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**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**ELECTION PETITION NO. 8 OF 2017**

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

**FRANCIS WAMBUGU MUREITHI.....PETITIONER**

**VERSUS**

**OWINO PAUL ONGILI BABU .....1<sup>ST</sup> RESPONDENT**

**NICHOLAS K. BUTTUK .....2<sup>ND</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION .....3<sup>RD</sup> RESPONDENT**

**JUDGEMENT**

1. Francis Wambugu Mureithi, and Owino Paul Ongili Babu, the petitioner and the 1<sup>st</sup> respondent respectively herein with eight others vied for the post of Member of National Assembly of Embakasi East Constituency on various political party tickets in the 8<sup>th</sup> August 2017 General Elections. The petitioner vied on a Jubilee Party(JP) ticket while the 1<sup>st</sup> respondent vied on the Orange Democratic Movement Party ticket. On 9<sup>th</sup> August 2017, Nicholas Buttuk, the 2<sup>nd</sup> respondent herein, in his capacity as the Constituency returning Officer, announced and declared the 1<sup>st</sup> respondent as the duly elected member of National Assembly for Embakasi East Constituency having garnered a total of 46,587 votes. The petitioner came second in the contest having garnered 42,253 votes. The petitioner being aggrieved by the declaration, filed the petition dated 5<sup>th</sup> September 2017 to challenge the election of the 1<sup>st</sup> respondent.

2. In the aforesaid petition, the petitioner sought for the following

orders and declarations:

***a) It be ordered that there be scrutiny and recount of all votes recorded as having been cast in the parliamentary elections in Embakasi East Constituency.***

***b) it be determined and ordered that the election of the 1<sup>st</sup> respondent as Member of parliament for Embakasi East Constituency was in any event null and void and he was, therefore, not duly elected.***

**c) That the said parliamentary election held on 08.08.2017 in Embakasi East constituency be determined and declared null and void.**

**d) It be determined that the 1<sup>st</sup> respondent had not been validly elected as the member of the national assembly for Embakasi East Constituency.**

**e) It be determined and ordered that the election of the 1<sup>st</sup> respondent as member of the national assembly for Embakasi East Constituency was in any event null and void and he was therefore not duly elected.**

**f) It be determined and declared that he petitioner was indeed validly elected as the member of the National Assembly for Embakasi East Constituency.**

**g) That such election offences and malpractice of omission and commission by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents as disclosed and found by the honourable court be reported to the investigative and prosecutorial agencies for appropriate action.**

**h) The respondents be condemned to pay the costs of this petition, and**

**i) Such further or other relief or orders be made as may be just.**

3. The petition is supported by the affidavit evidence of Francis Wambugu Mureithi, Obiende Joshua Otieno, Moses Mwangi Kihuga, Jane Wandai, James Gitau Kamau, George Kimani Njambi, Samuel Ngugi, Gilbert Njuguna, Kennedy Njoroge, Naftaly Wambugu, Eddmud Weru and Ayub Kimani Mwangi. The petitioner also filed a further affidavit of Obiende Joshua Otieno. All the aforesaid deponents of the affidavits filed in support of the petition testified before this court except for Samuel Ngugi and Gilbert Njuguna.

4. When served with the petition, the 1<sup>st</sup> respondent filed a response dated 20<sup>th</sup> September 2017 to oppose the same. The 1<sup>st</sup> respondent filed an affidavit he swore together with 32 witness affidavits in answer to the petition. However, when the petition came up for hearing the 1<sup>st</sup> respondent and six witnesses namely Jim O. Owino, Michael Ogutu, Duncan Odundo, Cynthia Akoth Zipporah Ngota and Florence Adhiambo were the only witnesses who testified to oppose the petition on the part of the 1<sup>st</sup> respondent.

5. Nicholas Buttuk and I.E.B.C, being the 2<sup>nd</sup> and 3<sup>rd</sup> respondents respectively, filed a joint response to the petition which response was also supported by the affidavits of Nicholas Buttuk and two witness affidavits of Radson Kuteyi and Josphat Nyandiko. The aforesaid deponents also testified before this court to oppose the petition on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

6. At the close of evidence, the petitioner successfully applied for orders of scrutiny and recount of ballots. The report on scrutiny and recount dated 21.2.2018 has been supplied to the parties. Learned counsels were also invited to file and exchange written submissions. I have considered both the oral and affidavit evidence and I do not intend to regurgitate the same in this judgment but would instead consider and analyse them as I determine the issues. I have further taken into account the report on scrutiny and recount. After a careful consideration of the pleadings, the evidence and the individual issues proposed by each party and I think the following issues commend themselves for determination by this court:

**i. Whether there were election irregularities and illegalities in the election of the member of National Assembly, Embakasi East Constituency held on 8<sup>th</sup> August 2017 and whether the**

***irregularities and illegalities if any affected the electoral process and the outcome of the aforesaid election.***

***ii. Whether the 1<sup>st</sup> respondent was validly elected and declared as the member of National Assembly of Embakasi East Constituency.***

***iii. What consequential declarations, orders and or reliefs should issue.***

***iv. Who should bear costs of these proceedings"***

7. The first issue can be determined in two parts. First, is to identify whether or not there were irregularities and illegalities during the election of member of National Assembly, Embakasi East Constituency in the general election on 8/8/2017.

8. Secondly, if it is found that there were irregularities and illegalities, whether or not they affected the electoral process and the outcome of the election. It is the submission of the petitioner that he presented evidence to demonstrate that 44 forms 35A which were used by the 2<sup>nd</sup> respondent to announce the election results for Embakasi East Constituency did not have the I.E.B.C's (3<sup>rd</sup> respondent's) stamp. In paragraph 23 of the petition the petitioner stated *inter alia* as follows:

**"23. .... that several form 35As are also not signed, nor stamped by the 2<sup>nd</sup> and 3<sup>rd</sup> respondent's officers ....."**

The petitioner also deponed in paragraph 28 of the affidavit filed in support of the petition in part as follows:

**"I have attached hereto and marked 'F.WM-8' forms 35As where my agents did not sign to either witness or raise any objection to the results declared and also those without the signatures of the presiding officer and the stamp of the 3<sup>rd</sup> respondent."**

9. The petitioner appeared and pointed out the forms 35As he alleged did not have the IEBC stamp.

10. In response to the issue touching on non-stamping of forms 35As, Nicholas Buttuk (DW3) deponed in paragraph 35 of his replying affidavit in part as follows:

**"35 In response to paragraphs 27 and 28 of the petition, the allegation therein is couched in generality thus the petitioner is put to strict proof. Further all authorized and appointed agents in line with regulation 61 (1) (c ) and (4) of the Elections (General) Regulations, 2012 were allowed in various polling stations throughout the constituency and the said authorized agents witnessed the electoral process from the beginning to the end and appended their signatures on the same confirming the results. Any allegations to the contrary is put to strict proof."**

11. It is apparent from the replying affidavit of the 2<sup>nd</sup> respondent that a general denial was made. It is also important to note at this stage that copies of forms 35As were attached to the replying affidavit of Nicholas Buttuk (DW3). When DW3 appeared to testify before this court, he admitted that some of the form 35As did not have the I.E.B.C stamp. I have carefully perused the forms 35As which are annexed to the affidavit of Nicholas Buttuk and marked as Annexures NB2 and it is apparent that the following 43 forms 35As did not have the I.E.B.C. stamp.

