



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI.

CORAM: R. MWONGO, PJ.

ELECTION PETITION NUMBER 5 OF 2017

IN THE MATTER OF: ARTICLES 2, 10, 38(2), 50(1), 88(4) OF THE CONSTITUTION OF KENYA.

IN THE MATTER OF: INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION ACT NO.9 OF 2011

IN THE MATTER OF: THE ELECTIONS ACT NO. 24 OF 2011

IN THE MATTER OF: THE ELECTIONS (PARLIAMENTARY AND COUNTY) PETITION RULES, 2017

IN THE MATTER OF: THE ELECTION FOR THE MEMBER OF NATIONAL ASSEMBLY FOR RUARAKA CONSTITUENCY (NO.281)

IN THE MATTER OF: THE ELECTIONS (GENERAL) REGULATIONS LEGAL NOTICE NUMBER 72 OF 2017.

IN THE MATTER OF: INTERNATIONAL CONVENTIONS AND / OR GOOD PRACTICE.

-BETWEEN-

ELIZABETH ONGORO AMOLLO.....PETITIONER

-VERSUS-

FRANCIS KAJWANG TOM JOSEPH.....1ST RESPONDENT

KAREN WACHERA MWANGI.....2ND RESPONDENT

INDEPENDENT ELECTORAL

& BOUNDARIES COMMISSION.....3RD RESPONDENT

JUDGMENT

Background

1. The petitioner was a contestant for the Ruaraka Constituency Parliamentary seat in Nairobi, on an

Amani National Congress (ANC) Party ticket. The election, the second in Kenya under the Constitution, 2010, took place on 8th August, 2017. At that election, Ruaraka constituency had 175 polling stations located within 19 polling centres. Each polling station had between 400 and 700 registered voters.

2. On the night of 9th August, 2017, Francis Kajwang Tom Joseph, the 1st Respondent, was declared the winner after he garnered 36,892 votes. The petitioner was the runner-up receiving 31,512 votes, a margin of 5,380 votes. The third candidate, Kinyua Dominic Gathecha of Jubilee Party was a distant third with 16,068 votes, and has not disputed the election. The turnout was recorded as 74% of the registered 116,301 voters in Ruaraka constituency.

3. Dissatisfied with the result, the petitioner filed this petition on 5th September, 2017. She also filed her supporting affidavit and the affidavits of seventeen other witnesses, and bundle of supporting documents.

4. The reliefs sought in the petition are as follows:

“i. Immediately upon the filing of the Petition, the 3rd Respondent do avail all the material including electronic documents, devices and equipment for the Ruaraka Parliamentary Election within 14 days of service of this Petition;

ii. An order for scrutiny and audit of all the returns of the Ruaraka Parliamentary Election including but not limited to Forms 35A;

iii. An order for scrutiny and audit of the system and technology used by the 3rd Respondent in the Ruaraka Parliamentary Election including but not limited to the KIEMS Kits, the Server(s); website/portal;

iv. A declaration that the non-compliance, irregularities and improprieties in the Ruaraka Parliamentary Election were substantial and significant and that they affected the result thereof;

v. A declaration that the Ruaraka Parliamentary election held on 8th August 2017 was not conducted in accordance with the Constitution and the applicable law rendering the declared result invalid, null and void;

vi. A declaration that the 1st Respondent was not validly declared as the Ruaraka Member of Parliament elect and that the declaration is invalid, null and void;

vii. An order directing the 3rd Respondent to organize and conduct a fresh Parliamentary Election in strict conformity with the Constitution and the Elections Act;

viii. A declaration that each and all of the Respondents jointly and severally committed election irregularities;

ix. Such election offences by the 2nd Respondent and the 3rd Respondent's Presiding officers as pleaded, disclosed, heard and determined by this Honourable Court be reported to the Director of Public Prosecutions for appropriate action;

x. Costs of the Petition; and

xi. Any other orders that the Honourable Court may deem just and fit to grant.”

5. All respondents filed their responses with supporting affidavits and documentation, albeit late in the case of the 2nd and 3rd respondents. Late responses were allowed pursuant to a consent order of the court.

6. A pre-trial conference was held on 9th October, 2017, at which all parties and counsel were present, and procedures and time-frames for the petition were agreed upon. It was also agreed that three applications would be canvassed, and directions thereon were given. On account of their effect on the petition, a brief summary of the applications canvassed is given hereunder.

7. At the pre-trial conference, the court also gave specific directions on transcription of proceedings. These were that the proceedings in court would be digitally recorded following a set of standard operating procedures, given to the parties. Thereupon, the digital record would be transcribed and the raw transcript availed to parties within two days of transcription. They would then notify the court of any observations or corrections within two days thereafter. All parties agreed to this process, which worked quite smoothly and satisfactorily.

8. Thus, by the time parties were making their closing submissions, they had a *verbatim* transcript of the entire proceedings of the petition. Mention is made of this transcription process only because the recording of proceedings in the High Court has traditionally been by the judge in long hand, whilst in this case there was a technology assisted departure from the norm.

1st Respondent's Application Requesting Further and Better Particulars

9. In the first canvassed application dated 5th October, 2017, the 1st Respondent made a detailed request for further and better particulars. The court made its determination thereon in Ruling No. 2 on 30th October, 2017, and ordered that the following be done within twenty four hours:

“33....the respondent / petitioner to provide particulars in respect of the following:

a. *Petition Page 21 paragraph ii 1 – the polling stations intended to be highlighted should be indicated (reference item 34(c) of RFP);*

b. *Petition Page 22 paragraph ii 2 – the polling stations intended to be highlighted should be indicated (reference item 34(c) of RFP);*

c. *Page 39 of the Petitioner's affidavit in support of the petition at paragraph 18 (i), (ii), (iii) and (v) which paragraphs are incomplete and make no sense unless completed (reference items 35 and 36 RFP), shall be provided;*

d. *Page 40 of the Petitioner's affidavit in support of the petition at paragraph 21 which paragraph is incomplete and makes no sense unless completed (reference item 37 RFP) shall be provided”*

10. In compliance with the ruling, the Petitioner filed their particulars on the hearing day.

Petitioner's Application for leave to file a further affidavit

11. The second application canvassed was filed by the petitioner. It sought leave to file the Further Affidavit of Silas Rabah, the Petitioner's Chief Agent in the 8th August, 2017 election. Annexed to the application was a draft of the said affidavit and annexures, namely, alleged appointment letters of several of the petitioner's agents sought to be admitted. The alleged appointment letters were for: Joyce Atieno Oduor; Paul Omina; Neville Ochieng'; Gaetano Musumba; Eunice Juma Onege and Raphael Otieno Adero, all of whom were the petitioner's witnesses.

12. The court dismissed the said application in its Ruling No 4 on 30th October, 2017. It held that the correct person to produce the said appointment letters would be either the petitioner who is indicated therein as the appointer, or the person who signed the appointment letters. There was no subsequent application by the petitioner in terms of the order of the court, and the matter rested there.

Petitioner's Application requesting for Preservation, Access and Audit of Elections Material and Technology

13. The third application canvassed, was also by the petitioner dated 12th October, 2017. It sought the preservation and production before the court of various election materials, and access thereto and audit thereof. It was a broad-based application, which the Court determined in its Ruling No 5 dated 30th October, 2017. The orders given by the court were as follows:

“a. With regard to the request for KIEMS kit, SD Cards shall be availed to the Registrar within 24 hours upon an order of the court when evidence is adduced in court, respectively in relation to any specific polling station necessitating the reading, audit or access to the SD Card(s) thereof for purposes of obtaining information on the Register of Voters; the Biometric voter registration; electronic voter identification; polling station information that is contained in the SD Cards and for such other purpose that the court may specify during the proceedings. The SD cards shall be collated in the manner stated in paragraph 41 hereof.

b. Consequently, the prayers concerning access and audit of KIEMS kit will only kick in upon provision by the petitioner of evidence necessitating the access or audit thereof. The court was also not given names of any technical experts who may be required for the said exercise, and this court is not prepared to expose the Deputy Registrar to conduct a technical exercise of auditing the KIEMS system, an area in respect of which he or she is unlikely to have any experience or expertise.

c. With regard to provision of lists of presiding officers and clerks, the prayer is declined.”

14. During the hearing of the petition on its merits, the petitioner did not apply for the KIEMS (Kenya Integrated Electoral Management System) Kit or other election materials. However, on 6th November, 2017, during the adduction of the evidence of the Constituency Returning Officer Karen Wacera Mwangi, 2RW1, the court did order, *suo moto*, for the original Forms 35A to be availed to court. These are the statutory forms containing the declaration of results for the Senator election as prepared by each presiding officer at the polling station. The court was satisfied that certain clarifications could only be made upon cross checking with the said original forms. The court order, issued on 6th November, 2017 was as follows:

“...the court hereby orders IEBC to:

1. Produce before the court all original Form No 35As for Polling Stations Codes 101 to 1905 together with the counterfoil booklets from which they were torn off for distribution to party agents and retention by the Returning Officer

2. The above documents to be placed before the court no later than COB [close of business] on 7th November, 2017

.....

3. In addition to the earlier order on production of original Forms 3As, the court also orders IEBC to produce before the court the Ballot Boxes for Member of National Assembly for Lucky Summer Polling Station Code 1301 and 1313. The two boxes to be produced before close of business on 7th November 2017 ”

15. The court subsequently gave directions for the examination in open court of the materials ordered to be produced. The examination exercise took place on 14th November, 2017, in open court, through a consensual process. After the said examination of Forms 35A, the parties signed a **Summary Analysis Report of Original Forms 35A** prepared by the Legal Researcher and Court Clerk during the open court scrutiny and examination exercise in which all parties participated. The Report forms part of the record of

proceedings, and was signed by all parties' counsel on 14th November, 2017 after conclusion of the examination.

16. The hearing of the substantive petition took place on continuous days from 31st October, 2017, to 6th November, 2017. The petitioner had 18 witnesses who filed sworn affidavits although only twelve testified. The 1st respondent had seven witness affidavits, but only six witnesses testified. For the 2nd and 3rd respondents four witnesses testified. Whilst **Rule 12(12) of the Elections (Parliamentary and County Elections) Petitions Rules** provides that an affidavit shall form part of the record of the hearing and may be deemed to be the deponent's evidence in chief, it is now settled law that without cross-examination such evidence of little, if any, probative value. Further, **Rule 12 (13) of the Rules** makes it mandatory that a deponent be cross-examined, and that was the stance agreed on at the pre-trial conference and directions issued thereafter. Therefore, the evidence of the witnesses who were not availed for cross-examination is omitted from consideration herein, in light of the fact that it was not tested.

17. By consent of the parties, written submissions were filed on 17th November, 2017 and orally highlighted on the same date.

Basis of the Petition

18. In her overview of the Petition and its grounds set out in paragraph B 6,7,14 and 15 of the petition, the petitioner asserts the following as the premises for the petition:

“6. The Petitioner avers that the Parliamentary Election for Ruaraka Constituency was so badly conducted, administered and managed by the 2nd and 3rd Respondents that it failed to comply with the governing principles enshrined under Articles 1, 2, 4, 10, 38, 81, 82, 86, 88, and 249 of the Constitution of Kenya; the Elections Act (as specifically set out herein below) and the Regulations made there under including the Electoral Code of Conduct and other relevant provisions of both domestic and international law.

7. The massive, systematic, deliberate and blatant non-compliance with the Constitution and the Law as will be shown and proved by the Petitioner:

i. goes to the very core and heart of holding elections as the key to the expression of the sovereign will and power of the people of Ruaraka Constituency;

ii. Erodes the foundation of the Kenyan system as a sovereign republic where the people are sovereign under Article 4 of the Constitution; and

iii. severely undermines the very rubric and framework of Kenya as a nation State.

