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Case Class:	Civil
Court:	Election Petition in Magistrate Courts
Case Action:	Judgment
Judge:	H.M. NG'ANG'A SENIOR RESIDENT MAGISTRATE
Citation:	Kapusia Ole Saloni v James Kipas Langues & 2 others [2018] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	Petition dismissed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATES COURT AT NAROK

ELECTION PETITION NUMBER 3 OF 2017

IN THE MATTER OF THE ELECTIONS ACT 2011

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

IN THE MATTER OF ELECTION FOR MEMBER OF COUNTY ASSEMBLY SUSWA WARD

KAPUSIA OLE SALONI.....PETITIONER

VERSUS

JAMES KIPAS LANGUES.....1ST RESPONDENT

CONSTITUENCY RETURNING OFFICER NAROK EAST

CONSTITUENCY CHRISTINE OTIENO....2ND RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....3RD RESPONDENT

JUDGMENT

INTRODUCTION AND BACKGROUND

1. This Petition, filed on 6th September, 2017, challenges the return of the 1st Respondent as the elected Member of County Assembly for Suswa Ward in Narok East Constituency, Narok County in the Elections conducted on the 8th August, 2017. The Petitioner, in his affidavit in support of the Petition, has tabulated the results declared by the 3rd Respondent on 9th August, 2017 as follows:

NAME OF CANDIDATE	PARTY	VOTES GUNNERED
KIPAS LENGUES	ODM	2,891
SALAASH NICKSON KISOTU	JUBILEE	2,555
KAPUSIA OLE LESALON PARSIMEI	INDEPENDENT	2,092
LEONARD MAISIODO	KANU	49
REJECTED VOTES		442

2. The gist of the Petition is that the Election of the Member of County Assembly, Suswa Ward (Hereinafter "*Election*") was not conducted in accordance with the principles set out under Article 81 of the Constitution of Kenya and the Elections Act 2011. In particular, the Petitioner avers that the Election was not free and fair.

3. The grounds of the Petition are pleaded under Paragraph 3 to 11. The grounds are as summarized

below;

- a) THAT there were wide spread cases of voter bribery by the 1st Respondent.
- b) THAT the Petitioner's agents were denied entry into polling stations by the 3rd Respondent's officers in collusion or under the instructions from the 1st Respondent.
- c) THAT the 3rd Respondent's agents and the 1st Respondent engaged in massive transfer of voters to Suswa Ward against their wishes.
- d) THAT, considering the difference of the votes garnered between the 1st Respondent and the Petitioner, the Election malpractices pleaded fundamentally affected the Election results.

4. The Petitioner seeks the following declarations and orders;

- a) A declaration that the 1st Respondent was not validly elected as Member of County Assembly for Suswa Ward and the Election be determined and declared null and void.
- b) An order that a fresh Election for the Suswa Ward be held.
- c) A declaration that the Election was neither conducted in compliance with the Elections Act 2011 and the Regulations nor in accordance with the principles laid down in the electoral law and the Constitution of Kenya 2010.
- d) The election offences on the part of the Respondents be reported to the Director of Public Prosecution for appropriate action.
- e) The costs of this Petition be borne by the Respondents.
- f) Any other order or determination that the Honourable Court may grant in the interest of justice.

5. The Respondents filed responses and denied the material allegations made in the Petition. The 1st Respondent's response was filed on 18th September, 2017 and the 2nd and 3rd Respondents' response was filed on 19th September, 2017. The Respondents aver that the Election was conducted in a free and transparent manner and in accordance with the principles enshrined in Article 81 and 86 of the Constitution and the provisions of the various Election Laws. In Particular, the Respondents deny the allegations of voter bribery, denial of Petitioner's agents to the polling stations and massive transfer of voters and pray that the Petition be dismissed.

SUMMARY OF THE EVIDENCE ADDUCED

6. In accordance with the provisions of Section 12(2) of the Parliamentary and County Elections Rules 2017 (Hereinafter "the Rules"), the parties filed witness affidavits which were adopted as evidence in chief and the witnesses subjected to cross examination and re-examination. In the ruling delivered on 19th October, 2017, this Court admitted the further affidavits filed on 10th October, 2017 and granted leave to the Respondents to file further affidavits.

7. The Petitioner filed 6 witness affidavits. However, during the hearing, the Petitioner availed a total of 5 witness. One of the Petitioner's witness by the name Kasankui Ole Mututua was not availed as a witness. His affidavit sworn on 9th October, 2017 remains on record and I shall mention on the weight to

be attached to the affidavit when analyzing the evidence. In his affidavit, the petitioner (Pw1) stated that during the voting the 1st Respondent walked along the queue at Suswa Primary School Polling Station bribing voters with Kshs 500. This caused a commotion and voters asked the 1st Respondent to leave the station. The Pw1 further stated that the bribery took place in the presence of the police officers and the officers of the 3rd Respondent who failed to take any action. The pw1 also stated that his agents were denied entry into polling stations by the officers of the 3rd Respondent and in particular, one Mukwe Ole Naadokila was denied entry into Suswa Primary School Polling Station. Further, the Pw1 stated that the agents of the 3rd Respondent managed to transfer voters massively to Suswa Ward against their consent. This, in accordance with Pw1, was achieved during the voters' verification exercise whereby the voters were deceived into signing transfer forms. Pw1 stated that the said voters were then bribed to cast their votes for the 1st Respondent.

8. Parmeres Ole Muriongo (Pw2), in his affidavit sworn on 9th October, 2017 stated that he had been appointed as the Petitioner's agent at Enariboo Primary School Polling Station. It was his evidence that on the Election day he presented his appointment letter to the Presiding Officer but he was informed that he could not be allowed in the voting room since independent candidates are only allowed to give one agent. The witness stated that he was later allowed to access the voting room at 12:00 noon though for the two hours he was restrained from accessing the voting room, voting went on without his presence. It was Pw2's further evidence that the Presiding Officer assisted illiterate voters without the involvement of the person accompanying them and the party agents.