***1. Tassia Catholic Primary School Polling Station no. 1 of 29***

- 2. Tassia Catholic Primary School Polling Station no. 22 of 29**
- 3. Tassia Catholic Primary School Polling Station no. 28 of 29**
- 4. Tassia Catholic Primary School Polling Station no. 29 of 29**
- 5. Mihango Primary School Polling Station no. 1 of 11**
- 6. Immaculate Primary School Polling Station no. 8 of 11**
- 7. Maua Primary School Polling Station no. 1 of 7**
- 8. Maua Primary School Polling Station no. 4 of 7**
- 9. Maua Primary School Polling Station no. 5 of 7**
- 10. Maua Primary School Polling Station no. 6 of 7**
- 11. Maua Primary School Polling Station no. 7 of 7**
- 12. East African School of Aviation Polling Station no. 1 of 16**
- 13. East African School of Aviation Polling Station no. 3 of 16**
- 14. East African School of Aviation Polling Station no. 8 of 16**
- 15. East African School of Aviation Polling Station no. 10 of 16**
- 16. East African School of Aviation Polling Station no. 16 of 16**
- 17. Utawala Academy Polling Station no. 1 of 18**
- 18. Utawala Academy Polling Station no. 5 of 18**
- 19. Utawala Academy Polling Station no. 10 of 18**
- 20. Utawala Academy Polling Station no. 11 of 18**
- 21. Embakasi Social Hall Polling Station no. 5 of 21**
- 22. Embakasi Social Hall Polling Station no. 14 of 21**
- 23. Soweto Social Hall Polling Station no. 3 of 28**
- 24. Soweto Social Hall Polling Station no. 4 of 28**
- 25. Soweto Social Hall Polling Station no. 5 of 28**
- 26. Soweto Social Hall Polling Station no. 12 of 28**

- 27. Soweto Social Hall Polling Station no. 17 of 28**
- 28. Soweto Social Hall Polling Station no. 24 of 28**
- 29. Soweto Social Hall Polling Station no. 25 of 28**
- 30. Soweto Social Hall Polling Station no. 26 of 28**
- 31. Edelvale Primary School Polling Station no. 1 of 13**
- 32. Edelvale Primary School Polling Station no. 5 of 13**
- 33. Edelvale Primary School Polling Station no. 12 of 13**
- 34. Doonholm Primary School Polling Station no. 5 of 27**
- 35. Doonholm Primary School Polling Station no. 7 of 27**
- 36. Doonholm Primary School Polling Station no. 9 of 27**
- 37. Doonholm Primary School Polling Station no. 11 of 27**
- 38. Doonholm Primary School Polling Station no. 12 of 27**
- 39. Doonholm Primary School Polling Station no. 19 of 27**
- 40. Doonholm Primary School Polling Station no. 20 of 27**
- 41. Doonholm Primary School Polling Station no. 23 of 27**
- 42. Doonholm Primary School Polling Station no. 25 of 27**
- 43. Doonholm Primary School Polling Station no. 26 of 27**

12. On 12<sup>th</sup> February 2018, this court issued an order directing the 3<sup>rd</sup> respondent to grant access to and supply to this court certified copies of the original forms 35As in respect of the following polling stations and centre for scrutiny:

- i. Mihango primary school polling station number 1***
- ii. Immaculate primary school polling station number 8***
- iii. Immaculate primary school polling station number 9***
- iv. Maua primary school polling station number 1***
- v. Maua primary school polling station number 4***
- vi. Maua primary school polling station number 5***

- vii. Maua primary school polling station number 6***
- viii. Maua primary school polling station number 7***
- ix. East African school of aviation polling station number 1***
- x. East African school of aviation polling station number 3***
- xi. East African school of aviation polling station number 10***
- xii. East African school of aviation polling station number 16***
- xiii. Utawala academy polling station number 5***
- xiv. Utawala academy polling station number 10***
- xv. Utawala academy polling station number 11***
- xvi. Tassia catholic primary school polling station number 1***
- xvii. Tassia catholic primary school polling station number 3***
- xviii. Tassia catholic primary school polling station number 7***
- xix. Tassia catholic primary school polling station number 22***
- xx. Tassia catholic primary school polling station number 28***
- xxi. Tassia catholic primary school polling station number 29***
- xxii. Embakasi social hall polling station number 5***
- xxiii. Embakasi social hall polling station number 14***
- xxiv. Embakasi social hall polling station number 17***
- xxv. Soweto social hall polling station number 3***
- xxvi. Soweto social hall polling station number 4***
- xxvii. Soweto social hall polling station number 5***
- xxviii. Soweto social hall polling station number 6***
- xxix. Soweto social hall polling station number 12***
- xxx. Soweto social hall polling station number 17***
- xxxi. Soweto social hall polling station number 24***

**xxxii. Soweto social hall polling station number 25**

**xxxiii. Soweto social hall polling station number 26**

**xxxiv. Edelvale primary school polling station number 1**

**xxxv. Edelvale primary school polling station number 5**

**xxxvi. Edelvale primary school polling station number 12**

**xxxvii. Doonholm primary school polling station number 5**

**xxxviii. Doonholm primary school polling station number 7**

**xxxix. Doonholm primary school polling station number 9**

**xl. Doonholm primary school polling station number 11**

**xli. Doonholm primary school polling station number 12**

**xl. Doonholm primary school polling station number 15**

**xliii. Doonholm primary school polling station number 19**

**xliv. Doonholm primary school polling station number 20**

**xl. Doonholm primary school polling station number 23**

**xlvi. Doonholm primary school polling station number 25**

**xlvii. Doonholm primary school polling station number 26**

In the report filed by the Deputy Registrar of this court dated 21.2.2018, it is noted that the 3<sup>rd</sup> respondent supplied to this court 18 forms 35As in respect of the following polling stations:

S/ NO	Polling Station	Serial no.	IEBC stamp	PO/DPO Details	Alteration	Agents details	remarks
1.	Embakasi Primary School 2	NAOO1840	YES	YES	NONE	YES	NONE
2.	Embakasi Primary School 3	NAOO11860	YES	YES	NONE	YES	NONE
3.	Embakasi Primary School 4	NAOO1879	YES	YES	NONE	YES	NONE
4.	Embakasi Primary School 5	NAOO1897	YES	YES	NONE	YES	NONE
5.	Embakasi Primary School 6	NAOO1531	YES	YES	YES	YES	Alterations counter signed
6.	Embakasi Primary	NAOO1939	YES	YES	NONE	YES	NONE

	School 7							
7.	Embakasi School 8	Primary	NAOO1573	YES	YES	NONE	YES	NONE
8.	Embakasi School 9	Primary	NAOO1975	YES	YES	YES	YES	Alterations counter signed
9.	Embakasi School 10	Primary	NAOO1609	YES	YES	NONE	YES	NONE
10.	Embakasi School 11	Primary	NAOO1919	YES	YES	YES	YES	Alterations counter signed
11.	Embakasi School 12	Primary	NAOO1639	YES	YES	NONE	YES	NONE
12.	Embakasi School 13	Primary	NAOO1658	YES	YES	NONE	YES	NONE
13.	Embakasi School 14	Primary	NAOO1681	NONE	YES	NONE	YES	NONE
14.	Donholm School 15	Primary	NAOO0260	NONE	YES	NONE	YES	NONE
15.	Tassia Catholic Primary School 18		NAOO2390	YES	YES	NONE	YES	NONE
16.	Embakasi Social Hall 17		NAOO1729	YES	YES	NONE	YES	NONE
17.	Immaculate School 9	Primary	NAOO3679	NONE	YES	NONE	YES	3 Unmarked ballot papers credited to BABU OWINO
18.	Mihango School 9	Primary	Not visible	YES	YES	NONE	YES	NONE

13. Upon scrutiny of the forms supplied it is apparent that form 35As in respect of Embakasi Primary School polling station no. 14, Doonholm Primary School polling station no. 15 and Immaculate Primary School polling station no. 9 did not have the I.E.B.C stamp.

