



Case Number:	Election Petition 1 of 2017
Date Delivered:	28 Feb 2018
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	Fred Andago Ochieng
Citation:	Hassan Noor Hassan v Independent Electoral and Boundaries Commission [I.E.B.C] & 3 others [2018] eKLR
Advocates:	Jamal for the Petitioner Mrs Kitur & Nyamodi for the 1st Respondent Mrs Kitur & Nyamodi for the 2nd Respondent Issa, Ahmednasir & Miss Ahomo for the 3rd Respondent Issa, Ahmednasir & Miss Ahomo for the 4th Respondent.
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Petition dismissed
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ELECTION PETITION NO. 1 OF 2017**

**IN THE MATTER OF: THE CHALLENGE OF THE VALIDITY OF THE MANDERA COUNTY GOVERNOR  
ELECTION, 2017**

**AND**

**IN THE MATTER OF: ARTICLE 1 (1); 2(2); 3(1); 4(2); 10; 21(1); 23; 38(3) (C);**

**47(2); 48; 81(A); & (E); 82(2) (B); 84; 86; 87(2) & (3); 88(5);**

**165(3) (A) AND (E); & 180(1) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: SECTION 75, 76, 80 AND 82 OF ELECTIONS ACT NO. 2 OF 2011**

**AND**

**IN THE MATTER OF: LEGAL NOTICE NO.128 OF 2012, THE ELECTIONS (GENERAL) REGULATIONS, 2012**

**AND**

**IN THE MATTER OF: THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS)**

**PETITION RULES, 2017 AND**

**IN THE MATTER OF: LEGAL NOTICE NO. 126 OF 2012 (THE ELECTIONS**

**REGISTRATION OF VOTERS) REGULATIONS, 2012**

**AND**

**HASSAN NOOR HASSAN.....PETITIONER/APPLICANT**

**- VERSUS -**

**THE INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION [I.E.B.C].....1<sup>ST</sup> RESPONDENT**

**THE MANDERA COUNTY RETURNING OFFICER**

**(DAVID MARO ADE).....2<sup>ND</sup> RESPONDENT**

**ALI IBRAHIM ROBA.....3<sup>RD</sup> RESPONDENT**

MOHAMED AHMED ARAI.....4<sup>TH</sup> RESPONDENT

**JUDGEMENT**

1. On 8<sup>th</sup> August 2017 the citizens of the Republic of Kenya participated in a General Election, to choose their political leaders.
2. The petitioner, **HASSAN NOOR HASSAN**, was a candidate for the office of Governor of Mandera County. He contested for that position as a member of the political party named **THE ECONOMIC FREEDOM PARTY**.
3. The 3<sup>rd</sup> Respondent, **ALI IBRAHIM ROBA**, was also a candidate for the office of Governor of Mandera County. He was a member of the **JUBILEE PARTY**.
4. The elections were conducted under the auspices of **THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (I.E.B.C)**, which is the 1<sup>st</sup> Respondent in this petition.
5. The Returning Officer for the Mandera County, **DAVID MARO ADE**, is the 2<sup>nd</sup> Respondent.
6. At the end of the elections, the **IEBC** declared that the 3<sup>rd</sup> Respondent had been duly elected as the Governor for Mandera County.
7. According to the petitioner, the results which were declared by the **IEBC** were as follows;
  - a. **Ali Ibrahim Roba 71,890.**
  - b. **Hassan Noor Hassan 62,769.**
8. However, the petitioner also said that on the **IEBC** Portal the following votes were displayed as constituting the final results;
  - a. **Ali Ibrahim Roba 72,985.**
  - b. **Hassan Noor Hassan 63,003.**
9. The petitioner was dissatisfied with the results declared, hence the filing of the petition to challenge the same.
10. The petitioner called a total of 17 witnesses, whilst the 1<sup>st</sup> and 2<sup>nd</sup> Respondents called a total of 11 witnesses. Thereafter the 3<sup>rd</sup> Respondent called 8 witnesses.
11. Each of the witnesses gave his or her evidence-in-chief through an affidavit. Thereafter, each of the witnesses was cross-examined by the other parties, before the witness was re-examined.
12. The petitioner testified that he was registered as a voter at Rhamu Primary School. On the election date, he cast his vote at 10.00 a.m.
13. He complained that 46 Presiding Officers, who presided over the electoral process on polling day, were strangers to him and to his party.
14. The said 46 persons were said to have been recruited by the **IEBC**, yet they had not been trained.
15. As far as the petitioner was concerned, the 46 presiding officers in issue, had been posted by the **IEBC** due to pressure exerted by and with the connivance of the 3<sup>rd</sup> Respondent.

16. It is notable that whilst the petitioner testified about 46 strangers who replaced the trained presiding officers on the eve of the elections, two of the petitioner's witnesses cited 70 strangers and 30 strangers respectively. Therefore, it is not clear how many presiding officers were allegedly replaced by strangers.

17. In any event, the petitioner was absent at the time when the presiding officers were allegedly replaced by strangers. Therefore, in respect to the contention that 46 of the persons who worked as presiding officers were strangers, the court would have to consider the evidence of other witnesses, in order to determine the truth.

18. It is to be noted that during re-examination, the petitioner stated that only 17 polling stations were presided over by presiding officers who were strangers.

19. Although in his affidavit he did not say that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents were involved in the vetting of the Presiding Officers, the petitioner testified that the **IEBC** and the Returning Officer had posted the strangers, with the connivance of the 3<sup>rd</sup> and 4<sup>th</sup> Respondents.

20. I have carefully perused the entire evidence presented by the petitioner, but I failed to trace anything to show that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents played any role in the vetting or the posting of the alleged strangers.

21. The petitioner testified that the 195 persons who were trained by **IEBC**, to work as presiding officers, were put on the payroll at the time of payment. That would imply that all the said 195 persons worked, and were thereafter put on the **IEBC** payroll.

22. But, at the same time, the petitioner's case was that 46 of the persons who were trained were replaced. Surely, if 46 persons were replaced, they cannot thereafter had been on the **IEBC** payroll at the time of payment.

23. The complaint in relation to strangers is that they replaced presiding officers who had been trained. If that be the case, it would imply that the **IEBC** payroll ought to have had 149 trained presiding officers and 46 strangers. I therefore fail to appreciate the petitioner's reasoning, that the 195 trained persons were put on the **IEBC** payroll at the time of payment.

24. Out of the alleged 46 persons who were replaced, the petitioner said that only 3 of them swore affidavits in this case. One such person is **PW2, IBRAHIM MOHAMUD IBRAHIM**.

25. It was the testimony of **PW2** that he was appointed as a Presiding Officer, however, he was not deployed to work on 8<sup>th</sup> August 2017.

26. He said that it is the Returning Officer who appointed him, on 30<sup>th</sup> July 2017. He was first appointed and then trained.

27. In his understanding, the persons who were supposed to collect the Electoral Materials on the eve of the elections were the Returning Officer and the Presiding Officers.

28. His evidence was that he was posted to the Guticha Primary School, as a Presiding Officer. However, on the eve of the elections, a Mr. Mohamed Salat, who is a clerk at the **IEBC**, informed **PW2** that he had been replaced.

