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Case Class:	Civil
Court:	High Court at Narok
Case Action:	Judgment
Judge:	Justus Momanyi Bwonwong'a
Citation:	David Kipsang Keter v Johana Kipyegon Ngeno & 2 others [2018] eKLR
Advocates:	Mr. Manyange for the Petitioner Mr. Bosek & Ms Okoth for the 1st Respondent Mr. Gathii & Mr. Masolia for the 2nd & 3rd Respondents
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Narok
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 NAROK

ELECTION PETITION NO. 2 OF 2017

DAVID KIPSANG KETER.....PETITIONER

VERSUS

JOHANA KIPYEGON NGENO.....1ST RESPONDENT

LILIAN OKOTH (RETURNING OFFICER).....2ND RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....3RD RESPONDENT

JUDGEMENT

INTRODUCTION

1. This judgement includes a ruling on the preliminary objection raised by counsel for the 1st respondent, which was also supported by counsel for the 2nd and 3rd respondents. At the close of the arguments in respect of the preliminary objection on 27/12/2017, I reserved the ruling to be delivered as part of the main judgement in the interests of the expedited trial of the petition.

2. I will deliver the ruling first and thereafter the main judgement will follow.

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JOHANA K. NGENO AND 2 OTHERS.....RESPONDENT

THE RULING

1. The ruling is in respect of the preliminary objection raised by counsel for the 1st respondent, Mr. Bosek, that the petition be dismissed for being incurably defective and fatal in that it failed to state when the election results were declared and how they were declared as mandatorily required by Rules 8(1) and 12(12) of the Elections (Parliamentary and County) Petitions Rules of 2017.

2. The application was brought under certificate of urgency by way of Notice of Motion under section 76 of the Elections Act No. 24 of 2011 and Rules 8(1) and 12(2) of the Elections (Parliamentary and County Elections) Petitions Rules of 2017 [hereinafter referred to as the Elections Petitions Rules].

3. The application is supported by the grounds set out on the face of the notice of motion and the 1st respondent's supporting and supplementary affidavits.

4. Additionally, the 1st respondent has filed written submissions in support of dismissing the petition.
5. The 2nd and 3rd respondents have filed written submissions in support of the motion to dismiss the petition.
6. The petitioner has filed written submissions in opposition to the motion to dismiss the petition

THE CASE FOR THE 1ST RESPONDENT

7. The 1st respondent has set out six grounds on the face of the notice of motion in support of dismissing the motion. The major grounds are as follows. First, the 1st respondent has stated that the petition, the supporting affidavit and the witness statements together with the annexures are bad in law and incurably defective. Second, he has stated that the petition itself is fatal and that the proceedings herein are untenable and that it is only just that it be dismissed. Third, he has also stated that the petition was filed in contravention of the clear mandatory provision of the law, which requires that it must state firstly the date when the elections results were declared and how they were declared.

8. Furthermore, the 1st respondent has stated that the petition, the affidavits in support thereof and the witness statements are fatally defective and cannot sustain the instant proceedings. And finally, the petitioner has stated that the said defects go to the root of the petition and for these reasons, the jurisdiction of the court is ousted.

9. In his supporting affidavit, the 1st respondent has deponed to a 14 paragraphs affidavit. He has deponed to the following major matters. He has deponed that he is the member of parliament for Emurua Dikirr Constituency. He was declared to have won by a majority of the votes. He has also deponed that the petitioner filed a petition on 6/9/2017 to which he filed a response on 21/9/2017. He has further deponed that following advice from his counsel he believes that the petition does not contain the date of declaration of results and how they were declared.

10. He has also deponed that the petition does not comply with the provisions of the Elections Act of 2011 as read with the mandatory provisions of Rules 8(1) and 12(12) of the Elections Petitions Rules of 2017. Finally, he has deponed that failure of the petitioner to comply with the mandatory provisions of the said provisions renders the entire petition incurably fatal.

SUBMISSIONS OF 1ST RESPONDENT'S COUNSEL

11. 1st respondent's counsel has submitted that the order he is seeking is a final order. And for that reason rule 15 of the Elections Petitions Rules does not apply, for it is in relation to interim orders. Counsel has further submitted that rule 15 applies in matters, wherein a party is seeking an order that is in the nature of an interim relief or that only disposes of some part of the matter.

12. In that regard, counsel relied on *Mwamlole Tchappu Mbwana v. IEBC (2017) eKLR*, wherein a similar issue was raised. In that case, the court ruled that where the issue raised is one of jurisdiction, the fact that the case is part heard, does not bar a party from raising the point in court.

13. Replying on rules 8(1) and 12(12) of the Election Petitions Rules counsel has submitted that non-compliance with those provisions renders the petition fatally defective and incurable. Furthermore, counsel has relied on section 76 (4) of the Elections Act and submitted that this court cannot grant an order to the petitioner to amend this petition, since he is time barred. According to counsel, the petitioner, despite being intimated of those defects by the 1st respondent in his grounds of opposition, failed to take steps to amend his petition within 28 days with leave of the court.

14. Counsel also cited *Jimmy Mkala Kazungu v. IEBC and 2 others (2017) eKLR* in which that court held that non-compliance with rules 8(1) and 12(12) renders the petition fatally defective and for that reason the petition was dismissed. That court ruled that the omitted matters namely the date of declaration of results and how they were declared are substantive matters that go to the root and substance of the issues to be adjudicated.

15. Furthermore, the reasons as to why the election rules should be complied with was explained by the court in *Amina Hassan Ahmed v. Returning Officer, Mandera County and 2 others (2013) eKLR*. Compliance with the rules will avoid a situation in which a petitioner seeks leave to amend the petition, which would cause unnecessary delays and thereby inflate trial costs. The court went further and stated that under the 2010 Constitution and the Elections Act together with the rules made thereunder embody

provisions whose deliberate overriding objective is to facilitate the just, expeditious, proportionate and affordable resolution of election petitions. That court also pointed out that under the older dispensation before the 2010 Constitution, election petition trials would last for five years, until the following electioneering period, thereby causing injustice and skyrocketing trial costs. That court was of the view that it was under both administrative and legal obligation to interpret those laws strictly and give effect to the said overriding object.

16. The 1st respondent's counsel further submitted that based on the Speaker of the *National Assembly v. Karume (2008) IKLR 425*, where that court expressed itself that:

"Where there is a clear procedure for redress of any particular grievance prescribed by the constitution or an Act of Parliament that procedure should be followed."

Counsel further cited *Martha Wangari Karua and Another v. Independent Electoral and Boundaries Commission & 3 others (2017) eKLR*, wherein the court held that:

"The requirement under rule 8(1) of the Rules are not mere technical requirements, they are substantive as they go to the root of the issue before an election court. A petition which has failed to state the date of declaration, the results of the election and how declared is fatally defective and beyond salvage. The consequence is that it must be struck out."

SUBMISSIONS OF 2ND AND 3RD RESPONDENTS

17. Counsel for the 2nd and 3rd respondents has supported counsel for the 1st respondent that the petition be dismissed for non-compliance with rule 8(1) of the Elections Petitions Rules of 2017. He has submitted that the declaration of the elections results must be stated in the petitions as well as in the supporting affidavit. He has further submitted that rule 12 (12) requires that the supporting affidavit to the petition shall state the very items that are stated in the petition.

18. Furthermore, counsel has submitted that the declaration of results is crucial in determining this petition. In this regard, counsel relied on Article 87 (2) of the 2010 Constitution which provides that:

"Petitions concerning an election, other than a Presidential Election, shall be filed within 28 days after the declaration of election results by the Independent Electoral and Boundaries Commission." He also relied on section 76 (1) (a) of the Elections Act, which also provides that:

1. *"A petition*

a) To question the validity of an election shall be filed within twenty eight days after the date of declaration of the results election and served within fifteen days of presentation."

Counsel has therefore submitted that the petition is fatally defective to warrant determination on the merits by this court and should therefore be dismissed.

SUBMISSIONS OF THE PETITIONER

19. Counsel for the petitioner filed written submissions in opposition to the application to dismiss the petition. Counsel has submitted that the application is ill timed and has been overtaken by events. He has further submitted that the application is seeking interlocutory orders, which should have been sought at the pre-trial stage, that is, prior to the hearing of this petition. Counsel has further submitted that the petitioner has been cross examined by the 1st respondent and partly cross examined by the 2nd and 3rd respondents.

20. Counsel has placed reliance on rule 15 (2) of the Election Petitions Rules, which state that:

"An election court shall not allow any interlocutory application to be made on conclusion of the pre-trial conference if the interlocutory application could have, by its nature, been brought before the commencement of the hearing of the petition."

21. Furthermore, counsel has also submitted in the alternative and without prejudice to the foregoing, that the objection raised in a technicality, since the petitioner has substantially complied with rule 8(1) of the Elections Petitions Rules. In this regard, counsel has relied on form 35B, which is annexure “DK1” to the replying affidavit of the 2nd respondent, Lillian Okoth, who is the returning officer, which in his view indicates the date of declaration of the results as being 9/8/2017 and has the stamp of the 3rd respondent.

22. Counsel has also cited *Dickson Mwenda Githinji v. Gatirua Peter Munya and 2 others (2014) eKLR*, in which the court stated that although affidavits are not usually deemed to be pleadings the affidavit in support of an election petition and any documents annexed thereto are deemed to be part of the petition and therefore part of the pleadings.

23. He has also placed reliance on rule 9(1) of the Elections Petitions Rules, which in mandatory language makes the 3rd respondent a party to every election petition and has submitted that pursuant to those provisions, the 3rd respondent through its affidavit dated 18/9/2017 attached form 35C, which form declared the 1st respondent as the winner. As a result the 1st respondent received his certificate of winning those elections on the same date. Counsel has therefore contended that form 35C and the replying affidavit of the returning officer are part of the petition and they therefore provide the date of declaration of the result of the election and how they were declared.