.....

14. The Petitioners aver that the Parliamentary Election was so badly conducted and marred with irregularities that it did not matter who won or was declared as the winner of the Parliamentary Election.

15. The Petitioner avers that the nature and extent of the flaws and irregularities significantly affected the results to the extent that the 2nd and 3rd Respondent cannot accurately and verifiably determine what results any of the candidates got.”

19. The above assertions summarise the petitioner's entire case, and I have highlighted them here because they serve fairly well as the petitioner's opening statement, and these are the matters the petitioner set out to demonstrate.

Issues for Determination

20. At the end of the hearing, the parties agreed on the issues which the court is required to determine in this petition, as follows:

“1. Whether there was non-compliance on the part of the 2nd and 3rd Respondents with the Constitution and/or the law in the conduct of the Ruaraka Parliamentary Election, and if so, whether the non-compliance affected the conduct and validity of the said election. Particularly, whether there was non-compliance with the law in respect of:

a. Alleged denial of access to and intimidation and ejecting of Petitioner’s agents from polling stations and preventing them from signing the statutory forms;

b. Alleged burning of ballot papers; and

c. Alleged declaration of the 1st Respondent as the winner of the Ruaraka Parliamentary election before the ballots had been received from all polling stations and before all returns of Forms 35A were received.

2 Whether the 1st Respondent committed electoral irregularities and malpractices of a criminal nature including: Intimidation and violence against voters as well as gender based violence at Ngunyumu primary school polling centre and Tiba Junior Polling Centre that prevented many voters from casting votes, voter bribery and undue influence and whether these irregularities and malpractices affected the conduct, validity or outcome of the voting and negated the will of the people of Ruaraka Constituency

3 Whether the 2nd and 3rd Respondent made administrative mistakes (electoral irregularities, non-compliances and improprieties that affected the conduct and validity of the result of the Ruaraka Parliamentary Election. In particular;

a. Whether there were serious irregularities in the returns/results of forms 35A’s and 35 B’s or the verifiability thereof; and

b. Whether the electoral process for Ruaraka Parliamentary Election was transparent and administered in an impartial, neutral, efficient and accurate manner?

4. What is the order as to costs

a. Who bears the costs of the Petition;

b. What is the quantum of the instruction fees that the court should award or cap the costs at;

c. Is there justification for more than one advocate?”

21. These issues are contained in the parties’ signed statement of agreed issues dated 16th November, 2017 and filed on 17th November, 2017.

Overview of Legal Principles Applicable

22. Before dealing with the parties’ cases and the analysis of evidence I deal with some of the general legal principles applicable in election petitions.

The Law Governing the Dispute

23. Elections are intended to concretise the ultimate expression of the will of the people in respect of their

governance. **Article 38** of the **Constitution** establishes the political rights enjoyed by all citizens. It provides:

“38(1) Every citizen is free to make political choices, which includes the right—

(a) to form, or participate in forming, a political party;

(b) to participate in the activities of, or recruit members for, a political party; or

(c) to campaign for a political party or cause.

(2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for—

(a) any elective public body or office established under this Constitution; or

(b) any office of any political party of which the citizen is a member.

(3) Every adult citizen has the right, without unreasonable restrictions—

(a) to be registered as a voter;

(b) to vote by secret ballot in any election or referendum; and

(c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.”

24. To achieve the enjoyment of those rights through voting, the constitution at **Article 81** makes provision for general principles for the system of elections as follows:

“81. The electoral system shall comply with the following principles—

(a) freedom of citizens to exercise their political rights under Article 38;

(b) not more than two-thirds of the members of elective public bodies shall be of the same gender;

(c) fair representation of persons with disabilities;

(d) universal suffrage based on the aspiration for fair representation and equality of vote; and

(e) free and fair elections, which are—

(i) by secret ballot;

(ii) free from violence, intimidation, improper influence or corruption;

(iii) conducted by an independent body;

(iv) transparent; and

(v) administered in an impartial, neutral, efficient, accurate and accountable manner.”

25. **Article 86** then makes provision for the manner of voting, and requires the Independent Electoral and

Boundaries Commission to ensure certain minimum standards for voting in the following terms:

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

(a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;

(b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;

(c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and

(d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.”

26. The Constitution also provides for electoral justice through electoral dispute resolution under **Article 87**, which provides for Parliament to make legislation to establish mechanisms for the timely resolution of electoral disputes. Directly relevant in this dispute is the **Elections Act, 2011**, the **Elections (General) Regulations, 2012** (as amended in 2017) and the **Elections (Parliamentary and County Elections) Petitions Rules, 2017**. I will refer to the latter two as the **Elections Regulations** and the **Elections Petitions Rules**.

27. The courts are required to discharge their role in electoral dispute resolution guided by the principles values, requirements and standards set out in the Constitution.

Burden of Proof in Electoral Dispute resolution

29. It is now well settled that elections disputes are a special category of civil suit required to be determined expeditiously within strict statutory timelines, and in accordance with their own regimen of electoral law and procedures. Nevertheless, the law of evidence applies.

29. In the case of **Raila Odinga and 5 Others v Independent Electoral and Boundaries Commission & 3 others, Supreme Court Election Petition No. 5 of 2013, [2013]eKLR**, the Supreme Court held, inter alia, that the petitioner bears the burden of proof in the following words:

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

And further that:

“Where a party alleges non-conformity with electoral law, the petitioner must not only prove that there had been non-compliance with the law but that such failure and non-compliance did affect the validity of an election. It is on that basis that the respondent bears the burden of proving the contrary. This emerges from a long standing common law approach in respect of alleged irregularity in the acts of public bodies *Ominia Praesumuntur rite solemniter esse acta* (*All acts are presumed to have been done, rightly and regularly*). So, the petitioner must set out by raising firm and credible evidence of the public authority’s departures from the presumption of the law “

30. But to what standard is the party who seeks to prove a fact in a petition to be held? The Supreme Court, in the **Raila case** (supra) gave the following guidance with regard to the standard of proof in elections petitions:

“...The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable-doubt –save that this would not affect the normal standards where criminal charges linked to an election are in question...”

31. Thus, every allegation of the petitioner in this case must be subjected to these standards for the petitioner to be able to disprove the legal presumption that the public authority acted rightly and regularly.

32. In this case, the petitioner bears the burden to establish not only that there were irregularities, illegalities, violations, omissions and malpractices in the conduct of the Ruaraka parliamentary election, but that these affected the outcome or result of the election. It must be proved that these alleged irregularities, illegalities, malpractices and violations did in fact affect the result in such a manner that they did not reflect the will of the people. Only upon establishing the foregoing to the satisfaction of the court, will the evidentiary burden shift to the respondents to establish the contrary.

33. The Supreme Court in **Raila 1** held that the burden of proof may shift from the petitioner to the respondent in the following terms:.

“[195] There is, apparently, a common thread in the foregoing comparative jurisprudence on burden of proof in election cases. Its essence is that an electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner, but, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting. Ultimately, of course, it falls to the Court to determine whether a firm and unanswered case has been made.”

34. It is also well settled that the court’s role is not to arrogate itself the power to substitute its will for that of the people. And if the people’s will is clear and evident, the court’s role is to give effect to that expression.

35. In the English case of **Morgan & another v Simpson & Another** [1974] 3 ALL E.R 722, the court enunciated the principle that where breaches of the election rules affect the results, then the election could be annulled. There, the court held as follows:-

“An election court was required to find an election invalid:

(a) if irregularities in the conduct of elections had been such that it could not be said that the elections had been conducted as to be substantially in accordance with the law as to the election; or

(b) if the irregularities had affected the results.

....

Accordingly, where breaches of the election rules, though trivial, had affected the results, that, by itself, was enough to compel the court to declare the election void even though it had been conducted substantially in accordance with the law as to elections. Conversely, if the election had been conducted so badly that it was not substantially in accordance with the law, it was vitiated irrespective of whether or not the result of the election had been affected.”

36. Similarly, in the case of **John Fitch v. Tom Stephenson & 3 Others** [2008] EWHC 501 QB6, the court held:-

“The decided cases, including those which Lord Denning considered in Morgan –v- Simpson, establish that the courts will strive to preserve an election as being in accordance with the law, even where there have been significant breaches of official duties and election rules, providing the results of the election was unaffected by those breaches. ...

This is because where possible, the courts seek to give effect to the will of the electorate.”

37. It is this state of the law that is expressly provided for in **Section 83** of the **Elections Act** which provides as follows with regard to how the court is to treat non-compliance with the law specifically in election petitions:

“83. No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election.”

38. More recently, however, the Supreme Court of Kenya in **Raila Amolo Odinga and Another v Independent Electoral and Boundaries Commission Supreme Court Election Pet No 1 2017 [2017] eKLR** analysed **Section 83** of the **Elections Act** and in its interpretation of the provision, determined as follows::

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

39. In summary, there are two disparate bases for annulment of an election:

First, a petitioner who is able to prove that the conduct of the election in question substantially violated the principles laid down in the Constitution as well as other written law on elections, will on that ground alone, void an election;

Second, if a petitioner proves that the election was fraught with irregularities or illegalities that affected the result of the election he will also be able to void the election even though it is shown to have been conducted substantially in accordance with the principles laid down in the Constitution as well as other written electoral law.

40. I now proceed to analyse the parties’ cases and the evidence availed in light of the foregoing principles.

Parties’ cases and analysis of evidence

41. I acknowledge the parties’ submissions together with the numerous authorities cited. Whilst I have read the same, I may not cite most herein due to their numerousness. For ease and good order, I will deal with the parties’ cases as pleaded and assess the evidence under each of the issues identified for determination.

a. Non-compliance with the Constitution and the law: Alleged denial of access to the Petitioner’s agents into several polling stations and its effect on the conduct or outcome of the election.

42. The petitioner has alleged that her agents were denied entry into polling stations. This allegation of denial of access has two limbs to it which were urged by the petitioner. The first is that the IEBC, in collusion with the 1st respondent, denied the petitioner’s agents ingress into the polling stations. The second limb was that the 2nd and 3rd respondents actively ejected the petitioner’s party’s agents from polling stations to which they were accredited and or assigned.

43. The allegations are made substantively at paragraph 18(d)viii of the petition, where it is presented in the following words:

“By colluding with the 1st Respondent and denying access and ejecting the legitimate agents of the Petitioner from various polling stations in the constituency the 2nd and 3rd Respondents abdicated their responsibility of ensuring a transparent, impartial process of voting, tallying and transmission of results” (emphasis supplied).

44. The said allegations are furthered in the petitioner’s affidavit at paragraph 18(i) where she states:

“That I have been informed by my agents, which information I verily and conscientiously believe to be true, that

(i) they were denied by the 1st Respondent and his supporters; and

(ii) denied by various election officials the right to witness and /or otherwise fully participate in vote tallying at...”

45. The allegation on ejection of the agents is based on advice by her lawyers, as contained in paragraph 22 (a) of her affidavit where she states:

“That I am advised by my Advocates on record which advise I verily believe to be true that

(a) the unlawful and unjustified ejections of the agents appointed by the ANC party was a clear violation of the Elections (General) Regulations, 2012” (emphasis supplied).

46. It is necessary to point out right away that the ANC Party itself did not file any material or documentation in this petition, either in support of the petitioner’s allegations that the party’s agents in this election were indeed ejected or locked out from polling stations, or at all. Accordingly, this allegation could only be evaluated on the strength of such evidence, if any, as is available from the petitioner. No evidence of actual ejection of agents was, however, presented by the petitioner. As pointed out hereunder, only about 25% of the all Forms 35A were not signed by ANC agents.

