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Court:	High Court at Kajiado
Case Action:	Judgment
Judge:	John Nyabuto Onyiego
Citation:	Mark Nkonana Supeyo & another v Independent Electoral and Boundaries Commission & 2 others [2018] eKLR
Advocates:	Ms. Opiyo Counsel for the Petitioners Mr. Liko counsel for the 1st and 2nd Respondents Mr. Masika counsel for the 3rd Respondent
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Kajiado
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 KAJIADO

ELECTION PETITION CASE NO.1 OF 2017

MARK NKONANA SUPEYO.....1ST PETITIONER

MESHANA OLE SIMEL.....2ND PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

THE KAJIADO WEST CONSTITUENCY,

RETURNING OFFICER.....2ND RESPONDENT

SUNKUYIA GEORGE RISA.....3RD RESPONDENT

JUDGMENT

BACKGROUND

1. Pursuant to the general elections exercise held country wide on the 8th August 2017, six candidates namely, Sunkuyia George Risa, Joseph Mokinyo Simel, Moses Somoin Ole Sakuda, Kennedy Geoffrey Ondieki, Gabriel Nemaigai and Jacob Wangai, took part as contestants for the position of Member of National Assembly Kajiado West Constituency.

2. Upon conclusion of the said exercise, Sunkuyia George Risa was on 9th August 2017 announced and declared the winner by the Returning officer Kajiado West Constituency (herein referred to as the “2nd respondent”) after garnering a total of 18,695 votes against his rivals Joseph Mokinyo Simel with 17,112, Moses Somoin Ole Sakuda – 10,409, Kennedy Geoffrey Ondieki – 121, Gabriel Nemaigai – 2,216 and Jacob Wangai 5,995 votes.

3. Dissatisfied with the said announcement and declaration, two voters from within Kajiado West Constituency namely Mark Nkonana Supeyo (herein referred to as the “1st petitioner”) and Meshana Ole Simel (herein referred to as the “2nd petitioner”) through the firm of Anyango Opiyo & Co. Advocates, lodged this petition on 6th September 2017 against the Independent Electoral and Boundaries Commission (IEBC) (hereinafter referred to as the “1st respondent”), Kajiado West Constituency Returning Officer (2nd respondent) and Sunkuyia George Risa (hereinafter referred to as the “3rd respondent”) challenging the results on grounds that elections were not free and fair owing to multiple violation of electoral laws and commission of massive irregularities (malpractices).

4. In support of their petition, both petitioners and one Daniel Komoi Kiok swore separate affidavits deponed on 6th September 2017 together with various annexures thereof. Further affidavits deposed by the petitioners and Koitamet Ole Kina’s affidavit sworn on 10th October 2017 were filed on the 11th October 2017.

5. Upon being served, the 3rd respondent filed his response through the firm of Masika & Co. Advocates on 19th September 2017 together with supporting affidavits sworn on 18th September 2017 but filed on 19th September 2017 by the 3rd respondent, Amos Solitei Semeyian and Hassan Senketo. They basically contended that the election process was free and fair and devoid of any

violation of the Constitution, electoral laws and malpractices and that he was validly elected.

6. Through the firm of Liko & Co. Advocates, the 1st and 2nd respondents who failed to file their response within the stipulated period pursuant to rule 11(1) of the elections (Parliamentary and County elections) petitions rules 2017, sought leave to file the same out of time vide a notice of motion dated 22nd September 2017 which was allowed by consent on 28th September 2017. Consequently, their joint response dated 21st September 2017 but filed on 28th September 2017 together with affidavits in support were deemed as duly filed. In support of their response, the 1st and 2nd respondents relied on the affidavit of Kwamboka Mogaka Florence (3rd respondent) deponed on the 21st September 2017 but filed on the 28th September 2017 denying the claim herein.

Reliefs Sought

7. Among the reliefs sought pursuant to Articles 1(1), 1(2), 1(4) (b), 2(1), 2(4), 3(2), 10, 27(1), 27(2), 38(1), 38(2) (3), 81, 86 and 249 (1) (2) of the Constitution of Kenya 2010, Sections 38, 39, 44 & 83 of the Elections Act 2011, Regulations 59(2), 62(1), (a), (b), (c), 62(2), 67, 68, 69(2), 73(2), 74(3), 75(b), 76, 79, 84, (3) (4) 71(1) (c) of the Elections (general) Regulations 2012 are:

(a) A declaration that the non-compliance, irregularities and improprieties in the Member of National Assembly election for Kajiado West Constituency were substantial and significant that they affected results thereof.

(b) A declaration that all the votes affected by each and all the irregularities are invalid and should be struck off from the tally and computation of the Member of the National Assembly election for Kajiado West Constituency.

(c) A declaration that the Member of National Assembly election held on 8th August 2017 was not conducted in accordance with the Constitution and the applicable law rendering the declared result invalid, null and void.

(d) A declaration order be issued quashing the results of Kajiado West Constituency Member of National Assembly elections as declared by the 2nd respondent on the 9th day of August 2017.

(e) An order directing the 1st respondent to organize and conduct a fresh Member of National Assembly elections in strict conformity with the Constitution and the Elections Act.

(f) Costs of the petition.

(g) Any other reliefs that the honourable court may deem just and fit to grant.

Grounds upon which Petition is anchored

8. Grounds upon which this petition is premised are set out in paragraphs 6 – 15 of the petition and most specifically stated as follows:

(1) That elections for the position of Member of National Assembly were fraudulently flawed and orchestrated by systematic and or deliberate errors specifically designed to tilt the final outcome of the elections in favor of the 3rd respondent.

(2) That the aforesaid elections did not pass the test of fairness, transparency, accountability and verifiability.

(3) That the orchestrated illegalities and anomalies were fundamental and therefore affected the constitutional rights of the petitioners and other residents of Kajiado West Constituency specifically the political rights enshrined under Article 38 of the Constitution as read with Articles 1, 2, 3, 4, 81, 86 and 249 of the Constitution.

(4) That the elections in the aforesaid constituency was irregular and marred by inconsistencies and anomalies including but not limited to:

- (a) Unexplained discrepancies in the total number of votes cast for the various elective positions in the same constituency.
- (b) Statutory forms used to declare results contain systematic inconsistencies and anomalies designed in favor of the 3rd respondent herein.
- (c) Failure and or omission and or neglect to make available to the public copies of the statutory forms used to declare results at the various polling stations.
- (d) Statutory forms used to declare the results in the possession of members of the public are unclear and illegible and hence cannot be in any way be ascertained and or be verified.
- (e) Form 35B used to declare the results for Member of National Assembly has various anomalies inter alia – the form does not bear the name and signature of the various political party agents and or candidates who vied for the said position thus putting into question the authenticity, credibility and verifiability of the said form and; that no reasons were given for failure by agents in signing the said form.
- (5) That the 1st respondent acted in blatant disregard to the rule of Law and constitutional principles to wit: accuracy, verifiability and transparency.
- (6) That there were a number of inconsistencies and anomalies in the process and in the tabulation and declaration of results.
- (7) Inconsistencies and anomalies in regard to the statutory forms used to declare results among them;
- (a) The forms used to declare results at various polling stations did not bear the security features as prescribed in the contract for supply of ballot papers as statutory results declaration forms signed by the 1st respondent and Al Ghurair LLC thus offending the constitutional principle of fairness, transparency, accountability and verifiability.
- (b) Forms not bearing signatures from the various political parties or reasons stated for such failure hence making the elections unverifiable and unascertainable.
- (c) Form 35B contains arithmetic discrepancies in the actual summation of the figures indicated reflecting 54,549 as the total amount of votes cast while actual summation shows 54, 548.
- (d) Form 35B does not bear the name of the returning officer who purportedly appended his/her stamp.
- (e) Form 35As from Singaraine Primary School station 1 of 1, Olepolos Primary School Polling Station 1 of 1, Ntoroshi Nursery Polling Station 1 of 1, ACK Nursery Polling Station 1 of 2, Ilmasin Primary 1 of 2, Leshuta Primary School 1 of 1, Olingarua Primary School new polling station 1 of 1, Oletapes Primary Polling Station 2 of 2, Kenya Marble Quarry Primary Polling Station 2 of 2, ACK Nursery Polling Station 1 of 2, ACK Nursery 2 of 2, Enkusero Keri Primary School New Polling Station 1 of 1 were not stamped or did not bear Returning Officer's stamp thus failing the test of accuracy, accountability, transparency and verifiability.
- (f) In Singaraine Primary School Polling Station 1 of 1, Ole Polos Primary Polling Station, Leshuta Polling Station and ACK Nursery Polling Station 1 of 2, form 35As were only signed by two party agents and no reasons were given for such failure.
- (g) In Enkusero Keri Primary School New Polling Station 1 of 1, form 35A was signed by a purported NASA party agent considering that NASA had no agents but instead individual affiliate parties of NASA had agents.
- (8) That the percentage of the total number of rejected votes for Kajiado West Constituency specifically for Member of National Assembly and Presidential were notably high as compared to other constituencies within the county hence reflecting Kajiado West with 2%, Kajiado North 4%, Kajiado East 1%, Kajiado South 0% and Kajiado Central 2%.