24. Counsel has further contended that *Mwalole Tchappu Mbwana v. IEBC and 4 others (2017) eKLR* is distinguishable from the instant petition. He has further submitted that the petitioner has substantially complied with rule 8(1) of the Elections Petitions Rules. In this regard, counsel has pointed to paragraph 4 of the petition’s affidavit in which the results that declared the 1st respondent as the winner are indicated as 16,098 votes followed by the petitioner with 13,707 votes, which were extracted from form 35A.

25. Furthermore, counsel for the petitioner has further submitted that in his paragraph 9 of his affidavit that the 2nd respondent in his affidavit dated 18/9/2017 attached form 35C, in which the 1st respondent was declared the winner on 9/8/2017 and was given a certificate of being the winner on the same date. In view of this affidavit evidence, counsel has submitted that it is surprising that the respondents are unable to ascertain the date when the result was declared.

26. Counsel has cited *Samuel Kazung Kambi and Another v. IEBC and 3 others (2017) eKLR*, in which the court stated that it did not buy the submission that compliance with the Elections Petitions Rules should be 100% and that substantial compliance was good enough. That court also pointed out that “*where the respondents are in a position to understand the petitioner’s case, such a petition should not be dismissed even if there are slight omissions and deviations from the rules.*”

27. Counsel also submitted that the respondents have filed their responses to the petition and have not been prejudiced in view of the substantial compliance with rule 8(1) of the Elections Petitions Rules. He has also submitted that summary dismissal of a suit is a draconian measure that should not be invoked unless the suit appears to be so hopeless and does not disclose a reasonable cause of action and that it is beyond redemption and incurable by amendment. In this regard, counsel relied on *D.T Dobie and Co. (K) Ltd v. Muchina (1982) KLR 1*. In that case the court expressed itself as follows:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere resemblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward. For a court of justice ought not to act in darkness without the full facts of a case before it.”

28. I have considered the affidavit evidence of the four parties, their counsel’s well researched submissions and in the light of the applicable law, I find the following to be the issues for determination.

1. Whether or not the pleadings are fatally and incurably defective.
2. Whether or not the jurisdiction of the court has been ousted by the pleadings.

29. **Issue No. 1**

It is important to point out that a preliminary objection relates to issues of law that are apparent from the pleadings of the parties. It

is therefore not necessary to produce evidence in order to sound a preliminary objection. The case of *Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd (1969) EA 696* is instructive as to what constitutes a preliminary point.

30. According to that case, a preliminary “*objection consists of a point of Law which has been pleaded or which raises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.*” In the light of this authority I find that the issue raised in the instant petition relates to alleged defective pleadings. In respect of these pleadings of the petitioner, it is submitted by the respondents that they are fatally defective and incapable of amendment due to lapse of time, within which amendments are permitted.

31. The question that arises then is whether or not the pleadings are fatally incurable in law. In this regard, I find that the 2nd respondent in her replying affidavit dated 18/9/2017 has attached form 35C, in which the 1st respondent is declared winner with 16,098 votes, while those of the petitioner are 13,707 votes. As a result, the 1st respondent was given a certificate dated 9/8/2017, which is signed and marked as annex “LO2” to the replying affidavit of the 2nd respondent.

32. Furthermore, I also find that all the respondents have filed their responses to the petitioner. And further that all the respondents effectively cross examined the petitioner during his testimony in court. I therefore find as a fact that in view of the petitioner’s pleadings and those of the respondents, the petitioner has substantially complied with rule 8(1) of the Elections Petitions Rules.

33. The fact that the declaration of the election results and how they were declared is not indicated in the petition is a minor and curable defect. This has been cured, first by the responses of the respondents. Second, the 2nd respondent has in her affidavit in annex “LO2” cured the defect in the pleadings of the petitioner.

34. In the light of the foregoing, I find that the petition is not fatally defective. It therefore follows that the answer to the first issue is in favour of the petitioner.

35. Issue No. 2

The contention of the respondents is that the defects in the pleadings of the petitioner have ousted the jurisdiction of this court to entertain and determine it. The jurisdiction of this court is donated by section 80 of the Elections Act No. 24 of 2011. Additionally, this court has been constituted, designated and gazette as an election court by the Chief Justice vide the Kenya Gazette No. 9795 of 29th September 2017, pursuant to powers conferred upon him by section 75 of the Elections Act and Rule 6(1)(2) and (3) of the Elections [Parliamentary and County Elections] Petitions Rules of 2017 in respect of the instant petition.

36. In the circumstances, I find that the statutory conferred jurisdiction of the court cannot be ousted by the defects in the pleadings.

37. It should always be borne in mind that the summary dismissal of a petition should be a measure of the last resort. It is a draconian measure, which should be avoided since the outcome of a petition has enormous impact on the rights of the public.

38. I have found the submissions of counsel and the authorities cited to be instructive, but those authorities are distinguishable from the instant application.

39. The upshot of the foregoing is that the preliminary objection of the respondents is hereby dismissed for lacking in merit.

THE JUDGEMENT

1. David Kipsang Keter, the Petitioner (PW 1), has sought the following orders from this court.

1. A declaration that the 1st Respondent has not been and was not validly elected as the Member of the National Assembly for Emurua Dikirr Constituency, Narok County.

2. The election for Member of National Assembly held on 8th August, 2017 in Emurua Dikirr Constituency, Narok County be determined and declared null and void.

3. An order that a fresh election for the Emurua Dikirr Constituency in Narok should be held.
4. A declaration that the election for the Member of National Assembly, Emurua Dikirr Constituency, Narok County was neither conducted in compliance with the Elections Act 2011 and the Regulations nor in accordance with the principles laid down in the electoral law and the Constitution of Kenya 2010 the principles of free and fair elections as provided under Article 81 of the Constitution.
5. The election offences on the part of the 1st respondent as disclosed and found by this Honourable Court be reported to the Director of Public Prosecutions for appropriate action.
6. The costs of this petition be borne by the Respondents.
7. Any other order or determination that this Honourable Court may grant in the interests of justice.

His petition is supported by the grounds set out in the petition itself, his supporting affidavit and the affidavit of seven witnesses who testified in support of his petition. The petitioner essentially seeks to have the election of Johana Ng'eno, the 1st respondent (D1/RW 1(1)) on the basis that his election was marred by violence, intimidation, destruction of property, lack of his agents in Mogondo ward and lack of secrecy in the ballot in relation to assisted voters.

2. Johana Ng'eno, the 1st respondent (D1/RW 1(1)) filed his response to the petition accompanied by supporting affidavit and his sworn testimony in court. In addition, he called Samuel Rop (DW 2/RW1(2)) as his defence witness in opposition to the petition.
3. The 2nd and 3rd respondents filed their responses to the petitions, in addition to calling two witnesses namely Lilian Okoth (RW. 2 W.1) and Joseph Rotich (R 2 W2).

THE CASE FOR THE PETITIONER

4. The petitioner testified that the election was marred by violence during the campaign period up to the day of voting on 8/8/2017. He further testified that his chief campaign agent Kibet Rono Anderson (PW 3) was beaten by agents of the 1st respondent. They also took from him letters of appointment of his agents, which incident he reported to the police and was entered in the police occurrence book under OB 6/9/8/2017. While under cross examination, he testified that he did not mention the names of the assailants of Kibet Rono in his supporting affidavit evidence. He only testified that PW 3 was his chief agent for Mogondo ward. He also testified that he did not attach the medical report popularly known as P3 in respect of Kibet Rono to show whether he sustained any injuries. He further testified that one Hillary Kirui was beaten on the eve of the election campaigns which ended 2 days before the date of the general elections of 8/8/2017. It was his evidence that Hillary Kirui was beaten on the 7/8/2017 at 2.00 a.m. in his home. He has further testified that this Hillary Kirui is not one of his witnesses.

5. Furthermore, he testified that some people were charged in court with malicious damage to property under the Penal Code [Cap. 63] Laws of Kenya and that he had not checked the status of that case up to the time he was testifying. It was also his evidence that he had no polling agents in Mogondo ward. He testified that he did not know how Jubilee party appointed its agents in Mogondo ward. Additionally, he testified that he had nothing to do with Jubilee party agents in that ward and that when

6. they signed form 35As, they were signing as agents of Jubilee and not for him. However, he admitted that he had agents in the other 3 wards namely; Ololmasani, Ilkerin and Kapsasian. It is to be recalled that the petitioner stood on a Jubilee party ticket in Emurua Dikirr. It was also his evidence that the Returning Officer, Lilian Okoth (RW1/RW1(2)) wrote a letter which is annex 3 to her affidavit addressed to both the petitioner and the respondent to stop campaigns for 2 days in order to bring peace in that area.

7. It was his further evidence that the house of Winnie Cheruiyot was torched on the eve of the voting day. He also testified that the 2nd and 3rd respondents were not involved in the violence. He continued to testify that he did not mention in his petition and affidavit that the 1st respondent was involved in the violence. He admitted that in the affidavit evidence/statements of all his witnesses, none of his witnesses has implicated the 1st respondent with the violence. It was his further evidence that he did not complain to the IEBC that Kibet Rono (PW 3) was unable to distribute letters of appointment to his agents in Mogondo ward. He has also testified that he did not mention the name of any voter who did not vote because his identification card was stolen.

