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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

ELECTION PETITION NO. 2 OF 2017

WASHINGTON JAKOYO MIDIWO.....PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL

BOUNDARIES COMMISSION.....1ST RESPONDENT

THE RETURNING OFFICER

GEM CONSTITUENCY.....2ND RESPONDENT

HON. ELISHA ODHIAMBO.....3RD RESPONDENT

JUDGMENT

1. The Petitioner was a candidate for Member of the National Assembly for Gem Constituency in Siaya County in the election held on 8th August 2017. He contests the results declared by the Returning Officer, 2nd Respondent in this petition, on 9th August 2017. While acknowledging that the voting exercise was generally peaceful, he contends that the 1st Respondent through its Returning Officer, the 2nd Respondent, failed to ensure that the elections and the subsequent announcement and declaration of results were within the scope of the law. He contends that, he, rather than the 3rd Respondent won the election with a landslide and that the declaration of the 3rd Respondent as the duly elected Member of the National Assembly for Gem Constituency is therefore invalid.

2. The gist of the Petition is that the election was not free and fair as required by the Constitution and that it was riddled with massive illegalities, procedural irregularities, systematic failures and numerical discrepancies whose cumulative extent and degree fundamentally affected the credibility and/ or legitimacy of the election both qualitatively and quantitatively and does not reflect the will of the people of Gem.

3. In summary the Petition is based on the following grounds;

1. APPOINTMENT OF CONSTITUENCY RETURNING OFFICER AND PRESIDING OFFICERS WAS ILLEGAL.(Paragraphs 13-14)

The petitioner contends that the appointment of the of the Presiding Officers as well as that of the 2nd Respondent as Returning Officer in this election in this election was not done in an open, transparent and participatory manner as required under Regulation 3(2) and 3(4) of the Elections (General) Regulations, 2012.

2. OUTRIGHT BIAS BY THE RESPONDENT IN THE RUN UP TO ELECTIONS. (Paragraphs 15-17)

On this ground the Petitioner states there was a close relationship between the 2nd Respondent who was

the Returning Officer for the election, and the 3rd Respondent and that the 2nd Respondent was and still is a director of a company known as Jamat Investments Limited, which had business dealings with the County Government of Siaya whose head the Governor is his arch rival but a political ally of the 3rd Respondent; that moreover the 2nd Respondent's co-Director in the said company is a business partner of a chief campaigners for the 3rd Respondent hence potential and real bias cannot be gain said. The Petitioner contends that although this was brought to the attention of the County Returning Officer his request to have the 2nd Respondent removed or transferred elsewhere was not heeded.

3. LEGAL AND PROCEDURAL FLAWS, ILLEGALITIES AND /OR IRREGULARITIES IN THE COLLATION, TALLYING, VERIFICATION AND TRANSMISSION OF ELECTION RESULTS- THAT RENDERED THE PURPORTED ELECTION A NULLITY. (Paragraphs 18-23)

The Petitioner states that Articles 81 and 86 of the Constitution and Section 39 of the Elections Act, No. 24 of 2011 that require the counting, tabulation and the transmission of results to be prompt and to be done in an open and accurate manner were disregarded. He accuses the 1st and 2nd Respondents of outrightly manipulating the results either deliberately or negligently and contends that omission to electronically transmit results alongside the prescribed forms violated the Constitutional principles and the law.

4. VOTER SUPPRESSION OF PETITIONER'S ELECTORS INVALIDATING THE ELECTORAL OUTCOME. (Paragraphs 24-28)

The Petitioner contends that the electors right to freely and without undue influence vote for the candidate of their choice was suppressed. He states that the 3rd Respondent without sanction from the 1st and 2nd Respondent breached his right under Article 38(3) (c) of the Constitution to be elected fairly and objectively.

5. DELIBERATE FAILURE TO ISSUE THE PETITIONER'S AGENTS WITH ACCREDITATION BADGES, CAUSING THEM TO BE LOCKED OUT OF POLLING STATIONS. (Paragraphs 29-30)

The Petitioner contends that the 2nd Respondent dilly dallied and refused to issue his agents with accreditation badges as a result of which they were denied access to the polling stations on the day of the election. He contends that it was only upon his and his Chief Agent's intervention that the agents were allowed in and this between 2 to 5 hours into the voting by which time ballot stuffing had occurred and illiterate and elderly voters who indicated their wish to vote for him had their ballots marked in favour of the 3rd Respondent.

6. CHASING AGENTS FROM POLLING STATIONS LEADING TO STUFFING OF BALLOT BOXES AND COUNTING GOING ON IN THEIR ABSENCE. (Paragraphs 31-32)

Here the Petitioner states that his agents were forcefully evicted from the polling stations for anything between 30 minutes and 2 hours after the voting and before the counting started and that during that time the agents and staff of the 1st Respondent would stuff ballot papers and tamper with the counting process. He states that the ballot boxes for Mwadi Primary School polling Station and Kogilo Primary School Polling Stations had their apertures completely broken or missing by the time his agents were allowed to return.

7. MODE OF COUNTING BALLOT PAPERS DID NOT COMPLY WITH REQUIREMENTS OF THE ELECTION ACT. (Paragraphs 31-32)

The Petitioner states that in most polling stations, the staff (Presiding Officers and Clerks) of the 1st Respondent proceeded to count the votes without openly displaying the marked ballots to the agents present. He also states that whereas the 1st Respondent had provided lamps for use during the counting, the lighting was not sufficient and as the agents had been asked to sit 5 meters away they could not clearly see the markings on the ballot papers. He alleges that his agents' pleas to move closer to the counting desk fell on deaf ears. In paragraphs 10-11 of his affidavit he names the affected polling stations as Kokwiri, Komuok, Gogo, Musembe, Unyonga, Tatro and Siala.

8. COLLUSION BY STAFF OF THE 1ST RESPONDENT TO ENCOURAGE A SPECIFIC PATTERN OF VOTING. (Paragraphs 35)

The petitioner states that many people would walk into the polling stations and state they wanted to vote six piece, 'Raila and his people' or 'six oranges' and that the clerks would allow voting in that manner in clear violation of the law. According to him the voters ought to have named the specific candidate they wished to vote for. He names the affected polling stations as Sirandu, Uhonya, Sorodha and Mularekaruwa (paragraph 36 of the supporting affidavit).

9. UNAUTHORIZED PERSONS ALLOWED TO SIGN FINAL RESULTS. (Paragraphs 36-37)

Here the petitioner avers that one Douglas Otiato purported to sign Form 35B on behalf of the Orange Democratic Party which was unlawful as he was not an agent of the party nor was he accredited. He further states that the said Douglas Otiato had not attended the trainings by the 1st Respondent and that in any event he could not have lawfully signed the Form as the 3rd Respondent, that party's candidate, already had an agent. He urges that the form be invalidated.

10. VARIANCE BETWEEN THE DECLARED RESULT AND THE ACTUAL RESULTS AS TALLIED BY THE PETITIONER. (Paragraphs 38-45)

The Petitioner states that having invested heavily in agents in all the polling stations he was able to get parallel results in the original Forms 35A and that upon reconciling those forms with the Form 35A and the Form 35 B used by the 1st Respondent to declare the result he discovered massive numerical discrepancies that fundamentally affected the final result to his disadvantage. He adds that a simple collation of the results in Forms 35A demonstrates that he (the Petitioner) won the elections. He further states that in Central Gem Ward 15 Form 35A were not stamped and that in Karariwu stream 1 and 2 the forms were missing altogether while in Migosi the figures were altered to his disadvantage but to the advantage of the 3rd Respondent. He states that in North Gem Ward 19 Form 35A were not stamped and that the results for Maliera Polling Station were altered to favour the 3rd Respondent. He alleges that in West Gem Ward 14 form 35A were not stamped and that the results for Uriri 2 and for Ulamba 2 were altered to his detriment. He further contends that Yala Township Ward had 15 unstamped forms 35A and that the results for St Teresa's 2 and Yala Township 2 were also altered to his detriment. That in East Gem Ward a total of 13 forms 35A were not stamped and that votes cast in Sagem 3 and Sagem 2 were in excess of the registered voters. In South Gem Ward he alleges 22 forms 35A were not stamped and that his votes at Malele 2 were deleted while his votes in Aluor Girls differed in form 35A and form 35B. He contends that just by looking at the sampled forms one can see a huge variance in the 3rd Respondent's votes and hence he could not have been validly elected. He describes the declaration of the 3rd Respondent as the winner of this election as a criminal act. He alleges that alteration was effected in all six (6) wards and states this goes to prove collusion between the Respondents in altering the correct results in favour of the 3rd Respondent.