(9) That the 1st and 2nd respondents did not allow access to form 35As from different polling stations by members of the public neither did they pin them at conspicuous positions thus making it impossible for petitioners and other members of the public to verify the tabulated results in forms 35A and 35B.

(10) That there is a glaring discrepancy in the number of votes cast for different candidates for the different electoral posts.

Interlocutory Applications

9. Before the matter could proceed to pre-trial conference and thereafter into full hearing, the court was invited to determine some issues raised in various applications.

10. The first application is the one dated 6th September 2017 filed together with the petition through notice of motion under certificate of urgency seeking:

(a) Full and unfettered physical and remote access to each biometric electronic appliance used at each polling station to verify voter's identification against a list of registered voters and for the appliances to be forensically imaged to capture, inter alia; metadata such as files, creation times and dates, devices IDs MAC addresses IP.

(b) Access to electronic devices used to capture form 35A and form 35B onto KIEMS system and transmitted to constituency and national tallying centers for Member of National Assembly.

(c) Access to any forms of scanning device which saved images onto local servers for onward transmission to the constituency and national tallying centers.

(d) An order to access for purposes of scrutiny and supply to court and to all the parties original form 35As, 35Bs, 35Cs and that leave be granted to be supplied with reading aid.

11. Consequently, the court vide its ruling delivered on 9th October 2017 directed for preservation of all election materials including KIEMS kits used during the 8th August 2017 general elections; the 1st respondent to supply in readable format a copy of data contained in KIEMS kits in respect of twelve contested polling stations as per paragraph 12 a – g of the petition in the presence of the Deputy Registrar and ICT experts provided by both parties; that the 1st respondent to supply all form 35As and form 35Bs and lastly; the 1st respondent to supply to the Deputy Registrar all Secure Digital Memory (SD) cards for safe custody pending hearing and determination of the petition. Concerning scrutiny request, the court found that the same was premature and instead advised the petitioners to first lay a basis and prove to the court at the appropriate time the need for the same after hearing the petitioners' and 1st respondent's case.

12. Upon preservation of election materials, the Deputy Registrar compiled a report dated 27th October 2017 making the following observations:

(a) That four ballot boxes were missing at the industrial area warehouse where they were stored by the 1st respondent.

(b) That one ballot box was empty.

(c) That 19 boxes had their seals tampered with as some had one or two seals missing or cut.

(d) That out of the 12 SD cards converted into readable format, six of them had a discrepancy in terms of votes cast as compared with the relevant form 35A for those stations.

Pretrial Conference

13. On 9th October 2017, a pretrial conference was held wherein parties agreed on a number of witnesses to call, period to take,

filing of written submissions at the close of the case and issues for determination as follows:

(a) Whether the elections for Kajiado West Constituency Member of National Assembly was conducted in accordance with and in compliance with the Constitution, Electoral Laws and Regulations.

(b) Whether the Parliamentary election held on 8th August 2017 in Kajiado West Constituency was conducted in a free, fair, transparent and credible manner in compliance with the provisions of the Constitution and all relevant provisions of the law.

(c) Whether non-compliance with the Constitution, Electoral Laws and Regulations affected the validity of the results of the Member of National Assembly for Kajiado West Constituency.

(d) Whether the irregularities complained of by the petitioners affect the results of the election.

(e) Whether the 3rd respondent was validly elected as the Member of National Assembly during the parliamentary elections conducted on 8th August 2017.

(f) Whether there are consequential declarations, orders and reliefs including costs that this honourable court should grant upon determination of this petition.

Petitioners' Case

14. In their endeavor to establish their case, the petitioners basically adopted and relied on the grounds stated on the face of the petition at Paragraphs 6 – 15 which I have already reproduced above and affidavits sworn by the 1st petitioner (PW1) sworn on 6th September 2017, 2nd petitioner (PW2) and Daniel Komoi Kiok (PW3) sworn on the same day plus, Koitamet Ole Kina's (PW4) affidavit deponed on 10th October 2017.

15. It is the petitioners' case that, Kajiado West Constituency election exercise was flawed as it was not conducted in a free and fair manner thus putting its legitimacy and credibility into question hence undermining the free will and sovereign power of the people contrary to Articles 1, 2, 3, 4, 38, 81, 86 and 258 of the Kenyan constitution and Section 39 of the Elections Act as read with Elections general Regulations 3, 4, 7, 79 and 44.

16. In Paragraph 9 (a) – (g) of his supporting affidavit, the 1st Petitioner alleged that the elections exercise was marred with massive irregularities and illegalities among them; forms used to declare results lacked security features (annexure MS.5); failure by party agents or candidates to sign declaration of results forms and that no explanation was given for such failure (annexure MS.3); form 35B contains arithmetic discrepancies; form 35B did not bear the name of the returning officer who appended the signature (annexure MS.1); various form 35As lacked IEBC stamp (annexure MS.2); unknown party agents from a non-existing party known as NASA signed some form 35As ; failure to avail declaration results form (35A) to the members of the public thus inhibiting accountability, verifiability and transparency and lastly; presiding officers and their deputies' failure to sign form 35As.

17. Corroborating the 1st petitioner's evidence, the 2nd petitioner swore an affidavit dated 6th September 2017 being a replica of the 1st petitioner's supporting affidavit and a further affidavit sworn on the same day.

18. In his testimony, the 1st petitioner (PW1) told the court that on the material day, he cast his vote at 7.00a.m at Kipeto Primary School Polling Center where the KIEMS kit allegedly failed to pick his finger prints for about six times. That when the KIEMS kit failed to identify him, he was advised to vote without being identified. He claimed that a number of voters who could not be identified were allowed to vote. That after voting, he visited various polling stations among them Don Bosco on a fact finding mission on how voting was progressing.

19. Upon visiting Don Bosco Polling Center, he allegedly found agents from various parties outside the tallying room save for Jubilee agents who were inside as tallying was going on. He was informed by his agents that they had been thrown out by the Presiding officer. He however managed to get a number of form 35As from members of the public who had picked them from

polling centers where they had been affixed. The witness (PW1) identified various form 35As annexed to his affidavit which he alleged lacked IEBC stamp and ODM agents' signatures. He further claimed that forms attached by the respondent were doctored as they were uniform and in one handwriting. In his cross examination by Mr. Liko for the 1st and 2nd respondents, PW1 admitted that he was told how agents were thrown out of tallying centers and that he did not witness the said act. He also acknowledged that he did not call any of those agents as witnesses to confirm the allegation.

20. When challenged as to whether he did sign his affidavit before a commissioner of oaths, he admitted that he signed before his lawyer and the same was taken to the commissioner for commissioning by his lawyer.