29. The said Mr. Salat said to **PW2** that 70 of the trained persons had been replaced.

30. As far as he was concerned, **PW2**, knew that the 70 persons who replaced the trained personnel, were never trained.

31. Notwithstanding his replacement, **PW2** said that he was assigned a payroll number.

32. Considering that the petitioner had testified that the **IEBC** had only put the names of the 195 trained persons onto its payroll at the time of payment, that would imply that **PW2** was put on the payroll at the time of payment, even though he did not work!

33. On the other hand, the **IEBC** said, through the County Returning Officer, **Mr. DAVID MARO**, that the Commission does not

give Staff Numbers to temporary staff, such as Presiding Officers.

34. Instead, the Commission provided contracts to such temporary staff. Mr. Maro added that the temporary staff are paid through their respective bank accounts.

**35. PW3, ESMAIL MOHAMUD IBRAHIM**, testified that the **IEBC** did not give contracts to any presiding officers.

**36. PW3** said that he had been appointed as a presiding officer, and had been assigned to work at Olla Primary School. However, he was replaced, through an oral communication by one, Mohamed Salat.

**37. PW3** knew about 100 out of the 195 people who were trained to be Presiding Officers. And he knew 20 out of the 70 people who replaced them.

38. Logically, it is thus possible that although the persons who replaced some of those known to **PW3**, were strangers to him, they may have been from among the 95 who (*although trained*), were unknown to the witness.

**39. PW4, ADAN MATHOBE BOSHE**, worked as a presiding officer at Wanga Dam, polling station No.3. However, he did not have a written contract with the **IEBC**.

**40. PW5, ABDI ADAN AHMED**, was a presiding officer at Ardagasu.

41. As he was hired, trained and deployed, **PW5** had no complaints, personally.

42. Just like **PW2** said in his testimony, **PW5** alluded to having been trained after he had been hired.

43. **PW5** said that during the training, there was another deployment, and that the list was prepared at that stage.

44. During deployment, **PW5** says that there was confusion.

45. But in the understanding of this witness, any person who was on the list of presiding officers, but who did not have a folio against his/her name, was a stranger.

46. From the evidence adduced thus far, it is not clear to me, who the petitioner classifies as a stranger. It appears that some persons say that a stranger was a person who was not trained by the **IEBC**. If that be the position, the petitioner ought to have provided a comprehensive list of all the persons who were trained. Thereafter, if any other person was deployed, he could be called a stranger. However, none of the witnesses produced an authentic comprehensive list of those who were trained.

47. As those who testified did not know all the other persons who had been trained, the petitioner fell back to the folios and to the payroll. However, I find that neither the folios nor the alleged payroll was shown to constitute proof that the person whose name was on it, had been appointed as a Presiding Officer.

48. The petitioner submitted that there was irregular deployment of Presiding Officers and Deputy Presiding Officers.

49. As I understand it, that submission is premised on an alleged failure by the **IEBC** to conduct a transparent process for the recruitment of presiding officers.

50. The County Returning Officer conceded that he had not engaged the political parties in discussions, prior to the appointment of presiding officers.

51. Pursuant to Regulation 4(2) of the Elections (*General*) Regulations, 2012;

**“Prior to appointment under sub-regulation (1), the Commission shall provide the list of persons proposed for appointment**

**to political parties and independent candidates at least fourteen days prior to the proposed date of appointment to enable them make any representations”.**

52. Rule 4 bears the heading;

**“Appointment of County Returning Officers”.**

53. Therefore, when the Returning Officer conceded that he did not comply with that Regulation, that does not have any impact on the issue concerning the appointment of presiding officers.

54. Regulation 5 is the one that is relevant for presiding officers; and it does not require **IEBC** to consult political parties or Independent candidates before appointing presiding officers.

55. Regulation 5(1) requires the Commission to *“transparently and competitively appoint a presiding officer for every polling station and similarly appoint such number of deputy presiding officers as may be necessary”.*

56. The petitioner’s focus appears to have been on the absence of trainings, for the persons he called strangers. There is no clear evidence that the persons hired by the **IEBC**, and who replaced some of the petitioner’s witnesses, had not been trained.

57. All the presiding officers were hired by the **IEBC**, and therefore none of them was a stranger to the electoral process.

58. Some of them may have been strangers to the petitioner and to his witnesses, but there was no legal requirement that the petitioner or his witnesses must have prior knowledge of the persons to be appointed as presiding officers.

59. As regards the timing of their deployment, it is to be noted that **PW9, MOHAMED HASSAN EYMOI**, was only deployed on 8<sup>th</sup> August 2017. That fact did not make him a stranger.

60. And as **PW9** said, there were no hitches at Sheekoley Farms Polling Station, where he served as the presiding officer. Therefore, the late deployment of a presiding officer, did not necessarily translate into bad performance of such an officer.

61. I am of the considered view that the petitioner failed to demonstrate that the **IEBC** had deployed any presiding officers irregularly.

62. I also find no evidence that there was a calculated scheme to facilitate the perpetration of irregularities and the illegalities complained of by the petitioner.

**Forms 37A; Not signed by Presiding Officers and/or Deputy Presiding Officers.**

63. Pursuant to Regulation 79(1) of the Elections (*General*) Regulations, 2012;

**“The presiding officer, the candidates or agents shall sign the declaration in respect of the elections”.**

64. Therefore, the petitioner submitted that the omission of the signature of the presiding officer shall invalidate the results.

65. By the petitioner’s calculations, a total of 14 polling stations were affected by the omission of signatures.

66. It was the petitioner’s evidence that in every polling station, the results declaration had to be signed by both the presiding officer and the deputy presiding officer.

67. If the two officers did not sign any declaration, the petitioner says that such declaration was incomplete, and the results therein do not constitute a declaration as contemplated under the law.

68. When he was being cross-examined by Mr. Issa Mansur, the learned advocate for the 3<sup>rd</sup> and 4<sup>th</sup> Respondents, the petitioner said that he was unable to state whether or not the results on the unsigned Forms 37A had any differences from the results which were announced at the polling stations.

67. I understand the petitioner to be saying that regardless of whether or not the results on the unsigned Forms 37A were the actual results obtained by the candidates, and announced by the presiding officer, they would be invalid if the presiding officer and his deputy did not sign the Form.

70. His contention is that the presence of the signatures of those two election officials rendered the results verifiable.

71. The question that must be asked is whether or not the results can only be deemed verifiable if the presiding officer and his deputy signed the Form containing the results.

72. In my considered view, the answer to that question is in the negative.

73. I say so because pursuant to Regulation 79 (1) it is not only the presiding officer who is required to sign the form. The candidate or his agents are also required to sign the form.

74. I appreciate the fact that when the candidate or his agent does not sign the Form, the Regulation states that they should record the reasons for the refusal or failure to sign.

75. Sub-regulation (6) further makes the point that the refusal or failure of the candidate or his agent to sign, or to record reasons for such refusal or failure would not render the results invalid.

76. In respect to the presiding officer, there is no similar latitude. Therefore, it does appear that the presiding officer is obliged to sign the Form.