8. Furthermore, he testified that there was violence and intimidation in Mogondo, Ilkerin and Ololmasani wards, without specifying as to who was assaulting who. It was also his evidence that one Anthony Ng'eno Kibet who was charged with incitement was the agent of the 1st respondent at Kurisiet centre. It was his evidence that the connection between this Anthony Ng'eno Kibet and the 1st respondent is that both of them were vying on a KANU ticket. This implies that that is what made Anthony Ng'eno Kibet, the agent of the 1st respondent.

9. The 2nd witness who testified in support of the petition was Winnie Cheruiyot (PW 2). It was her evidence that there was fighting in Araret polling station on 8/8/2017, which involved the supporters of the 1st respondent. It was also her evidence that she voted. This evidence of Winnie Cheruiyot is contradicted by that of the petitioner who testified that she did not vote due to intimidation. It was also her evidence that her house was burned and that she failed to indicate the police occurrence book entry number in her affidavit evidence. It is also her evidence that it is one Geoffrey Ng'etich, who burned her house. She further testified that PW 2 was beaten at the polling station. Geoffrey Ng'etich was not called as a witness.

10. Furthermore, she testified that she never told the police that she voted for the 1st respondent out of fear and that no one forced her to vote for Ngong (1st respondent). It was also her evidence that 2 groups of people were fighting at the gate of the polling station. She also testified that there was one police officer at the polling station.

11. Furthermore, Kibet Rono Anderson (PW 3) testified that he was a chief agent of the petitioner. It was his evidence that he was assaulted on the eve of the voting day as a result of which he was rushed to hospital. Additionally, he testified that he reported to the police and the incident was recorded as OB 6 of 098. It was also his evidence that he never travelled with Winnie Cheruiyot to Nairobi. He also testified that it was his IEBC badge which was taken from him and not the Jubilee card. However, he admitted that he told the police in his statement that it was his Jubilee card which was taken from him and not his IEBC card. He also admitted in his affidavit that he did not attach a police abstract report to his affidavit to show that he made a report to the police. Additionally, he also admitted that he did not attach any medical document to his affidavit to show that he was assaulted. It was also his evidence that those who assaulted him have not been arrested as the case is still under investigations. Furthermore, he admitted that he voted at Charamakei polling station and that he did not encounter any problem in doing so.

12. Furthermore, it was also his evidence that there were some groups who were forcing voters to vote for particular candidates and that these groups were outside the polling station. He admitted that inside the polling station, the voting was by secret ballot. He also testified that whatever was happening outside did not affect him in voting. He has also testified that he did not complain to IEBC, the Returning Officer [RW1/RW2(1)] about those groups who were fighting outside the polling station. He further testified that he has not recorded about these two groups in his police statement. He also testified that he did not distribute letters of appointment of the petitioner's agents for Mogondo ward. Furthermore, he testified that he did not complain that his assault case has not moved forward. Finally, he testified that although he knew his assailants as supporters of the 1st respondent, he did not disclose their identity in his police statement.

13. There is also the evidence of David Kiprono Ng'eno (PW 5) who was a neighbour to the deceased Jeremiah Rop, Peter Ruto and Benard Bii. It was his evidence that it was Peter Ng'eno who 1st inflicted injuries on the deceased Jeremiah Rop. He also testified that Peter Ruto has been charged with the murder of Jeremiah Rop. It was his evidence that the cause of the fight was because Jeremiah Rop shouted "*kiwole*". *Kiwole* was a campaign slogan for the petitioner. PW 5 has admitted that he has not indicated in his statement that there was any fight other than that of Jeremiah Rop and Peter Ruto. It was his evidence that he voted peacefully at Soget polling station and that the fight between Jeremiah Rop and Peter Ruto was politically motivated. Finally, he testified that it was the 1st respondent who instigated the violence and intimidation.

14. There is further evidence of Benard Korir (PW 6), who was a boda boda rider who testified that he ferried 500 passengers. It was his evidence that one Hillary Kirui was beaten by unknown people. Finally, he testified that he never heard people shouting "*kiwole or mokiwole*" and that Hillary Kirui did not identify his assailants.

15. There is further evidence of Francis Martim (PW 7). It was his testimony that he himself and Philip Korir were attacked for being Jubilee supporters. However, he admitted that he did not indicate the OB No. in his affidavit evidence, because he reported the matter to Abosi Police station. It was also his evidence that voters voted and that he did not witness any fighting.

16. Furthermore, he testified that the police did not give him the P3 form. It was also his evidence that although he knew his assailants he did not mention their names in his police statement. Instead he testified that those who assaulted him shouted '*mokiwole*' which is another name for the 1st respondent. Furthermore, he testified that people voted peacefully. And finally, he

testified that he never testified that he never wrote in his police statement that voters feared to vote due to violence.

17. SUBMISSIONS OF COUNSEL FOR THE PETITIONER

Counsel for the petitioner filed written submissions and further supplementary submissions in opposition to the submissions of the 1st, 2nd and 3rd respondents. Counsel submitted that in the build-up to the election there was a systemic and systematic pattern of violence and intimidation, which were intended to influence the voters to vote for the 1st respondent at the cost of the petitioner. It was his submission that the election for Member of National Assembly for Emurua Dikirr Constituency was not conducted in a free and fair environment due to violence, destruction of property, intimidation and improper influence.

18. Furthermore, counsel has submitted that on 30/7/2017 the 1st respondent held a meeting near Kuresiet centre in Ololmasani Ward, in which he incited people against the petitioner and his supporters. It was his submission that during cross examination, the 1st respondent admitted holding 3 meetings at Kuresiet. He also submitted that the 1st respondent's meeting was held a day before the petitioner was to stage a rally on 31/7/2017. The petitioner's meeting was held at the home of Hillary Rotich. During that meeting, violence broke out with stones being pelted at the petitioner and his supporters. It was his submission that a large group of youths shouting "makivole" which was the campaign slogan of the 1st respondent, attacked the petitioner's supporters. As a result, the petitioner's supporters sustained severe injuries, a matter which was not controverted by the respondents in their response to the petition. Furthermore, counsel has submitted that the 2nd respondent, who was the returning officer for Emurua Dikirr constituency, testified that there was violence at Kuresiet centre in Ololmasani Ward, in which several people were injured, property destroyed, including motor cycles that were not less than 4. The evidence of the 2nd respondent is corroborated by her letter which was addressed to both the petitioner and the 1st respondent, which letter is marked as annex 'DK 3' to the petitioner's supporting affidavit. It is as a result of that violence that the 2nd respondent stopped campaigns for 2 days namely on 2nd and 3rd August, 2017.

19. It was also counsel's submission that political contests are not characterized by violence and intimidation. It was for this reason according to the evidence of the Returning Officer (RW1/RW2W1) that a resolution was proposed by the District security committee that Kenya Defence Forces (KDF) and Narok County askaris (Game Warden Rangers) be deployed. This proposal was objected to by the 1st respondent (DW1/R1W1). As a result, the deployment was not done. Based on this successful objection, counsel has submitted that the 1st respondent was the beneficiary of this violence.

20. Furthermore, Counsel submitted that annexes marked 'DK 2' are copies of the police charge sheets, which clearly state that on 31/7/2017, the accused therein was charged with the offence of malicious damage to property contrary to section 339 (1) of Penal Code (Cap 63) Laws of Kenya and incitement to violence contrary to section 96 of the Penal Code. Again based on this police charge sheet, counsel for the petitioner has submitted that there was violence at Kuresiet centre which was meant to intimidate and threaten the supporters of the petitioner.

21. Counsel for the petitioner itemized a series of violent incidents involving Winnie Cheruiyot (PW 2), Kibet Rono Anderson (PW 3), Francis Kipsang Maritim (PW 7) and the killing of Jeremiah Rop whose key witness was David Kiprono Ngeno (PW 5), as evidence of wide spread violence that affected voters in that constituency.

22. Furthermore, counsel has submitted that the evidence of the 1st respondent in respect of the killing of Jeremiah Rop is not credible. He submitted that the evidence of Samuel Rop (DW2/R1W2) in respect of the death of the Jeremiah Rop is also incredible. He also submitted that the holding of the district security meeting which was attended by the 1st respondent was further evidence of wide spread violence. In this regard, he relied on the petitioner's annex 'DK 4' (a) which he submitted was a petition by members of Emurua Dikirr Constituency which is against the 1st respondent. He has pointed out that the petitioner in that annex was seeking assistance of the 2nd and 3rd respondents and the security organs to put in place measures to guarantee peaceful political engagements.

23. Furthermore, counsel has submitted that Benard Kibet Korir (PW 6) ferried supporters to the home of David Chepkwony on 6/8/2017 in regard to which he was paid Sh.300/-. According to counsel, this was evidence to show that there was a plan to attack the supporters of the petitioner.

24. It was also counsel's submission that the 1st respondent acted in violation of section 10 of the Elections Offences Act of 2016 through intimidation and cohesion of members of the public through his public utterances. It is therefore his submission that the 1st respondent committed election offences in regard to which, a report should be sent to the DPP. Additionally, counsel has

submitted that the respondents should be banned from elections.

25. Counsel has cited the case of *Benard Shinali Masaka v. Boni Khalwale and 2 others (2011) eKLR*, in which the court referred to the words of *Musinga J. in Manson Nyamweya v. James Magara and 2 others (2009) eKLR*, wherein the court stated that both the quantitative test and qualitative test are applicable “*in particular the court stated that the quantitative test “was said to be most relevant where numbers are in question whereas the qualitative test is most suitable where the entire electoral process is in question and the court has to determine whether or not the election was free and fair.”* That court went further and stated that:

“Is not just a question of who got more votes than the other. It cannot be said that the end justified the means”

Counsel has also cited the case of *Kabogo Gitau v. George Thuo and 2 others (2010) eKLR*, and submitted that it is persuasive, because it provides guidance in handling an election petition such as the instant petition namely whether the election was free and fair in terms of article 81 of the 2010 Constitution.