21. According to the 2nd petitioner's evidence before court, on 8th August 2017, he voted at Olepolos Primary School and thereafter went round various polling stations monitoring the exercise. During his visit to Narumoru Polling Center, he found only Jubilee agents inside the tallying center while agents from other parties were locked outside. He also claimed that he witnessed some voters vote without being identified by the KIEMS kit and that in several stations the same happened. The witness basically adopted the evidence of PW1.

22. PW3 Daniel Komoi Kiok also adopted his affidavit sworn on 6th September 2017 in which he stated that he was a chief agent ODM party posted at the constituency tallying center tasked with the responsibility of receiving form 35As from polling stations' agents. That after voting, he proceeded to the constituency tallying center where he received only 15 form 35As which had glaring discrepancies as some were not stamped or signed by their agents and his complaints to the 2nd respondent were ignored. He reiterated his averments in his affidavit claiming that their party agents were denied result declaration forms (form35A). On his cross examination by the respondents' counsels, he admitted that he did not sign form 35B because he was not in agreement with the results. He also conceded that he did not call any of those agents who claimed to have been denied access to the tallying centers and that he took the 15 form 35As to his ODM candidate.

23. PW4 Koitamet Ole Kina who swore an affidavit on 10th October 2017 deponed that he was approached by the petitioners as a consultant to analyze 15 form 35As given to him by the petitioners. That he did analyze the same by categorizing them in terms of forms not signed by agents, presiding officers or candidates, forms without IEBC stamp, forms without security features or bar code and that out of the six elective posts, votes cast varied hence an irregularity. In his testimony, he simply reiterated what is contained in his affidavit in support of the petition.

1st and 2nd Respondents' Case

24. The 1st and 2nd respondents called only one witness the returning officer Kajiado West Constituency (2nd respondent) (DW1-RW1) one Florence Kwamboka Mogaka. The witness basically adopted the 1st and 2nd respondents' response dated 21st September 2017 but filed on 28th September 2017 and her affidavit in support sworn on 21st September 2017 and filed on 28th September 2017. Kwamboka denied every irregularity complained of stating that the election exercise was conducted in a free and fair manner and in accordance with the law. She termed the petitioners' allegations in Paragraph five of the petition as too general, misplaced and without factual basis.

25. In response to the allegation that there was a variance in the votes cast and declared for the presidency and member of National Assembly, she responded that the 1st respondent had no control on how voters cast their votes. Regarding the allegation of illegible form 35As being supplied to the petitioners' agents, she expressed surprise arguing that forms attached to their response were clear and therefore could not understand why the illegible forms.

26. Concerning forms lacking security features, DW1 (RW1) in paragraph 12 of their response asserted that forms used to declare results bore IEBC water mark, IEBC logo, serial number at the top left, number of the form at the top left (form 35B) and the regulation prescribing the form at the top right.

27. Regarding form 35B which had her signature and ID card without her name, she contended that the law only required her signature and the date which she did. In paragraph 7 of her supporting affidavit, she alleged that all form 35As listed in paragraph 37 – 54A of the petition were signed by the presiding officers, deputy presiding officers and party agents who were present. She listed the 13 affected stations and produced the relevant forms as annexure KMF-3.

28. In her cross examination by Ms Maumo for the petitioners, DW1 (RW1) denied the allegations that voters who were not identified as voters did vote. She explained to the court various methods of identification process before a voter would vote. When challenged why voting at Singaraine Polling Station commenced at 6.22.22am, last voter voted at 9.43.49pm and voting closed at 10.02 pm, she answered that she had no explanation. As to the variance to the votes cast in favour of the presidency as compared to the member of national assembly, DW1 associated the discrepancy to stray votes and that in any event, the variance complained of was too minimal to be able to affect the results. She gave an example of Ewuaso Nyiro where the president got 538 votes and Member of National Assembly 539.

29. Regarding the four missing SD cards from four polling stations, she told the court that the four cards went missing during reconfiguration exercise by the supplier (O.Morpho co.) during the repeat presidential election exercise.

30. While giving evidence, the court on its own motion asked the witness (Dw1) to demonstrate and prove before court that the forms used had security features. While using a bar code reader and UV light, the witness proved that the forms had the requisite security features save for form 35B which had the rest of the security features but upon photocopying failed to reflect the anti-copy writings as one of the elements of security features.

31. In answer to the question put by Mr. Masika Advocate regarding the discrepancy reflected in the number of valid votes cast as per the KIEMS kit vis a vis the votes reflected in form 35A in six of the contested polling stations, the witness stated that she had no explanation but maintained that, in such a scenario, results in form 35A should supersede the KIEMS kits' results. She however blamed the KIEMS kit attendants (clerks) for wrongly posting or entering results.

3rd Respondent's Case

32. The 3rd respondent (DW2) adopted his response and affidavit sworn on 6th September 2017 in which he stated that the election exercise was conducted in a free and fair manner and that he was validly declared as the winner. He denied any involvement in violation of the constitution, electoral laws or engagement in any illegalities or irregularities. He attached form 35B (annexure SGR2) and forms 35A marked "SGR 3-a – to 3-l" showing that all the forms had IEBC stamp and presiding officer's signature.

33. DW3 Amos Solitei Semeyian who swore an affidavit on 18th September 2017 as chief agent for Jubilee party in support of the 3rd respondent, acknowledged having received form 35As from polling stations' agents and that they all had presiding officers' signatures and IEBC stamp. In his testimony, he claimed that after voting, he visited various polling centers and that he did not witness any form of harassment on party agents.

34. Corroborating the evidence of DW2 and DW3, DW4 Hassan Senketo also swore an affidavit on 18th September 2017 claiming that he was an agent for Jubilee party Ookidong Ward in whose jurisdiction Enkusero Keri Primary School and Olngarua Primary Polling centers fall. He stated that he personally visited the said stations and saw form 35As having been filled and signed by the presiding officer and agents among them NASA and Jubilee parties. He attached form 35As from the said stations to confirm his assertion.

35. After the petitioners' and the 1st and 2nd respondents' testimony, the petitioners sought scrutiny of the results in the entire constituency vide their application dated 16th November 2017. Through its ruling delivered on 29th November 2017 and directions made thereof, partial scrutiny was allowed.

Scrutiny

36. Following this court's orders regarding preservation of election materials made on 9th October 2017 and after hearing evidence of both petitioners and 1st and 2nd respondents, a number of issues raised in the petition and some that arose during the trial regarding existence of various irregularities and illegalities did commend for partial scrutiny so as to clarify on some disputed areas.

37. The court therefore directed scrutiny on six areas:

(a) Scrutiny on 12 disputed stations namely Singaraine Primary 1 of 1, Ole Polos Primary 2 of 2, Ntoroshi Nursery School 1

of 1, Ilodoariak Primary School 1 of 1, Kenya Marble Quarry Primary School 1 of 1, Enkusero Keri Primary School 1 of 1, Oletepes Primary School 2 of 2, ACK Nursery 1 of 2, Olongarua Primary School 1 of 1, Leshuta Primary 1 of 1, Ilmasin 1 of 2 and Oletepes Primary 2 of 2.

(b) 1 empty ballot box S/NO. 120756.

(c) Identified ballot boxes with seals interfered with i.e. Oletepes Primary 1 of 1, Inchoroi Primary 1 of 1, Narumoru 1 of 5, Narumoru 3 of 5, Oloirien Primary, Ensonorua Primary, Indupa Primary School 1 of 1, Torosei Primary School 2 of 2, Emorkeya Primary School 1 of 1. Entamo Nursery Primary School 1 of 1, Oloika Primary School 2 of 2, Shampole Primary School 1 of 1, Ewuaso Primary 1 of 3, Ewuaso Primary 3 of 3, Kushero Primary 1 of 1, Olasho Primary and Saikori Primary.

(d) Unidentifiable ballot boxes – S/Nos. 124404, 120639, 124984, 124982, 124545, 120854, 120336, 124416, 124417, 124625, 124407, 124909.

(e) Four missing ballot boxes but later on found.

(f) Ballot boxes in respect of the four missing SD cards.

