



Case Number:	Election Petition 2 of 2017
Date Delivered:	05 Mar 2018
Case Class:	Civil
Court:	High Court at Mombasa
Case Action:	Judgment
Judge:	Eric Kennedy Okumu Ogola
Citation:	Rashid Juma Bedzimba v Ali Menza Mbogo & 2 others [2018] eKLR
Advocates:	Mr. Said for Petitioner Mr. Ndegwa for 1st Respondent Ms. Oyier for 2nd & 3rd Respondents
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	Petition dismissed
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ELECTION PETITION NO. 2 OF 2017

**IN THE MATTER OF: THE ELECTIONS ACT CHAPTER 7 LAWS OF KENYA & THE REGULATIONS
MADE THEREUNDER**

**IN THE MATTER OF: ELECTION FOR MEMBER OF THE NATIONAL ASSEMBLY OF ALI MENZA
MBOGO FOR KISAUNI CONSTITUENCY**

RASHID JUMA BEDZIMBA.....PETITIONER

VERSUS

1. ALI MENZA MBOGO

2. MOHAMED ABOUD BAHERO

3. INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION

(IEBC).....RESPONDENTS

JUDGMENT

The Petition

1. The Election Petition herein dated 5th September, 2017 was filed by the Petitioner who challenges the declaration of the 1st Respondent as the validly elected Member of National Assembly for Kisauni Constituency vide election held on 8th August, 2017. In disputing the said election, the Petitioner prays for the following orders:

(a) A declaration that the 1st Respondent was not validly elected as a member of the National Assembly for KISAUNI Constituency ;

(b) An Order for Scrutiny and recount.

(c) Or alternatively, an order for fresh elections to be held within the time permitted by the law.

(d) A determination that electoral malpractices of a criminal nature may have occurred and an order for the matter to be transmitted to the Director of Public Prosecution for appropriate investigation and action against the named perpetrators of the electoral malpractices.

(e) The Respondents jointly and/or singularly be condemned to bear the Petitioners costs and matters incidental to this Petition.

(f) Such further, other and consequential orders as this Honourable Court may deem fit and just to grant.

The Petition is supported by the affidavit of RASHID JUMA BEDZIMBA sworn on 5th September, 2017 and the affidavits of his witnesses.

The Background

2. The Petitioner was a registered voter during the Parliamentary general elections for the KISAUNI Constituency and also a candidate for said election as the ODM Parliamentary candidate.

3. The 1st Respondent was one of the candidates in the Parliamentary elections for Kisauni Constituency and was declared the winner in the said elections.

4. The 2nd Respondent was the Constituency Returning Officer for the KISAUNI Parliamentary Election and is joined in this proceeding by reason of his conduct and the conduct of some of electoral officers who worked under him.

5. The 3rd Respondent is the body mandated to carry out and supervise elections in the country and is responsible for the acts and omissions of its officers and subordinates.

6. The Petitioner alleges that the general election was held on 8th August, 2017 and during the said elections, Kisauni Constituency had the following Parliamentary candidates:-

CANDIDATE NAME	PARTY
a. ABDULHAKIM JAMALLAT	- Maendelo ChapChap
b. BEDZIMBA RASHID JUMA	- ODM
c. JUMA WILLIS ODHIAMBO	- INDEPENDENT
d. KAVINGO SAMWEL TUVA	- INDEPENDENT
e. LEWAH FRANCIS RUNYAH-	JUBILEE
f. MBOGO ALI MENZA -	WIPER
g. THUKU TONY CORNELIOUS GAKUI	

It is the Petitioner's claim that after tallying of votes from the various polling stations, the 2nd Respondent on 10th August 2017 declared the 1st Respondent the winner having received 34, 898 votes.

7. The Petitioner contends that the Parliamentary election for the said Constituency was not conducted in accordance with the provisions of the Elections Act and regulations made thereunder, the Election Offences Act (Cap.66) or in line with the principles of the Constitution.

8. Specifically, the Petitioner makes the following allegations as against the 1st Respondent; voter bribery, violence, intimidation and harassment of the Petitioner by the Police and passing off by the 1st Respondent as a member of a political party. And as against the 2nd and 3rd Respondents, the Petitioner alleges bias by IEBC officials, collusion between the 1st Respondent and IEBC officials, discrepancies at the tallying center, ejection of agents and voting at ungazetted polling stations.

9. In relation to bribery of voters, the Petitioner claims that the 1st Respondent personally and/or through his agents, committed the offence of bribery and treating of voters prior to the polling day as well as on the 8th of August 2017. To support this assertion, the Petitioner alleges that on 27th July 2017, the 1st Respondent personally bribed voters at Maunguja Primary School by giving them gifts and later treated the persons present in a bid to influence and induce their support for his candidature. Secondly, that on 5th August, 2017, the 1st Respondent allegedly bribed voters with cash at Majaoni Kidongo in a bid to influence their voting. Thirdly, that on the Election Day, 8th August, 2017, the 1st Respondent either personally or through his associates engaged in bribery in many polling stations including Mjambere Polling Station where the 1st Respondent's agents or associates allegedly recorded voters' names after polling. It is the Petitioner's contention that these acts of bribery and/or treating of voters unduly and negatively influenced his would be voters.

10. The Petitioner alleges that the 1st Respondent with the assistance of the police engaged in several instances of disruption of the electoral process and this caused the Petitioner anxiety and disorganization contrary to the Election Offences Act and the Code of Conduct as well as in violation of Article 81(a) and (e)(ii) of the Constitution. The Petitioner alleges that in the early morning of the 8th August 2017, a squad of around 60 policemen in 4 vehicles swooped down on the Petitioner's agents centre at McMillan Hall in Kisauni Constituency where his agents had converged in readiness for assignment to their respective polling stations. The said agents were allegedly surrounded by heavily armed and camouflaged security team who detained them within the premises for close to 4 hours before being allowed to proceed to their stations. This action, the Petitioner claims, caused unnecessary anxiety and fear amongst the agents who were therefore disrupted and disorganized in their planning for the work of monitoring the polls.

11. Further, the Petitioner claims that on 8th August 2017, his Chief agent and other agents were either unlawfully arrested, detained and/or assaulted resulting in a state of fear among his agents. This action had the effect of making the agents less vigilant in monitoring the elections, with the result that the integrity of the voting process was questionable.

12. As to the allegation that the 1st Respondent passed off as a member of a political party, the Petitioner's case is that the 1st Respondent displayed campaign materials and banners suggestive of him being an ODM member as his banners adorned the photo of the 1st Respondent alongside the ODM Gubernatorial candidate, HASSAN ALI JOHO. This, despite the fact that the 1st Respondent was a Wiper candidate. The Wiper Party candidate for the same position was HASSAN OMAR. The Petitioner claims that the 1st Respondent during the campaign period created the impression that he was a member of the ODM party which he alleges is popular in the Kisauni area. The Petitioner avers that this behavior was unlawful and deceptive contrary to the ethical demands on a candidate for public office.

13. With regard to the 2nd and 3rd Respondents, the Petitioner alleges that the Presiding Officer stationed at Mwandoni Kwa Mtumwa Ground Polling Centre was engaged in campaigning for the 1st Respondent and attempted to influence or induce people to vote for the 1st Respondent by sending SMS messages to voters. The Petitioner further alleges that, prior to the Election Day, the said Presiding Officer attended campaign meetings called by the 1st Respondent.

14. The Petitioner claims that the 2nd and 3rd Respondents on the Election Day permitted unauthorized persons associated with the 1st Respondent in and around the Tallying Centre at Shanzu TTC, and privately and secretly, met with them to the exclusion of other agents. It is alleged that in these meetings arrangements were made that favoured the 1st Respondent while prejudicing the Petitioner. It is alleged that this action affected the integrity of the entire election process in the Kisauni Constituency. While at the said tallying center, the Petitioner claims that the 1st Respondent through persons associated with

him together with officers of the 3rd Respondent interfered with the results by tampering with the seals on the ballot boxes.

15. The Petitioner claims that his agents located at various polling stations across the Constituency were either barred or ejected from the respective stations during the casting of the vote and or the counting process. This was allegedly done by Security Officers under instructions of the Presiding Officers assigned to the polling stations. This action was a gross violation of the provisions under the Elections Act. As a result the agents could not have vouched for the voting process in the stations, rendering the entire voting and counting process unfair and unlawful.

16. The Petitioner alleges that the 3rd Respondent deliberately decided to conduct the voting exercise at polling stations that were not gazetted. The Petitioner gave an example of Magogoni ward, where voters were registered at Kwa Mtumwa Grounds polling station but instead voted at Bilima Grounds polling station which was allegedly ungazetted. The Petitioner contends that this caused confusion and frustration among his voters.

17. The Petitioner claims that the process of transmission of results from polling stations within KISAUNI Constituency to the tallying centre was not transparent because the counting and tallying exercise was generally irregular as the votes announced by the Presiding Officers in the polling stations were different from the final votes announced by the returning officer.

18. Further, the Petitioner alleges that in some polling stations the 3rd Respondent without any basis announced and recorded inflated results for the 1st Respondent in Form 35B without any reference to the results provided by the Presiding Officers in the Form 35A. It is alleged that this resulted in irregularity in votes counted.

