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**THE REPUBLIC OF KENYA**

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

**ELECTION PETITION NO 4 OF 2017.**

**IN THE MATTER OF THE ELECTIONS FOR THE GOVERNOR OF KITUI COUNTY**

**BETWEEN**

**DR. JULIUS MAKAU MALOMBE.....PETITIONER**

**VERSUS**

**CHARITY KALUKI NGILU.....1<sup>ST</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....2<sup>ND</sup> RESPONDENT**

**GOGO ALBERT NGUMA.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

1. General elections were held in Kenya on 8<sup>th</sup> August 2017, including gubernatorial elections in all of the forty seven (47) counties in Kenya. Charity Kaluki Ngilu, the 1<sup>st</sup> Respondent herein, was elected as the Governor of Kitui County following the said elections, after having been declared winner by the County Returning Officer for elections in Kitui County who was appointed by the Independent Electoral and Boundaries Commission, the 3<sup>rd</sup> and 2<sup>nd</sup> Respondents herein respectively. The Petitioner garnered 169,990 votes in the said election. Dr. Julius Makau Malombe, the Petitioner herein, was a candidate in the said elections for Governor of Kitui County, and was the third runner up after 74,681 votes were cast in his favour. The second runner up was David Musila, who had 114,827 votes cast in his favour.

2. The Petitioner thereupon filed a Petition on 7<sup>th</sup> September 2017, in which he is challenging the election of the 1<sup>st</sup> Respondent as the Governor of Kitui County in the said gubernatorial elections. He also filed a supporting and further affidavit that he swore on 7<sup>th</sup> September 2017 and 16<sup>th</sup> October 2017 respectively, which he adopted as his evidence during the hearing of the Petition when he testified as PW1. He also filed affidavits by fourteen (14) intended witnesses. Eight (8) of these witnesses testified in Court, namely Florence Lau Mbuvi (PW2), Benson Mulandi Nyamai (PW3), John Mwalimu Mulanga (PW4), Kalungu Nzau (PW5), Esther Mueni (PW6), Veronica Syombua Wambua (PW7), Bernard Kitheka Mulatya (PW8) and Martin Musembi Kasina (PW9).

3. The gist of the Petitioner's case as set out in the Petition is that the results announced by the 2<sup>nd</sup> Respondent were illegal, as the elections were conducted by the 3<sup>rd</sup> Respondent contrary to the provisions of Article 81 and 86 of the Constitution, and in particular that the said elections were not free, fair, credible and accountable.

4. The main grounds alleged by the Petitioner in this regard were that the agents of Wiper Democratic Movement-Kenya (hereinafter "the Wiper Party"), which was the Petitioner's party, were denied access to various polling stations across the County; the Forms 37A and Forms 37B used during the election were not signed by his agents, were not duly stamped and the results therein did not match; and that the voting process was marred by violence and intimidation of the Petitioner's voters and agents.

5. Further, that the data entered In the Kenya Integrated Elections Management System (KIEMS) Kits was not consistent with the data from the respective Forms 37A; the 1<sup>st</sup> and 2<sup>nd</sup> Respondents failed to adhere to the provisions on voting, counting of votes and

declaration of results; the election results were based on false figures arrived at as a result of forgery of the Forms 37A, 37B and Form 37C; the security of ballot boxes at the polling stations was compromised, and that the 1<sup>st</sup> Respondent through her agents committed an election offence of bribery.

6. The 1<sup>st</sup> Respondent filed a response to the Petition and a supporting affidavit both dated 20<sup>th</sup> September 2017, wherein she denied the allegations by the Petitioner. The 1<sup>st</sup> Respondent in particular contended that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents conducted the gubernatorial elections in accordance with the provisions of Articles 38, 81 and 86 of the Constitution of Kenya, 2010 and the outcome of the said elections reflected the will of people Kitui County. Further, that the Petitioner lost the election in a democratic, free, fair and credible election, and that the declaration of the 1<sup>st</sup> Respondent as Governor was therefore Constitutional, legal and regular.

7. The 1<sup>st</sup> Respondent testified during the hearing of the Petition as DW2, and in addition filed affidavits by fourteen (14) intended witnesses, out of whom two testified, namely Simon Sali Malonza (DW3) and Josephine Muthui (DW4).

8. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents on their part filed a joint response to the Petition and a supporting affidavit sworn by the 3<sup>rd</sup> Respondent both dated 16<sup>th</sup> September 2017. The 3<sup>rd</sup> Respondent also filed a further affidavit sworn on 29<sup>th</sup> October 2017. He testified as DW1 and as the only witness for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

9. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents contended that the gubernatorial elections held in Kitui County were conducted in full compliance with the principles laid down in the Constitution and the law relating to elections, in particular Articles 10, 38, 81 and 86 of the Constitution as well as sections 39 (1), (1A), 44, 44A and 83 of the Elections Act, together with the regulations therein. They stated that the elections were free, fair and transparent thus enabling citizens and voters of Kitui County to exercise their political rights in accordance with Article 38 of the Constitution of Kenya.

10. In addition, that the elections were held by secret ballot, free from violence, intimidation, improper influence or corruption on the part of the 3<sup>rd</sup> Respondent and or his agents, and administered in an impartial, neutral, efficient, accurate and accountable manner. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents denied that duly appointed agents of any candidate were denied entry to the polling stations and the opportunity to represent their candidate. They contended that the allegations of rigging are devoid of any grounds and to the extent that the said allegations are criminal offences under the Election Offences Act (No. 37 of 2016), they stated that the Petitioner is under duty to provide evidence in proof thereof on a standard beyond reasonable doubt.

11. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents denied the allegations of malpractices, which they termed unsubstantiated, and averred that the 3<sup>rd</sup> Respondent legally and lawfully declared the duly elected Governor of Kitui County after conducting a free, fair, transparent, election that was administered in an impartial, neutral, efficient, accurate, verifiable and accountable manner contrary to the Petitioner's allegations.

12. The details of the respective cases by the Petitioner and Respondents will be set out when discussing the issues raised in the Petition.

### **THE APPLICABLE LEGAL PRINCIPLES**

13. To fully appreciate the arguments that were raised by the Petitioner and Respondents, it is necessary at the outset to summarise the applicable principles governing the conduct of elections as laid out in the Constitution, applicable laws, and judicial decisions. These principles are primarily provided by Articles 38, 81 and 86 of the Constitution, and section 83 of the Elections Act, and in the most recent Supreme Court decision on the conduct elections, being **Raila Amolo Odinga & Another vs Independent Electoral and Boundaries Commission & 2 Others, SC Election Petition No.1 of 2017** (herein after referred to as "**the 2017 Raila Odinga Case**").

14. **Article 38** sets out the political rights, by which the principle of the sovereignty of the people of Kenya as articulated in **Article 1** of the Constitution is exercised, 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.*

The electoral system set out in the Constitution for the realisation of the said political rights is guided by the principles articulated in **Articles 81 and 83**. Article 81 of the Constitution provides for the principles that apply to the electoral system, including the principle of free and fair elections which are to be held as follows:

a) by secret ballot;

b) free from violence, intimidation, improper influence or corruption;

c) conducted by an independent body;

d) transparent; and

e) administered in an impartial, neutral, efficient, accurate and accountable manner.

15. Article 86 further stipulates the manner of carrying out elections and referenda, and the voting processes 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.”**

16. The Supreme Court of Kenya in the **2017 Raila Odinga Case** explained the principles and terms governing the electoral process as contained in Article 81 and 86 of the Constitution as follows:

**“282....Of importance are the expectations of transparency, accountability, simplicity, security, accuracy, efficiency and especially, verifiability of the electoral process. These terms should be understood to refer to:**

**(a) An accurate and competent conduct of elections where ballots are properly counted and tabulated to yield correct totals and mathematically precise results;**

**(b) An election with a proper and verifiable record made on the prescribed forms, executed by authorized election officials and published in the appropriate media;**

**(c) A secure election whose electoral processes and materials used in it are protected from manipulation, interference, loss and damage;**

**d) An accountable election, whose polling station, constituency and national tallies together with the ballot papers used in it are capable of being audited; and**

**(e) A transparent election whose polling, counting and tallying processes as well as the announcement of results are open to observation by and copies of election documents easily accessible to the polling agents, election observers, stakeholders and the public and, as required by law, a prompt publication of the polling results forms is made on the public portal.”**

17. There are various election legislations that have been enacted and/or amended with a view to implementing these principles. The key legislation is the Elections Act and the Rules and Regulations made thereunder. Specifically with respect to the threshold to be met in election petitions, the applicable provision is 83 of the Elections Act. The 1<sup>st</sup> Respondent’s counsel in his submissions did observe that this provision was amended by the *Election Laws (Amendment) Act, 2017 (Act No. 34 of 2017)*. However, as the counsel further observed, the operation of the said amendment was suspended by the High Court, and in addition, the amendment came into force on 2<sup>nd</sup> November 2017 and is not applicable to these proceedings as it is not retrospective (see *John Harun Mwau & Others vs Independent Electoral and Boundaries Commission* SCK Presidential Petition Nos. 2 & 4 of 2017).

18. The provisions of section 83 of the Act prior to the said amendment were 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 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.”**

19. The Supreme Court in the *2017 Raila Odinga Case* interpreted the threshold set by section 83 as follows:

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

20. The Supreme Court was in this regard of the view that an election has to be both quantitatively and qualitatively in accordance with the Constitution.

21. The issue of the burden of proof and standard of proof required to meet this threshold were also extensively discussed in the *2017 Raila Odinga Case*. The Court held that a petitioner who seeks the nullification of an election on account of non-conformity with the law or on the basis of irregularities that affected the results, bears the legal and evidentiary burden from the onset of the trial of proving to the required standard his/her allegations of breach and that an election should be nullified.

22. However, that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not

affect the results of the election.

23. Lastly, on the applicable standard of proof or extent of proof that is required, the Supreme Court reiterated the position in previous decisions that where no allegations of a criminal or quasi-criminal nature are made in an election petition, an 'intermediate standard of proof', one beyond the ordinary civil litigation standard of proof on a 'balance of probabilities', but below the criminal standard of 'beyond reasonable doubt', is applied.

24. The Court also reiterated that the rationale for this higher standard of proof is based on the notion that an election petition is not an ordinary suit concerning the two or more parties to it, but involves the entire electorate in a ward, constituency, county or, in the case of a presidential petition, the entire nation.