77. I pause there to point out that the Regulation does not impose a similar obligation on the deputy presiding officer.

78. Therefore, I find no basis in law, for the insistence of the petitioner, that both the presiding officer and this deputy must sign the Form.

79. I now revert to the issue of verifiability of results. I totally agree that when a presiding officer signed the Form, it can be verified, later, using that signature as the beacon. When the form lacks the beacon, it could be possible that another Form might be introduced into the process, by an unscrupulous person.

80. In my understanding, if the results on the form can be traced backwards, to the votes cast and which were then assigned to each candidate in the way voters expressed their will, that would constitute verifiability.

81. In the case of **WILLIAM KABOGO GITAU Vs. GEORGE THUO & 2 OTHERS, ELECTION PETITION No. 10 of 2008**, Kimaru J. alluded to the issue of verifiability, when he said;

**“In the present petition, it was apparent that the 3<sup>rd</sup> respondent failed to verify or confirm that the results filled in the Form 17A were the true and correct results of all the 231 polling stations in Juja constituency. The Form 17A was not dated. It was evident that the 3<sup>rd</sup> respondent, if at all, filled the Form 17A in the absence of the candidates (which is a mandatory requirement of the law). That was the reason why the candidates, including the 1<sup>st</sup> respondent, failed to append their respective signatures on the said Form 17A. The said Form 17 cannot therefore be said to be a valid legal instrument or statutory form containing the declared results of Juja constituency. This is on account of the fact that the results contained therein do not reflect the true and correct results of Juja Parliamentary election. This court could have evaluated the anomaly contained in the results in the said Form 17A with the actual ballots cast if it could be in a position to order for the scrutiny and recount of votes. Unfortunately, as stated earlier in this judgement, this court could not possibly have ordered for the said ballots to be scrutinized when the integrity of a third (66 out of 231) of the ballot boxes had been seriously brought into question. It was apparent that the said ballot boxes had been tampered with in the period between the time the**

**defunct ECK was disbanded and the constitution of the 2<sup>nd</sup> respondent”.**

82. Clearly, if the ballot boxes has not been tampered with, in that case, the court could have evaluated the anomaly contained in the results, through an order for scrutiny.

83. In this case, the petitioner asked for scrutiny, and the court allowed it.

84. Through the process of scrutiny, the court and the parties had an opportunity of conducting an evaluation of the results contained on the unsigned Forms.

85. The scrutiny exercise constituted a process of verification of the accuracy, or otherwise, of the results in the Forms 37A.

86. Secondly, unlike in the case of **KABOGO Vs. THUO**, the Agents of the petitioner signed the Forms 37A. By appending their signatures to the Forms 37A, the Agents were expressing their satisfaction with the results contained therein.

87. In my considered opinion, the signatures of the Agents cannot have been in vain. They constitute a clear chain between the results in the Forms 37A and the petitioner.

88. Thirdly, the results from the scrutiny largely demonstrate that the results on the unsigned Forms 37A are the same results as were earned by the candidates, as declared by the presiding officers.

89. When it is borne in mind that the petitioner and his Agents made conscious decisions not to challenge the declared results through the process of a recount; and because the Agents signed the Forms 37A, I hold that the accuracy of the results were verifiable.

90. I reject the notion that although the Agents signed the Forms 37A, such results would be invalid simply because the presiding officers did not sign them.

**Alteration of Forms 37A without countersigning**

91. It is common ground that regardless of whether or not it is a statutory requirement, the counter-signing of alterations on the Forms 37A is an acceptable best practice.

92. The petitioner submitted that when an alteration was not counter-signed, the contents of the Form 37A which was altered, do not reflect the will of the people.

93. In the face of the alterations which were not counter-signed, the petitioner sought and was granted an order for scrutiny.

94. However, the petitioner now submits that the order for scrutiny, as granted, did not provide sufficient opportunity to establish the truth.

95. He likened the exercise which the court ordered for, to the viewing of the seals of the physical ballot boxes and its top cover, without examining the contents of the box.

96. In my understanding, it is not necessary for the contents of the ballot boxes to undergo scrutiny before it can be established whether or not alterations had been countersigned.

97. The alterations in issue herein were said to relate to the results which had been declared. I understood the petitioner to be saying that after results were announced by presiding officers, the same presiding officers altered the results by reducing the votes garnered by the petitioner, and by increasing the votes garnered by the 3<sup>rd</sup> respondent.

98. During his testimony, the petitioner said;

**“Any changes to any IEBC documents must be countersigned; especially results must be counter-signed for authentication.**

**The Forms are from pages 626 to 640.**

**There are differences between the declared results and the results in the Forms”.**

99. Thus, the need for counter-signing alterations is the authentication of the information. And the need for authentication arose because the petitioner said that the results which were declared were different from the results on the Forms.

100. However, the petitioner conceded that he was not present when results were being announced at the polling stations. Clearly, therefore, the petitioner relied upon his agents, on information about the results which were announced at the polling stations.

101. Curiously, however, the petitioner did not have any affidavits from his Agents, giving facts about the results which were announced at the polling stations.

102. Instead, the petitioner fell back on the differences between results on the **IEBC** portal and the results on the Form 37C. But when he was asked to provide evidence of the results allegedly on the portal, the petitioner said that he did not have them.

103. Ultimately, therefore, the comparison was done between the results on the Forms 37A and those on the **KIEMs** kits.

104. In that regard, the petitioner complained that the **IEBC** provided carbon copies for 7 out of the 20 forms 37A.

105. However, if the results that were produced were carbon copies, the petitioner has not demonstrated how they were different from the original Forms 37A.

106. Ordinarily a carbon copy would be an exact replica of the original. Therefore, if the petitioner had any reason to doubt the carbon copies in this instance, the burden of proof was upon him, to prove that the carbon copies were different from the originals. He did not discharge that onus.

107. If anything, the Final Report on Scrutiny revealed that, for the most part, the results which were announced, are the same as the results in both the Forms 37A and in the **SD** cards.

108. Therefore, the failure by the presiding officers to counter-sign the alterations did not alter the expression of the will of the voters in Mandera County.

**Failure to use KIEMs without following due procedure**

109. It was the petitioner’s case that in most polling stations in Morothile Ward, Guricha Ward and Rhamu Dimtu Ward, in Mandera North Constituency, the **KIEMs** were not used.

110. As the petitioner said;

**“Technology was to be used in the election therefore as an accountability tool, to ensure that only persons whose biometrics were identified by the equipment would be allowed to cast their votes”.**

111. In this case, the petitioner drew attention to the fact that no presiding officer or agent, whatsoever, signed any report documenting the failure of the **KIEMs** system, to justify the decision to resort to the complimentary system.

112. The petitioner testified that the presiding officers could only abandon the electronic identification process after exhausting the entire procedure used when **KIEMs** kits had failed completely.

113. He said that the procedure was not used at the polling stations which he visited.

114. Although it was not in his affidavit, the petitioner said (*during cross-examination*) that he visited Tawfiq Primary School and Hidayah Primary School.

115. He stated that the Agents would provide the particulars of the abandonment of the **KIEMs** kits.

**116. PW6, HASSAN ISAACK MAALIM**, said that he was an Agent for the petitioner, at Olla Primary School, where the polling station for Korm Adow had been shifted to.