9. Pw3, Joel Tuanei Partoip, in his affidavit sworn on 9th October, 2017, stated that he had been appointed as the Petitioner's agent. It was his evidence that on the Election day, the Presiding Officer asked him to produce original copies of the Oath of Secrecy and Appointment letter and he was only allowed to access the voting room at 9:00am after voting had started. It was Pw3's further evidence that he was chased out of the voting room during counting time and he could not access the polling station for the entire period of counting and announcement of votes. He further stated that he saw lots of people from different counties, wards and constituencies being brought to the station and whom he perceived to be strangers.

10. Pw4, Dennis Kuitamet Omerae, in his affidavit sworn on 9th October, 2017, stated that he had been appointed as the Petitioner's agent at Mpeuti Primary School Polling Station. It was his evidence that on the Election day, the Presiding Officer denied agents of independent candidates' entry to the polling station demanding that only one agent of the independent candidates could access the polling station. It was Pw4's further evidence that the Presiding Officer assisted illiterate voters without the involvement of the person accompanying them and the party agents.

11. Pw5, Mukwe Ole Lesalon, in his affidavit sworn on 9th October, 2017, stated that he had been appointed as the Petitioner's agent at Mpeuti Primary School Polling station. It was his evidence that on the Election day, he arrived at the station at 8:00am but the Presiding Officer denied him entry to the polling station despite being the duly authorized agent of the Petitioner and producing his appointment letter and oath of secrecy. He was only allowed to the voting room at 12:36pm. It was Pw5's further evidence that some voters were turned away and informed that they had been transferred to Ottepesi and Enarupa Oogila polling stations. He further stated that during the counting of votes, the presiding officer put the Petitioner's votes in the bundle of the 1st Respondent's votes and after complaining they were able to recover 15 votes but the presiding officer did not stop transferring the Petitioner's votes to the 1st Respondent.

12. The 1st Respondent availed all the 6 witnesses who had sworn affidavits. Dw1, Kipas Langues was returned as the winner of the Election of Member of County Assembly, Suswa Ward in the Elections

having garnered 2,891 votes. He denied the allegations of bribing or otherwise improperly influencing voters to vote for him. He also denied that any of the agents of the Petitioner were denied entry at the polling station. He further stated that one Mukwe Ole Naadokila was not an agent at Suswa Ward but was an agent at Mpueti Primary School. Dw1 further denied that he participated in massive transfer of voters at Suswa Ward against their consent.

13. Dw2, Paul Tingoi was an agent for the National Super Alliance (NASA) and had been posted at Oloitipi Nursery School Polling Station. In his affidavit sworn on 30th October, 2017, he stated that he arrived at the polling station at 6:00am and the Presiding Officer asked all agents to present their original Letters of appointments and not copies as alleged by Joel Tuanei Partoip. He also stated that all illiterate voters were assisted by the Presiding officer in the presence of the persons accompanying them and the party agents. He further stated that only the persons whose details were verified by the KIEMS kit were allowed to vote.

14. Dw3, Daniel Murera was an agent for the National Super Alliance (NASA) and had been posted at Mpeuti Polling Station. He stated that he arrived at the polling station at 5:00am and at 5:30am, the Presiding Officer asked all agents to present their respective Letters of appointments and oaths of secrecy and thereafter voting progressed well without any hitches. He further stated that he recalls seeing Mukwe Ole Lasalon at the polling station all through the whole exercise and at no time did he raise any complaint with the P.O. He also stated that all illiterate voters were assisted by the Presiding officer in the presence of the persons accompanying them and the party agents.

15. DW4, Leshinka Ole Njiri was an agent for the National Super Alliance (NASA) and had been posted at Oloirowua Primary School Polling Station. In his affidavit sworn on 30th October, 2017, he stated that he arrived at the polling station at 7:00am and after presenting his original letter of appointment and oath of secrecy to the Presiding Officer, he was allowed to enter the polling station. He also stated that all illiterate voters were assisted by the Presiding officer in the presence of the persons accompanying them and the party agents. He further stated that only the persons whose details were verified by the KIEMS kit were allowed to vote.

16. DW5, Santai Morionko, was an agent for the National Super Alliance (NASA) and had been posted at Enariboo Primary School Polling Station. In his affidavit sworn on 30th October, 2017, he stated that he arrived at the polling station at 5:00am and after presenting his original letter of appointment and oath of secrecy to the Presiding Officer he was allowed to enter the polling station. He stated that he recalls that Parmeres Morionko, his elder brother who was representing the Petitioner, was present at all times from the opening to the closing of the polling station and that he never raised any complaint. He also stated that all illiterate voters were assisted by the Presiding officer in the presence of the persons accompanying them and the party agents allowed to vote.

17. DW6, Parkire Joseph Lemeloi was an agent for the National Super Alliance (NASA) and had been posted at Suswa Primary School Polling Station. In his affidavit sworn on 30th October, 2017, he stated that he arrived at the polling station at 5:00am and after presenting his original letter of appointment and oath of secrecy to the Presiding Officer he was allowed to enter the polling station. He stated that he recalls that Mr. Kipino Ole Musei was representing the Petitioner in the said station contrary to the assertion by the Petitioner that he was represented by Mukwe Ole Naadokila. He also stated that at about midday, the 1st Respondent came to the station and he informed him that voting was progressing well and at no time did the 1st Respondent leave his car

18. The 2nd and 3rd Respondents availed a total of 5 witnesses. Dw7, Teresia Landi Nkipidia, was the 3rd Respondent's Presiding Officer at Oloirowua Primary School. She stated that the agents who were

allowed to the polling station are only those with a letter of accreditation from the 3rd Respondent and appointment letters from their candidate's political parties. It was her further evidence that one Kasankui Ole Mututua was not an agent at her polling station as evidenced by the polling station diary. Dw7 further stated that the voting exercise was conducted peacefully with no complaints registered and further that no authorized agent was denied entry into or evicted from the polling station.