25. This Court shall now proceed to examine the evidence adduced by the parties, and the arguments they made on each of the issues, in light of the aforementioned principles, before making its determination.

### **THE ISSUES AND DETERMINATION**

26. The hearing of the Petition commenced with pre-trial conferences, wherein the parties agreed on the issues arising from the respective pleadings as follows:

*a) Whether the election of the Governor of Kitui County was conducted in accordance with the Constitution of Kenya, 2010; the constitutional principles governing the conduct of elections; the Elections Act and the Regulations made thereunder.*

*b) Whether in the conduct of the election of the Governor of Kitui County, there was substantial and material non-compliance with the provisions of the Elections Act and the Regulations made there under, and whether such non-compliance substantially and materially affected the results of the elections.*

*c) Whether any electoral malpractices of a criminal nature may have occurred during the election of the Governor of Kitui County worthy of being reported and transmitted to the Director of Public Prosecution .*

*d) Whether the 1st Respondent was validly elected as the Governor of Kitui County*

*e) Which Party should bear the costs"*

27. During the pre-trial conferences, the Court further directed that the method of resolving the issues would be by way of adopting of witnesses affidavit evidence, which would be subjected to cross-examination and re-examination. During the hearing, the Petitioner was represented by Mr. Okon'go Omogeni SC, Mr. Appollo Muinde, and Mr. Gomba; the 1<sup>st</sup> Respondent was represented by Mr. Kioko Kilukumi; while the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were represented by Mr. A. Masika and Mrs. Dorothy Mageto.

28. The parties were directed to address the legal arguments raised by the Petition by way of written submissions. The Petitioner's counsel and Respondents' counsel all filed submissions in Court on 6th February 2018. A summary of the evidence adduced and arguments made on each of the issues is hereinafter set out, as well as the Courts findings on the same.

***On whether the election of the Governor of Kitui County was conducted in accordance with the Constitution of Kenya, 2010; the constitutional principles governing the conduct of elections; the Elections Act and the Regulations made thereunder.***

29. This issue was canvassed under three heads, being firstly, whether the Petitioners agents were denied access to the polling stations; and secondly, whether the process of voting was marred by violence and intimidation of voters. The third head was whether the results that were declared by the 3<sup>rd</sup> Respondent were credible, accurate and verifiable. However, this third head will be discussed under the second issue as it substantially dealt with non-compliance with the applicable provisions of the law in this regard.

*Whether the Petitioner's agents were denied access to polling stations*

30. The Petitioner in his Petition and evidence listed various polling stations where he alleged his agents were denied access on account of the Forms 37A from those stations not having been signed by a Wiper Party agent. Martin M. Kasina (PW9) who was a statistician and the Petitioner's expert witness, also presented a list of 278 polling stations where the Forms 37A were not signed by the said agents.

31. The Petitioner alleged that the act of denying his agents access meant that his agents were unable to witness the counting and tallying of votes as the process was only carried out in the presence of the agents of the 1<sup>st</sup> Respondent, which resulted in bribery and intimidation of his voters and votes being cast in favour of the 1<sup>st</sup> Respondent. Further, that as a result of the non-inclusion of his agents at the various polling stations and tallying centers, his agents were unable to get the Forms 37As from the various polling stations or Forms 37B at the tallying centers.

32. On cross examination, the Petitioner reiterated that he had agents in various polling stations, and is aware of the process of appointing agents and the documents they are supposed to sign. He stated that the list of agents he attached to his affidavit of 7<sup>th</sup> September 2017 as Exhibit 2 was presented to Wiper party. He however acknowledged that it does not bear any stamp of Wiper party and is not signed.

33. He also stated that the information in his affidavit that his agents were denied access to various polling stations was received from his agents, and that the 2<sup>nd</sup> Respondent's officials and Presiding Officers are the ones who denied his agents access to the polling station, to ensure that they were not at the polling stations at the time the stations opened. The Petitioner was not aware that the agents required accreditation, and stated that his agents showed the 2<sup>nd</sup> Respondent's officials their letter of appointment and identity cards, and that is why some were later allowed access to the polling stations. He however stated that he did not file the statements by any of the agents who were denied access, and that the said agents reported to his Chief agent who will give evidence on the agents who were denied access.

34. Bernard Kitheka Mulatya (PW8) was the Petitioner's Chief agent, and he adopted a supplementary affidavit filed in Court that he swore on 17<sup>th</sup> October 2017 as his evidence. He stated therein that he was appointed by Wiper Party as the party's chief agent. That his role was among others to supervise the elections in Kitui County and coordinate the various party agents who were dispatched by the party to oversee the elections specifically for the seat of Governor of Kitui.

35. PW8 stated that the major ground being raised by the Petitioner is that his party's agents were denied access throughout most of the polling stations, and that this allegation is true because the agents reported to PW8 that they had been denied access. He further stated that he made several calls to the 3<sup>rd</sup> Respondent who assured him that it was a mistake for the agents to be denied access, and that he would rectify the same by calling the specific returning officers to return the Petitioner's agents to the polling/tallying stations.

36. However, that after complaining about the denial of entry of agents, they were allowed back to the stations but they were not allowed to stay long, as they were ejected again from the polling stations before the counting and tallying process... That this prompted him to write a letter to the 3<sup>rd</sup> Respondent having visited most of the polling stations within Kitui Central and Kitui East Constituencies that are near Kitui town. In addition, that the allegation by the 1<sup>st</sup> Respondent's chief agent, Simon Saili Malonza, that the agents for all parties signed the Forms 37A is not true, and that the absence of agents was evident in specified polling stations as shown in various Forms 37As.

37. Upon cross –examination, PW8 testified that he did not personally know or recruit all the Wiper Party agents, and he relied on other people to recruit the agents. He also stated that it was his first time to be a chief agent and he did not undergo any training as an agent. He was aware of the list of agents of Wiper Party provided as an exhibit in the petition, and stated that they had agents in all known polling stations. He however admitted upon being shown the list that some polling stations did not have any names of an agent, namely Ngwani Market 1 and Ngwani market 2 polling stations; Musila Gardens polling stations 4-8; and Mwingi Youth Poly A & B. polling stations.

38. PW8 also testified that he did not witness any ejection of the Wiper Party agents from the polling stations, and that the information about ejection was relayed to him by the agents. He contended that he visited about four (4) polling stations where he witnessed the ejections being Ngwane Polling stations 1 and 2, Kamandio Polling station, Kimyumu Polling station and Matonyani Primary School Polling stations. He also on cross-examination admitted that he did not write the letter to the County Returning Officer dated 8<sup>th</sup> August 2017 on the agents being ejected that was annexed to his affidavit, and that he instructed another chief agent to write the letter.

39. PW8 was also taken through the Forms 37A of a sample of 100 polling stations, in which the Petitioner stated that the Wiper Party agents were not allowed into the polling stations and did not sign the Forms 37A. He confirmed that agents either with similar names as those in the Petitioner's exhibited list of agents, and with the same identification numbers did sign the said forms 37A but for different political parties, mainly for the National Super Alliance Coalition (NASA) and for the Orange Democratic Movement (ODM), as well as for various other parties and independent candidates. He explained that he had no control over agents who changed their loyalty and they then stopped being their agents. In addition that NASA was not a political party.

40. PW8 also confirmed during cross-examination that Wiper Party agents signed the tallied results in the Forms 37B at the Constituency tallying centres for Mwingi Central Constituency, Mwingi North Constituency, Kitui West Constituency, Kitui Rural Constituency and Mwingi West Constituency. Further, that no Wiper Party agent signed the Forms 37B for Kitui East Constituency and Kitui South Constituency. In addition that he as Chief agent signed the Form 37C at the County tallying centre and that he was not ejected from the centre.

41. In the course of cross-examination of PW8, the 1<sup>st</sup> Respondent's counsel urged this Court to have the said witness investigated for committing an electoral offence, when PW8 indicated that at the time of appointment as chief agent of the Petitioner, he was in the employment of the Petitioner and his salary was paid by the Kitui County Government. The counsel relied on Section 15 (1) (a) of the Election Offences Act provides that:-

**“A Public officer who engages in the activities of any political party or candidate or act as an agent of a political party or a candidate in an election, commits an offence and is liable on conviction, to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years, or to both such fine and imprisonment.”**

This Court will address this aspect of PW8's evidence in the section of this judgments dealing with the issue of election offences

42. Two of the witnesses who testified in support of the Petition annexed their letters of appointments and oaths of secrecy to show that they were appointed as Wiper agents. The said witnesses were Benson Mulandi Nyamai (PW3) and Esther Mueni (PW6). Both testified as to gaining access to their respective polling stations at Kitui Boys High School and Uae Polling station when voting started. Their testimony was mainly on the malpractices they noted during voting while they were at the polling stations, which will be dealt with in other sections of this judgment.

43. On cross-examination, PW3 stated that he knew of the exhibit of the list of Wiper agents, and confirmed that his name was not on the said list as an agent at Kitui Boys secondary polling station. Further, that he was not aware of the number of votes cast for the Petitioner at the polling station, and that he did not sign the Form 37A because there were problems in that polling station.

44. PW6 on the other hand confirmed that her name appeared on the list of Wiper Party agents exhibited in Court, and that she was at the Uae polling station the whole day and witnessed the voting and counting of votes. She stated that she signed the Form 37A for the said polling station and confirmed that the results were as shown in the form.

45. Other agents who testified in support of the Petition were Veronica Syombua Wambua (PW7) and John Mwalimu Mulanga (PW4). PW7 testified that she was a Wiper agent at Moi primary school polling station, although she did not present any documentation of such appointment. Her evidence was that she arrived at the said polling station at 5:00 am, inspected the election materials, and that after the voting and counting of votes at around 10.00 pm, all agents appointed by the Petitioner were chased out. In addition, that they were denied the chance to escort the ballot boxes to the Constituency tallying center at Zombe, and were also denied the chance to take copies of Form 37A .

46. On cross examination, PW7 stated that her name appeared on the list of Wiper agents as Veronica Katee, an agent at Moi primary school polling station. She also confirmed that she was present when the polling station opened, during voting , when the counting of votes was done and when the seals were put on the ballot boxes. Further, that the voting ended at 5pm and results for governor were announced at 10 p.m., and that she signed the Form 37A. However, that the agents were chased out of the polling station after signing the Form 37A. According to the witness, the agents were supposed to stay on at the polling station and escort the ballot boxes or votes to Zombe Tallying Centre.