11. ALTERATION OF VARIOUS FORM 35AS. (Paragraphs 46-50)

The Petitioner contends that the statutory forms were altered and the number of votes changed in favour of the 3rd Respondent without any countersigning by the officers of the 1st Respondent. He also contends a total of 98 Form 35A were not stamped, signed or they bore different signatures. He urged that all those unsigned and unstamped forms be nullified and declared void. In paragraph 37 of the affidavit he deposes that his votes were reduced and added to the tally of the 3rd Respondent.

12. TRANSMISSION OF RESULTS COMPLETELY FAILED TO CONFORM TO BOTH THE LETTER AND THE SPIRIT OF THE CONSTITUTION OF KENYA, 2010 AND THE ELECTION ACT AND RULES (Paragraphs 51-55)

On this ground the Petitioner avers that the failure of the electronic transmission of results at the polling stations due to poor network and the subsequent migration of the Presiding officers to other locations so as to send the results was unlawful. He contends that the failure gave rise to massive rigging and manipulation of the results as the agents would not be there to verify that the results eventually sent electronically were the correct results.

13. VOTER INTIMIDATION, UNDUE INFLUENCE, BRIBERY AND/OR FLAGRANT COMMISSION OF ELECTORAL OFFENCES BY THE 3RD RESPONDENT. (Paragraphs 56-60)

The Petitioner states that the 3rd Respondent incited his supporters to commit acts of violence against those of the Petitioner and that two were even threatened with death if they continued supporting his bid which acts were reported to Yala Police Station under OB no. 16/7/2017. He contends further, that the 3rd Respondent moved around the Constituency giving bribes to induce voters hence influencing the voting.

4. RESPONSE TO THE PETITION

1ST AND 2ND RESPONDENTS CASE:

The 1st and 2nd Respondent filed a joint response dated 17th September 2017 in which they denied all the allegations leveled against them by the Petitioner. It is their contention that the elections were conducted in accordance with the Constitution, the Elections Act and the rules and regulations thereunder, the Independent Electoral and Boundaries Commission Act 2011 and all other material laws. They also contend that the elections were free and fair and that they were a true reflection of the will of the people of Gem.

5. The 3rd Respondent's response is dated 19th September 2017 and is also a denial of all of the allegations by the Petitioners. He contends that he won the Gem Constituency Parliamentary Election with a landslide having garnered 34,963 votes against the Petitioner's 29,374 votes. He also avers that the elections were free, fair and transparent.

6. At the hearing of the petition the Petitioner called 10 witnesses, the 1st and 2nd Respondents 6 witnesses and the 3rd Respondent 5 witnesses. Save for the Petitioner, who was examined in chief, all other witnesses adopted their affidavits and were then cross examined. Learned Counsel summed up their cases by way of written submissions which they then highlighted orally on 5th January 2018. I shall advert to the evidence and submissions as I consider the issues for determination.

7. In a ruling dated 30th October 2017 this court ordered the 1st and 2nd Respondents to supply the Petitioner with the data in the KIEMS (the Kenya Integrated Elections management System) kits for this election. The Petitioner's application for recount, tallying and scrutiny was however declined.

8. ISSUES FOR DETERMINATION

- i. Whether the election was free, fair, transparent, impartial and accountable.**
- ii. Whether the votes cast were counted, tabulated, tallied and announced in accordance with the Constitution, the Elections Act and regulations thereunder.**
- iii. Whether the transmission of results from the polling stations to the Constituency Tallying Center was conducted in accordance with the law and more so whether it was accurate, secure, open, accountable, verifiable and prompt.**
- iv. Whether there were illegalities and irregularities in the conduct of this election and if so whether the same affected the result of the election.**
- v. Whether the 3rd Respondent was validly declared as the winner of this election.**
- vi. Who bears the costs of the petition.**

9. DETERMINATION

The right of every citizen to **free, fair and regular** elections is guaranteed under **Article 38(2)** of the **Constitution**. **Article 38 (3)** guarantees the right, **(b) to vote by secret ballot** and **(c) to be a candidate** for public office and if elected to hold that office.

10. Article 81 of the Constitution sets out the general principles of our electoral system. Those principles require that the electoral system put in place comply inter alia with:

- a. “the freedoms set out in Article 38,**
- b. free and fair elections, which are-**
 - i. by secret ballot;**
 - ii. free from violence, intimidation, improper influence or corruption;**
 - iii. conducted by an independent body;**
 - iv. transparent; and**
 - v. Administered in an impartial, neutral, efficient, accurate and accountable manner.”**

11. Article 86 of the **Constitution** on the other hand imposes an obligation on the Independent Electoral and Boundaries Commission, the 1st Respondent herein, 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 election materials.”

12. The above principles are given effect in the **Elections Act** which has elaborate provisions for elections at Part 111. More particularly **Section 38** of the **Elections Act** obligates returning officers to conduct elections in accordance with the regulations relating to elections. Those regulations are, in this case, the **ELECTIONS (GENERAL) REGULATIONS, 2012**.

Whereas **Article 105(1) of the Constitution** vests this court with jurisdiction to determine whether the 3rd Respondent was indeed validly elected that jurisdiction is not to be exercised so as to usurp the right of the people to choose their leaders. The will of the people must always prevail and for that reason an election court will invalidate an election only if Section 83 of the Elections Act is satisfied. That section, before it was amended by the **Election Laws (Amendment) Act, 2017** which came into force on 2nd November 2017 and which is therefore of no effect to this petition, provided:-

“ 83. 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.”

13. The purport of the above section has now been settled in **Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 4 others & Attorney General & Another EP No. 1 of 2017**, where the Supreme Court Judges without departing from their interpretation of the section in **Gatirau Munya v Dickson Mwenda Githinji and 2 Others (2014) eKLR** held:

“[211] in our respectful view, the two limbs of Section 83 of the Elections Act should be applied disjunctively. In the circumstances, a petitioner who is able to satisfactorily prove either of the two limbs of the Section can void an election. In other words, a petitioner who is able to prove that the conduct of the election in question substantially violated the principles of the Constitution as well as other written law on elections, will on that ground alone, void an election. He will also be able to void an election if he is able to prove that although the election was conducted in accordance with the principles laid down in our Constitution as well as other written law on elections, it was fraught with irregularities and illegalities that affected the result of the election.”

For this petition to succeed therefore this court must be convinced either that this election was not conducted in accordance with the principles laid down in the Constitution and the law or that it was plagued with so many irregularities and that those irregularities affected the results. Given that the presumption regarding elections is that the same are valid unless otherwise proved the onus to prove that this election did not meet the requirements of the Constitution and the law or that it was beset by irregularities that should result in this court invalidating the election lies with the Petitioner. In other words the burden of proof lies with the Petitioner.

14. In **Raila Amolo Odinga & Another V Independent Electoral and Boundaries Commission & 4 Others & Attorney General & Another Petition No. 1 of 2017 (2017) eKLR** the Supreme Court citing the Canadian Supreme Court in **Opitz v Wrzesnewskyj** and reiterating its own position in **Raila Odinga and Others v Independent Electoral and Boundaries Commission and 3 Others Petition No.5 of**

2013 (2013) eKLR pronounced itself as follows on the burden of proof:-

“[131] Thus a petitioner who seeks the nullification of an election on account of non-conformity with the law or on the basis of irregularities must adduce cogent and credible evidence to prove those grounds[49]”to the satisfaction of the court.”[50] That is fixed at the onset of the trial and unless circumstances change, it remains unchanged. [51]....”

15. It is recognized however that occasionally the burden of proof may shift to the Respondent(s). Those occasions were enumerated in **Raila Amolo Odinga & Another V Independent Electoral and Boundaries Commission & 4 Others & Attorney General& Another Petition No. 1 of 2017 (supra)** where the Supreme Court stated-

“[132] Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and “remains constant throughout a trial [52] with the plaintiff, however, *depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting*” [53] and “*its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.*”[54]

[133] It follows that once the court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most case the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce factual evidence to prove his/her allegations of breach, then the burden shifts and it behoves the respondent to adduce evidence to prove compliance with the law....”

