations, ANC agents were present.

No credible, or any evidence was adduced to prove the allegation that the petitioner's agents were

locked out. **Regulation 75(2)** obligates the IEBC to disallow any person whose name and address have not been submitted within the above timeframe. Further, failure by an agent to sign any of the Statutory Forms cannot on its own, invalidate an election – **Regulation 79 (6) and (7)**.

See **William Kabogo Gitau Vs George Thuo & 2 others (2010) eKLR**. In any event, even if it was proved that the Petitioners agents were denied entry that alone would not affect the validity or integrity of the election, unless evidence is adduced as to the effect, which has not been done.

#### **86. Ballot stuffing and fraudulent manipulation of the ballot papers.**

This allegation appears on paragraph 35-36 of the petition, and paragraph 35-38 of the petitioner's affidavit.

The petitioner did not offer any submissions on this claim. The petitioner in examination in Chief stated that he had no evidence but relied on his witnesses, **PW4** and **PW10** who, testified that they were given five ballot papers instead of six, that the Member of National Assembly ballot papers were missing and that upon complaining loudly to the Presiding Officers over the anomaly, nothing was done. They did not find it fit to report to the Presiding Officer who was inside the voting hall. It was further alleged that the retained ballots papers were later marked in favour of the 3<sup>rd</sup> Respondent. No evidence was adduced to prove this claim.

87. I find these allegations to say the least unbelievable in that if indeed **PW4** (Wemulabi Polling Station) complained loudly, and the IEBC clerks and the presiding officer were in the room, including agents and observers, I find it doubtful that the complaint would have gone without being entered in Form 35A. **RW4** who was the Presiding Officer ( **Benson Omodi** ) denied such incidents happened or having received such complaints. **PW10** too did not report to the Presiding Officer or to the police officers despite her alleged loud protests in the presence of all agents, and officials of IEBC.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents officers who would later mark the 6<sup>th</sup> ballot papers were not identified by the petitioner or any of his witnesses. This sounds more like fiction than reality. If indeed this took place in the two polling stations, it was upon the petitioner to tender credible and believable evidence, of having reported the incidents to the Presiding Officers and Security agents. Nothing turns on this allegation. It is without merit.

#### **88. Campaigns Past the official campaign period, and the mater of the 3<sup>rd</sup> Respondent's Billboard at the Busia Junction**

This complaint appears at Paragraph 24 of the Petition, and Paragraph 4, and 7 of the petitioner's Supplementary Affidavit sworn on the 11/10/17.

The petitioner's disposition is that he notified the Returning Officer (2<sup>nd</sup> Respondent) about the 3<sup>rd</sup> Respondent's Campaigns beyond the 48 hours deadline to the Election, via a phone call to his registered number who requested him to take a photograph which he did and sent it to him by WhatsApp after he called and confirmed Receipt. The alleged conversation was attached to the affidavit including the photographs, and filed a certificate issued by himself, pursuant to section 106 B of the Evidence Act, to authenticate the electronic evidence. As would have been expected, admission of this electronic evidence was objected to by the Respondents.

89. In a ruling dated the 16/11/2017 upon objection to admissibility of the above evidence (telephone call and Photograph by WhatsApp), I made a finding that the photograph of the Billboard did not have an

accompanying message, no senders identify nor the recipients telephone number or name. Further citing **Section 78A and 106A of Evidence Act**, I found that such evidence can only be admitted if it meets the various safeguards to ensure the authenticity and reliability of the said evidence, as it is vulnerable to alterations and modifications as changes may occur while collecting the evidence as well as being easy to tamper with. See **CORD & another VS Republic, High Court (Naisti) Constitutional petition No. 628 of 2014 and Republic Vs Mark Lloyd Stevenson in Kiambu High Court Criminal Revision No. 1 of 2016**.

90. I upheld the objection and disallowed admissibly of both the image of the Billboard and the alleged telephone conversation, together with the certificate of authentication of the photograph as it did not meet requirements stated under **Section 78A and 106 Evidence Act** that seek to ensure the authenticity and reliability of such electronic evidence. The petitioner was unsuited and incompetent to prepare and sign the certificate himself, of his own documents. The petitioner, having not authenticated the date, instrument and manner of taking the evidence failed to prove non-compliance of deadlines and presence of the 3<sup>rd</sup> Respondents Billboard standing on the election date at the Busia Junction near Ebusakami polling station.