14. The 3<sup>rd</sup> respondent failed to supply to this court form 35As in respect of the following polling stations:

***i. Mihango primary school polling station number 1***

***ii. Immaculate primary school polling station number 8***

***iii. Immaculate primary school polling station number 9***

***iv. Maua primary school polling station number 1***

***v. Maua primary school polling station number 4***

***vi. Maua primary school polling station number 5***

***vii. Maua primary school polling station number 6***

- viii. Maua primary school polling station number 7***
- ix. East African school of aviation polling station number 1***
- x. East African school of aviation polling station number 3***
- xi. East African school of aviation polling station number 10***
- xii. East African school of aviation polling station number 16***
- xiii. Utawala academy polling station number 5***
- xiv. Utawala academy polling station number 10***
- xv. Utawala academy polling station number 11***
- xvi. Tassia catholic primary school polling station number 1***
- xvii. Tassia catholic primary school polling station number 3***
- xviii. Tassia catholic primary school polling station number 7***
- xix. Tassia catholic primary school polling station number 22***
- xx. Tassia catholic primary school polling station number 28***
- xxi. Tassia catholic primary school polling station number 29***
- xxii. Embakasi social hall polling station number 5***
- xxiii. Embakasi social hall polling station number 14***
- xxiv. Embakasi social hall polling station number 17***
- xxv. Soweto social hall polling station number 3***
- xxvi. Soweto social hall polling station number 4***
- xxvii. Soweto social hall polling station number 5***
- xxviii. Soweto social hall polling station number 6***
- xxix. Soweto social hall polling station number 12***
- xxx. Soweto social hall polling station number 17***
- xxxi. Soweto social hall polling station number 24***
- xxxii. Soweto social hall polling station number 25***

- xxxiii. Soweto social hall polling station number 26***
- xxxiv. Edelvale primary school polling station number 1***
- xxxv. Edelvale primary school polling station number 5***
- xxxvi. Edelvale primary school polling station number 12***
- xxxvii. Doonholm primary school polling station number 5***
- xxxviii. Doonholm primary school polling station number 7***
- xxxix. Doonholm primary school polling station number 9***
- xl. Doonholm primary school polling station number 11***
- xli. Doonholm primary school polling station number 12***
- xlii. Doonholm primary school polling station number 15***
- xliii. Doonholm primary school polling station number 19***
- xliv. Doonholm primary school polling station number 20***
- xlv. Doonholm primary school polling station number 23***
- xlvi. Doonholm primary school polling station number 25***
- xlvii. Doonholm primary school polling station number 26***
- xlviii. Edelvale primary school polling station number 4***
- xliv. Mihango primary school polling station number 8***
- I. Greenspan mall grounds polling station number 5***
- li. Doonholm primary school polling station number 20***
- lii. Doonholm primary school polling station number 15***
- liii. Doonholm primary school polling station number***
- liv. Greenspan mall grounds polling station number 5***
- lv. Greenspan mall grounds polling station number 7***
- lvi. Greenspan mall grounds polling station number 8***
- lvii. Greenspan mall grounds polling station number 12***

***Iviii. Edelvale primary school polling station number 8***

***lix. Embakasi social hall polling station number 6***

***lx. Embakasi social hall polling station number 9***

***lxi. Tassia catholic primary school polling station number 3***

***lxii. Tassia catholic primary school polling station number 4***

***lxiii. Tassia catholic primary school polling station number 29***

***lxiv. Tassia catholic primary school polling station number 18***

***lxv. Utawala academy polling station number 7***

***lxvi. Mihango primary school polling station number 9***

***lxvii. Mihango primary polling station number 10***

***lxviii. Embakasi primary school polling centre***

15. The aforementioned form 35As were annexed to the affidavit of Nicholas Buttuk and marked as exhibit 'NB2'. I have perused those forms and there is no dispute that the aforesaid forms did not have the I.E.B.C stamp. None of the respondents and their witnesses disputed the averment that the aforesaid forms lacked the I.E.B.C stamp. I am convinced that the petitioner has proved the allegation that several form 35As were not stamped by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

16. The second issue to determine is what is the impact of the non- stamped forms 35As" It is the submission of the petitioner that the authenticity of forms 35As in the affected polling stations is questionable in the absence of the I.E.B.C stamp. The petitioner pointed out that the specified forms are in respect of 44 polling stations with a total of 20,473 votes cast. The petitioner also averred that the official stamp is an additional security measure in order to identify the form as an official I.E.B.C document and distinguish it from any other form.

17. On the other hand, it is the submission of the 1<sup>st</sup> respondent that though some of the form 35As were not stamped by the presiding officers, each of those forms were signed by at least a presiding officer therefore the failure to stamp the said forms was immaterial in determining the true will of the people of Embakasi East Constituency. The 1<sup>st</sup> respondent further argued that the failure to stamp forms 35As cannot therefore by and of itself be a reason to nullify the election without further cogent evidence being adduced to establish that the election was materially flawed and or that the results were materially affected. It is the further submission of the 1<sup>st</sup> respondent that the failure to stamp the forms 35As occurred in only one polling station per a polling centre in different wards in Embakasi East Constituency therefore this shows that the omission was an error by presiding, officers in random polling stations hence it was not a deliberate or systematic omission as the petitioner alleges. The 1<sup>st</sup> respondent cited the decision of **John Murumba Chikati –vs= the Returning Officer, Tongaren Constituency and 2 others (2013) eKLR Election Petition no. 4 of 2013** where Justice Gikonyo held inter alia that

**“.....affixing the official stamp is important, but lack of it does not invalidate the form or the results thereto. The requirement of the law under regulation 79 of the Elections (General)**

**Regulations, 2012 ..... is that the presiding officer signs the statutory form”**

The 1<sup>st</sup> respondent further relied on the case of **I.E.B.C & Another =vs= Stephen Mutinda Mule & 3 others (2014) C.A no. 219 of 2013 eKLR** where the Court of Appeal held inter alia as follows:

**“There is no stamping requirement in the case of the form 35. All that is required with regard to form 35 as provided for in Regulation 79 is the signature of the presiding officer and the agents of the candidates.**

**We agree with the submission made on behalf of the appellant that it is the signatures of the presiding officers and the agents that authenticate the form 35.”**

18. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents were of the view that the petitioner has in his pleadings failed to identify specific polling stations where forms 35As did not have the I.E.B.C stamp. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not however deny the allegation that several form 35As did not have the I.E.B.C stamp. They argued that the failure to affix the IEBC stamp on the aforesaid form was not fatal. They relied on the case of **I.E.B.C and Another =vs= Stephen Mutinda Mule and 3 others (2014) eKLR (Supra)**

19. Having considered the pleadings, the evidence and the rival submissions, it is clear in my mind that the arguments of the respondents carry the day. It is not in dispute that several form 35As did not have the I.E.B.C stamp. With respect, I agree with the submissions of the respondents that the failure to affix the I.E.B.C stamp on the form 35As was not fatal so long as the aforesaid forms are signed by the presiding officers and the agents. This ground therefore crumbles.

20. The second ground put forward by the petitioner in support of his petition is that the authenticity of form 35As in four (4) polling station is in doubt since the aforesaid forms do not bear the signature of the presiding officers. The petitioner named the following polling stations whose forms 35As had no signatures of the presiding officers:

***i. Edelvale Primary School Polling Station no. 4***

***ii. Mihango Primary School Polling Station no. 8***

***iii. Greenspan Mall Grounds Polling Station no. 5***

***iv. Doonholm Primary School Polling Station no. 20***

21. The petitioner stated that the votes cast in the aforesaid polling station were 1953. It is the submission of the petitioner that the signature of the presiding officer or the deputy presiding officer on form 35A is a mandatory legal requirement under Regulation 79 of the Elections (General) Regulation, 2012. The petitioner cited the case of **John Murumba Chikati =vs= Returning Officer Tongaren Constituency & 2 others (2013) eKLR** where it was held *inter alia*:

**“..... the requirement of the law .... is that the presiding officer signs the statutory form.**

**..... The statutory form is valid once it has been signed by the presiding officer,  
.....”**

The petitioner further cited the case of **Raila Odinga & Another =vs= Independent Electoral and Boundaries Commission & 2 others petition no. 1 of 2017** in which the Supreme Court held in part as

follows:

**"|..... of the 4,229 forms 34A that were scrutinized, many were not stamped, yet others were unsigned by the presiding officers and still many more were photocopies. 5 of the forms 34B were not signed by the returning officers. Why would a returning officer or for that matter a presiding officer, fail or neglect to append his signature to a document whose contents he/she has generated" Isn't the appending of a signature to a form bearing the tabulated results, the last solemn act of assurance to the voter by such office that he stands by the "numbers" on that form" Where do all these inexplicable irregularities, that go to the very heart of electoral integrity, leave this election" It is true that where the quantitative difference in numbers is negligible, the court, as we were urged, should not disturb an election. But what if the numbers are themselves a product, not of the expression of the free and sovereign will of the people but of the many unanswered questions with which we are faced."**

22. The petitioner further pointed out that forms 35As in the following three polling stations were altered without being countersigned:

***a. Embakasi Social Hall polling Station no. 6***

***b. Edelvale Primary School Polling Station no. 3***

***c. Embakasi Primary School Polling Station no. 6***

In the aforesaid polling stations a total of 1410 votes were cast.