19. Dw8, Dominic Kasaine Lolchoki was the 3rd Respondent's Presiding Officer at Oloitip Primary School. He sought to corroborate Dw7 evidence that no agents, duly authorized and vetted, were denied access to the polling stations. In particular, he stated that one Joel Tuanae Partoip was present at the polling station as early as 5:00am and signed the polling station diary as indicated in the polling station diary for Oloitip Primary School code 045. The said Joel Tuanae Partoip also signed the polling station diary before counting started and after counting of the votes.

20. Dw9, John Pose Mereu was the 3rd Respondent's Presiding Officer at Mpeuti Primary School. He sought to corroborate Dw7 and Dw8 evidence that no agents, duly authorized and vetted, were denied access to the polling stations. In particular, he stated that one Dennis Kuitumet Omerare was the first to sign the polling station diary at 5:30am and voting started at 6:00am and not at 10:00am as claimed by Dennis Omerae. He also stated that one Mukwe Ole lesalon was present at the station from 8:00am when he reported. It was his evidence that after the closure of the counting of votes all the agents present, (including Dennis and Mukwe) signed form 36A and confirmed that the votes counted were correct and each candidate allocated the exact votes he or she garnered

21. Dw10, Julius Oloosinigi was the 3rd Respondent's Presiding Officer at Enariboo Primary School. He sought to corroborate Dw7, Dw8 and Dw9 evidence that no agents, duly authorized and vetted, were denied access to the polling stations. In particular, he stated that one Parmeres Ole Muriongo was present at the station from the time the station was opened for voting till closure as indicated in the polling station diary. It was his evidence that voting went on without complaints and at no time did the KIEMS kits fail.

22. Dw11, Christine Otieno was the 2nd Respondent and the Returning Officer for Narok East Constituency under which the Suswa Ward is situated. She returned the 1st Respondent as the duly elected member of County Assembly, Suswa Ward. She denied that any of the Petitioner's agents were denied access at the polling stations and stated that the said agents had signed the polling stations Diary(PSD). She also denied allegations of massive transfer of voters against their wishes and stated that it was only during the verification exercise that voters were allowed to transfer if they so wished and in case of Suswa ward, no voter notified the 3rd Respondent of the intention to transfer. The Dw11 further stated that on the voting day she did not, either verbally or in writing, receive any complaint

ISSUES FOR DETERMINATION

23. At the conclusion of the hearing of this Petition and after considering the evidence on record and the issues identified by the parties on 19th October 2017, the Court narrowed down the issues for determination as follows:

a) Whether the Election of the member of County Assembly for Suswa Ward was conducted in accordance with the principles laid down in the Constitution and the various Election laws.

b) Whether there were any illegalities, Irregularities and Election offences committed in the conduct of the Election of the Member of County Assembly, Suswa Ward.

c) If there were any illegalities, irregularities and election offences Committed, did they affect the integrity and outcome of the Election of Member of County Assembly, Suswa ward.

d) Whether the 1st Respondent was duly elected as Member of the County Assembly, Suswa ward.

e) What are the Consequential orders the Court should make including who should bear the Costs of this Petition.

THE PRINCIPLES APPLICABLE IN CONDUCT OF ELECTIONS

24. The conduct of elections and the entire process leading to the voting day is the means that the Kenyan people have chosen to express their sovereign will. It is for this reason, that the Constitution of Kenya and the various Election laws have laid down several principles to ensure that the will of the voters is protected. Counsel for the parties have ably submitted on these principles in their written submissions which I will briefly highlight.

25. The Sovereignty of the people in electing their representatives is accentuated by Article 38 of the Constitution which provides;

38(1) Every citizen is free to make political choices, which includes 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 this 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; and

(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.

26. Under Article 81(e) of the Constitution, the electoral system should comply with the principle of free and fair elections. According to this provision, elections are free and fair when they are by secret ballot, free from violence and intimidation, improper influence or corruption, conducted by an independent body, transparent and administered in an impartial, neutral, efficient, accurate and accountable manner.

27. The 3rd Respondent, established under Article 88(1), is mandated and obligated to conduct an election that meets the threshold of a free, fair, impartial, simple and verifiable election that upholds the

aspirations of the voters and mirrors their sovereignty will in electing representatives of their choice. Article 86 states that:

86. *At every election, the Independent Electoral and Boundaries Commission 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) 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 electoral materials.

28. Section 83 of the Elections Act 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.

29. The above principles have been elaborated in the superior Courts and applied in the contest of the conduct of elections. Majanja J. in the case of ***Jackton Nyanungo Ranguma v Independent Electoral and Boundaries Commission & 2 others [2018] eKLR*** referred to the Supreme Court case and stated as follows:

*“In **Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission and 2 Others, Presidential Election Petition No. 1 of 2017 [2017] eKLR** expounded on the meaning and application of section 83 of the Elections Act. It stated that the provision comprised two limbs; the first regarding compliance with the Constitution and the law on elections and the second, concerning irregularities that may affect the result of the election. The court noted;*

[203] Guided by these principles, and given the use of the word “or” in Section 83 of the Elections Act as well as some of our previous decisions, we cannot see how we can conjunctively apply the two limbs of that 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 an approach would be tantamount to a misreading of the provision.