91. **PW7** and **PW11**, alleged to have seen the Billboard, they however testified that its presence at the Ebusakami – Busia junction did not affect or influence their minds as to which candidate they wanted to vote for, and no person or voter testified that the Bill board indeed influenced him or created doubts in their minds as to which candidate they wanted to vote for.

92. On alleged campaign rumours peddled by the 3<sup>rd</sup> Respondent that the Petitioner had stepped down, no evidence was adduced in support. **PW7** and **PW11** also confirmed that though they heard of the rumours, they did not affect them or the voting patterns of the people of Luanda. They also did not state from whom they heard the rumours or that the rumours originated from the 3<sup>rd</sup> Respondent or by his agents with his approval. See **William Odhiambo Vs IEBC & 2 other, Kisumu Election Petition No. 2 of 2012**. Nothing turns on this allegation.

### 93. VIOLENCE

In his petition paragraph 4-49, the petitioner stated that Violence was witnessed against himself and his supporters before, during and after the declaration of results. He however could not prove that the 3<sup>rd</sup> Respondent was a party to or was connected with the said violence against himself or his supporters. On the alleged stonning of a vehicle Reg No. KBK 097G, he owned up in his examination in chief, that it was Tom Alwaka, one of the other candidates who organized the stonning, of his vehicle and not the 3<sup>rd</sup> Respondent. He did not produce any evidence at all that the 3<sup>rd</sup> Respondent tried to block him and his supporters in what he called the 3<sup>rd</sup> Respondents strongholds, but which he failed to report to the police. **PW2 Joel Okonji**, the petitioners agent testified that he was attacked, with the petitioners supporters at the gate of **Kaila polling station**, but when he reported no action was taken. No evidence of any entry of a report was produced. He failed to name any of the 3<sup>rd</sup> Respondent's supporters, nor the alleged strongholds.

94. **RW7 Patrick Odera** confirmed there having been some violence before the elections, during party Nominations between ANC supporters to which party the petitioner belongs but that the, the 3<sup>rd</sup> Respondent, who was not competing with the petitioner was not involved as he was not an ANC candidate and therefore had nothing to do with the violence. In his own evidence, the Petitioner owned up that he was not competing with the 3<sup>rd</sup> Respondent, an ODM candidate and had no evidence of violence associated with the 3<sup>rd</sup> Respondent or his agents, or would he associate him with the injuries sustained by his supporters who in any event did not testify despite their P3 Forms having been filed.

95. Violence is a Criminal offence under the **Election Offences Act, 2016 section 11** it provides

**“that any person who uses force or violence during an election period commits an offence and is liable , upon conviction to a fine not exceeding two million or to imprisonment not exceeding six years or both”**

Being a Criminal Offence Proof is beyond reasonable doubt . In **Election Petition No. 6 of 2013 Kakamega , Justus Gesito Mugali M’mbaya Vs IEBC & 2 Others (2013) eKLR**, faced with allegations of violence , the court rendered that

**“ ... The court must establish who is responsible and under what circumstances the violence occurred. The court must also address whether that violence affected the results of the elections...”**

96. In **Benson Maneno Vs Jacob Machekele & Others (2013) eKLR** ,the court stated that :-

**“ For the petitioner to sustain the claim that violence disrupted the election, he was required to establish that the respondents were either responsible for the violence or condoned or connived in the perpetration of violence”.**

The Petitioner by his own oral evidence fully absorbed the 3<sup>rd</sup> Respondent his agents and supporters from the violence against himself and his vehicle or any other. Indeed no prove was adduced that the 3<sup>rd</sup> Respondent was responsible or condoned or perpetrated the violence that occurred at party nominations as aforesaid. The necessary nexus was not established by evidence or otherwise. The allegation of violence was baseless and ought not even have pleaded at all. It is dismissed as vexatious and malicious.

97. **FLAWED TALLYING .**

The petitioners case was that in a significant number of polling stations votes cast were not tabulated and accurately collated (paragraph 50 to 75 of the petition, and paragraph 48 , 54,56,58 and 60 of his affidavit). None of the many polling stations are named. It is a very generalized allegation, and lacks specificity.

No evidence was adduced that the results announced at the tallying centre were inconsistent with the data and information in the respective Form 35As. No evidence too was adduced by the petitioner and his witnesses that the votes cast were manipulated, engineered or deliberately distorted in favour of the 3<sup>rd</sup> Respondent.