47. In paragraph 18 of her affidavit, the petitioner further stated that she was informed by her agents that not only were they harassed and denied the right to witness or fully participate in the vote tallying; but also that the 2nd and 3rd respondents accepted results not signed by her agents, and refused to address serious concerns raised by them. Having neither named the agents who informed her of these allegations, nor the polling stations at which these events are alleged to have occurred, the petitioner was ordered by the court in Ruling on Application No 2 to file further and better particulars (FBP) in that regard.

48. The petitioner did file further and better particulars on agents. FBP Schedule 2 thereof contains a list of 14 polling centres covering 112 polling stations where the petitioner’s agents were allegedly harassed by the 1st Respondent and his supporters. Even then, the form and type of harassment was not specified, nor was evidence later on provided as to the nature, time and details of such harassment, and upon whom it was specifically visited.

49. In her testimony, the petitioner (PW1) stated that most stations did not have agents throughout because they were not given IEBC badges; and by the time some got the badges, it was long after polling stations had opened. Thus, that they did not witness the opening of polling stations nor witness assisted voters being assisted. In cross-examination, the petitioner asserted that she appointed 174 agents and gave the list to IEBC; that less than half the agents were allowed access; that only six agents got IEBC badges. She admitted that none of the affidavits of her agents had attached duly completed and executed letters of appointment as agents, or duly attested oaths of secrecy of agents.

50. Further, the petitioner also admitted that she had not attached the list of her agents to her petition, nor had her Chief Agent, Silas Rabah, attached such a list. She was not able to identify or list out her agents who allegedly did not get access into the polling stations. It should have been a simple task, having listed in her further and better particulars 112 polling stations where her agents were allegedly harassed, to file a list of the agents assigned to those stations. She did not have such a list, nor did her Chief Agent.

51. PW2 Silas Rabah, the petitioner's Chief Agent, testified in the proceedings. He stated that his responsibility was to co-ordinate all the petitioner's agents. He said that on 7th August, 2017, he went with his list of agents to Stima Club – where the Returning Officer was stationed – to collect IEBC identification badges for the agents. He was told to return on 8th August at 3.00am, as the badges were not available. According to his affidavit, he went again at 2.30 am only to be told the badges had run out and he got only 6 of them. 169 agents were therefore left without badges. However, the Returning Officer told them not to worry as all agents who had an appointment letter and oath of secrecy would be allowed into the stations. His last attempt to get badges at Stima Club at 4.30 am on 8th August, 2017, was repulsed as he was told only IEBC officials could access Stima Club at that time.

52. At paragraph 13 of his affidavit, he named thirteen agents who were denied entry into the polling stations. Of these thirteen, four were called as witnesses namely, Felix Nyagesa (PW4), Joyce Atieno Owuor (PW5), Gaitano Musumba, (PW7) and Eunice Juma Onege (PW10). I will assess their evidence on this issue shortly.

53. In cross examination by Mr Ongoya, Rabah was shown his and other agents' letters of appointment and oaths of secrecy. He was surprised that most of them were either not signed or duly commissioned or dated. He admitted that the requirement of proper documents was a criterion for admission to polling stations. He was unable to state how many of their agents signed Form 35As. Thus, he was taken through a good number of such forms that were signed by ANC agents, for example those at pages 57, 84, 100, 103, 106, 115 of the plaintiffs bundle; and pages 31, 32, 34, 35, 36, 37, 38, 39, 40, 41 and 42 of the 1st Respondent's bundle, amongst others. He admitted that a number of the forms in respect of which he had alleged in his analysis that they were not signed by ANC agents were in fact signed. He attributed the preparation of the analysis to his lawyers, and not to himself, subtly suggesting exaggeration on the part of his lawyer.

54. Rabah was led by counsel Muyundo to paragraph 16 of his affidavit where he states that at around 1.00pm:

“a few of our agents managed to get access to polling stations yet voting had begun officially at 6.00am”.

He listed one Rose Auma, as among the four agents who accessed polling stations at around 1.00pm. However, he was forced to admit in cross-examination that she was also called Rose Auma Wasiaya, who had identified herself in that statutory Form 35A as an agent of ODM Party, and not an agent of ANC. In a surprising turn, he was also unable to identify, other than himself, the five others that received IEBC badges.

55. Called to testify on behalf of the petitioner, PW4 Felix Nyagesa, contradicted his Chief Agent, Silas Rabah, on this point. He said that he was not aware that he was listed by PW2, the Chief Agent, as one of the people denied entry to a polling station for lack of a badge. He stated that he in fact had an IEBC badge during the election; and that as the petitioner's agent at Tiba Junior Academy, he actually arrived there at 5.00am, obtained access at 6am, and then later left the polling station.

56. PW 5 Joyce Atieno Oduor and PW 10 Eunice Juma Onege testified that they were the petitioner's agents at Drive In polling station and Ngunyumu Primary school polling station No 4, respectively, and had been denied entry at 6am when the stations opened because of lack of an accreditation badge. They both finally gained access into the polling station at about 10.30am. However, in cross examination, Eunice Juma prevaricated as to whether she had an appointment letter from the petitioner. She, however, admitted that she did sign Form 35A after counting of ballots. Neither of these witnesses annexed a letter

of appointment and duly attested oath of secrecy to their affidavits.

57. PW 7 Gaetano Musumba, the petitioner's agent at Mathare North Primary School polling station 8 testified that he was granted access to the polling station at 10.30am, and remained there throughout until counting was done. In cross-examination he admitted that there were two agents from ANC in that station, himself and one Hamisi. He admitted that Hamisi had signed Form 35A, and that he had failed to indicate these facts in his affidavit. Hamisi did not file an affidavit.

58. PW 12 Raphael Otieno Adero testified that he was the petitioner's agent at Stima Club polling station No 1. Although he reported at the station at 6.00am, he was not allowed in for lack of a badge until just before 11.00am. He admitted that the letter of appointment and oath of secrecy attached to his affidavit were not signed or attested. In cross examination, he confirmed that he witnessed events at the polling station from 11.00am onwards. However, despite averring in his affidavit that he was denied Form 35A to sign, he admitted in cross examination that he did not sign Form 35A because he was not asked to, and did not indicate a reason for not signing the form.

59. Karen Wacera, 2RW1 the 2nd respondent, gave oral evidence. She denied through her affidavit that any preferential treatment was accorded to the agents of the 1st respondent. She stated that she received a list of agents from the petitioner and also from the petitioner's party, ANC. She also stated that all accredited agents were allowed access into the polling stations and that no agent was denied access or harassed in any way. Accreditation was obtained through providing a letter of appointment and oath of secrecy.

60. In cross examination, she said that because there were six elective positions, if every party and candidate had an agent there would be too many to comfortably be accommodated in the polling stations all at once. Accordingly, the agents were to agree amongst themselves who would be inside the station at any one time. She agreed that the presence of agents in the stations helped in the proper conduct of the elections. At no time, she stated, did she receive any complaints about agents being denied entry or being ejected from any polling station.

61. It is clear that of all the agents called to testify on the issue of grant of access to and ejection from polling stations, only three: PW 5 Joyce Atieno Oduor, PW 10 Eunice Juma Onege and PW 12 Raphael Otieno Adero may possibly have been prevented entry at the time of opening of the polling stations. Their respective polling stations were: Drive In polling station, Ngunyumu Primary School and Stima Club. Their evidence on late entry was not controverted, but it is contested, and unclear that they had duly executed letters of appointment or oaths of secrecy at the time of the opening of the stations.

62. What are we to make of the alleged locking-out of the three agents from the polling stations at the time of opening? If proved, their locking-out could potentially affect the result in the three stations: Drive In Polling Station 5 which had 456 valid votes, Ngunyumu Polling Station 4 which had 548 valid votes and Stima Club Polling Station 1 which had 451 valid votes. All these votes total 1,455 that would be potentially affected.

63. Even assuming it were true that the three agents were, for whatever reason, not granted early access to the polling stations, no evidence was availed that the election in those stations was compromised or not properly conducted, nor was any impropriety or other negative effect on the elections shown or even suggested. There is no claim that there was electoral fraud or malpractice during their absence at opening of the stations. Also there is no evidence that other ANC agents were not in the stations at that time. In other words, the effect of their absence on the election process or on the result is not indicated.

64. In the case of Eunice Juma Onege, she did finally sign the results in Form 35A for Ngunyumu polling station without any comment. Joyce Atieno also signed Form 35A without comment; and the original Form 35A was also seen to have been signed by another ANC agent, Joshua Olala Otieno, without comment. Raphael Otieno said in cross examination that once he had been allowed in he did not experience any problem and witnessed the vote counting at Stima Club.

65. On ejection from polling stations and alleged collusion between the 2nd and 3rd respondents with the 1st respondent, no single shred evidence was adduced. On the alleged intimidation of the petitioner's agents, again there is scant evidence. In light of the above, the allegations on ejection and intimidation of agents wholly fail.

66. In the end, the court notes that, overall, the petitioner's complaints involving agents are about: agents being denied access; agents being intimidated; agents being ejected from polling stations; agents being prevented or denied the right to sign statutory forms; and collusion between the respondents. All this was alleged to have occurred on a massive scale. If true, it would amount to an abrogation of the cardinal right to a fair and credible election transparently conducted, in an unbiased atmosphere free of intimidation.

67. In law, the agents of a candidate or party are entitled to be the eyes and ears of the candidate or party throughout the election process. They are amongst the privileged few, entitled to be in a polling station throughout, and to witness the proper transaction of polling station business. They have a legal platform to voice consent or to dispute anything that happens therein. They are a legitimate part of and critical to the credibility system of the electoral process. Of all actors in the electoral process, they have the most significant and most expansive roles on Election Day: they shadow the presiding officers at polling stations, and returning officers at tallying centres. Wherever the ballot box and results form is, there they are. They have many roles and legal platforms for engagement. All these roles, responsibilities, and the consequences of their actions or omissions, are spelt out extensively in the **Elections (General) Regulations**. In particular they are as set out in **Regulations 48, 57, 62, 63, 65, 67, 68, 72, 73, 74, 75, 76, 78, 79, 80, 81, 83, 85 and 97**;

68. On account of the critical roles of agents, the court has carefully analysed all the original Forms 35As that were ordered to be deposited into court by the 2nd and 3rd respondents. The analysis as relates to agents, discloses as follows: Out of the 175 polling stations in the constituency, Forms 35A were not signed by ANC Party agents in 44 of the said polling stations. Of the witnesses presented by the petitioner on the issue of prevention from entry into or ejection from polling stations, intimidation and denial to sign Forms 35A, there is evidence only of three alleged agents that may have been denied entry. However, whether they did or did not have duly executed appointment letters and oaths of secrecy is not proved.

69. Further, the analysis on scrutiny shows that, comparatively, for agents of the major political parties, Forms 35A were not signed by agents of ODM Party in 26 polling stations, and by Jubilee Party agents in 55 polling stations, respectively. Without giving a badge of approval to failure of various agents to sign this important form, it is not demonstrated and does not appear to the court from the broader perspective disclosed by this information, that there was a concerted or focused attempt or conspiracy by the 2nd and 3rd respondents to collude against the petitioner's agents by locking them out of polling stations or preventing them from signing the said forms.

70. Understood in light of the provisions of **Regulations 62, 79 and 97**, it cannot be said that the mere failure by an agent to be present at a polling station or to sign the statutory forms negates or invalidates the results of an election. **Regulation 62** provides that:

“(2) Notwithstanding sub-regulation (1), the presiding officer shall admit to the polling station not more than one agent for each candidate or political party.

(3) The absence of agents shall not invalidate the proceedings at a polling station.”