26. In respect of assisted illiterate voters, counsel has submitted that based on the evidence of 1st respondent (R1/R2W1), the secrecy of the ballot was breached, because according to counsel, the presiding officer and all political party agents were present to assist. Counsel cited Regulation 72(7) of the Elections (General) Regulation of 2012 and submitted that the assisted illiterate voters who were accompanied by the political party agents and the Presiding Officer was flawed in all aspects. The provisions of Regulation 72(7) are as follows:

“(7) No person other than a person acting under this regulation shall be present in a compartment of polling while a voter is in the compartment for the purpose of marking his or her ballot paper and any person who contravenes this sub regulation commits an offence.”

Furthermore, according to counsel, breach of the secrecy of the ballot impugned the election process and was not in compliance with the election laws and the 2010 Constitution of Kenya.

27. It was also the evidence of the petitioner (PW 1), that he was not represented by his agents in the whole of Mogondo Ward. The reason for this was that this chief agent Kibet Rono Anderson was attacked and the letters of appointment for the petitioner’s agents were taken away by the assailants. It was also his evidence that the Jubilee party agents did not represent him.

28. Furthermore, it is counsel’s submission that the voter turnout cannot be used to determine whether the elections were affected by the violence. It is his contention that the violence was intended to affect the election of the member of the National Assembly. Furthermore, counsel submitted that the provisions of regulation 69 (3) of the Elections (General) Regulation of 2012 forced voters to vote for the member of the National Assembly because any voter who left without voting committed an offence. The provisions of Regulation 69 (3) provide that:

“A person who knowingly fails to place a ballot paper issued to him or her (not being a spoilt ballot paper) into a ballot box before leaving the place where the box is situated commits an offence under the Act.”

29. Furthermore, counsel has cited the case of *William Odhiambo Oduol v. Independent Electoral and Boundaries Commission and 2 others (2013) eKLR* in which the court stated that an election is a process and not an event and that some offences relate to the period during voting, while others relate to the period during the campaigns. The court went further to require that an election court should consider the offences that are committed during campaigns and during voting. Counsel also cited the case of *Moses Wanjala Lukoye v. Bernard Alfred Wekesa Sambu and 3 others (2013) eKLR*, in which the court stated that it is settled law that in matters of election petitions: “*the standard of proof in allegations other than those of commission of electoral criminal offences is higher than that of balance of probabilities required in civil cases although, it does not assume the standard of proof beyond reasonable doubt.*” However, where the petitioner alleges commission of criminal offences, the standard of proof on the criminal charges is beyond reasonable doubt. Counsel further submitted that this court can annul this election on the basis of the various incidents of violence and the fact that the election was not carried out in substantial compliance with article 81 (e) & (2) of the 2010 Constitution of Kenya. Additionally, counsel invited the court to disqualify the 1st respondent from participating in future elections if it is established that he committed election offences.

30. As regards costs, counsel has urged the court to cap the costs so as to protect the integrity and sanctity of voters as well as the

parties. He urged the court to guard against abusive costs. In support thereof, he cited the case of *Henry Okello Nadumo v. Independent Electoral and Boundaries Commission and 2 others (2013) eKLR*. In conclusion, he has urged the court to annul the election on the basis of incidents of violence and intimidation, which substantially breached article 81(e) (ii) of the 2010 Constitution of Kenya.

31. THE CASE FOR THE 1ST RESPONDENT

Johana Kipyegon Ng'eno, the 1st respondent (DW1/RW1(1)), filed a response to the petition against himself accompanied by a replying affidavit in which he denied the allegations made against him by the petitioner and his witnesses. While under cross examination, he admitted that the returning officer, Lilian Okoth (DW 2/RW1(2)) wrote a letter addressed to the petitioner and himself dated 17/6/2017, in which she stopped campaigns for 2 days due to continuous breach of peace. He further testified that as a result of that letter which was marked "DK 3" they held a meeting at the DC's office. The issues discussed at that meeting were whether the alleged violence had anything to do with the campaigns. He did not know whether police went to his residence on 21/6/2017 and that he also did not remember whether there were demonstrations after the death of Jeremiah Rop. His further evidence was that he confirmed attending the sub-county security meeting, which was not attended by the petitioner. He also confirmed that that meeting resolved that he should reign in his supporters. It was also resolved in that meeting that a patrol base was to be operationalized at Soget and Murkan areas, which areas reported incidents of violence. It was also his evidence that Jubilee party agents represented the petitioner and that those agents were supplied with both IEBC and party badges. He denied being aware that Benard Bii was found in his home.

32. In respect of assisted voters, it was his evidence that he assisted his 88 years old mother to vote. It was also his evidence that he did not hear any person forcing voters to shout the name of any candidate that they were going to vote for. It was also his evidence that there were at least 2 police officers in every polling station.

33. Furthermore, it was his evidence that assisted voters came with people to assist them to vote. He also testified that he did not encounter any case where a voter came to the polling station without any assistance. He also testified that whenever a voter requested to be assisted, the assisting person had to sign a document before the presiding officer. Additionally, such an assistant was only allowed to assist not more than two voters. It was also his evidence that the fingers of the person assisting were to be marked with ink marks which were not more than 2. Furthermore, in the case of an illiterate voter, it was such a voter who was to choose his assistant. The assisted voter had to indicate whom he was voting for openly in the presence of all agents of all the parties. All party agents at the polling stations were sworn to secrecy.

34. Furthermore, it was his evidence that the voting in the constituency was peaceful. He also testified that the counting was equally peaceful and voting was free and fair. It was his further evidence that he did not experience any violence. He also testified that even the police who were there in every polling station would have reported any violence.

35. The 1st respondent also testified that he sat with the petitioner and sat with him at Lelagoin polling station until all the votes were counted and the results declared. It was his evidence that he did not hear the petitioner complain about the elections. He also testified that if there was any complaint, he could have heard of it. He also testified that he did not have any gangs.

36. In respect of agents, the 1st respondent testified that for all candidates who were standing, for example, on a KANU ticket, all candidates for elective offices would sit together and agree on agents. Once all candidates for all elective offices on a KANU ticket had agreed on the agents, they sent the names of those agents to IEBC. The party would then send to them the letters of appointment for those agents. It was then the responsibility of the chief agents to give those letters of appointment to the party agents. It was his evidence that it was these letters of appointment which identified the party agents who were then briefed by the returning officer on behalf of IEBC. He further testified that IEBC did not give appointment letters to agents. It only gave them identifying badges and those badges are given to the agents at the polling station by the Presiding officers on the polling day.

37. Furthermore, it was his evidence that the agents are sworn to secrecy. It was also his evidence that an agent at any polling station represented the party and that at no time was any candidate allowed to have his own agent. And such agent was one who was agreed upon by all party candidates in all polling stations. He also testified that agents signed on behalf of the party and not for a particular candidate. After perusing pages 47 – 56 of form 35As, he testified that the polling stations shown on those pages were in relation to Mogondo ward and all of them had been signed by Jubilee party agents. He also testified that there were other agents for other political parties who had signed those forms. Additionally, no agent complained of any malpractices according to those form 35As. In respect of page 21, the presiding officer commented that the agents and himself accepted the results.

Furthermore, in relation to Koisagat polling station in Mogondo ward the presiding officer's remarks were that the exercise was fair and credible. Again after perusing form 35As in relation to the office of Member of Parliament, there were no complaints from voters, observers, the press and from the candidates themselves.

38. It was also his evidence that he did not come across any violence during voting, counting and tallying. He further testified that he was never summoned to any police station to produce any assailants. It was also his evidence that the death of Jeremiah Rop was on 20/6/2017, which was before the elections. He further testified that he confirmed the death of Jeremiah Rop and wanted that it be ascertained whether his death was due to politics or was an ordinary murder case. The Deputy County Commissioner summoned a security meeting which included the returning officer (R1/R2W1) all security agencies namely National Intelligence Services, AP Commander, OCPD and the CID Boss. Other aspirants for the elective posts did not attend that meeting.

39. Furthermore, it was his evidence that Jeremiah Rop was his supporter. It was also his evidence that his constituency borders Borabu and Kilgoris, where violence was a common occurrence. His evidence is that the cause of that common violence was due to land disputes and cattle rustling. In respect of the burning of Winnie Cheruiyot's house (PW 2) house, he testified that she was her sister in-law. His evidence in that regard was that the burning was due to a family matter involving Winnie Cheruiyot and his cousin by the name Geoffrey Ngetich. It was his evidence that Winnie Cheruiyot bought a bed from Geoffrey Ngetich but refused to pay for it. And that was the cause of the burning of Winnie Cheruiyot's house, which was arbitrated by elders. He denied that Benard Korir (PW 6) had been given money to ferry supporters to the house of David Chepkwony. He also denied holding night campaigns, which were outlawed by IEBC.

40. He further testified that the winning of elective posts in the whole constituency was by different party candidates, which showed that the elections were free and fair and they reflected the will of the people. He also testified that the voter turnout was high for the 6 elective posts. He also testified that he had no complaints against the petitioner, the 2nd and 3rd respondents in regard to those elections.

41. While under re-examination, he testified that he met with the family members of the deceased, Jeremiah Rop and he assisted the family by employing the wife of Jeremiah Rop. It was also his evidence that only the chief agents and the candidates themselves who were allowed to enter every polling stations to ensure that the voting was proceedings normally. The chief agents were to report back to the candidates of any anomaly. Additionally, they were allowed to report to the returning officer any anomaly that occurred during the day. It was also his evidence that there was a problem with the voting kits technically known as Kiems kits due to network problems. Thereafter, at the end of the tallying, he was declared the winner at 8.30 p.m. And as at that time, the petitioner congratulated him for winning. Finally, he testified that 'mokiwole' was his campaign slogan which from the evidence meant no change. 'Kiwole' was the campaign slogan for the petitioner which meant change.