98. There is too no evidence that votes cast in any polling station were not counted or accurately collated. In his evidence , the petitioner on cross examination stated that he had not counted nor compared the returns made on the votes he had garnered in Form 35A's, that were filed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in their bundle of documents volume 1 and served upon the petitioner in September 2017. He can only blame himself for his failure. On cross examination, the petitioner was heard to say that he had no questions or complaints with his vote tally or the 3<sup>rd</sup> Respondents. This also appears in my ruling delivered on the 21/11/2017 on his application for scrutiny and recount. The allegation is thus meritless.

99. The petitioner too could not substantiate or offer any evidence that on the 10/8/17 two days after the election, seals of ballot boxes from Lua Sou polling station were found broken and boxes open. He told

the Court as such.

On further probe by the Respondents, the petitioner confirmed that there were no results presented in Form 35As that differed from results in Form 35B.

**PW3** confirmed that the results in Form 35B were the results read out and announced by the 2<sup>nd</sup> Respondent, and he was satisfied with the same.

**PW14** further affirmed the above. The petitioner failed to tender any submission on the “flawed tallying” malpractice and irregularity as stated by the petitioner. The only discrepancy in the votes was in the number of rejected votes, and spoilt votes, 7 in number at Esinamtu polling station where there was a difference of 7 votes, but **RW1** offered a satisfactory explanation that on the Form 35A Table 1, 367 votes were shown as the valid votes while in Table 2 it showed 374, but that being a summation error, and the final tally in Form 35A being correct, the error did not affect the result of the election. It is my finding that even if the 7 disputed votes were to be given to the Petitioner, the final result would not have been affected.

100. As stated in the **2017 Raila Presidential Petition (Supra), (Par 208)**, “Procedural or administrative irregularities and other errors occasioned by human imperfection are not enough by and of themselves to vitiate an election ...” In my view the few and minor identified irregularities are minor in nature and taken together with the totality of the petitioner’s case, they are not enough to vitiate the election. In any event the Petitioner has not discharged his obligation of proof that the said irregularities are so fundamental and substantive that they affect the result of the election. See **Gatirau Peter Munya case (supra)**.

#### 101. **Failure of KIEM’s Kit**

This is an allegation couched in a very generalized manner, that in many polling stations, the Kiems Kit failed causing many voters to leave without voting. The petitioner did not state any of the polling stations nor any voter who failed to vote due to the alleged failure.

**PW6 Jeremiah Otemo** could not be identified by the KIEM’s Kit on the first attempt but on the 3<sup>rd</sup> attempt, he was identified and voted.

**PW8** registered twice in, 2013 and 2017 and her name, could therefore not be identified. Registering twice as a voter as confirmed in her own evidence is an election offence **under Section 4 of the Election Offence Act, 2016**. She had herself to blame.

None of the petitioner’s witnesses testified, and none was identified as having failed to vote due to failure of the KIEMs Kit, and even if the Kit failed, which is not the case here, there was put in place a Supplementary mechanism where any voter could be biometrically identified. There is no truth whatsoever in this claim. It is baseless.

#### 102. **DETERMINATION**

The petitioner sought a myriad of Reliefs in this petition.

The multiplicity of the reliefs were resolved by the parties condensing them into the Agreed Issues.

#### 103. **ISSUES NO. 1**

**Whether the election for the Member of the National Assembly for Luanda Constituency was conducted in accordance with the Constitution, the Elections Act and the Regulations made thereunder.**

It was upon the petitioner to prove non-compliance with the Constitution and the Electoral Laws for the election to be invalidated (**Moses Masika Wetangula Vs Musikari Nazi Kombo & 2 Others (2014) eKLR.**

He was required to discharge the burden of proof, both legal and evidence to the required standard of an election petition through cogent and credible evidence **Sections 107 -109 of the Evidence Act (Court of Appeal No. 48 of 2013 Mercy Kirito Mutegi Vs Beatrice Nkatha Nyaga & 2 Others( 2013)eKLR, Supreme Court Presidential Petition No. 1 of 2017 (2017) eKLR; Paragraph 126 -133), supra).** This he failed to do .