Similarly, **Regulation 79** provides:

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

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

failure to sign the declaration form.

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

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

(7) The absence of a candidate or an agent at the signing of a declaration form or the announcement of results under sub-regulation (2) shall not by itself invalidate the results announced.” (emphasis supplied)

Regulation 97 provides, in essence, that non-attendance of an agent at any proceeding or act which requires their attendance or attention shall not invalidate the act or proceedings, unless the act is unlawfully done. The provision states:

“97(1) Where in these Regulations expression is used requiring, authorizing, or implying that, any act is to be done in the presence of the candidates or agents, that expression shall be regarded as reference to the presence of such candidates or agents as may be required or authorized to attend.

(2) The mere non-attendance of any candidate or agents at the time and place as contemplated under sub-regulation (1) shall not, if any act is otherwise lawfully done, invalidate that act.”
(emphasis supplied)

71. The law is thus clear that, in the absence of proof of an unlawful act, the mere absence or failure by an agent to sign the forms, without more, cannot invalidate the act or proceedings in or at which the agent was required to participate.

72. It is also not clear that, in this case, the agents effectively understood their roles in the election. Otherwise, why did Raphael Otieno not sign Form 35A, or formally protest if denied the right to do so? Also, why did Joyce Atieno and Eunice Juma sign Form 35A without comment? Further, in absence of a full list of the agents of the petitioner, it may never be known how many of the 133 ANC agents who signed the Forms 35As at polling stations belonged to the petitioner.

73. In the petition at Paragraph 18 k) ii. 3 on “Election Offences”, it is stated that:

“Your Petitioner pleads that the unlawful and unjustified ejections of the agents appointed by ANC Party was a clear violation of the Elections (General) Regulations 2012”

None of the witnesses above gave any evidence suggesting that they were ejected from a polling station. In light of the absolute lack of evidence on ejection of agents from any polling station, as earlier stated, and the absence of any plea by the ANC Party itself, this plea by the petitioner has no basis and cannot stand.

b. Non-compliance with the Constitution and the law: Burning of ballot papers and a Video of the alleged burning

74. The petition at paragraph 17 alleges that:

“....several ballot papers marked in favour of the Petitioner were destroyed and discovered partially burnt within polling stations such as Lucky Summer. This undoubtedly affected the votes counted, their numbers and final result of the parliamentary election”

75. In her supporting affidavit on this issue, the petitioner says at paragraph 6 that the 1st and 2nd

respondents through omission and commission failed to keep safe custody of ballot papers and allowed the access thereto and destruction thereof. Relying on the affidavits of Barrack Odongo and Felix Nyagesa, the petitioner stated as follows :

“Your Petitioner says that many marked and stamped ballot papers were found burning at Lucky Summer Open Ground Polling Station”

She attached to her affidavit photocopies of what she said were some of the ballot papers in question. Later on in cross examination, she admitted that she was not at the scene and was given these papers by her agent.

76. In her oral testimony on the alleged burning of ballot papers, the petitioner says that on the afternoon of 9th August, the day after the election, she was informed that members of the public came across burning ballot papers. They then alerted the media, who came and witnessed the alleged incident. On hand was one Peter Mutuma Kirichia, a journalist with citizen media, who allegedly recorded the event by video, and availed the video to the petitioner. After the event, members of the public went to record a statement with the police at Ruaraka Police Station, but the police allegedly refused to enter such a record. At the hearing, the petitioner requested that the video clip of the alleged burnt ballot papers be played in court. The court viewed the video twice or thrice during the hearing of evidence of different witnesses who referred to it.

77. In cross examination, the petitioner confirmed that one of the protagonists in the video was Barrack Odongo, one of her witnesses. She admitted that Odongo had not attached any of the allegedly burnt ballot papers found at the scene to his affidavit. She herself was not at the scene of the alleged burning. She admitted that the video clip made no mention of the Ruaraka parliamentary election; that one could not tell in whose favour the defaced ballot papers were marked.

78. Barrack Odongo Ojiao gave evidence as PW 3. He was an agent for Evans Kidero, the ODM Party candidate for the Nairobi Governor seat. According to his affidavit, as he was going home at about 9.30 pm from Chief's Camp on 8th August, 2017, he received a call from a friend concerning a fire at Lucky Summer Open Ground. He went to the scene, and because he had an IEBC badge, he managed to wangle his entry into the Open Ground area where he saw a fire in three heaps. He could not tell exactly what was burning as there were security officers and youth restraining people. When he and others later took some of the ballot papers from the heap to the police station, the police initially refused to record the incident until the following day when they went back with an advocate called William Aluoch. On intervention of the Director of Criminal investigations Officer for Starehe area, a record was then entered as OB No 17/08/2017. The said OB report was not exhibited, and therefore the details of the content of the report cannot be ascertained.

79. In cross examination, Barrack said he reached the Lucky Summer Open Ground scene at 9.30pm. Once there, he saw three heaps of burning paper. They were heaps of roughly three reams of paper each. He said the heaps were near the polling station tents at Lucky Summer. On the following day, he returned and saw the papers still smouldering. He said he and others present carried some of the papers to the police station to record a statement. They were turned away, but eventually, after several attempts, the police recorded a statement. At first he said he could not remember on what day that was. Pressed, he said it was on 11th August, 2017, that the police recorded the statement. Questioned on how he could have left Chief's Camp at 9.30 and yet reach Lucky Summer at 9.30pm, he said he took no time at all. He insisted that only he knows how he got there so fast. The court formed the impression that this witness was not credible.

80. Felix Nyagesa PW 4 and Geoffrey Obora Dullo PW8 also gave evidence concerning the alleged burning of ballot papers. Their evidence is similar in essential particulars; namely that they received a call requesting them to go to Lucky Summer Grounds polling centre; that they went there and found a commotion due to a group of people crowding the entrance to the polling station; that on 9th August they went back to the polling centre; that they saw burning election materials. Dullo noted that they were three heaps of burning ballot papers; that Felix Nyagesa and Barrack Odongo, with others, took the ballot

papers to Ruaraka police station to report the alleged burning incident.

81. Barrack Odongo, Felix Nyagesa and Geoffrey Dullo –who testified for the petitioner and allegedly saw the alleged burning – did not exhibit any photographs of the event. Nor did they exhibit any of the material they allegedly found burnt or burning at Lucky Summer. It is true that the petitioner made an oral application in court during the hearing to produce a bundle of documents alleged to be remains salvaged from the burning heaps of ballot papers found and collected from the field. However, the respondents’ objections to such production were sustained by the court on the grounds that this was an ambush and that evidence by the finder and sequence of handling and storage since the alleged find, would be impossible to trace. In addition, there were no affidavits produced with the petition or by the petitioner’s witnesses as required by **Rule 12(3)** of the **Election Petition Rules**, and no reason had been proffered for such omission.

82. In light of all the above, the court is not satisfied that the evidence given through the three witnesses reasonably demonstrates that ballot papers for the Ruaraka Parliamentary election, were indeed burnt and that this alleged episode affected the results of the election. The burden of proof resting on the petitioner to show these facts was not discharged so as to require the respondents to explain or rebut evidence of burnt ballots for the Ruaraka parliamentary election.

83. As earlier stated, the legal burden of proof only shifts once the allegation is demonstrated, through clear, cogent evidence to be probable on a standard above a balance of probabilities but not reaching beyond reasonable doubt.

The Video on Burnt Ballot papers

84. A video clip was produced as evidence of the burnt ballot papers and played in court. I summarise it as follows:

The video clip is two minutes and thirty-five seconds in length and filmed at daytime. It shows close up pictures of a crowd of irate people; a young man in a red T-Shirt then speaks in English into a microphone marked “*plive co.ke*”; He displays a number of ballot papers which he alleges were found “*dumped there at the polling station*”. Initially, he does not indicate which polling station he is referring to; then he displays another ballot paper; and a third one, which he describes as “original”; the ballots allegedly have an IEBC rubber stamp, which he shows; he alleges they have not been counted and that the one he lifts up is for Passaris (Esther); there is a lot of shouting until the reporter calls for calm.

The man is then interviewed in a noisy background amidst shouting and demands for justice. He says again that the ballots were found at the polling station; asked where, he says they found them at Lucky Summer Grounds; He shows another ballot paper for the Governor elections, he asserts the ballot is for Kidero; He questions how, if ballot papers for Passaris and Kidero are being thrown away or dumped, then how can there be justice for Raila Amollo Odinga?

There is then prolonged shouting and expressions of anger and disapproval from the crowd which joins the speaker in shouting that they want justice. The shouting goes on until a second gentleman in a black and white striped T-shirt ultimately steps forward and talks into the reporter’s microphone amid the shouting. He says he is an agent of Kidero, and puts on a badge – presumably for a polling agent. The second gentleman says he took an agent’s oath and displays it. The video clip then suddenly ends.

85. The video was intended to corroborate the fact that there was indeed burning of ballot papers relating to the Ruaraka Parliamentary Constituency. The court, however, notes as follows on the content of the video clip: There is no mention in it of a *fire*, or of *burning* of ballot papers; the main speaker talks of ballot papers having been “dumped” and “thrown away”. However, there are no pictures in the clip of any burning or burnt ballot papers. All that is shown are alleged ballot papers in the man’s hands, three of them. Nothing else is shown that is burning or burnt. The interview is at daytime but the camera does not pan out to the location or scene of the alleged dumping and throwing away of the ballot papers. No heaps of any type of paper are seen, burning or otherwise. No polling station set-up is seen. The pictures

captured revolve entirely around the agitated crowd commenting angrily on allegedly dumped ballot papers.

86. As evidence or corroboration of the allegation of mounds of burnt or burning ballot papers, the clip sheds not a shred of light. It may give circumstantial evidence of dumping of ballot papers for Passaris and Kidero. If any burning of election material had truly occurred, it would reasonably have been expected to have formed the centre of the video or press attention. The video evidence is, however, of no evidential value at all in relation to the Ruaraka Parliamentary election, and certainly not as evidence of burnt ballot papers of the petitioner or as corroboration thereof.

87. It would have been the easiest thing in this day and age of smart mobile phones for any of the witnesses who allegedly saw the burning heaps of ballot papers to have taken photographs or videos of the scene as they saw it and avail them in court. They did not do this. Instead, they called for the media. When the media people came, either they missed the whole point of the event and evidence by carrying on interviews of angry wananchi instead of focusing on the allegedly burning ballot papers, or they were never truly notified of burning ballot papers. In any event, they did not investigate or report anything in respect of burnt ballot papers for this election or at all.

88. In the end, the court finds that the video evidence availed was of no probative value in establishing the petitioner's allegations of burnt ballot papers in the Ruaraka parliamentary election. The dumping of ballot papers reported on was also not shown to have had any effect on the election results in this election.

c. Non-compliance with the Constitution and the law: Alleged declaration of the 1st Respondent as the winner of the Ruaraka Parliamentary election before the ballots had been received from all polling stations and before all returns of Forms 35A were received.

89. The petitioner's allegations on this issue are at paragraphs 15-21 of the petition. There, she states that she was present at the Constituency Tallying Centre at Stima Club when the 2nd respondent declared the 1st respondent to be the duly elected Member of Parliament on the basis that he had attained 36,892 votes; That her Chief Agent objected to the announcement as all the results had not yet been received from all polling stations in Ruaraka Constituency; That the announcement was in contravention of **Regulation 87 of the Elections (General) Regulations**; That the announcement having been premature, the 2nd Respondent did not publicly fill in or sign Form 35 B as required; That such declaration subverted the will of the people.