19. It is the Petitioner's case that the 2nd Respondent and other officers of the 3rd Respondent in various stations failed to comply with mandatory provisions of law with regard to record keeping. In particular the handling of electoral materials was compromised to the detriment of the Petitioner as well as other candidates, while giving unfair advantage to the 1st respondent.

20. It is also the Petitioner's case that by virtue of the various irregularities and illegalities committed by the Respondents, the results of the election for member of National Assembly- Kisauni Constituency- were materially altered to the detriment of the Petitioner. It is therefore the Petitioner's prayer that the said Parliamentary election results for Kisauni Constituency be annulled and avoided, and a fresh election be called for the constituency.

The Response

1st Respondent

21. The 1st Respondent opposed the Petition by way of a Response to the Petition dated 19th September 2017, and a Replying affidavit sworn by Hon. **ALI MENZA MBOGO** on 20th September, 2017.

22. As to the allegation of bribery of voters, the 1st Respondent avers that neither he nor his agents recorded the names of voters at Mjambere polling station after polling or at any other place or time on 8/08/2017 as alleged or at all. Neither did he bribe voters with cash or otherwise at Majaoni Kidongo on 5/08/2017 or at Kisauni Constituency Tallying Center at Shanzu college as alleged or at all. The 1st Respondent put the Petitioner to strict proof of these allegations.

23. In response to the allegation of passing off as a member of another political party, the 1st Respondent denied the same adding that he did not display any campaign materials suggesting that he was a member of the ODM party. The 1st Respondent avers that he is a member of WIPER Party which together with ODM Party forms part of the National Super Alliance Coalition, and as such, candidates for different positions under the NASA Coalition often campaigned together.

24. The 1st Respondent states that the Presiding officer for Mwandoni kwa Mtumwa Grounds polling station did not campaign for him nor did he influence voters to vote for him by sending them text messages.

25. The 1st Respondent avers that he did not by himself or through his associates meet with the 2nd Respondent privately in the absence of agents of other candidates. He also denied tampering with ballot boxes at Shanzu Teachers Training College Tallying center.

26. It is the 1st Respondent's case that the agents of the Petitioner participated in the casting of ballots, counting and tallying of results and the said participation was confirmed by the agents signing the Forms 35A. If at all the agents were ejected, which is denied, then it was as a result of the 3rd Respondent carrying out its duties.

27. In response to allegation that voting took place in ungazetted polling stations, the 1st Respondent admitted there was no polling station gazette by the name Bilima, but clarified that the place referred to as Bilima by the Petitioner is the place gazetted as Mwandoni Kwa Mtumwa Grounds in Gazette No. 6397 of 30/6/2017 at page 3525. Further, the 1st Respondent stated that all voters registered at Mwandoni Kwa Mtumwa Grounds registration center, and who verified their designated polling stations with the 3rd Respondent by sending a text message to the number 70000 received a text message indicating that the polling center was Mwandoni Kwa Mtumwa grounds.

28. The 1st Respondent contends that the counting at the polling stations and the tallying at the tallying center were accurate and the votes announced by the presiding officers at the polling stations were the same as those announced by the returning officer. Therefore no votes were tampered with or manipulated as alleged by the Petitioner.

29. It is the 1st Respondent's case that there were no election malpractices or irregularities committed by the 1st Respondent or any other person associated with him. Further, the 1st Respondent states that there were no irregularities which could affect or alter the election results for Kisauni Constituency as announced by the Returning Officer, and that there were no irregularities that affected the election results.

2nd and 3rd Respondents

30. The 2nd and 3rd Respondents opposed the petition by way of a response to the petition dated 25th September, 2017 and a replying affidavit sworn by **MOHAMMED ABOUD BAHERO** on 25th September, 2017.

31. The 2nd and 3rd Respondents aver that the election of member of national assembly for Kisauni Constituency was conducted in accordance with the Constitution, election statutes and regulations, and that the same was free, fair, accurate and verifiable.

32. The 2nd and 3rd Respondents state that the Petitioner's agents were not ejected or denied access to the polling stations. In support of this assertion the 2nd and 3rd Respondents aver that the polling station

diaries show that some of the Petitioner's agents signed in as early as 0550hrs.

33. The 2nd and 3rd Respondents deny that they held any meetings in private with the 1st Respondent or with his agents. They contend that if any meeting took place it was done in the open hall with all the agents of all candidates who honored the invitation.

34. With regard to the incident at the tallying center where the Petitioner alleges that the ballot boxes were tampered with, the 2nd and 3rd Respondents deny this allegation and state that the only problem that arose was at Emmas Academy Polling Station No.6 in Junda Ward where some hooligans attacked the presiding officer and her deputy. In the process the hooligans tampered with the seals and scattered the election materials. However, the 2nd and 3rd Respondents aver that the problem was handled mutually, and by the consent of all parties the ballots were recounted in the presence of all the agents. The recount confirmed the entries at the polling station.

35. The 2nd and 3rd Respondents deny that ungazetted polling stations were used for voting and instead state that there is a Ground commonly known as Kwa Mtumwa. The said ground has three polling centres; Kwa Mtumwa, Bilima and Kishada. The 2nd and 3rd Respondents state that during voter education, Magogoni ward educators sensitized the people and provided them with all the information regarding location of polling centers. Subsequently a voter verification exercise took place in the polling centers used and no confusion arose.

36. It is the 2nd and 3rd Respondents' case that the election for member of national assembly for Kisauni Constituency was conducted in accordance with the law and the 1st Respondent was duly elected.

The Hearing

37. After the completion of pre-trial conference and the determination of all interlocutory applications, the petition came up for first hearing on 27th November, 2017. Mr. Said appeared for the Petitioner, Mr. Wamuti Ndegwa and Mr. Aziz appeared for the 1st Respondent and Ms. Oyier appeared for the 2nd and 3rd Respondents. 14 witnesses testified for the Petitioner.

38. **PW1, Mmazi Adalla Dumbo and PW2, Josephine Mchoi Mwamvongo** testified that their children, Racheal Mwadzungu and Kevin Salim Ngome respectively attend Maungunja Primary School in Kisauni Constituency. The witnesses testified that on 27/ 07/2017 they had each gone to the school to collect their respective child's report book. They testified that they saw the 1st Respondent come to the school and address a gathering asking them to vote for him. The witnesses testified that at the end of the meeting the 1st Respondent gave out gifts in form of chairs and tables to the school.

39. Upon cross examination, the witnesses each admitted that they did not produce any evidence to show that they are indeed the parents to the aforementioned children. The witnesses also admitted that although they were members of the school's Parents committee they have no proof of the same. They indicated that the gifts- tables and chairs- were for the nursery section of the school but clarified that they themselves did not receive any personal gifts from the 1st Respondent. They also admitted that they did not take photos of the chairs and tables or of the meeting. On cross examination by the court, PW1 stated that although the 1st Respondent gave gifts to the school and asked for votes she did not complain or report the matter to the police while PW 2 stated that she was happy with the gifts given to the school.

40. **PW3, Nasor Bakari Mgao**, testified that he was a social media user with a Facebook account under

the name “*Nassor Ngao*” and that on 27/07/2017 he saw that the 1st Respondent had posted something on his Facebook account. PW3 testified that the 1st Respondent posted that he had gone to donate chairs and tables at a school in Mwakirunge Ward and posted pictures of the same. PW3 testified that he used his phone- Samsung galaxy S6 Edge Plus- to take screenshots of the 1st Respondent’s account. The witness testified that the 1st Respondent later took down the post.

41. On cross examination, PW3 averred that he did not see the 1st Respondent make the postings on the 1st Respondent’s account. The witness admitted that his annexure NB2 (said pictures posted on Facebook) does not have the Facebook logo. PW3 also admitted that he did not print the pictures himself but rather he sent them to his advocate who printed them out.

42. **PW4, Dudu Mwanzaya Tingete and PW5, Daniel Mwangome Mweni** testified that they are fishermen at Kidongo Beach. PW4 testified that he was the chairman of the Beach Management Unit while PW5 was a member of the Beach Management Unit. They both testified that sometime in June, 2017, there was a meeting between the fishermen at Kidongo Beach and the 1st Respondent. They stated that the 1st Respondent asked them the challenges that they face as fishermen. Their answer was that they required fishing nets and new engine boats to enable them fish in the deep sea. They claimed that the 1st Respondent asked for votes and gave them Kshs.9,000/= for water. PW4 testified that the 1st Respondent asked him to prepare a quotation for the fishing nets. According to PW 4 he did prepare the quotation and communicated the same to a person by the name “Pastor” who informed him that the 1st Respondent would come to see them on 5.08/2017. Both PW4 and PW 5 claimed that on 5/08/2017, the said “Pastor” went to the Beach and gave the fishermen Kshs. 50,000/= which he said was from the 1st Respondent. The “Pastor” told them that if the 1st Respondent won the elections, the fishermen would get more money and would also get the fishing nets. Both witnesses testified that they divided the money amongst themselves.

43. On cross examination, both witnesses insisted that the 1st Respondent gave them money being Kshs. 9,000/= and later Kshs. 50,000/=. However, they both admitted that they did not take photos or videos of the meeting with the 1st Respondent. They also both testified that the money given was not a bribe.

