



Case Number:	Election Petition 3 & 9 of 2017 (Consolidated)
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Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	Hedwig Imbosa Ong'udi
Citation:	Abdirahman Husseinweytan Mohamed & another v Independent Electoral & Boundaries Commission (IEBC) & 3 others [2018] eKLR
Advocates:	Mr Kinaro for the 1st Petitioner, Mr Mwangi, Mr. Ndegwa and Mr. Kago for the 2nd Petitioner, Mr. Muthama for the IP, Mr. Ratemo and Mr. Orare for the 1st and 2nd Respondent, Mr. Biring and Mr. Ondieki for the 3rd 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. 3 OF 2017

CONSOLIDATED WITH ELECTION PETITION NO. 9 OF 2017

**IN THE MATTER OF ELECTION FOR MEMBER OF THE NATIONAL ASSEMBLY FOR MANDERA EAST
CONSTITUENCY**

BETWEEN

ABDIRAHMAN HUSSEINWEYTAN MOHAMED.....1ST PETITIONER

ABDIKADIR SHEIKH HASSAN.....2ND PETITIONER

AND

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION (IEBC).....1ST RESPONDENT

ADAN HARAR NOOR, RETURNING OFFICER

MANDERA EAST CONSTITUENCY.....2ND RESPONDENT

HON. HASSAN OMAR MOHAMMED MAALIM...3RD RESPONDENT

AND

AHMED JAMALDIN ADAN.....INTERESTED PARTY

JUDGMENT

INTRODUCTION AND BACKGROUND

1. Two election petitions challenging the election of Hassan Omar Mohamed Maalim as member of the National Assembly for Mandera East Constituency in the general election held on 8th August, 2017 were instituted in this court. *Election Petition No. 3 of 2017* was filed on 5th September, 2017 by Abdirahman Husseinweytan Mohamed while *Election Petition No. 9 of 2017* was filed on 6th September, 2017 by Abdikadir Sheikh Hassan. Both petitions were filed against the Independent Electoral and Boundaries Commission (1st respondent), Adan Harar Noor, returning officer, Mandera East Constituency (2nd respondent) and Hon. Hassan Omar Mohamed Maalim (3rd respondent). The petitions were consolidated for hearing by this court in terms of Rule 17 of the Election (Parliamentary and County Elections) Petition Rules (hereinafter the “*The Rules*”). Petition No. 3 of 2017 became the lead file with Abdirahman Husseinweytan Mohamed as the 1st petitioner and Abdikadir Sheikh Hassan as the 2nd petitioner.

2. Prior to the hearing of the petitions, Ahmed Jimaldin Adan (Interested party) successfully applied to be enjoined to the proceedings as an interested party in a ruling rendered by this court on 5th October, 2017. His participation in the proceedings was limited to filing of affidavit evidence and submissions being made at the close of the hearing of the consolidated petitions.

3. The 1st and 2nd petitioners together with the 3rd respondent and the interested party were candidates in the election running on Jubilee Party (JP), Federal Party of Kenya (FPK), Economic Freedom Party (EFP) and Alliance for Real Change (ARK)

respectively.

4. Both petitioners did not set out the declared results of the elections in their petitions as is required under Rule 8 of the Election (Parliamentary and County Election) Petition Rules 2017 (“The Rules”). The results were as follows;

Hassan Omar Mohammed Maalim11441

Abdirahman Husseinweytan Mohamed8470

Ahmed Jamaldin Adan278

Haji ali Hassan72

Hassan Sheikh abdikadir6119

Hassan ali salat29

Sheikh Mohammed Abdinoor142

5. The petitioners being aggrieved by the declaration of the 3rd respondent as the Member of Parliament for Mandera East Constituency have through their respective petitions sought for the nullification of the results leading to the said declaration. They are supported in their quest by the interested party.

6. The gravamen of the petitioners’ petition is that the parliamentary elections in Mandera East Constituency were not free and fair contrary to the principles outlined in the Constitution, electoral laws and the Regulations governing elections.

7. They accuse the respondents of numerous electoral malpractices which they say amounted to a violation of the Constitution and electoral laws. The interested party has made similar allegations. They have therefore called for the nullification of the 3rd respondent’s election as the MP for Mandera East Constituency.

8. The 1st and 2nd respondents filed joint responses to each of the petitions dated 15th September, 2017 and 19th September, 2017 respectively. They deny all the allegations by the petitioners and contend that they held free and fair elections. They sought for dismissal of the petitions.

9. The 3rd respondent filed his response to both petitions. They are each dated 18th September, 2017. The 3rd respondent denies all allegations against him and contends that he was validly elected as the MP for Mandera East Constituency.

10. Several interlocutory applications were made before the commencement of the hearing. Following an application by the 1st petitioner for access to the Kiems kits used by the 1st respondent in the election, this court granted the 1st petitioner a read only access to the data extracted from the Kiems kits and stored in SD cards in relation to the 64 polling stations listed in paragraph 19 of his affidavit in support of the petition. The said orders applied to the 2nd petitioner since their petitions had been consolidated. A report on the said exercise was filed by the deputy registrar and learned counsel have submitted on it.

11. At the close of the 3rd respondent’s case, this court heard the petitioners’ applications for scrutiny and recount of votes. The said applications were considered and the court in its Ruling of 10th January, 2018 dismissed them.

ISSUES FOR DETERMINATION

12. It was agreed during the pretrial conference that parties would either file agreed issues for determination or individual ones. Each party filed his own issues for determination through his counsel. I have considered the pleadings, evidence by witnesses, written and oral submissions by learned counsel. I find the following to be the issues falling for determination.

- (a) Whether the Mandera East parliamentary election was held in accordance with the constitution and electoral laws.
- (b) Whether there were irregularities and illegalities that affected the outcome of the said election.
- (c) Whether the 3rd respondent was validly elected as the MP for Mandera East.
- (d) Who bears the costs of the petition

Issues (a) and (b) are interrelated and I shall deal with them together.

13. The general principles applicable in general elections are found in various articles of the Constitution, Election Act plus the Regulations governing elections. Article 38 of the Constitution which sets out the political rights of the Kenyan citizen provides as follows;

(1) Every citizen is free to make political choices, which includes the right—

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

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

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

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

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

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

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

(a) to be registered as a voter;

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

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

14. These political rights are realized through the citizens' free election of their representatives. The process of such an election is supposed to be free, fair and transparent. Towards this end, Article 81 (e) of the Constitution provides;

“(e) 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.”