42. Samuel Kibet Rop (DW2/R1W2) was the only witness who testified in support of the 1st respondent. It was his evidence that there was no violence at the funeral of his brother, Jeremiah Rop. He confirmed that the petitioner attended his funeral. It was also his evidence that there were no demonstrations after the death of Jeremiah Rop. Furthermore, it was his evidence that the death of his brother was due to personal differences with Peter Ruto, who was arrested for the death of his brother. It was his evidence that Peter Ruto and the deceased had quarreled over shs.200/-, which the deceased owed to Peter Ruto. It was a death arising out of playing a pool table game. Peter Ruto and Jeremiah Rop fought following the quarrel. When he tried to separate them, his deceased brother stabbed him with a knife. While under cross examination, he testified that Jeremiah Rop refused to pay sh.200/= to Peter Ruto, which he had won after the pool table game. It was also his evidence that Jeremiah Rop used to carry a knife at all times. It was also his evidence that the petitioner was capitalizing on the death of his brother to advance on his political interests. Finally, he testified that the death of his brother did not have anything to do with his petition.

43. Counsel for the 1st respondent has urged the court to find that the witnesses for the petitioner namely PW 2, 3, 4,5,6 and 7 did not file affidavits as required by rule 12(3) of the Elections Petitions Rule 12(3) which provides as follows:

"Each person who the petitioner intends to call as a witness at the hearing, shall swear an affidavit."

According to him, the affidavits envisaged are those that are provided for under the provisions of the Oaths and Statutory Declarations Act and Order 19 of the 2010 Civil Procedure Rules. He has therefore urged the court to ignore them.

44. Furthermore, counsel has also urged the court to dismiss the petition for not complying with Rules 8(1) (a) and 12(2)(c) and (d) of the Elections Petitions Rules. He contends that non-compliance with those provisions has rendered this court to be without

jurisdiction to entertain and determine this petition. In support of that contention, counsel has cited the case of *Sir Ali Bin Salim v. Shariff Mohammed Sharry (1938) KLR*, in which that court stated that if a court has no jurisdiction over a matter in litigation, its judgements and orders are mere nullities for they are void and have no effects. That court went further to state that those judgements and orders may be set aside at any time by the court that issued them. Finally, that court stated that it is settled law that jurisdiction cannot be conferred on a court by consent of the parties and that waiver on their part cannot make up for the lack of defect of jurisdiction. Counsel also cited the case of *MacFoy v. United African Co. Ltd (1961) 3 All E.R 1169*, which is to the same effect.

45. In respect of standard of proof, counsel has cited the case of *John Kiarie Waweru v. Beth Wambui Mugo (2008) eKLR* in which that court stated that the standard of proof in election cases is higher than that applicable in ordinary civil cases, but lower than the standard of proof beyond reasonable doubt required in establishing criminal cases. That court also stated that allegations of electoral malpractices like bribery, require higher proof. Counsel also cited a number of cases on the issue of standard of proof which are not contested.

46. Counsel has further submitted that the contention by the petitioner that he never had agents in all polling stations in Mogondo Ward did not affect the elections and the results. He has contended in that regard that the petitioner has not established how the alleged failure to have agents in Mogondo Ward affected the elections and the declared results. In support thereof, counsel has relied on section 2 of the Elections Act which has defined an agent as a person who has been duly appointed by a political party or an independent candidate for the purposes for an election under that act. He has further cited section 30 of the Elections Act, which makes it clear that a candidate such as the petitioner may only appoint his agents where a political party has not done so in terms of section 30(2) of the Elections Act.

47. Counsel has also cited *Mercy Kirito Mutegi v. Beatrice Nkathie Nyaga and 2 others (2013) eKLR*, in which that court stated as follows:

“These provisions speak for themselves. It is not a must that every candidate must have an agent in every polling station relevant to their election. That is why failure to have any agent cannot be a ground to nullify an election.”

48. Furthermore, counsel has submitted that the petitioner should never be heard to disown Jubilee party agents who signed form 35As. The nomination by Jubilee of its agents was a proper exercise of that party’s mandate to do so. The nominated agents also acted for the petitioner in law.

49. Furthermore, counsel has submitted that the evidence of the petitioner (PW 1) and his witnesses (PW 2, 3,4,5,6,and 7) is not credible. Additionally, the totality of that evidence according to counsel does not connect the commission of those offences to the 1st respondent in particular the killing of Jeremiah Rop by one Anthony Ng’eno in respect of which the key witness for the 1st respondent is Samuel Rop (DW 2/R1W2). In other words, the killing of Jeremiah Rop by Anthony Ng’eno has no linkage. In respect of the burning of Winnie Cheruiyo’s house by one Geoffrey Ngetich (not a witness) counsel has submitted that this was a domestic dispute, which was resolved by the village elders as testified to by the 1st respondent (DW1/R1W1). The evidence that the deceased Jeremiah Rop snatched a knife from one Benard Bii is corroborated by the petitioner’s witness namely David Kiprono Ngeno (PW 5). Counsel has therefore submitted that based on the evidence of the 1st respondent and that of Samuel Rop there is no evidence to connect the 1st respondent with the death of Jeremiah Rop.

50. Furthermore, counsel submitted that Winnie Cheruiyot did not produce a police abstract report that her house was burnt. He also submitted that the evidence of Winnie Cheruiyot contradicts that of Kibet Rono Anderson as regards the vehicle they used in travelling to Nairobi. According to Winnie Cheruiyot, they used a probox motor vehicle, whereas Kibet Rono Anderson testified that they used a Nissan matatu and that Winnie Cheruiyot was among the people he travelled with to Nairobi.

51. Furthermore, counsel has submitted that the evidence of Winnie Cheruiyot is incredible in respect of the events during the voting day. She testified that she left for the polling station at around 8 a.m. and while en-route she met police who were on their way to her home. The police were proceeding to her home in response to the burning of her house. Instead of accompanying them to her home, Winnie Cheruiyot asked them to wait for her as she was going to vote and promised to return immediately. This he submits is evidence that Winnie Cheruiyot was not a truthful witness. She also testified as to what happened in the polling station. It is her evidence that she was given a ballot paper which she immediately cast and left. She did not testify as to what happened to the remaining 5 ballot papers. Counsel submits that this is another indication that Winnie Cheruiyot was not a truthful witness. Furthermore, Winnie Cheruiyot did not produce a police abstract report in respect of burning of her house. Finally, the petitioner

contradicted the evidence of Winnie Cheruiyot that she did not vote, whereas her evidence is that she voted. Counsel has submitted that this was a clear contradiction.

52. In respect of Francis Maritim(PW 7), counsel has submitted that he too was an incredible witness. It was his evidence that he was beaten by people known to him in the night of 7th and 8th August, 2017. He did not seek medical attention until the 11th August 2017, which is 3 days after the alleged assault incident. He also did not produce the police abstract number which is popularly known as the OB number. Counsel has also submitted that if it is true that PW 7 was assaulted, there is no evidence that links this incident with the 1st respondent. Additionally, counsel has submitted that there is no evidence that 1st respondent organized for the alleged violence. Additionally, this witness did not produce any supporting evidence in respect of the allegations.

53. Counsel cited the case of *Hassan Mohammed Hassan & Another v. IEBC and 2 others (2013) eKLR*, in which the court stated that it found the evidence tendered before it was sketchy and too generalized. That court also found that the evidence tendered before it did not point to the specific voters, who were adversely affected by intimidation. It also found that there was no evidence to specifically show where incidents of violence occurred that disrupted the voting, counting or tallying. The court concluded that the claim of intimidation, violence and insecurity, which would adversely affect voters to vote for a person not of their choice had not been sufficiently supported by the evidence on record. Counsel therefore urged the court to find that this authority is persuasive.

54. In respect of the security situation in Emurua Dikirr, counsel has submitted that a district security meeting was held which included the following security agencies.

i) The National Intelligence Service (NIS) Intelligence Service (Boss)

ii) Officer Commanding Police Division (OCPD Police Boss).

iii) District Criminal Investigation Officer (DCIO –CID Boss)

iv) General Service Unit (GSU Boss)

v) Administration Police (AP Boss)

55. Counsel's submissions in this regard is that the petitioner did not call any witnesses from these security agencies to testify on election violence. He further submitted that there was no evidence tendered to show that any person was facing trial for election related offences under the Election Offences Act No. 37 of 2016. He further submitted that the Returning Officer (RW1/R2W1) was co-opted to that meeting. It was her evidence that at no point was the 1st respondent ever mentioned or discussed as a security threat.

56. Counsel has also invited the court to the discrepancies in respect of the signatures of the petitioner's witnesses namely the ones appearing on their affidavit evidence and the ones they signed in court.

57. Counsel has finally submitted that the petition is fatally defective and that the petitioner has failed to prove his case to the standards required in law and for that reason he has urged the court to dismiss the petition in its entirety with costs.