104. Further, the Petitioner was bound by his pleadings as stated in his petition, and supported in his Supporting Affidavits and by his witness affidavits. The court is not obligated to consider any evidence led by any of the parties, which does not support the averments in the pleadings which is at variance with the pleadings. Such evidence ought to be disregarded ( **IEBC & another Vs Stephen Mutinda Mule & 3 Others (2014) eKLR.**)

Looking at the petitioners pleadings and averments by witnesses in their affidavits and oral evidence, issues that were not pleaded, and that the petitioner urged the court to consider, are alleged

**(a) unstamped forms 35A's**

**(b) alterations in the forms**

**(c) unauthorized presiding officers and agents at polling stations**

**(d) Discrepancies in form and Polling Station Diaries.**

105. These issues arose vaguely during the hearing and the 1<sup>st</sup> and 2<sup>nd</sup> respondents responded to them without the benefit of having been pre warned and /or given a chance to respond to the allegations before the hearing. This was trial by ambush and a court should not accept such practice. It obviously pre judices the opposite parties. See **Court of Appeal No. 48 of 2013 Mercy Kirito Mutegi Vs Beatrice Nkatha Nyaga & 2 Others( 2013)eKLR.**)

106. What a party pleads is what his opponent responds to and it would be improper for a court to consider and introduce it in a Judgment. It is trite that a party is bound by its pleadings.

The court of Appeal cited with approval the following paragraph in **Adeteon Oladeji (NIG) LTD Vs Nigeria Breweries P/S S.C 91/2002 .**

**In IEBC & another Vs Stephen Mutinda Mule & 3 others (2014) eKLR that**

**“ ... It is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings and which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”**



107. The allegations I have stated as having not been pleaded at paragraph 102 above are, for purposes of this petition no issues for this court's determination. I decline the petitioner's invitation to consider them, as by doing so I would be violating the Respondents constitutional and legal rights to a free and fair hearing as enshrined in Article 25 of the Constitution.

See **Civil Appeal No. 307 of 2008 , Peter Karuthi Kimunya Vs Aden Giyo Havo( 2015) eKLR.**

108. On the various allegations of irregularities and malpractices in my very considered opinion the petitioner failed in his duty to discharge the burden of proof to the required Standard which has been settled as:

**“... Higher than the balance of probabilities but lower than beyond reasonable doubt and where allegations of Criminal of quasi Criminal are made, it is beyond reasonable doubt”.**

My findings on each of the specific allegations against the Respondents, jointly and severally are stated above. They all lack merit and are all dismissed.

109. The Independent Electoral and Boundaries Commission the 1<sup>st</sup> Respondent, was able by its responses to the petition and by affidavit evidence , to demonstrate its compliance with the law and the constitution, of the functions bestowed upon it under **Article 88 ( 4) of the Constitution** and to ensure that

- a) Whatever voting 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 malpractices are put in place, including the safekeeping of elections materials.

110. By their evidence , the 1<sup>st</sup> and 2<sup>nd</sup> Respondents rebutted the petitioners allegations and set out to prove that they conducted the election in accordance with the constitution and the law ( **Raila Amolo Odinga – No. 1 of 2017 (supra)**, and finally submitted that the burden of proof that the election was not thus conducted lay with the petitioner, which he failed to discharge to the satisfaction of the court.

In **Joho Vs Nyange & another (2008) Maraga J** ( as he then was ) rendered that

**“ Election Petitions are no ordinary suit but disputes in rem of great public importance . They should not be taken lightly and generalized allegations are not the kind of evidence required in such proceedings , Election petitions should be proved by cogent , credible and consistent evidence ..... the petitioner being the one seeking to nullify an election he has the burden of proof”.**

111. For a petitioner to void an election on grounds of non-compliance with the constitution and the law, he must prove with cogent and credible evidence that the non-compliance with the electoral law impugned the integrity of the election, and the result thereof.

**Lord Denning in Morgan Vs Simpson(1975) I.Q.B 151 ) and cited with approval in the 2017 Raila Odinga Presidential Petition(Supra)**

**Stated “ collating all these cases together , I suggest that the law can be stated in these propositions :-**

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

**b) If the election is so conducted that it was substantially in accordance with the law as to elections , it is not vitiated by breach of the rules or a mistake at the polls... but even though the election was conducted substantially in accordance with the law as to elections, nevertheless , if there was breach of the Rules or a mistake at the polls and it did affect the result , then the result is vitiated...”**

The above propositions are now incorporated in our **electoral law in Section 83 the Election Act 2011** and applied by the courts In **Gatirau Peter Munya Vs Dickson Mwenda Githinji & 2 Others (2014)eKLR**, and the 2017 presidential Election petitions, among other electoral decisions.

112. To that effect, an election petition ought not to be vitiated on generalized irregularities and malpractices that the petitioner casually alleges and despite being accorded an opportunity to substantiate, he was unable to adduce cogent, clear and credible evidence. That is the case in this petition. The petitioner failed in this regard. See **Karanja Babage Vs Joseph Kiuna Kaya mbegu Nyaga & 2 Others** and **Court of Appeal decision in C.A No. 48 of 2013, Mary Kirito Mutegi (supra)**.