15. The body mandated to conduct elections in Kenya is the IEBC (1st respondent) being a creature of Article 88 of the Constitution. Its mandate is outlined in Article 86 of the Constitution which provides as follows;

“ 86. At every election, the Independent Electoral and Boundaries Commission shall ensure that—

(a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;

(b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;

(c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer;

(d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.”

16. The constitutional provisions are reflected in the Elections Act and the Regulations made thereunder governing the conduct of elections. It is upon this court to determine whether the said political rights of Kenyans under Article 38 were upheld and whether the election was free, fair and transparent.

17. An election petition is not an ordinary civil suit. The burden of establishing all the allegations raised lies on the petitioner. In the case of *John Kiarie Waweru –vs- Beth Wambui Mugo & 2 Others [2008] eKLR*, the Court of Appeal stated thus;

“The burden of establishing all these allegations regarding the conduct of the said election and the results announced thereafter is on the petitioner. This court is aware of its duty to consider and determine the evidence adduced by the parties to this election petition after putting in mind the fact that the election that is sought to be nullified is in respect of an exercise of the right by the voters of Dagoretti constituency to elect a representative of their choice. This court will not therefore interfere with the democratic choice of the voters of Dagoretti constituency unless it is established to the required standard of proof that there were irregularities and electoral malpractices that rendered the said elections null and void and therefore subject to nullification.”

18. As to the legal burden in electoral causes, the Supreme Court of Kenya in the case of *Raila Odinga & 5 Others –vs- Independent Electoral and Boundaries Commission & 3 Others [2013] eKLR* held;

“[195] Its essence is that an electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner, but, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting.

[196] Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondent bears the burden of proving the contrary. This emerges from a long standing common law approach in respect of alleged irregularity in the acts of public bodies. Omnia praesumuntur rite et solemniter esse acta: all acts are presumed to have been done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authority’s departures from the prescriptions of the law.”

19. On the standard of proof in an election petition, it has been held that the proof should be above the balance of probability, but below the beyond reasonable doubt in criminal cases. This does not however apply to criminal charges linked to an election where such charges must be proved beyond reasonable doubt. In the *Raila Odinga case (supra)*, it was stated thus;

[203] But at the same time, a petitioner should be under obligation to discharge the initial burden of proof, before the respondents are invited to bear the evidential burden. The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable-doubt- save that this would not affect the normal standards where criminal charges linked to an election, are in question.”

20. The respondents have raised issues about the petitioners bringing up issues which were never pleaded in their petitions. A

petitioner is bound by his/her pleadings, affidavits and the evidence must be consistent with the pleadings.

The Indian Supreme Court in the case of *Arikala Nasara Reddy –vs- Ventaka Ram Neddy Reddygari & Another Civil Appeal No. 5710 – 5711 of 2012 [2014] 2SCR* held that

“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 of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.”

This was also cited by Supreme Court of Kenya with approval in the case of *Raila Amolo Odinga & Another –vs- Independent Electoral & Boundaries Commission and 2 Others, [2017] eKLR* (Also see *Nairobi City Council –vs- Thabiti Enterprises Ltd. (1995 – 98) EA 231* and *Aga Wanjiru Mwaniki –vs- Jane Wanjiru Mwaniki [1997] eKLR*).

I am duly guided.

21. This court is alive to the fact that it cannot substitute its own will for that of the voter. Section 83 of the Elections Act (before the Election Laws amendment) Act, 2017 (Act No. 34 of 2017) which is applicable to these proceedings provided that:

“S. 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 of the election.”

22. An election is a process designed to serve a broad based public interest. The first duty of the court is to therefore give effect to the will of the electorate. Irregularities and/or illegalities will only be the basis for nullification of an election if they substantially affected the results of the election. See *Raila Amolo Odinga [2017] supra paragraph 203; Gatirau Peter Munya –vs- Dickson Mwenda Kithinji & 2 Others [2014] eKLR at paragraphs 216 – 220*.

23. The above are the general principles governing the determination of an election petition. They are the parameters within which this court will consider the allegations raised against the respondents. It is noted that the two petitioners and the interested party are all complaining about one and the same election. That is the main reason that led to the consolidation. It's in that light that the court will consider the allegations raised.

24. To prove his case, the 1st petitioner called a total of eight (8) witnesses including himself; the 2nd petitioner called (4) witnesses including himself; the interested party relied on his affidavit evidence. On the other hand, the 1st and 2nd respondents called the 2nd respondent as their only witness while the 3rd respondent called six (6) witnesses, him included.

25. I now wish to consider the issues framed.

Issue No. (a)

Was the Mandera East Parliamentary election conducted in accordance with the Constitution and electoral law or were there irregularities/illegalities which affected the result of the election"

The 1st and 2nd respondents have been accused of failure to conduct this election in accordance with the Constitution and electoral laws. The petitioners and interested party have leveled numerous allegations against them. I will now consider each of the complaints, the evidence adduced thereto, the submissions and the law applicable.

(i) Undue influence on assisted voters

26. This was raised by the 1st petitioner who claimed that the assisted voters were influenced by presiding officers and deputy

presiding Officers to vote for the 3rd respondent. That the presiding officers would loudly inquire from the voter whether they wanted to vote for the dadach/quraa which essentially meant acacia tree, symbol for the 3rd respondent's party. This was before they could mark the ballot paper for them. P1 – PW2 **Ahmed Shale Billow** was an agent at Bokulo Duse – 02 representing the Jubilee party (JP). He testified that he witnessed the deputy presiding officer mark a paper for a voter against her wishes. He protested and the presiding officer marked it correctly and it became a spoilt vote. The voter was however issued with a fresh ballot paper.

27. P1 – PW3 **Abdi Rahman Noor Ahmed** was a Jubilee Party agent supervisor at Township Primary School – 03 where he witnessed a deputy presiding officer wrongly marking a ballot paper for a voter who protested. He also said a voter would be asked if he wanted to vote quraa and all papers would be ticked “quraa”. He informed the presiding officer and security personnel, of this anomaly.

28. M/s Odiya in her submissions stated that this allegation had been proved through the evidence of P1 – PW2, P1 – PW3 and P2-PW1. They submitted that the word quraa/dadach had been used to influence the voters to vote for the EFP candidate (3rd respondent). That RW2 **Mohammed Adbi Ali** had confirmed hearing that word. Relying on the case of **Ahmed Abdulahi Mohamed and Another –vs- Mohamed Abdi Mohamed & 2 Others [2018] eKLR** it was their submission that since no presiding officers from the affected polling stations testified then, the allegation remained rebutted.