90. In her supporting affidavit, the petitioner avers as follows:

At paragraph 8(ii), that: “ *[t]he results declared at the tallying centre were substantially at variance with actual results tallied and declared at the polling stations as to fundamentally affect the finality of the result declared*”;

At paragraph 10, that she was told by her Chief Agent, Silas Rabah, that the results were announced “*without verification of the results from over 80 polling station representing approximately 15,000 voters...*”

91. The 2nd and 3rd respondents denied all the averments alleging prematurity of announcement of the election result and that the all results had not been received and tallied. That they verified and determined accurately what results each candidate got; and that the results were announced based on accurate and verified Forms 35A from all polling stations.

92. In cross-examination the petitioner admitted that she was not at the tallying centre when the results Forms 35A were being collated and tallied, and that it was her Chief Agent, Silas Rabah who was given the forms at the tallying centre.

93. Silas Rabah, PW 2, was the petitioner's key witness on this issue. He was posted at Stima Club tallying centre. His job was to oversee all the petitioner's agents and in particular to verify Forms 35A as they were received from the polling stations. He attached to his affidavit what he said was a "screenshot" of the 3rd respondent's computer capturing the results on the night of 8th August, 2017 when the results were being announced. The screenshot shows that the candidate for Jubilee, Kinyua Dominic Gathecha, was leading at the time with 68,657 votes. Francis Kajwang had 36,892 votes and the petitioner had 31,512 votes. This was about 8.00pm

94. The "screenshot" was the centre of Rabah's claims that the results of the election were incomplete and announced prematurely. He stated that the results being displayed on the screens at the tallying centre at about 8.00pm were those in the screenshot. However, the returning officer was not publicly announcing the results as they streamed into the tallying centre for verification.

95. In cross examination, Rabah admitted that the screenshot was incomplete as it was cut off on the left and right sides and at the bottom. It therefore did not represent the whole picture. He admitted it was on its face an excel spread-sheet. He stated that the returning officer is the one who invited him to look at the computer and take a picture of it. He accepted that the screenshot showed the formula "D183+E183+F183". He accepted that the figures in these, when added, resulted in the total figure of 68,657, the same figure as that reflected under Kinyua Gathecha's column. However, he declined the suggestion by My Ongoya for the 1st respondent that the figure of 68,657 was in fact the addition of those figures in the formula because it was absurd that it should feature under Gathecha's name.

96. The 2nd respondent did not comment on the screenshot in her affidavit, other than to say that all results were tallied and verified before being announced. In her cross-examination by Mrs Kayugira for the 1st respondent, she denied as an absolute impossibility the allegation that final results were declared before 80 polling station results had been tallied, and stated she had received no complaint concerning the alleged 80 stations.

97. Given, inter alia, the petitioner's allegations that the results were announced before the completion of tallying and verification in over eighty polling stations, the court ordered that all original forms 35A for all polling stations in Ruaraka constituency be produced before the court. The same were produced and available to all parties during the rest of the proceedings, and retained by the court.

98. The court has carefully considered the evidence on this issue. The critical questions raised by this evidence are: whether the evidence shows that the results declared are at variance with the results finally tallied; whether the results were announced without verification from 80 polling stations accounting for about 15,000 votes; and, thirdly, whether upon reviewing the original Forms 35A and B there are massive discrepancies in the results that affect the outcome and demonstrate that the will of the people was not respected.

99. The screenshot was initially not introduced into evidence through a certificate of evidence. The court had to order that such certificate be produced. It was deposed by Rabah and indicates that he took a photograph of a computer belonging to the 3rd respondent in the tallying centre, although there is no indication of who was using the computer. If the information displayed in the screenshot is to be believed with the explanation presented by the petitioner – that Gathecha was winning when the results were announced – we have two absurdities to deal with, which I discuss here-below.

100. The first absurdity concerns excessive voter numbers. Going by the petitioner's assertion that the screenshot shows votes garnered by each candidate as at 8.00pm, or thereabouts, they are:

Petitioner	-	31,512 votes
Francis Kajwang	-	36,892 votes
Kinyua Dominic Gathecha	-	68,657 votes

Paul Caleb Mosikoyo	-	253 votes
Maranga Joseph Isaboke	-	2 votes
Masika Allan Juma	-	6 votes, and
Orete Charles Ouma	-	0 votes
Total	-	137,322 votes

As seen, all these add up to 137,322 votes as at about 8.00pm. And according to the petitioner's same assertion, at this time there were results yet to be received from over 80 (that is 45%) of the 175 gazetted polling stations. Yet, if the assertion by the petitioner is accepted, the votes in the screenshot are already 21,021 *more* than the total registered voters of 116,301 for the constituency. The registered votes – which are not disputed – are as shown in Form 34B which was annexed to the petitioner's bundle. Thus, if 45% of the votes (i.e. 95,069 votes - calculated as follows: $137,322 \times 100/65 \times 45/100 = 95,069$) had not been received and verified at the time of the screenshot, and we accept the petitioner's argument, we would have to add those votes to the total votes counted or "screened" as alleged at 8.00pm. That would rack up the voters to an inexplicable 232,391 – far in excess of the registered voters by over 100,000.

101. Further, this does not make any sense in light of **Section 38A of the Elections Act** which limits the number of registered voters per polling station to a maximum of 700 registered voters. Acceptance of the screenshot figures as urged by the petitioner would thus mean that even assuming that all the 175 polling stations in the constituency had the maximum of 700 registered voters per station – totalling 122,500 registered voters – there were an additional 14,822 (137,322-122,500) voters who could have made up an additional 21 polling stations.

In both instances, the outcome would be an automatic cancellation of the results in all such stations pursuant to **Regulation 83(1)(b) of the Elections (General) Regulations** which provides that a returning officer shall:

“....disregard the results of the count of a polling station where the total valid votes exceeds the number of registered voters in that polling station;”

102. The second absurdity, suggested in cross examination of Rabah, is as follows. If Gathecha of Jubilee was winning by such a large number of votes (68,657) – more than double those of every other candidate except the 1st respondent – and these were being displayed publicly on the screen as alleged by Mr Rabah, what circumstances later led to his votes shrinking to the point where his announced final result was 16,068 votes only? And why would there have been no complaint by him or a petition filed by Jubilee which was one of the two major parties in this election? It would reasonably have been expected that Mr Gathecha of Jubilee party would have filed a petition in such circumstances.

103. For the above reasons, I am unconvinced by the petitioner's allegation that the screenshot concerned the result of the election at the time it was taken. I prefer the 2nd respondent's assertion, supported by the results entered into Form 35B, that she had received all the results by the time she announced the outcome. The explanation suggested in cross-examination by the 1st Respondent concerning the 'screenshot' also makes more logical sense. A close perusal of the 'screenshot' indeed shows that the form displayed there is an excel document. On it, there is indication of a function entered in the input section with the formula “=D183+E183+F183” displayed. Thus, the highlighted figures shown in the third row of the screenshot, are in respect of the said formula, namely, under Columns D=253, E=31512 and F=36892. When added, the highlighted figures result in the figure of 68,657 – similar to that alleged by the petitioner as the votes for Gathecha.

104. Further, the court has closely perused each of the original Forms 35As and 35Bs that were produced by the 3rd respondent in court, as ordered. It has also perused the Summary Report of Analysis of Forms

35As signed by all parties following the scrutiny carried out in court. The Forms account for all 175 polling stations in the constituency and no single polling station is left out. Not one single Form 35A shows *more* valid votes cast than the registered voters in any polling station. And it is not alleged that there are stations for which there were no forms availed. Subsequently, the results entered in the Forms 35As were transferred into Form 35B, and no evidence of any relevant inaccuracy or irregularity during the entering of the results into Forms 35B from Forms 35A was demonstrated. In addition, the total valid votes cast are clearly shown to be 116,301, and the number of voters who turned out to vote is shown to be 86,556. Elsewhere, I deal with alleged irregularities in the forms. However, as far as numerical discrepancies in the forms are concerned, the scrutiny discloses negligible discrepancies at only two polling stations:

- at St Stephens Nursery School Polling Station 9 of 10 where the valid votes are indicated as 483 instead of the actual 482; and

- at Lucky Summer Open Ground Polling Station 3 of 13 where the valid votes are indicated as 548 instead of the actual 543.

105. Accordingly, no evidence of the allegedly missing or unverified results from ***“over 80 polling stations representing approximately 15,000 voters”*** as alleged by the petitioner, has been demonstrated in court. In any event 80 polling stations, each with an average number of 540 voters – the average in this constituency – would represent approximately 43,200 voters. Nor do I perceive from the Summary Report upon scrutiny or from evidence adduced, that the results in Forms 35A and 35B are at variance with the results declared or that they ***“have massive numerical discrepancies that fundamentally affected the final result...”*** as alleged by the petitioner.

106. In light of the foregoing, and the fact that the scrutiny of Forms 35A and 35B did not yield the discrepancies alleged, I am unable to agree with the petitioner’s allegations on this issue and hereby dismiss the same.

d. Intimidation and violence against voters at Ngunyumu Primary School Polling Centre and Tiba Junior Polling Centre, and gender based violence

107. The petitioner alleges that the 1st and 2nd respondents failed to maintain an electoral process and atmosphere that was conducive to a free and fair election, free from intimidation and violence. The petitioner asserts that the environment during the election was rife with gender based violence. In paragraph 18(j) of her petition, the petitioner states that the 1st respondent engaged in wanton acts of violence against the petitioner and her supporters leading to injuries and deaths.

108. At paragraph 18 j) ii of the petition, the petitioner states that evidence of the alleged injuries and deaths would be adduced through the affidavits of *eleven* witnesses, namely: Judith Awuor, Caroline Auma, Eunice Oduor, Kennedy Odhiambo Ouma, Jackline Akoth Okello, Rebeca, George Ouma, Anastacia Awuor, Ruth Awimbo, Nancy Atieno and Perez Achieng’.

109. None of the eleven witnesses mentioned by the petitioner in her affidavit as witnesses of the alleged violence either provided affidavits or were called by her to testify on the same. An affidavit was sworn as to the alleged violence by one Ochar Maxwell Ochieng’ to which was attached several receipts for payment for medical treatment and x-rays. However, this witness was not called to testify, and his evidence is of no probative value.

110. In response to the 1st respondent’s request for further and better particulars on this allegation, the petitioner asserted that there was widespread violence on election day at the following polling centres: Baba Dogo Primary School, Ngunyumu Primary School, Mathare North Primary School, Haidemarie Mathare 4A Primary School, Stima Members Club, Korogocho Community Centre, Lucky Summer Open Ground and Tiba Junior Academy.

111. The petitioner also alleges at paragraph 18 (j) v. of her petition that:

“...the 1st Respondent engaged in sexist tactics and violence to keep her and her supports who were mostly women from actively engaging in politics. Respondent made disparaging sexist remarks in full glare of cameras against the petitioner and her female supporters. One such instance was during a rally in Mathare when the 1st Respondent said he will engage the petitioner’s supporters in sex without condom” (emphasis supplied)

112. The petitioner asserts that in a bid to stop the 1st respondent from engaging in acts of violence against the petitioner and her supporters, she filed a complaint against him with the IEBC Code of Conduct and Ethics Committee on 27th July, 2017. She attached the complaint, Ref No IEBC/ECC/43/2017, at pages 49-53 of her petition.