38. After scrutiny, the Deputy Registrar compiled a report in which the 148 polling stations were identified using seals inventory thus clarifying on the actual polling stations in relation to an unidentified ballot boxes. As to the four missing boxes, the same were found having been misplaced within the warehouse and therefore were identified as Khibt, Isinya OO Melook, Kibiko and Oloonkurman polling stations. There was no dispute or issue relating to those stations. As to the empty box, the same was traced as belonging to Everet Polling Station with one registered voter who never voted hence there was no form 35A and therefore the reason for its emptiness.

39. In respect to category B relating to ballot boxes with seals interfered with, form 35As were made available during scrutiny although not in tamper proof envelopes in majority of the ballot boxes.

40. Concerning identification of stations with wrong SD cards, the same were identified as Oloonkurman, Endoinyo Olasho, Oloirien and Oldorko Nursery.

41. Having highlighted on the grounds in support of the petition, testimonies by both parties and their witnesses, submissions by the petitioners' Counsels filed on 18th January 2018, 1st and 2nd respondents' filed on 26th January 2018 and 3rd respondent's filed on 29th January 2018, a brief outline and analysis of the law governing electoral process in Kenya would suffice.

The law governing electoral process in Kenya

42. Kenyan electoral system/process is underpinned by various legal provisions inter alia: Constitution of Kenya 2010, Elections Act 2011 and other related statutes, general regulations and Elections (parliamentary and county Elections) Petitions Rules 2017 breach of which would attract serious ramifications including but not limited to vitiation of election results and prosecution in case of any omission or commission of a criminal nature. Most of the salient provisions have adequately been covered by the petitioners in their petition, respondents' responses and counsels' submissions.

43. Under Article 1(1) of the 2010 Kenyan Constitution, all sovereign power belongs to the people of Kenya and same shall only be exercised in accordance with the Constitution. In a free democratic society, a successful electoral process is a manifestation of fidelity to the Constitution and all electoral laws governing its electoral system. It is therefore a constitutional imperative that, when Kenyan people exercise their sovereign power either directly or through their democratically elected representatives (Article 2 of the Constitution), their choice of leadership in a free and fair electoral process must be respected as a true reflection of their desire on how to be governed and by who.

44. Article 38 of the Constitution outlines political rights of Kenyan citizens vis a vis election process as follows:

Sub-Article 1(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.**

Sub-Article 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.**

Sub-Article 3 - Every citizen has the right without unreasonable restrictions-

- (a) to be registered as a voter;**
- (b) to vote by secret ballot in any election 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.**

45. To reinforce Article 38 above quoted, Article 81 goes further to provide as follows – **the electoral system shall comply with the following principles:**

- (a) Freedom of citizens to exercise their political rights under Article 38;**
- (b)**
- (c)**
- (d) Universal suffrage based on the aspiration for fair representation and quality of vote; and**
- (e) Free and fair elections which are**
- (f) (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.**

46. It is the petitioners' contention that Kajiado West Constituency elections exercise was not transparent, impartial, verifiable and

accountable owing to improper influence calculated at tilting results in favour of the 3rd respondent through fraudulent activities orchestrated by the 1st and 2nd respondents.

47. In any progressive democratic society with the desire to have legitimate government in power which would then guarantee political, social and economic stability, the free will and sovereign power of the people in electing leaders of their choice through universal suffrage in a free and fair electoral process must not be compromised at the whims of other considerations or external factors other than the expression of the intention of the people who are the ultimate donors of authority to any leadership.

In the case of **Richard Kalembe Ndile and another vs Patrick Musimba Mweu and two others (2013) eKLR** the court had this to say:

“under our democratic form of government, an election is the ultimate expression of the people and the electoral system is designed to ascertain and implement the will of the people. The bedrock principle of election dispute resolution is to ascertain the intent of the voters and to give effect whenever possible.”

48. Based on the parameters set by Articles 1, 38, 81 and 86 of the Constitution, implementation and delivery of a successful, free and fair elections squarely lies on the IEBC as an impartial umpire pursuant to its mandate donated under Article 88. Recognizing the important and central role played by the IEBC in any election exercise, Judge Kimaru expressed himself in the case of **William Kabogo Gitau vs George Thuo and 2 Others (2010) eKLR** as follows:

“If there is any statutory body whose actions should be considered to be above the board and which should perform its duties to the required standard or integrity and probity, it should be the electoral commission. The electoral commission has a duty to inculcate and imbue confidence in the electorate that its process is transparent, free and fair. I would be speaking for many Kenyans when I state that the events subsequent to the 2007 elections made many Kenyans to stand up and take note that an electoral process cannot under any circumstances be compromised. Many Kenyans were ashamed when our country was referred in similar terms and in the same breath with a neighboring failed state. Kenya is not, and cannot be considered as a banana or a groundnut republic. This court will stand up and be counted as not countenancing or tolerating electoral irregularities and malpractices.”

49. Ideally, IEBC as a midwife mandated with the responsibility to oversee free and fair elections, is under obligation to deliver credible, accurate, verifiable, secure and transparent results and as a matter of necessity, ensure that at all times there is a level playing ground for all parties, exercise high standards of integrity and transparency devoid of any manipulation or improper influence. This mandate is well captured under Article 86 which provides as follows:-

At every election, the Independent Electoral and Boundaries Commission shall ensure that:

- (a) Whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;**
- (b) The votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;**
- (c) The results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and**
- (d) Appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.**

50. To buttress the important role played by IEBC, the Supreme Court of Kenya in **Gatirau Peter Munya vs Dickson Mwenda Kithinji and 2 others (2014) eKLR** expressed itself at Paragraph 216 as follows:

“It is clear to us that an election should be conducted substantially with the principles of the Constitution as set out in Article 81(e). Voting is to be conducted in accordance with the principles set out in Article 86. The Elections Act, and the regulations thereunder; constitute the substantive and procedural law for the conduct of elections.”

51. For purposes of orderly management and administration of election exercise by IEBC as ‘a midwife’ and general electoral dispute resolution mechanism, Article 87 of the Constitution donated powers to parliament to enact various laws inter alia Elections Act No. 24/2011, Elections Offences Act No. 37 of 2016, Parliamentary and County elections petitions rules 2017 and elections general regulations 2012.

52. In electoral disputes, any aggrieved party seeking a court to void an election, such party is bound to prove to the satisfaction of the court that the impugned election was not conducted in compliance with the Constitution, electoral statutes and other related laws or that, such non-compliance substantially affected the results. Underscoring this requirement, Section 83 of the Elections Act No. 24/2011 succinctly set out the criteria as follows:

“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 principles laid down in the Constitution and in that written law or that non-compliance did not affect the results of the election.”

53. From the wording of Section 83 above, a court is cautioned not to enter into the arena of trivial electoral disputes thereby voiding an election result merely because some errors and irregularities have been committed or that a provision of law relating to elections has not been complied with. It is therefore important that one must prove that such errors and irregularities or the non-compliance with the election law is of such a gravity that the election is substantially compromised.

54. In the case of Gatirau Peter Munya vs Dickson Mwenda Kithinji and 2 others (Supra), the Supreme Court held at **Paragraph 217** that:

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

Paragraph 218 – Where, however, it is shown that the irregularities were of such magnitude that they affected the election results, then such an election stands to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human intervention are not enough by and of themselves to vitiate an election.”

It is incumbent upon the aggrieved party to prove to the satisfaction of the court that the election exercise was not conducted in conformity with the constitution or written law or such noncompliance did substantially affect the outcome.

Burden of Proof

55. It is a basic rule of evidence that he who alleges or asserts existence of a fact(s) or any legal right or obligation bears the burden of proof (See Section 107 and 108 of Cap 80 of the Evidence Act). In this case, the petitioners made several allegations regarding violation of the Constitution and other related electoral laws thus rendering the credibility and legitimacy of the whole process questionable. The burden to prove such violations, commission of illegalities and irregularities purely lies on the petitioners and upon such discharge, the same shall shift to the respondents who shall equally discharge their portion in like manner.