Mr. Ndegwa for the 2nd petitioner submitted that P2 – PW1 and P1 – PW2 and PW3 supported this allegation. That the word dadach had been used to influence voters. Secondly, that since the 1st and 2nd respondents had failed to produce in court Forms 32, it was a clear indication that they had not assisted the voters within the requirements of the law.

29. **Mr. Orare** for the 1st and 2nd respondents submitted that **P1 – PW5 Zakaria Abdinur Isaack** and **PW6 Hassan Hussein Adan** who were election observers from Elog confirmed in cross-examination that IEBC conducted credible elections on 8th August, 2017. This was supported by the evidence of RW1 – RW4 who explained how they had handled assisted voters. In regard to P1 – PW3, it was his submission that the affected voter whom the witness talked about should have been called to testify. Furthermore, the witness had signed Form 35A confirming the accuracy of the results in Township Primary School – 03.

30. Mr. Ondieki for the 3rd respondent relied on his submissions at page 14. He pointed out that the EFP did not have any presidential candidate and so what P1 – PW3 said about all six (6) ballot papers being marked for one party was not correct. He submitted that the principle of quraa was unfounded and none of the allegedly influenced voters had testified. On the Bokulo Duse Centre complaint, he said there was no “spoilt vote” in the results of that station as per Form 35A.

31. It is clear from the record that the petitioners and the interested party did not witness this assisted voter complaint raised herein. They received information from their agents on this and the persons who testified are P1 – PW2 and PW3 and P2 – Pw1.

Undue influence of the nature raised herein is an offence under the Elections Act No. 37 of 2016. Section 10 (1) of the said Act provides;

“(1) A person who, directly or indirectly in person or through another person on his behalf uses or threatens to use any force, violence including sexual violence, restraint, or material, physical or spiritual injury, harmful cultural practices, damage or loss, or any fraudulent device, trick or deception for the purpose of or on account of—

(a) inducing or compelling a person to vote or not to vote for a particular candidate or political party at an election;

(b) inducing or compelling a person to refrain from becoming a candidate or to withdraw if he has become a candidate; or

(c) impeding or preventing a person from being nominated as a candidate or from being registered as a voter, commits the offence of undue influence.”

It is therefore an allegation of a criminal nature and must be proved to the required standard of beyond reasonable doubt.

32. P1 – PW2 stated that after his protests to the presiding officer, the vote was treated as a spoilt vote since it had been marked twice. The voter was issued with a fresh ballot paper and voted. He made it clear that, that was the only such incident he witnessed. However, the Form 35A in respect of this polling station does not reflect the spoilt vote. This witness did not say

anything about dadach or quraa.

33. P1 - PW3's evidence was that the deputy presiding officer Township Primary School – 03 assisted all voters even before they requested for assistance. That she influenced the voters by asking them if they wanted dadach/quraa and would mark for them candidates against their will. He gave a very good example of a voter who had such an experience. This alleged voter was not called as a witness. **P2 - PW1 Mohamed Ishmael Mohamed** was an agent at Livestock Market – 02. He too said the presiding officer was forcing voters to vote for dadach even when they said their choice was Jubilee Party. He did not however make a report anywhere or to anyone, in respect of this occurrence.

34. There is a general plea of undue influence in both petitions without particularization of the polling stations. It is not specific in relation to what came out in the evidence before the court. Neither the petitioners nor interested party made any request for the 1st and 2nd respondents to produce the Forms 32 or 32A in this petition and these unlike Forms 35A are not pleaded anywhere in this petition. If indeed the petitioners had it clear in their minds from the onset that the voters in Mandera East constituency had been influenced by the word dadach/quraa, this should have been specifically pleaded and the affected polling stations named. That is not the case here.

35. There is no evidence of any report having been made to any police station in respect of this complaint which is an election offence. Finally, P1 –PW3 having witnessed the alleged malpractice, safely signed the Form 35A confirming the accuracy of the results yet nobody forced him to sign. This witness was an agent in stream 3 of 3 but he wants to talk of matters affecting all the polling stations in Township Primary School. He can't be said to be a credible witness.

On the other hand, P2 – PW1 despite witnessing all the alleged wrongs including criminal offences as an agent, he did not report anywhere or to anyone. The claim was a general complaint of undue influence with no particulars in the pleadings. Even the general plea itself has not been proven to the required standard.

(ii) Bribery

36. This was raised by the 1st petitioner and the interested party. P1 – PW2 said he saw EFP people bribing voters at Bokolo Duse polling station but he could not mention any names for security reasons.

P1 – PW5 **Zakaria Abdinur Isaack** was an Elog observer and he visited Township Primary School, Bulla Mpya Primary School and Mandera Village Polytechnic centres which had a total of 12 polling stations. PW1 – PW6 **Hassan Hussein Adan** also an Elog observer was at Bulla Mpya Primary School – 02. Both say they witnessed voters on queues being bribed by EFP supporters. That some persons involved in this were arrested from various polling stations but were released after 20 – 30 minutes. Even though they allege to know these people they gave no names.

37. P1 – PW1 **Mohammed Ishmael Mohammed** was at Mandera DEB – 01 as a JP agent. He saw an observer from NAPD bribing voters. He suspected him to be a supporter of the EFP candidate because of the way he related with the EFP agent. The observer was sent away by the presiding officer after the witness raised a complaint against him. The interested party averred that one Mohamed Khalif, the 3rd respondent's chief campaigner was seen and recorded bribing voters.

38. **Mr. Orare** for the 1st and 2nd respondents submitted that there was no allegation of any form of corruption leveled against the 1st and 2nd respondents. Mr. Ondieki for the 3rd respondent submitted that no evidence was tendered to support this allegation against the 3rd respondent.

39. Bribery is a grievous election offence under section 9 of the Election Offences Act 2016 and where one is found, guilty of the said offence, he/she is liable, on conviction to a fine not exceeding Kshs.2,000,000/= or imprisonment for a term not exceeding six years or to both. The law requires that bribery be proved beyond reasonable doubt. See **Moses Masika Wetangula –vs- Musikari Nazi Kombo & 2 Others [2014] eKLR paragraphs 39 and 40; Halsbury's Laws of England 4th Edition Vol. 15 paragraph 695.**

40. An evaluation of the evidence adduced shows that P1 – PW1, PW2, PW5, PW6 and P2 – PW1 were not serious at all with what took them to those polling stations as agents and observers. First of all, they did not report any incident of bribery to the police. The interested party did not report the person he mentions in his affidavit including those who were allegedly arrested and released. Secondly, they clearly told the court that they could not give any names of either the bribers or the bribed because of security

reasons. Even those who were allegedly arrested are not known to the court.