117. His testimony was that at that polling station, **KIEMs** kits were not used at all. He said that it was 32 page exercise books that were used.

118. That contention was completely new, in the sense that it was not founded upon the Petition. Therefore it cannot advance the petition. Accordingly, it is hereby disregarded altogether.

**119. PW7, MOHAMED ALIOW MOHAMED**, said that at Shir Shir Primary School, (*where the polling station for Yaqilla Farm had been moved to*), **KIEMs** was used briefly.

120. His testimony was that after about an hour, at about 9.30 a.m, the presiding officer stopped the usage of **KIEMs** kits.

121. As noted by the petitioner, it is those two witnesses who gave evidence on the issue of the alleged abandonment of the **KIEMs** kits.

122. The **IEBC** denied the assertions that it used 32 page exercise books. It also denied the contention that the presiding officer at the Yaqilla polling station simply stopped using **KIEMs** kits after about an hour.

123. The word of one witness, which is denied by another witness, is not proof of that which the first witness said.

124. In this case, we have not been shown any of the exercise books that were allegedly used.

125. And if the books were in the hands of the Commission, the court would have expected the petitioner to make an application to compel the Commission to make them available.

126. Although the petitioner did make an application for the preservation, and eventually for the production in court, of some electoral materials, he did not ask for the exercise books. If those books were used, the petitioner should have proved so, but he did not.

127. In any event, if the **KIEMs** kits did not work in the two polling stations, that could not have proved the allegation that in most polling stations in Morothile, Guticha and Rhamu-Dimtu Wards, the **KIEMs** kits did not work.

128. According to the petitioner, the **KIEMs**, kits "*resurrected*" during the transmission of results. That submission was not supported by any tangible evidence.

129. If anything, when **KIEMs** kits were not used to identify the persons who voted at the various polling stations, it would be difficult to understand how the **KIEMs** kits would later relay the results from such polling stations.

130. From my basic understanding of **KIEMs** kits, they can only give an output based on the information which was entered into it. And the information about voters includes their National Identity Card Numbers or the particulars of their Passports; together with each such voter's biometrics. It is therefore inconceivable that the **KIEMs** kits would produce results including the persons who were only identified with the use of an exercise book.

131. I find that in relation to Yaqilla Farms polling station, the Returning Officer proved that during the very limited time when the **KIEMs** failed, no voters cast their votes. That fact is clearly recorded in the Polling Station Diary.

132. Finally, on this issue of **KIEMs**, the fact that **IEBC** failed to make available some nine (9) **SD** Cards does not lead to an automatic conclusion that **KIEMs** was not used at those 9 polling stations. This is because, in the first instance, the petitioner only called evidence of two (2) witnesses, in an endeavour to prove that **KIEMs** was used only briefly in three Wards in Mandera North Constituency. He cannot turn around and say that because **IEBC** did not produce **SD** Cards for nine (9) polling stations, that is proof that **KIEMs** was not used in the 9 polling stations.

133. The respondents had no legal obligation to disprove that which the petitioner had not led evidence on.

**Chasing away from polling stations and assault of the Agents for Petitioner/EEP**

134. The petitioner testified that his Agents were chased away or were locked out of the vote counting and the tallying process. Indeed, that is his submission, as well.

135. In the first instance, a distinction must be drawn between polling stations and the tallying centre.

136. Whilst polling stations are the primary units at which voters cast their votes, and where the presiding officers count the votes; the tallying centres are presided over by Returning Officers, who receive results from the presiding officers. The primary task of the Returning Officer, at the tallying centre is to carry out the process of tallying the results shown on the Forms 37A, and to come up with the totals.

137. In effect, at the tallying centres, the Returning Officers do not count votes.

138. The petitioner's testimony was that eight (8) of his Agents had sworn affidavits in which they narrated about how they were chased away from the polling stations where they had been assigned.

139. However, the petitioner also said that only two (2) of those Agents would testify.

140. The court had given very clear and express guidelines to the parties concerning the Affidavits sworn by persons who thereafter failed to make themselves available in court, to undergo cross-examination. The affidavits of such persons were to be disregarded completely.

141. The petitioner told the court that both he and his Chief Agent visited the polling stations where the Agents were chased away from.

142. The petitioner drew the court's attention to the evidence of **PW6**, who was allegedly refused entry into Olla Primary School polling station.

143. That witness never said that he was either chased away from the polling station, or that he was assaulted.

144. He said that he was originally denied entry into Olla Primary School. The person who allegedly denied him entry was the Deputy Presiding Officer.

145. However, after the intervention of a police officer, the Presiding Officer allowed **PW6** into the polling station.

146. The witness narrated that he was told to sit next to the place where thermos flasks were kept. He said that he was allowed to be at the polling station, on condition that he was not allowed to see.

147. Nonetheless, the witness went on to say;

**"I observed when voters cast their votes from about 9.00 a.m until 4.00 p.m".**

148. Obviously, if **PW6** was telling the truth about what he saw, that means that from the place where he was seated, he was able to

observe what was happening.

149. If **PW6** saw what was happening at the polling station, it cannot also be true that he had remained there, on condition that he was not able to see.

150. At any rate, **PW6** was neither chased away from the polling station nor assaulted.

151. The next person whom the petitioner identified as having been chased away was **PW8, IBRAHIM MOHAMED NUNOW**. He testified that he had been an Agent for the petitioner, at **USUBEY** polling station.

152. According to **PW8**, he signed the Polling Station Diary upon his arrival at the polling station.

153. His evidence was that voting went on very smoothly between 6.00 a.m and 2.00 p.m, when the presiding officer told him that **EFPP** had had problems in some polling stations.

154. The presiding officer had held discussions with a person calling himself a Chief Agent.

155. The said “*Chief Agent*” and the presiding officer then suggested to **PW8** that he should leave the polling station before problems arose.

156. However, **PW8** refused to leave, as there were no problems at the polling station.

157. Thereafter, the voting ended peacefully, at 4.00 p.m, when there were no other persons waiting to vote in both streams 1 and 2.

158. According to **PW8**, he was then offered any amount of money he wished for, so that votes could be added to the Jubilee candidate, in order to have 100% voter turn-out at Usubey polling station.

159. However, **PW8** rejected the offer.

160. At that stage, the “*Agent*” ordered the presiding officer to tell those who had voted earlier to vote a second time.

161. It was the evidence of **PW8** that;

**“Everybody who had voted in the morning, voted a second time”.**

162. When those persons had lined up, **PW8** raised an alarm.

163. The voters “*incited PW8*”, saying that he was an **EFPP** Agent who was not wanted there. **PW8** ran away and raised an alarm with the Chief Agent. He then reported the incident to the police station.

164. After **PW8** had left, most of the persons who had lined up, voted. However, **PW8** did not return to the polling station after he left.

165. It is worthy of note that when **PW8** was shown the Polling Station Diary, he confirmed that his name was not in it. But to be fair to the witness, he also said, (*during re-examination*), that what he had been shown did not qualify to be the Polling Station Diary.