47. PW4 was an agent at Syongila Youth Polytechnic Polling station for one Bernard Mwendwa Munyasya of Safari Njema Party, who was an independent candidate for member of National Assembly . His evidence was that he was at the station from 6 a.m. to



the time he voted at 4:30 p.m. and that he signed the Form 37A. The gist of his evidence was that later on that night at 1 a.m., there was a commotion when the 1<sup>st</sup> Respondent came to the polling station and alleged that PW4's motor vehicle which was parked at the polling station was carrying extra votes, causing the said vehicle and other premises to be searched.

48. The Petitioner's counsel submitted that PW4 testified to the fact that agents were ejected and that his account was corroborated by PW6 and PW8. Further, that this resulted in Wiper Party agents not signing a substantial number of Forms 37A, and that the 2<sup>nd</sup> Respondent has not been able to effectively explain away the reason the agents failed to sign Forms 37A, and did not disprove the particular accounts of PW4 and PW6.

49. According to the counsel, the law relating to the failure of agents to sign the forms is Regulation 79 of the Election Regulations which provides that the presiding officer, the candidates or agents shall sign the declaration in respect of the elections, which must be complied with for the Presiding Officer to undertake any other step. Further, that from the record it is clear that there is no Presiding Officer who indicated the reason why the agents refused to sign and/or the absence of the said agents.

50. In addition, that the locking out of his agents compromised the integrity of the process in the aforementioned Polling Stations as they were unable to observe and or verify the returns and the entire polling process. He relied on the decision in **Bwana Mohamed Bwana vs Silvano Buko Bonaya & 2 Others, Malindi Election Petition No. 7 of 2013**, for the position that the importance of agents to a candidate and the entire electoral process cannot be underestimated and that the role of an agent in a polling station is a legal requirement which must not be taken lightly.

51. Lastly, with regards to the evidential burden, the Petitioner averred that it was upon the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent to prove that the agents were not chased out of the respective polling stations, and reliance was placed on the Supreme Court decision in the **2017 Raila Odinga Case**.

52. The 1<sup>st</sup> Respondent on her part testified that the Petitioner has not demonstrated that the agents he claimed to have been denied access, met all the legal requirements for admission into a polling station as an agent. She listed the requirements as a duly signed and stamped oath of secrecy, an appointment letter by the respective political party, and an accreditation badge issued by the 2<sup>nd</sup> Respondent. She denied that any of the Petitioner's agents were denied access and/or forcefully ejected from the pleaded polling stations.

53. During cross-examination, the 1<sup>st</sup> Respondent opined that political parties and candidates cannot blame other agencies if their agents are not at polling stations, as they are the ones to adequately facilitate the agents and ensure that they stay in the polling stations.

54. The 1<sup>st</sup> Respondent further stated that the polling, counting and tallying of votes was carried out in the presence of agents of the Wiper Party, and the said agents signed Forms 37A, 37B and 37C and were supplied with copies of the said forms.

55. The 1<sup>st</sup> Respondent's counsel submitted that it is elementary law of evidence that the chief agent cannot give evidence on behalf of the agents denied access, which would be inadmissible hearsay evidence. Reliance was placed on the decision in **Kithinji Kiragu vs Martin Nyaga Wambora & 2 Others (2013) eKLR** in this regard, where the High Court stated that it could not rely on the hearsay evidence of the Petitioner. Further, that the presumption that Forms 37A which *ex facie* did not indicate they were signed by any Wiper agent as evidence of denial of access to the polling station was debunked by the Petitioner's own witnesses, who accessed the polling stations, but nonetheless did not sign Form 37A.

56. It was further submitted that there is no evidence on record whatsoever to demonstrate denial of access to any polling station, and that the Petitioner made a deliberately choice not to call any of the agents alleged to have been denied access. Further, that the Court do take into consideration the unchallenged evidence of Simon Sali Malonza (DW3) that of the pleaded polling stations where allegations of denial of access was made, majority of the Forms 37A were indeed signed by persons identifying themselves as agents of Wiper. For them to have signed, it must follow they had access to the polling stations.

57. More fundamentally, that apart from the polling station level, all the Forms 37A were presented at the constituency tallying centre where agents of Wiper were present in six (6) out of the eight (8) constituencies, and Wiper agents signed the six (6) Forms 37B's thereby signifying their acceptance of the results from the polling stations. In addition that the Petitioner failed to call any of their agents at the two (2) constituencies, to explain why they did not sign Form 37B.

58. Therefore, that the only inference to be drawn from any Form 37A which *ex facie* does not have an agent signing on behalf of Wiper is not that the agent was denied access. On the contrary, that the evidence on record shows that there were fraudulent misrepresentations made by Wiper agents to hoodwink this Court that they were not present at the polling stations, and other evidence indicates deliberate refusal to sign, though present at the time of declaration of results.

59. The 3<sup>rd</sup> Respondent in his evidence stated that all party or candidates' agents must have an appointment letter from their employer and an oath of secrecy before a Commissioner of Oaths, and should present themselves before the presiding officer who, upon being satisfied with their credentials, then allows them access to the polling stations as agents. Further, that the information of the purported agents of the Petitioner does not contain their respective appointment letters and oaths of secrecy which are prerequisite for their admission as agents, and thereby unable to confirm their authenticity as agents.

60. Further, that he was aware that there was an agent for the Wiper party in all the polling stations where the Petitioner contested the election for Governor. That every candidate's agent duly signed the respective polling station diary as having been present at the polling station, and the Forms 37A, 37B and 37C confirming the results of the respective candidates. Thus that the allegation that the Petitioner's agents were turned away from participating as agents are not correct. In addition, that he is aware having been present during the signing of Form 37C, that the Petitioner's chief agent signed Form 37C confirming the results of the Kitui gubernatorial election.

61. Upon cross-examination, the 3<sup>rd</sup> Respondent deponed that agents at polling station are admitted by the Presiding Officers, and that he was at the tallying Centre and he did not have direct access to the Presiding Officers. He stated that after receiving the complaint from PW8 that Wiper agents were denied access to polling stations, he called the eight constituency Returning Officers and told them to establish from the Presiding Officers the truth or otherwise of the allegation. That the constituency Returning Officers contacted the Presiding Officers of the polling stations that had been mentioned, who gave them feedback that Wiper agents had been admitted to the polling stations and the allegations were not true.

62. The 3<sup>rd</sup> Respondent was also taken through various Form 37A and admitted that on their face they did not the names and signatures of Wiper agents. He however explained that the evidence of PW8 had shown that some Wiper Party agents had changed their names or were signing for other parties, and gave examples of some such agents.

63. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' counsel submitted that only one of the Petitioner's agents, Veronica Syombua Wambua (PW7), gave evidence that the Petitioner's agents were chased away from Moi Primary School at around 10 pm. Nonetheless, that her evidence does not prove this ground at all, because Moi Primary School was only one of the many polling stations and is not among the 27 Polling Stations pleaded in the Petition where the Petitioner's agents were purportedly denied access, and the witness confirmed that she was at the said Moi Primary Polling Station throughout the day voting.

64. Further, that the Petitioner's evidence was hearsay because he expressly confirmed that he did not personally witness any of the incidents in question in the Petition, but learnt of them from the information from his chief agent and by his experts and agents. In addition, that during the cross-examination of the Petitioner's chief agent, (PW8), it was revealed that over 100 of the Petitioner's agents from the list he produced in Court had signed the Forms 37A in the Polling Stations to which they were attached, but deliberately misstated the party for which they were acting as agents with some mostly indicating that they were NASA (National Super Alliance) coalition, and others naming various political parties.

65. According to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, the Petitioner's agents at the constituency level and chief agent respectively signed the Forms 37B and 37C ratifying the results on Form 37A. That if they had any problem with such results, they were enjoined by law to record the reasons for their refusal to do so, which they did not.

66. Lastly it was submitted by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' counsel that under Regulation 62(3) of the Elections (Voter Regulations), 2012, the absence of agents shall not invalidate the proceedings at a polling station. That this position is replicated in Regulation 79(7) by providing that the absence of a candidate or agent at the signing of a declaration form or the announcement of results shall not of itself invalidate the results announced. Furthermore, that under Regulation 79(6) of the Regulations, the refusal or failure of a candidate or an agent to sign a declaration form outlining the reasons for his or her refusal or failure to sign the declaration form shall not of itself invalidate the results.

67. I will commence my determination on the arguments made by the parties by reiterating, as held by the Supreme Court in the **2017 Raila Odinga Case**, that contrary to his submissions, the legal and evidential burden of proof was on the Petitioner from the

onset of the trial to prove beyond a balance of probability, the allegations he made on the denial of access of his agents to polling stations.

68. After consideration of the evidence adduced by the witnesses who testified in this regard, I note firstly that the evidence as regards denial of access of ejection of the Wiper agents from the polling stations by the Petitioner and PW8 was hearsay, as they admitted they did not directly witness any such denial and ejection, and were told of the same by third parties. The applicable law as regards admissibility of evidence is the Evidence Act, (Chapter 80 of the Laws of Kenya), which in section 2 provides for its applicability as follows:

**“(1) This Act shall apply to all judicial proceedings in or before any court other than a Kadhi’s court, but not to proceedings before an arbitrator.**

**(2) Subject to the provisions of any other Act or of any rules of court, this Act shall apply to affidavits presented to any court.”**

69. The provisions of the Evidence Act therefore apply to all judicial proceedings be they criminal or civil proceedings, or election petitions as in the case of the present proceedings. The only exception are proceedings in Kadhi’s Court where Islamic law applies. It is notable that the Evidence Act also applies to affidavit evidence adduced in Court. As regards admissibility of hearsay evidence, such evidence is inadmissible save in well-known exceptions under section 33 of the Evidence Act which are not applicable in this Petition. Section 63 of the Evidence Act in addition specifically requires direct evidence to be adduced in the following terms:

**“(1) Oral evidence must in all cases be direct evidence.**

**(2) For the purposes of subsection (1), “direct evidence” means:-**

**(a) With reference to a fact which should be seen, the evidence of a witness who says he saw it;**

**(b) With reference to a fact which could be heard, the evidence of a witness show says he heard it.**

**(c) With reference to a fact which could be perceived by any other sense or in any other manner, the evidence of a witness who says he perceived it by that sense or in that manner.**

**(d) With reference to an opinion or to the grounds on which that opinion is held, the evidence of the person who holds that opinion or, as the case may be, who holds it on those grounds:**

**Provided that the opinion of an expert expressed in any treatise commonly offered for sale, and the grounds on which such opinion is held, may be proved by the production of such treatise if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable.**

**(3) If oral evidence refers to the existence or condition of any material thing, other than a document, the court may, if it thinks fit, require the production of such material thing for its inspection.”**

70. I accordingly agree with the position as stated in Kithinji Kiragu vs Martin Nyaga Wambora & 2 Others (Supra) eKLR that as no direct evidence was adduced by the Petitioner and PW8 as to ejection of their agents from polling stations, it remained hearsay and the same cannot be relied on by this court.