*The Court reiterated what it had stated in **Gatirau Peter Munya v Dickson Mwenda Kithinji and 2 Others SCK Petition No. 2B of 2014[2014] eKLR** that;*

[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 Election 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”

BURDEN OF PROOF

30. The Petitioner has the legal burden to prove the allegations pleaded and in particular that the election was not conducted in compliance with the principles enumerated above. In doing this, the Petitioner is bound by the pleadings filed and the affidavits sworn by the witnesses. Section 107 (2) of the Evidence Act provides that when a person is bound to prove the existence of any fact it is said the burden of proof lies on that person. In ***Raila Odinga and others v Independent Electoral and Boundaries Commission and 3 Others SCK Petition No. 5 of 2013 [2013] eKLR***, the Supreme Court held that the petitioner bears the burden of proof. It observed that;

[196] 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 be done rightly and regularly. So the Petitioner must set out by raising firm and credible evidence of the public authority’s departures from the prescriptions of the laws.

31. In ***JOHN KIARIE WAWERU v BETH WAMBUI MUGO & 2 others [2008] eKLR***, the court had this to say in regard to the standard of proof;

*“As regard the standard of proof which ought to be discharged by the petitioner in establishing allegations of electoral malpractices, there is consensus by electoral courts that generally the standard of proof in election petition cases is higher than that applicable in ordinary civil cases i.e. that of proof on a balance of probabilities. The standard is higher than proof on a balance of probabilities but lower than the standard of proof beyond reasonable doubt required in establishing criminal cases. Allegations of electoral malpractices, like for instance bribery, require a higher proof. This legal position was accepted in the cases of *Muliro vs. Musonye & Another [2008] 2 KLR (EP) 52 at page 64, Wanguhu Ng’ang’a & Another –vs. Owiti & Another (No. 2) [2008] 1 KLR (EP) 799 at page 806 and Joho vs. Nyange & Another [2008] 3KLR (EP) 500 at page 508.*”*

32. In ***Raila Odinga and 5 others -V- Independent Electoral and Boundaries Commission and 3 others [2013] eKLR***, the Supreme Court stated as follows on burden of proof in election petitions;

“Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondent bears the burden of proving the contrary.....While it is conceivable that the law of elections can be infringed, especially through incompetence, malpractices or fraud attributable to the responsible agency, it behoves the person who thus alleges to produce the necessary evidence in the first place – and thereafter, the evidential burden shifts, and keeps shifting...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.”

ANALYSIS AND DETERMINATION

33. I have already summarized the Petitioner's and the Respondents' evidence in chief adduced in Court. I have also considered the written submissions filed by Counsel for the parties and the long list of authorities. I am thankful to Counsel for their well-researched submissions. It is on the basis of the principles enumerated herein above that I now seek to analyze the issues identified in order to determine whether the Petitioner has discharged his burden of proof.

Whether there were any illegalities, Irregularities and Election offences committed in the conduct of the Election of the Member of County Assembly, Suswa Ward.

34. The Petitioner, as stated herein above, is bound by his pleadings. It is not upon this Court to delve on complaints which have not been pleaded in the Petition and affidavits filed. A Petition is not a fishing expedition that allows a Petitioner to wallow in the abyss of uncharted waters and imagined evidence which is not pleaded. I will, therefore, confine myself to the allegations raised in the Petition. In his Petition, the Petitioner has raised the following three complaints:

- a) That the Petitioner participated in widespread voter bribery which improperly influenced the voters.
- b) That the Petitioner's agents were denied access into polling stations by the 3rd Respondent's Officers in collusion or under instruction from the 1st Respondent.
- c) That the Respondents managed to engage in massive transfer of voters to Suswa ward against their wishes.

Voter Bribery

35. In relation to voter bribery, the Petitioner made an allegation that the Petitioner was bribing voters in the queue with Kshs 500. When cross examined by Mr. Kiarie for the 1st Respondent, the Petitioner(Pw1) stated that he visited Suswa Primary School polling station at 7 am and stayed there for 20 minutes. He further stated that he did not witness the 1st Respondent bribe the voters and was only informed by his agents. When further cross examined by Counsel, he stated that his agents reported to the police officers present but the police officers did not take any action. When cross examined by Ms. Karanja for the 2nd and 3rd Respondents, Pw1 stated that he did not witness the 1st respondent bribe voters and did not witness any commotion. In this regard, the evidence by Pw1 was mere hearsay and was not sufficient to prove the allegation of bribery.

36. Pw2, pw3, pw4 and pw5 in their sworn affidavits did not mention any allegation of bribery. In accordance to Pw1, the alleged bribery of voters occurred at Suswa Primary School polling station. Pw1 stated that he was informed of this vice by his agents on the ground. He further stated, when cross examined, that his agent, one Mukwe(Pw5) was his agent at Mpeuti primary School polling station and not at Suswa Primary School as stated in his Petition at Paragraph 7 which he admitted was a mistake. The Respondents rely on the particulars of Agents at Mpeuti Primary School (Exhibit no. "KL4" at Page 34 of the 1st Respondent's Response) which shows the name of Pw5 as the last name in the list and who entered the polling station at 8:14am. When further cross examined, Pw1 stated that his agent at Suswa primary School polling station, where the bribery allegedly took place, did not swear an affidavit as she was threatened not to give evidence. DW6, Parkire Joseph Lemeloi, was an agent for the NASA and had been posted at Suswa Primary School Polling Station. He stated that at about midday, the 1st Respondent came to the station and informed him that voting was progressing well and at no time did the 1st Respondent leave his car. The 1st Respondent denied bribing voters and also denied influencing voters in any way to vote for him.