23. The 1<sup>st</sup> respondent's response to the allegation is to the effect that the petitioner made general and broad allegations that some forms 35A were not signed without specifying the particular forms to enable him adequately file a response. The 1<sup>st</sup> respondent further pointed out that the forms identified by the petitioner in paragraph 28 of his affidavit were actually signed by both the presiding officers and the deputy presiding officers in the respective polling stations. In response to the four (4) forms 35A identified by the petitioner, it is the 1<sup>st</sup> respondent's submission that there was no allegation that in the petition or evidence that the results indicated in any of the said forms do not reflect the correct results as counted and declared at the polling stations. It is also his argument that there are no alterations or any changes to any candidate's results in any of those forms. It was also argued that no agent from the affected stations was summoned to testify except that from Edelvale Primary School polling station. The 1<sup>st</sup> respondent further stated that all the listed form 35As were signed by the petitioner's agents. As regards Edelvale Primary polling station, the 1<sup>st</sup> respondent stated that in the absence of proof that Mr. George Kimani Njambi was the petitioner's appointed and accredited agent at that polling station his evidence in respect of the said polling station does not meet the standard of proof in election disputes. It was also pointed out that the form 35A in respect of Embakasi Social Hall polling station no. 7 was signed by Samuel Ngugi who failed to come to court to testify. It is for those reasons that the 1<sup>st</sup> respondent has urged this court to find that in the circumstances it was difficult to verify the truth or otherwise of the allegations of George Kimani Njambi.

24. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents argued that the 3<sup>rd</sup> respondent's agents and officials were conducting an election which involved six elections which in itself was not an easy task as it involved long hours and under the circumstances, a few innocent and or unintentional human errors and or mistakes here and there in the electoral process had to be experienced. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents have also argued that the petitioner has made ambiguous and blanket allegations that certain forms were not signed by the presiding officers. It is stated that the petitioner does not indicate which specific polling stations were

affected by the allegation. The respondents have pointed out that though the petitioner has named in his submissions four(4) polling stations, he does not challenge the results as entered in those forms. There is no doubt that the respondents have raised a common issue which is to the effect that the petitioner has put forward a general complaint on non-signing of forms 35As by the presiding offices without specifying which polling stations were affected. It is not in dispute that the petitioner raised the question touching on the failure on the part of the presiding officer failure to append their signatures on forms 35As without specifying the affected polling stations. The question to be determined at this preliminary stage is whether or not this is fatal. It is also not in dispute that the respondents in their responses to the petition filed affidavits whereof they annexed copies of forms 35As. At the hearing of the petition, witness were cross-examined on the issue touching on the failure by the presiding officers to append their signatures on those forms. It is clear in my mind that though the petitioner did not mention the affected polling stations, the respondents were put on notice that such an issue will arise at the trial. I agree with the submissions of the petitioner that if an issue arises in the course of a hearing and the same is fully canvassed by the parties, even if that issue was not pleaded, the court will make a determination on the matter. In **Odd Jobs =vs= Mubia (1979) E.A 476** it was held inter alia **“that a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue had been left to the court for decision.”**

25. There is no doubt in my mind that the issue in respect of the failure to sign forms 35As was left for the determination of this court.

26. Having determined the preliminary issue, let me now determine the merits of the matter. I have perused the forms 35As in respect of the four polling stations namely: **Mihango Primary School Polling Station no. 8, Edelvale Primary School polling station no. 4, Greenspan Mall Grounds polling station no..... 5 and Doonholm Primary School polling station no. 20** and it is apparent that those forms were not signed by the respective presiding officers. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents have argued that may be their officers were tired.

27. Another irregularity which was raised by the petitioner is related to the first two issues discussed hereinabove. It is said that the results in respect of three polling stations in form 35A were altered without being countersigned. The petitioner mentioned the three polling stations as **Embakasi Social Hall polling station no. 6, Edelvale Primary School polling station no. 3 and Embakasi primary School polling station no. 6**. The petitioner has argued that the alterations made on the statutory forms are required to be countersigned by the presiding officer to ensure verifiability of the altered results. This court was urged to find that where the result forms are altered but are not countersigned they should suffer the same fate of invalidation as unsigned forms. The petitioner pointed out that the forms are in respect of 1410 votes cast. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents admitted that the results in form 35A in Embakasi Primary School polling station no. 6 were altered and there was no countersigning. They further stated that the results of the other two polling stations were altered but were countersigned. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents are of the view that the mistake is excusable considering that no issues have been raised over the results or the authenticity of the form and further that the same cannot affect the outcome of the result.

28. The 1<sup>st</sup> respondent on the other hand is of the view that the petitioner made general allegations without specifying the polling stations where votes were altered. The 1<sup>st</sup> respondent pointed out that except for three (3) forms, all the forms 35As were signed by the agents. He further argued that the alterations of results occurred in two forms 35As for **Embakasi Social Hall polling station nos. 6 and 7** were altered but countersigned by the presiding officers. The 1<sup>st</sup> respondent stated that the alterations were undertaken after recount. The 1<sup>st</sup> respondent accused Mr. Kennedy Njoroge, the petitioner's agent for failing to append his signature and for failing to take part in the recounting exercise despite being

asked to do so by the presiding officer. The 1<sup>st</sup> respondent argued that the alteration of one form out of 14 polling stations in a polling centre without countersigning is excusable and in any case cannot of itself affect the result of the election.

29. I have considered the evidence tendered and the rival submissions. It is clear that the alterations in forms 35As of **Embakasi Social Hall polling station no. 6** and **Edelvale Primary School polling station no. 3** were countersigned by the presiding officer. However form 35A in respect of **Embakasi Primary school polling station no. 6** was not annexed to the affidavit of Nicholas Buttuk. However the one annexed to the affidavit of Gilbert Njuguna who was an agent to the petitioner shows that the results in form 35A in respect of **Embakasi Primary School polling station no. 6** was altered but was not countersigned by the presiding officer. It is surprising that the 3<sup>rd</sup> respondent did not deem it fit to avail to this court that particular form in response to the petition. I have already noted that all the respondents agree that the results in form 35A in respect of Embakasi Primary School polling station no. 6 was altered but not countersigned.

30. The report on scrutiny and recount dated 21.2.2018 indicates that the 3<sup>rd</sup> respondent supplied to the Deputy Registrar of this court a copy of the aforesaid form and upon perusal it was clear that the form was altered but countersigned by the presiding officer. This court is now dealing with two conflicting situations. Unfortunately, neither the presiding officer nor the petitioner's agent in the aforesaid polling station testified hence the issue will remain in doubt.

31. In a situation where alterations are done without being countersigned, the law is clear that the results in such an altered form cannot be relied upon. In the case of **Nathif Jama Adam =vs= Adbikhaim Osman Mohammed & 3 others (2014) eKLR** the Court of Appeal held *inter alia* that:

**“..... In James Omingo Magara =vs= Manson Myamweya & 2 others, Civil Appeal no. 8 of 2010, this court held that when a document is not signed by its author it means that the author does not own it. It follows therefore that in this case the forms 35 with no presiding officer's signature were worthless and their results should have been excluded from the final tally. In the same vein, the absence of countersignatures against alterations, especially where such alterations related to votes garnered by the candidates, the results of the election on those forms were unverifiable.”**

32. The failure by the petitioner and the 3<sup>rd</sup> respondent to summon the agent and the presiding officers respectively to testify robbed this court the opportunity to settle the issue as to whether or not the altered form 35A in respect of **Embakasi Primary School polling station no. 6 was countersigned**. Consequently, this court goes as per the report of the scrutiny and recount hence nothing turns on this ground.