58. The case for the 2nd and 3rd respondent

Only 2 witnesses testified on behalf of the 2nd and 3rd respondents. The 1st witness, Lilian Okoth (RW1/R2W1) testified that she was the Returning Officer for Emurua Dikirr constituency. She testified that she was the one who filled form 35As, which reflect the results from the polling stations for the entire constituency in respect of the seat of the Member of Parliament for Emurua Dikirr constituency. It was her evidence that all political parties were represented by agents. She also testified that independent candidates had their own agents. Her further evidence was that there were presiding officers who were working under her. Her evidence was that one candidate would be allowed to have many agents due to changing over from one agent to another, because it was not possible for one agent to stay in the polling station the whole day. She also testified that it is the agents who signed form 35As. It was also her evidence that the agents for parties without candidates signed those forms as witnesses in relation to whether the elections procedures were followed. She further testified that Jubilee party agents would represent all Jubilee candidates for the 6 electives posts. It was also her evidence that there was the polling station diary, which would show a change over from one agent

to the other and that cannot be shown on Form 35As. It was also her evidence that she was the one who wrote a letter dated 17/6/2017 in respect of an incident report on complaints from voters and the murder of a voter. She also confirmed what was reported to her was an argument between 2 voters. She also confirmed that in the security meetings which was chaired by the Deputy County Commissioner, it was resolved that investigations were to be carried out to find out whether gangs were operating in the area and that the 1st respondent was asked to reign in his supporters.

59. Furthermore, it was also her evidence that a resolution was passed to the effect that a patrol base was to be operationalized in Soget and Murken areas. She also testified that there were previous plans to establish patrol bases in those areas. Furthermore, she testified that her letter of 1/8/2017, which was addressed to both the petitioner and the 1st respondent, was in relation to Kuresiet centre. The letter was addressed to those candidates because they were the major candidates in that area. She also confirmed the burning of motor cycles which were not less than 4. And because of the violence in the area, she ordered the campaigns to be stopped for 2 days.

60. In respect of the assisted voters, it was her evidence that there were 2 classes of those assisted voters. The first class were those assisted voters, who came with their own assistants. The second class of assisted voters, were those who sought the assistance of the presiding officer. Those who were to assist the assisted voters were required to sign form 32 which was a declaration made by the person assisting the assisted voter. The procedure to be followed is outlined in the evidence of the 1st respondent. It was also her evidence that she had given directions in respect of voters to be assisted to presiding officers during training. The assisted voters were illiterate. She also testified that she could not remember the number of assisted voters.

61. It was also her evidence that the declaration of a winning candidate is made on form 35C, which is also a certificate given to the winning candidate. According to her, results are announced using form 35B. She further testified that forms 35A, 35B and 35C are public documents which are available upon request. She also testified that the petitioner through one of his agents requested for form 35As and 35Bs. He did not request for form 35C. Furthermore, no single agent complained that he was not allowed to sign form 35A. Furthermore, she testified that all presiding officers and agents were sworn to secrecy and that the presiding officer had to sign the polling station diary (abbreviated as PSD), which is signed by the presiding officer and the agents. She also testified that *"I did not receive any complaint from an agent that assisted voters were not handled well. No candidate complained to me in regard to assisted voters."* Finally, she testified that the voter turnout in Emurua Dikirr was more than 84%, which according to her, is explicable on the basis of a conducive voter environment and voter education, which they had conducted and the campaigns by the individual candidates. She closed her evidence by testifying that no person complained to her during the counting, tallying and declaration of results in respect of the whole electoral process.

62. The only witness who testified on behalf of the 2nd and 3rd respondents in Joseph Kipkoech Rotich (RW2/R2W2). He was the presiding officer at Motosiet polling station in Mogondo ward. It was his evidence that during voting day one voter shouted the name of one particular candidate while on the queue to vote. He went to assist him to vote for the candidate of his choice namely President Uhuru Kenyatta. He took him to the polling booth and called all the agents. He then asked the assisted voter in the presence of all the agents as to who was his candidate of choice. After all the agents were satisfied he folded the ballot paper and gave it to the voter who then put the ballot paper in the right ballot boxes. Thereafter, he assisted the voter to exit. This witness did not hear about the burning of the house of Winnie Cheruiyot. He also was not present when the death of Jeremiah Rop occurred. Finally, it was evidence that the voter turnout was very high.

63. Submissions of counsel for the 2nd and 3rd respondents.

Counsel for the 2nd and 3rd respondents filed his written submissions in support of dismissing the petition on the grounds that the evidence of his witnesses was not credible and did not prove the various incidents of violence and the alleged breach of the secrecy of the ballot. Furthermore, they have submitted that the petitioner did not prove the nexus between the alleged criminal actions and electoral malpractices and the 1st, 2nd and 3rd respondents. Additionally, he has also submitted that the petitioner did not call any witnesses from the security agencies namely the Kenya Police in order to establish the *Mens rea* and *actus reus* of the alleged perpetrators of the violence.

64. It was also their submissions that the alleged incidents violence did not stop any person or any of the petitioner's witnesses from voting. In respect of the burning of Winnie Cheruiyot's house (PW 2), it was her evidence that one Geoffrey Ngetich, a declared supporter of the 1st respondent accosted her and went further and told her that Araret was not a Jubilee zone. It is these threats which led her to believe that Geoffrey Ngetich, burned her house on 8/8/2017. She also testified that she witnessed a meeting that was held at the house of David Chepkwony, who is a neighbour of the 1st respondent. The evidence of the burning of her house and

the meeting in the house of David Chepkwony have not been shown in terms of evidence to have any nexus with the 1st respondent. Additionally, she did not testify as to what transpired in the meeting in the house of David Chepkwony. In this regard, there is no evidence that the commission of this offence of arson was at the instance or approval of the 1st respondent. The evidence of the 1st respondent is that Geoffrey Ngetich burned her house due to a debt owed to him by Winnie Cheruiyot.

65. In respect of the assault of Kibet Rono Anderson (PW 3), who was the chief agent of the petitioner the evidence was that on 8/8/2017 he was accosted by persons known to him and attacked while distributing the petitioner's agents' appointment letters. Notwithstanding the alleged attack, PW 3 went ahead and voted at Cheramgoi. It is counsel's submission that no violence was meted out on PW 3 as he alleges. The alleged attack was an afterthought. Counsel further submitted that there is no nexus between the persons who allegedly attacked PW 3 and the 1st respondent. And for that reason, the 1st respondent cannot be held personally responsible.

66. Furthermore, in respect of the killing of Jeremiah Rop as testified to by PW 4 the evidence was that on 20/6/2017 during the campaigns, the deceased was stabbed to death by Peter Ng'eno. The defence evidence through the brother of the deceased, Samuel Rop (DW2/R1W2), is that the deceased and Peter Ng'eno were previously involved in a fight over a sum of Shs.200/= which the deceased refused to pay to Peter Ngeno. The debt arose out of a pool table game, in which the deceased had lost. It was the evidence of DW 2 that the petitioner had sought to politicize the death of his brother which was a personal dispute involving the deceased and Peter Ngeno. There was no evidence produced which directly linked the death of the deceased to the 1st respondent.

67. Furthermore, as regards the attack on Francis Kipsang Maritim (PW 7), in the night of 7th and 8th August 2017, his assailants had never been arrested or charged in court. Counsel has submitted that PW 7 is not a credible witness. He was attacked on the polling day and sought medical treatment on 11/8/2017. Counsel has submitted that although PW 7 had a medical card, it was not explained if he sustained any injuries.

68. In respect of lack of agent representation in Mogondo Ward, it was the evidence of the petitioner and his chief agent Kibet Rono Anderson, that the latter was attacked and letters of appointment for the petitioner's agents were stolen. That was the reason given by PW 3 as to why the petitioner was not represented by his agents in Mogondo Ward. Counsel has submitted that this witness (PW 3) failed to attach a copy of a list of his purported agents or any other document to support his evidence. In this regard, counsel cited Regulation 79(6) and (7) which was interpreted in the case of *Mercy Kirito Mutegi v. Beatrice Nkatha Nyaga and 2 others (2013) eKLR* that the absence of a candidate or an agent at the signing of a declaration form or the announcement of the results under sub regulation 2 shall not by itself invalidate the results announced.

69. As regards the alleged violation of the secrecy of the ballot in respect of the assisted voters, counsel submitted that the right of assisted voters to vote for a person of their choice is protected by regulation 72 (2), &2(5 & (6) of the Elections (General) Regulations of 2012. Those provisions provide as follows:

2. where the person who appeals to be assisted is not accompanied by a person who is qualified to assist him/her, the Presiding Officer shall assist such a voter, in the presence of agents.

5. the following shall apply with respect to a person who assists a voter under this regulation.

a) the person shall before assisting or supporting the voter, make a declaration of secrecy before the presiding officer in form 32 set out in the schedule.

b) a person who breaches his/her declaration commits an offence under the act.

c) the person shall assist or support only one voter at that election and have a mark as proof of the assisting or supporting a voter.

6. Where a presiding officer grants the request of a voter under this regulation, the presiding officer shall record in the polling station register against the name of the voter the fact that the voter was assisted and the reason for the assistance.

70. Based on the foregoing provisions of the law, counsel has submitted that the evidence of the Returning Officer (Lilian Okoth) and that of the Presiding Officer (Joseph Kipkoech Rotich) clearly indicate that the voting by assisted voters was a participatory process that involved all the party agents and the presiding officer. Furthermore, the evidence of Hon. Johana Kipyegon Ng'eno, the

1st respondent was that once a person assisted a voter to vote a mark had to be made between his fingers in order to show that he had already assisted a voter to vote, which is in accordance with regulation 72(5)(c). He further submitted that once a voter had been assisted the presiding officer would proceed to make an entry in the record of the polling station register indicating the reasons as to why the voter had to be assisted, in terms of regulation 72(6). Counsel has also submitted that the petitioner alleges that there was massive breach of secrecy for assisted voters but failed to name the persons that advanced the malpractice and the exact polling stations where this took place. Counsel also submitted that Winnie Cheruiyot was one of the assisted voters, who willingly voted for a candidate of her choice in the presence of party agents. Counsel pointed out that Winnie Cheruiyot did not complain of having been misled by the agents who were present. Finally on this point, counsel also submitted that none of the petitioner's witnesses complained of having been misled at the polling station.