37. Bribery of voters is an election offence. **Section 9(1)** of the **Election Offences Act, 2016** provides that:

“A person who, during an election period—

(a) directly or indirectly offers a bribe to influence a voter to—

(i) vote or refrain from voting for a particular candidate or political party;

(ii) attend or participate in or refrain from attending or participating in any political meeting, march, demonstration or other event of a political nature or in some other manner lending support to or for a political party or candidate;

(b) in any manner unlawfully influences the result of an election;

(c) directly or indirectly, in person or by any person on his behalf, in order to induce any other person to agree to be nominated as a candidate or to refrain from becoming a candidate or to withdraw if they have become candidates, commits an offence.”

38. Mr. Kiarie for the Petitioner submits that It was imperative that the Petitioner proved that bribes were offered by the 1st Respondent or his agent(s) acting at his behest and received by voters; the 1st Respondent intending to influence them to vote in a particular manner. Counsel referred the Court to the decision of Hon. Anyara Emukule J.in the case of **Karanja Kabage v Joseph Kiuna Kariambegu Nganga & 2 others [2013] eKLR**; at para 11.03.4. where the Court stated;

“From the above holding I find that for an offence of bribery to be proven in relation to an election petition, it has to be shown that a bribe was offered and received with an intention to influence a voter to vote for a particular candidate. The evidence on which such a finding can be made has to be conclusive and it is not open for the court to make presumptions without a clear and concise basis. In Ntwiga v Musyoka & 3 others (No 2) (2008) 2 KLR (EP) 276

“It was held in Election Petition No 9 of 1983 Mohamed Jahazi –v- Shariff Nassir A Taib again quoting Halsbury’s Laws of England 3rd edition vol 14-page 222 paragraph 384 on:

“Proof of Bribery: Due proof of a single act of bribery by or with the knowledge and consent of the candidate or his agents however insignificant that act may be, is sufficient to invalidate the election. The judges are not at liberty to weigh its importance, nor can they allow any excuse, whatever the circumstances may be, such as they can allow in certain conditions in cases of treating or undue influence by agents. For this reason clear and unequivocal proof is required before a case of bribery will be held to have been established. Suspicion is not sufficient and the confession of the person alleged to have been bribed is not conclusive. Bribery, however, may be implied from the circumstances of the case, and the Court is not bound by the strict practice applicable to criminal cases, but may act on the uncorroborated testimony of an accomplice”.

39. Bribery of voters, being a criminal offence, requires a higher standard of proof. This is proof which can *prima facie* establish the offence of bribery and persuade the Court that there were acts committed intended to influence the voters to vote in a particular manner. In this case, none of the witnesses who were allegedly bribed and or witnessed the 1st Respondents or his agents bribing voters swore an affidavit. The 1st Respondent did not witness the alleged act of bribery and the agents he availed did not aver to the alleged acts. There is also no evidence that the alleged acts of bribery were ever reported to

the police for investigations. It would have helped the Petitioner's case that he or his agents made an official report which was recorded in the Occurrence book but the police failed to take any action. The Petitioner, apart from making wild allegations of massive voter bribery, did not adduce an iota of evidence even to cast aspersions of improper influence of voters through bribery by the 1st Respondent. The Petitioner did not provide a scintilla of evidence upon which the Court could interrogate the allegations and make a finding. There is no evidence, oral or electronic, direct or indirect, of the time the offence was committed, the voters bribed or the amounts used to bribe the voters.

40. In ***John Kiarie Waweru v Beth Wambui Mugo and 2 others Nairobi EP No. 13 of 2008 [2008] eKLR*** Kimaru J. observed as follows;

"In the present petition, it was evident that the petitioner failed to establish to the required standard of proof that the 1st respondent indeed bribed voters and that the said bribery was so pervasive that it influenced the voters to vote in favour of the 1st respondent. Although there was no doubt that PW2 and PW4 were given money by persons who purported to be agents of the 1st respondent, the petitioner offered no evidence to establish to the required standard the nexus between the said persons giving the money and the 1st respondent...PW2 and PW4 were unable to give the names of the persons who allegedly bribed them at Shalom house at Dagoretti Corner. It was therefore difficult for this court to reach conclusion with certainty that the persons who were dishing out money to potential voters at Shalom house were doing so at the behest of the 1st respondent."

41. In view of the foregoing and the evidence on record, I find that the Petitioner has failed to establish the offence of bribery.

Denial of access to the Petitioner's agents to Polling Stations

42. In relation to the allegation of the Petitioner's agents being denied access to the polling stations, the Petitioner's agents swore affidavits to demonstrate the alleged election malpractice. PW2 stated that on the Election day he presented his appointment letter to the Presiding Officer but he was informed that he was not allowed in the voting room since independent candidates are allowed to give one agent. The witness stated that he was later allowed to access the voting room at 12:00 noon though for the two hours he was restrained from accessing the voting room, voting went on without his presence. Mr. Manyange for the Petitioner submits that the agent was denied entry without proper justification since he had all the requisite documents to allow him entry into the polling station. Counsel further submits that the Presiding Officer's statement that all independent agents were represented by one agent has no basis in law, is illegal and irregular, and constitutes an electoral offence contrary to section 13(i) of the Election Offences Act.

43. Dw10, the 3rd Respondent's Presiding Officer at Enariboo Primary School stated that Pw2 was present at the station from the time the station was opened for voting till closure as indicated in the polling station diary. When cross examined by Mr. Kiarie, Pw2 stated that he was only allowed access to the polling station after he called the Petitioner who intervened. When cross examined by Ms. Karanja, Pw2 stated that he entered the polling station at 6pm and did not sign any papers. He, however, further stated that he was denied access to the polling station for two hours. Dw10 annexed the particular of agents in his affidavit (see JO1). In the document, the name of Pw2 appears as an independent agent. I note that at Enariboo primary school polling station, the agents did not indicate the time they entered the polling station. This was an irregularity. However, at the closure of the polling before counting, the agents appended their signatures including Pw2. Pw2, therefore, was not truthful when he stated that he did not sign any papers. I also note that Pw2 did not sign form 36A for Enariboo polling station (see page 85 of the 2nd and 3rd Respondents' response) and therefore did not register any of his complaints.