16. It is therefore clear in my mind that the Petitioner herein bears the initial burden of proving the allegations in the petition and it is only once he has discharged that burden should this court consider whether the Respondents have adduced sufficient evidence in rebuttal.

17. As for the standard of proof the Supreme Court has in **Raila Amolo Odinga &Another v Independent Electoral and Boundaries Commission &4 Others & Attorney General & Another Petition No. 1 of 2017 (Suppra)** reaffirmed that the same is higher than that in civil cases but lower than in criminal cases save where election offences have been alleged. In so doing the Court held-

“[152] We maintain that, in electoral disputes, 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 beyond reasonable doubt....

[153]..... It must be ascertained, based on the evidence on record, that the allegations made are more probable to have occurred than not.”

18. Having set out the principles governing elections and election petitions I now turn to the issues for determination. I take note that in the submissions Counsel for the Petitioner framed issues for determination otherwise than were presented to this court at the pretrial conference. With due respect however I propose to deal with the issues as framed by the parties at the pretrial and which I have as paraphrased above.

(i) Whether this election was free, fair, transparent, impartial and accountable.

19. In paragraph 7 of the petition the Petitioner avers that during the election most polling stations were opened and closed on time and that although there were a few incidences of disturbances the elections were generally peaceful. In his evidence and more particularly during cross examination he conceded that the 3rd Respondent won this election by a margin of 4000 votes and stated that what he was challenging was the process. He thereafter set out to demonstrate why the election was not free and fair. He stated firstly, that the election was not by secret ballot as voters would openly state that they wanted to vote **“six pieces”, “Raila and his people”** or **“machungwa”** meaning they wanted to vote for **the Orange Democratic Movement Party** candidates. He contended that in so far as this was said openly the election was not by secret ballot. He also stated that there were people intimidating voters to vote six piece and faulted the election officials for encouraging this pattern of voting despite the fact that there were Independent candidates like him. He alleged to have heard the 3rd Respondent using the six piece slogan but stated he did not plead it. He stated that for clarity and to give equal footing to the Independent candidates the proper thing would have been for voters to name the candidates by their names rather than by the name of their party or party symbol.

20. Secondly, he testified the election was not free and fair because the appointment of the 2nd Respondent as the Returning Officer was irregular as it did not comply with **Regulation 3(1) and 3 (2) of the Elections (General) Regulations 2012 in that it was not participatory. He alleged not to have seen the list of the applicants for that position, for presiding officers and for polling clerks although the list should have been supplied to the candidates so that they could raise objections if any. In addition he contended that in so far as he was concerned the 2nd Respondent was never appointed as a Returning Officer but as an Administrative Assistant and even if he was, that appointment was irregular for lack of a formal appointment. He urged this court to distinguish between appointment and gazettelement and hold that the latter on its own does not equal to appointment. He further testified that the 2nd Respondent was biased against him. He testified that his reasons for saying so were firstly that the 2nd Respondent belonged to a rival political camp which fact was manifested by his company doing business with the County Government whose head the Governor was in the same camp as the 3rd Respondent and secondly because the 2nd Respondent had held private meetings with the 3rd Respondent. He stated that although he did not personally witness it, the two of them had been seen at a certain hotel by another candidate in the election, namely Booker Ngesa and that this was communicated to the County Returning Officer but no action was taken.**

21. The Petitioner further testified that the 3rd Respondent not only intimidated voters but that he openly gave out bribes in the run up to the elections. He testified that when he learnt of this he requested one of his supporters to ensure that it was captured on tape. He alleged to have received a WhatsApp clip from one of his supporters which clearly depicted the 3rd Respondent giving money to voters at a rally. He stated that the clip was taken in July 2017 at a place called Ujimbe in Gem Constituency. At the hearing he testified that upon receiving the clip in early October he caused it to be uploaded into a flash disc and into cds by a friend who owns a cyber café in Kisumu. The clip was played in court.

The petitioner also alleged to have personally witnessed violence on the day of the election but stated that he did not plead it. He however stated that one of his supporters, Washington Ochieng Oluoch was accosted and beaten by people believed to have been supporters of the 3rd Respondent.

Still on the issue of the election not being free and fair the Petitioner testified that there were 168 polling stations in the constituency and although he appointed agents in all of them the 1st Respondent did not issue them with accreditation badges and as a result on the day of the election most of them were denied access into the polling stations. He contended that this was intended to allow the other candidates to gerrymander with the ballot boxes. He stated that it took his intervention and that of his

Chief Agent for the agents to be allowed in by which time it was midmorning and voting had considerably taken place. He stated that he had to personally go to Ojola Primary School and Odok Primary School polling stations as the Presiding Officers had adamantly refused to allow his agents access despite him calling them. He further gave evidence that after the polling closed and before counting started his agents were evicted from the polling stations. He contended that this was so as to give room for ballot stuffing. As for the actual counting he testified that his agents were kept five meters from the counting table which made it impossible for them to see the mark on the ballot paper. He gave examples of the polling stations where this occurred as Odok, Komuok and Kojuok.

22. The above allegations paint an election that was so badly conducted that it should not be left to stand. The question however is whether these allegations were proved to the standard required. That standard of proof as earlier discussed being higher than a balance of probabilities but below reasonable doubt save in the case of election offences where the same must be proved beyond reasonable doubt.

23. Among the tenets of free and fair elections is that they must be conducted by an independent body, they must be transparent and they must be administered in an impartial and neutral manner. Indeed the Code of Conduct for Members of the Commission found in the Fourth Schedule of the Independent Electoral and Boundaries Commission Act calls upon employees and members of the Commission to perform the functions of their office impartially and independently. The Code also prohibits its employees and the Commissioners from becoming members of political parties and also provides that a member of the Commission shall not in any way directly or indirectly support a political party or a candidate in an election. . In addition the Public Officers Ethics Act prohibits use of a public office for improper enrichment. The Petitioner contends that these Constitutional tenets were breached as the Returning Officer who is the 2nd Respondent in this case was biased against him.

24. While I appreciate that even a reasonable apprehension of bias would suffice, it is my finding that the allegations of bias have not been proved at all. True, the 2nd Respondent is a director of Jamat Investments Limited and yes the company has been awarded several tenders to supply services to the County Government of Siaya. However there is no evidence that the company won those tenders otherwise than through the laid down regulations or that those awards were courtesy of the 2nd Respondent's office. Neither was it demonstrated that the awarding of those tenders to Jamat Investments Limited was influenced by either the 3rd Respondent or even the Governor. Moreover the 2nd Respondent gave evidence that once he was appointed as a Returning Officer he took a back seat from the company. Apart from saying that the 2nd Respondent is still a Director of the company as he has never resigned the Petitioner did not tender proof of the 2nd Respondent's involvement in the day to day running of the company during the period of this election. There was also no evidence that the 2nd Respondent did business directly or indirectly with the 3rd Respondent and the Governor or that he had any relations with them. As will be seen shortly the allegation that the 2nd Respondent secretly met the 3rd Respondent was not proved. It turned out that **Booker Ngesa** (PW6) who is alleged to have told the Petitioner about the meeting at Madeya VIP Hotel did not see them himself but rather relied on what he was told by someone. When questioned about it he refused to disclose the source of his information. His is therefore evidence of hearsay which in my finding is neither trustworthy nor reliable.

25. It is also my finding that whereas the 2nd Respondent's contract of employment forbids him to do business while in the employment of the Commission the same permits him to be a normal shareholder for investment only. Therefore to assert that he could not even partake of dividends of his investment as a shareholder is stretching the terms of his employment too far. I do not therefore agree with the submission that the 2nd Respondent acted unlawfully by earning dividends from the Company. More importantly there was not even an iota of evidence to suggest that the 2nd Respondent's judgment or decisions either in the period before the election or on the day of the election were clouded with

prejudice against the Petitioner and in favour of the 3rd Respondent There were 168 polling stations in the Constituency and admittedly the Petitioner had an agent in every one of them and there was no evidence that the 2nd Respondent interfered with the voting in any of the polling stations so as to favour or give advantage to the 3rd Respondent. To the contrary we have evidence from **Saulo Owino Liseno (PW8)**, the Petitioner's agent at **Mwadi Polling Station**, that he did not see IEBC favoring anybody (see cross examination by Mr. Were). It is my finding therefore that the Petitioner's apprehension of bias on this account was not reasonable. In any event he told this court that when he encountered problems on Election Day he liaised with the 2nd Respondent and the same were resolved.