44. **PW6, Samson Baya Kefer alias “Kenga Yaa”** also attended the meeting involving fishermen in June, 2017. The witness testified that he personally received the 1st Respondent before they proceeded to meet the fishermen. PW6 reiterated PW4 and PW5’s account as to what happened during the meeting, adding only that it was routine for the 1st Respondent to give out money at the end of a campaign. However, on cross examination PW6 stated that he did not witness any bribe being given and that he had no proof that the 1st Respondent ordinarily gave money to people after campaign meetings.

45. **PW7, Shali Mote Shukur**, testified that on 6/08/2017 he received a message from a Teacher Yusuf Mohammed Shee (a campaign manager for the 1st Respondent) from mobile number 0724888504 requesting him and his family to vote for the 1st Respondent. PW7 further stated that on the voting day he went to vote at Mwandoni kwa Mtumwa Grounds but he did not see any IEBC officials. He then went to the next polling station at Mwandoni-Kishada Play Ground but his name was not on the poll register of that place. He was told to go to Bilima ground at Bakarani. On arrival at Bilima ground, PW7 stated that he found Teacher Yusuf Mohammed Shee who had an IEBC badge. PW7 testified that he finally voted at Bilima ground. On cross examination, PW7 stated that he had no evidence from Safaricom to prove that the message he had received on his phone was from Yusuf Mohammed Shee.

46. **PW8, Jumaan Omar Said**, offered almost similar testimony to that of PW7. He stated that he was a registered voter at Bilima grounds and that he voted at the said polling centre which was 1 kilometer

away from Mwandoni Kwa Mtumwa ground.

47. **PW9, Maimuna Salim Mwawasi**, testified that she was the MCA for Shanzu and that on 9/08/017 she was at Shanzu Teachers Training College where tallying of votes was on going. PW9 testified that at around 4.00pm while at the parking at the tallying centre, she heard people shouting “*mwizi wa kura*” and saw people trying to open a door of a classroom. PW9 claimed that when she entered the classroom she saw a man called Bakari Tsuna who was the bodyguard of the 1st Respondent and after a short while the said Bakari Tsuma escaped through one of the windows. The witness testified that votes were being stolen in the room and that upon arrival of the Petitioner the Returning Officer informed him that action would be taken against IEBC officials who had interfered with the ballot boxes. However, PW9 testified that she did not report the matter to the police because police officers were present during the incident.

48. On cross examination, PW9 averred that they forced their way into the classroom where they found ballot boxes open with some having no seals. PW9 further stated that inside the classroom there was a presiding officer and her deputy and that there were ballot papers on the floor which were green in colour hence they belonged to the Member of National Assembly position. PW9 admitted that she did not see any IEBC official break any seal. She did not take any pictures of the incident.

49. **PW10, Okelo Lazaro Joseph**, testified that he was the ODM agent for Kisauni Constituency posted at the tallying center for the purpose of the general election. On 9/08/2017 at 4.00am while at the tallying centre, the witness noted several irregularities including ballot boxes which were coming from various centers being diverted and stored in a certain room away from the tallying center. Referring to Forms 35A the witness testified that several Forms 35A were not signed by ODM agents and there were no comments by the Presiding Officers as to why the forms had not been signed by the agents. The witness testified that he raised these issues with the Returning Officer but was not assisted. The witness further testified that the diverted ballot boxes were interfered with, and that the police denied him access to the room where these ballots were diverted. The witness peeped through the window and saw many people in the room and ballot boxes with seals broken. PW10 also testified that he did not sign Form 35B as he had noted several irregularities and that the Returning officer refused to record his reasons for not signing the Form 35B. On cross examination, the witness admitted that he did not receive any complaints from any of his agents about irregularities and that he did not know the specific polling stations where agent did not sign Forms 35A. However, in re-examination, PW 10 clarified that the Forms 35A that were not signed by ODM agents are those at pages 3, 9, 11, 14, 15, 22, 24, 31, 32, 35, 36, 42, 47, 59, 70, 76, 81, 93, 96, 107, 113, 115, 119, 123, 124, 129, 135 and 13 of the 2nd and 3rd Respondent’s documents.

50. On his part **PW11, Omar Abdalla**, testified that on 9/08/2017 he was called by his friend Geoffrey who was at Shanzu Tallying Centre. He proceeded to the Tallying Centre to join Geoffrey. While at the parking at Shanzu Teachers Training College, PW11 stated that he heard some noise coming from one of the classes far away from the tallying hall. PW11 went to the classroom and found two ladies with IEBC badges. These ladies had seals for ballot boxes. The witness also saw yellow and green ballot papers on the floor. The witness removed his phone and took a video of what was happening. He testified that the police came and asked people to get out of the room but people refused to do that until the Returning Officer was called. PW11 testified that the Returning Officer said that the said room was not their working room and asked the two IEBC ladies why they were in the room and why they were interfering with the ballot boxes. The witness did not report the incident to the police as the police were already at the scene.

51. PW11 on cross examination stated that he was a registered voter in Mvita Constituency. He also admitted that he was not an agent or candidate of any party thus he had no right to access the tallying

center. He claimed that his friend Geoffrey Busaka was at the tallying center as a member of ODM and stated that he did not see a person by the name Bakari Tsuma "Totsy".

52. **PW 12, Marie Mabruk and PW 13, Salim Juma Ali** testified that they were ODM agents with PW13 claiming to be the chief agent. They both testified that on 7th August, 2017 all ODM agents were required to attend a briefing meeting at Macmillan Hall, Majaoni. They claimed that while at the meeting at around 12.00am they were attacked by 60 police officers who claimed that ODM agents were members of Mombasa Republican Council (MRC). The witness testified that they informed the police that they were ODM agents but the police detained them in the said hall until 4.00am when the Petitioner arrived and explained to the police that they were indeed agents and they were then allowed to leave to their respective polling stations. The witness testified that agents were shaken up by the incident and it became difficult to brief them and this affected their preparedness for the polls.

53. PW 13 added that on the Election Day, 8/08/2017 he was harassed by the police severally as he was first assaulted by two men in Junda ward who later took him and another agent to Bamburi Police Station where they were detained until 2.00pm. The witness was later called by the OCS Bamburi Police Station who required the witness to report to the police station as he had instructions to arrest him but when the witness reported to the station on 9/08/2017 he was told to go home.

54. On cross examination both PW 12 and PW 13 admitted that during the incident at Macmillan hall the police did not arrest or assault any of the agents.

55. **PW14, Rashid Juma Bedzimba** (the Petitioner) adopted his witness statement and testified that he contested the Kisauni Parliamentary seat on an ODM ticket on 8/08/2017 and got 29,752 votes. However, the Petitioner claimed that the election was not free and fair. He alleged that there was bribery during the campaigns and voting. Further, the Petitioner alleged that security officers attacked his agents claiming they were members of MRC and that there were irregularities at the tallying center as ballot boxes had their seals removed. While focusing on the incident at the Tallying center, the Petitioner stated that he was at home when he was informed that ballot boxes at the tallying center had been opened thus he proceeded to tallying center. On reaching the tallying center, the Petitioner claimed that he found that the said ballot boxes were not in the tallying center but rather in an adjacent classroom. The Petitioner stated that there were ballot papers (green, yellow & blue) and seals on the floor. He testified that there were also two IEBC ladies in the room. The Returning Officer was called who admitted that the ballot boxes were not to be opened until they reached the tallying room. However, the Returning Officer did not take any action. The Petitioner stated that he reported the matter to the police and was given an OB number but he was not aware whether investigations were done.

56. On cross examination the Petitioner stated that there was bribery of voters by the 1st Respondent. He cited bribery at Maunguja Primary School but admitted that he did not witness any bribery. The Petitioner also testified that there was violence and harassment of his voters but admitted that he was neither arrested nor assaulted by the police. The Petitioner claimed that the police harassment of his agents benefited the 1st Respondent and also insisted that the 1st Respondent passed off as a member of ODM by using pictures and banners of ODM. The Petitioner admitted that he had no evidence that the IEBC was acting in favour of the 1st Respondent. The Petitioner also testified that he had no evidence that the Presiding Officer campaigned for the 1st Respondent. He also stated that he did not see the seals being broken from the ballot boxes at the tallying center but only saw seals on the floor. The Petitioner admitted that although he alleged that the 1st Respondent was given additional votes he has no evidence of that. The witness did not know the names of the two IEBC ladies in the classroom at the tallying center.

57. On the part of the 1st Respondent, 10 witnesses testified. **DW1, Kokota Chivatsi Mududze, DW 2, Mkoli Juma Ali and DW 3, Umazi Gari** testified that they were traders at Kidongo Bahari; DW 1 and DW 2 being fishermen and DW3 a fishmonger. They also claimed to be members of the Beach Management Unit with DW 2 stating that he was the treasurer. They all testified that sometime in June, 2017 they attended a meeting at the beach which was also attended by the 1st Respondent. They denied that the 1st Respondent gave them Kshs.9,000 during the said meeting and also denied occurrence of another meeting on 5/08/2017 in which the 1st Respondent is alleged to have given the fishermen Kshs. 50,000/=. The witness insisted that during the meeting in June, 2017 the 1st Respondent only stated that he would assist them through government funds such as CDF if he was elected as the M.P for Kisauni.