56. In the Raila Amolo Odinga and another vs IEBC and 3 others SCK petition No. 5 of 2013 (2013) eKLR case, the Supreme Court held as follows:

“A petition seeking to nullify an election should clearly and decisively demonstrate that the conduct of the election was devoid of merits and so distorted as not to reflect the expression of the people’s electoral intent and that the evidence should disclose profound irregularities in the management of the electoral process.”

At Paragraph 196, the court emphasized on the burden of proof by stating that:

“where a party alleges non-compliance with electoral law, the petitioner must not only prove that there had been non-compliance with the law but that such failure and non-compliance did affect the validity of an election. 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 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 prescription of the law."

57. It is now settled law that election disputes are unique in nature as compared to ordinary civil suits. Whereas in an ordinary civil suit the burden of proof is that of proof on a balance of probability and beyond reasonable doubt in a criminal case, the story is however different in electoral disputes where the standard of proof is intermediate i.e. above proof on a balance of probability and below proof beyond reasonable doubt. In **Raila Amolo Odinga and another vs Independent Electoral Boundaries Commission and others SCR Presidential Petition No. 1 of 2017 (2017)eKLR** at paragraph 152 the court stated thus;

"We maintain that, in electoral disputes, the standard of proof remains higher than the balance of probabilities but lower than beyond reasonable doubt and where allegations of criminal or quasi criminal in nature are made, it is proof beyond reasonable doubt."

At Paragraph 192, the court went further to state the consequence of non-conformity with Section 83 of the Elections Act as follows:

"there are clearly two limbs to all the above quoted provisions; compliance with the law on elections and irregularities that may affect the results of the election. The issue in the interpretation of the provisions is whether or not the two limbs are conjunctive or disjunctive."

58. While quoting the Raila Amolo Odinga 2017 case, counsel for the petitioners submitted that the petitioners had discharged their burden of proof as required and that the election exercise was conducted in violation of the Constitution and related laws. On the other hand, counsel for the 3rd respondent relying on the same case (Raila Amolo 2017) (Supra) submitted that the petitioners had failed to prove their case to the required degree. To bolster their claim, Mr. Masika referred the court to the case of **Ntwiga vs Musyoka and 3 others (2008) eKLR (EP)** in which the court held that:

"The burden of proof throughout rests on the petitioner and the quality of evidence that is advanced is to be considered with a thoroughness and gravity which is commensurate with the dire consequences that can follow by virtue of the provisions of Section 6 of the national assembly and presidential Elections Act and Section 35 of the Constitution.

59. Having analyzed the underlying legal principles upon which electoral disputes are anchored, I will now turn to the grounds of the issues raised, evidence adduced and submissions by both counsels to make a determination.

Analysis and Determination

60. Considering the grounds of the petition, reliefs sought, evidence adduced and framed issues, I will conveniently deal with issues number 1, 2, 3 and 4 together as they are intertwined.

(A) Whether Elections were free, fair and held in compliance with the Electoral laws and; whether such non-compliance if any affected the results herein.

61. According to the petition paragraphs 6-15, the petitioners set out various grounds impugning the election of Kajiado West Constituency terming it as fundamentally flawed and orchestrated to tilt results in favour of the 3rd Respondent contrary to the constitution and other related laws. I will therefore consider and individually address each allegation against the relevant law, evidence on record and Counsel's submissions.

(a) Un explained discrepancies in the total number of votes cast for various elective posts in the same constituency

62. It is the Petitioners' contention that, a voter who is given six ballot papers for the six elective posts should cast one ballot paper for each elective post in a separate ballot box hence no room for one post having more votes than the other. An example given during cross examination of DW1-(RW-1-) by Ms Maumo Advocate for the Petitioners was Ewuaso Nyiro Polling station 1 of 3

where the president (form 34B) got 538 votes and the member of National Assembly 539(form 35B) a difference of one vote which discrepancy she (DW1) associated to stray ballot papers. It is true that astray or rejected ballot is not counted for any candidate meaning that if the victim of such action is the presidential post, it will be shot of one vote by virtue of casting its vote in a wrong ballot box. The Petitioners did not demonstrate how such inevitable errors which is quite negligible in this case substantially affect or affected results. The explanation given by the returning officer is convincing in the circumstances and therefore that ground fails.

(b) Failure to make available to the public copies of statutory forms used to deliver results at various polling stations.

63. At paragraph 9 (c) and (d) of the petition, the petitioners alleged that copies of statutory forms used to deliver results at various polling stations were not made available to members of the public and those in their possession were unclear and illegible hence cannot be ascertained or verified. From this statement, the two paragraphs are contradictory. One, there is the allegation of non-availability of the forms and secondly, availability of illegible forms. How did they get the illegible forms they needed to file the petition" In his evidence in-chief, PW1 stated that he got some form 35As from members of the public who picked them from polling centers where they had been affixed. It should be borne in mind that, the only official way of availing physical results declaration forms to the public is by affixing them at the polling centers in compliance with Reg.79(2A)(d) of the elections general Regulations.

64. PW3 Daniel Kimoi Kiok ODM chief agent also admitted in his evidence in chief that he obtained 15 forms 35A from some of their agents. It is common knowledge and a matter of local notoriety that most agents in general elections for various reasons including nonpayment by their principals do not even bother to deliver results declaration forms to their bosses hence that cannot be a failure on the part of the Respondents. In any event, those forms upon request of the Petitioners were availed to the Deputy Registrar hence their existence should not be an issue. To allege that those forms were not made available to the members of the public is not correct. On that note, that ground fails.

(c) Form 35B used to declare the results of member of National Assembly has various anomalies as hereunder;

(i)Form lacks name of the Returning Officer and signature of the various political party agents or candidates.

(ii) Form indicates total number of votes cast as 54, 549 while actual summation reflects 54, 548 (Para 12 (c) of the petition).

65. In paragraph 9 (e) of the petition, petitioners stated that their party (ODM) agent was not allowed to sign Forms 35B. In their submissions, Counsel for the Petitioners opined that ODM agent did not sign the said form and that the name of the Returning Officer who signed was missing (Para.12(d) of the petition) thus making authentication and verification of the results questionable. In answer to this allegation, DW1-(RW1) admitted on cross examination by Mr. Masika that when she declared results, ODM agents and their candidates immediately left before signing.

66. However, PW3 Daniel Komoi Kiok acknowledged in his evidence in chief that when DW1 attempted to deliver results which they had disputed, he refused to sign Form 35B because their complaints had been ignored. With this admission, the Petitioners cannot claim that they were not given an opportunity to sign the form. They are therefore estopped from alleging prejudice and failure to sign did not disenfranchise them in any way. As to the discrepancy in total no of votes cast 54,549 against the actual summation of 54,548 a difference of one vote, DW1 termed it as a curable arithmetic human error. Indeed, this is an ordinary human error involving arithmetic calculation of figures hence nothing serious for anybody to cling on.

67. Regarding the returning officer's failure to write her name in Form 35B, the witness (DW1) asserted that, there was no legal requirement for her to write her name. She stated that her signature was sufficient considering the space provided for writing the name which is too small. In submission, Mr. Liko for the 1st and 2nd Respondents urged that regulation 79(2) and (2A) of the Elections general regulations 2012 only provides for the Presiding Officer, candidates or their agents to sign. I wish to however state that the relevant Regulation applicable in this context is Reg. 83 which provides;

Sub regulation (1)- immediately after the results of the poll from all polling stations in a constituency have been received by the Returning Officer, the Returning Officer shall, in the presence of candidates or agents and observers, if present-

(f) Sign and date the relevant forms and publicly deliver the results for the position of;

(i) **Member of County Assembly**

(ii) **Member of National Assembly**

Based on this provision, the name of the Returning Officer is not mandatory.