71. What then was the evidence was required of the Petitioner under this head" It is notable that the Elections Act defines an agent as “a person duly appointed by—(a) a political party or an independent candidate for the purposes of an election under this Act; or (b) a referendum committee for the purposes of a referendum under this Act, and includes a counting agent and a tallying agent. Section 30 of the Act in addition provides as follows as regards the appointment of agents:

**“(1) A political party may appoint one agent for its candidates at each polling station.**

**(2) Where a political party does not nominate an agent under subsection (1), a candidate nominated by a political party may appoint an agent of the candidate's choice.**

**(3) An independent candidate may appoint his own agent.**

**(3A) A registered referendum committee may appoint one agent at each polling station.”**

72. Regulation 57 of the Elections (General) Regulations 2012 also provides additional guidelines on appointment of agents as follows:

**“(1) Every political party shall at least fourteen days to the date of the election submit to the Commission the names of one national chief agent and forty-seven county chief agents.**

**(2) Every independent candidate at a presidential election shall fourteen days to the date of the election submit to the Commission the names of one national chief agent and forty-seven county chief agents.”**

73. As regards admission of such appointed agents to polling stations, section 55(A) of the Act provides that every agent authorized to take part in any proceedings relating to the issue or receipt of ballot papers, or to attend at a polling station or at the counting of the votes shall, before so attending, make an oath of secrecy as prescribed in the Act, and shall while in attendance at a polling station maintain and aid in maintaining the secrecy of the ballot.

74. Regulations 5 (5) (7) the Elections (General) Regulations 2012 in addition state that the returning officer shall require an agent authorised to attend at a polling station, as soon as he or she has made the oath of secrecy prescribed by the Act, to make a declaration before the returning officer that the agent shall undertake their duties according to the law. In addition that every agent appointed by a candidate shall at all times during the performance of the duties authorized by the candidate wear the official badge or insignia of their political party. Lastly, under Regulation 62(1)(c) of the Regulations, authorized agents are one of the categories of persons who can be admitted to polling stations by the Presiding Officer.

75. It is evident from the above cited provisions of the law that the Petitioner was required to bring evidence of the appointment of the agents he alleged were denied access to polling stations, and that he had communicated this authority to the 3<sup>rd</sup> Respondent. The list of Wiper agents he produced in Court as his exhibit was neither signed nor dated, nor was there any evidence that the same was communicated to the 3<sup>rd</sup> Respondent. Be that as it may, the 3<sup>rd</sup> Respondent admitted in his testimony to receiving a list of the Wiper agents that were to be attached to various polling stations. However, in addition to appointment letters or documents, evidence of the oaths of secrecy by the agents of the affected polling stations and their badges were required to be provided by the Petitioner, to prove that the agents were indeed not only appointed, but also legally permitted to access the said polling stations.

76. Furthermore, the gist of the Petitioner's case is that after being so authorized, the agents did indeed avail themselves at the polling stations and were denied access. The Petitioner relied in this regard on the fact that many Forms 37A from many polling stations were not signed by Wiper agents, and is thereby seeking that an inference of denial of access be drawn from this fact. However, this Court is unable to draw such an inference as the only inference for three reasons.

77. Firstly, the Petitioner did not call any witness to testify that they were a duly authorized agent who was denied access to any of the particularized polling stations. In the circumstances other inferences can thus be made from the fact that the Forms 37A in these polling stations were not signed by Wiper agents, including that the requirements set out hereinabove may not have been met as regards the appointment and admission of the Petitioner's agents; that the Petitioner agents may simply not have been present at the polling station; or that they may have been present but chose not to sign the Forms 37A.

78. Secondly, the inference that the Wiper agents were denied access was rebutted by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, who during cross-examination showed that persons appearing in the list of Wiper agents, with the same identification details, and in some cases using different names, did sign about one hundred of the disputed Forms 37A as agents of other parties.

79. Lastly, the Petitioner's witnesses who were agents namely PW3, PW4, PW6 and PW7, on the contrary did testify that they were allowed entry into the polling stations and stayed on in the polling stations. PW4 and PW6 in addition testified that they were shown and signed the Forms 37A at their respective polling stations. PW8, who was the Petitioner's chief agent, also admitted to

having signed the Form 37C at the County tallying centre.

80. The only evidence of ejection from a polling station was by PW7, whose evidence was contradictory as she admitted being allowed access to the polling station from 5am to 10pm in the night on the voting day. In addition, this witness did not add any value to the Petitioner's case as she testified that the reasons for ejection was because she wanted to accompany the votes to the tallying centre, yet she did not provide any evidence of her appointment as a tallying agent, and admitted that she was appointed as an agent to a particular polling station.

81. This Court thus finds that there was insufficient evidence that the Petitioner's agents were denied access to the polling stations or the opportunity to sign the Forms 37A, Forms 37B and Form 37C for the foregoing reasons. In this event, the legal provisions the Petitioner relied on are not applicable and cannot be brought to bear, particularly Regulation 79 (1), (3) and (4) of the Elections (General) Regulations 2012 that requires agents to sign the declaration forms in respect of the elections, and for the agents or presiding officers to give reasons and record the fact of the agents' refusal or failure to sign the declaration form.

82. Under Regulation 79, the prescribed declaration forms that are to be signed are provided as follows:

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

**(2) For purposes of subregulation (1), the declaration for—**

**(a) Presidential election results shall be in Form 34A set out in the Schedule; and**

**(b) National Assembly, County women representatives, Senator, Governor and county assembly elections shall be in Forms 35A, 36A, 37A, 38A, and 39A set out in the Schedule.**

**(2A) The presiding officer shall—**

**(a) immediately announce the results of the voting at the polling station before communicating the results to the returning officer;**

**(b) request each of the candidates or agents present to append his or her signature;**

**(c) provide each political party, candidate, or their agent with a copy of the declaration of the results; and**

**(d) affix a copy of the declaration of the results at the public entrance to the polling station or at any place convenient and accessible to the public at the polling station.**

**(3) Where any candidate or agent refuses or otherwise fails to sign the declaration form, the candidate or agents shall be required to record the reasons for the refusal or failure to sign.”**

83. Lastly, it is also my finding that in addition to the paucity of the Petitioner's evidence, the effect thereof was further watered down by the provisions of Regulations 79(6) and (7) of the Elections (General) Regulations 2012 that the refusal or failure of an agent to sign, or the absence of an agent at the signing of a declaration form or at the announcement of results shall not of itself invalidate the results.

*Whether the process of voting was marred by violence and intimidation of voters*

84. The Petitioner under this head deponed that the voting process was marred with violence and intimidation of voters who supported him, including agents in most polling stations, which was perpetuated by the 1<sup>st</sup> Respondent's agents. That the said agents restricted the voters from freely exercising their democratic right. Further, that the violence and scenes of intimidation were witnessed in Kitui Central Constituency in areas such as Yumbisye Primary School Polling Station, Kisekini polling station, Kanyumu Primary School polling station and in Mwingi West Constituency at Kang'utheni primary school polling station.

85. Florence Lau Mbuvi (PW2) testified in this regard that she was a voter at Muslim Secondary School, and when leaving the said polling station after voting, she dropped a friend at Moi Primary Kyanika Polling station and went to wait for her at Mwembe Tayari Shopping Centre. While so waiting, a motor vehicle came and parked in the middle of the road alongside her vehicle and a group of men led by Moses Munyalo, who she said was a key supporter of the 1<sup>st</sup> Respondent and part of her security detail during campaigns, came and opened her car door and snatched her phone and took KShs. 20,000/= from her bag.

86. That when PW2 asked them to return the money, she was assaulted by the said Moses and rescued by members of the public. She reported the matter to Kitui Police Station where she was issued with OB/No. 20/8/2017 and thereafter went to Kitui General Hospital for treatment and later obtained a P3 form. She produced her identity card, P3 form and treatment notes as her Exhibits 1, 2 and 3 respectively.

87. On cross examination, PW2 stated that there was no incidents of intimidation at the time she voted, and that the voting was free and fair at the time. She stated that Mwembe Tayari Shopping centre was not a polling station, and that there was no polling station where she attacked. That she filed charges and reported the matter at the police station and took her witnesses to the police station. She asserted that the police have not done anything, and there are no charges that have been brought against the assailants.

88. PW4 also testified as to a commotion allegedly caused by the 1<sup>st</sup> Respondent at Syongila Youth Polytechnic Polling station as summarised previously in this judgment. On cross-examination, he deponed that he had requested the Administration Police to allow him to move his motor vehicle from outside the polling station to near the gate, and it was this vehicle which was alleged to have extra votes. Further, that the motor vehicle was moved at about 8:30pm, and by that time the vote counting had not started. That when the 1<sup>st</sup> Respondent came and asked to see the driver of the vehicle with extra votes, he took the motor vehicle to the Administration police camp.

89. Kalungu Nzau, (PW5), was a voter at Kisekini Primary School Polling station. He stated that on the voting day, he went to the polling station at around 1.30 pm accompanied by his mother, Martha Nzau. That on their way out just before leaving the precincts of the polling station, he saw two motor vehicles, and that a group of about 9 young men emerged from the two vehicles. Among the men was Muriithi Mwendwa who is his neighbour, and who attacked PW5 by holding his short collar and slapping him across his face, and tearing his shirt. PW5 stated that he was severely hurt on his shoulder, and reported the incident to Kitui Police station and later went to Kitui hospital for treatment.

90. On cross examination, PW5 stated that when he voted there was no commotion, but that it ensued within the polling station before he left. He stated that he did not see the registration numbers of the two cars and did not know their owners. Further, that he has made a follow up thrice but no action has been taken by the police. He confirmed that he was involved in the Petitioner's campaign but denied that he was giving out money at the time of the assault.