71. As regards costs, counsel has relied on rules 30 (1) & (2) of the Elections (Parliamentary and County) Petitions Rules of 2017, which provide that the election court may at the conclusion of a petition make an order specifying;

- a) The total amount of costs payable
- b) The maximum amount of costs payable
- c) The person who shall pay the costs
- d) The person to whom the costs shall be paid.

72. Furthermore, counsel has submitted that Winnie Cheruiyot (PW 2) and Kibet Rono Anderson (PW 3) materially contradicted themselves in the evidence in respect of the mode of travel to Nairobi to sign the witness affidavit evidence. PW 3 testified that they travelled to Nairobi in a Nissan Matatu, whereas Winnie Cheruiyot testified that they used a Toyota probox. Additionally, counsel has submitted that Peter Cheruiyot Mutai's, (PW 4) evidence was internally contradictory. It was his evidence that his identification card was stolen from him on 7/8/2017, amongst other several items and for that reason, he was unable to vote on 8/8/2017. He further testified that he had a new identity card supplied to him at Huduma Centre in Narok town. When he testified in court, he produced his old identity card which he confirmed was issued to him on 15/11/1996. He tried to explain this contradiction in his cross-examination that his old identity card, had been found at Karinde Hotel in Emurua Dikirr.

73. Counsel also submitted on the standard of proof in support of which he cited *Raila Odinga and 5 others v. IEBC and 3 others (2013) eKLR* and that of *Joho v. Nyange & Another (4) (2007) eKLR*, whose principles in regard to the standard of proof are not contested.

74. Counsel submitted that the petition is premature and an afterthought since the voters in Emurua Dikirr were aware of their voting rights and turned out in large numbers to vote. In support thereof, he pointed to the fact that most if not all forms 35As from the polling stations have comments from the presiding officer that the polls were peaceful and fair. He submitted that that is why the overall turnout in almost all polling stations were at 84%. This is supported by the evidence of the Returning Officer Lilian Okoth (R1/R2/W1). It is for these reasons that counsel has urged the court to dismiss the petitioner's petition with costs to the respondents.

75. Issues for determination

After considering the totality of the evidence of all the parties, the rival submissions of all participating counsel and the applicable law including the cited authorities, I find the following to be the issues for determination:

1. Whether or not there was violence and intimidation
2. Whether or not there was destruction of property
3. Whether or not there was a violation of the secrecy of the ballot.
4. Whether or not the petitioner was represented by agents especially in Mogondo ward.

5. Whether or not election offences were committed
6. Whether or not the elections were free, fair and accountable
7. Who bears the costs of this petition"

76. Issue No. 1

I have considered the entire evidence in respect of violence and intimidation presented by all the parties. I find that the petitioner's evidence that his chief agent Kibet Rono Anderson (PW 3), who was allegedly beaten by the agents of the 1st respondent is not credible. It was his evidence that this assault was reported to the police and recorded in the police occurrence book as OB 6/9/8/2017. The names of his assailants are not mentioned by the petitioner. Furthermore, the petitioner has not attached the medical report (P3) to his affidavit. Furthermore, according to the affidavit evidence of the petitioner, Hillary Kirui, was beaten on the eve of the election campaigns that is 2 days before the date of the campaigns. This Hillary Kirui was not called as a witness for the petitioner. It was also his evidence that the offences charged were under the Penal Code and not under the Elections Act and that in those charges, the 1st respondent is not an accused. It was also his evidence that since the alleged incident which occurred on 9/8/2017, he had not checked on the status of that case, which translates to 4 months of inactivity on his party in relation to that case.

77. Furthermore, it was the evidence of the petitioner that he did not lodge a complaint with IEBC that his chief agent was unable to distribute letters of appointments to his agents. Additionally, the petitioner testified that he did not indicate the name of any voter who did not vote because his identification card was robbed. It was also his evidence in re-examination that voters in Mogondo ward which has 9 polling stations and a few polling stations in Ololmasani and Ikerin wards were intimidated and there was also violence in those wards. Finally, it was also his evidence that Jeremiah Rop was killed at Soget centre on 31/7/2017.

78. Additionally, it was also his evidence that the 1st respondent participated in the violence, which he planned and that he used his agents to carry out that violence.

79. Winnie Cheruiyot (PW 2) testified that there was fighting at Araret polling station on 8/8/2017, which involved the supporters of the 1st respondent. That fighting involved one by the name Rono, who was an agent who had been taken to hospital. It was also her evidence that she voted. It was also her evidence that her house was burned by Geoffrey Ngetich. She also testified that she voted for the 1st respondent out of fear, because her house had been burned. She further testified that no one forced her to vote for Ngong (1st respondent). Finally, she testified that there was fighting at the gate of the polling station and as she entered through the door to the polling station, she shouted "Ngong" (1st respondent). In respect of demeanour, I noted that this witness was refusing to answer the question as to who was fighting who outside the gate of the polling station in terms of Order 18 rule 7 of the 2010 Civil Procedure Rules.

80. The next witness who testified was Kibet Rono Anderson (PW 3). He was the chief agent of the petitioner. It was his evidence that after being beaten, he was rushed to hospital which he did not name. It was also his evidence that he reported the assault committed upon himself to the police station, which was entered in the police occurrence book as OB 6 of 098 of 2017. He further testified that it was his IEBC badge that was taken and not the Jubilee card. Subsequently, he contradicted himself in testifying that he told the police that what was taken away from him was his Jubilee card. He further testified that he did not attach the police abstract report and the P3 form to his affidavit. Additionally, he testified that his assailants had not been arrested as the case was still under investigations. He further testified that he never complained in respect of those groups that were fighting outside the gate to the polling station to the IEBC, the returning officer (RW2R2W1). He further testified that he did not mention the issue of 2 groups fighting outside the gate of the polling station in his affidavit. He also testified that he has not complained in respect of his assault notwithstanding that it has not moved forward.

81. Furthermore, interestingly, PW 3 testified that he knew his assailants. Furthermore, PW3 testified that he did not indicate the identities of the youths who had beaten him although he indicated that they were supporters of the 1st respondents.

82. In addition to the foregoing witnesses, there is the evidence of David Kiprono Ng'eno (PW 5). PW 5 testified that he was an eye witness to the stabbing to death of Jeremiah Rop. His evidence was that Jeremiah Rop, Peter Ruto and Benard Bii were all his neighbours. His evidence was that it was Jeremiah Rop, who inflicted injuries on Peter Ruto then stabbed Jeremiah Rop, who

subsequently died. It was his evidence that Jeremiah Rop had been stabbed in the left chest from which wound he bled, and as a result, he lost energy and was unable to injure Peter Ruto. He also testified that Peter Ruto has been charged with the murder of Jeremiah Rop. It was his evidence that Jeremiah Rop had shouted *kiwole* and that is what gave rise to the fight between him and Peter Ruto. It was also his evidence that the fighting between Peter Ruto and Jeremiah Rop was due to politics, since Jeremiah Rop supported the petitioner while Peter Ruto supported the 1st respondent. He also testified that he voted peacefully as Soget polling station. He further testified that he did not have any complaint to make.

83. Furthermore, there is the evidence of Benard Kibet Korir (PW 6), who testified that Hillary Kirui was beaten by unknown people. He also testified that he did not know why Hillary Kirui, was beaten.

84. Finally, there is the evidence of Francis Maritim (PW 7), who testified that he himself and Philip Korir were attacked for being supporters of Jubilee party. Additionally, he testified that he was an agent of Jubilee. It was his evidence that they were attacked in the night of 7th /8th of August, 2017, just on the eve of election day. He admitted that he had not indicated the police occurrence entry number in his affidavit in respect of his being assaulted. He gave as a reason for not doing so because he had reported the assault incident at Abosi police station. In paragraph 10 of his affidavit, he has identified his assailants as David Kimutai, Koech and Hillary Kipngetch Cheruiyot, who escaped to an unknown place on 8/8/2017. He further testified that his assailants did not vote. It was also his evidence that he was an agent for the presidential candidate. He also testified that he took care of all candidates who stood on a Jubilee party ticket. He also testified that people voted and he did not witness any fighting. His further testimony was that although he reported his assailants to the police station at Abosi, he was not issued with a P3 form. Finally it was his evidence that although he knew his assailants, he did not mention their names. His assailants shouted "*mokiwole*" which was another name for the 1st respondent. It was also his evidence that people turned up and voted peacefully. And those who did not turn up to vote feared. However, he did not write in his police statement that voters feared to vote due to violence.

85. Furthermore, he testified that after being assaulted he lost money and a belt. He further testified that although he was attacked on the 8/8/2017, he went to the hospital on the following day (9/8/2017) and to the police on 10/8/2017. Finally, he testified that he never complained against IEBC in respect of voting in his polling station.

86. It should be noted that Moses Kiprono Lang'at (PW 8) did not testify following my ruling that his intended video evidence did not meet the admissibility requirement of section 106B (2) of the Evidence Act (Cap 80) Laws of Kenya. The photographs taken by PW 8, being the product of electronic evidence required certification and for that reason they are not admissible in evidence.

87. The 1st respondent, Johana Kipyegon Ng'eno (D1/R1W1) testified in his own defence that the voting was very peaceful. He also testified that the counting was equally peaceful. He further testified that the voting was free and fair. Additionally, he also testified that he did not experience any violence and that even the police did not report any violence. He further testified that he did not have any gangs who were forcing voters to vote in a particular manner.