33. The third irregularity which the petitioner identified is that multiple forms 35As relating to the same polling stations specifically **Soweto Social hall polling station no. 28** and **Tassia Catholic primary School polling station no. 3** were used contrary to the legitimate expectation that there would be only one form 35A per each polling station. The petitioner stated that in the aforesaid polling stations different forms 35As with different results were submitted for the same polling station. It is the submission of the petitioner that this irregularity affected **Soweto Social Hall polling station no. 28**. It is alleged that the standard format of the form 35A has also been altered as evidenced in Soweto Social Hall Polling station no. 14. The petitioner further urged this court to take into account the fact that the 2<sup>nd</sup> respondent admitted in cross-examination that the alleged alterations which took place were not lawful.

34. The petitioner also argued that some of the results in forms 35As do not tally with the results in form

35B. The following polling stations were specifically mentioned:

- a. **Soweto Social Hall polling station no. 5**
- b. **Soweto Social Hall polling station no. 13**
- c. **Soweto Social Hall polling station no. 28**
- d. **Utawala Academy polling station no. 11**
- e. **Edelvale Primary School polling station no. 4.**

35. It was argued that the forms 35A ought not to differ with form 35B since they lead to its generation. This court was urged to find that if the results in the forms 35B cannot be traced back to the individual forms 35As due to their irregularities, then the votes are not verifiable. The petitioner stated that he has demonstrated that in some instances there were multiple forms 35As relating to a single polling station, for example there are two forms 35As for Soweto Social Hall polling station no. 28 and Tassia Catholic Polling station no. 3.

36. In response to the petitioner's assertion, the 1<sup>st</sup> respondent was of the view that the allegations in paragraphs 4 and 5 of the affidavit of Eddmund Weru and paragraph 28 of the petitioner's affidavit that there were more than one form 35As for Tassia Catholic Primary School polling station no. 3 and Soweto Social Hall polling station no. 28 are not pleaded in the petition. The 1<sup>st</sup> respondent pointed out that the petitioner's witness Eddmund Weru admitted in his affidavit and in cross-examination that the results shown on form 35B were the correct results for polling station no. 28. The 1<sup>st</sup> respondent further pointed out that the purported duplicate result was in actual fact the result for Soweto Social Hall Polling station no. 14. This court was urged to accept the explanation given by the returning officer that the duplicate form was in fact the result for Soweto Social Hall polling station no. 14 to be satisfactory. The 1<sup>st</sup> respondent further stated that if the error is rectified the margin of his win will increase by 116 votes.

37. The 1<sup>st</sup> respondent further argued that it is evident in form 35B that the results were infact entered for polling stations nos. 3 and 18 respectively therefore it is not true that both forms were for the same station. The 1<sup>st</sup> respondent was also of the view that the allegation of duplicity of results was merely speculative hence without merit.

38. In response to petitioner's contention, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents argued that the petitioner never mentioned the specific polling stations that had inconsistencies in forms 35B. They argued that a comparison of the results in forms 35As and 35B will show that the figures were consistent. They accused the petitioner for being in a fishing expedition. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents have however admitted that there are a few instances where the results in forms 35As and form 35B were not consistent. It was pointed out that the inconsistent figures were mostly on the registered voters and or rejected votes which did not affect the results attributed to the petitioner and the 1<sup>st</sup> respondent. This court was implored to find that the 2<sup>nd</sup> respondent had given a satisfactory explanation on how the errors arose. Nicholas Buttuk (DW3) stated that the clerks and the presiding officers worked for long hours without any sleep hence it was expected for them to make a few mistakes. This court was urged to find that the few errors are not sufficient to nullify the election. The 2<sup>nd</sup> respondent stated in his testimony that the result from **Soweto Social Hall polling station no. 5** was not included in the tally claiming all agents objected to the results because the presiding officer had left the ballot boxes unattended to at the tallying centre. It was also submitted by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents that the returning officer had explained that a wrong formulae had been used to key in the results of four candidates namely; **Haji Jibril Abdow**,

**Wangui Maina Faith, Waruinge Stephen Maina and Wekesa Francis Masinde** thus giving rise to wrong figures being announced. It should be noted that DW3 did not explain which formulae was used neither did the 3<sup>rd</sup> respondent summon its ICT officers to explain the alleged formulae. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents have also argued that the petitioner raised the issue touching on duplicity of forms 35As through paragraphs 4 and 5 of the affidavit of Eddmund Weru but not in the main petition. It was also pointed out that Eddmund Weru admitted when he testified before this court that through forms 35As and 35Bs that the results shown on form 35B was the correct result for Soweto Social Hall polling station no. 28. It was admitted by the returning officer that the results for polling station no. 28 were keyed in for station no. 14 on form 35B making it a transposition error. This court was also urged by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents to find in respect of Tassia Catholic Primary School that it is evident that in form 35B the results were in fact entered for polling stations no. 3 and 18 respectively hence it is not true that both forms were for the same polling station.

39. Having considered the evidence and arguments of both the petitioner and the respondents, It is clear that the respondents do not perse deny the allegation that form 35As for a different polling station were used to key in the results of different polling stations. The main issue which was raised in contention by the respondents is that the issue was pleaded in general terms instead of being specifically pleaded. I have taken into account the respondents' concerns. A careful perusal of the evidence tendered by both sides will reveal that the parties and their witnesses substantially presented evidence and made serious submissions over it. What I gather from the evidence and submissions is that the parties left the issue to be determined by this court despite the fact that the same was pleaded in general terms in the petition. I will therefore overrule the preliminary objection based on specificity and proceed to determine the issue on its merits. It is on record that Mr. Nicholas Buttuk (DW3) the constituency returning officer for Embakasi East Constituency, admitted during the hearing that some results in forms 35B do not tally with those he announced and declared at the tallying. The results attributed to **Haji Jibril Abdow, Wangui Maina Faith, Waruinge Stephen Maina and Wekesa Francis Masinde** were cited. I have examined the votes attributed to the aforementioned candidates and it is apparent that the error gave rise to a difference of 4,874 votes. It is also apparent from the evidence tendered that in some instances like in **Soweto Social hall polling station no. 28** and **Tassia Catholic Primary School polling station no. 3** a multiple form 35A was used for a single polling station. The report on scrutiny and recount by this court dated 21<sup>st</sup> February 2018 revealed that the empirical comparison between the final results declared by the constituency returning officer in forms 35Bs though appear consistent indicate there are about 93 polling stations with a difference between the results announced and the figures obtained upon recount. The aforesaid mathematical errors affected 68 forms 35As. The number of polling stations with different results appear to be many and that may explain the reason why the petitioner and the 1<sup>st</sup> respondent had their votes increase from the results announced by the constituency returning officer. Upon scrutiny and recount this court was able to identify that the results which were attributed to Soweto Social Hall polling station no. 28 to belong to Soweto Social Hall polling station no. 10. With respect, I agree with the petitioner that the results in forms 35As ought not to differ with form 35B since the results in forms 35As leads to the generation of the results in form 35B. The Court of Appeal in the case of **Dickson Mwenda Githinji vs= Gatirau Peter Munya & 2 others Civil Appeal no. 38 of 2013** expressed itself in part as follows:

**“Differences in forms 35 and 36 affect the verifiability and credibility of the election results. Whenever there is a difference between forms 35 and 36, the entries in form 36 are not verifiable and yet it is the entries in form 36 that are used to declare the winner.”**

40. In the circumstances of this petition I am convinced that the legitimacy of some of the forms cannot be established due to the irregularities pointed out. In my view it does not matter that the irregularities affected the results of other candidates and not the parties to this petition. What we are concerned here

is the validity of the entire election process in Embakasi East Constituency. I am persuaded by the holding of **Musoke J** in the Ugandan case of **Winnie Babihuga =vs= Masiko Winnie Komuhanji & Others HCT-00-CV=E.P.0004-2001** in which the learned judge expressed himself in part as follows:

**“..... to determine whether the results as declared in an election ought to be disturbed, the court is not dealing with a mathematical puzzle and its task is not just to consider who got the highest numbers of votes ..... it is not just a question of who got more than the other. It cannot be said that the end justifies the means. In a democratic election, the means by which a winner is declared plays a very important role ..... the votes must be verifiable by the paper trail left behind.....”**

41. The 2<sup>nd</sup> respondent, Mr. Nicholas Buttuk(DW3) stated in his evidence while in cross-examination in part as follows:

*“I refer to pages 25A and 56 of the I.E.B.C document, the figures for Babu Owino was 202 in both documents. Mr. Francis Mureithi got 245 in page 56 and got 246 in page 25A. That was an error by 1 vote. In page 56 Mr. Masinde got 14 votes and in page 25A he got 240. That is an error ..... Had we been allowed to collate and tally the figures these errors could have been corrected.”*

42. It is apparent from the above excerpt that the 2<sup>nd</sup> respondent announced and declared the 1<sup>st</sup> respondent the winner of the contest on the basis of figures which had not been collated, tallied and verified. It is clear from the evidence and submissions that the results in form 35B cannot be traced back to the individual forms 35A due to the aforesaid irregularities, therefore the votes cannot be said to be verifiable.