41. It is not clear how they identified the party affiliations of the bribers and the bribed, to be that of the 3rd respondent and 1st petitioner respectively. It must also be remembered that under the Bribery Act 2016, the giver and recipient of a bribe commit an offence under Sections 5 and 6 of the said Act. If the persons who committed these offences were identified by P1 – PW1, Pw2, PW5 and Pw6; P2 – Pw1 they should have been bold enough to give out their names including those of their supporters who took bribes. Thirdly, the petitioners and interested party have failed to connect the 3rd respondent to the alleged acts of bribery. I refer to the case of *Mercy Kirito Mutegi –vs- Beatrice Nkatha Nyaga & 2 Others* [2013] eKLR paragraph 42 where the Court of Appeal said;

“In addition to the reasons given by the Judge, which we agree with entirely in dismissing this evidence, we hasten to add that allegations of bribery or corruption require setting out in the pleadings, particularizing and during the hearing, whoever alleges, has a duty to prove them strictly. There was no evidence connecting the 1st respondent with the offence of bribery, witnesses claimed that they saw agents of the 1st respondent dishing out money and asking people to vote for the 1st respondent. From this evidence, it was difficult to draw a definitive conclusion that the people who were seen bribing voters were authorized agents of the 1st respondent.”

42. My finding on this issue is that the allegation of bribery was not particularized in the pleadings and even the general plea has not been proved to the standard required.

(iii) Irregular recruitment and deployment of election officials

43. In paragraph 12 of the supporting affidavit and paragraph 8 of the further affidavit, the 1st petitioner alludes to a complaint of irregular recruitment of election officials. The complaint was allegedly raised through his chief campaigner. M/s Odiya submitted that failure to respond to the 1st petitioner’s letter amounted to a clear violation of his right to fair administrative action under Article 47 of the Constitution.

Regulation 5 of the Elections (General) Regulations has prescribed how appointments of election officials should be done. There is supposed to be advertisement, shortlisting, interviews and recruitment/appointment to make the process transparent. The 1st petitioner does not say which one of these was not followed. What he says is that the three (3) people he has complained about were relatives and supporters of the 3rd respondent. It is not indicated how each of the three people is connected to the 3rd respondent. Further, it has not been shown in what capacity the 1st petitioner’s chief agent was writing to IEBC.

44. The Regulation No. 5 provides that the List is shared with political parties or independent candidates before appointment. There is no evidence showing that JP which sponsored the 1st petitioner had any issue with the list or that the 1st petitioner was an independent candidate in order for him to deal directly with the IEBC. In fact, that would be why the letter by the chief agent was not responded to by IEBC which was to deal with political parties and/or independent candidates in such a matter. The petitioners have failed to demonstrate the irregularity in the said recruitment and deployment of election officials.

(iv) Failure to sign and stamp Forms 35A by presiding officers and deputy presiding officers

45. The 1st petitioner at paragraph 14 and 15 of the petition and paragraph 19 and 20 of his supporting affidavit pleaded that 64 out of 84 Forms 35A were not signed nor stamped by the presiding officers and were therefore not verifiable. In his affidavit, he has set out the polling stations he is complaining about. It came out clearly during the hearing that the Forms 35A in possession of the petitioners and interested party were photocopies and were a bit faint. What was filed in court by the 1st respondent are clearer copies since they are carbon copies.

46. I have taken the liberty to examine each Form 35A filed herein and the following are my findings;

All the Forms have been signed by both the presiding officer, deputy presiding officers and agents except for the following;

(i) Mandera Village, Bur Abor Primary School and Geneva White House – 02. Both the presiding officers and Deputy presiding officer signed but signatures for agents are not clear;

(ii) *Amin Gurey Primary – all signatures not clear;*

(iii) *Kamor Primary School – only the deputy presiding officer and agents signed;*

(iv) *Township Primary School – 03 and DEB Primary School – 03 only the presiding officers and agents signed.*

(v) *Libehia Primary School – 01 – agents signed but the signatures of the presiding officer and deputy presiding officer are not clear.*

The refusal or failure of a candidate or an agent to sign a declaration form (Form 35A) or to record reasons for their refusal to sign shall not by itself invalidate the results announced. Regulations 62 (3) and 79 (6) of the Elections (General) Regulations speak to this.

Regulation 62 (3) provides;

“The absence of agents shall not invalidate the proceedings at a polling station.”

Regulation 79 (6) provides;

“The refusal or failure of a candidate or an agent to sign a declaration form under subregulation (4) or to record the reasons for their refusal to sign as required under this regulation shall not by itself invalidate the results announced under subregulation (2)(a).”

47. After the counting of the votes unless there is a request for a recount the results are announced and the agents *present* and the presiding officer/ deputy presiding officer sign the statutory form. In his evidence, the returning officer (RW4) said he had received all the Forms 35A in respect of the 84 polling stations.

The 1st petitioner alleged that the Forms 35A had no IEBC stamp on them. It is true that some of the said Forms do not have the said IEBC stamp but he has not challenged the authenticity of the document. Neither the Elections Act nor the Elections (General) Regulations provide for such a requirement as stamping.

48. Save for Amin Gurey Primary School and Libehia Primary School – 01, where the presiding officers and deputy presiding officers signatures cannot be clearly seen (the document being a carbon copy) the rest of the Forms 35A have been signed by both the presiding officer and deputy presiding officer and agents. The signing of these forms by the presiding officers and deputy presiding officers is not just a formality, it signifies authentication of the results therein. That is why agents who have issues with the results should indicate so and not disappear. Failure by the agents to sign by itself is not ground for nullifying a result. I am in agreement with the finding by *Onyancha J.* in the case of *Hassan Mohamed Hassan & Another –vs- Independent Electoral and Boundaries Commission & 2 Others Garissa High Court, EP No. 6 of 2013* on this particular issue of signing of Forms 35A.

49. The Court of Appeal in the case of *Independent Electoral and Boundaries Commission –vs- Stephen Mutinda Mule & 3 Others [2014] eKLR* held thus;

“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 Form 35 that did not contain the stamp. On this score too, the appeal succeeds.”

I therefore find that the Forms 35A are not invalid. They are valid for all purposes.

(v) **Unlawful extension of voting hours**

50. The petitioners’ averred that polling at Livestock polling centre, Shafshafely Primary School, Neboi Primary School and DEB Primary School had been unlawfully extended to later in the night and even the next day.

P1 – PW1 and PW2 testified on late closing of polling at Bulla Mpya and Gumbiso polling stations. As can be clearly seen, these two polling stations were never pleaded in the petition or supporting affidavits.