26. As regards **Booker Ngesa (PW6)**, it is worth noting that in his affidavit, the only allegation he makes against the 2nd Respondent is that on 2nd August 2017 the 2nd Respondent had planned a meeting with the 3rd Respondent. He deposes:

“4. That on 2nd August 2017, it came to my attention that the Constituency Returning Officer, one Mr. Martin Oloo had planned a meeting with one of the parliamentary aspirants under ODM ticket Mr. Elisha Odhiambo to subvert the will of the people of Gem with a view to rig the said elections.

5. That the Returning Officer organized a meeting between the said candidate and other election officials including the Presiding officers, deputy presiding officer, clerks among others.”

27. Booker Ngesa makes no mention of finding the 2nd and 3rd Respondents at **Madeya VIP Hotel** on 31st July 2017. A reading of paragraph 4 above shows that it is based on what he was told. During cross examination he stated that he learnt about it from a teacher. He however refused to name the teacher saying he could not disclose the source of his information. As stated earlier given that the said teacher was not called as a witness that evidence is hearsay and cannot form the basis to invalidate this election. His allegation that the 2nd and 3rd respondents met at VIP Hotel is contained in a letter he wrote to the County Returning Officer on 2nd August 2017. Notice however that he does not state that he was in that hotel on 31st July 2017 or that he personally saw them which is what he alleged in court. In my opinion it is doubtful that he did. If he did why did he not expressly state it in the letter and depose it in the affidavit? The answer is that it was most likely untrue. A closer reading of his affidavit and the letter annexed thereto reveals that this witness was reacting to rumours. His evidence falls below the standard required to prove the allegation he makes let alone bias.

28. The petitioner also alleged that the recruitment of the 2nd Respondent, presiding officers and clerks was not transparent and that the list of those the Commission proposed to recruit was not availed to him as is required under **Regulations 3(2) and 3(4)** of the **Elections (General) Regulations, 2012** and therefore the election breached the principles in the Constitution and the law. **Regulation 3(2)** enlists the Commission to share the list of those it proposes to appoint with political parties and independent candidates at least 14 days prior to the appointment to enable them make any representations. **Regulation 3(4)** requires that the appointment be done transparently and competitively and thereafter be gazetted. The court heard that the 2nd Respondent was first appointed to the Commission in 2016 as an Administrative Assistant and was gazetted as a Returning Officer on 31st May 2017. The Petitioner is on the other hand on record as stating that he became an Independent candidate in June 2017. By then the 2nd Respondent had already been gazetted as the Returning Officer for this election. It also transpired that the issue of the appointment of Returning Officers was litigated before **Odunga J** in **Republic v Independent Electoral and Boundaries Commission Ex parte NASA [2017] eKLR** where the NASA coalition sought leave to commence judicial review proceedings to quash the decision of the 1st Respondent by which the Commission selected and deployed the Constituencies and Counties Returning Officers to oversee the elections of 8th August. The record shows that pursuant to those proceedings the parties recorded a consent culminating in an order requiring the Commission to circulate

the list of the officers to all duly registered Political Parties and eligible Independent Candidates by close of day on 24th June 2017. This was to be done through publication of notices in the Commission's website and at least 2 newspapers with national circulation. The Political Parties and Independent Candidates were then required to make their presentations regarding the list by 9th July 2017. It is my finding that if the Commission had acted irregularly earlier then these orders were intended to cure the irregularity. When the notices published pursuant to **Odunga J's** orders were put to the Petitioner in cross examination he told this court that he did not make any representations regarding the appointment of the 2nd Respondent. The Petitioner having been given an opportunity to object to the appointment of the 2nd Respondent and having neglected to do so he cannot now be heard to say that the appointment was irregular. To do so is tantamount to asking this court to sit on appeal or to review the orders of a court of competent jurisdiction which I cannot do.

29. The Petitioner also raised an argument that the appointment of the 2nd Respondent was irregular because although there was a gazette notice to that effect there was no letter appointing him as a Returning Officer for this election. The Petitioner contended there was no such thing as appointment through a gazette notice and described the process through which the 2nd Respondent was appointed as a roadside appointment (sham). I have already held that the appointment of the counties and constituencies returning officers was resolved and regularized by the consent order above. No objections were made to the appointment of the 2nd Respondent meaning that it remained as it was not quashed. That being the case the appointment of the 2nd Respondent became an issue for which this court should take judicial notice under **Section 60(1)(f)** of the **Evidence Act** which states:

“60(1) The courts shall take judicial notice of the following facts-

(f) the accession to office, names, titles, functions and signatures of public officers, if the fact of their appointment is notified in the Gazette.”

Section 59 of the Evidence Act provides that the court should not require proof of a fact which it should take judicial notice of. My interpretation of **Section 60(1) (f)** read together with **Section 59** is that once the appointment was notified in the Gazette the notice became evidence of that appointment and the court does not require further proof of the same. Therefore the fact that the 2nd Respondent could not show a letter of appointment becomes immaterial. The submission that the 2nd Respondent acted without jurisdiction in this election is misconceived and that ground is dismissed.

30. The Petitioner did not pursue the issue of appointment of the Presiding Officers at the hearing and I therefore consider it to have been abandoned.

31. The allegations of voter intimidation, undue influence, bribery and flagrant commission of election offences are found at paragraphs 56 and 57 of the Petition These are election offences under **Sections 10 and 11 of the Election Offences Act** and as discussed earlier require proof beyond reasonable doubt. To prove violence the Petitioner called his **Chief Agent (PW1)** and **Washington Ochieng Oluoch (PW2)** who described himself as a strong supporter. The evidence of these witnesses was however inconsistent and contradictory. Although in his affidavit **Washington Ochieng Oluoch** deposes he was specifically appointed to serve at Sinanga Polling station in Yala Ward in court he testified he was an overall supervisor for Marembe and that after voting at Sinanga early in the morning he left for his house to pick his phone only to be attacked on the way back. Whereas he testified that he reported the assault to the police and thereafter went to hospital he has neither annexed a police OB extract nor treatment notes. Indeed in the affidavit he does not state he went to hospital at all. Neither does he state when he was assaulted. That he could not agree with the Chief Agent (PW1) on the hospital he went to rendered both of them unreliable witnesses. His allegation that the assailants were supporters of the 3rd

Respondent and that therefore the 3rd Respondent intimidated voters and perpetrated violence is nothing but hearsay as the person who told him the vehicle carrying the assailants belonged to the 3rd Respondent was not called as a witness. The fact that the bodaboda or even those who went to his rescue were not called as witnesses renders his evidence doubtful.

32. Evidence that two other voters were threatened with death if they continued supporting the petitioner was not tendered and the allegation was not therefore proved.

33. On bribery the Petitioner pleaded that the 3rd Respondent moved all around the Constituency bribing people to vote for him. At the hearing he alleged that this was witnessed by very many people. However to prove the allegation he only called two witnesses **Paul Juma Achar (PW4)** and **Erick Omondi Rabuogi (PW5)**. **Achar** claimed to have taken a WhatsApp video of the 3rd Respondent bribing voters at a place called Ujimbe within Gem Constituency. He claimed to have done so using his smart phone. He stated that upon taking the clip he sent it to the Petitioner as instructed. The petitioner testified that upon receiving the clip he arranged a meeting between **Achar** and **Fredrick** who uploaded it and stored it in a flash disk as well as in several CDs. The clip was played in court and this court also allowed its production in evidence as it was of the view that the respondents having agreed to its being played they could not raise issues on its admissibility. The 3rd Respondent also called a witness **Phelix Odiwuor Khodhe (R11)** who also claimed to have taken that video clip. It was his evidence that contrary to **Achar's** evidence that the people in the clip are voters and that the cash the 3rd Respondent is seen giving them are bribes the clip was taken at his home on the Christmas of 2016 and that the 3rd Respondent was merely giving the people who had come to visit gifts. He also disputed that the place where the clip was taken is in Gem Constituency and contended it was in Khwisero which is in another County altogether. I have considered the evidence and submissions in regard to this tape carefully. Even leaving the issues of its admissibility aside the same was beset with several challenges which render it of no probative value. To begin with there was no cogent evidence that the clip was recorded by **Achar** or even by **Phelix** the latter because apart from making reference to his phone he did not prove that he had such a clip in the phone and in fact no such clip was played. As for **Achar** when he was asked to play the clip in the phone he could not do it and generally exhibited ignorance on the phones features leading to suspicion that the phone was not his. It was also doubtful that he could have used the phone he exhibited in court to take the clip as he alleged. How could he have done so yet he could not even point out the WhatsApp feature on the phone" Moreover the clip does not have a date or anything to indicate when it was taken and it could be very well that it was taken at an occasion or circumstances other than those claimed by the Petitioner. Contrary to the submission by Counsel for the Petitioner it matters how, where and when the video was taken. That is the essence of Section 106B of the Evidence Act which governs the admissibility of electronic evidence. It also did not help that there were serious contradictions between **Achar** and **Erick** accounts on the manner in which the clip was uploaded. They could not even agree on where **Achar** was sitting as the clip was uploaded or even the number of CDs that were made hence creating doubt as to whether the video played was uploaded from Achar's phone. The Petitioner's averment in the affidavit dated 6th October 2017 that information regarding the video came into his possession only recently only adds to the mystery. Bribery is a serious election offence and for this election to be invalidated on that ground the Petitioner ought to have proved it beyond reasonable doubt. In **Moses Masika Wetangula v Musikali Nazi Kombo & 2 Others [2015] eKLR** the **Supreme Court** observed: -