43. The other issue which was raised by the petitioner which is related to the preceding issue is that, despite having garnered a considerable number of votes in **Immaculate Primary School polling station no. 1 of 11** the 3<sup>rd</sup> respondent's officials illegally recorded he had received zero votes. The petitioner attached to his affidavit a copy of form 35A in respect of the aforesaid polling station. A quick perusal of the form shows that the petitioner is recorded to have received zero votes. The petitioner summoned Jane Wairimu Wandai (PW6) his agent at the aforesaid polling station to testify in support of his contention. She stated that when the votes were counted, the petitioner got 326 votes but was surprisingly given zero votes. PW6 claimed she hurriedly signed form 35A when chaos erupted. In cross-examination PW6 stated that he signed form 35A for fear of her life since there was tension. In response to this allegation, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents summoned Josphat Nyandiko (DW2) the presiding officer for Immaculate Primary School polling station no. 1 to testify. DW2 confirmed that the petitioner got zero votes while the 1<sup>st</sup> respondent got 146 votes in that particular polling station and that PW6 did not raise any objection against the result he had announced and recorded in form 35A. DW2 denied the allegation that there was violence and tension in his polling station. The 1<sup>st</sup> respondent denied that he visited Immaculate Primary School polling station as alleged by PW6.

44. The report on scrutiny and recount carried out by this court revealed that upon recount of votes, the petitioner actually received 283 votes contrary to the zero votes attributed to him in form 35A. This is of course, a grave error which creates doubt on the credibility of the election process in Embakasi East Constituency. The 3<sup>rd</sup> respondent's witness one Josphat Nyandiko who was the presiding officer did not give a satisfactory explanation for the discrepancy but instead stood by his figures. He merely stated that form 35A was signed by all agents with no objection. In view of the report on recount, it is apparent that he attributed the wrong results to the petitioner.

45. After considering the evidence, the submissions and the report on scrutiny and recount over the above issues touching irregularities, illegalities, procedural and unprocedural omissions, I am convinced that the errors identified involve a substantial number of forms and are widespread. These shortcomings alone vitiates the 1<sup>st</sup> respondent's win.

46. In paragraphs 10, 11, 12, 13, 14 and 15 of the petition, the petitioner made serious allegations against the 1<sup>st</sup> respondent and officials of the 3<sup>rd</sup> respondents of committing electoral offences, irregularities and malpractices.

47. The petitioner summoned one Joshua Obiende Otieno (PW2) to testify in support of his assertion that the 1<sup>st</sup> respondent caused violence at Soweto Social Hall polling centre leading to a serious injury of PW2. It is also the submission of the petitioner that the 1<sup>st</sup> respondent intimidated the constituency returning officer for Embakasi East Constituency at the constituency tallying centre into declaring him as the winner. The petitioner further alleged that the 3<sup>rd</sup> respondent's officials namely Jackline Waithira Muigai, Monica Kasaya Wambua and Naftali Muriithi David committed election offences while performing their duties as presiding officers in Embakasi East Constituency and the criminal cases facing those officers are still pending before the Makadara Chief Magistrate's court. The petitioner (PW1) and his chief agent one Naftaly Mwambugu (PW10) testified alleging that the 1<sup>st</sup> respondent engaged himself in undue influence and intimidation of the electoral staff at the East African School of Aviation, the tallying centre for Embakasi East Constituency. The petitioner further tendered video evidence through the certificate of David Kemei Lelei. It is the submission of the petitioner that the 1<sup>st</sup> respondent's acts of intimidation affected the conduct of the election and specifically the declaration of the result.

48. The petitioner pointed out that his evidence that the 1<sup>st</sup> respondent caused violence in Soweto Social Hall polling centre was corroborated by the evidence of Obiende Joshua Otieno, Samuel Ayub Kimani and Naftaly Wambugu. In short, the petitioner is of the view that voting in Soweto Social Hall polling centre was marred by violence and voter intimidation. The petitioner further argued that due to violence voters, were prevented from voting and Obiende Joshua Otieno was named among those voters who failed to vote as a result of violence.

49. In response to the allegations, the 1<sup>st</sup> respondent filed a response together with affidavits to deny the assertion that he caused violence and intimidation. The 1<sup>st</sup> respondent stated that the petitioner failed in his affidavit or during his oral testimony to prove that he personally witnessed a single event of violence at any polling station caused by the 1<sup>st</sup> respondent or purported supporters. The 1<sup>st</sup> respondent also argued that no single witness from Greenspan Mall polling centre was summoned to testify to prove the allegation of violence therefore the petitioner's evidence remain as hearsay since he was not in Greenspan Mall polling centre. The 1<sup>st</sup> respondent attacked the credibility of the evidence of three witnesses namely: Obiende Joshua Otieno (PW2), Naftaly Wambugu (PW10), Samuel Ayub Kimani (PW3) and Eddmund Weru (PW7) claiming that their affidavit evidence vis-à-vis their oral testimony is contradictory. He pointed out that Mr. Wambugu (PW10) did not disclose the source of his reports of violence in his affidavit but when he came to testify he stated that he saw the 1<sup>st</sup> respondent push Mr. Obiende (PW2) and that people were throwing stones. On the other hand Mr. Weru (PW7) is said to have stated that he did not witness any fighting but nevertheless, he saw Mr. Obiende bleeding but he never saw who assaulted him. PW7 also stated that he saw stones being thrown but police restored order that eventually made people to vote smoothly. Mr. Ayub Kimani (PW 3) stated that he saw Mr. Obiende enter Soweto Social Hall polling centre and also witnessed him being pushed by an agent who was with the 1<sup>st</sup> respondent. PW3 further stated that he witnessed stone throwing though he did not see what was happening outside the polling hall because he was inside. The 1<sup>st</sup> respondent pointed out that in the video supplied by the petitioner which was played in court, that PW3 was seen outside the polling hall causing a commotion with Mr. Obiende, therefore he did not witness any commotion. The 1<sup>st</sup>

respondent is of the strong view that the petitioner and his witnesses grossly contradicted themselves therefore there was no credible and accurate account of the allegations of violence attributed to him at Soweto Social Hall polling centre.

50. The 1<sup>st</sup> respondent took time to attack the credibility of Obiende Joshua Otieno as a witness and his evidence. It is pointed out that in the video played in court, PW2 was a lone ranger walking and making noise in company of three individuals while people were lining up to vote. It is also said that no witness from Soweto Social Hall polling centre swore an affidavit or testified to corroborate the allegation of violence against PW2. The 1<sup>st</sup> respondent also challenged the admissibility of the medical reports because the maker was not summoned to testify and produce the same. The 1<sup>st</sup> respondent however admitted that he is currently facing a charge for allegedly assaulting Mr. Obiende Joshua Otieno. The hearing of the criminal case facing the 1<sup>st</sup> respondent is yet to start. The 1<sup>st</sup> respondent submitted that from the results of Soweto Social Hall polling centre, the voter turn out was greater than the average turnout in other polling centres therefore the allegations of violence at Greenspan and Soweto Social Hall polling Centres are untrue. Mr. Duncan Odundo and Mr. Michael Ogutu who were agents of the 1<sup>st</sup> respondent at Soweto Social Hall polling centre swore affidavits to deny the petitioner's allegation of violence. It is the averment of the duo that there were at least two armed police officers at each of the 28 polling stations at Soweto Social Hall polling centre therefore there was no possibility of violence taking place. The 1<sup>st</sup> respondent further argued that in order for a court to nullify an election on grounds of violence, it is not enough to allege that there was violence. It must be demonstrated that the violence was widespread and that it led to intimidation of voters and further that it has to be shown that the voters were prevented from exercising their right to elect the candidate of their choice because of intimidation, coercion or violence.