58. On cross examination the witnesses admitted that the 1st Respondent did ask them for votes but insisted that he did not give them any money. DW 3 added that on 5/08/2017 she was at a WIPER party meeting at Kadongo, Mishomoroni which was also attended by Johnson Mwasingo “pastor”.

59. **DW4, Johnson Mwasingo**, testified that he was a Pastor at Calvary Praise Center International and that in June, 2017 he attended a meeting with the 1st Respondent and members of the Beach Management Unit. He testified that PW4 (Mr. Dudu Mwadzaya) explained the challenges that the fishermen faced and appealed for assistance from the 1st Respondent. The 1st Respondent asked for votes and promised that if he was elected he would assist them using government funds such as CDF. DW4 testified that the 1st Respondent did not ask for any quotation neither did he give out any money. As regards his whereabouts on 5/08/2017, DW4 stated that he attended the last campaign meeting for WIPER Party at Kadongo grounds, Mishomoroni, and was there from 8.00am to 8.00pm. The witness refuted the allegation that on the same day at around 4.00pm he attended a meeting at Kidongo with the members of the Beach Management Unit and gave them money on behalf of the 1st Respondent.

60. Upon cross examination, DW4 stated that he campaigned with the 1st Respondent in Majaoni area and admitted that he did attend the meeting with the Beach Management Unit members. However, the witness denied receiving any bribe or giving any bribes.

61. **DW7, Tom Mutinda**, testified that he is a teacher at Maunguja Primary School. He admitted that on 27/07/2017 there was an event at the school involving the nursery section of the school. He stated that the 1st Respondent attended the event and addressed the nursery school children and the teachers for about a minute on the challenges of education. He denied that the 1st Respondent gave the school seats during the event. On cross examination, DW 7 stated that the event at the school was not a political campaign and the 1st Respondent was not invited by the school to the event.

62. **DW8, Hidaya Mohamed Mwinyi and DW 9, Asha Charles Mwanzala** testified that they were voter educators at Magogoni ward in Kisauni Constituency. They testified that Mwandoni Kwa Mtumwa and Bilima were the same place but on the voting register the polling center was referred to as Mwandoni Kwa Mtumwa. The witnesses testified that verification, voter education and voting took place at Mwandoni Kwa Mtumwa or Bilima, and there was no confusion with regard to this polling center. The witnesses added that there was no polling center at Uwanja wa Kobra and no voting took place there on 8/08/2017. On cross examination, DW8 stated that in 2013 the polling center was referred to as Bilima grounds but in 2017 it was called Mwandoni kwa Mtumwa and there was no polling station gazettes as Bilima.

63. **DW 10, Hon. Ali Menza Mbogoh**, the 1st Respondent herein, denied bribing voters at Mjambere Polling Station and fishermen at Bandarini Kidongo in June, 2017. The witness testified that in the meeting in June, 2017 a representative of the fishermen informed him of the challenges that they face which include lack of cooling equipment, fishing nets and deep sea engines. In response he told the

fishermen that if he was elected as M.P he would champion their issues through the National Assembly. The 1st Respondent denied giving any money to the fishermen on that day. In relation to his whereabouts on 5/08/2017, DW 10 stated that he was at a campaign rally at Kadongo grounds from 10.00am to 6.00pm together with DW 4 whom the Petitioner alleged gave Kshs. 50,000/= to fishermen at Kidongo Bandarini on behalf of the 1st Respondent.

64. With regard to the allegation that the 1st Respondent gave out seats and tables to Maunguja Primary School in a bid to bribe potential voters, DW 10 stated that on 27/07/2017 he visited Maunguja village and on his way back he was stopped by school children from Maunguja primary school who wanted him to address them. He stated that he entered the school and found that there was a nursery school function that was ongoing. The witness was invited to greet the parents. He accepted the invitation, greeted the parents and left the place. The witness denied giving out any chairs and tables to the school.

65. DW 10 denied that he arranged for the police to harass the Petitioner or his agents at Mac Millan hall. As to the allegation of passing off as a member of ODM party, DW 10 stated that he was a member of WIPER party which belonged to the NASA coalition and as such members of the coalition campaigned together for their Presidential candidate.

66. In relation to the alleged incident at the Tallying center on 9/08/2017, DW 10 testified that he was at the tallying center from 7.00am and there was a commotion about 10 meters from the tallying hall involving Hon. Fahad Kassim, Hon. Maimuna Mwasi, Geoffrey Busaka and Omar Abdalla all of whom DW 10 claimed were ODM members. He stated that he saw six ballot boxes, one for each category of positions from president to MCA for Emmas Polling Center, Polling Station No. 6. The witness testified that the commotion was resolved by a recount of the votes with the results being the same as those recorded at the polling station. On the allegation of forms not signed by agents, DW 10 stated that it was not a must for each party or candidate to have agents.

67. On cross examination, DW 10 testified that he had visited schools previously but had not made any kind of donations. He stated that he had not been invited to the meeting at Kidongo Bandarini in June, 2017 but rather he was simply conducting door to door campaigns in the area when he met with the fishermen. He further stated that he never used any emblems belonging to ODM party. The witness testified that the recount for Emmas Academy polling station No. 6 was agreed upon as between the returning officer and the petitioner as a solution to the issue that had arisen at the tallying center, and that he was present during the recount. He stated that there was no report from other parties or from observers that agents had been denied entry into some polling stations. He denied seeing any IEBC official tampering with or breaking ballot boxes seals.

68. DW 11 who was also DW 9 (as witness for 1st Respondent, and now witness for the 2nd & 3rd Respondents) reiterated her testimony. **DW 12, Violet Nyang'ate Monyancho and DW 13, Teresiah Kemunto Getonto** were respectively the Deputy Presiding Officer and Presiding Officer at Emmas Polling Center, polling station No. 6. They both testified that the voting went on well on 8/08/2017 and so did the counting process. The witnesses testified that the results were declared at the polling station on 8/08/2017 and transmitted to the IEBC portal. On 9/08/2017 they took the ballot boxes and all other materials which they had used, to the returning officer at Shanzu tallying center. DW 13 stated that on arrival at the tallying center at around 1.00pm she left DW 12 in a room with the election materials and went to the clearing desk to secure a registration number. DW 12 testified that she was later attacked by some people who alleged that the ballot boxes had been interfered with. DW 12 testified that the attackers broke the seals and took out the ballot papers. The witness called out for help and security officers led by the OCPD went to her rescue together with DW 13 and the County Returning Officer. The

Petitioner was present during the scuffle. These witnesses testified that the issue was resolved by way of recount of votes which was done by DW 13. The witnesses testified that after the recount the results were found to be similar to those entered in Form 35A.

69. On cross examination, DW 12 testified that she was in the room with other Presiding officers but she was not aware whether the other presiding officers were also attacked. DW 13 claimed that the attackers were supporters of the Petitioner.

70. **DW 14, Yusuf Mohammed Shee** testified that he is a teacher at Maunguja Primary School and on the Election Day he was the presiding officer at Kwa Mtumwa Grounds Polling Station No. 3. DW 14 denied the allegation by PW 7 that he tried voting at the polling center and was told to go to Bilima ground, clarifying that Kwa Mtumwa ground is also referred to as Bilima. DW 14 also denied sending any message to PW 7 requesting him and his family to vote for the 1st Respondent. With regard to the occurrences on 27th July, 2017, DW 14 stated that there was an event for the nursery section of the school and the 1st Respondent passed by and was invited by the students to say a word. DW 14 testified that the 1st Respondent did not give the school any gifts. On cross examination, DW 14 admitted that when the 1st Respondent came to the school all teachers including non-nursery school teachers were invited to attend the meeting. The witness insisted that Kwa Mtumwa ground was the gazetted polling center with three polling stations.

70. **DW 15, Mohammed Aboud Bahero** (2nd Respondent) testified on his own behalf that he was the Returning Officer for Kisauni Constituency stationed at Shanzu Teachers College tallying center. The witness received all Forms 35A from the polling stations, tallied them in the presence of parties' agents and entered the results into Form 35B. According to the final tally the Petitioner got 29, 752 votes while the 1st Respondent got 34, 898 votes. The witness testified that Form 35B was signed by the agents present except for PW 10-the ODM agent- who refused to sign citing several irregularities which he did not specify. DW 15 admitted that there was an incident involving Emmas Polling station No. 6 in which the DW 12 was attacked by some people who alleged there was ballot stuffing. DW 15 interrogated DW 12 and DW 13 and decided that the issue would be resolved by way of a recount. A recount was done in the presence of all agents and the results were the same as those in the Form 35A. DW 15 insisted that the incident did not affect the results.

71. On cross examination, DW 15 stated that the presiding officer is in charge of the polling station diary which records all incidents at the polling station. However, the incident at the tallying station was recorded in the diary as the duty of the presiding officer in relation to the diary had not ended. It is ended only when the diary is handed over to the Returning officer.

Analysis and Determination Principles governing election petitions

72. Article 1(2) of the Constitution provides that the people may exercise their sovereign power either directly or through their democratically elected representatives while Article 38 affirms the sovereignty of the people by providing for their political rights including the right to free, fair and regular elections. How then can elections be free and fair" Article 81 (e) of the Constitution provides the requirements of a free and fair election being that election should be by way of secret ballot; free from violence, intimidation, improper influence or corruption; conducted by an independent body; transparent; and administered in an impartial, neutral, efficient, accurate and accountable manner.