68. Further, a perusal of the 1st and 2nd respondents' response and affidavit of Dw1 (Returning officer) clearly reveals that, form 35B (Annexure KMF-2) attached is duly signed with her id card indicated and Kenya gazette notice No. 4410 of 5th May 2017 showing her appointment as a returning officer and her name corresponding with ID No. 9929799 reflected. She went further to produce her original ID before court for comparison and verification. There is no doubt that form 35B was filled and the results delivered by Kwamboka Florence Mogaka as a Returning officer. The omission of her name is perse not fatal and therefore does not change the results collated from form 35A which is the final results declaration form. For those reasons, that ground also is not available to void the results herein.

(d) **Forms used to declare results lacking security features**

69. The petitioners alleged in paragraph 12(a) of the petition that the results declaration forms lacked requisite security features as prescribed in the contract for supply of ballot papers signed by the 1st respondent and Alghurair Co. Although no specific security features were mentioned in the petition, it came out during the hearing that such security features include lack of anti-copying and IEBC logo or water marks.

70. On its own motion, the court did direct DW1 (Returning officer) when giving evidence in chief to demonstrate identification of security features. Upon examining a sample of Forms 35A using a bar code reader and UV light, the impugned Forms passed the test save for Form 35B which did not reveal anti- copying features. As stated in the **IEBC Vs. Maina Kiai and 5 others Nairobi Civil Appeal No.105 of 2017 (2017) eKLR case** cited with approval by the Supreme Court in **Raila Amolo Odinga and Another Vs IEBC and others (2017) (Supra)** at para 264), Form 35A is the final authority in declaration of results. In this case, the court of Appeal made the following remarks;

“.....it is clear beyond peradventure that the polling station is the true locus for the free exercise of voter's will. The counting of the votes as elaborately set out in the Act and regulations, with its open, transparent and participatory character using the ballot as the primary material, means as it must, that the count there is clothed with a finality not to be exposed to any risk of variation or subversion. It sounds ill that a contrary argument that is so anathema and antithetical to integrity and accuracy should fall from the appellant's mouth”

71. It is my finding that, the final result declaration forms (Form 35A) had sufficient security features for purposes of authenticating results. Form 35B reflected IEBC water mark (logo) and s/no using bar code reader and UV light. The Petitioners did not in any event submit the alleged contract which the 1st Respondent and the supplier of the forms in question to confirm the actual features they had in mind as the law does not provide for the alleged features. I do not find this ground sustainable in light of evidence at hand and explanation given by Dw1 hence the same is dismissed.

(e) **Forms 35A not bearing IEBC or presiding officer's stamp**

72. At Paragraph 12(e) of the petition, the Petitioners listed various polling stations allegedly lacking IEBC or presiding officers' stamp thus rendering them invalid as they cannot be verified falling short of the constitutional test of accuracy, accountability, transparency and verifiability. Among the listed stations are;

(i) Singiraine Polling Station 1 of 1

(ii) Ole Polos Primary School 2 of 2

(iii) Ilodoariak Primary School 1 of 1

- (iv) Ntoroshi Nursery 1 of 1
- (v) ACK Nursery 1 of 2
- (vi) Ilmasin Primary 1 of 2
- (vii) Leshuta Primary School 1 of 1
- (viii) Olngarua Primary School New 1 of 1
- (ix) Oletpes Primary School 2 of 2
- (x) Kenya Marble quarry Primary 2 of 2
- (xi) ACK Nursery 1 of 2
- (xii) ACK Nursery 2 of 2
- (xiii) Enkusero Keri new 1 of 1

73. In support of their claim, Counsel for the Petitioners cited various authorities inter alia **Simon Nyaundi Ogari and Another Vs Joel Omagwa Onyancha and 2 Others (2008)eKLR and Manson Oyongo Nyamweya Vs James Omingo Magara and 2 Others EP No.3/2008 (2009) eKLR** where the respective courts found it irregular for a presiding officer not to stamp results declaration forms hence aground to void an election.

74. To counter the Petitioners' claim that failure to stamp election result declaration forms is an irregularity sufficient enough to vitiate an election, Mr. Liko for the 1st and 2nd Respondents submitted to the contrary citing the case of **IEBC and Another Vs. Stephen Mutinda Mule and 3 Others (2014)eKLR** wherein the Court of appeal held as follows;

“.....it is signatures of the presiding officers and agents that authenticate the forms 35. If any such forms were stamped, it was a gratuitous and superfluous discretionary or administrative Act incapable of creating a statutory obligation less still the invalidation of the forms 35 that did not contain the stamp”

75. Although stamping of results declaration form is not provided for anywhere in the Kenyan Electoral Laws, the same seems to emanate from the internal administrative guidelines provided by the IEBC for purposes of authenticating the integrity and ownership of the form hence a sign of transparency, accountability and verifiability. However, in the absence of proof of any prejudice suffered by failure to stamp the requisite form and therefore the fundamental negative effect on the results delivered, the omission cannot perse stand on the way of the electorate to frustrate the will of the people especially when the result including the votes garnered by each candidate is not in question and party agents have signed. Accordingly, I do not see any prejudice suffered by the petitioners by failure to have Returning Officers (IEBC) stamp on some forms. In any event, the forms attached to the petition by the Petitioners are faint copies which do not reveal the actual content Visa- vis clear copies attached by the Respondents which clearly shows that those forms had IEBC stamp. For those reasons that ground also fails.

(e) Exclusion of Agents from tallying Centers

76. It is the Petitioner's contention that party agents save for those from jubilee were excluded and forced out of the tallying centre. It is however admitted by the Petitioners that they did not call any of the affected agents to confirm the allegation. I find this to be hearsay evidence which is not admissible in law. In any event, all legible form 35As attached to the Petition and those filed by the respondents have either ODM, NASA or Ford Kenya party agents having signed. That is a confirmation that agents were allowed in the tallying centers and NASA, ODM and Ford Kenya are one and the same thing being affiliate parties of NASA coalition.

77. Concerning the allegation that agents from unknown parties like NASA did sign the forms, the same is a baseless argument. It is a matter of local notoriety that NASA was and still is a coalition party representing ODM party, Wiper, Ford Kenya, ANC and others. If the form was signed by either NASA agent or ODM, Ford Kenya or ANC, then, the same is as good as the other. That cannot be an anomaly to void an election in this case.

(f) High number or percentage of total number of rejected votes in Kajiado West Constituency National Assembly Seat and Presidential Post

78. The Petitioners raised concern on the high percentage of rejected votes in Kajiado West at 2% against Kajiado North at 4%, Kajiado East 1%, Kajiado South 0% and Kajiado Central at 2%. This was a generalized observation which did not translate to any interference or manipulation of results in the instant case. It was not demonstrated to the satisfaction of the court how such variation in terms of percentage amongst Constituencies affected the results in Kajiado West Constituency and most importantly the will of the people.

(g) Failure by agents in signing result declaration forms and failure by presiding officers in giving reasons for such failure

79. In Para 12 (b) and (g) of the petition, the Petitioners contended that failure by party agents to sign Form 35As and failure by Presiding officers in not giving reasons for such failure was a serious and glaring omission capable of voiding an election. Counsel for the Petitioners relied on Regulation 79(1) and authorities in respect of **Simon Nyaundi Ogari and Another Vs. Joel Omagwa Onyancha and 2 others and Manson Oyongo Nyamweya Vs. James Omingo Magara and 2 others (Supra)**.

However, Counsel for the 1st and 2nd Respondents Submitted that, authentication of result declaration forms by agents was optional under regulation 79(b) of the elections general regulations.

80. Regulation 79(1) of the Elections (general) regulations 2012, provides that;

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

Sub Reg. 4; where a candidate or agent refuses to record the reasons for refusal or failure to sign the declaration form, the presiding officer shall record the fact of their refusal.

Sub-Reg. 6; The refusal or failure of a candidate or an agent to sign a declaration form under Sub-Reg. 4 or to record the reasons for their refusal to sign as required under that regulation shall not by itself invalidate the results under Sub-Reg. 2(a).

81. Whereas there are varying and contradictory authorities for or against vitiation of results on account of failure by agents to sign result declaration form or a presiding officer's failure to record reasons for agent's refusal or failure to sign, each case is treated on its own circumstances and merits and most importantly whether such failure substantially affect the outcome.