Her four complaints against the accused on this issue were as follows: that at a meeting held on 15th March, 2017 in Korogocho, she and her supporters were attacked by a group of youth and many women were injured; that on 16th March, 2017 at another women’s meeting she and her supporters were attacked by a group of nearly one hundred youth with weapons and that she reported this incident at Muthaiga Police station in OB No 125/3/2017 file No CRL1221/51/2017; that on 14th July, 2017, at a NASA rally women were attacked and beaten and many rushed to hospital; and finally, that on 15th July, 2017 at a road show, her caravan was attacked along Korogocho and her women supporters injured

113. The 1st respondent denies all these allegations. In his response, he states that he did not appear at Ngunyumu polling station and that he never uttered any sexist remarks in Mathare. He, however, admits that the petitioner filed proceedings against him with the IEBC Code of Conduct and Ethics Enforcement Committee, but that such proceedings were stayed by the High Court in judicial review proceedings.

114. The record of the IEBC Committee shows that the petitioner’s complaints were heard on 27th and 28th July, 2017 and the petitioner, as complainant, presented two witnesses besides herself. The 1st respondent, as the accused, did not appear. The IEBC Committee found that the accused was bound to abide by the Electoral Code of Conduct and Ethics, and that he blatantly refused to co-operate with the Committee. It therefore ordered as follows in its determination of 3rd August, 2017:

“That pending appearance of the accused before the Committee:

The accused [shall] pay a fine of Ksh 500,000 payable within 24 hours. [T]he accused T.J. Kajwang is hereby warned that should he fail to adhere to any of the orders herein he shall be disqualified from participation in the 8th August 2017 General Elections.”
(emphasis supplied)

115. It is also shown that by an urgent application dated 31st July, 2017 in High Court Miscellaneous Application No 473 of 2017, the 1st respondent, as the accused before the IEBC Committee, sought judicial review of the Committee’s proceedings. The 1st respondent attached the ruling of Lesiit, J, at pages 209-217 of his bundle in response to the petition. The ruling notes that both parties’ counsel were heard on 3rd August, 2017. The court found that the applicant had demonstrated that the proceedings before the IEBC Committee had *“proceeded un-procedurally without prior notification or summons to [the applicant] , thus infringing the applicant’s right to natural justice, and right to a fair hearing, fair trial and administrative action”*.

116. Consequently, by its ruling on 4th August, 2017, the court granted the applicant leave to apply for prerogative orders of certiorari to quash all the proceedings before the IEBC Committee. It also ordered at paragraph 29 (3) of the ruling:

“(3) That leave be granted to operate as a stay of all proceedings before the Independent Electoral and Boundaries Commission Electoral Code of Conduct Enforcement Committee in IEBC/ECC/43/2017....including but not limited to Charge Sheet dated 25th July, 2017,

Summons dated 25th July, 2017, Statement of Complaint dated 16th July, 2017 and all consequential orders and/or judgment emanating therefrom pending hearing and determination of the motion for judicial review” (emphasis supplied).

117. The petitioner asserts that the orders of the court, having been issued on 4th August, 2017, had no effect on the proceedings and determination of the IEBC Committee as such proceedings had been concluded and a determination issued by 3rd August, 2017. In essence, she argues, there was thus nothing to be stayed. Further, that the court’s orders would have been effective only if the applicant had followed through on the leave granted and filed the appropriate motion for prerogative orders, which he did not.

118. A careful perusal of the highlighted part of the Court order above clearly shows that the Court did not stay only the IEBC proceedings. The leave granted also stayed all *consequential orders and judgment* emanating from the said IEBC proceedings. Thus, the whole of the IEBC proceedings, past, present and future as connected to the charge sheet, summons and complaint, and any orders made or arising thereunder became the subject of the stay order on account of breach of the rules of natural justice. The same remain stayed until the judicial review proceedings are determined. In that regard, I find and hold that until such stay is vacated, the findings and determination of the IEBC stand suspended, and are of no legal effect. The result is that the substance of the IEBC proceedings and determination cannot be relied on, without more, as evidence of the 1st respondent’s alleged actions in these proceedings, as they are in any event *sub-judice*.

119. In the end, witness testimony of the alleged violence against voters and gender based violence was adduced by the petitioner. She was at times quite emotional and also graphic in her explanation. She strenuously urged the court to take such measures as would be necessary to support women in politics and protect them against sexism. She said that at a rally in *Baba Dogo* on 1st June, 2017, in a packed stadium the 1st respondent used abusive language towards women. He spoke in the Luo language (she uttered the words she said he spoke) and threatened the women that he would rape them without a condom. Everyone was shocked, she said. Later, she had to go for counselling, as she could not continue campaigning. As a result, she testified, many of her female, supporters felt intimidated and did not go to vote.

121. In cross-examination, she admitted that her affidavit did not indicate where the alleged violence occurred. She also admitted that in the petition, she had referred to these disparaging sexist remarks as having been uttered in Mathare, and not in *Baba Dogo*. She then re-asserted that the rally was at *Baba Dogo* as orally testified because she remembered that she had just come from filing her candidature papers. She was pressed concerning the date of the remarks, and conceded that 1st June was a public holiday – Madaraka Day – but insisted that that was the date on which she presented her papers to IEBC.

121. The petitioner also admitted in cross examination that she had no other witnesses to corroborate her evidence as to the violence or as to the allegation that due to such violence they were intimidated, and did not vote or had to re-locate due to the threats. She further admitted that she did not witness the violence at Ngunyumu, and was relying on the evidence of Ochar Maxwell Ochieng’. When it was pointed out to her that Maxwell Ochieng’s affidavit stated that he had been told of the violence, she had no response; and she admitted that she never witnessed the 1st respondent engage in or direct any violence there.

122. George Ouma Opiyo who was mentioned in the petition as one of the persons whose affidavit the petitioner would rely on for evidence of violence, instead appeared in court as a witness for the 1st respondent. Giving evidence as RW 3, Mr Ouma said he was a voter at Ngunyumu Primary School. He stated that what there was at Ngunyumu was a stampede when the crowd surged at the opening of the polling station. Many people were trampled on as a result, and many sustained injuries.

123. In cross-examination, he admitted that he was not injured, but asserted he was personally present and helped some of the injured. He was steadfast in his evidence, and asserted that the stampede did not prevent the voting at Ngunyumu.

124. From the sole inconsistent evidence adduced by the petitioner, the court cannot find, even on a low balance of probability, in her favour on this issue. The only witness testimony given is hers. In it, she contradicts the assertion in her petition. Could she really have been confused as to where the shocking abuses, insults and threats occurred that made her resort to a counsellor, when she stated in the petition that this singular incident occurred at Mathare? I doubt it. Having given evidence that her majority supporters were women, and having named eleven of them as having provided affidavits (which they did not) is it probable that she could not find a single one of them to give evidence of what befell them?

125. In light of the foregoing, the evidence of the petitioner is, in my view, and without corroboration, not satisfactory to prove the allegations of intimidation and violence. In the circumstances, the court is unable to find for the petitioner on this issue.

e. Alleged Voter bribery and undue influence and whether these irregularities and malpractices negated the will of the people of Ruaraka Constituency

126. The petitioner's allegation on voter bribery is at paragraph 18 ii of her affidavit, where she stated:

“THAT I have been informed by agents, which information I verily and conscientiously believe to be true, that...

ii. the 1st Respondent engaged in widespread bribery and unduly influenced voters and election officials at.... ” (emphasis supplied).

The detail of the place where the bribery occurred was incomplete. It was provided following a request for particulars which at paragraph 2b) stated as follows:

“b) The 1st Respondent engaged in widespread bribery and unduly influenced voters and election officials at Utalii Hotel on the night of 7th August 2017.”

127. In paragraph 25 of his affidavit, the 1st respondent denied the allegation of bribery. He made a counter-allegation that it was the petitioner's agents who engaged in bribery. He did not provide any specifics to the allegation.

128. The petitioner was the sole witness on this issue. She testified that she went to Utalii Hotel at 7.30 pm on 7th August and encountered some youths who were counting money which they said they had received from a “Mheshimiwa”:

“At the hotel, I bumped into the 1st respondent. He was shocked. I saw the 1st respondent giving the youth the money”

129. In cross-examination by Mr Ongoya, the petitioner re-stated the incident at Utalii Hotel where she had gone to meet her agents. At the entrance to the hotel she met some youths holding money and talking about how “Mheshimiwa” had given them the money. The youths were familiar faces from the constituency. She said she bumped into the 1st respondent at the reception. He was watching TV and giving out money.

130. In re-examination, she said the 1st respondent was sitting at the entrance lobby of the hotel holding money and handing it out to youths. When he noticed her he was shocked and quickly left the hotel.

131. The 1st respondent in cross examination on the issue admitted that he met the petitioner at Utalii Hotel. He however denied that he was engaged in any bribery there. He said it was ridiculous to suggest that even if he had to bribe, he would do so openly at the reception of an international hotel in the glare of everyone.

132. In analysing the evidence, the first glaring difficulty I have is with the fact that the petitioner's

version does not feature in the petition. And where it does feature in the petitioner's supporting affidavit, at paragraph 18(ii) quoted above, she clearly states three facts: First, that she was "*informed by agents*" of the bribery; Second, that the 1st petitioner was engaged in "*widespread bribery*"; and third, that this act "*unduly influenced voters and election officials*".

133. In providing further particulars upon the court's order, she provided the alleged location and date of the bribery. However, in giving her oral testimony, she forgot that her deposition had been based on information received from her agents, and goes on to give the evidence herself, of what she alleges she actually saw. This contradicts her deposition, which she had had an opportunity to correct or clarify by deposing that she had personally witnessed the bribe-giving incident. This contradiction persists in her cross-examination and re-examination.

134. Thus, whilst the petitioner's deposition presents the Utalii bribery story from the perspective of what the petitioner was informed by her agents and verily believed to be true, this is contrasted with her oral testimony which makes no mention of the agents who told her the story. Instead she converts herself into the key sole witness in presenting the bribery story. The question is: which is which: was she told as stated in her affidavit, or did she see, as she orally alleges?

135. Another glaring difficulty I have with this evidence is that the petitioner deposed to widespread bribery which duly influenced voters and election officials. In her oral testimony, nothing emerges about which election officials were influenced. Further, there is no evidence of any widespread bribery, as only one incident is mentioned.

136. I am therefore unable to rely on the fusion of evidence based on information she received and that which she alleges she witnessed. My sense is that the bribery story is in fact probably an afterthought.

137. Bribery, if proved, is an election offence. Under the previous legal regime prior to the amendments in 2017 to the **Elections Act**, it was necessary to prove bribery beyond reasonable doubt. This was the position held in a number of cases including **Moses Masika Wetangula v Musikari Nazi Kombo & 2 Others, Supreme Court Petition No. 12 of 2014**; **Raila Odinga v Independent Electoral and Boundaries Commission & 3 Others, Supreme Court Petition No. 5 of 2013** and **Frederick Otieno Outa v Jared Odoyo Okello & 4 Others, Supreme Court Petition No. 6 of 2014**. The Court was then expected to make a finding on bribery.

138. Under the present law, an election court is merely required under **section 87** of the **Elections Act** to determine whether an election malpractice of a criminal nature "may have occurred" and if so, to report the matter to the Director of Public Prosecutions. In this case, I am not satisfied that the evidence availed by the petitioner is, on balance, sufficient to enable me to make a determination that the 1st respondent may have committed a criminal act of bribery.

139. The evidence before me is, simply put, that the petitioner went into Utalii Hotel, saw the 1st respondent with money which he was giving to some youths. His response is that he was in the hotel on the said date but gave no bribes, and even if he had chosen to do so, would not have done it openly in an international hotel. This is the sum total of the evidence of bribery. Is it sufficient to make a finding that bribery may have occurred? I think not. It is one's word against another. Had there been some corroborative evidence, a photograph, an audio recording or another witness who was involved in or saw the events, there may have been grounds to find that bribery "may have occurred". In the circumstances, there is merely a direct allegation which is directly refuted.