166. Nonetheless, the petitioner and **PW8** did not produce the Polling Station Diary which the witness signed.

167. Another significant fact is that **PW8** confirmed that the Agents whose names appeared on the lists produced by the **IEBC** were;

**“...the agents I left at the station when I was kicked out”.**

168. So, whether or not the list of those agents were in a Polling Station Diary, **PW8** confirmed that they were agents on the material day.

169. If **PW8** was an agent at that polling station, his name ought to have been there too; but it is not.

170. I therefore find that **PW8** failed to prove that he was the **EFP** Agent at Usubey polling station.

171. I further note that by 4.00 p.m, **PW8** says that 324 persons had voted in one “*stream*”, whilst in the other “*stream*”, 314 persons had voted.

172. Therefore, if all those persons voted again as, **PW8** said, the total votes cast should have been **648** and **628**, respectively.

173. However, the final tally was **357** and **375** votes, respectively. Obviously, **PW8** cannot have been telling the court the truth when he testified that everybody who had voted in the morning, voted a second time.

174. Accordingly, I find that **PW8** was an unreliable witness. That finding is fortified by the fact that during re-examination, **PW8** said that he saw;

**“...almost 5 people cast their votes twice”.**

175. It is almost like the witness had appreciated the fact that his earlier testimony, (*about every person voting twice*) could not hold water. He therefore scaled down his evidence to “*almost five people*”.

176. Surely, if five (5) people had voted a second time, that should have been easy enough for **PW8** to count. Why then would he talk about “*almost five people*”, as if it is possible to have fractions of a person, casting their votes!

177. I have no doubt that **PW8** was so unreliable as a witness that his evidence must be disregarded altogether.

178. Next, the petitioner presented **PW16, ADOW MOLU KIKE**, as a witness who would provide proof that the petitioner’s Agents were chased away from the polling stations or were assaulted.

**179. PW16** was an Agent at **DARAB ATHATHI** Primary School. He testified that only forty (40) persons voted at that polling station.

180. However, he also said that the final results at that polling station were unknown to him. I find that that was a very curious statement, considering that during re-examination **PW16** said that he was present all through the time when the votes were being counted.

181. Whilst he was at the polling station, he was assaulted and was severely injured. Notwithstanding the severe injuries sustained by him, **PW16** slept at the polling station until 9<sup>th</sup> August 2017.

182. His testimony was that he went to the hospital, but the staff at the hospital were on strike.

183. He also went to Rhamu Police Station, but the police refused to record his statement.

184. After the witness found that the staff at the hospital were on strike, he went to a private hospital.

185. The witness did not provide any document to prove that he visited any private hospital.

186. However, he made available a P3 Form dated 14<sup>th</sup> August 2017. That date coincides with the oral testimony given during the

re-examination of **PW16**, when he said that it is on 14<sup>th</sup> August 2017 that he reported to the police.

187. In effect, as the police issued a P3 to the witness, that appears to be inconsistent with the contention that the police refused to record his statement.

188. Although **PW16** said that he did receive treatment on 9<sup>th</sup> and 14<sup>th</sup> August 2017, he only provided evidence that shows he was treated on 14<sup>th</sup> August 2017. He offered no explanation for failing to provide proof of the treatment he allegedly got on 9<sup>th</sup> August 2017.

189. In my considered view, the decision to provide proof of the treatment received on 14<sup>th</sup> August 2017, whilst withholding proof of the treatment allegedly received on 9<sup>th</sup> August 2017 is consistent with the lack of any treatment on 9<sup>th</sup> August 2017.

190. And it is not just a matter of consistency; I so find because **PW16** said that;

**“I first went to the police before getting treatment”.**

191. The P3 Form which he produced shows that he reported to the police on 14<sup>th</sup> August 2017. **PW16** further reiterated that fact during re-examination.

192. Therefore, it follows that **PW16** did not get any treatment prior to 14<sup>th</sup> August 2017, as he only got treatment after he had reported to the police.

193. I cannot help but wonder why **PW16** was trying to persuade the court that he first received treatment on 9<sup>th</sup> August 2017.

194. From the P3 Form and the extract of the medical records presented by **PW16** it appears that he sustained soft tissue injuries to his right eye.

195. The injury was allegedly inflicted by the presiding officer, who hit him with a blow to the face.

196. I find that **PW16** sustained injuries after he had been assaulted at the Darab Athathi Primary School polling station.

197. The assault on an Agent is wholly unacceptable, and is condemned unreservedly by the court.

198. Nonetheless, I find that the said Agent was present throughout the voting and the counting of votes. Therefore, instead of simply declaring his “*unwillingness*” to sign the Form 37A, he would have been more helpful by expressly endorsing his reason for refusing to sign the Form.

199. The petitioner submitted that the Constituency Returning Officer, **ABDI BASHIR ALINOOR ALI (R1-RW2)** had admitted that violence was visited upon the petitioner’s agents. In that respect, the petitioner drew the court’s attention to page 364 of the court proceedings.

200. I have carefully perused the proceedings on the page referred to, and I find that the only thing which **R1-RW2** admitted to, is the fact that there was an un-signed alteration. It is the issue of the un-signed alterations which had been reported to the County Electoral Manager.

201. As regards the chasing away of the petitioner’s Agents, **R1-RW2** said;

**“I am not aware that EFP agents were chased from some polling stations”.**

202. Therefore, there is no evidentiary foundation upon which the petitioner could come to the conclusion that the County Returning Officer had made an admission concerning the alleged chasing away of the petitioner’s Agents.

203. The petitioner went on to submit thus;

**“The locking out of the petitioner’s agent was thus contrary to the principles of transparency, accountability and fairness, and the petitioner was largely prejudiced”.**

204. There is no evidence that any agent of the petitioner was locked out from any polling station, to which they had been assigned.

**Illegal Transportation and/or Distribution of Electoral Materials**

205. It was the petitioner’s case that the transportation of the electoral materials was never done by the **IEBC**. He said that the entire process was conducted exclusively by the police officers attached to the Rhamu Police Station.

206. According to the petitioner, Regulation 61 (4) of the Elections (*General*) Regulations stipulates that electoral materials ought to be distributed by the Constituency Returning Officer.

207. In his case, the petitioner testified that the electoral materials were ferried in police vehicles.

208. He was aware of the fact that the police are normally recruited for the purposes of safeguarding transportation.

209. It was his understanding that the Returning Officer ought to bring vehicles for use in the distribution of electoral materials, from the **IEBC** offices. He added that;

**“The Presiding Officers are allocated their materials and the police provide security.**

**But in Mandera North, that did not place. I did not personally see materials being transported by police officers form Rhamu Police Station”.**

Notwithstanding the fact that the petitioner admitted having not seen the police distributing the electoral materials, he insisted that;

**“IEBC officials did not handle the materials.**

**Apart from the police, nobody else handled the materials”.**

210. When the petitioner was asked about the vehicles which were used to transport the materials he said;

**“Very many vehicles were used. Some were police vehicles. There is no data kept by anybody as required by IEBC Rules”.**

211. Thus, from the outset, it was not clear whether all the vehicles used were police vehicles or only some, were police vehicles.

212. In order to put the matter within perspective, it is to be noted (*as all the parties agreed*) that the non-strategic materials were being kept at the **IEBC** offices. Meanwhile, the strategic materials, in particular the ballot papers, were kept at Rhamu Police Station.