"[120] Now on account of this quasi-criminal aspect of bribery in elections, the offence is to be proved beyond reasonable doubt. The petitioner has to adduce evidence that is cogent, reliable, precise and unequivocal, in proof of the offence alleged....."

[122] further by Section 67(2) of the Elections Act, the offence of bribery is cognizable: a person

alleged to have committed it is liable to arrest, without warrant. This shows the gravity of the offence, and signals that a high standard of proof is required. Accordingly, an allegation that an election offence has been committed has to be specific, cogent, and certain. This requirement guarantees the right of a fair trial, for the persons(s) against whom such allegations are made.”

It is my finding that on this issue of bribery that high standard of proof was not met in this petition and I accordingly dismiss the accusation of bribery.

34. The Petitioner did not adduce evidence in support of his allegations of intimidation, undue influence and flagrant commission of other election offences. Neither did he prove suppression of those who wished to vote for him.

35. The Petitioner and his Chief Agents allegations of almost all their agents being denied access to polling stations because they did not have badges were also not proved. During the hearing they both admitted that they were not at the polling stations but gave accounts of how they received calls from agents who were locked out. Not even one such agent was called. The few agents who gave evidence gave evidence to the contrary. Fredrick Elijah Nyawalo (PW3) who testified he was an agent at Ramula told this court that he was at the polling station as early as 5 am. Walter Ofwenye Okelo (PW7) who was Presiding Officer at Uranga Polling Station 1 told this court that he did not lock out any agent and that all including those of the Petitioner had badges. In his affidavit Saulo Owino Lisenso (PW8) claimed to have been locked out of Mwadi Polling Station where he had reported at 6.30am. However when he was cross examined by Counsel for the 3rd Respondent he admitted to have been inside the polling station at 6.30am and even confirmed that the ballot boxes were empty before the voting begun. He also admitted to leaving the room on his own accord. This is what he stated upon cross examination by Mr. Were, Learned Advocate, for the 3rd Respondent:

“I arrived at the polling station at 6.30am. The ballot boxes were displayed for us and we saw there was nothing inside. Because I did not have a badge I came out fearing I could be arrested. I was not evicted by anybody. I just came out of my own volition.”

He went on to explain that after walking out he called the Chief Agent who made a call and he went back. The fact remains however that he had not been refused entry. The other agents who swore affidavits were not called as witnesses and even had they been called their depositions were that despite the hiccup they had all been allowed into their respective polling stations by 7am contrary to the averment by the petitioner and his Chief Agent that they only got in mid-morning by which time voting had considerably taken place.

36. Regulation 70 of the General Regulations sets out the method of voting as follows:

“(1) A voter shall upon receiving a ballot paper under regulation 69(2)-

a. Go immediately into one of the compartments of the polling station and secretly mark his or her ballot paper by putting a cross, a tick, thumbprint or any other mark in the box and column provided for that purpose against the name and the symbol of the candidate for whom that voter wishes to vote;

b. Fold it up so as to conceal his or her vote, and shall then put the ballot paper into the ballot box in the presence of the presiding officer and in full view of the candidates or agents.”

37. Regulation 72 recognizes that some voters may require assistance to vote due to disability or

inability to read (**sub regulation (1)**). Where such a voter is not accompanied by someone to assist him he is assisted by the presiding officer in the presence of the agents (**sub regulation (2)**). The presiding officer is then required to record this in the polling station register against the name of the voter (**sub regulation (6)**). Even then the regulation requires utmost secrecy to the extent that the persons assisting are required to ascribe to an oath of secrecy (**sub regulation (5)(a)**). From the foregoing the Petitioner's complaint that the election was not by secret ballot had it been proved would have established a serious breach of the regulations. However the allegation was just that, an allegation. It was not supported by evidence. The genesis of this complaint is that people openly stated they wanted to vote "**six piece**", "**Raila and his people**" or **machungwa**". At paragraph 18 of his affidavit the Chief Agent (PW1) claims to have witnessed this first hand. He states that this happened at Sirandu, Uhonya, Sorodha and Mularekaruwa Polling Stations. The Petitioner on his part relied on the above deposition by his Chief Agent. It is instructive however that the agents in those polling stations did not swear affidavits. Those that swore affidavits were Charles Ochieng Warinda (Ojola Polling Station), Erick Otieno Omollo (Komwuok Polling Station), Margret Akinyi Odhiambo (Malele Polling Station), Benard Oduor Warinda (Ojola Polling Station) and Pamela Adhiambo Nyabera (Muhanda Polling Station) but again they were not called as witnesses to confirm the allegation. Instead the Petitioner called Fredrick Elijah (PW3) and Saulo Owino Liseno (PW8) whose evidence on this issue turned out to be hearsay. PW3, an agent at Ramula, testified that it was a certain clerk who was telling people to vote six piece. He stated however that contrary to his deposition that he sighted a clerk bribing voters he did not personally see or hear her doing it but was told about it through a phone call by a voter called Bernard. As for Liseno, PW8, he stated he was told about it by one Choka who like Bernard above was not called as a witness. PW3 also admitted that his statement that a voter told him he wanted to vote six piece was not deposed in his affidavit and it is my finding therefore that it was an afterthought. It is noteworthy that whereas the Petitioner alleged that this pattern of voting was so widespread as to affect his chances in the election PW3 said only one assisted witness asked to vote six piece. This evidence was therefore not sufficient to prove this allegation. It is also instructive that contrary to the Petitioner's claim that this pattern of voting was encouraged by the election officials these two witnesses told the court that when they alerted the Presiding Officers about it action was taken. This takes us to the second issue.

(ii) Whether the votes cast were counted, tabulated, tallied and announced in accordance with the Constitution, the Elections Act and Regulations made thereunder.

38. The Petitioner and his Chief Agent's averments in the petition as regards this issue are that their agents were evicted from the polling stations between the time polling closed and the time counting started and that this made fertile ground for ballot stuffing. In paragraphs 31 and 32 of the petition the Petitioner avers that a trick was employed to get the agents to leave and when they refused to leave police were called to forcibly eject them for anything between 30 minutes and 2 hours during which period the clerks would stuff the ballot boxes. In the affidavit he gives names of the polling stations where this occurred. The Petitioner and his Chief Agent also aver that that counting of the votes was opaque as during the counting the agents could not see the mark on the ballot papers firstly due to the distance between them and the counting table and secondly because the Presiding Officers did not openly display the ballot papers and the lighting was poor. They further aver that there were massive irregularities in the collation of results resulting in massive numerical discrepancies that substantially affected the results. The polling stations with variances are listed in paragraph 39 of the petition and the Petitioner claims to have personally visited those polling stations and witnessed it. They also contend that at Mwadi and Kogilo Polling Stations the seals of the ballot box were missing. The two also contend that some of the Presiding officers altered Form 35A to give a different result in blatant transgression of the law. At the Petitioner' testified that there were variances in several Form 37A and Form 37B which led to his votes being deducted. He gave examples as Migosi Primary School polling station where he lost 60 votes and the 3rd Respondent 40 votes. He wondered how the candidates could obtain the exact

number of votes in Karariwu 2 and 3 polling stations and stated that was not humanly possible. He reckoned that someone must have been trying to do some balancing. He however dropped his claim in regard to Mariera 3, Uiri 2, St Teresas 2, Yala Township 2, Sagam 2 and ALuor2. He contended that his results for Malele Polling Station 2 were given to Booker Ngesa leaving him with only one vote. He contended that in Sagam 3 about 30 people more than were registered voted. He stated that as a result of the variances he was wrongfully deducted 337 votes.