73. The elections in this country are conducted by the Independent Electoral and Boundaries Commission. The Commission is tasked with implementing the requirements of Article 86 with regard to the actual voting. Article 86 of the Constitution provides as follows:

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

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

74. Election petitions are not ordinary civil suits thus the standard of proof applicable in civil matters does not apply in election petitions. Election Petitions are regarded as special disputes with the “unique” standard of proof. While in civil suits the standard of proof is that of a balance of probability, in election petitions the standard of proof is referred to as intermediate. The term “intermediate” standard of proof means that the standard of proof is above that of a balance of probability but below the standard of beyond reasonable doubt applied in criminal matter. This position was affirmed in the case of **Raila Odinga & Another vs. IEBC & 3 others, Presidential Petition No. 1 of 2017** where the Supreme Court observed as follows:

“[148] In many other jurisdictions including ours, 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 proof “beyond reasonable doubt”, is applied. In such cases, this Court stated in the 2013 Raila Odinga case that “the threshold of proof should, in principle, be above the balance of probability, though not as high as beyond reasonable doubt...”

[150] The rationale for this higher standard of proof is based on the notion that an election 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. (emphasis added) [152] **We maintain that, in electoral disputes the standard of proof remains higher than the balance of probabilities but lower than beyond reasonable doubt and where allegations of criminal or quasi criminal nature are made, it is proof beyond reasonable doubt.”**

75. Where elections offences are alleged in an election petition, as stated by the Supreme Court above the standard of proof is that of beyond reasonable doubt.

76. In election petitions, the Petitioner bears the burden of proof. It is the Petitioner who makes allegations of violations, irregularities and illegalities. It is upon the Petitioner to prove these allegations to the satisfaction of the court. The Petitioner needs to show that the purported allegations did affect the results declared and consequently the will of the people.

77. Where the Petitioner diligently discharges his burden of prove, the burden of proof shifts to the respondents to disprove the allegations laid down by the Petitioner. With regard to shifting of the burden of prove from the Petitioner to the respondents, the Supreme Court in the **Raila Odinga & Another case (supra)** pronounced itself as follows:

“[133] It follows therefore 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. In other words, while the Petitioner bears an evidentiary burden to adduce “factual” evidence to prove his/her allegations of breach, then the burden shift and it behoves the respondent to adduce evidence to prove compliance with the law.” (emphasis added)

78. An election court strives to give effect to the will of the people and not to substitute it with its own. Section 83 of the Elections Act thus requires a Petitioner to prove either one of its limbs in order to void an election. This Section contains two limbs on which an election can be avoided, first, non-compliance with any written law, and second, the effect of non-compliance on the result of the election.

79. In as much as a Petitioner can void an election by proving only one limb of Section 83, the intention of the provision is not to allow an election to be voided based on mere irregularities which may be caused human error. In the case of **Peter Gatirau Munya vs. Dickson Mwenda Githinji and 2 others [2014] eKLR**, the Supreme Court interpreted Section 83 of the Elections Act as follows:

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

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

80. People spend hours on queues to exercise their democratic right to vote. This right should not be trivialized by a court upsetting an election due to mere irregularities and errors. The irregularities and non-compliance with the law, if any, should be of such a magnitude that mandates the court to find that the election was significantly compromised.

Issues for determination

81. The following issues were formulated for determination by this court:

a) Whether the election for the Member of Parliament-Kisauni Constituency was conducted in accordance with the Constitution and other electoral laws and whether there were any irregularities and illegalities that affected the validity of the results.

b) Whether the 1st Respondent was validly elected as the Member of Parliament for Kisauni Constituency.

c) Who shall bear the costs of this Petition.

a) Whether the election for the Member of Parliament-Kisauni Constituency was conducted in accordance with the Constitution and other electoral laws and whether there were any irregularities and illegalities that affected the validity of the results.

82. The Petitioner raised various allegations in support of his Petition. I will analysis each allegation on its own.

a) Bribery of voters/offence of treating

83. At paragraphs 12-15 of the Petition, the Petitioner alleged that there were acts of bribery attributed to the 1st Respondent or his agents during this election. The Petition cited three incidents of bribery. The first incident, the Petitioner claimed occurred on 27th July, 2017 at Maunguja Primary School where the 1st Respondent bribed voters by way of giving them gifts. The second incident according to the Petitioner occurred at Majaoni Kidongo where he claimed that on two occasions the 1st Respondent bribed fishermen by giving them money. The third incident, the Petitioner alleged occurred on the day of the election (8/08/2017) where the 1st Respondent's agents bribed voters at Mjambere polling station.

84. In his submissions, the Petitioner submitted that PW4, PW5 and PW6 confirmed the incidents of bribery at Majaoni Kidongo that took place on an unspecified date in June 2017 and on 5/08/2017 while PW1, PW2 and PW3 had confirmed the incident of bribery at Maunguja Primary School. The 1st Respondent on his part submitted that the offence of bribery had not been proved to the required standard by the Petitioner. Further, the 1st Respondent submitted that several defence witnesses including DW1, DW2, DW3, DW4, DW6, DW7 and DW10 had disputed the Petitioner's claim of bribery and/or treating of voters.

85. Section 9 of the Election Offences Act No. 37 of 2016 states as follows:

(1) A person who, during an election period—

(a) directly or indirectly offers a bribe to influence a voter to—

(i) vote or refrain from voting for a particular candidate or political party;

(ii) attend or participate in or refrain from attending or participating in any political meeting, march, demonstration or other event of a political nature or in some other manner lending support to or for a political party or candidate;

(b) in any manner unlawfully influences the result of an election;

(c) directly or indirectly, in person or by any person on his behalf, in order to induce any other person to agree to be nominated as a candidate or to refrain from becoming a candidate or to withdraw if they have become candidates, commits an offence.

(2) A person who, during an election period, accepts or agrees to accept a bribe that is offered in the circumstances described in subsection (1) commits an offence.

(3) A person who commits an offence under this section shall be liable, on conviction, to a fine not exceeding two million shillings or to imprisonment for a term not exceeding six years or to both.

Bribery or treating of voters is an election offence thus the standard of proof applicable is that of beyond reasonable doubt. Did the Petitioner meet this standard of proof"

86. PW1 and PW2 claimed they were parents who attended Maunguja Primary School. They alleged

that on 27th July, 2017 there was a function at the school which they attended. They both claimed that 1st Respondent attended the event and that he gave out chairs and tables that were meant for the nursery section of the school. PW2 further testified that the 1st Respondent also gave the parents water to drink.

On cross examination, both PW1 and PW2 claimed that they did not have any proof such as photos to show that the 1st Respondent gave out tables and chairs. They also admitted that they had no evidence to show that the parents that were present at the event were registered voters. PW 3 claimed to be a social media activist and alleged that on 27/07/2017 he saw a post on the 1st Respondent's Facebook which included pictures depicting the 1st Respondent donating chairs and tables to a school in Mwakirunge Ward. DW 10, the 1st Respondent, denied having a Facebook account. Further in his testimony, the 1st Respondent admitted that he was present at the school on 27/07/2017 but he denied being invited as a guest in the alleged school function. He testified that he was only passing by the school when he was stopped by pupils from the school who requested him to address them. The 1st Respondent testified that he only spoke for a few minutes and denied giving out any chairs or tables.

87. Regarding the incidents at Majaoni Kidongo, PW 4, PW5 and PW 6 testified that sometime in June, 2017, the 1st Respondent attended a meeting that involved members of the Beach Management Unit. They claimed that the 1st Respondent inquired the challenges that the fishermen faced and he was informed of various challenges including lack of fishing nets. They alleged that that the 1st Respondent promised to buy them fishing nets and asked for a quotation and later gave them Kshs. 9,000. Later on 5/08/2017, PW 1 claimed that DW4 who was acting on behalf of the 1st Respondent came to see the members of the beach management unit and gave him Kshs. 50,000 and asked the members to vote for the 1st Respondent. On cross examination, these witnesses admitted that they had no proof that the 1st Respondent actually gave out the aforementioned monies. DW 1, DW2, DW3 and DW 6 who are also members of the beach management unit in their testimony admitted that the meeting of June, 2017 did occur. They, however, denied that the 1st Respondent gave out any money. They testified that the 1st Respondent would assist them through the Constituency Development Fund if he was elected. In relation to the meeting on 5/08/2017 the 1st Respondent's witnesses denied existence of this meeting. DW4 who allegedly gave Kshs. 50,000 to PW4 testified that on that day he was at Kadongo Grounds Mishomoroni where the 1st Respondent was having his final campaign rally. The testimony of DW 4 was collaborated by DW3.

88. In order to succeed on allegation of bribery, the Petitioner should not merely allege that the offence of bribery was committed. The Petitioner should show who gave the bribe, who received the bribe and that the intention was to convince the recipient, who should be a voter, to vote or refrain from voting for a particular candidate. I should think that there should be a guilty mind in both the giver and the receiver of the bribe.