91. The Petitioner's counsel's submissions on this head were that an election is not an event but a process, and that the instances of violence and intimidation affecting his supporters and agents deponed to by PW2, PW3, PW4 and PW5 vitiate the expected conduct of an election as demanded by Article 81 (e) (ii) of the Constitution. The counsel cited Moses Masika Wetangula vs Musikari Nazi Kombo & 2 Others [2014] eKLR and Cornel Rasanga Amoth vs William Odhiambo Oduol & 2 others [2014] eKLR which emphasized strict or rather mandatory compliance to the law governing elections, and that what happens during campaign is the legitimate business of the court hearing a petition concerning that election.

92. Further, that even though the vehicles were not proven to be registered to the 1st Respondent, the electoral process was nevertheless tainted by acts of violence compromising the electoral process and the election laws thereto.

93. The 1<sup>st</sup> Respondent on her part denied that she was engaged personally or through her agents in any intimidation of voters as alleged. She also denied that there were acts of violence and intimidation in the polling stations pleaded in the petition. According to the 1<sup>st</sup> Respondent, she only has one security officer and driver accorded to her by the government, and the said Moses Munyalo involved in the incident with PW2 was not part of her security. Further, that the area of Majengo where the incident happened is about 10 kilometres from Ithokwe primary school polling station where she was during voting day, and she would not know what happened at Majengo that day.

94. Further, that the Syongila Youth polling station is about 3 kilometres from Ithokwe polling station where she voted. That at about 11-12 pm on the night of the voting day, she was informed that a vehicle had been driven into the said polling station by a supporter of the Petitioner. The 1<sup>st</sup> Respondent deponed that she got curious and went only with one of her security persons, as she

could not get many people at that time of the night. That she had been told by the County returning officer that no car would be parked in a polling station. She asked that the car be moved to the police station and a report be made and then left. In addition, that by that time the polling station had closed and counting of votes was going on.

95. The 1<sup>st</sup> Respondent further averred that she got 212 votes at the said polling station and PW4 signed the Form 37A confirming these votes as an agent for an independent candidate. However, that the Form 37B had a transposition error and she was credited with only 12 votes from the polling station .

96. The 1<sup>st</sup> Respondent's counsel submitted that the alleged violence and intimidation of PW2, PW4 and PW5 took place after voting and outside the respective polling stations. Further, that there was no nexus established between the perpetrators and the 1st Respondent, and none of the perpetrators has ever been charged with a criminal offence. Thus, that the totality of the evidence taken at its best cannot establish commission of crimes to the required standard of proof.

97. The 3<sup>rd</sup> Respondent on his part deponed that at no time did he receive any report of the election at any polling station having been stopped or interfered with either by violence or any other acts of intimidation or voter bribery as alleged by the petitioner. That no such incidents were ever reported to him from any polling station.

98. Further, that it is standard procedure in the conduct of elections by the 2<sup>nd</sup> Respondent that in the event that any violence, or any other acts of intimidation or voter bribery or any other incidents of intimidation or voter bribery or any other incidents of intimidation are reported, the voting must be stopped immediately to address such challenges and as a result, and additional voting time must be added to compensate for such stoppage of voting. However, that no such stoppage was reported to him during the elections and the process went on peacefully.

99. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent's counsel submitted that only one witness, Kazungu Nzau (PW5), was from a pleaded polling station, which was Kisekini Primary School. That there were no witnesses called from the other polling stations that were pleaded as having been affected by violence and intimidation. Further, that the testimony of this witness was not credible since he never established that the purported incident of assault prevented anyone from accessing the polling station. In addition, both he and his mother had already voted before the purported incident, and there was no other person who was assaulted. In any event, that his mother never adduced evidence to even corroborate his allegations of assault.

100. Further as regards the evidence of PW2, that the purported assault took place away from any polling station at a market, and she, like PW5, had already voted. In addition, that no other person testified to corroborate her account, and Muslim Primary School was not one of the Polling stations where the Petitioner pleaded as having witnessed violence and voter intimidation.

101. On the evidence of PW4 , it was submitted that his evidence cannot be relied upon to prove any violation of the principles of elections, because the agent confirmed that he signed the results as can be seen on the Form 37A of the polling station, and he was not an agent of the Petitioner. More importantly, that the alleged incident PW4 testified about happened long after the end of voting and the counting of votes, and could not possibly have had any impact on the voting process, the same having gone on smoothly as he had confirmed.

102. I have considered the evidence adduced and arguments made on the incidents of violence and intimidation alleged by the Petitioner. It is evident that there were incidents of violence and assault were some of the Petitioner's witnesses, particularly PW2 and PW5 were injured. Reports of the same were also made to the police. The 1st Respondent has also admitted to having been present at the Syongila Youth polling station when the incident involving PW4'S motor vehicle occurred.

103. The question before the Court therefore is whether the threshold necessary to invalidate an election on account of these incidents has been met. This threshold is that the Petitioner must show that the violence is traceable to or attributed to the respondent(s), the violence must be widespread and not isolated and the violence must have affected the voting and the election results. See in this regard the decisions in **Benson Maneno v Jacob Machekele and Others, [2013]eKLR, Kajembe v Nyange and Others, [2008]2 KLR 1, Lenno Mwambura Mbaga & Another v Independent Electoral & Boundaries Commission & Another, [2013]eKLR, Joho v Nyange & Another, (No 4)(2008) 3KLR(EP) and Justus Gesito Mugali M'mbaya v Independent Electoral & Boundaries Commission & 2 Others, [2013]eKLR.**

104. It is my finding that this threshold has not been met for the following reasons. In the case of the incidents narrated by PW2 and

PW5, the Petitioner did not adduce evidence linking the said incidents to the Respondents, or showing their active participation therein, or their connection to the perpetrators.

105. In addition, the incident involving PW4 appears to have been of his own making, as he testified that he did move his motor vehicle to the polling station, and was thus the cause of the 1<sup>st</sup> Respondent's reaction. The Court also notes that it was an isolated incident, that occurred after voting had ended and while counting of votes was ongoing, and no evidence of any voter having been influenced or affected by the incident was adduced. Therefore the incidents cannot be the basis of invalidating an election for these reasons, even though some of them may warrant different remedies.

***Whether in the conduct of the election of the Governor of Kitui County, there was substantial and material non-compliance with the provisions of the Elections Act and the Regulations made there under, and whether such non-compliance substantially and materially affected the results of the elections***

106. There were six limbs of this issue in the arguments made by the Petitioner. The first is that the Forms 37A were not signed by the Wiper agents, which has already been determined by the findings in the foregoing on denial of access to polling stations and Forms 37A by the said agents.

107. The second limb was that the Forms 37A were not signed by the Presiding Officers and Deputy Presiding Officers at polling stations. The Petitioner did not plead the particularity of Forms 37A not being signed by the Presiding Officers and Deputy Presiding Officers of Polling Stations in his Petition. A Petitioner is not permitted to make a case outside the grounds he raises in his Petition, and his or her affidavits and testimony must be consistent with and support the case he or she has pleaded therein.

108. I am guided in this respect by the decision of the Supreme Court in the **2017 Raila Odinga Case** in which the said Court quoted with approval the decision of the Supreme Court of India in **Arikala Narasa Reddy vS Venkata Ram Reddy Reddygari and Another Civil Appeal Nos. 5710 -5711 of 2012[2014] 2 SCR** as follows:

***“In 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 and 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.”***

109. In addition, I also agree with the holding by Kimaru J. that resonates with the facts of the present petition in **Mahamud Muhumed Sirat v Ali Hassan Abdurahman and 2 Others [2010]eKLR** as follows:

***“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.”***

110. I accordingly find that even though the Petitioner called evidence on this limb and made lengthy submissions thereon, this Court will not render a decision thereon and on other particularities that were not pleaded in the Petition. These were aptly identified by the 1<sup>st</sup> Respondent's counsel in his submissions to include particulars that voters were assisted in a manner that violated the Regulations, that usage of carbon copies of Forms 37A was irregular or contrary to the law, the absence of security features of Forms 37A, such as watermarks or serial numbers; that votes cast exceeded the registered number of voters, that there were ungazetted polling stations, that the formats of the Forms 37B were irregular, and of the different handwritings on the Forms 37A. In addition, the Petitioner's counsel cross-examined the 3<sup>rd</sup> Respondent, and made lengthy submissions on the time of signing of the Form 37D, whilst there was no mention of any irregularity in the Form 37D in the Petition.

111. The remaining four limbs which will be substantively addressed in this section were that the Forms 37A were not stamped; that the election results were based on altered and false figures arrived at as a result of forgery of Forms 37A, Forms 37B and Forms



37C; that the data entered into the Kenya Integrated Election Management System (KIEMS) was not consistent with the data from the respective Forms 37A; and that the security of the ballot boxes at the polling stations was compromised.

112. The Petitioner alleged in this regard that the statutory forms made available to his agents were found to be faulty and defective for failure to comply with the relevant mandatory provisions of the law. He particularized the alleged failures as:

- a) The Forms 37A and 37B were not signed by the agents of the Petitioner.
- b) The Forms 37A and 37B were not duly stamped.
- c) Forms 37B did not match the actual results in Forms 37B.

113. In addition that that the election results for Kitui County were based on false figures arrived at, as a result of forgery of the statutory Forms 37A, Form 37B and Form 37C and were computer generated. According to the Petitioner, this was shown by the 1<sup>st</sup> Respondent achieving a win of at least 71 per cent after the tallying of the votes as per the form 37; by the Petitioner who was then a sitting Governor performing so dismally even in his own known strongholds including Ikutha, Kyoani in Kitui South Constituency; by the rejected votes being factored in and added to the votes cast and the total number of valid votes; and by the number of votes being replicated in the two streams of Yumbisye secondary school polling station.

114. In addition, that the results of the gubernatorial contestants in Mwingi North Constituency and Mwingi Central Constituency were arrived at through a pre-determined formula leading to an almost similar number of votes allegedly cast in favour of the respective candidates.

115. On the data entered in the KIEMS, the Petitioner alleged that in most polling stations, the data entered into the KIEMS kits was not consistent with the information and data from the respective Forms 37A; some of the KIEMS equipment had precast votes indicated on the screens which had the ability to influence the voters before they cast their votes as witnessed in Mutendea Primary School Polling Station; and that the data that was being displayed publicly by the 3<sup>rd</sup> Respondent at the County Tallying Center was not consistent with the information and data in the respective Forms 37A.