140. Accordingly, I am unable to find for the petitioner on this issue, even on a balance of probability.

f. Whether the 2nd and 3rd Respondent made administrative mistakes and electoral irregularities, non-compliances and improprieties that affected the conduct and validity of the result of the Ruaraka Parliamentary Election

-Serious irregularities in Forms 35As and 35Bs affecting their verifiability

141. The petitioner at paragraph 18 of the petition complains that relaying and transmission of results was not accurate, verifiable, secure, accountable, transparent open and prompt. At Para 18 b) of the petition the complaint is detailed as follows:

“viii The Petitioner avers that in more than 100 polling stations the data entered into the KIEMS Kits was not consistent with the information and data from the respective Forms 35A.

ix The Petitioner avers that the data that was being projected publicly by the 3rd Respondent at the Constituency Tallying Centre (CTC) was not consistent with the information and data in the respective Forms 35A and Form 35B. In proof of this allegation I shall be relying on the Sworn Affidavit of Mr.Silas Rabah.

.....

xi The information in Forms 35A is not consistent with the information recorded in Forms 35B as required and legitimately expected.

xii In light of the above, Form 35B was a secondary document emanating from Form 35A. Hence whatever Forms 35B were purported to have been relied upon by the 2nd Respondent at the Constituency Tallying Center (CTC) and on the basis of which the 1st Respondent was awarded the Interim Certificate of Election final result of the Parliamentary Election was declared were inaccurate as they were inconsistent with the Forms 35A which were the primary documents from which they are required by law to be created;

xiii As a direct consequence of the foregoing the Form 35B is not accurate and verifiable and as such it is invalid;

xiv In consideration of the above, the results declared by the 2nd Respondent on the basis of the impugned Forms 35B ought to be rendered invalid and a nullity.

xv The computation and tabulation of the results in number Form 35B is not accurate, verifiable and internally consistent.

xvi The Petitioner aver that the nature and extent of the inaccuracies and inconsistencies between Forms 35A and 35B is not clerical but deliberate and calculated to the detriment of the Petitioner.”

142. PW2 Silas Rabah gave extensive evidence on this issue and sought to identify mistakes and errors in Forms 35A and 35B. At paragraph 36 of his affidavit, he set out a six page table identifying specific irregularities seen in 48 forms 35A. No evidence was availed concerning errors or irregularities in respect of Form 35B.

143. The evidence of PW2 was essentially based on forms that were in the possession of the petitioner. There were several categories of mistakes and irregularities pointed out by the petitioner in the petition at:

-Paragraph 18 h - Unsigned unstamped and un-witnessed Forms 35A, with some witnessed by strangers who could not be held to account. For example Form 35A Serial No NA000248 was witnessed by Dalmas Asenji who was an agent of Julius Kiyayi, a candidate for the County Assembly

-Paragraph 18 j) ii – Some Forms 35A bear fatal irregularities affecting at least 100 polling stations

-Paragraph 18j) iii - Forms 35A whose results do not match those on the 3rd respondent’s portal

-Paragraph 18 j) iv - Forgery in the preparation of Forms 35 A

-Paragraph 18 j) vi - Forms 35A not signed as required under the law

-Paragraph 18 j) vii - not bearing the IEBC Rubber stamp

-Paragraph 18 j) viii - Forms 35A which do not bear the signatures of the candidates' agents nor the reason for their failing to sign the forms

-Paragraph 18 j) ix - A substantial number of Forms 35A do not bear serial numbers as required

-Paragraph 18 j) - A substantial number of Forms 35A have been signed by agents of Member of County Assembly instead of agents for National Assembly.

144. The petitioner submits that these errors amount to illegalities and irregularities whose consequence is that the results contained in those forms are rendered unverifiable, not credible, unaccountable, illegitimate and thus invalid.

145. As earlier indicated, the court called for the originals of all Forms 35As and carried out a scrutiny exercise, including a recount in some polling stations in Lucky Summer area where burning of ballot papers had been alleged. The following is a summary of mistakes identified upon scrutiny and some relevant observations thereon:

- a. Forms not signed by both the Presiding Officer and Deputy PO - Nil
- b. Forms not signed by Presiding Officer only - 4
- c. Forms not signed by Deputy Presiding Officer only - 11
- d. Forms not bearing the IEBC Rubber stamp - 33
- e. Forms not signed by any agent of any party at all - 5
- f. Forms not bearing any serial numbers - 1 (Serial Number appears torn off)
- g. Forms signed by individuals not authorised in law - 1

For perspective, the relevant observations made during scrutiny with the parties are as follows in relation to the mistakes identified:

- i. Of the 33 unstamped Forms 35As, twenty one (21) had signatures of an agent of ANC and two (2) of them had signatures of two ANC agents each;
- ii. On the Form without a serial number, it appeared that the number had been torn off uniformly at the top. The duplicate form for this polling station had a serial number.

146. From the above summary of scrutiny, the most frequently recurring mistake or error noted in the scrutiny exercise appeared to be that of unstamped Forms 35A. On this, the petitioner submits at page 9 of her submissions that the court should take into account the fact that the 3rd respondent had placed:

“...fundamental importance on its stamp to the effect of declaring on 5th August, 2017 that any cast ballot papers that did not bear the official IEBC stamp would be deemed to be invalid, yet the ballot paper is the supreme document in as far as elections go. It then beats logic for the 2nd respondent to consider Forms 35 As that did not bear the official IEBC rubber stamp as valid and genuine and proceed to declare the 1st respondent as the (sic)

validly elected without ensuring that all forms 35A had the IEBC rubber stamp”

147. The petitioner made reference in her submissions to a declaration the IEBC of 5th August, 2017. That declaration was, however, not put in evidence before this court, and the court cannot comment on it. Nevertheless, the legal provisions on stamping are as follows: **Regulation 69(4)** of the **Elections General Regulations** makes it an offence for an election officer not to stamp a ballot paper. The provision states:

“(4) An election officer who deliberately refuses to stamp any ballot paper commits an offence” (emphasis supplied).

148. The question that comes to the fore is: why is it an offence for an officer not to stamp the ballot paper? It is intriguing that an offence for not stamping a ballot paper is created when there seems to be no regulatory direction obliging such stamping. Research on this led me to **Regulation 61(4)(e)** of the **Regulations** which partly explains the issue. That provision is as follows:

“The returning officer shall provide each polling station with –

(e) a seal of the Commission suitable for the purposes of Regulation 69(1)(g)”

Regulation 69(1)(g) is, however, indicated as having been deleted by an amendment to the **Regulations** vide **Legal Notice No 72/2017 r 31**. The deleted **Regulation 69(4)(g)** existed under the **Elections (General) Regulations 2012 L.N. 128/2012**, and read as follows when extant:

“(1) Before issuing a ballot paper to a voter an election official shall –

(g) stamp the ballot paper at the back with the official mark of the Commission”

However, since **Regulation 69(4)** has not been amended to remove the offence of failure to stamp a ballot paper, the said offence can, *prima facie*, be said to exist.

149. Nevertheless, a ballot paper is defined in **Section 2** of the **Elections Act** as follows:

“ ‘ballot paper’ means a paper used to record the choice made by a voter and shall include an electronic version of a ballot paper or its equivalent for purposes of electronic voting”

The form of a ballot paper for the various elections is as prescribed under **Regulation 68**, which refers to the templates of ballot papers contained in the Schedule to the Regulations.

150. Clearly, Form 35A is not a ballot paper in respect of which the rubber stamp of IEBC is legally required to be affixed by an election officer, and I have not been shown any written law or constitutional edict that makes it unlawful or irregular for an election officer not to stamp Form 35A. As noted earlier, I am alive to the majority decision in **Raila Odinga v IEBC in Presidential Petition No 1 of 2017 (Raila 2017)** which overturned the Presidential election of August 2017, inter alia, due to non-compliance with electoral law and because it was marred by many irregularities the cumulative effect of which fundamentally and negatively impacted the integrity of the election.

151. In **Raila 2017**, some of the irregularities identified upon scrutiny included the following: Reliance on duplicated forms, photocopies of forms, forms not stamped (para 343; 377 Opinion); Non-submission of original Form 34C amongst other documents despite a court order (para 357 Opinion); Failure to fill in the hand-over and take-over sections of many Forms 34A thus throwing verification into doubt (para 367 Opinon); deployment of prescribed forms that either lacked or had different security features (paras 375-376 Opinion); Absence of watermark or serial number on Form 34C had rendering it of dubious authenticity, and using a certified copy of Form 34C instead of the original (para 377 Opinion);

152. Other findings or revelations in **Raila 2017** included: the returning officer compiling Form 34C when all results had not been received at the tallying centre; declaring the results using form 34B rather

than 34A as admitted by the IEBC (paras 250-257 Opinion). Based on the cumulative effect of the irregularities seen by the Supreme Court, it concluded as follows:

***“[378] Where do all these inexplicable irregularities, that go to the very heart of electoral integrity, leave this election? It is true that where the quantitative difference in numbers is negligible, the Court, as we were urged, should not disturb an election. But what if the numbers are themselves a product, not of the expression of the free and sovereign will of the people, but of the many unanswered questions with which we are faced? In such a critical process as the election of the President, isn’t quality just as important as quantity? In the face of all these troubling questions, would this Court, even in the absence of a finding of violations of the Constitution and the law, have confidence to lend legitimacy to this election? Would an election observer, having given a clean bill of health to this election on the basis of what he or she saw on the voting day, stand by his or her verdict when confronted with these imponderables? It is to the Kenyan voter, that man or woman who wakes up at 3 a.m on voting day, carrying with him or her the promise of the Constitution, to brave the vicissitudes of nature in order to cast his/her vote, that we must now leave Judgment.*”**

[379] In concluding this aspect of the petition, it is our finding that the illegalities and irregularities committed by the 1st respondent were of such a substantial nature that no Court properly applying its mind to the evidence and the law as well as the administrative arrangements put in place by IEBC can, in good conscience, declare that they do not matter, and that the will of the people was expressed nonetheless. We have shown in this judgment that our electoral law was amended to ensure that in substance and form, the electoral process and results are simple, yet accurate and verifiable. The presidential election of 8th August, 2017, did not meet that simple test and we are unable to validate it, the results notwithstanding.” (emphasis supplied).

153. In reaching this conclusion, the Supreme Court reiterated three well-known principles for determination of election petitions, and laid down two new ones. They are contained in the following passages of the majority opinion:

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

...

[372] It is in this spirit, that one must read Article 38 of the Constitution, for it provides inter alia, that every citizen is free to make political choices, which include the right to “free, fair, and regular elections, based on universal suffrage and the free expression of the will of the electors...”. This “mother principle” must be read and applied together with Articles 81 and 86 of the Constitution, for to read Article 38 in a vacuum and disregard other enabling principles, laws and practices attendant to elections, is to nurture a mirage, an illusion of “free will”, hence a still-born democracy. Of such an enterprise, this Court must be wary.

[373] It is also against this background that we consider the impact of the irregularities that characterized the presidential election. At the outset, we must re-emphasize the fact that not every irregularity, not every infraction of the law is enough to nullify an election. Were it to be so, there would hardly be any election in this Country, if not the world, that would withstand judicial scrutiny. The correct approach therefore, is for a court of law, to not only determine

whether, the election was characterized by irregularities, but whether, those irregularities were of such a nature, or such a magnitude, as to have either affected the result of the election, or to have so negatively impacted the integrity of the election, that no reasonable tribunal would uphold it.