89. The Petitioner in this case failed to prove that the offence of bribery was committed. In the incident at Maunguja, the Petitioner failed to show that the purported gift of the chairs and tables were meant to influence those at the event to vote for the 1st Respondent. The Petitioner did not even prove that the persons who attended the event were registered voters. He also failed to tender evidence to show that the 1st Respondent actually gave out tables and chairs. Similarly, in both alleged incidents at Majaoni Kidongo, the Petitioner failed to prove commission of the offence of bribery. No evidence was tendered to show that the 1st Respondent gave the fishermen money. Further, the Petitioner himself in his testimony admitted that he had no proof to support this allegation. Even the Petitioner's witnesses who testified on this issue admitted that the alleged money was not a bribe. How then can this court come to the conclusion that the 1st Respondent committed the offence of bribery" In relation to the alleged bribery incident at Mjambere polling station, the Petitioner alleged that the 1st Respondent's associates were recording the names of voters after voting. The Petitioner did not identify the person or persons who were recording the names and did not reveal the identity of the voters whose names were recorded. The

Petitioner did not also show the intent behind the recording of the names. Further, the Petitioner did not call any witness to support this allegation.

90. The Petitioner relied on Halsbury's Law of England, 3rd Edition Vol. 14 which at page 220 states "**Due proof of a single act of bribery by or with the knowledge and consent of the candidate or by his agents, however, insignificant that act may be, is sufficient to invalidate the elections. The Court is not at liberty to weigh its importance nor can it allow any excuse whatever the case may be.**" The proposition herein is correct, however, no "due proof" was tendered by the Petitioner in the matter before the court. What the Petitioner has alleged before this court do not go beyond mere allegations. The allegations of bribery in this Petition do not even merit the question or calling in the relevant standard of proof. They are mere allegations which this court must summarily dismiss as I hereby do.

b) Violence, Intimidation and harassment of the Petitioner's agents by the police

91. The Petitioner at paragraphs 16-20 of his Petition pleaded that his agents were constantly harassed and intimidated by the police on several occasions contrary to Article 81 (a) and e(ii) of the Constitution. The Petitioner submitted that PW12 had proved in his testimony that on the eve of the Election Day while at Mc Millan hall the petitioner's agents were attacked by police officers who presumed that they were criminals thus disrupting their preparations for the elections. The Petitioner also submitted that PW13 who was the Chief agent for ODM party testified that on the Election Day he was attacked by two plain cloth officers who unlawfully detained him and another agent at Bamburi police station.

92. The 1st Respondent submitted that there was no evidence that the Petitioner had appointed agents in the first place. Secondly, the 1st Respondent submitted that the police had a good reason for visiting Mc Millan hall on the eve of the elections. The 2nd and 3rd Respondents did not submit on this issue.

93. Section 10 of the Election Offences Act provides as follows:

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

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

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

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

(2) A person who induces, influences or procures any other person to vote in an election knowing that the person is not entitled to vote in that election commits an offence.

(3) A person who directly or indirectly by duress or intimidation—

(a) impedes, prevents or threatens to impede or prevent a voter from voting; or

(b) in any manner influences the result of an election, commits an offence.

(4) A person who directly or indirectly by duress, intimidation or otherwise compels or induces any voter who has already voted at an election—

(a) to inform that person or any other person of the name of the candidate or political party for which the voter has voted; or

(b) to display the ballot paper on which the voter has marked his vote, commits an offence.

94. Section 11 of the same Act provides for the use of force or violence during the election period. It states as follows:

“A person who, directly or indirectly in person or by any other person on his behalf, inflicts or threatens to inflict injury, damage, harm or loss on or against a person-

a) So as to induce or compel that person to support a particular candidate or political party;

b) On account of such person having voted or refrained from voting; or

c) In order to induce or compel that person to vote in a particular way or refrain from voting,

Commits an offence and is liable on conviction to a fine not exceeding two million shillings or to imprisonment for a term not exceeding six years or both.

95. The Petitioner claimed that his agents were attacked by a contingent of about 60 police officers on the eve of the Election Day while at Mc Millan hall. PW 12 and PW13 testified that on 7/08/2017 there was a briefing meeting for ODM agents at McMillan hall and that at around 12.00 midnight the agents in the hall were attacked by about 60 armed police officers who claimed that the individual at the hall were members of the MRC group. They both stated that they were detained in the hall until around 1.00 am when the Petitioner went to the hall and explained to the police that they were agents and so they were later released at 4.00 am. On cross examination both witnesses admitted that they had no permit from the police to hold the meeting and that nobody was arrested by the police.

96. While the Petitioner alleged that the agents were intimidated and harassed by the police, no evidence was tendered to support this claim. Neither the Petitioner nor his witnesses identified the police officers who supposedly attacked them and harassed them. The Petitioner did not reveal the conduct by the police that amounted to intimidation and harassment. Further, no witness testified that violence was meted upon him by the police when they went to the hall. The Petitioner and his witnesses admitted that the meeting was conducted at night and it involved around 200 agents. The Petitioner did not deny that the presence of the police was attributable to the fact that they thought that there was a meeting of members of the MRC at the hall. To my mind, the reason as to why the police went to the hall is plausible considering that the meeting was being conducted into the wee hours of the morning and involved a considerable number of individuals. To compound this was the fact that this meeting was taking place on Election Day. It is only logical that once the police suspected that an unlicensed group or indeed any other group, was having a meeting whose purpose was hitherto unclear, the police would be in the ready for any eventuality. In this case, the police acted reasonably and as expected. Indeed when the Petitioner explained to the police the purpose of the meeting, the police understood the same. Nobody was arrested, harmed or harassed. The agents were duly released to go and attend to their electoral duties.

97. The Petitioner claimed that his chief agent, PW 13 while supervising the voting exercise was arrested. PW 13 testified that on the Election Day while at Barsheba ground he was attacked by two armed individuals (who he later claimed were police officers) who claimed that he was giving voters money. PW 13 testified that he was taken to Bamburi police station where he was detained in a room until 2.00pm. He claimed that he was not charged with any offence and was released when the Petitioner intervened. PW13 was not able to identify the two people who attacked him although he claimed that they were police officers. The witness did not tender any proof to show that he was attacked. He did not claim that he sustained any injuries or that he reported the incident to the police. As to the detention of PW13 at Bamburi police station, the same was not proved. However, even if this court were to accept the testimony of PW13 as stated, this would be a solitary incident involving one agent or voter. It is not shown how this single incident would affect the results of the entire constituency. If there were some proof of criminal conduct, which I have not seen, the best the court can do is to order investigation on the same. It is the finding of this court that the allegations by the Petitioner that the elections herein was marred with violence, intimidation and harassment of his agents and would be voters, have not been proved and is not true. These allegations are dismissed.

c) Bias by IEBC officials and the 1st Respondent passing off as a member of ODM party

98. At paragraph 21-24 of the Petition the Petitioner pleaded that the 1st Respondent displayed campaign materials and banners suggestive of him being a member of ODM party as his banners adorned the photo of the 1st Respondent alongside the ODM Gubernatorial candidate, HASSAN ALI JOHO instead of that of the wiper candidate, HASSAN OMAR. The Petitioner alleged that ODM party was the most predominant party in Kisauni thus the banners by the 1st Respondent were deceptive and confused voters. The Petitioner did not submit on this allegation. The 1st Respondent submitted that there was no evidence that the 1st Respondent passed himself off as being a member of the ODM party.

99. In the just concluded election there was the NASA coalition which was a coalition of ODM party, Wiper Democratic Party, FORD-Kenya, Amani National Congress and Chama Cha Uzalendo. The Petitioner was the nominated candidate for ODM party while the 1st Respondent was nominated by Wiper Democratic Party. In my mind the activities of these parties were intertwined as they all campaigned for the same Presidential Candidate. As proof of this allegation, the Petitioner attached a copy of a photograph (photograph not admitted as it was not properly produced) depicting the 1st Respondent alongside NASA principals. However, it is clear to me that while campaigning for the Presidential candidate, the individual parties held campaigns together.

100. The Petitioner did not produce the banners that he claimed adorned the picture of the 1st Respondent alongside the ODM Gubernatorial candidate. If at all the 1st Respondent did pass himself off as a member of the ODM party, there was no proof at all of this allegation. The court therefore cannot discuss the effect of such passing off on the voters.

101. At paragraph 25-32 of the Petition, the Petitioner alleged that the Presiding Officer (DW 14) for Mwandoni Kwa Mtumwa polling station No. 3 campaigned for the 1st Respondent and attempted to induce people to vote for the 1st Respondent by sending them SMS messages. The Petitioner also alleged that the 2nd Respondent met privately with the agents or associates of the 1st Respondent at the tallying centre and made arrangements that favoured the 1st Respondent while prejudicing the Petitioner.

102. The Petitioner submitted that Section 15 of the Election Offences Act prohibits a public officer from engaging in activities of a political party or candidate in an election including engaging in political campaigns. The Petitioner contended that PW7 in his testimony had demonstrated that DW 14 was in violation of Section 15 of the aforementioned Act.

103. The Respondents submitted that there was no evidence that DW 14 had sent an SMS message to PW7 campaigning for the 1st Respondent. Further, the 1st Respondent submitted that the Petitioner in his testimony had admitted that he had no evidence that the 1st Respondent or his associates meet privately with the 2nd or 3rd Respondent.