In the **Manson Oyongo Nyamweya case (Supra)**, the Court was emphatic that failure by any agent to sign and failure by a presiding officer to provide reasons for such failure is sufficient reason to void results. In the case of **John Murumba Chikati Vs Returning Officer Tongaren Constituency and 2 others (2013) eKLR (E.P) No. 4 of 2013** it was held that; although signing of statutory forms by agents is crucial, failure to do so cannot vitiate an election unless there are other reasons or factors.

82. In the instant case, at Para 12(b) (f) of the Petition, the Petitioners cited failure by political parties' agents to sign various form 35As. They did not specify which political party and whether they had such agents in the first place. At Para 12(f), they listed Singaraine 1 of 1, Ole Polos Primary, Leshuta Primary and ACK Nursery 1 of 2, as lacking signatures of agents. A look at form 35A from Leshuta Primary 1 of 1, 2 agents from Jubilee and ODM signed. Form 35A in respect of Ole Polos 2 of 2 attached by the petitioner is blank but the same form attached by the Respondents to their responses is signed by ODM, Sakuda (candidate) and PPK party agents. With regard to Singiraine, Form 35A attached to the Petition is not legible but the Form (35A) attached by the respondents has the signature of ODM agent and Sakuda being one of the candidates. As to ACK Nursery 1 of 2 form 35A attached to the petition has ODM agent having signed and the same is reflected in the same form attached by the Respondents in their

respective responses. I do not see any reason why the Petitioners belonging to ODM party would complain yet their party was adequately represented and their agents did sign either as ODM, Ford Kenya or NASA. For those reasons that ground fails.

(h) Failure by presiding officers in signing Form 35A

83. Although failure by presiding and deputy presiding officers in signing form 35A was not raised as a ground in the petition, the same was alleged in paragraph 18 of the 1st Petitioner's further affidavit sworn on the 10th October 2017 at Paragraph 18 (c) and Paragraph 77 of the Petitioners' submissions. In their submissions, Counsel for the Petitioners asserted that the requirement to sign a document is to authenticate the same. Reference was made to the case of **Shah and Another Vs. Investment and Mortgages Bank Ltd and 2 Others (2001) KLB 190.**

84. The requirement for signing of Form 35A is provided under Regulation 79 (1) of the Elections General Regulations of 2012. This requirement is couched in mandatory terms. Underpinning the importance of presiding officer's signature, the Supreme Court in **Raila Amolo Case (2017) (Supra) had this to say at Para 377**

“.....why could a returning officer, or for that matter a presiding officer, fail or neglect to append his signature to a document whose contents, he/she has generated” Isn't the appending of a signature to a form bearing the tabulated results, the last solemn act of assurance to the voter by such officer, that he stands by the “numbers” on that form”

85. Unfortunately, the Petitioners did not list the specific form 35As that were not signed by the presiding officers for examination. They merely made a general statement. A perusal of all legible form 35As attached by the Petitioners to their petition have the presiding officers' signature. Equally, all form 35A attached by the Respondents have presiding officer's signature.

The allegation that the forms produced by the Respondents were doctored is not based on any expert opinion evidence like a forensic document examiner. I am in agreement with the Petitioners' that as a mandatory requirement, the authenticity of any result declaration form (document) and its admissibility as a legal document is greatly pegged on the availability of the maker's signature. The burden to successfully challenge non-existence of a signature in form 35A and its authenticity if any, purely lies on the person alleging such omission. Besides, there is no proof of any form lacking a presiding officer's signature save for the illegible forms attached by the petitioners which are not of any evidential value. Regarding Deputy returning officers' signature, the same is not mandatory as long as the Presiding officer has signed. There is no law requiring both of them to sign concurrently. A deputy can sign in the absence of a presiding officer for good reason or both can sign if present hence no harm.

(i) Voters voting without being identified

86. Although this specific ground was not raised in the petition, the same was raised generally as being a violation of regulation 69 of the Elections general regulations 2012 (at Para. 28 of the petition) and Article 86 of the Constitution (at Para. 14 of the petition). During the hearing, PW1 and PW2 claimed that voters who could not be identified did vote. Relying on the scrutiny report with regard to SD cards, on 9th October 2017, this honourable court ordered for preservation of all election materials and supply of 12 SD cards in respect of 12 disputed polling stations. At that time, 11 SD cards were provided but one went missing. When the Court ordered for scrutiny on 29th November 2017, the order affected 12 disputed stations, one empty box which was found and four missing boxes which were eventually found within the ware house and unidentified ballot boxes eventually identified using seals inventory.

87. It however emerged when SD cards were converted into readable format that voters were identified in four categories by the KIEMS kit as follows.

- 1) Finger Print Identification.
- 2) Alpha Search Finger Print.
- 3) Document Search.

4) Alpha Search Document.

The returning officer (DW1) was categorical that all the four systems in one way or the other involved machine identification (KIEMS kit) hence there was no need to fill form 32A. On the other hand, the petitioners' counsels insisted that the last mode of identification required the presiding officer to fill form 32A in the presence of agents.

88. According to the Returning Officer (DW1), on the 8th August 2017 election exercise, voters were identified through three modes of identification namely;

a) Biometric or Finger Prints identification .This particular mode entails a voter placing his or her finger on the KIEMS kit which will then reveal particulars of the voter.

b) (i)Alpha Numeric .This mode involves use of an ID card No. of the voter which if identified by the machine would reveal his or her particulars.

(ii) Document Identification .This one also involves the scanning of the back of the ID card.

c) Supervisors' mode of identification. This method is applicable where the presiding officer fills form 32A in the presence of agents who would then sign the form and a voter is identified through printed register.

89. Under regulation 69, identification of a voter is through biometric method or printed register. Where a voter is not identified by the KIEMS kit, the presiding officer is bound to fill in form 32A in the presence of all agents who shall then sign. In this case, there is no proof that a printed register was used so as to require filling of form 32A.It is clear that under biometric identification method, there are elimination stages involved before a printed register is called upon. There is no proof that voters who were not registered or those registered but not identified biometrically voted. In any event, all form 35As in respect to the disputed stations are signed by various party agents including ODM or NASA. For those reasons, that ground also fails

(k) Four missing SD cards

90. The purpose of electronic identification is to make electoral process more transparent, accurate, accountable and verifiable. Upon preservation of election materials, 15 SD cards (KIEMS kits) were not made available by the 1st and 2nd respondent. Later, 11 were recovered but 4 went missing completely. Unfortunately, in the 4 affected stations –OloonKurman, Sunkuyia George had 10 votes, Joseph Simel 98 votes and Moses Sakuda 163. In Endoinyo olasho, Joseph Simel had 204, George Sunkuyia 112 and Moses Sakuda1. In Oloirien, Joseph Simel had 66 votes, Sunkuyia George had 118 and Moses Sakuda had 74 votes. In Oldorko, Moses Sakuda had 8 votes, Joseph Simel 39 and George Sunkuyia 74. From these results, there was no proof that they were manipulated towards favoring any particular candidate.

91. The returning officer (DW1) in her evidence in chief told the court that the four SD cards got lost while reconfiguring afresh KIEMS kits for the repeat presidential elections exercise. She attempted to produce a police abstract to confirm the same allegations but the move was rejected as she was not the maker. Although this allegation was not one of the grounds in the petition as a pleading binding on the parties, this court nevertheless on account of the interest of justice did entertain interrogation of the same. In Moses Masika Wetangula vs Musakari Nasi Kombo and 2 others (2015) EKLR, the supreme court entertained parties to canvass on an issue that was not pleaded in the petition for the sake of the ends of justice to be met hence held that;

“...the court cannot appear to condone illegality in election process and would therefore investigate any alleged breaches of the law, even where these were not in the proceedings of the trial.”