P2 – PW3 testified on ShafeShafy – 01 saying the polling station accepted voters up to 9th August, 2017 3.00 am.

51. This witness was an agent for the PDR party whose candidate was the 2nd petitioner. He testified that he voted at 6.00 am but the station opened at 6.35 am and between 6.30 am – 7.30 am there were already about 100 voters at the station. He however left the polling stations at 7.00 am when he had been denied an attendance form. It's not clear what this form is all about because he had already been admitted into the station as an agent. When he left, he never returned to the station. In cross examination, he said he could not tell how long the voting took; there was no electricity in the room and the pressure lamp was not working. This is all from a man who was not inside the polling station from 7.00 am on 8th August, 2017. The Form 35A for this station was signed by the agents of the JP and EFP. P2 – PW3 did not sign because he was not there. He cannot be relied on to explain things that happened in his absence. The deputy registrar's report on scrutiny captures something on this issue of opening and closing of stations and I wish to bring it at this point.

52. Mr. Ndegwa for the 1st petitioner submitted on the opening and closing times as revealed in the SD cards scrutiny exercise particularly in polling stations pleaded at paragraph 119 – 121 of the petition ie Shafshafey Primary School Centre; Livestock Centre and DEB Primary School Centre. Below is the schedule for the opening and closing times as shown in the deputy registrar's report;

No.	Polling Station	Opening Time	Closing Time
1.	Shafshafey – 01	6.33 am	7.04 pm
2.	Shafshafey – 02	7.21 am	3.51 am
3.	Shafshafey – 03	6.52 am	10.26 pm
4.	DEB Primary School – 03	6.51 am	11.21 pm
5.	DEB Primary School – 04	6.12 am	11.01 pm
6.	Livestock Market – 01	6.27 am	8.08 pm
7.	Livestock Market – 02	6.34 am	11.06 pm

Regulation 66 of the Election (General) Regulations provides for polling time. It states;

Regulation 66 (1) Subject to regulation 64, voting shall commence at 6 o'clock in the morning and end at 5 o'clock in the afternoon on the polling day.

(2) Notwithstanding subregulation (1), a person who is on a queue for the purposes of voting before 5 o'clock in the afternoon shall be allowed to vote despite the fact that the voting time may extend to after 5 o'clock."

53. This provision allows those that are on the queue at 5 pm for purposes of voting to be allowed to vote and it does not limit the time. It is therefore possible that voting may be prolonged depending on how many people are on the queue and whether they are assisted voters or not. There are those who like to join the queues just before closing time and they must be allowed to vote. The 2nd petitioner testified that when he visited these polling centres, he found voting on going. He witnessed voters walking in and out as the places were not fenced. He did not know how many people voted after the official closing time. Despite all this, he never

raised a red flag by reporting the incident or raising a complaint with the presiding officers, deputy presiding officers, security and returning officers.

54. His witness who was an agent at Shafshafey polling station – 01 said voting started at 6.30 am and closed at 3.00 am. The SD card shows it closed at 7.04 pm. This is the same witness who left unceremoniously at 7 am of 8th August, 2017. He cannot therefore say when the station exactly closed. The 1st petitioner said, he had agents in these polling stations. None came to testify on the reason for the late closing of the polling stations.

55. The 1st respondent did not call any of the presiding officers from the questioned stations to explain the cause of the delay. Such an explanation would have sufficed to allay any suspicions of ill intentions and/or motives. I therefore find from the deputy registrar's report that indeed the late closing of Shafshafey – 02 and 03; DEB Primary School – 03 and 04 and Livestock Market – 02 required an explanation by the respective presiding officers as it was unprocedural.

56. From the said report, Mr. Kinaro picked out 3 polling stations, namely;

(i) Karo Primary School

(ii) Mandera Open Air Market – 01

(iii) Mandera Open Air Market – 02

He submitted that the valid votes cast as shown in the Forms 35A and the SD cards vary. In fact, the variance is by one (1) vote in each of the three polling stations in terms of registered voters. As for votes cast, the difference is between 1 – 3 votes respectively.

57. An examination of the Forms 35A for Mandera Open Air Market – 01 and 02 together with the deputy registrar's report gives the impression that the deputy registrar may have inadvertently interchanged results between the two polling stations given the figures showing. The variance for Karo Primary School is one (1) vote.

Having found the above to be the position, the issue to determine is whether the irregularity pointed out above affected the results. With reference to the closing time, the 2nd petitioner has not demonstrated how the said late closing affected him negatively, the reason being that if indeed these voters were on the queue by 5pm, they had every right to vote. No one has testified as to how many were voters on the queue and how many people indeed voted between 5 pm and the time of closure in the cited polling stations.

(vi) Tallying results from polling stations where votes cast exceeded voter turnout

58. The first petitioner claimed that votes for the 3rd respondent had been inflated in the following polling stations; Geneva White House, Korjab Farms, DEB and Bur Abor Primary School polling stations. That there had been swapping of results at Shafshafey Primary School – 02.

The 2nd petitioner pleaded that votes allegedly cast at Mandera Village Polytechnic – 05 show that the 3rd respondent got **39** votes (Form 35A) while Form 35B showed he garnered **239** votes.

Mr. Kinaro in submission contended that the polling station diaries show that the voter turnout was less than what was reflected in the Form 35A in various polling stations enumerated in paragraph 14 of the submissions. That in considering these excess votes in his tally, the returning officer was in breach of Regulation 83 (1) (c) of the Election (General) Regulations.

Mr. Orare for the 1st and 2nd respondents submitted that the 2nd petitioner had in cross examination admitted that the results in the stations complained of tallied in both Forms 35A and 35B. That he had not demonstrated how swapping was done in Shafshafey polling station. Mr. Biriq for the 3rd respondent supported the submission by Mr. Orare on this.

59. I have carefully examined the Forms 35A in respect to the mentioned polling stations plus the entries in Form 35B and they are all tallying. The carbon copy of Form 35A for Mandera Polytechnic – 05 clearly shows the results as;

Hassan Omar	239
Abdirahman Husseinweytan	91
Ahmed Jamaldin	8
Haji Hassan	7
Hassan Abdikadir	80
Hassan Ali Salat	1
Sheikh Mohamed Abdinoor	3

These are the same entries made in Form 35B. The 2nd petitioner did not explain what was swapped and to whom in Shafshafey – 05 polling station.

60. It is a principle of law that parties must stick to their pleadings. This court stressed this right from the beginning of this petition. The material contained at paragraph 14 of the submissions on behalf of the 1st petitioner is not in the pleadings. It must have come from the scrutiny that was allowed by this court and the polling station diary. Had it been clearly pleaded, I would have had no problem with it as it would be supporting the already pleaded case.