213. On the eve of the elections, **IEBC** was required to transport the electoral materials to all the polling stations.

214. Secondly, the persons who had been appointed as Presiding Officers were to get to their respective polling stations.

215. It is common ground that some presiding officers were replaced by the Returning Officer. However, as those who were replaced were not formally notified, they converged at the **IEBC** offices.

216. The petitioner said that;

**“There was commotion and police stepped in to restore order”.**

217. PW2 said that;

**“On 07/08/2017 the Polling Clerks reported for duty. They came to collect the Ballot Boxes and Ballot papers and Election Materials.**

**I am aware that only Returning Officers and Presiding Officers who collect Election Materials, but with the Polling Clerks”.**

218. In other words, both the petitioner and PW2 made it clear that presiding officers had gone to the IEBC offices, with a view to collecting the electoral materials.

219. At that stage, a Mr. MOHAMED SALAT informed the Presiding Officers that some of them had been replaced. It is that announcement which gave rise to a commotion.

220. The petitioner made it clear that the police stepped in to restore order.

221. On the other hand, PW15, HASSAN IBRAHIM ALI, testified that the police officers invaded the IEBC offices.

222. In effect, the petitioner and his own witness were not reading from the same script.

223. It is thus not clear to me why, in the final submissions, the petitioner’s advocates disregarded the evidence tendered by the petitioner and adopted the evidence of PW15.

224. Meanwhile, I note that PW15 said that the Returning Officers and the Presiding Officers were about 100 metres away from the IEBC offices. That implies that, even by the evidence of PW15, the Returning Officers and the Presiding Officers were within the vicinity of the IEBC offices.

225. PW15 said;

**“The OCS and the OCPD invaded my office, with very many police officers. They were armed. The officers were colliding with those who were complaining of being replaced”.**

226. I understand that evidence to mean that, whether the police action was an invasion or an attempt to restore order, it happened at the IEBC offices.

227. Elsewhere, PW15 said that there were no Presiding Officers at the IEBC offices, and that those who were complaining that they had been replaced were outside the gate.

228. If the police officers were colliding with those who had been replaced, and if such collision was outside the gate, that would imply that the police did not literally invade the IEBC offices.

229. In my considered view, the police did not remain outside the compound, because they could then not have been involved in getting the materials which were within the compound.

230. My said view is fortified by the evidence tendered by PW15 during re-examination, when he said;

**“I continued arranging the materials. At 8.00 p.m someone knocked on the door. He said he was the OCS Rhamu Police Station. He was with the OCPD and DCIO”.**

231. Clearly therefore, the police officers were within the compound.

232. Secondly, they did not just bust into the office. As **PW15** said, the **OCS** knocked on the door, and they then introduced themselves. To my mind, that is not the conduct of a person who was invading the offices of **PW15**.

233. If the police officers were no less than 200, and if they were armed, (*as PW15 said*), I believe that if they simply wanted to carry away the electoral materials, without involving **PW15**, nothing could have stopped them.

234. It is noteworthy that although the materials were already arranged outside the office, but within the compound, the police officers first engaged **PW15**. This is what **PW15** said about the police officers;

**“They said that the Returning Officer had instructed that the materials be distributed.**

**I refused, insisting that the Returning Officer must arrive first. I tried to reach the Returning Officer but he did not answer”.**

235. Of course, it was a reasonable stand taken by **PW15**, when he tried to reach the Returning Officer.

236. It would have been reckless of the witness to simply release the electoral materials which were in his custody, before verifying that the Returning Officer had given the instructions attributed to him by the police.

237. But I also note that **PW15** never tried to verify with the Returning Officer, after the materials were distributed. **PW15** said that he had did not meet the Returning Officer from the date when the materials were distributed until **PW15** testified in court. Therefore, **PW15** did not ever get to know whether or not the Returning Officer had given instructions on the distribution of the electoral materials.

238. On the other hand, the Returning Officer testified that it was **PW15** who distributed the non-strategic electoral materials. He did not say that he had sent the police officers to the **IEBC** offices, with instructions that the electoral materials be distributed.

239. This is what the Returning Officer said;

**“On 07/08/2017 I did not distribute electoral materials with Hassan (PW15). It was his role to distribute the materials”.**

240. It is common ground that the electoral materials which the Returning Officer was talking about were the non-strategic materials. I say so because **PW15** confirmed that the strategic materials, and in particular, the Ballot Papers, were to be distributed by the Returning Officer.

241. Whilst the Returning Officer said that it was the role of the **IEBC LOGISTICS OFFICER (PW15)** to distribute the non-strategic materials, **PW15** said;

**“On 07/08/2017 I did not distribute the non-strategic materials. It was the role of the Returning Officer to distribute the materials. He and I work together”.**

242. Each of the two **IEBC** officials said that it was the role of his counterpart to distribute the non-strategic materials. If effect, neither **PW15** nor the Returning Officer has claimed responsibility for the distribution of the said materials.

243. Does that therefore mean that it is the police officers who carried out the process of distribution, and that, therefore the election should be vitiated"

244. During cross-examination, the Constituency Returning Officer described thus, what happened;

**“The ballot boxes were brought to the police station, before the ballot papers were given to the Presiding Officers who had come with the Ballot boxes”.**

245. That implies that the presiding officers accompanied the Ballot boxes from the **IEBC** offices, to the police station.

246. During re-examination, the Returning Officer further clarified how the whole thing works. He said;

**“The other materials were distributed from our offices, by the logistics officer, and the permanent Deputy Returning Officer.**

**The materials were already prepared and packaged. Once the Presiding Officers arrived, they reported to the Logistics Officer and the Deputy Returning Officer. The Presiding Officers collected those materials with Ballot Boxes.**

**The Presiding Officers would collect the KIEMs from the ICT officials.**

**They would then board their car to the police station, where they picked the Ballot papers and 2 security officers”.**

247. After giving due consideration to the evidence on the issue of the transportation of the electoral materials, I have come to the conclusion that it was not carried out exclusively by the police officers as had been alleged by the petitioner.

248. Some presiding officers accompanied the non-strategic materials from the **IEBC** offices, until the materials reached the police station.

**249. PW15** had made it clear that the police never made a record of distribution of the electoral materials.

**250. PW15** also said that he did not keep a record of what was distributed. He only had a record of the electoral materials, before distribution.

251. Notwithstanding the absence of the record on the distribution of the electoral materials, the petitioner never said that any ballot boxes or other electoral materials were delivered to the wrong polling station.

252. Instead, **PW15** said;

**“At the end of the election, I retrieved all the materials. I did account for all the materials the police had distributed”.**

253. The fact that none of the electoral materials was either lost or was sent to the wrong polling station is consistent with the evidence of the Returning Officer, who had said that the materials were distributed by the presiding officers.

254. Since the Logistics officer was able to retrieve all the materials and he was able to account for all the materials which he did not distribute, *(and which he said had been distributed by the police)*, I find that the manner in which the distribution was carried out, did not prejudice the petitioner.