39. My finding however is that even without considering the explanations given by the Presiding Officers of the impugned polling stations the above facts were not proved. To begin with, it is doubtful that the Petitioner and the Chief Agent visited those polling stations as alleged. In his evidence the Chief Agent was categorical that the Petitioner stayed at home on the day of the election and that it was him who briefed him on what was happening. If he did it means the Chief Agent was not a truthful witness and that his evidence is not credible. Secondly and more importantly whereas one would have expected the agents in the impugned polling stations to be called as witnesses they were not and so this court did not hear evidence of any agent who was forcibly evicted. There was also no evidence at all of the alleged ballot stuffing.

40. The three witnesses who actually witnessed the voting and subsequent counting were Fredrick Elijah Nyawalo (PW3), Walter Ofwenye Okelo (PW7) and Saulo Owino Lisenso (PW8). Walter Ofwenye himself a Presiding Officer testified that after voting closed he allowed the clerks and agents to take a break during which time the polling station was converted to a counting center. PW3 and PW8 who were agents confirmed that this procedure was adopted in their polling stations as well. None of these two agents alluded to being forcibly removed from the polling stations. As a matter of fact it was PW8's testimony that he did not leave the polling station during the break save to answer a call of nature.

41. On the issue of counting PW7, himself a presiding officer, testified that the sitting arrangement that he, and to the best of his knowledge the other presiding officers, adopted was the one they were taught during the training and that the agents could clearly see the marks on the ballot papers. On his part PW3, an agent, did not state he experienced any problem during counting and to him the results entered in the Form 35A for his polling station were a true reflection of what the candidates, the Petitioner included, obtained. PW8 also an agent testified that the only time there was no light in the polling station was when the lamp blew before counting started. He did not blame anybody for the lamp blowing. He stated that the situation was soon remedied and counting continued. He explained that a clerk would pick ballot papers one by one display it and then place it in the place provided for each candidate. He stated that there was a clerk assigned for the votes of each candidate. He also stated that they could see the mark although not very well though they did not complain. He too confirmed that the results recorded in the Form 35A for that station were what the Petitioner got and that he signed the form to certify that. There was no evidence that the sitting arrangement adopted during the counting only affected the agents of the Petitioner. It is also noteworthy that PW3 did not notify the Presiding Officer that he could not see the mark. There is therefore no evidence to warrant this court to attribute a sinister motive to the Presiding Officer(s) and on the whole I find it difficult to believe that the counting was as opaque as the Petitioner would like this court to believe.

42. What about the variances in the results" The Petitioner is on record as stating that he had agents in all the polling stations and that he had his own tallying center to which those agents relayed the results announced at the polling stations. He is also on record as stating that none of those agents told him he was denied votes in their polling stations. He told this court that his own tally gave him 29,374 votes and the 3rd Respondent 34,693 votes. Although evidence of that tally was not shown to this court it is important to note that the Petitioner conceded that the difference in votes between his own tally and that of the 1st Respondent was only 329 votes. Those votes were traced to Malele polling Station where a

misalignment affected all the candidates and Migosi Polling Station where likewise there was an error of misalignment. When this was brought to his attention during cross examination by Mr. Wasuna, Learned Counsel for the 3rd Respondent, the petitioner stated:

“Mr. Otieno led me through a calculation of what I said I garnered per ward and what the 3rd Respondent garnered in each ward. I went through my tally as well as that of Elisha. According to the figures of my agents I got 29703 and Elisha 34583. Elisha’s total is high. If you go by my documents, Elisha won. It is correct that I am not disputing numbers but the process.” (Underlining mine).

43. The Petitioner is therefore approbating and reprobating when he says there were massive irregularities in the tallying of results and that he won the election when his by his own admission the margin of error was not that great. In the Petition he gave names of several polling stations where he alleged there were variances but he did not back that up with evidence. Indeed during cross examination he ended up dropping some of those polling stations. It is also worth noting that the agents he called as witnesses confirmed that the results given to him in Form 35B were his true results thereby confirming that the results were to a large extent accurate. The allegation that 30 people more than were registered voted at Sagam 3 was not proved and his allegation concerning Karariwu was based on conjecture. The Returning Officer attributed the errors in the tabulation to fatigue given the number of elections involved and I find that reasonable. To invalidate an election the variances must be of such a magnitude as would affect the results. In this case it is my finding that the same did not affect the result whose margin was admittedly 4,000 votes.

44. Evidence of a broken ballot box was given by PW8 the agent at Mwadi Polling Station. Even then it was his evidence that only the aperture on the side was broken and that the seals were intact. He stated that he noticed this when the Presiding Officer turned the box to pour out the ballot papers on the table in readiness for counting. PW8 did not allege that anything untoward happened to the ballot box as a result of the broken aperture. It should be remembered that PW8 is the witness who testified that he never left the polling station during the break. He is also on record as stating that before the voting all the ballot boxes were empty and that no box was brought into the room from outside before the counting; that they could see all the boxes from where they sat and that the 3rd Respondent won fairly in that polling station. Clearly his evidence does not support the allegations of ballot stuffing.

45. No evidence was led in regard to the broken aperture at Kogilo Polling Station.

46. The allegation that the results were altered was not proved either. It transpired from cross examination that PW 7’s (Presiding Officer at Uranga Polling Station) evidence on this issue was based on conjecture. Whereas in his affidavit he alleges that presiding officers were issued excess forms which resulted in some of them using them to tinker with the results in cross examination he was categorical that he did not see any presiding officer altering a form. It is also instructive that his own evidence was that he exhausted the forms given to him thereby negating his allegation that the forms were excessive. In fact he was able to account for each of them. Further when pressed to mention the officers he alleged he saw filling Forms 35A at the tallying center he could not name a single one yet he alleged to know them. He could also not explain how a presiding officer could use the forms to tinker with the results when they were carbonated and bore different serial numbers. In the end he admitted that his evidence was based on what he imagined rouge Presiding Officers could do.

47. The other witness the Petitioner intended to call in regard to alteration of Form 35A was **PW9 (Lucas Zablon Oluoch)**. This witness however disowned the affidavit he was to rely on and I find and hold that this rendered him an incompetent witness and his evidence superfluous. The allegation that election

officials altered statutory forms was therefore not proved. To the contrary the three agents called as witnesses confirmed that results were announced and that what was announced for the Petitioner in those polling stations was accurate and was correctly entered in Form 35A. Even PW7 himself a presiding officer confirmed that his tally was correct and that what he indicated in Form 35A was accurate.

48. Forgery of statutory forms by election officials which is what alteration of the same would amount to is an offence under **Section 6(a) of the Elections Offences Act** and as such it ought to have been proved beyond reasonable doubt. What was adduced however is evidence of conjecture which this court cannot rely upon to vitiate an election.

49. The Petitioner also claimed that the results were not announced as required by the law. This however is not borne by the evidence. First there is evidence from his witnesses that results were announced at the polling stations. The Petitioner's complaint seems to be anchored on evidence that his Chief Agent did not participate in the declaration. The 2nd Respondent testified that the Chief Agent left the tallying center before the declaration but that he nevertheless made the declaration as there were other agents present. Listening to the Chief Agent (PW1) I gathered he left because there was a delay. **Regulation 79(7) of the ELECTIONS (GENERAL) REGULATIONS, 2012** provides that the absence of a candidate or an agent at the signing of a declaration or the announcement of results shall not of itself invalidate the results announced and **Sub regulation (6)** states that even the refusal of a candidate or agent to sign a declaration or to record the reasons of his refusal is not sufficient to invalidate the results. **Regulation 97(2)** makes it emphatic that such nonattendance shall not invalidate an act otherwise lawfully done. There is nothing to show that there was more to the Chief Agents nonattendance and the argument by the Petitioner that the election ought to be invalidated because there was no declaration as his agent did not sign or was not present at the declaration cannot therefore hold and is dismissed.