44. Pw3 stated that he had been appointed as the Petitioner's agent. It was his evidence that on the Election day, the Presiding Officer asked him to produce original copies of the Oath of Secrecy and Appointment letter and he was only allowed to access the voting room at 9:00am after voting had started. It was Pw3's further evidence that he was chased out of the voting room during counting time and he could not access the polling station for the entire period of counting and announcement of votes. To rebut this evidence, Dw8, the 3rd Respondent's Presiding Officer at Oloitip Primary School stated that Pw3 was present at the polling station as early as 5:00am and signed the polling station diary as indicated in the polling station diary for Oloitip Primary School code 045. Dw8 further stated that the said Joel Tuanae Partoip also signed the polling station diary before counting started and after counting of the votes. When cross examined by Ms. Karanja, Pw3 stated that he arrived at the polling center at 6am and was only allowed entry to the polling station at 9am after engaging the Presiding officer in an argument. He further stated that he presented the original Oath of Secrecy but had only carried a copy of his appointment letter. Dw8, has annexed the poll day diary for Oloitip Nursery Polling station code 045 (see annexure DKL1). In the diary, Pw3 name appears as the first in the list with the agent having signed in at 5am. The agent also signed the certificate of closure before counting. Pw3 did not deny his signature appearing in the poll day diary and did not formally register the complaint of being denied access in form 36A or through any other media.

45. Pw4 stated that on the Election day the Presiding Officer denied agents of independent candidates' entry to the polling station demanding that only one agent of the independent candidates could access the polling station. To rebut this evidence, Dw9, the 3rd Respondent's Presiding Officer at Mpeuti Primary School, stated that Pw4 was the first to sign the polling station diary at 5:30am and voting started at 6:00am and not at 10:00am as claimed by Pw4. He also stated that Pw5 was present at the station from 8:00am when he reported. It was his evidence that after the closure of the counting of votes all the agents present (including Dennis and Mukwe) signed form 36A and confirmed that the votes counted were correct and each candidate allocated the exact votes he or she garnered. When cross examined by Mr. Kiarie, Pw4 stated that he arrived at 6am and ballot boxes arrived at 7am and he was allowed to enter. He further stated that Pw5 was only allowed to enter the polling station when he left the polling station at 1pm. Dw9 sought to rely on the Poll day diary annexed in his affidavit. In the diary, the names of pw4 and Pw5 appear. Pw4 signed in at 5:30am while Pw5 signed in at 8:14am. Dw4 confirmed that he signed the documents including the Certificate of closure of the poll before counting.

46. One, Kasankui Ole Mututua, who swore an affidavit but was not availed for cross examination, also alleged that he was denied access to the polling station. His affidavit, which is on record, is diminished in evidentially weight and lacks in probative value and proof. In **Josiah Taraiya Kipelian Ole Kores v Dr. David Ole Nkediye & 3 Others, Election Petition (Nairobi) No. 6 of 2013**, the Court held as follows:

"I now turn to the issue of the Petitioner failing to testify. I find fault with the Petitioner's argument that there is no rule in law or evidence that requires verbal evidence for an affidavit to be deemed credible. In my opinion, an election petition is no ordinary suit and the facts deponed therein must be interrogated. Such interrogation can only be done by testing the evidence through cross-examination of the deponent. Failure to attend court for the testing of such allegations in such a deposition makes the Affidavit to be just that, mere allegations. It is evidence without any probative value. In my view therefore, it was imperative for the Petitioner to have testified during the hearing of this Petition given that he was responsible for its institution and had made adverse claims against the Respondents. On the day he was supposed to testify, he sought and found comfort in a trip to South Africa and sought to have his Affidavit admitted without cross-examination. That won't do. The allegations remained just that, bare allegations not proved."

47. Mr. Manyange submits that the High Court has established the crucial aspect of representation by

agents and relies on the case of ***Richard Nchapi Leiyagu v Independent Electoral and Boundaries Commission & 2 others [2013] eKLR***. Where the Court stated;

From the evidence, it is clear that some if not the majority of the Petitioner's agents were locked out from the polling stations. The presence and participation of party or candidate's agents in an election process is a crucial and fundamental step in ensuring that an election is free and fair. For an election to be said to be credible, transparent and verifiable, the participation of agents is crucial. Indeed, their presence and signing of Statutory Form 35 is but a legal requirement under Regulation 62 of the Regulations.

48. Regulation 62(1) of the Elections (General) regulations, 2012 (hereinafter "*the regulations*") names authorized agents among the people to be allowed in a polling station. An authorized agent must possess accreditation documents namely, the letter of appointment from his party or the candidate and the Oath of Secrecy from the Commission. Regulation 62(3) provides that the absence of agents shall not invalidate the proceedings at a polling station. The presiding officer shall therefore carry on the polling exercise even where all the agents or some of them are not present. This provision does not give the presiding officer the license to bar or remove authorized agents from the polling station.

49. The attendance of agents in a polling station is regulated under Regulation 74 thus;

"The presiding officer shall not be obliged to admit more than one agent of any political party, candidate or referendum committee, as the case may be to the counting venue."

50. The 2nd and 3rd Respondents submit that even if the agents of the Petitioner allege that they were absent, there was no evidence to show that the agents for the other parties were not present. Counsel further submits that no complaint was lodged at the polling station and therefore these allegations are baseless and that in any event, the Petitioner's agents signed form 36A and did not record any complaint therein. Counsel urges the Court to dismiss this allegation and relies on the case of *Richard Nchapi Leiyagu vs IEBC and 2 others(supra)* where Justice A. Mabeya stated that;

"In any event the agents signed the form 35 and did not record any complaint therein. I am not satisfied that this complaint was proved to the required standard."