116. Further particulars of the KIEMS data pleaded were as follows:

- a) That the electronic transmission of the results from most of the polling stations to the tallying center did not take place as required under the law.
- b) That during the tallying of the votes and the transmission of the results, there were instances when the provisional results would reflect on the KIEMS portal while the actual tallying at the polling stations had not begun, for example in Central Primary School in Kitui Central Constituency.
- c) That there was false recording of votes case for each candidate at Kombu polling station which saw the votes cast in favour of the 1<sup>st</sup> respondent highly inflated.
- d) That during the tallying of votes cast, there was no attempt made to reconcile the BVR records and the registered of the voters as per the polling stations. That this saw false results being keyed in the system of some voters who did not participate in the voting process.
- e) That the Biometric Voter Registration (BVR) machines were either interfered with prior to the voting process or the same were faulty because some voters were unable to be recognized by the machines in Yumbisye Secondary School polling station. That this resulted in some of them being sent home without voting after having queued for hours.

117. The Petitioner further alleged that the security of the ballot boxes was compromised in the polling stations and in most instances totally disregarded by the agents of the 2<sup>nd</sup> Respondent. That in Central Primary School polling station, Yumbisye secondary school and Kitui High School, his agents were sent away and the ballot boxes interfered with by stuffing of other ballots. Further, that this was done to facilitate the introduction of a number of pre-marked ballots in favour of the 1<sup>st</sup> Respondent.

118. It was also contended by the Petitioner that the ballot boxes were deliberately delayed where some boxes took over 19 hours to reach the constituency tallying centres. That this was evident in some areas in Mwingi North including Tharaka, Tseikuru and Ngomeni areas. That in Kitui East, similar incidences occurred in Endau/Malalani area, Mutitu/Kaliku area as well as Voo/Kyamatu, and that the agents who were present at the polling stations were not accorded the opportunity to record down the number of boxes used and confirm the seals.

119. The Petitioner in his cross examination indicated that his expert (PW9) would provide the evidence of these allegations. The only evidence by PW9 in this regard was a list of polling stations where the Forms 37A were shown not to be stamped, or to have alterations, or errors in the transposition of results to Forms 37B and Forms 37C. PW9 in this regard did admit during cross-examination that he was not an expert on the KIEMS, election laws or on handwriting.

120. This Court notes in this respect that the only value added by PW9 to the Petitioner's Case was the enumeration of polling stations where it was alleged certain irregularities occurred, and which PW9 did clearly state was his instructions from the Petitioner. He also specifically also stated during cross-examination that there was no pre-determined formula he observed in the declared results, which was an area that was well within his qualifications as a statistician.

121. While referring to the irregularities in the Forms 37A noted by PW9, the Petitioner's counsel submitted that alterations of the statutory forms without countersigning was illegal and contrary to Article 86 of the Constitution; section 39 of the Elections Act; and Regulations 73, 75, 76, 79 and 82 of the (General) Regulations. Further, that although the 2<sup>nd</sup> Respondent explained away these pertinent errors as 'human' arising out of a 'manual' process, the errors and malpractices revealed in this matter are substantial and not just mere human errors but inordinately widespread and a well-orchestrated plan, aimed at arriving at a decision not reflective of the genuine voice of the citizens of Kitui County as spoken through their vote. Reliance was in this regard placed on the decision in **Joho vs Nyange & Another, 2008 (3) eKLR EP 500**

122. The Petitioner urged this Court to place emphasis on the entire electoral system and processes rather than results alone when dealing with malpractices, as favored in **William Kabogo Gitau vs George Thuo & 2 Others, [2010] eKLR**. It was contended in this regard that accuracy and accurate collation and tabulation of results are a key constitutional requirement, and that the failure to abide by the same is a contravention of the Constitution. Furthermore, that the Constitution prescribes for a preservation of the sanctity and integrity of the entire electoral process and each stage and step of the process is as important as the final stage.

123. Lastly, the Petitioner's counsel submitted on what he called a ballot sealing report, which he stated was sanctioned by the Court and adopted on the 3rd February 2018. That its findings reveal massive irregularities regarding the safekeeping of ballot boxes as well as inauthentic seals used in securing the boxes contrary to the provisions of Article 86(d) on the obligations to secure voting materials and as emphasized under Regulations 80, 86 and 93 of the Election (General Regulations). Further, that the audit revealed defects with multiple ballot boxes that included missing seals, broken box bottom which was sealed with masking tape, broken boxes, cracked tops, and seals with serial number plates broken.

124. The 1<sup>st</sup> Respondent's evidence on these limbs of the Petitioner's case was that the entries in the Forms 37A, 37B and 37C were genuine, accurate and verifiable, and there was compliance with election regulations. She denied the allegations of forgery of the statutory forms pleaded in the Petition, and stated that the genuine and authentic forms 37As, 37Bs and 37Cs are in proper custody of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent.

125. Further, that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents conducted the elections in the County in accordance with the Elections (Technology) Regulations, 2017. In addition, that the KIEMS was deployed in the election and any imperfections in the system are wholly attributable to human error as is all human endeavours. She averred that the ballot boxes in the polling stations pleaded were at all times secure, there was no ballot stuffing, and that the party agents recorded the seal numbers of the ballot boxes.

126. The 1<sup>st</sup> Respondent's counsel submitted that it is not a legal requirement for Forms 37A to have the 2<sup>nd</sup> Respondent's stamp, and it is a mere administrative measure to easily identify the Forms as the 2<sup>nd</sup> Respondent's documents. Further, that the only documents required to be stamped under Regulation 61(4) (c) of the Regulations are the ballot papers, and an examination of the Forms 37A will reveal that a majority of them were indeed affixed with the 2<sup>nd</sup> Respondent's stamp. Lastly, that failure to stamp any of those Forms cannot be said to materially alter the results of the election, a necessary step under Section 83 of the Elections Act, before an election can be nullified.

127. On the transposition errors, it was submitted that the 3rd Respondent freely admitted that there were transposition errors in

entering the data from Forms 37A to Forms 37B and 37C. Further, that the errors were random and from human mistakes, they were not a deliberate falsification of electoral records and were not designed to advantage any candidate. In addition that the effect of transposition errors was to give each candidate extra votes, which had not been casted in their favour by the voters, and the errors do not affect the outcome of the election and do not therefore meet the nullification criteria under Section 83 of the Elections Act.

128. The 1<sup>st</sup> Respondent's counsel further submitted that the Petitioner did not have evidence of inconsistencies between the KIEMS electronic data and the entries in Forms 37A, and he could not substantiate his claims of pre-determined formula. Further, that in the scrutiny report dated 30th January 2018, a comparison between the readings in the KIEMS SD Cards showing the number of persons who voted compared with entries in Forms 37A of the valid votes cast gave a mirror image of each other, when one takes into account rejected, spoilt and stray ballots. Lastly, that there is no legal requirement for electronic transmission of election results in the gubernatorial category as per section 39 (1)(A) and (1) (C) of the Elections Act, which is limited by law to presidential elections only.

129. On the security of ballot boxes, the counsel submitted that the Petitioner did not call any witness from any of the pleaded polling stations to back up the allegation with evidence. In addition, that Mr. Benson Mulandi Nyamai (PW3) testified that he was the Wiper Party agent at Kitui Boys High School, one of the pleaded polling stations, and said nothing about ballot boxes in his entire testimony. Lastly, that the Petitioner did not call his agents from Central primary school and Yumbisye secondary school as witnesses.

130. The 3<sup>rd</sup> Respondent on his part affirmed that all the results that were announced were actual results duly signed by the parties' agents and verified accordingly as contained in Forms 37A, 37B and 37C. He also contended that all the ballot boxes were well secured and were at all times placed under tight security, as the 2<sup>nd</sup> Respondent had procured security officers to guard the polling stations throughout the election process, and that ballot stuffing did not occur in any polling station.

131. On the KIEMS equipment, the 3<sup>rd</sup> Respondent averred that the same is used for purposes of Electronic Voter Identification (EVI) while the process of voting is taking place, and that it is only after the voting exercise has officially ended that the KIEMS devices are then utilized for electronic transmission of results. Further, that at the point of identification, contrary to the allegations by the Petitioner, the KIEMS equipment could not transmit any results, that in any event, voting was manual via ballot papers and therefore the issue of precast votes does not arise.

132. In addition that there was never any display of provisional results during the election; that the final results that were announced were generated from Forms 37A, 37B and then fed into Form 37C; and that the Biometric Voter Registration (BVR) was used during the voter registration exercise which ended in March, 2017, and had no application in the election.

133. Upon cross-examination, the 3<sup>rd</sup> Respondent admitted that there were transpositional errors made in some instances when results were transferred from Forms 37A to Forms 37B and Form 37C, which he attributed to fatigue and human errors on the part of the 2<sup>nd</sup> Respondent's officers. He in addition stated that the said errors would not materially affect the results of the subject elections.

134. He also explained the process of filling the results declaration Forms which in summary was that after filling and signing the Forms 37A at the polling stations, they were taken to the Constituency Returning officers who then brought the Forms 37B and accompanying Forms 37A to him as the County Returning officer, and he entered the results in the Form 37C in the presence of the candidates agents. Further, that the Constituency Returning officer arrived with the Forms 37B at different times, and that the last Constituency returning officer to arrive was from Mwingi West Constituency at 11pm on 11<sup>th</sup> August 2017, as it was the farthest constituency, with polling stations which were very far from the county tallying centre.

135. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' counsel substantially reiterated the submissions made by the 1<sup>st</sup> Respondent's counsel on the limbs under consideration.

136. This Court allowed an application the Petitioner had made for access to information and scrutiny of votes in a ruling delivered on 19<sup>th</sup> January, 2018, in light of the irregularities shown by the Petitioner, and/or admitted by the 3<sup>rd</sup> Respondent during the hearing in the transposition of results from Forms 37A to Form 37B and From 37C.

137. This Court in the said ruling ordered scrutiny of the information and logs in the SD Cards of the KIEMS used during the Kitui

gubernatorial elections held on 8<sup>th</sup> August, 2017; scrutiny of the original Forms 37A, 37B and 37C arising from the said elections; and a recount and re-tallying of the valid votes cast for each candidate, the total votes cast, the rejected votes and the spoiled votes be conducted; which was limited to 51 polling stations that were identified and listed in the ruling where irregularities had been shown in this regard.