(iii) Whether the transmission of results from the polling stations to the constituency tallying center was done in accordance with the law and more so whether it was accurate, secure, open, accountable and prompt

50. According to the Petitioner transmission of the results did not conform to the letter and spirit of the Constitution and the Elections Act because, firstly whereas sending of results electronically was mandatory it failed on a massive scale and secondly, because where it was done, it was at places other than at the polling stations contrary to the law. He contended that consequently the results were neither verifiable nor accountable and their accuracy was also doubtful. I agree with him that electronic transmission of the results is intended to verify the accuracy of the results physically delivered to the Constituency Returning Officer from the polling stations and to hold the presiding officers accountable for those results. That the electronic transmission in this case failed is not in doubt. It was proved by PW3 and PW7. My finding however is that in this election it was not fatal. I say so because unlike in the case of the presidential election where electronic transmission is mandatory under **Section 39(1C) of the Elections Act** and hence failure to comply is an illegality, in this election it is provided for under **Regulation 82(1)** making noncompliance an irregularity. As observed earlier a court cannot invalidate an election on account of an irregularity unless it is shown that it affected the result. The petitioner has not proved that the failure of electronic transmission affected the result. It is also the law that the results announced at the polling station are the final results (see **Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others, Nbi C/App No 105 of 2007(2017)eKLR**) and indeed **Regulation 82(2)** provides that the results sent electronically are provisional results. PW7 testified that although transmission from the polling stations failed presiding officers managed to do so at the tallying center. The 2nd Respondent confirmed that the presiding officers were allowed to send the results at the tallying center or any other place if they experienced a problem with network in their stations. He stated

and proved that Siaya County had been gazetted as one of the counties which had areas with poor connectivity. The Petitioner did not adduce evidence of any of those results being different from what was announced at the polling station. When the witnesses were shown Form 35B they confirmed those were the results obtained by the Petitioner and were also the results announced at their polling stations. This despite that there were no agents to confirm what the presiding officers were sending. PW7 also told this court that at his polling station the agents had already sent their copies of the results to their Chief Agent a fact which was confirmed by the Petitioner who stated that if he wanted he could have verified the results from what he got from the agents. In my view this negates the allegation that the results were not verifiable.

51. On the whole I am convinced that the failure to send the results electronically from the polling stations arose from poor connectivity and it cannot be blamed on the respondents. Moreover it was not altogether an illegality. Contrary to the Petitioner's submission the Supreme Court did not outlaw the sending of results otherwise than at the polling station. In **Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 4 Others & Attorney General & Another Petition No.1 of 2017**, the Court stated:

“ [272].....Even if we were to accept that all of them are off the 3G and/or 4G network range, it would take at most, a few hours for the POs to travel to vantage points from where they would electronically transmit the results. That they failed to do that in our view, an inexcusable contravention of Section 39(1C) of the Elections Act.”

52. In any case at the hearing the Petitioner conceded that upon obtaining an order to be supplied with the data in the KIEMS he accessed the kit for Nyawara Primary School polling station and discovered that the Form 37A for that station had in fact been scanned and transmitted to the Constituency tallying Center. More important however was his evidence that the results in that form were those announced at the polling station. That tells us firstly, the results were indeed electronically sent and secondly, that the results in this election were accurate, verifiable and accountable. In any event the failure to send the results from the polling stations and sending them from other locations would be an irregularity which unless it is demonstrated it affected the result cannot be a basis for nullifying the election.

(iv) Whether there were illegalities and irregularities in the conduct of this election and if so whether they were of such magnitude that could affect the result.

53. In regard to illegalities and irregularities the Petitioner testified that contrary to the law statutory forms were signed by strangers and singled out one Douglas Otiato who signed Form 35B. He contended that the said Douglas Otiato was neither a party agent nor an agent for any of the candidates. He disputed that Hon Orengo could have appointed Douglas Otiato as agent for ODM saying he lacked the credentials to do so. He also cited the failure to send results electronically as an irregularity. On the forms he told the court that 98 Forms 37A issued to his agents were not stamped or signed and that some had been completed by the same person yet they originated from different polling stations. He contended that because of that the results were not verifiable, lacked credibility and were also questionable. During the hearing he took this court through data he obtained from the KIEMS kits pursuant to an order of this court and stated that the same showed that more people voted than were identified through those kits. Whilst conceding that a complementary system for identification of voters existed he contended that no evidence of its use was proven as the requisite forms that should have been used were not produced. He urged this court to find that the irregularities and illegalities enumerated entitled him to the prayers sought in the petition.

In Raila Amollo Odinga & Another v Independent Electoral and Boundaries Commission & 4

Others & Attorney General & Another Pet No.1 of 2017 the Supreme Court made distinction between an illegality and irregularity as follows:

“[304].....Illegality refers to breach of the substance of specific law while irregularities denote violation of specific regulations and administrative arrangements put in place.”

54. It is with this in mind that I came to the conclusion that the failure to send the results electronically and to do so at the polling stations was an irregularity. It was also the reason why I held, and I believe the drafters of the regulations provided, that failure by a candidate or an agent to attend the declaration of results or to sign the declaration or to state the reasons for not signing is an irregularity which alone does not invalidate the result. As for the Forms 35A the petitioner alleged to be written in the same hand he ought to have called a hand writing expert to confirm this was the case. In the absence of such evidence his allegation remains unproven. In respect of the unstamped forms he did an analysis at paragraph 7 of his affidavit sworn on 6th October 2017. In that analysis he has listed 94 forms which he alleges had no stamps but whose stamps were forged later. My finding however is that to begin with that list disproves that there were any forms that were not stamped because by his own admission they have been stamped. His contention that they were stamped later and that the stamps thereon were forgeries was not proved. He did not tell this court why he came to the conclusion that the forms were stamped later and he did not adduce evidence of when, where, how and who forged the stamps. Secondly and more importantly there is no requirement in the Elections Act or in the Regulations that the forms should be stamped. In so saying I find support in the decision of the Court of Appeal in **Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others [2014] eKLR** where it was held:

“As to the Forms 35, the learned Judges view was that the fact of those from 19 polling stations not being stamped with IEBC stamp invalidated the results. With respect, she thereby misdirected herself on the law. This is all the more remarkable because the learned Judge herself did correctly state in her judgment that” it is not specifically stated that the form should be stamped.”.....

There is no stamping requirement in the case of the form 35. All that is required with regard to Form 35 as provided for in regulation 79 is the signature of the presiding officer and the agents of the candidates.

We agree with the submission on behalf of the appellant that it is the signatures of the presiding officers and the agents that authenticate the Form 35. If any such forms were stamped, it was a gratuitous and superfluous discretionary or administrative act incapable of creating a statutory obligation, less still the invalidation of the Forms 35 that did not contain the stamp....”

55. In **Nathif Jama Adan v Abdikhaim Osman Mohamed & 3 Others [2014] eKLR** the Supreme Court while dealing with the twin issues of unsigned and unstamped forms not only cited with approval the **Ghanaian** case of **Nana** (citation not provided) where the Judges declined to invalidate an election on those two grounds saying that **“doing so on those grounds per se would amount to putting in the power of some unscrupulous presiding officer in some polling station to nullify the solemn act of the whole constituency by his single act of omission and that it would run counter to the principle of universal adult suffrage and perpetuate an injustice”**, but also overturned the position of the Court of Appeal on the two issues and upheld that of the trial judge and stated:

“[90] From the foregoing passage, and from the record, we find that the authenticity of the results on the unsigned and unstamped Forms 35 had not been the subject of challenge. But there had

been an irregularity in the handling of statutory forms from the polling station. There was no *explanation of how that irregularity affected the results of the election*. This, clearly, is a censurable condition. But in a dutiful resolution of a legal and electoral dispute, the fundamental question is the *constitutional franchise-right of the people inhabiting the electoral area*. It is *this*, to be protected, in circumstances such as those unfolding in this instance-the default in view being that of election presiding officers failing to have forms duly signed and stamped. In a similar situation in the Nana case from Ghana.....”