51. In this case, there is evidence that the presiding officers indeed allowed more than one agent for the Petitioner, notably at Mpeuti Primary School polling station. The presiding Officer was not obliged to admit more than one agent. Having considered the evidence on record, I find that, substantially, the Petitioner's agents were allowed access to the polling station contrary to the allegations made. They signed most of the poll day registers to signify their presence at the polling stations. The Petitioner has not adduced evidence to prove that the signatures appearing against the names of his agents were forged and or the times indicated were erroneous or fraudulently entered. The agents did not also formally register their complaints with the Presiding Officers and the Returning officer. The various presiding officers acted within their mandate in only allowing duly accredited agents who possessed original letters of appointment and Oath of secrecy as well as IEBC badge. The 3rd Respondent has demonstrated that the polling diary registers were made available and most of the agents who were accredited and authorized signed the necessary forms. Failure by any of the agent to agree with the declared results and sign form 36A is not a sufficient ground to nullify the results. The only irregularity noted was failure by the Presiding Officer at Enariboo polling station to have the agents indicate the time they entered the polling station.

Massive transfer of voters to Suswa Ward.

52. The Petitioner stated that the agents of the 3rd Respondent managed to transfer voters massively to Suswa Ward against their consent. This, in accordance with Petitioner, was achieved during the voters' verification exercise whereby the voters were deceived into signing transfer forms. The Petitioner further stated that the said voters were then bribed to cast their votes for the 1st Respondent. When cross examined, the Petitioner stated that during the verification exercise, he was informed that voters from other wards within Narok County and yonder, were persuaded to transfer to Suswa ward on the promise and or inducement that they were to receive "Msaada" or "dunga" (interpreted as bursaries or monetary help). The 1st respondent denied have given any bursaries as an inducement and stated that the bursaries were processed in the course of his expiring term as County Representative and were issued in the ordinary discharge of his official functions.

53. The Petitioner further stated that during the voting day he met several voters who were denied the chance to vote on account that their names were registered in other stations. The Petitioner, however, failed to adduce evidence relating to the number of the voters who were transferred to Suswa ward during the verification exercise. He was not able to recall the period that the verification exercise was conducted by the 3rd Respondent. Further, none of the voters allegedly induced to transfer to Suswa ward or transferred to Suswa Ward against their consent and induced through bribery to vote for the 1st respondent, swore affidavits in support of the allegations.

54. Pw5 stated that the presiding officer allowed voters who came from far to vote first and that he witnessed two vans ferrying voters to the polling station to vote. When cross examined, he did not provide details of the vans including the registration numbers. It could be possible that there were vans which transported voters to the particular polling station. However, the Petitioner needed to provide a nexus between the 1st Respondent and the persons who transported the voters. I take into account that there were other candidates participating in the subject election and to make an assumption that the voters transported were ferried by the 1st Respondent or his agents would be largely speculative. Pw3, who was the Petitioner's agent at Oloitip Primary School Polling Station, did not also provide any helpful evidence to indeed prove that the many people he saw, allegedly from different counties, had been transferred to Suswa Ward against their wishes.

55. Dw11, who was the Returning Officer for Narok East Constituency, explained to the Court that the only voters who were allowed to transfer were the ones who expressed their wish and consented to the transfer by signing the relevant forms. Counsel for the 2nd and 3rd Respondent submits that transfer of voters is a process whereby the voter is required to submit a photocopy of the document one used in the last registration exercise fills the request for transfer form and wait to be effected after the registration exercise. Counsel urges that the Petitioner did not establish how the transfer took place and who did it and testified that the 1st Respondent did not or is not mandated with the responsibility of registering voters.

56. The 1st Respondent's Counsel submits that the Petitioner has not challenged the authenticity of the Register of Voters and only contention is that 'strange faces' voted in the Elections. Counsel further submits that no evidence has been tendered that the 1st Respondent; a candidate in the MCA Elections had command over the 3rd Respondent; an Independent Commission constitutionally-charged with the conduct of elections and urges that no evidence has been adduced to show any form of collusion between the 1st Respondent and the 3rd Respondent. Counsel relies on the case of **John Lokitare Lodinyo v Mark Lomunokol & 2 others [2013] eKLR**, where the Petitioner therein alleged that the 1st Respondent ferried unregistered voters into Kacheliba Constituency and that these unregistered voters were unlawfully allowed to vote. In dismissing these claims, the Court took issue with the scanty evidence that was adduced in support thereof.

57. From the above analysis, I find and the Petitioner did not prove, to the required standard, that the 3rd Respondents' agents in, collusion with the 1st Respondent, participated in massive voters transfer to Suswa Ward.

Other Election Malpractices

58. In the course of hearing, the Petitioner witnesses made further allegations that include Pw5's assertion that the presiding officer had, at Mpeuti Primary School Polling station deducted 15 votes cast in favour of the Petitioner and added them to Respondent. The Petitioner's witnesses also testified that illiterate voters were assisted by the presiding officer in the absence of the persons accompanying them and the party/ candidates' agents. These allegations were not made in the Petition but through the witnesses' affidavits.

59. Be that as it may, I have considered the evidence adduced. Pw5, did not register a formal complaint that the Petitioner's votes were unfairly deducted. He also signed form 36A for the polling station and did not register any dissatisfaction with the vote counting. The Petitioner did not make a prayer for recount or scrutiny. In the circumstances, the allegation lacks any material proof and falls on its face.