113. The petitioner having not proved the irregularities and malpractices as well as the criminal allegations of voter bribery fraudulent manipulation of ballot papers against the respondents to the required standard, and Pursuant to **Article 38(2) of the Constitution**, the electorate of Luanda Constituency exercised their free will and made their political choices in a free and fair election based on universal suffrage and expression of their will.

#### 114. **ISSUE NO. 2**

**Whether non-compliance with any of the constitutional or statutory and Regulatory Provisions affected the results of the election and if so , to what extent.**

I have stated above that I am satisfied that there was substantial compliance of the constitution and electoral laws and regulations in this election by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. (**Section 83 of the Election Act 2011**) The minor proven irregularities in my view have not been shown to have affected the result of the election in any way . I hold that by themselves they are not enough to vitiate the election.

**See Kithinji Kiragu Vs Martin Nyaga Wambora & 2 others Election petition ( Embu) No. 1 of 2013.**

115. **In its totality the petitioner failed to clearly and decisively, and by cogent and credible evidence demonstrate that there was non- compliance with the constitution and the law in the conduct of the election. He further failed to show in what way, if at all ,the alleged irregularities and malpractices affected the result of the election and thus the free will and expression of the electorate of Luanda Constituency, pursuant to provisions of Section 83 Election Act 2011 and Article 38(2) and 81(e) of the Constitution.**

116. **ISSUE NO. 3**

**Whether the 3<sup>rd</sup> Respondent was validly declared as the winner for the position of Member of the National Assembly for Luanda Constituency.**

**The answer is in the affirmative.**

117. The Supreme Court in Presidential Election Petition No. 2 & 4 (consolidated) of 2017 **John Mwau & 2 others Vs IEBC & 4 Others** the court pronounced itself that:

**“ The duty of an Election court is to give effect to the will of the electorate to investigate the nature and extent of any election offence alleged in the petition...”**

I have discharged my duty as stated above.

118. **In conclusion, I find that the Election for the Member of Parliament for Luanda Constituency on the 8/8/2017 was simple, accurate, verifiable, secure, transparent and accountable and was conducted and managed in compliance with provisions of the Constitution and all Electoral Laws and Regulations. I am further satisfied that the 1<sup>st</sup> Respondent IEBC discharged its obligations stated in Article 86 of the constitution in the conduct of the Election.**

**Consequently, I find that the 3<sup>rd</sup> Respondent was validly elected and declared as the winner for the position of Member of the National Assembly for Luanda Constituency.**

119. The upshot is that the petition lacks merit and is hereby dismissed with costs to the Respondents.

120. **COSTS.**

**Section 84 of the Elections Act 2011 and Rule 30 of the 2017 Election Rules** empowers the court to make orders on costs after conclusion of a petition.

I have considered the nature and volume of work, research and time each party had to put in the preparation, documentation and hearing of the petition. I have also considered relevant court decisions in the award of costs. I award costs to the respondents as stated here below.

121. **FINAL ORDERS:**

**1. Kakamega Election petition No. 6 of 2017 is hereby dismissed with costs to the Respondents, and payable by the petitioner.**

**2. A declaration is hereby issued that the 3<sup>rd</sup> Respondent Omulele Christopher was validly elected and declared Member of National Assembly for Luanda Constituency.**

**3. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents are awarded costs capped at shillings three million to be shared equally. The 3<sup>rd</sup> Respondent's costs shall be a maximum of shilling two million. The costs shall be taxed and certified by the Deputy Registrar of this court.**

**The security deposit placed in court by the Petitioner shall be released to the Respondents to defray part of their costs on pro rata basis.**

**4. A certificate in terms of Section 86(1) of the Election Act 2011 shall issue to the Speaker of the National Assembly and Independent Boundaries and Electoral Commission.**

**5. Finally** I wish to appreciate and comment all counsel who appeared in this petition for their cooperation and respect to each other and to the court.

Further I commend my Secretary Emmy Isutsa and my two Court Assistants, Lilian Sagala & Susan Eistinah for the support they accorded to me. They made my tour of duty at Kakamega High Court pleasant .

**DELIVERED, dated and signed in open court on the 16<sup>th</sup> day of February 2018**

**JANET MULWA**

**JUDGE**

In the presence of

Mr. Odeny ..... for Petitioner/Applicant

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

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

Lilian & Susan .....Court Assistants



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