### **Illegal Alteration or Movement of Polling Stations**

255. It was the petitioner’s case that the 1<sup>st</sup> and 2<sup>nd</sup> respondents had allegedly altered various gazetted Polling Stations. He said that there was 10 gazetted polling stations which were later altered without due compliance with the law.

256. Out of the said 10 polling stations, the petitioner visited Korm Adow.

257. However, he conceded that there was not a single voter who had said that he or she could not trace the 10 polling stations.

258. Indeed, in the assessment of the petitioner, the voter turn-out in the 10 polling stations was 90%.

259. So, what did the petitioner mean when he talked about polling stations which were either altered or moved illegally"

260. He said;

**“A polling station is properly located by dint of gazettelement. Instead, polling took place at other places, which were not gazetted”.**

261. At that point, the petitioner was shown the gazette Notice dated 30<sup>th</sup> June 2017, which shows the polling stations which had been gazetted.

262. After giving consideration to the contents of the gazette Notice, and comparing it to the list of polling stations which were cited in the petition, as having been altered illegally, the petitioner said;

**“There are no polling stations in pages 1444 to 1448 which were not gazetted. They were all gazetted”.**

263. Therefore, if the lack of gazettelement of a polling station is what renders the said polling station illegal, the petitioner is deemed to have confirmed, through his own evidence, that all the polling stations were legal, as they had all been duly gazetted.

264. However, the petitioner also complained that although polling stations may have been gazetted, in real terms, voting did not take place in some of those polling stations.

**265. PW6, HASSAN ISAACK MAALIM**, testified that voting did not take place at **KORM ADOW**. Instead, the persons registered as voters at Korm Adow were moved to **OLLA PRIMARY SCHOOL**.

266. His evidence was that Korm Adow was completely abandoned. The driver of the vehicle which was ferrying agents for **EFP** told **PW6** that the next place that they would go to was Sarman.

267. At Sarman Primary School, **PW6** inquired about the whereabouts of the polling station for Korm Adow. The witness was directed to Langura.

268. Upon arrival at Langura, **PW6** was told that the Korm Adow polling station had been moved to Olla Primary School. He then went back to Olla Primary School, which is located between Korm Adow and Rhamu.

269. When **PW6** was questioned about the distance between Korm Adow and Olla he said that although he was unsure about the actual distance, it was not less than 50 kilometres.

270. Obviously, if a polling station had been re-located not less than 50 kilometres from its original location, the persons who were registered to vote there would be highly inconvenienced if they had to travel over 50 kilometres to go and vote.

271. However, it is noted that during re-examination, **PW6** said that from Korm Adow to Olla Primary School, the distance is 20 kilometres. But the witness did not tender any explanation for revising his assessment of the distance from “*not less than 50 kilometres*”, to 20 kilometres.

272. He did say that that was his first time to travel to Korm Adow. However, that cannot explain why the witness had a major change of his evidence on the issue of the distance. That un-explained change in evidence puts to question the reliability of **PW6**.

273. It was the testimony of **PW6** that at Korm Adow there were 403 registered voters.

274. If the majority of the registered voters did not vote because of the alleged change of location of the polling station, that should be reflected in the number of votes cast.

275. The petitioner had persuaded the court to order for scrutiny in respect of Korm Adow Polling Station.

276. In the Final Report on the scrutiny, the learned Deputy Registrar noted that 376 votes were cast.

277. The results show that a very sizeable proportion of the registered voters cast their votes. In fact, my calculations show that the voter turn-out was in excess of 93%. To my mind, that is inconsistent with the petitioner's narrative, that voters were inconvenienced as the polling station was moved away from its original location.

**278. PW7, MOHAMED ALIOW MOHAMED**, an Agent for **EFP** said that the polling station for **YAQILLA FARMS** was moved to **SHIR SHIR PRIMARY SCHOOL**.

279. He said that as an Agent he would only sign the Form embodying the results if he was content with the voting.

280. He added that if he was either not content with the voting or if he had issues with the said voting, he would not sign the Form. However, in the event that he had issues, but signed the Form, he would give his reasons.

281. In this instance, **PW7** signed the Form.

282. Having signed the results in respect to the Yaqilla Farms, **PW7** is deemed to have accepted the same, unconditionally. If he had any issues, he would have given the same at the material time. As he did not cite any reasons at the time of signing the Form which had results, any issues being raised much later are construed as an afterthought.

283. In the event, the petitioner failed to provide credible evidence to prove that **IEBC** moved the two polling stations of Korma Adow and Yaqilla Farms.

#### **Relocation of the Tallying Centre**

284. Through **Petition No. 362 of 2017**, some aggrieved citizens from Mandera North sought and obtained an Order from the High Court, requiring the **IEBC** to move the tallying centre from the Office of the DC Rhamu, to the Rhamu Arid Zone Primary School.

285. Notwithstanding that court order, the tallying centre was not moved from the DC's office.

286. As far as the petitioner was concerned, the failure to comply with the court order was a serious malpractice.

287. However, it is clear that the Court of Appeal did grant an Order staying the execution of the High Court order. The Court of Appeal's order was granted in **CIVIL APPEAL No.188 of 2017**.

288. In the light of the decision of the Court of Appeal, the **IEBC** cannot be said to have disobeyed a lawful order when it did not move to tallying centre.

#### **Electoral Malpractices at the tallying centre**

289. Pursuant to Regulation 87 (1) (a) of the Elections General Regulations, 2012;

**“The constituency returning officer shall, as soon as practicable -**

**(a) deliver to the county returning officer all Forms 37B, 38B and 39B from the respective constituencies and the collated results.....”**

290. In respect to the elections for the position of a Governor, the prescribed Form is 37B, which is headed;

**“Collation of County Governor Election Results at the Constituency Tallying Centre”.**

291. In this case, the results were captured on a Form which bore the Heading;

**“Collation of Presidential Election Results at the Constituency Tallying Centre”**

292. The Returning Officer cancelled the reference to “*Presidential Election*”, and inserted a reference to the County Governor’s Elections.

293. In my considered opinion, the important issue is the contents of the Form, rather than the title.

294. The information embodied on the Form clearly and obviously is in relation to the elections for the position of the Governor.

295. I find no merit at all in the contention that what was done constituted a malpractice.

296. Furthermore, the petitioner did not challenge the substance of the Form, in terms of the results shown. Therefore, the fact that the returning officer modified a Form and populated it with the correct information cannot be the basis upon which to invalidate results of the election.

297. As regards the contention that the ballot boxes were not brought to the tallying centre, and that the petitioner had no idea about where the ballot boxes were, I note that the petitioner’s witness, (**PW15**) retrieved all the materials. **PW15** was the Logistics Officer for the **IEBC**. He said, during re-examination, that he did account for all the materials.

298. I therefore find that the petitioner must be deemed to know that the Ballot Boxes were retrieved by the **IEBC**.

299. There has been no contention that any Ballot Boxes were missing.

300. As relates to the contention that the results for Tossi Primary School Polling station were altered at the tallying centre, I note that the **EFP** Agent had signed the Form 37A.

301. First, the petitioner has not made available to the court, the Form that was allegedly altered.

302. Secondly, any alteration at the tallying centre would not have any impact on the final results as the same had already been announced at the polling station.