60. On the issue of illiterate/assisted voters, the evidence on record is scant, Pw4 alleged that some assisted voters were denied the company of the persons accompanying them. However, no one swore an affidavit to confirm that he was denied a chance to accompany an illiterate voter or any other person requiring assistance. Regulation 72(1) states as follows:

"on the application of a voter who is by reason of disability or being unable to read or write, and therefore unable to vote in the manner prescribed in these regulations the presiding officer shall permit the voter to be assisted or supported by a person of the voter's choice, and who shall not be a candidate or an agent"

61. I find the allegations of the malpractices not proven to the required standard.

Whether the illegalities, irregularities and election offences (if any) affected the integrity and outcome of the Election of Member of County Assembly, Suswa ward

62. Counsel for the 2nd and 3rd Respondents submits that the Petitioner has failed to establish that the irregularities and breaches of the law complained of significantly affected the outcome of the election. Counsel relies on the case of ***Raila Odinga & 5 others vs IEBC [2013] eKLR*** (supra) where the Supreme Court held that:

"the 1st Petitioner also cited variations in the number of registered voters as a factor of illegality in the conduct of the presidential election. We have however found no major anomalies between the total of registered voters and the total tally in the declaration of presidential Election results made by the 2nd Respondent on 9th March 2013. Although as we find there were many irregularities in the data and information captured during the registration process, these were not so substantial as to affect the credibility of the electoral process and besides no credible evidence was adduced to show that such irregularities were premeditated and introduced by the 1st Respondent for the purpose of causing prejudice to any particular candidate"

63. I have already made several findings and conclusions on the evidence adduced. The Petitioner has failed to prove the allegations of the malpractices which are generalized and devoid of any substance. The only irregularity pointed was the failure by Dw10 to ensure the agents indicated the time they

entered the polling station before voting begun, This, in my view, was an isolated incident which may pass off as an excusable human omission and may not warrant an impeachment of the entire process.

64. In the case of **John Fitch vs. Tom Stephenson & 3 Others (2008) EWHC 501(QB)** it was held:

“.....the courts will strive to preserve an election as being in accordance with the law, even where there has been significant breaches of official duties and election rules, providing the results of the election was unaffected by those breaches This is because where possible, the courts seek to give effects to the will of the electorate”

65. In the case of **Dorothy E. Brownton vs. Jean Hart Kangas & Others suit no.CI 98 – 01 – 10265, Queen's Bench Division, Manitoba** it was held in regard to elections:

“When interpreting legislation relating to elections, one may reasonably conclude the primary purpose is to ensure that we have a free, open and properly conducted democratic elections. If there have been irregularities, these should be exposed to the view of the general public through the returning officer and through the candidates and their agents involved in the recounts.”

66. Section 83 of the Elections Act 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.

67. In the case of **Mohamed Ali Mursal v Saadia Mohamed & 2 Others [2013] eKLR S.N. Mutuku J** stated:

“I agree with the court in Joho case above in that there are two categories of irregularities, the innocent ones and deliberate ones. I wish to add that it is upon the Petitioner to prove that the irregularities were made deliberately with the sole purpose of denying him victory. I wish to state that the elections held on 4th March 2013 were complex and some errors like the ones committed in this case can be excused unless there is proof that there was a deliberate attempt to scuttle the process to the detriment of the Petitioner.”

68. In **Morgan and others v. Simpson and another [1974] 3 All ER** the court held that:

“An election court was required to declare an election invalid if the irregularities in the conduct of the election had been such that it could not be said that the election had been ‘so conducted as to be substantially in accordance with the law as to elections, or if the irregularities had affected the results.’”

69. Upon analysis of the evidence adduced, I find that the election was conducted substantially in accordance with the principles spelt out in the Constitution and the laws relating to elections. The Petitioner did not provide cogent and credible evidence of any election malpractices which affected the results as declared by the 2nd Respondent.

DISPOSITION

70. In view of the foregoing, it is my finding that the election for Member of County Assembly, Suswa Ward was conducted in accordance with the principles enunciated by the Constitution and the various Election laws. The election was free and fair and by secret vote. The Petitioner has failed to discharge his burden of proof as it relates to the malpractices he has pleaded in his Petition. It is therefore my

finding that the 1st respondent was duly elected as Member for County Assembly Suswa Ward in Narok East Constituency within Narok County and the Petition herein is hereby dismissed for lack of merit.

COSTS

71. Section 84 of the Election Act 2011 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 2017 provide that the court shall at the conclusion of an election petition, make an order specifying the total amount of costs payable and the person by and to whom the costs shall be paid. Costs should be reasonable. I have considered the pleadings filed, the applications heard and the length of time, research and submissions made. The Superior Courts have made awards ranging from 3 Million to 10 Million in Petitions filed in the High Court. I award the Respondent costs of Kshs 1, 200,000/- to be shared equally between the 1st Respondent on the one hand and the 2nd and 3rd Respondents on the other hand. I also order the security of costs deposited be released in the share of Kshs 50,000/- to the 1st respondent and Kshs 50,000/- to the 2nd & 3rd Respondents.

72. I make the following Consequential Orders;

- a) That a Declaration be and is hereby issued that the 1st Respondent was duly and validly elected as the Member of County Assembly- Suswa Ward, Narok County;
- b) That a Certificate of validity do issue to the 1st Respondent and be transmitted to the Speaker of the County Assembly –Narok County; and
- c) That the Petition is hereby dismissed with costs to the Respondents as determined above.

JUDGMENT DATED AND DELIVERED AT NAROK THIS 15TH DAY OF FEBRUARY 2018

H.M. NG'ANG'A

SENIOR RESIDENT MAGISTRATE

IN OPEN COURT IN THE PRESENCE OF:

FOR PETITIONER: MR. MANYANGE

FOR 1ST RESPONDENT: MS. KARANJA H/B FOR MR. KIARIE

FOR 2ND & 3RD RESPONDENTS: MS. KARANJA

COURT CLERK: SHADRACK KASASO



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