51. In answer to the allegation that the 1<sup>st</sup> respondent coerced and intimidated the 2<sup>nd</sup> and 3<sup>rd</sup> respondents into announcing results that were incorrect, the 1<sup>st</sup> respondent stated that the allegations when tested at the trial in cross-examination emerged that the same were merely speculative and devoid of merit. It was argued that the petitioner failed to prove the allegations and also failed to demonstrate how the same affected the election and the eventual outcome of the contest. The 1<sup>st</sup> respondent pointed out that the petitioner failed to summon a single witness from Greenspan Mall polling station to attest to the purported events therefore his allegations remain as hearsay. The 1<sup>st</sup> respondent further argued that the alleged 'pressure' exerted on the returning officer by the 1<sup>st</sup> respondent was a direct consequence of the returning officer and his deputies action in losing form 35C, a form used to declare the winner of the election of a member of National Assembly. He pointed out that the returning officer had stated that at the time of the purported pressure all the candidates and authorized agents knew what the results of the election were as the same had been transmitted to the tallying centre and publicly announced, verified, tallied and shown on a large screen mounted at the tallying centre for that purpose. In short, the 1<sup>st</sup> respondent was of the view that the said pressure did not and could not have affected the outcome of the elections as required under Section 83 of the Elections Act.

52. In answer to the allegation of election offence facing one of the 3<sup>rd</sup> respondent's official namely Jackline Waithira Mungai of leaving ballot boxes for Soweto Social Hall Polling Station no. 5 unattended at the East African School of Aviation Tallying Centre, the 1<sup>st</sup> respondent submitted that at the material time, voting, counting and declaration of results at the polling station and electronic transmission of the same to the tallying centre was complete and all that remained was the transmission of the physical forms 35As for the said polling station to the tallying centre. The 1<sup>st</sup> respondent argued that notwithstanding the complaint, he would still have garnered the highest number of votes at Soweto Social Hall polling station no. 5. He further submitted that the returning officer was under obligation to declare and tally the results of the said station into form 35B and in failing to do so, the returning officer acted ultra vires his powers under Regulation 83(1) (a), (b) and (c) which specifically empowered him to

disregard only results of a polling station where the total number votes exceeds the number of registered voters who turned out to vote. The 1<sup>st</sup> respondent further argued that by purporting to disregard the results of Soweto Social Hall polling station no. 5 on account of agent complaints, the returning officer effectively altered the results of the election in that polling station in contravention of the law.

53. On the alleged offence of concealment of a ballot paper, the 1<sup>st</sup> respondent argued that the returning officer gave a satisfactory explanation to the effect that the affected presiding officer inadvertently retained the ballot paper well after the ballots had been counted and results declared. In his opinion, the incident was too minor and could not have affected the outcome of the election in Soweto Social Hall polling station no. 18.

54. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents also filed responses and affidavit evidence in answer to the petitioner's allegation of violence, coercion and intimidation. Three witnesses were also summoned to testify namely: Radson Kuteyi (DW1), Josphat Nyandiko (DW2) and Nicholas K. Buttuk (DW3). The trio each swore affidavits and all appeared in court to orally testify. It is the evidence of Radson Kuteyi (DW1,) the presiding officer in Embakasi Social Hall polling station no. 6 that the voting process went on smoothly in his polling station and that the results recorded in form 35A tallied with those recorded in form 35B. He denied having ordered the police to eject Kennedy Njoroge from the polling station. DW1 stated that ordered for the votes to be recounted in his polling station and all the agents signed except for Mr. Kennedy Njoroge who put a lot on pressure on him.

55. Josphat Nyandiko (DW2), the presiding officer in Immaculate Primary School polling station no. 1 stated that voting went on peacefully in his polling station. He also denied having forced one Jane Wandai to sign form 35A for that particular station where the petitioner is recorded to have received zero votes. DW2 stated in his evidence in cross-examination that the results he announced was a reflection of the votes which were cast in his polling station. He was emphatic that the petitioner got zero votes in that station.

56. Nicholas Buttuk (DW3) is the witness whose evidence responded directly to issues raised relating to violence, intimidation, coercion and election offences. In his evidence in chief, DW3 stated that he announced and declared the results of Embakasi Constituency under immense pressure from the 1<sup>st</sup> respondent when it took time to locate form 35C which was in his desk which was locked. He went ahead to state that despite the pressure he still went ahead to announce the same results. DW3 was also categorical that the 1<sup>st</sup> respondent was not justified to put pressure on him and he should have been patient. Mr. Nicholas Buttuk further stated that he did not witness the 1<sup>st</sup> respondent assault anyone but he saw empty plastic bottles being thrown at his staff. DW3 said he felt intimidated by the 1<sup>st</sup> respondent. DW3 identified the 1<sup>st</sup> respondent as the one standing on top of a table in a video played before this court while addressing a crowd in a hall. He confirmed that, what was shown in the video is what happened before he announced and declared the results at East African School of Aviation Tallying centre.

57. DW3 described in detail what happened. He said that when he delayed to announce the results, the 1<sup>st</sup> respondent climbed a table and begun to address the crowd inside the hall. He went ahead to state that the 1<sup>st</sup> respondent's supporters outnumbered the agents and the 3<sup>rd</sup> respondent's officials. He also said that he felt intimidated and was forced to announce the results before collating and tallying the results in forms 35As as against form 35B. DW3 was also emphatic that the security officers were outnumbered hence many people felt intimidated including his staff. The returning officer went ahead to state that the electoral process was interfered with by the 1<sup>st</sup> respondent.

58. It is also in evidence of D.W.3 that on 8/8/2017, he visited Soweto Social Hall polling centre where he

stayed for an hour. He said he observed that there was congestion and that there was need to mount tents outside the hall. DW3 further stated that he discussed incidences of violence on the basis of reports he received from his presiding officers. He said that when he visited Soweto Social Hall polling centre he was informed that there were acts of breach of peace though he did not personally witness any breach of peace or violence. DW3 was also clear in his evidence that he was not informed of a scuffle in Soweto but that he was informed by Criminal Investigation Officers (C.I.O) that one Obiende Joshua Otieno was attacked in Soweto Social Hall Polling centre.

59. On 12.2.2018, this court issued orders for scrutiny and recount of the votes to be conducted by the Deputy Registrar of this court. The polling station Daily Diaries for all the polling stations within Soweto Social Hall polling centre were scrutinized as revealed in report dated 21.2.2018. In polling station no. 2 it is stated that at 8.00am on the voting day ,there was disruption of voting process by arrogant and aggressive youths. In polling station no. 4 it is indicated that at 6.55am there was a fracas outside the polling station and by 7.44am the fracas was settled due to the intervention of security personnel. Again at 9.11am, it is indicated that there was a disturbance with an agent and security officers were called in to intervene. In polling station no. 5, it is noted that at 6.55am there was a fracas and a rowdy crowd forcing the voting to be adjourned until 8.01 am. In polling station no. 9 it is stated that at 12.00 noon violence erupted at the polling centre but police contained the violence within 10 minutes. In polling station no. 12, it is recorded in the diary that there were violence the whole morning. In polling station no. 18, it is noted in the diary that at 12.00 Babu Owino came to the station with supporters from Muruthi causing a lot of commotion in the station thus forcing voting to be stopped for half an hour. In polling station no. 24, it is recorded that at 14.00 hours, chaos erupted and there was enormous police shoot out with voters for 20 minutes as police prevented voters from entering the polling station forcing the station to be closed until calm returned.