303. The petitioner failed to show that the allegedly altered results were used by the returning officer when collating or tallying the results from the respective polling stations.

304. Therefore, I find no credible evidence of the alleged alteration of the results from Tossi Primary School Polling Station 02. I also find that there is no evidence that the alteration, if any, had any impact on the results which were declared.

305. In respect to Garsey Primary School Polling Station 01, Form 37A showed that the 3<sup>rd</sup> respondent got 352 votes.

306. However, the results from the scrutiny revealed that only 100 votes had been cast.

307. Obviously, there is a discrepancy between the declared results and the results obtained after scrutiny.

308. The court notes that during scrutiny, the learned Deputy Registrar and the parties all agreed that apart from the Aperture seal, all the other seals did not correspond with what was on the Polling Station Diary.

309. Obviously, therefore, there had been some tampering with the seals on the ballot box. In the circumstances, nobody can vouch for the integrity of the contents of the ballot box, at the time of scrutiny.

310. As the electoral materials, including the ballot box in issue, were in the custody of **IEBC**, it was the obligation of the Commission to ensure that they were properly secured.

311. However, there is no explanation from **IEBC** for the difference between the seals whose particulars are in the Polling Station Diary, and the seals found on the ballot box during scrutiny.

312. I appreciate that the question of the seals did not arise from the pleadings, and that therefore none of the parties led evidence about them.

313. In the circumstances, the facts which came to light at scrutiny shall be taken at face value. They show that the results of the 3<sup>rd</sup> respondent should be reduced from 352 votes to 100 votes.

314. However, I find no reason to order that the presiding officer be investigated. It has not been shown that the presiding officer had inflated the votes assigned to the 3<sup>rd</sup> respondent.

315. The drop in the number of votes could possibly be due to other reasons, considering that the seals which were cited in the Polling Station Diary had been changed.

316. Pursuant to Regulation 83 (1) (b) of the Elections (*General*) Regulations, 2012, the Returning Officer is directed to disregard;

**“the results of the count of a polling station where the total valid votes exceed the number of registered voters in that polling station”.**

317. In relation to *Sukela Tinfa, Al Hidaya Primary School-04* and *Olla Primary School -03*, the Returning Officer disregarded the results because the votes cast had exceeded the registered voters in the respective polling stations.

318. However, the scrutiny has shown that in each of those polling stations, the votes cast did not exceed the registered votes. If that is the position, as appears from the scrutiny, it would follow that the returning officer ought not to have disregarded the results from those three polling stations.

319. But the petitioner has pointed out that in relation to *Sukela Tinfa* and *Al Hidaya Primary School-04*, the ballot papers were not properly secured. It was therefore the view of the petitioner that it was impossible to verify if indeed the votes allegedly garnered by the candidates were a true representation of the will of the voters.

320. My considered view is that justice demands that if the votes garnered by the 3<sup>rd</sup> respondent in *Garsey Primary School-01* be reduced so that the number is in line with that which was arrived at during the scrutiny, it should follow that other results obtained through scrutiny should be upheld.

321. In the alternative, if the results from *Sukela Tinfa, Al Hidaya-04* and *Olla Primary School-03* were to be disregarded, then the results from *Garsey Primary School-01* should also be disregarded.

322. I so hold because if the possible interference with the contents of the respective ballot boxes has an impact on the results which were either declared or disregarded, a similar consideration should befall other polling stations whose ballot boxes were possibly interfered with.

323. I find that because neither the petitioner nor the 3<sup>rd</sup> respondent has been shown to have played any role in any possible interference with the contents of the ballot boxes after the presiding officers had declared the results, we should accept the results of the scrutiny at face value.

324. By my calculations, this would be the consequence;

**a. Garsey Primary School-01**

**Petitioner - 0 votes**

**3<sup>rd</sup> Respondent - 100 votes**

In effect, the votes for 3<sup>rd</sup> respondent is reduced by 252 votes.

**b. Sukela Tinfa**

**Petitioner - 313 votes**

**3<sup>rd</sup> Respondent - 50 votes**

**c. Al Hidayah Primary School-04**

**Petitioner - 196 votes**

**3<sup>rd</sup> Respondent - 221 votes**

**d. Olla Primary School-03**

**Petitioner 0 votes**

**3<sup>rd</sup> Respondent 220 votes.**

After deducting from the 3<sup>rd</sup> respondent, the 252 votes, and then adding the votes from *Sukela Tinfa*, *Al Hidayah Primary-04* and also from *Olla Primary School-03*, the **final tally is 72,129 votes**.

Meanwhile, to the petitioner's declared results, I have added the votes from all the 4 polling stations. **The tally is 63,278 votes.**

325. On the other hand, if the results from the scrutiny were to be disregarded in respect to *Olla Primary School-03*; *Al Hidayah Primary School-04* and *Sukela Tinfa* (as suggested by the petitioner); whilst the votes for the 3<sup>rd</sup> respondent were reduced by 252 (on account of *Garsey Primary School-01*), the results would be;

**Petitioner - 62,769 votes**

**3<sup>rd</sup> Respondent - 71,638 votes.**

326. In either scenario, I come to the conclusion that if there were any irregularities in the manner in which the **IEBC** and the Returning Officer had conducted the elections for Mandera County, the said irregularities did not have any significant impact on the results.

327. I find that the elections were generally conducted in a fair and transparent manner.

328. I further find that the results obtained by the candidates were largely verifiable.

329. I found no flaw in the elections which was so grave as to have been capable of subverting the Will of the people of Mandera County.

330. The results declared by the Returning Officer reflected the will of the voters, as they had been expressed through the ballot.

331. Accordingly, I find that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents were validly elected as the Governor and the Deputy Governor of the Mandera County.

332. In the event the petition is dismissed.

333. The 3<sup>rd</sup> and 4<sup>th</sup> respondents have asked me to issue a certificate for 3 advocates.

334. However, I have found no reason in law, to warrant the issuance of a Certificate for 3 counsel.

335. There has not arisen any novel issues of law which required the engagement of 3 advocates, to represent the 3<sup>rd</sup> and 4<sup>th</sup> respondents.

336. I order the petitioner to pay the costs of the petition, to all the respondents. I direct that the costs shall be taxed by the Taxing Officer of this Court.

337. However, in keeping with the desire of Kenyans to keep a lid on the costs, I direct that the Instruction Fees for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents shall not exceed Kshs. 5,000,000/-.

338. Similarly, I direct that the Instruction Fees for the 3<sup>rd</sup> and 4<sup>th</sup> Respondents shall not exceed Kshs. 5,000,000/-.

**DATED, SIGNED and DELIVERED at NAIROBI this 28<sup>th</sup> day of February 2018.**

**FRED A. OCHIENG**

**JUDGE**

**Judgement read in open court in the presence of**

Jamal for the Petitioner

Mrs Kitur & Nyamodi for the 1<sup>st</sup> Respondent

Mrs Kitur & Nyamodi for the 2<sup>nd</sup> Respondent

Issa, Ahmednasir & Miss Ahomo for the 3<sup>rd</sup> Respondent

Issa, Ahmednasir & Miss Ahomo for the 4<sup>th</sup> Respondent.



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