61. None of the petitioners pleaded and named polling stations that had a lesser turnout than what was in the Forms 35A. Secondly, poll results are not announced from what is written in the polling station diaries. These diaries are just but working administrative tools to guide the presiding officers and deputy presiding officers in carrying out their duties at the polling stations.

(vii) Voting conducted from ungazetted polling centres

62. The 2nd petitioner at paragraph 116 of the petition and paragraph 38 of his affidavit claimed that there was an unlawful dissolution and merger of polling stations/polling centres namely;

- (i) Ledi polling centre and its polling stations were moved to Omar Jillow polling centre.
- (ii) Berawyon Farms polling centre and its polling stations were dissolved and merged with Hegalow Primary School polling centre.
- (iii) Kamar Bahawa polling centre and its polling stations were dissolved and relocated to an ungazetted polling centre (Arabia Girls Secondary School).
- (iv) Korjab Farms polling centres and its polling stations were relocated to an ungazetted polling centre (Arabia Boys Secondary School).
- (v) Kamar Buhlow polling centre and its polling stations were relocated to (Libehia Primary School).
- (vi) Jeeri Libi polling centre and its polling stations were dissolved and relocated to Bella Primary School.

The 1st petitioner and interested party did not plead to this and did not speak to it. In cross examination on this issue at page 67 of the typed proceedings, the 2nd petitioner says;

“I have no evidence of dissolving the polling stations on the eve of the election. They were all gazetted polling stations.”

Further in re-examination, he said there were voters who turned up only to find the polling stations changed. He cited Kamar Bahawa polling station as one of the ungazetted stations where voting took place.

63. **P1 – PW7 Ahmed Abdi Hassan** said he is registered at Korjab polling station but voted from Arabia Boys Secondary School. As the 2nd petitioner's chief campaigner, he was calling the Korjab voters to come to Arabia Boys which is 4KM from Korjab. **CWI Samow Adbulahi Mohammed** is a watchman at Arabia Boys Secondary School, where he voted from. He said voting ended the same night and the officials left at 3 am. He confirmed being a voter at Korjab polling station and he voted at Arabia Boys Secondary School. He further explained that because of security reasons and Korjab being at the boarder, the ballot boxes for Korjab polling station were brought to Arabia Boys Secondary School (Arabia Boys). He further stated that Korjab polling station is just outside the school. It was his evidence that the voters were informed through the elders and P1 – PW7 was one of the elders.

64. Mr. Ndegwa for the 2nd petitioner in his submissions stated that what happened at Korjab and Arabia was an irregularity which was not controverted. The irregularity was in breach of Regulation 64 of the Elections (General) Regulations. It was his submission that the presiding officer should have sought the authority of the returning officer and a detailed report filed on the issue, which was never done.

65. **Mr. Orare** for the 1st and 2nd respondents submitted that the 2nd petitioner had not placed before the court any evidence of mergers, dissolutions and relocation of polling stations on the eve of the election. Further, that there was no witness who testified to confirm that he or she was disenfranchised. He submitted that the 1st petitioner did not raise any issues about relocations and mergers. He contended that Arabia Boys Secondary School was not a gazetted polling station. **Mr. Biriq** for the 3rd respondent raised similar arguments to those of Mr. Orare.

66. The 2nd petitioner cited in his petition several polling centres and polling stations which were allegedly affected by the merger, dissolution and relocation. In his evidence, he did not seem to know which polling centres and/or stations were affected. He wanted the Kiems kits to do that for him. Secondly, in spite of having listed so many polling centres and stations, the only evidence adduced was in respect of Korjab Farms. In his petition at paragraph 116, he states;

“Korjab Farms polling centre and its polling stations were dissolved on the eve of the election and unlawfully and unprocedurally relocated to an ungazetted polling centre to wit: (Arabia Boys Secondary School) which is about 20KM from Korjab Farms polling centre.”

67. From the material before this court, it's clear that Korjab is a single polling station and not a polling centre as pleaded. The 2nd petitioner pleaded that the distance between Korjab and Arabia Boys is 20 kms; P1 – PW7 said it is 4 kms, while CW1 said Korjab polling station is just outside Arabia Boys Secondary School. P1 – PW7 and CW1 said that they are registered voters at Korjab but they voted at Arabia Boys Secondary School. CW1 explained why this was so. The returning officer (2nd respondent), said he was not aware of that occurrence as all he knew was that voting took place at Korjab polling station.

68. **P1 – PW4 Abdullahi Sugal Maalim** was a JP agent at Korjab polling station. He confirmed that voting took place in that station and there were six (6) agents present. The Form 35A contained the correct record and he signed it. The Form 35A confirms that Abdullahi Sugal Maalim ID No. 29934468 of JP Telephone No. 0723200357 signed the same. It also shows the voters as follows;

Registered votes

Valid votes cast

1st petitioner 152

2nd petitioner 2

3rd respondent 144

Interested party 0

The Form 35A shows that five (5) party agents signed it.

69. The voter turnout was about 70% which is slightly higher than the national voter turnout. There is no voter from Korjab polling station who testified that he was ever disenfranchised at all. I am therefore satisfied that voting took place at Korjab polling station as confirmed by P1 – PW4 and 2nd respondent. Ballot boxes were brought into Arabia Boys as stated by CW1. There was no evidence led on the rest of the polling centres and stations enumerated in paragraph 116 of the 2nd petitioner's petition. I find this allegation not proved.

(viii) Unaccountable system of voter identification

70. This is found in paragraph 27 of the 1st petitioner's supporting affidavit, where he disputes the 3rd respondent's election as MP for Mander North. Five (5) sub grounds have been listed and I have already dealt with (ii), (iii) & (iv) in the paragraphs above.

The 1st petitioner relied on the evidence of P1 – PW3 and PW7 and others who did not testify to prove this allegation. P1 – PW7 did not testify to any of the two issues. P1 – PW3 testified that there were some voters who were advised by the deputy presiding officer to bypass the Kiems kit, yet they were given ballot papers. Though he was an agent, he did not report to the police. All he did was to inform the presiding officer and security personnel and he left it at that. He also added that though the results announced were not as per what they had counted, he just signed the declaration, at Township Primary School – 03. This is not a witness who can be relied on as he was not serious about his work or what he was telling the court on oath.

71. M/s Odiya for the 1st petitioner has also raised issue with the records in the polling station diary in particular the identification of voters through the printed register. The returning officer (2nd respondent) told this court in cross examination that there was no station that used the printed register in his constituency. He further explained that in cases where the polling station diary showed that voters were identified through the printed register, it was a pure error made in good faith as there was no such identification.