104. PW7 testified that on 6/08/2017 he received a text message from the number 0724888504 which he claimed belonged to DW14 requesting him and his family to vote for the 1st Respondent. On cross examination, PW7 admitted that he had no evidence that the phone number from which the text message was sent belonged to DW 14.

105. A print out of the alleged message was annexed to the affidavit of PW7. However, the same was expunged from the record as it was not accompanied by certificate as required by Section 106B of the Evidence Act. The Petitioner did not prove that the phone number that sent the message to PW7 belonged to DW14. The Petitioner should have verified from the appropriate service provider that indeed the phone number is registered under DW14's name. The Petitioner also failed to prove that DW14 had on several occasions campaigned for the 1st Respondent in breach of Section 15 of the Election Offences Act. He did not tender any evidence to show that DW14 was a campaigner of the 1st Respondent or that DW14 attended any of the 1st Respondent's campaigns. Alternatively, if DW14 did campaign for the 1st Respondent, how did he do it" Did he hold meetings or rallies" Did he do door-to-door campaigns" This was another allegation loosely made without evidence.

106. On the issue of the 1st Respondent's associates holding private meetings with the 2nd Respondent, the same was not proved. The Petitioner himself in cross examination admitted that he had no evidence of such meeting. It was incumbent upon the Petitioner to show that indeed the private meetings occurred, by identifying those who attended such meetings and what was discussed in those meetings. There was no effort made to prove this allegation.

d) Voting at ungazetted polling stations at Magogoni ward

107. At paragraphs 36-37 of the Petition, the Petitioner alleged that the 3rd Respondent carried out the voting exercise at polling stations/centers that were not gazetted. The Petitioner claimed that at Magogoni ward, voters were registered at Mwandoni kwa Mtumwa grounds yet voting was not done there but instead the voting exercise was carried out at Bilima grounds which was not gazetted. This, the Petitioner claims, confused and frustrated voters.

108. The Petitioner submitted that the 3rd Respondent violated Regulation 7 (1) (c) of the Election (General) Regulations, 2012 which provides that the 3rd Respondent shall publish in the gazette and publicize through electronic and print media of national circulation the polling stations established for each constituency which may be the same as the registration centers which they respectively comprise. The Petitioner disputed the Respondents assertion that Mwandoni Kwa Mtumwa grounds and Bilima grounds are one and the same place

109. The Respondents submitted that Mwandoni kwa Mtumwa grounds and Bilima grounds were the same place and argued that voter registration and voter education did take place at the said grounds thus no voter was disenfranchised.

110. PW7 and PW8 in their testimonies claimed that they were registered to vote at Bilima grounds but on the day of the elections when they went to Bilima grounds and found that there was no voting that was going on there, they had to go to Mwandoni Kwa Mtumwa grounds where they voted.

111. DW 8, DW9, DW10 and DW14 disputed this allegation and claimed that the polling center in question is identified by two names, Mwandoni Kwa Mtumwa grounds and Bilima grounds. DW 8 and DW 9 claimed that they were voter educators in Magogoni ward and that voter registration and voter education occurred at the same place in relation to the polling center in question. The evidence of the aforementioned Defence witnesses was not shaken during cross examination.

112. A copy of Gazette Notice No. 6397 published on 30th June, 2017 is annexed to the affidavit of the Petitioner and marked as "RJB-2". The said Gazette Notice gives the names of the polling centers and polling stations in each constituency. In Kisauni Constituency, there is no polling centre by the name Bilima grounds. However, there is a polling centre by the name Mwandoni Kwa Mtumwa grounds which has three (3) polling stations.

113. DW 8, DW9, DW10 and DW14 testified to the satisfaction of this court that Bilima grounds and Mwandoni Kwa Mtumwa are one and the same place. Since voter education was conducted in Magogoni ward, voters are deemed to have been aware that the same place where they were registered is the place where they would vote. There were also various platforms through which voters would verify their respective polling centers and polling stations before the Election Day. However, even if the allegation of voter confusion was to be accepted, there was no evidence that indeed voters were disenfranchised and consequently the results of the election were affected. If anything both PW7 and PW8 testified that despite the alleged confusion, they did vote. Looking at this issue in an impartial manner, the alleged voter confusion would not confer a detriment or a benefit to any of the parties. Significantly, no candidate, not even the 1st Respondent would benefit from it. This court is not satisfied that this allegation has merit. The same is herein dismissed.

e) Discrepancies within the polling stations and the tallying centre

114. The Petitioner at paragraphs 30-32 and 38-45 of the Petition alleges that at an adjoining room within the tallying centre a number of ballot boxes were open and their seals removed. It was the Petitioner's claim that the 3rd Respondent tampered with the ballots in the said ballot boxes. Further, the Petitioner alleged that persons associated with the 1st Respondent were found to have seals and ballots papers presumably from the alleged open ballot boxes.

115. The Petitioner pleaded that the transmission of results from the polling stations to the tallying centre was not transparent. In addition, the Petitioner alleged that the results announced by the Presiding Officers were different from those that were announced by the Returning officer. It was the Petitioner's contention that the 2nd Respondent unlawfully inflated the results of the 1st Respondent in Form 35B.

116. The Petitioner submitted that there were several Forms 35A that had not been signed by ODM agents and reasons were not provided as to why the agents did not sign these forms. The Petitioner also submitted that some of the Forms 35A had alterations that had not been countersigned by the Presiding officer while there was a Form 35A for Community Christ Church-Mtopanga Polling Station No. 3 of 3 that was not signed by the presiding officer. Further, the Petitioner submitted that a ballot box from a polling station at Emmas Academy polling centre was unlawfully opened at the tallying centre and ballots therein tampered with.

117. The Respondents submitted that the absence of agents' signature on Forms 35A was not evidence of irregularity. The Respondents also submitted that the incident at the tallying centre was extensively explained by DW12 and DW13 who proved that no illegality was committed.

118. PW14, the Petitioner, in reference to the incident that occurred at the tallying centre testified that he received information that ballot boxes were being opened at the tallying centre. He proceeded to the tallying centre and when he got there he went to a classroom where he saw ballot papers and seals on the floor. He claimed that the seals which were in different colours had been cut into pieces. The Petitioner testified that he reported this incident to the 2nd Respondent but no action was taken.

119. DW12 and DW13 who were the deputy presiding officer and presiding officer respectively at Emmas Academy Polling Station No. 6 testified that after the elections exercise on 8/08/2017 they counted the votes and declared the results. They testified that on 9/08/2017 they took the ballot boxes and other election materials to the 2nd Respondent at the tallying centre. On reaching the tallying centre, DW12 testified that she was left with the ballot boxes in a room as DW13 went to secure a registration number. While at the room, DW12 testified that she was attacked by unknown people who alleged that there was interference with the ballot boxes. The attackers according to the testimony of DW12 broke the seals and took out the ballot papers. DW12 then called DW13 who came together with the 2nd Respondent and security officers. DW12 and DW13 testified that after consultations, the 2nd Respondent decided to resolve the issue by having a recount. DW12 and DW13 testified that the recount was an open exercise and that the results of the recount were similar to those that had been announced at the polling station.

120. DW14, the 2nd Respondent, corroborated the evidence of DW12 and DW13. DW14 in his testimony added that the recount was done in the presence of the agents of the candidates and the incident was recorded in the respective Polling station diary which can be found at page 273 of the 2nd and 3rd Respondents' response.

121. During cross examination of the Petitioner, he admitted to being present in the room when the above incident occurred. He also admitted that he had not received any complaint from any polling station at Emmas Academy.

122. Regulations 81 of the Election General Regulations provides that the Presiding officer shall seal the ballot boxes after placing the ballot papers in tamper proof envelopes then proceed to deliver the ballot boxes to the returning officer. Regulation 83 provides that the Returning Officer shall tally the results from the polling stations without recounting the ballots and after this the returning officer is required to seal the ballot box in the presence of the candidates or their agents.

123. It is evident from the above Regulations that the law does not envisage a recount of votes after they are declared by the Presiding officer. Even the returning officer is not allowed to recount the votes when tallying the votes. Clearly, the 2nd and 3rd Respondents violated these provisions of the law. The question left for this court to determine is whether the violation was in substantial breach of the law or whether the violation affected the results of the election" To answer this question it is important to note that the Petitioner was informed of this incident. He was present when the 2nd Respondent agreed to resolve the issue by way of a recount. During the cross examination of DW15, who is the 2nd Respondent, by the Petitioner's counsel, DW15 emphatically insisted that no agent complained about the recount. I would therefore conclude that the Petitioner was satisfied with the decision to recount although the said recount was irregular. The Petitioner did not at any point disagree with the manner in which the 2nd Respondent handled the issue.