“[91] The trial Judge, in the instant case, quite properly arrived at his determination, which we affirm, as follows [paragraph89]:

In this regard, the Petitioners did not lead evidence that lack of signatures or stamp of the presiding officers in Forms 35 for the above mentioned polling stations affected the outcome of the election. Further, the Petitioners did not even challenge the results that were tallied and declared at those polling stations. It is not enough for the Petitioners to merely allege and indicate a failure on the part of the 1st and 2nd Respondent, but it was essential for them to demonstrate that such failure affected the result of the election.”

56. I do not see anything in the regulations to suggest that the position as to stamping of Forms 35A has changed. Indeed **Regulation 69(f) and (g)** which required stamping of the counterfoil ballot paper and the ballot paper itself were deleted. Signing of the statutory forms by presiding officers is still a requirement under **Regulation 71 (1)** of the General Regulations but as was held in **Nathif Jama Adan v Abdikhaim Osman Mohamed & 3 Others [2014] eKLR** the petitioner ought to have demonstrated how the omission of the presiding officers to sign the forms affected the result. He did not and the submission that the election must be invalidated on that ground cannot be upheld and I dismiss it.

57. I hold the same in regard to the complaint that the final result was signed by a stranger who in any event for all intents and purposes was an agent for the 3rd Respondent’s political party who happened to be in the tallying center. In so doing I am fortified by the holding of the Supreme Court in **Raila Amolo Odinga and Another v Independent Electoral and Boundaries Commission & 4 Others & Attorney General & Another Petition No.1 of 2017(supra)** that a court must: “.... not only determine whether the, the election was characterized by irregularities, but whether, those irregularities were of such a nature, or magnitude, as to have either affected the result of the election, or to have negatively impacted the integrity of the election, that no reasonable tribunal would uphold it”- (see paragraph [373]).

For emphasis, it is my finding that the fact that Douglas Otiato signed the declaration did not in any way affect the integrity of the final result and cannot be a ground to invalidate the election.

(v) Un-pleaded issues.

58. During the hearing and in the summing up Counsel for the Petitioner raised two issues that were not pleaded in the petition but which they nevertheless urged this court to determine. Mr. Sala for the Petitioner relied on the decision of Makau J in **Dickson Mwenda Githinji V Gatirau Peter Munya & 2 Others (2013) eKLR** where citing **Justus Mugumbu Omiti v Walter Enock Nyambati Election Petition No. 1 of 2008** the judge observed:-

“All issues raised in the petition and those which crop up during the hearing, whether pleaded or not and which had the potential to affect adversely the final result, and the will of the voters in a constituency, must come under spotlight, scrutiny and interrogation. They have to be

interrogated and determination made thereon. In this case, all illegalities and irregularities which impugn on the credibility of the outcome of the elections have to be considered. It will be a sad day indeed if such evidence which comes through the petitioner, his witnesses, the respondents and their witnesses as well, are to be discarded and rendered irrelevant or inadmissible merely on the grounds that the same was not the subject of any pleading.....”

59. Mr. Malebe, for the 1st and 2nd Respondents and Mr. Willis Otieno for the 3rd Respondents expressed the view that this court can only deal with that which was pleaded as to do so would result in making a determination on an issue to which the Respondents did not have an opportunity to respond.

60. Unpleaded issues were:-

- That the tallying and declaration was made in an illegal venue as the same was not gazetted.
- That the number of voters exceeded those identified through the KIEMS kits.

61. I have considered the rival submissions and my finding is that this court cannot determine issues that did not arise in the petition. It has been held time and again that parties are bound by their pleadings. Faced with a similar issue in the **Raila Odinga Petition No.1 of 2017(Ruling)** the Supreme Court cited with approval the Supreme Court of India in **Arikala Narasa Reddy v Ventaka Ram Neddy Reddygari & Another, Civil Appeals Nos. 5710-5711 of 2012 [2014] 2SCR** in which the court stated as follows:

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

The Court emphasized the above principle in its final judgment when it stated:

“[332] the rule of the thumb has always been that parties are bound by their pleadings and especially in a case such as this where the petitioner is asking the Court to address its mind to the possible unconstitutionality of a legal provision. For proper consideration therefore, and especially to do justice to both parties and the greater public interest, we cannot afford to lock our eyes to the disadvantage placed upon the 3rd respondent especially who had no benefit to bring his thoughts into this cause”

62. The issue concerning the Constituency Tallying Center is not in the Petition. It was raised during the hearing and it clearly embarrassed the 1st and 2nd Respondents who did not know how to respond to it as they were totally unprepared. Be that as it may, note they annexed a notice to their submissions in answer to that issue. The said notice is contained in The **Kenya Gazette dated 4th August, 2017, GAZETTE NOTICE No.7592** and reads:

“ Corrigenda

IN Gazette Notice No.6396 of 2017, published on 30th June, 2017, in the second and Third Schedules, delete as specified herein below:

....

21. Page 3519, row - 40, column 3

Delete; Maliera Boys Secondary School

Insert; Sawagongo High School”

The above notice is duly signed by the Chairperson of the Commission and therefore answers the issue of whether Sawagongo High School was an illegal tallying center. I must however state that the same would not have been an issue for determination by this court.

63. The second issue arose after the petitioner obtained orders to be supplied with data from the KIEMS and as regards the same his submission is that there was variance between the number of voters biometrically identified and the votes cast as a result of which thousands of votes cannot be accounted for and that these literally wipe out the small gap between the results obtained by the Petitioner and those of the 3rd Respondent. In **Zacharia Okoth Obado v Edward Akong’o Oyugi & 2 Others [2014] eKLR** the Supreme Court stated as follows regarding new issues arising from scrutiny:

“[153] We hold it to be improper that, when re-tally is conducted, a party should take this as an opportunity to introduce *new spheres of disputes*, which had not been signaled in his or her original pleadings. It is vital, in election disputes, that the respondent should know the case that faces him or her. Hence the petitioner ought to have indicated in his or her pleadings the disputed matters, with clarity and specificity, as a basis for being allowed to urge that there were irregularities in those spheres, after re-tally has been conducted. However, where a trial Court exercises its discretion and, *suo motu*, orders a scrutiny, recount or re-tally, revealing irregularities other than those that were pleaded, then there is a proper basis for any party to pose questions upon such new findings; and the Court then *will make findings on the effect of those irregularities on the declared results.*”

64. The Petitioner admitted that in the petition he did not raise the issue of more people voting than were identified through the KIEMS kits and indeed this was not a matter that can be said to have arisen from scrutiny the Petitioner’s application for scrutiny having been refused. It is a matter that he came up with upon being supplied with the information in the KIEMS kits. From the petition it is apparent that the main intention of the application for that data was to demonstrate that the results in this election were not sent electronically or that they were not sent from the polling stations which as I have already found he did not prove. It was therefore surprising that the Petitioner could use the data to raise a totally new issue. As was stated by the Supreme Court in **Zacharia Okoth Obado v Edward Akong’o Oyugi & 2 Others (Supra)** he could do so only if scrutiny had been ordered by this court *suo motu* which again was not the case. Accordingly this court declines to determine that issue.

(vi) Whether the 3rd Respondent was validly elected

65. I have found that this election was conducted in accordance with the principles laid down in the Constitution and other electoral laws. I have also found that although there were some irregularities the same were not deliberate and were in any case minor and did not affect the result. Accordingly I find and hold that the 3rd Respondent was validly elected as the Member of the National Assembly for Gem Constituency and that this petition has no merit.

(vii) Costs

66. Costs follow the event and in this case the petitioner shall bear the costs. Under Rule 30 (1) of the **Elections Petition Rules, 2017**, the court is required to make an order on the amount of costs payable. When this court requested counsel to submit on the issue of costs the petitioner's Advocate proposed Kshs 5 Million as did Counsel for the 3rd Respondent, Counsel for the 1st and 2nd Respondents proposed Kshs 4 Million. I must say however that this petition though of much importance to the parties was not complex. Taking everything into account I hereby cap instruction fees at **Kshs 1.5 Million** for the 1st and 2nd Respondents and **Kshs 1.5 Million** for the 3rd Respondent and direct that the other costs shall be taxed by the Deputy Registrar of this court.

67. Final Orders: -

a. The petition be and is hereby dismissed.

b. The Respondents are awarded costs as capped above.

c. A certificate pursuant to Section 86 (1) of the Elections Act shall issue to the Independent Electoral and Boundaries Commission and the Speaker of the National Assembly.

Dated and Delivered at Siaya on this 26th day of February 2018.

E. N. MAINA

JUDGE



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