138. The Deputy Registrar of the Kitui High Court conducted the scrutiny, recount and re-tallying of the valid votes cast for each candidate in the presence of the parties and their representatives, and the final report thereof was signed by the Parties and the findings filed and adopted in Court on 1<sup>st</sup> February, 2018.

139. From the findings in the report, there is no tangible basis in the Petitioner's assertions that the results in the Forms 37A were forgeries, as the same were confirmed during the scrutiny of the original Forms 37A, and the recount of votes cast in the 51 polling stations where the results had been contested because of the errors and irregularities alleged by the Petitioner. The results in the Forms 37A also dovetailed with the records in the SD Cards of the KIEMS used during the Kitui gubernatorial elections held on 8<sup>th</sup> August, 2017. In addition, out of the 51 Polling stations, it is only transpositional errors that were identified in 10 of them where mistakes were made when transferring the results from Forms 37A to Forms 37B and Form 37C. The rest of the polling stations' results were accurately reflected in Forms 37A, 37B and 37C.

140. In particular, the errors noted in the 10 polling stations were as follows:

#### **Kitui Central Constituency**

- Syongila Youth Polytechnic

The results for H.E Charity Kaluki reduced from 212 valid votes in Form 37A to 12 votes in Form 37B during transposition.

During recount the valid votes for H.E Charity Kaluki Ngilu were found to be 221 votes.

Form 37B showed eighteen (18) rejected votes, however on recount the rejected votes reduced to five (5).

- Kangundo Primary School

The total votes cast in Form 37B and Form 37C exceeded the number of persons who voted as shown in the Form 37A.

The SD card showed 90 -registered voters and 65 persons having voted, however Form 37 B and C showed a total of 200 valid votes cast.

The results for H.E Charity Kaluki Ngilu increased from 48 in form 37A to 148 votes in Form 37B during transposition.

During recount it was found that the valid votes for the said candidate were 48 only. This was accurately captured in Form 37 A.

- Ndiani Primary School

Results for H.E Charity Kaluki Ngilu increased from 13 votes in form 37A to 19 votes in form 37 Band 37C.

On recount it was found valid votes for the candidate to be 13.

- Yumbisye Secondary School

The results in forms 37A and 37B for all the candidates did not match. The results in form 37B reduced by 4 votes for Dr. J M Malombe, for Musila they increased by 9 votes and for H.E Charity Kaluki Ngilu the increased by 4 votes .

- Kaliakakya

The total votes cast in Form 37 B and C slightly exceeded the number of persons who voted by 2.

- Central Primary School Polling station

There were a total of 31 rejected votes which upon recount we found 1 spoilt vote only.

All the 31 rejected votes were found to be valid and were allocated amongst the three candidates hence varying their final tally.

#### **Kitui Rural Constituency**

- Kanzau Secondary School

The total votes cast in Form 37B and 37C exceeded the number of those who voted.

According to the SD Card those who voted were 120 however forms 37B and 37C recorded 357 total votes cast.

The results in Form 37 B for all the candidates did not match those in form 37A. The results for Dr. J M Malombe rose from 11 votes to 45 votes, for Musila increased from 3 votes to 5 votes and those for H.E Charity Kaluki Ngilu increased from 105 votes to 307 votes.

The recount showed that the valid votes for Dr. J M Malombe were 11 votes, for Musila 3 votes and for H.E Charity Kaluki Ngilu were 105 votes.

#### **Mwingi Central Constituency**

- Thonoa Primary

The total votes cast exceeded the number of persons who voted.

Form 37B indicated 382 valid votes whereas Form 37C showed 385 valid votes

According to the SD Card there are 155 registered voters and 121 persons voted.

The results recorded in Form 37 B for all the candidates did not match those in form 37A. The results for Dr. J M Malombe rose from 65 votes to 75 votes, for Musila increased from 36 votes to 279 votes and those for H.E Charity Kaluki Ngilu increased from 28 votes to 31 votes.

Upon recount the total votes cast were 129.

- Kasina Primary

Form 37 B and 37 C recorded 19 rejected votes however upon recount the rejected votes were 9 however this did not affect the final tally of the total votes cast.

#### **Kitui west constituency**

- Kwa Mboya Market

Total votes cast as per Form 37 B and C slightly exceeded the number of persons who voted.

333 were the number of persons who voted, form 37A showed 340 valid votes , form 37 B and 37C recorded 339 votes respectively.

141. The above cited results of the scrutiny exercise confirm that the transpositional errors affected all the candidates in the elections for Governor, with all of them getting a few additional votes in the Forms 37B and Form 37C that were not reflected in the Form 37A. In particular, the errors as summarised in the foregoing resulted in the Petitioner getting 40 more votes, the 1<sup>st</sup> Respondent 106 more votes, and the second runner up who was Mr. David Musila getting 254 more votes. Some of the errors did not benefit any candidate, particularly as regards the errors on transposition of the rejected votes .

142. It is thus my finding for these reasons that given the difference of votes that between the votes cast in favour of the Petitioner and those cast in favour of the 1<sup>st</sup> Respondent which was 95,309 votes, the said errors did not affect the outcome of the election, and cannot be a basis for nullifying the election of the 1<sup>st</sup> Respondent as presently sought.

143. On the stamping of the Forms 37A, while the cross-examination of the 3<sup>rd</sup> Respondent did show that there were a number of Forms 37A which did not bear the 2<sup>nd</sup> Respondent's stamp, the Petitioner did not point this Court to any law that provides for this requirement, to enable this Court make a finding that there was a breach of the law by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

144. Besides the findings on the effect of the transpositional errors and the stamping of Forms 37A hereinabove, this Court finds and agrees with the submissions made by the Respondents that the other allegations made by the Petitioner were not supported by any evidence, and in particular no witnesses were called on the KIEMS data inconsistencies and on the stuffing and sealing of ballot boxes in the pleaded polling stations.

145. The Petitioner's counsel sought to rely on the inventories of the resealing of the ballot boxes which he termed as the Ballot sealing report, and which was agreed on by the parties during the pre-trial conferences. This Court in this regard reiterates the contents of its ruling when the Petitioner sought to cross-examine the 3<sup>rd</sup> Respondent on the said inventories, that such evidence cannot be relied on by the Petitioner as it was not in existence at the time of filing of this Petition or in the Petitioner's pleadings, nor was any notice of the same given to the Respondents. In addition, of the polling stations where the Petitioner was able to show irregularities, the scrutiny undertaken thereof showed no interference with the votes that were cast.

***Whether any electoral malpractices of a criminal nature may have occurred during the election of the Governor of Kitui County worthy of being reported and transmitted to the Director of Public Prosecution .***

146. The Petitioner alleged that the 1<sup>st</sup> Respondent through her agents committed election offence of bribery contrary to section 9 of the Election Offences Act in the following manner:

- i. That at Central Primary School, the 1<sup>st</sup> Respondent's agents were seen dishing out money to voters and trying to convince the voters to cast their ballots in her favour.
- ii. That a vehicle was seen parked outside Kitui School polling station in Kitui Central Constituency branded with the 1<sup>st</sup> Respondent's posters and on being impounded by the police once reported the same was found to have the 2<sup>nd</sup> Respondent's materials as well as the 1<sup>st</sup> Respondent's campaign materials and that the vehicle is still held at Kitui Police Station.
- iii. That an agent for the 1<sup>st</sup> Respondent, Mutia Ngulungu interfered with voters inside Matinyani Polytechnic polling station by directing them where to vote and in favour of the 1<sup>st</sup> Respondent. That the incident was reported at Kitunduni Polling Station.

147. He alleged that the 1<sup>st</sup> Respondent was the key player and beneficiary of the election offences and breaches of the Code of Conduct and the irregularities aforesaid, and is equally liable for the commission of the said election offences and breaches.

148. Only one witness, namely Benson Mulandi Nyamai (PW3), testified from the pleaded polling stations. He deponed that he was a polling agent for the Wiper Party at Kitui Boys High School polling station for gubernatorial elections. He stated that the polling exercise went on smoothly until 8.30 am when he noticed a motor vehicle registration No. KBY 013N branded with the 1<sup>st</sup> Respondent's posters. He reported the presence of the vehicle to the police manning the polling station and IEBC presiding officer. That the motor vehicles had T-shirts and posters belonging to the 1<sup>st</sup> Respondent.

149. At the time of adoption of PW3's affidavit as his evidence, the counsels for the Respondents objected to the production of a photograph of the said vehicle annexed as Annexure "BNM3" to the affidavit. The objection was upheld by this Court in a ruling delivered on 5<sup>th</sup> January 2018 for reasons that no certificate has been produced showing compliance and authentication as required

by section 106B of the Evidence Act in relation to the photograph, and the said photograph is found to be inadmissible as evidence.

150. On cross-examination PW3 stated that he did not see who made or put the 1<sup>st</sup> Respondent's posters on the motor vehicle or the driver of the vehicle, as he saw the said motor vehicle when it was already parked at the polling station. Further, that he conducted a search which revealed the owner of the vehicle to be one David Ouma Acharu. He acknowledged that the vehicle is also co-owned by Diamond Trust Bank Kenya Ltd.

151. The second witness called by the Petitioner on this issue was Esther Mueni (PW6), whose testimony was that she was an agent for the Wiper Party at a UAE primary school polling station, and she witnessed a Jubilee Party agent by the name Kavutha Kisangau voting on behalf of elderly ladies. That she protested to the presiding officer, and that the said Kavutha was stopped from bringing people and voting for them.

152. On cross examination, she stated that she did not know the names of the elderly ladies or who they voted for, and that she did not see anyone give or receive bribe.

153. The Petitioner's counsel submitted on this head and relied on the evidence of PW3 and PW6. He contended that the failure by agents of the Second Respondent to act on pertinent actions of malpractice committed within the respective polling stations amounts to gross dereliction of duty, as well as a fundamental breach of official obligations. It is the Petitioner's case that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents acquiesced to and condoned illegalities without taking prompt action as required by law.