88. Furthermore, it was also his evidence that he was never summoned to any police station to produce any assailants. It was also his evidence that Jeremiah Rop was his supporter. It was also his evidence that he did not hear the petitioner complain against the elections in Emurua Dikirr. According to him, the cause of violence in Emurua Dikirr was due to cattle rustling and land disputes. In respect of the burning of the house of Winnie Cheruiyot, he testified that this was a family dispute between Winnie Cheruiyot and Geoffrey Ngetich which the elders arbitrated successfully. The burning of the house of Winnie Cheruiyot arose out of a bed dispute which Geoffrey Ngetich sold to Winnie Cheruiyot. Winnie Cheruiyot refused to pay the purchase money to Geoffrey. As a result, Geoffrey Ngetich burnt her house. The issue was resolved by Geoffrey Ngetich being asked to rebuild the house for Winnie Cheruiyot.

89. In respect of the death of Jeremiah Rop, the 1st respondent testified that he met family members after his death and that he visited the home of the deceased. He went further and employed the wife of Jeremiah Rop. In this regard, the evidence of the 1st respondent is supported by that of Samuel Rop (DW2/R1/W2). Samuel Rop is the brother of the deceased. He testified that Peter Ruto killed his brother due to a debt of Sh.200/-, which his brother owed Peter Ruto. The debt arose out of a pool table game, in which Peter Ruto won as against the deceased.

90. The evidence of the 1st respondent is corroborated by that of Lilian Okoth (R1W1), who testified in respect of violence in the constituency. She testified that there was campaign violence in the constituency which forced her to stop the campaign for 2 days. She wrote a letter dated 31/7/2017 addressed to both the petitioner and the 1st respondent. According to her evidence, the violence was of a general nature and was not connected to the 1st respondent. She also testified that the 1st respondent objected to the usage

of Kenya Army soldiers and Narok County Askaris (Kenya Wildlife Rangers) to be deployed in the constituency. It was never put to him as to why he took objection to the deployment. In those circumstances, it is difficult to draw an inference that he was against peace. It was also her evidence that the voter turnout in the constituency was over 80%, which she considered to be high. Her evidence in this regard also was that the high voter turnout was due to a conducive voter environment, voter education which they had conducted and the campaigns by the individual candidates.

91. After considering the totality of the evidence both for the petitioner and the respondent, I find that the evidence for the petitioner was not credible. His witnesses contradicted themselves in material particulars. The totality of their evidence was not cogent and credible. It fell short of proving that the 1st respondent was connected with the violence for the reasons I have already given in analyzing the evidence both for the petitioner and the respondents. I therefore find in favour of the respondents that they were not the authors of the violence before and during the voting on the 8/8/2017 elections. I further find that those incidents of violence were isolated and did not adversely affect the electoral process during campaigns, voting and tallying. I therefore answer the 1st issue in favour of the respondents.

Issue No. 2

92. In respect of the 2nd issue, there is credible evidence from the 1st respondent that the burning of the house of Winnie Cheruiyot by Geoffrey Ng'etich was a family dispute arising out of a debt owed to Geoffrey Ng'etich by Winnie Cheruiyot. It was resolved by the elders by asking Geoffrey Ngetich to rebuild the house for Winnie Cheruiyot. It had nothing to do with these elections.

93. There is also the destruction of motor cycles which were not less than 4 according to the evidence of Lilian Okoth who was the 2nd respondent. The evidence in respect of the destruction of the motor cycles did not connect the 1st respondent with that destruction. The evidence of Lilian Okoth, who was the Returning Officer, clearly indicated that the 1st respondent had nothing to do with this violence. In the circumstances, I find that the evidence of the petitioner and witnesses in this regard is not credible at all. I therefore find that the destruction of property which is the subject matter of the 2nd issue did not implicate the 1st respondent. I therefore find that the petitioner and his witnesses have failed to prove that the 1st respondent was responsible.

Issue No. 3

94. The evidence in this regard is that assisted voters according to the evidence of Lilian Okoth was that there were 2 classes of assisted voters. The 1st class of assisted voters were those who were accompanied by their assistants. These class of people posed no problem at all because their assistants assisted the voters to vote for the candidates of their choice. A case in point is that of the 88 years old mother of the 1st respondent, who was assisted by his son to vote because she was frail. The 2nd class of assisted voters were the illiterate voters. According to the evidence of Lilian Okoth, all agents were sworn to secrecy. When voters in need of assistance turned up, the person assisting them had to sign form 32. Furthermore, according to the evidence of Joseph Rotich (R2W2) who testified on behalf of the 2nd and 3rd respondents clearly set out the procedure that they followed. The procedure according to R2W2 was that the voter was given a ballot paper. He then took the voter to the polling booth. After that he called all the agents to witness. Thereafter he asked the voter the name of the candidate of his choice. After that the voter mentioned the name of his preferred candidate namely President Uhuru Kenyatta. All the agents were satisfied to what he did after which he folded the ballot paper and gave it to the assisted voter. The assisted voter then put the ballot paper in the right ballot box. Thereafter, he assisted the voter to exit the polling station. In the obtaining circumstances, there was no breach of secrecy of the ballot paper. It should be borne in mind that the secrecy is for the benefit of the voters singly and collectively. If the voter decided to breach the secrecy, that was his choice and must be respected. Furthermore, it should also be borne in mind that the presiding officer (R2W2) and all the agents are sworn to secrecy. This is consistent with the requirement of article 81(e)(i) of the 2010 Constitution of Kenya.

95. Furthermore, there was evidence from Winnie Cheruiyot which I find incredible that voters were directed to vote in a particular manner. In this regard, there is credible evidence of the 1st respondent and the 2nd respondent that the elections were peaceful, free and fair. I found the evidence of these 2 witnesses to be credible and cogent. In the circumstances, I find as a fact that there was no breach of the ballot secrecy. I therefore answer issue No. 3 in favour of the respondents.

Issue No. 4

96. In respect of the representation of candidates by their agents in all the 4 wards of Emurua Dikirr constituency, I find from the evidence of the 2nd respondent (Lilian Okoth) that agents represented political parties. I also find from her evidence that

independent candidates were also allowed to have their agents. It is these agents who were required and did sign form 35As. However, she admitted that there was a possibility that a party could be represented by more than one agent. This according to her depended on the discretion of the presiding officer. It was also her evidence that agents for political parties without candidates signed the form 35As as witnesses in respect of whether the election procedures were followed. Furthermore, she testified that Jubilee agents represented all Jubilee candidates for the 6 elective posts.

97. The evidence of the petitioner in this regard is that each candidate for each of the 6 elective offices had his own agent. He also testified that Jubilee could not represent him in the absence of his agent. His further testimony was that Jubilee agent signed on his behalf. According to him in respect of each elective post, each candidate had his own agent, because there was no overall party agent. It was also his evidence that in the whole of Mogondo ward, he was not represented by his own agents. It was also his evidence that Jubilee agents were signing forms 35As and 35Bs on his own behalf and on behalf of the other candidates.

98. The evidence of the petitioner is supported by that of Kibet Rono Anderson (PW 3). He testified that the petitioner was not represented in the entire Mogondo ward. The reason being that as the chief agent of the petitioner, he was beaten and was unable to distribute letters of appointment to the agents.

99. The evidence of the 1st respondent in this regard is that agents for all parties were agreed upon by each party separately. It was his evidence that an agent for a particular party represented that party at the polling station. It was also his evidence that it was the party that issued badges and not the agents. In the light of the totality of this evidence I find the evidence of the petitioner and his witness (PW 3) to be incredible. I find as a fact that the Jubilee agents in Mogondo ward represented the petitioner. In the circumstances, I find in favour of the respondents in respect of issue No. 4.

Issue No. 5

100. Mr. Manyange for the petitioner submitted that if the court finds that the 1st respondent committed electoral malpractices, he should be banned from standing for elections and an order be made sending the report of the electoral malpractice to the Director of Public Prosecutions for action. I have considered the totality of the evidence presented by the petitioner and his witnesses and I do not find any cogent and credible evidence that electoral malpractices of a criminal nature were committed to warrant this court to make an order to transmit the electoral malpractices to the Director of Public Prosecutions in terms of section 87 of the Elections Act No. 24 of 2011.

Issue No. 6

101. Whether or not the elections were free, fair and in accordance with article 81 of the 2010 Constitution and of the Elections Act No. 24 of 2011.

I find from the totality of the evidence and the applicable law that the election of member of the National Assembly of Emurua Dikirr constituency were free and fair as required by law. And the law in this regard is as set out in *Moses Wanjala Lukoye v. Bernard Alfred Wekesa Sambu and 3 others (2013) eKLR*, in which that court stated that the stand of proof in election petitions is that:

“It is now settled law that in election petitions, the standard of proof in allegations other than those of commission of electoral criminal offences is higher than that of balance of probabilities required in civil cases although it does not assume the standard of beyond reasonable doubt. However, where the petitioner alleges commission of criminal offences, the standard of proof on the criminal charges is beyond reasonable doubt.”

It therefore follows that the petitioner’s petition is hereby dismissed in its entirety.

Issue No. 7

102. Who should bear the costs of this petition"

The petitioner has failed to prove his case against the respondents as required by law. In other words, the respondents have succeeded in their case that the elections were free and fair. They will therefore have the costs of this petition, which I hereby grant

them and which I hereby cap at Ksh. 3 million. These costs will be shared equally among the 3 respondents.

Judgement delivered in open court this 7th day of February, 2018 in the presence of Mr. Manyange for the petitioner, Mr. Bosek and Ms Okoth for the 1st respondent and Mr. Gathii and Mr. Masolia for the 2nd and 3rd respondents.

J. M. Bwonwonga

Judge

7/2/2018



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