124. I have also perused a copy of Form 35A from Emmas Academy polling station No. 6 of 6 which is at page 83 of the 2nd and 3rd Respondents' response. I have looked at the Form 35B at pages 277 to 280 of the 2nd and 3rd Respondents' response. The results as declared in the Form 35A are similar to those in Form 35B. Further, the Form 35A for Emmas Academy polling station 6 of 6 has been signed by

an ODM agent, SOPHIA H. GHAZAL. The implication being that the Petitioner did not dispute the results as declared at the polling station. It cannot therefore be concluded that the failure to procedurally comply with the law as shown above affected the results of the election either at the polling station in question or in the entire Kisauni Constituency. It should be noted that the Petitioner in his Petition had a prayer for scrutiny and recount. However, the Petitioner did not pursue these prayers. If the Petitioner had successfully pursued these prayers, he would have been able to examine the ballot papers and other materials used in this polling station and would have had a better chance of substantiating his allegations. Even then, if, for whatever reason, the votes at Emmas polling station No. 6 were to be discounted, there would be no visible dent on the overall results of the elections.

125. Turning to the issue of the Forms 35A that were not signed by ODM agents, the Petitioner contended that no reasons were indicated as to why the said agents did not sign the forms. In the Petition, the Petitioner does not specify the Forms 35A that were not signed by his agents. However, in his submissions he identifies 27 Forms 35A that were not signed by his agents. During the course of the trial, the Petitioner did not lead any evidence to substantiate this allegation. Be that as it may, Regulation 79(3) (4) (5)(6) of the Election General Regulations provides as follows:

(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.

(4) Where a candidate or agent refuses or fails to record the reasons for refusal or failure to sign the declaration form, the presiding officer shall record the fact of their refusal or failure to sign the declaration form.

(5) Where any candidate or agent of a candidate is absent, the presiding officer shall record the fact of their absence.

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

Sub-regulation (6) makes it clear that refusal of an agent to sign or record reasons for the refusal shall not invalidate the results.

126. This was the position in the cases of **Odalo Makojwando Abuor vs. Dalmas Otieno Anyango & 2 others (2013) eKLR** and **Kakuta Maimai Hamisis vs. Peris Pesi Tobiko & 2 others [2013] eKLR** where the court held that although the forms are meant to be signed by all agents, the refusal by agents to sign or given reasons coupled with the failure of the presiding officers to provide reasons for the agents refusal to sign, does not invalidate the form. This is the position adopted by this court hence this allegation is dismissed.

127. The Petitioner also alleged that some Forms 35A had alterations which were not countersigned. The Petitioner did not identify the specific Forms 35A that had alterations nor did he call the attention of this court to the alleged alterations. This court is left to wonder which alterations the Petitioner was referring to. The Petitioner ought to have identified the specific forms 35A that had alterations and pointed out the alterations that were made in those forms. The burden of proof as stated earlier is on the Petitioner and he has to efficiently discharge it to the satisfaction of this court. The Petitioner has been in possession of the 2nd and 3rd Respondents' Response to the Petition since September, 2017. The said Response contains copies of Forms 35A for Kisauni Constituency. The Petitioner could have easily perused these forms and identified the alleged alterations. However, the Petitioner did not do so. This

court cannot therefore venture into determining the effect of the alleged alterations if in the first place it was not made aware of these alterations. For this reason, this allegation is dismissed.

128. An allegation was raised by the Petitioner that the Form 35A for Community of Christ Church-Mtopanga Polling Station No. 3 of 3- was not signed by the Presiding Officer. Regulation 79 (1) of the Election (General) Regulations, 2012 provides that the presiding officer shall sign the declaration form. I should think that the basis for this Regulation is to ensure credibility of the results. But can the results be credible if the Presiding Officer still does not sign Form 35A" Form 35A is signed by not only the presiding officer but also the candidates or their agents. In this case, the Form 35A in question was signed by four agents including one who was representing ODM party, one GODFREY A. ODINGA. I would think that the agents also by signing the form attest to the credibility and accuracy of the results therein. In essence, the Petitioner through his agent was agreeable to the results that were announced in this polling station and did not lead any evidence to the contrary. The Petitioner also failed to prove that the alleged failure by the presiding officer to sign the forms affected the results that were declared in that polling station. Justice Mabeya in the case of **Abdikam Osman Mohamed & Another vs. Independent Electoral & Bounseries Commission & 2 others [2013]eKLR**, had the following to say regarding Form 35A not being signed by the presiding officer :

“Regulation 79 (1) of the Regulations imposes a duty on the presiding officer to sign the Form 35. Where there is failure to do so, the Election Court should resolve the issue in favour of preserving the voter’s inalienable right to vote particularly when there is no proof that failure by the Presiding Officer to sign or stamp the Form 35 was willful or affected the election results in any manner.

In this regard, the Petitioners did not lead any evidence that the lack of signatures or stamp of the presiding officers in Forms 35 for the above mentioned polling stations affected the outcome of the election. Further, the Petitioners did not even challenge the results that were tallied and declared in those polling stations. It is not enough for the Petitioners to merely allege and indicate a failure on the part of the 1st and 2nd Respondent, but it was also essential for them to demonstrate that such failure affected the result of the election. The concerned Presiding Officers who failed to sign or stamp the Forms 35 should however be sanctioned but this does not mean that the voter who toiled for hours to exercise his or her right to vote should be disenfranchised for the omissions of the electoral officials.” (Emphasis added)

129. This court finds that although the Presiding Officer for the polling station in question failed to sign Form 35A, this failure did not in any way affect the results that were declared. This allegation is therefore dismissed.

f) Ejection of the Petitioner’s agents from polling stations

130. The Petitioner at paragraphs 33-35 of his Petition pleaded that his agents were barred and/or ejected from various polling stations during the voting and counting process. The Petitioner contended that the 1st Respondent had colluded with police officers to exclude his agents from polling stations. The Petitioner did not submit on this allegation. The Respondents submitted that the Petitioner did not prove that he had agents who were properly accredited and that the Petitioner did not call any witness or any of the agents who were allegedly ejected or barred from polling stations to prove these allegations.

131. The Petitioner called a total of 13 witnesses. Some of these witnesses testified that they were agents of ODM party. However, none of these agents claimed that they had been ejected or denied access at any polling station. Further, the Petitioner in his own testimony and pleadings did not identify

any of the agents who were ejected and the respective polling stations from where they were ejected. This court is left to question whether the agents had all the relevant statutory documents; whether they presented these documents to the presiding officers; what reasons were given by the presiding officers for denying these agents access or ejecting them from the polling stations; if at all; and whether the reasons given were justifiable.

132. The Evidence Act at section 107 provides that a party that alleges that certain facts exist must prove existence of the facts. The burden of proof lies squarely with the Petitioner. The Petitioner cannot make a blanket allegation and deem it duly proved when there is no proof. This court finds that this allegation has not been proved and is hereby dismissed.

b) Whether the 1st Respondent was validly elected as the Member of Parliament for Kisauni Constituency

133. The Constitution provides that for an election to be valid it must be free and fair. Articles 83 and 86 set out principles for a free and fair election. The election should be verifiable, transparent, accurate, impartial and accountable. Has the Petitioner proved that these principles were grossly violated to warrant the invalidation of the election?"

134. Section 83 of the Election Act provides that if an election appears to have been conducted in compliance with the Constitution and any written law, such an election will not be invalidated. The Petitioner has not proved that the Respondents substantially violated the principles enumerated above. Section 83 of the said Act further provides that to invalidate an election, a petitioner may prove that non-compliance with the principles in the law affected the result of the election. The Petitioner did not show that where there were irregularities, the irregularities affected the results declared. The Supreme Court in the case of **Raila Amolo Odinga & Another (supra)** observed as follows:

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

135. In essence, Section 83 provides two limbs upon which a Petitioner can invalidate an election. A Petitioner does not need to prove both limbs. Proof of one limb is enough. The Petitioner herein did not prove any of the limbs. This court finds that the 1st Respondent, ALI MENZA MBOGO was validly elected as the member of National Assembly for Kisauni Constituency. This Petition is, accordingly, dismissed.

c) Who shall bear the costs of this Petition"

136. Section 84 of the Elections Act provides that an election court shall award costs in an election petition and such costs shall follow the cause. Rule 30 (1) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 also provides for costs and states that at the end of a petition, an election court may make an order on the total amount of costs payable, the maximum amount of costs, the person who shall pay the costs and how the costs shall be payable.

137. While Section 84 of the substantive legislation provides that costs shall follow the cause, Rule 30 (2) provides that an election court may impose the burden of costs on a party that may have caused

unnecessary expense whether or not that party is successful.

138. The Petitioner submitted that costs should not exceed Kshs.3,000,000.00 while the Respondents prayed that costs be assessed at Kshs. 10,000,000.00.

139. In the spirit that justice is accessible to all as espoused by Article 48 of the Constitution, costs should not be so high as to lock out potential litigants. Bearing this in mind and taking into account the amount of documents filed and the work done in conducting the Petition, I do find a total amount of Kshs.2.5 million to be sufficient. The said amount shall be paid by the Petitioner to the Respondents as follows; Kshs. 1,500,000.00 to the 1st Respondent and Kshs. 1,000,000.00 to the 2nd and 3rd Respondents.

140. For the foregoing reasons this Petition is dismissed. A Certificate of validity of the election shall issue to the Independent Electoral and Boundaries Commission and to the Speaker of the National Assembly in accordance with Section 86 of the Election Act.

Dated, Signed and Delivered in open court in Mombasa this 5th Day of March, 2018.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Said for Petitioner

Mr. Ndegwa for 1st Respondent

Ms. Oyier for 2nd & 3rd Respondents

Mr. Kaunda Court Assistant



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