60. Before making any determination on the issues raised in the preceding paragraph, let me address my mind to the vexing question of the admissibility of the video evidence presented by the petitioner and the 1<sup>st</sup> respondent. It is the submission of the 1<sup>st</sup> respondent that the video evidence produced by the petitioner in this petition is inadmissible since they were broadcasts of a media outlet known as KASS FM whose agents did not testify in these proceedings thus rendering the same as hearsay. The 1<sup>st</sup> respondent attacked the certificate of electronic record signed by Mr. David Kemei Lelei, a freelance journalist. It is said that Mr. David Kemei Lelei does not identify himself as an agent of KASS FM. It is further pointed out that the video is not attributed to him. The petitioner on the other hand is of the view that the video evidence he produced to prove his case is admissible as they are relevant to his case and comply with the provisions of Section 106 of the Evidence Act. It is pointed out that the person who took the video, a Mr. David Kemei Lelei has issued the relevant certificate therefore the court should adopt the video produced by the petitioner since the same comply with the provisions of Sections 78A and 106B of the Evidence Act. Having considered the rival submissions over the issue touching on the admissibility of video evidence, with respect I agree with the submissions of the 1<sup>st</sup> respondent. I am persuaded by the decision of Ochieng, J in the case of **Ndwiga Steve Mbogo =vs= I.E.B.C & 2 others Election Petition no. 7 of 2017 (2017) eKLR** where he held *inter alia*

**“When a person watches news items on television, he may choose to record it. If the said person was to later replay the recording, he would not be the originator of the contents.**

**The person who produced the original record would be the most appropriate person to produce the record in evidence .....**”

I hereby decline to admit the video evidence presented by the petitioner.

61. On the other hand, the petitioner too objected to the admission of the video evidence tendered by the 1<sup>st</sup> respondent claiming that the same does not comply with the provisions of Sections 78A, 106A to 106I of the Evidence Act. It is said that the certificate producing the videos does not meet the criteria under Section 106B (2) of the Evidence Act. It is said that the certificate produced by Donald Olewe does not identify the original electronic record. It is pointed out that the videos have been downloaded from a secondary source, Youtube. With respect, I agree with the submissions of the petitioner therefore the video evidence tendered by the 1<sup>st</sup> respondent is found to be inadmissible therefore this court will not rely on them as cogent and reliable evidence.

62. Having determined the question of the admissibility of video evidence, let me now determine the issues raised and argued relating the allegations of violence, coercion, intimidation and other electoral infractions. After a careful consideration of the pleadings, the evidence, the submission and the report on scrutiny and recount over the above issues I have come to the following conclusions:

First, the question as to whether or not the 1<sup>st</sup> respondent caused violence at Soweto Social Hall polling centre leading to serious injury of Obiende Joshua Otieno was substantially canvassed. This court has critically examined the evidence tendered by both sides. The petitioner stated in his evidence in chief that he was told by his chief agent, Naftaly Wambugu that the 1<sup>st</sup> respondent instigated violence in the aforesaid polling centre. Naftaly Wambugu (PW10) claimed he visited Soweto Social hall polling centre and claimed he saw Obiende being attacked inside Soweto Social Hall. He alleged he peeped through the window and saw Obiende and the 1<sup>st</sup> respondent exchange bitter words. He also claimed he saw the 1<sup>st</sup> respondent push Mr. Obiende and that the youths accompanying the 1<sup>st</sup> respondent attacked Mr. Obiende. PW10 also said he witnessed youths throwing stones. Obiende (PW2) claimed he was hit on the forehead by the 1<sup>st</sup> respondent. This evidence deviated from what he had deponed in his affidavit. In his affidavit he had deponed he was hit by the 1<sup>st</sup> respondent's supporters. Having considered and analysed the evidence presented in support of this allegation I am not persuaded that the 1<sup>st</sup> respondent instigated the violence alleged to have taken place in Soweto Social Hall polling centre. The evidence tendered to establish the allegation is not consistent nor reliable. As to whether or not the 1<sup>st</sup> respondent assaulted Mr. Obiende, I refrain to determine the issue because it is a matter pending before a court of law.

63. Secondly, the other issue which is related to the issue I have just determined is whether or not there was violence which rocked Soweto Social Hall polling centre. Having considered the evidence tendered by the petitioner and the 2<sup>nd</sup> respondent and having taken into account the report on the scrutiny of the polling station Daily Diary in respect of the above polling centre I am convinced that the polling centre was marred by violence. The evidence shows that the voting exercise had to be adjourned in some instances for hours. In fact, it is noted that the security personnel had to be called in to restore law and order. The incidences of violence and fracas were attributed to the voters and youths.

64. In polling station no. 18 of Soweto Social Hall polling centre, it is noted that the 1<sup>st</sup> respondent arrived with some supporters causing a lot of commotion forcing the election to be stopped for half an hour.

65. Thirdly, the question as to whether or not the 1<sup>st</sup> respondent intimidated and coerced the constituency returning officer at the tallying centre into declaring him the winner of the election" Nicholas Buttuk (DW3) was consistent throughout his testimony that the 1<sup>st</sup> respondent intimidated him thus forcing him to announce and declare the results before he concluded the exercise of vote tallying. He expressly stated that the people who accompanied the 1<sup>st</sup> respondent to the tallying centre outnumbered the I.E.B.C officials and the security personnel, therefore everybody felt intimidated. My finding is that the 1<sup>st</sup> respondent coerced and intimidated the constituency returning officer, the 2<sup>nd</sup> respondent herein.

66. Fourthly, I find no evidence there was violence in Greenspan mall polling centre and Embakasi Social Hall polling centre.

67. Arising from the above findings, the question which need to be addressed is whether or not the election was adversely affected. A careful reading of Article 81(e) (ii) of the Constitution of Kenya, 2010, is that one of the parameters to be considered to determine whether an election was free and fair is whether the election was free from violence, intimidation and improper influence. I have already identified from the evidence that there was violence which took place at Soweto Social hall polling centre. Though the violence cannot be attributed to the 1<sup>st</sup> respondent, the truth of the matter is that the election in the entire polling centre was affected.

68. The second aspect which arose from my above findings is that the 1<sup>st</sup> respondent intimidated and coerced the constituency returning officer. That act of intimidation in my humble view affected the conduct of the election and particularly the declaration of the result. Several errors were identified in the process of the trial and during the exercise of the scrutiny and recount which errors may be attributed to the aforesaid conduct.

69. The second issue to determine is whether or not the 1<sup>st</sup> respondent was validly elected and declared as the member of National Assembly, Embakasi East Constituency. Taking into account the irregularities, illegalities and other factors like intimidation, coercion, violence and improper influence, I find that the Election of the 1<sup>st</sup> respondent as member of National Assembly, Embakasi East Constituency was not free nor fair.

70. The third issue is what are the consequential declaratory orders or reliefs which should issue. Having found that the 1<sup>st</sup> respondent was not validly elected, the consequential order which commends itself is that a declaration which I hereby make that the election of Owino Paul Ongili Babu, the 1<sup>st</sup> respondent herein, as member of National Assembly, Embakasi East Constituency is annulled and the election be repeated in accordance with the Constitution and the Election laws.

71. The last issue is in respect of costs. I have considered the submissions of the parties over this issue. I have also taken into account the recent decisions of this court on awards on costs. The petitioner has merely urged this court to exercise its discretion to award costs by taking into account the recent decisions of this court on costs. The 1<sup>st</sup> respondent has urged this court to award ksh.10,000,000/=. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents merely urged this court to condemn the petitioner to pay costs without specifying the amount. It is clear from my findings that this petition was allowed on the basis electoral infractions committed partly by the 1<sup>st</sup> respondent and the 3<sup>rd</sup> respondent's officials. In this petition costs follows the event. I award the petitioner costs assessed at ksh. 5 million. The aforesaid amount is to be shouldered in equal measure between the 1<sup>st</sup> and 3<sup>rd</sup> respondents. For the avoidance of doubt, the 1<sup>st</sup> and 3<sup>rd</sup> respondents to each pay ksh.2,500,000/=.

**Dated, Signed and Delivered in open court this 2<sup>nd</sup> day of March, 2018.**

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Petitioner

..... for the 1<sup>st</sup> Respondent

..... for the 2<sup>nd</sup> Respondent

..... for the 3<sup>rd</sup> Respondent



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