154. The 1<sup>st</sup> Respondent denied the acts of malpractice and bribery alleged by the witnesses, and deponed that on the contrary and in breach of electoral code of conduct, the Petitioner unlawfully and illegally using the headed paper of National Rainbow Coalition (NARC) party, which was the 1<sup>st</sup> Respondent's party, and misrepresented to the people of Kitui County that she has dropped out of the gubernatorial race. That the Petitioner and/or his agents falsely branded a vehicle with her posters during the polling day in further contravention of the election law.

155. The 1<sup>st</sup> Respondent stated that she immediately protested the act to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and urged the court to report the Petitioner to have committed electoral offences under the Elections Act, 2016. She produced a letter dated 8<sup>th</sup> August, 2017 and a copy of a poster regarding her further participation in gubernatorial election as her exhibits.

156. The counsel for the Petitioner objected to the production and admissibility of the said poster on the grounds that it did not have a certificate as required by section 106 of the Evidence Act. The 1<sup>st</sup> Respondent's counsel submitted in response that the document was a scanned and photocopied document and not computer generated. The Court reserved its ruling on the objection until the delivery of this judgment, but allowed cross-examination and re-examination on the said poster.

157. In summary, section 106A of the Evidence Act provides that the contents of electronic records may be proved in accordance with the provisions of section 106B. Section 106B on the other hand requires any information contained in an electronic record (whether it be the contents of a document or communication printed on a paper, or stored, recorded, copied in optical or magnetic media produced by a computer), is deemed to be a document and is admissible in evidence without further proof of the production of the original, providing the conditions set out in section 106B (2) for the admissibility of evidence are satisfied.

158. I note that the 1<sup>st</sup> Respondent in her affidavit in response to the Petition averred that the said poster was prepared by the Petitioner using NARC headed paper, and it was therefore neither prepared by, nor computer generated by the 1<sup>st</sup> Respondent. In addition, being a reproduction of another poster whether by scanning or photocopying, no computer was used in its generation or printing and it does not fall within the definition of an electronic record. The provisions of section 106B of the Evidence Act are accordingly inapplicable and the objection by the Petitioner is thereby overruled.

159. In further response to the alleged malpractices, the 1<sup>st</sup> Respondent stated that on the day of election, she voted at Ithokwe Primary School Polling Station, and on her way home, she was informed that there was a vehicle at Kitui High School polling station with her posters, and she proceeded to see the motor vehicle. On arrival, she found the motor vehicle being towed away. Further, that when she arrived, she did not enter the polling station at Kitui high school as she found the car being towed at the entrance of the school. She stated that it was not her motor vehicle and that she had not put the said posters and left it at that.

160. The 1<sup>st</sup> Respondent also alleged that it is the Petitioner's agents who were found bribing voters and one was charged in Court.

She however did not have the evidence of such bribery incidents or charges, or any evidence linking the Petitioner to the posters she alleged he of his agents had prepared on NARC letterhead.

161. The 1<sup>st</sup> Respondent's counsel submitted that bribery is an electoral offence, which the Petitioner is obligated to prove beyond reasonable doubt in an election court. Further, that the Petitioner has not adduced evidence to that standard on any of the criminal acts he alleges.

162. On the allegation that a car branded with posters of the 1st Respondent was parked at a polling station in Kitui Boys High School on election day, it was submitted by the counsel that this was supported by the evidence of Mr. Benson Mulandi Nyamai (PW3), but that the said witness did not see who made or put the posters on the motor vehicle. Further, that he did not see the driver of the motor vehicle, nor how it got to the polling station, neither was the vehicle was not registered in the name of the 1st Respondent.

163. The 3<sup>rd</sup> Respondent on his part denied receiving any report of the alleged acts of malpractice or bribery, and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' counsel submitted that PW3 alleged to have been the Petitioner's agent at Kitui Boys Secondary School, yet he was not on the Petitioner's list of agents for this station and his evidence therefore lacks any probative value. In addition, that PW6 denied witnessing anyone giving or receiving a bribe.

164. As this Court stated earlier on in this judgment, the Supreme Court in the 2017 Raila Odinga Case held that the burden of proof on a person who alleges commission of an electoral is one of beyond reasonable doubt. In addition, the evidence must also show a relationship not only between the offender and a candidate but also show that the election was thereby affected in the manner contemplated by section 83 of the Elections Act, 2011

165. Furthermore, in Mohamed Ali Mursal vs Saadia Mohamed and Others [2013]eKLR, Mutuku J., described bribery in the context of an election petition as follows;

**“Bribery is an electoral offence. It is also a criminal offence in ordinary life. Being such, proof of the same must be by credible evidence and in my view, nothing short of proving this offence beyond reasonable doubt will suffice. There is no distinction as far as I am concerned, and rightly so, between bribery in a criminal case and one in an election petition. Bribery involves offering, giving, receiving, or soliciting of something of value for the purpose of influencing the action of the person receiving. “**

166. The Election Laws (Amendment) Act, 2017 took away the power of this Court to find a person guilty of an election offence. Instead, the Court is now only empowered to make a finding that an electoral malpractice of a criminal nature may have occurred and report the matter to the Director of Public Prosecutions (DPP). The Court makes the said report to the Director of Public Prosecutions in the final judgment of the court, pursuant to section 87 (1) of the Elections Act which is in the following terms:

**“ (1) An election court may, at the conclusion of the hearing of a petition, in addition to any other orders, make a determination on whether an electoral malpractice of a criminal nature may have occurred.**

**(2) Where the election court determines that an electoral malpractice of a criminal nature may have occurred, the court shall direct that the order be transmitted to the Director of Public Prosecutions.**

**(3) Upon receipt of the order under subsection (2), the Director of Public Prosecutions shall —**

**(a) direct an investigation to be carried out by such State agency as it considers appropriate; and**

**(b) based on the outcome of the investigations, commence prosecution or close the matter.”**

167. I find in this regard that the allegations of election offences committed by the 1st Respondent were not proved to the required standard, as no evidence was adduced by the Petitioner to link the alleged offences to the 1st Respondent. In particular, the Petitioner, PW6 and PW8 testified that they did not witness any incidents of bribery. In addition, PW3 did not bring any evidence to show that the motor vehicle was branded with the 1st Respondent's posters as he alleged, or that the said motor vehicle had any connection to the 1st Respondent. Likewise the 1st Respondent did not bring any evidence linking the Petitioner to the commission



of election offences as she alleged.

168. However, in the course of the hearing it became apparent that there were assaults made on some of the Petitioners' witnesses namely PW2 and PW5, which have not been acted upon to date. As regards the investigation of PW8 as requested by the 1st Respondent's counsel, this Court notes that the responses and evidence of PW8 on cross-examination were that he was at the time of appointment and undertaking of duties as chief agent of the Petitioner, also employed as the Petitioner's Economic Advisor, when the Petitioner was the Governor of Kitui County, and receiving a salary paid by the Kitui County Government.

169. In this regard, Article 260 of the Constitution defines "public office" to mean "an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament;" A person holding such a public office commits an offence under the Elections Offences Act when he or she engages in political activity.

170. Pursuant to section 87 of the Elections Act, 2011 I find that there is evidence that the following electoral malpractices may have occurred which will require investigation and further action by the Director of Public Prosecutions if need be:

- (a) Assault on Florence Lau Mbuvi (PW2) reported as OB No. 20/8/8/2017 at Kitui Police Station.
- (b) Assault on Kalungu Nzau(PW2) reported as OB No. 25/8/8/2017 at Kitui Police Station.
- (c) Commission of the offence of participation in elections by public officer by Bernard Kitheka Mulatya(PW8)

171. The Deputy Registrar of the High Court at Kitui is directed to forward this judgment to the Director of Public Prosecutions for such action on the matters set out in paragraph 170 above as he or she may deem fit.

***Whether the 1st Respondent was validly elected as the Governor of Kitui County***

172. The sum total of the foregoing findings is that the Petitioner's case was largely based on allegation, suppositions and arguments which were either not pleaded in his Petition, or not supported by sufficient evidence. In addition, the irregularities noted and found by this Court to exist will not in any way affect the results of the 1<sup>st</sup> Respondent as the winner of the election for Governor of Kitui County. Furthermore, after applying the provisions of **section 83** of the Elections Act, I find that these irregularities would not have affected the ultimate result given the margin of votes and the fact that the irregularities were established to occur in only 10 out of over 1000 polling stations in the Kitui County.

***Which Party should bear the costs"***

173. **Section 84** of the Elections Act provides that *an election court shall award the costs of and incidental to a petition and such costs shall follow the cause.* Such costs are to follow the event and the Court has broad jurisdiction to determine costs. In election petitions, however, the Courts in awarding costs in addition have to balance the rights of parties to access electoral justice with the work undertaken by the successful parties in preparation and conduct of the Petition.

174. In the present Petition, this Court finds that as there were irregularities that were admitted and found to have been committed by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' agents, it is only fair that the two parties share the burden of the costs borne by the 1<sup>st</sup> Respondent, even if the Petitioner has largely been unsuccessful.

**DISPOSITION**

175. I accordingly find that the Petition herein lacks merit, and the final orders are as follows:

- (a) The Petition herein be and is hereby dismissed.
- (b) Charity Kaluki Ngilu, the 1st Respondent herein, was validly elected as the Governor of Kitui County at the general election held on 8th August 2017.

(c) The 1st Respondent is awarded costs on the following terms:

(i) Instruction fees to be paid by the Petitioner which are capped at Kshs. 3,000,000/=.

(ii) Instruction fees to be jointly or severally paid by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents which are capped at Kshs. 1,000,000/=.

(d) The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are jointly awarded costs on the following terms:

(i) Instruction fees to be paid by the Petitioner which are capped at Kshs. 2,000,000/=.

(e) The costs awarded shall be taxed and the total costs certified by the Deputy Registrar of this court.

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

(g) The Deputy Registrar is directed to forward this judgment to the Director of Public Prosecutions for further action in accordance with section 87 of the Elections Act, 2011.

(h) A certificate of this determination in accordance with section 86(1) of the Elections Act, 2011 shall issue to the Independent Boundaries and Electoral Commission and the Speaker of the Senate.

176. Orders accordingly.

**DATED AND SIGNED, AT NAIROBI THIS 2<sup>ND</sup> DAY OF MARCH 2018**

**P. NYAMWEYA**

**JUDGE**

**DELIVERED AT NAIROBI THIS THIS 2<sup>ND</sup> DAY OF MARCH 2018**

**JOHN M. MATIVO**

**JUDGE**



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