72. I have carefully considered the figures in the table set out by the 1st petitioner in ground (f) of the submissions, and also examined the scrutiny done in the said stations through the SD cards. I find that the results from the Kiems kits would be more reliable because the machine was picking the information straight after the identification. As the 2nd respondent explained, the entries may have been erroneously shown as those of persons identified through the printed register instead of the biometric method. The entries in the polling station diary are manually done and errors could be made by the officers, in this regard as stated by the 2nd respondent.

73. The issue here is not even about the figures, it's whether these figures represent those who were manually or biometrically or both manually and biometrically identified. My view is that a conclusive decision cannot be made by examining the polling station diary alone. All other documents like forms 35A and B and SD cards must be considered.

(ix) Failure to secure ballot materials

74. This was an issue raised by the 2nd petitioner and interested party. Evidence was led by P1 – PW7 **Ahmed Abdi Hassan** and CW1 **Samow Adbulahi Mohammed** to the effect that 5 marked ballot papers were found at Arabia Boys School on 9th August, 2017. The ballot papers were for Member of Parliament, Governor, Women Representative, and Senator. It is 3 of these which had been marked. CW1 said he found these ballot papers under a prayer mat in one of the classrooms where polling had taken place. He later called PW1 – PW7 who came and he informed him about it and gave him the papers. The said ballot papers were produced here as CW1 1 - 5. He denied seeing any burnt ballot papers.

75. RW6 No. 216271 **Mr. Henry Mworja Kiambati, SSP** the DCIO Mander East testified on the issue of the recovered ballot papers. He confirmed receiving reports on the issue of recovered ballot papers and burnt ballot papers. He confirmed that the matter was under investigation but had been put on hold because of this election petition since the recovered ballot papers had been produced in this court by the petitioners.

76. Mr. Ndegwa in his submission contended that the 1st and 2nd respondents failed to immunize the electoral process from infiltration by unauthorized personnel. This to him was negligence and the evidence provided by the DCIO was inconclusive and aimed at unduly giving advantage to the 3rd respondent.

77. **Mr. Muthama** for the interested party submitted that they had through the interested party's supporting affidavit and annexures confirmed that ballot papers were found strewn all over outside a polling station. That they even gave the names of those

concerned, but the 1st respondent did not address this.

78. The documents produced herein as CW1 1 - 5 were ballot papers. Three of them were marked i.e. two for the Member of Parliament and one for the Governor. The watchman, CW1, said he recovered them under a prayer mat in Form 3E at Arabia Boys. He did not find any ballot papers strewn all over the school nor did he find any burnt ballot papers anywhere. The ballot papers appeared to have an IEBC stamp with the words “spoilt” at the back.

79. This complaint by the petitioners and interested party is under investigation by the criminal investigation agency and this court as mentioned earlier, would not make a conclusion that would predetermine their findings. However, as an election court, my concern is whether the recovery of these votes affected the results of this election.

80. First and foremost, the IEBC has a duty to preserve all electoral materials. Regulation 81 of the Elections Regulations 2012 provides thus;

“81. (1) Upon completion of a count (including a recount), the presiding officer shall seal in separate tamper proof envelopes—

(a) the counted ballot papers which are not disputed;

(b) the rejected ballot papers together with the statement relating thereto;

(c) the disputed ballot papers; and

(d) the “rejected objected to” ballot papers;

(2) The presiding officer shall, after demonstrating to the candidates or agents as the case may be, that the ballot box to be used to carry the election results is empty, put into that box—

(a) the packets specified in subregulation (1);and

(b) the statements made under regulations 78 and 79.

(3) After the procedure in sub regulation (2), the presiding officer shall seal the ballot box with the seal of the Commission and allow the candidates or agents to affix their own seals on the ballot box, if they

(4) The presiding officer shall, as soon as is practicable deliver to the returning officer for the electoral area the ballot box containing the items listed under subregulation (2).”

It was therefore the sole duty of the IEBC officials to ensure that all materials are safely in their custody. The finding of these ballot papers was therefore a confirmation of negligence on the part of the IEBC. It is not clear at what point these ballot papers left the custody of the IEBC, even though they had been marked “spoilt”.

81. The issue then is whether this irregularity affected the results of the election. The MP votes marked were two out of five recovered ballot papers as the allegation was only in respect of one recovery. There was no evidence to show that this was rampant or common in the various polling stations in the constituency. Even if the two votes were added to those of either the petitioners or interested party, they would not change the results.

(x) Disparity in results

82. The interested party wants this court to compare the parliamentary results plus the results of other candidates who vied for other seats. In that regard, he annexed to his affidavit various Forms 34A, 35A and 36A which he said show a discrepancy in that they show different results for the different positions and that the returning officer could not explain the difference.

83. **Mr. Orare** and **Mr. Ondieki** for the 1st and 2nd respondents and the 3rd respondent respectively, submitted that the interested party's assessment of the election of 8th August, 2017 was a matter of personal opinion which had no probative value. That he had failed to establish a factual basis for the alleged malpractices or irregularities in each polling station.

84. My view is that there is no way votes cast for the various seats can ever be the same. The simple reason is that many voters go to a polling station to vote for one or two people. Whatever they do with the rest of the ballot papers is no one's business. They may decide to haphazardly mark them resulting in spoilt votes or so. They may deliberately place them in the wrong ballot box so that they are considered as stray votes. There could also be an erroneously entered number of votes in the statutory forms. There can therefore be no guarantee that the number of votes for all posts would be similar.

(xi) Unpleaded matters

85. The 1st petitioner introduced unpleaded matters specifically through the 1st petitioner's further affidavit which gave the petition a totally new character. In the case of **Independent Electoral and Boundaries Commission and Another –vs- Stephen Mutinda Mule & 3 Others (Supra)** the court expressed itself as follows;

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

86. When directions were taken during the pre-trial conference, none of the petitioners sought leave to give additional evidence under Rule 15 (h) of the Election Petition Rules. A further affidavit does not give a party an opportunity to tender new evidence which denies the other party an opportunity to rebut it. That's exactly what the 1st petitioner did. I therefore have limited my observations and judgment to what is pleaded in the two (2) petitions, interested party's supporting affidavit and the other affidavits and evidence.

87. I am persuaded by what **Kimaru J.** stated in the case of **Mahamud Muhumed Sirat –vs- Ali Hassan Abdirahman & 2 Others, Nairobi EP No. 15 of 2008 [2010] eKLR.** He stated thus;

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

Such unpleaded issues include but are not limited to polling station diaries; recording of activities in the polling station diaries, availing and sealing of Forms 32 and 32A which were submitted on by learned counsel for the petitioners.