92. After the court directed scrutiny of forms 35As of the affected stations, the same were found to have been duly signed by various party agents. The results contained in these forms were not in contention at all at the inception of the petition. I think the petitioners took advantage of the revelation that the SD cards got lost and decided to make it a serious ground in the course of the trial. I do not see any fundamental effect on the results which were discernable from form 35A the ultimate expression of the will of the people .It is possible the four SD cards got lost, but what is the effect of their non-availability when there is an alternative of verification

through form 35A. This ground is not sustainable and as such, allowing it will be tantamount to condoning unnecessary fishing expedition in the course of the trial.

(1) Variance in the votes cast in the KIEMS kit against votes cast as per form 35A

93. Out of 11 KIEMS kits analyzed in respect to the 12 polling stations after preservation and scrutiny of election materials, six of them were at variance when compared to the respective forms 35A in terms of votes cast. The SD card which is a data storage device in a KIEMS kit which also serves as the electronic register, revealed discrepancies in the six stations as follows.

1) Singaraine 1 of 1 - According to the KIEMS kit, 574 votes were cast while form 35A indicates 573 votes making a difference of one vote unexplained with Sakuda Moses leading.

2) Ole polos 2 of 2 - In respect of this polling station, the KIEMS kit reflects 355 votes cast while form 35A indicates 359 votes making a difference of 4 votes with Moses Sakuda leading.

3) Enkusero - The KIEMS kit reveals 231 votes were cast while form 35A shows 232 votes were cast revealing a difference of 1 vote with Joseph Simel leading.

4) Leshuta - The KIEMS kit shows 158 votes were cast while form 35A reveals 157 votes were cast giving rise to a difference of 1 vote with Sakuda Moses leading.

5) ACK nursery 2 of 2 - The KIEMS kit reflects 436 votes cast while the form 35A reveals 486 votes cast hence a difference of 50 votes with George Sunkuyia leading.

6) Kenya marble 2 of 2 - The KIEMS kit indicates 343 votes cast while form 35A reflects 340 votes cast hence a difference of 3 votes with George Sunkuyia leading.

94. From the above analysis, only sixty votes were affected and therefore couldn't be accounted for. Even if we were to minus 60 votes from 1,584 votes which is the margin between the winner and the 2nd candidate, the same may not fundamentally affect the results. There is no proof that this discrepancy was systemic, systematic and widespread so as to substantially affect the results. As I said earlier, nobody knew of this discrepancy from the word go hence a new ground arising during the trial (the scrutiny) although insignificant. Accordingly, that ground fails.

m. Late closing of polling stations

95. It is the petitioners' case that most polling stations closed well past official closing hours. After scrutinizing the 11 SD cards affecting the 12 polling stations named in the petition, it emerged that in some stations, voter closing period was past 5.00 pm. For instance, Singaraine closed at 10.02.01 pm and Iloodoriak Primary 07.07.23 pm. DW1 was unable to explain the reason for late closure but tried to associate the KIEMS' record as a reflection of staff negligence by failing to switch off the kits immediately after the last voter, voted.

96. She however invited the court to check on the station polling diary which contains correct information on the actual closing time properly endorsed by agents. Since nobody interrogated or challenged the official closing hours as reflected in the polling station diary, and further considering the same was not widespread, I am satisfied by the explanation given by the returning officer (DW1). In any event, under regulation 64 (3), a presiding officer can in consultation with the returning officer extend the voting hours for a valid cause e.g late opening which shall then be extended by the time lost. Regulation 66 also allows late voting if there are voters still on the queue even if it was past 5.00pm which is the official closing time. Since this ground wasn't raised initially in the petition, the respondents were denied an opportunity to respond and controvert the same. I do not find the element of non-compliance with closing hours as having affected the outcome. In fact, in respect to Singaraine, it was Moses Sakuda who led while in Iloodoriak it was Joseph Simel who led with 385 while George Sunkuyia got 89 and Moses Sakuda 127 votes. From this trend, it is clear that there was no calculated move to tilt results in favour of any particular candidate leave alone the 3rd respondent.

97. Having made the above finding, it is apparent and crystal clear that the election exercise held on 8th August 2018 in Kajiado West constituency was conducted in a free and fair manner and that the same was transparent, accurate, accountable and verifiable hence its credibility and legitimacy is a reflection of the will and sovereign power of the people.

98. I must acknowledge just like any other ordinary person that the world over, there can never be a perfect or 100% election devoid of minor infractions. Just as in this case, the irregularities complained of are not fundamental enough to overturn the will of the people which is the paramount test for any court to consider before voiding an election. It is no wonder that the supreme court in **Raila Amollo Odinga & 2 others case vs IEBC & others (2017)(supra)** had this to say;

“...at the outset, we must re-emphasize that not every irregularity, not every infraction of the law is enough to nullify an election. Were it to be so, there would hardly be any election in this country, if not the world, that would withstand judicial scrutiny. The correct approach therefore, is for a court of law, to not only determine whether, the election was characterized by irregularities, but whether, those irregularities were of such a nature, or such a magnitude, as to have either affected the result of the election, or to have so negatively impacted the integrity of the election, that no reasonable tribunal would uphold it”.

(B) Was the 3rd respondent validly elected

99. Having made a finding that elections for Kajiado west constituency were conducted in conformity with the law and that any alleged noncompliance thereof did not substantially affect the results, the will and sovereign power of the people who braved the early morning of 8th August 2017 to elect a leader of their choice in exercise of their democratic right through universal suffrage as enshrined in articles 1, 38, and 81 of the constitution was not in vain and the same must be respected and pronounced without hesitation. Accordingly, it is my finding that the 3rd respondent was validly elected as member of National Assembly for Kajiado West constituency on 8th August 2017.

(C) Whether this court can issue any other relief including an order for costs.

100. Besides their general prayers for costs, none of the Petitioners prayed or submitted for any specific amount. Section 84 of the Elections Act provides that an election court shall award costs of and incidental to a petition and such costs shall follow the event. Rule 30 of the Elections (Parliamentary and County elections) petitions Rules 2017 confers discretionary powers to the court to determine the amount payable as costs to a party or parties. The amount of costs awarded being an act of discretion by the court concern, the same should be exercised judiciously without financially disabling or over burdening litigants as a measure of condemnation in pursuit of legal redress. Election Petitions should not be used as a source of enrichment for the successful litigant thus discouraging the loser from exhausting his or her legal mechanism to the apex court in case of an appeal.

101. Considering that Election Petitions are public interest litigation in nature encompassing both the poor and rich members of society as litigants and consumers of justice, awards of costs should be reasonable and commensurate to the country’s economic situation and a true reflection of society expectation without losing sight of the amount of work, number of lawyers engaged by parties and time spent in preparation of the trial itself. Although a delicate act, public interest must prevail and therefore costs must not be seen as a punitive measure intended to discourage genuine litigation. However, where malice is obvious and clear on the face it, courts should never hesitate to award commensurate costs to that extent against vexatious litigants. In this case, the petitioners are to blame for filing this suit and costs shall follow the event. Accordingly, I am inclined to condemn the petitioners to pay costs to the 1st and 2nd respondents as a set capped at one million and similar amount to the 3rd Respondent taking into account the amount of work and number of counsels involved.

102. Pursuant to the above finding, the following declaratory orders are hereby made;

(a) That the National Assembly elections in Kajiado West Constituency held on 8th August 2017 was validly held.

(b) That the 3rd Respondent herein George Sunkuyia Risa was validly elected and gazetted as Member of National Assembly Kajiado West Constituency.

(c) That the certificate of elected member of National Assembly Kajiado West issued on 9th August 2017 was constitutionally

and legally issued to the said George Sunkuyia Risa as Member of National Assembly Kajiado West Constituency.

(d) That Petitioners to pay costs to the Respondents subject to taxation by the Deputy Registrar.

Read, Delivered and Signed in open Court at Kajiado Law Courts this 28th day of February 2018

HON. J. N. ONYIEGO

(JUDGE)

In the presence of;

Ms. Opiyo.....Counsel for the Petitioners

Mr. Likocounsel for the 1st and 2nd Respondents

Mr. Masikacounsel for the 3rd Respondent

Mrs. Catherine.....Court Assistant



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