88. The 1st petitioner complained that Form 35B having not been signed, cannot be valid and could not therefore be relied on to declare the 3rd respondent the winner of the election in Mandera East Constituency for Member of Parliament. He had alleged that results in some Forms 35A were not accurately entered in Form 35B. In cross-examination, he was taken through the said Forms 35A and the entries in Form 35B and he confirmed that they tallied. The returning officer (2nd respondent), testified and admitted that the Form 35B that was given to the 1st petitioner was not signed but added that the failure to sign was not deliberate.

89. In the case of **Independent Electoral and Boundaries Commission and Maina Kiai & 5 Others C.A No. 105 of 2017 [2017] eKLR,** the court held that the votes announced at the polling station by the presiding officer are final. The constituency returning officer's duty is to receive all the Forms 35A, tally and collate them without making any alterations and announce the total tally. In his evidence, the returning officer stated that when he noted he had not signed the Form 35B given out, he signed one whose copy was filed in court and certified copies served on the parties.

90. I have examined the Forms 35A and the Forms 35B and I have confirmed that the entries from all the Forms 35A were properly entered into the Form 35B and collated. The said Form 35B is signed by the returning officer and some agents.

(xii) Ejection of agents from polling stations

91. P1 – PW3 was allegedly chased severally from Township Primary School – 03 by the deputy presiding officer and did not carry out his duties at the said station. In cross-examination, he said he witnessed the counting of the votes and eventually signed the Form 35A. This was a confirmation of the results and what he had witnessed. He could not have witnessed all these if he had been chased away.

P2 – PW3 was the agent at Shafshafey – 01. He confirmed leaving the polling station at 7.00 am on 8th August, 2017. This was on his own volition. No one ejected him.

92. P2 – PW2 claimed to have been denied entry at Gumbiso Primary School. That on instructions of the presiding officer, he was arrested by the police and he never returned to the polling station. He did not explain why the presiding officer instructed the police to arrest him. His friend (1st petitioner's agent) whom he alleges to have been arrested with did not testify. He later on 12th August, 2017 made a report to the police. No police abstract was produced to confirm the nature of his complaint to the police. This allegation of ejection was therefore not established.

Other Allegations

93. I have considered all other allegations pleaded and where no evidence was adduced to support them. These are; failure to furnish Forms 35A and 35B to agents; delayed announcement of results; double voting; barring of JP agents from polling stations; amending Forms 35A at the tallying centre; intimidation of agents by presiding officers; denial of agents from participating in counting and tallying; refusal to address serious concerns. My finding on them is that they were not proved and they remain mere allegations.

94. The question now arises as to whether the alleged irregularities affected the results and whether the 3rd respondent was validly elected as the Member of Parliament for Mandera East Constituency. The test to be applied in evaluating the conduct of the election by the 1st and 2nd respondents can be found at Section 83 of the Elections Act, Act No. 2012 which provides;

No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election.

See the cases of *Raila Odinga –vs- Independent Electoral and Boundaries Commission & 3 Others [2013] eKLR paragraph 196 (supra)*; *John Kiaria Waweru –vs- Beth Wambui Mugo & 2 Others [2008] eKLR* and *Clement Kungu Waibara –vs- Bernard Chege Mburu & 2 Others [2011] eKLR*

95. I have in the analysis above dealt with the allegations raised by the petitioners and interested party and my findings thereon. I have pointed out a few irregularities like the late closing of Shafshafey polling station – 02 and -03. Besides the late closing, it was not explained to the satisfaction of the court the prejudice the 2nd petitioner suffered as a result of this. At the same time, the court did not lose sight of the fact that though the 1st petitioner and interested party participated in the same election, they did not question the late closing of these polling stations or any other. Had it been an obvious occurrence, they could have taken note of it. None of the allegations by both petitioners and interested party were proven to the required standard.

96. My finding therefore is that the election for Member of Parliament for Mandera East was conducted substantially in accordance with the principles laid down in the Constitution and the law relating to elections.

97. I further find that the 3rd respondent was validly elected as Member of Parliament for Mandera East Constituency.

The Order for Costs

98. Being guided by Section 84 of the Election Act, Rule 30 (1) of the Election Petition Rules and the case of *Kalembe Ndile & Another –vs- Patrick Musimba & Others, Machakos High Court EP No. 1 and 7 of 2013 [2013] eKLR*, I do find that this petition was involving but the issues were not so complex.

99. Upon consideration of all factors herein, including the fact that the respondents were dealing with two petitions in one, I do cap instruction fees for the 1st and 2nd respondent at Kshs.3,500,000/= and for the 3rd respondent at Kshs.3,500,000/=.

FINAL ORDERS

100. (a) The petition be and is hereby dismissed.

(b) The respondents are awarded costs on the following terms;

(i) Instruction fees for the 1st and 2nd respondents are capped at Kshs.3,500,000/=.

(ii) Instruction fees for the 3rd respondent are capped at Kshs.3,500,000/=.

(iii) The costs shall be taxed and the total costs certified by the deputy registrar of this Court.

(iv) The certified costs awarded shall be paid out of the security deposit on a pro-rata basis.

(c) A certificate of this determination in accordance with Section 86 (1) of the Elections Act, 2011 shall issue to the Independent Electoral and Boundaries Commission and the Speaker of the National Assembly.

Orders accordingly.

Signed, dated and delivered this 27th day of February, 2018 in open court at Nairobi.

HEDWIG I. ONG'UDI

HIGH COURT JUDGE

27.2.2018

Coram

Before: Hon. H. I. Ong'udi Judge

Court Assistant: Ojwang

Mr Kinaro for 1st Petitioner

Mr Mwangi, Mr. Ndegwa and Mr. Kago for 2nd Petitioner

Mr. Muthama for the IP

Mr. Ratemo and Mr. Orare for 1st and 2nd Respondent

Mr. Biring and Mr. Ondieki for 3rd respondent

Court:

Judgment delivered in open court.

H. I. ONG'UDI

HIGH COURT JUDGE

27.2.2017

Mr. Ndegwa:

We apply to be supplied with certified copies of the proceedings and the judgment.

Court:

As prayed.

H. I. ONG'UDI

HIGH COURT JUDGE

27.2.2017

Mr. Kinaro:

I also pray to be supplied with certified copies of the proceedings and judgment.

Court:

As prayed.

H. I. ONG'UDI

HIGH COURT JUDGE

27.2.2017



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