[374] In view of the interpretation of Section 83 of the Elections Act that we have rendered, this inquiry about the effect of electoral irregularities and other malpractices, becomes only necessary where an election court has concluded that the non-compliance with the law relating to that election, did not offend the principles laid down in the Constitution or in that law. But even where a Court has concluded that the election was not conducted in accordance with the principles laid down in the Constitution and the applicable electoral laws, it is good judicial practice for the Court to still inquire into the potential effect of any irregularities that may have been noted upon an election. This helps to put the agencies charged with the responsibility of conducting elections on notice.

154. The reiterated principles are as follows:

- a. Not every irregularity, not every infraction of the law is enough to nullify an election.
- b. The correct approach is for a court of law, to not only determine whether, the election was characterized by irregularities, but whether, those irregularities were of such a nature, or such a magnitude, as to have either affected the result of the election, or to have seriously impacted the integrity of the election,
- c. To overturn an election, the irregularities must be serious and so negatively impact the integrity of the election and the result thereof, that no reasonable tribunal would uphold it.

The new principles are as follows:

- a. In determining whether free, fair, and regular elections, based on universal suffrage and the free expression of the will of the electors has occurred, **Article 38** of the **Constitution** must be read and applied together with Articles 81 and 86 of the Constitution, for to read **Article 38** in a vacuum and disregard other enabling principles, laws and practices attendant to elections is to nurture an illusion of free will;
- b. In light of **section 83** of the **Elections Act.**, an inquiry about the effect of electoral irregularities and other malpractices, becomes only necessary where an election court has concluded that the non-compliance with the law relating to that election, did not offend the principles laid down in the Constitution or in that law,
- c. Even where a Court has concluded that the election was not conducted in accordance with the principles laid down in the Constitution and the applicable electoral laws, it is good judicial practice for the Court to still inquire into the potential effect of any irregularities that may have been noted upon an election.

155. Applying the foregoing principles in the present case, it is my considered opinion that the irregularities identified through the evidence herein, were not so cumulatively fundamental as to enable the court to make a finding that the free will of the people of Ruaraka was subverted. The scrutiny conducted showed that whilst failure to stamp Forms 35A was the greatest culprit, even that was not demonstrated to have any notable effect on either the results nor was any legal or other requirement shown demanding stamping as a fundamental requirement.

156. Indeed, as noted from the scrutiny exercise, of the 33 unstamped Forms 35As, twenty one (21) had signatures of an agent of ANC and two (2) of them had signatures of two ANC agents each. This constitutes their approval of the results. Further, of the 5 Forms 35As that had no signatures at all of any agents, all but one were signed by a presiding officer or deputy. In my view, this is an indication that the

presiding officers verified the results in the absence of agents' signatures.

157. The one Form 35A that had no signatures of either agents or presiding or deputy presiding officer was for Haidemarie Mathare 4A Primary School Polling Station 9 of 17 Serial No NA 000600. It has the rubber stamp of the IEBC and the hand-written names of the IEBC presiding officers, but not their signatures. It accounts for 497 valid votes of which the top three candidates garnered: Amollo Elizabeth Ongoro 218 votes; Francis Kajwang Tom Joseph 246 votes; and Kinyua Dominic Gathecha 23 votes. This polling station and its Form 35A had not attracted any complaint from the petitioner.

158. All in all, the court is not satisfied that the alleged irregularities, non-compliance, improprieties, mistakes and omissions under this head, affected the conduct of the elections and validity of the result of the Ruaraka Parliamentary Election.

- **Deliberate manipulation of results, conniving and /or distorting results in favour of 1st respondent; including commission of Electoral offences.**

159. This allegation is contained in paragraph 18 c) iii. and iv. of the petition in the following terms:

"iii. The Petitioner avers that in numerous instances the Presiding Officers, Deputy Presiding Officers and Polling Clerks working in concert with the 1st Respondent and his agents deliberately manipulated, connived, engineered and/or distorted the votes cast and counted particularly in favour of the 1st Respondent thereby affecting the final results tallied. Case in point is where Damaris Atieno who was an agent of the 1st Respondent at Daniel Comboni Polling Station in Korogocho was charged at the Makadara Law Courts vide Charge Sheet dated 9th August, 2017 with electoral offenses among them unlawfully being in possession of marked ballot papers and capturing images of marked ballot papers for financial gain from the 1st Respondent and as proof of her allegiance to the 1st Respondent.

iv. The Petitioner aver (sic) that in a substantial and significant number of instances the 2nd and 3rd Respondents grossly inflated the votes cast in favour of the 1st Respondent thereby affecting the final results tallied." (emphasis supplied).

160. In addition, in her affidavit at paragraph 15 (ii) the petitioner alleges that the 1st respondent influenced the 3rd respondent to hire his relatives as presiding and deputy presiding officers and clerks in various polling stations in the constituency; That these colluded with the 2nd respondent to manipulate results in his favour, and in particular, that some of these appointees worked for the 1st respondent at the Constituency Development Fund.

161. The evidence availed in proof of these assertions under this head was essentially through PW2, Silas Rabah. He states in paragraph 18 of his affidavit that he became aware that one of the 1st respondent's agents at Daniel Comboni Primary school polling centre:

"...known as Damaris Atieno Obuya had been arrested by security personnel at the polling centre for being in unlawful custody of ballot papers and also taking photographs of marked ballot papers and transmitting them to Hon Francis Kajwang for financial gain" (emphasis supplied).

He attached the charge sheet in respect of the alleged arrest.

Further, at paragraph 21 of his affidavit, Rabah alleges that Damaris Atieno Obuya was not only an agent of the 1st respondent, but was also his secretary. He attached a list showing staff members of Ruaraka Constituency Development Fund office, public officers some of whom he states were 1st respondent's relatives. He alleges these people were used by the 1st and 2nd respondents to influence the election and

manipulate the results in favour of the 1st respondent.

162. In addition, the petitioner provided a video clip by Kenya Television Network (KTN) in respect of the charge against Damaris Atieno, which the court viewed several times at the instance of the petitioner's witnesses.

163. The respondents denied the allegations, and refuted the video evidence.

164. In cross examination by the 1st respondent's counsel, Rabah admitted the following facts: That that the charge sheet in respect of Damaris Atieno does not contain a charge for being in unlawful possession of ballot papers; That ***"the claim in paragraph 18 of my affidavit is not true"*** ; and that it was his advocate, William Ongoro, who prepared his affidavit and convinced him it was accurate and true.

165. The court notes that the charge sheet indicates that the offence with which Damaris Atieno was charged is as follows:

"DAMARIS ATIENO OBUYA: On the 8th day of August 2017 at Daniel Comboni polling station in Korogocho within Nairobi County using a mobile phone make Tecno captured an image of a marked ballot paper for the purpose of financial gain or for showing allegiance purpose" (emphasis supplied)

166. In alleging that the 1st respondent and his agents deliberately manipulated, connived, engineered and distorted the votes cast, counted and tallied in favour of the 1st Respondent, the petitioner gave the example of the election offence of Damaris Atieno. From the above evidence and the admissions of PW2, however, no proof of the allegations is demonstrated.

167. The court has also analysed the video evidence availed in a clip, which I summarise as follows:

1. The clip is a KTN News Bulletin running at 9:38:59 to 9:40:45 thus a total running time of 1 minute and 46 seconds, and is titled IEBC officials charged in court
2. At clip time 0.00 to 1.03 the newscaster reports concerning four people amongst whom two are a man and woman from IEBC were charged in court for violations of election laws. Two are named as Eric Onwonga a Presiding Officer and Dorcas Kimani Deputy Presiding Officer, who left their work stations at Independent Presbyterian Church polling station in Roysambu Constituency Kasarani
3. At clip time 1:03: The reporter reports on another person, Damaris Atieno, who is reported to have been brought to the same court. She is alleged to have been capturing images of marked ballot papers as proof of her allegiance. She was alleged to be an agent of TJ Kajwang, who is vying for Ruaraka Parliamentary seat.
4. The story in relation to Damaris Atieno ends at clip time 1:22 and another story begins
5. At clip time 1:23 Reporter begins a report on a man in Kariobangi charged with voting multiple times

168. There is nothing in the video clip that even vaguely suggests any election related offence or irregularity implicating the 1st respondent. To that extent, the video is of no probative value whatsoever in relation to the allegations made under this issue. The court has no difficulty in dismissing the allegations under this head as unproved.

169. With regard to evidence concerning the appointment of relatives of the 1st respondent as IEBC officers and their influencing the results, no concrete evidence was availed by the petitioner.

Whether the electoral process for Ruaraka Parliamentary Election was transparent free and fair

170. The answer to this issue will be found in the overall determination of this petition as contained in the disposition.

Costs : Who bears the costs of the Petition

What is the quantum of the instruction fees that the court should award or cap the costs at; Is there justification for more than one advocate?

171. The parties were required to submit on the question of costs to ensure that the Court was not acting in a vacuum, in exercising its power to assess and award costs and make orders on the security deposit pursuant to **Section 83** of the **Elections Act** and **Rules 30** and **33** of the **Election Petition Rules**. All parties filed submissions as required under the agreed heads.

172. The petitioner submitted, on the strength of several authorities, that instructions fees should be capped at Kshs 3,000,000/- “to be shared equally by the respondents” as found in **Malindi Election Petition No 3 of 2013 Francis Baya and Another v Amason Kingi and Others**.

173. The petitioner sought that the court certifies costs for three counsel on the basis that the petition was complex; and three to four counsel were present for the petitioner throughout the proceedings. That although only twelve of their witnesses gave evidence, they had prepared affidavits for eighteen.

174. The 1st respondent submitted that instructions fees for petitions should be reasonable but no less than shillings 500,000/ as prescribed by **Schedule 6 Paragraph (i)** of the **Advocates Remuneration Order**. The court was urged to take into account the factors set out in **Orders 4, 5** and **59** of the **Advocates Remuneration Order**. These provide for situations where the business requires or is of: exceptional despatch; exceptional importance or of unusual complexity exceptional despatch. **Order 59** entitles a court to certify that costs for the services of more than one advocate are reasonable in the matter. The 1st respondent cited **Atsango Chesoni v David Morton Silverstein [2009]eKLR** where the court certified costs for two advocates

175. I note that the aforesaid **Orders 4** and **5** referred to by the 1st respondent deal with “*additional remuneration for exceptional despatch*”, and “*special fee for exceptional importance and complexity*”, respectively. **Order 4(2)** provides, however, that:

“(2) Such additional remuneration shall, except in special circumstances, be allowable only as between advocate and client” (emphasis supplied).

And **Order 5 (1)** provides:

“(1) In business of exceptional importance or of unusual complexity, an advocate shall be entitled to receive and shall be allowed as against his client a special fee in in addition to the remuneration provided in this Order” (emphasis supplied).

It is clear that the above references in the **Orders** relate to remuneration as between advocate and client, aspects which the court cannot be concerned upon or interfere with in respect of this petition.

176. The 1st respondent sought certification for the three advocates they retained, and submitted that the court should allow instructions fees of Shillings 4,000,000/- per advocate.

177. The 2nd and 3rd respondents submitted that they co-operated throughout the proceedings, complied with all orders and remained diligent. They were represented throughout by two lawyers from two different law firms. They sought that costs should be in the amount of Shillings 10,000,000/- without particularising how these are shared out.

178. All parties were agreed that costs should follow the event.

179. Having considered the submissions of the parties and the authorities cited on costs, I am of the view that the petition was like many petitions: not particularly complex but required exceptional dedication to expedition as the court maintained a short leash on time by applying a time-bank at the substantive hearing stage. Parties unused to this system may have found it pitiless and unpleasant until they got used to it. A total of twenty two witnesses were heard, a number of whom were extremely short. According to the time-bank, the substantive hearing lasted twenty eight odd hours. Three interlocutory applications were also heard and reserved rulings delivered which also took up time that is accounted for.

180. Taking into account all factors, I cap instructions fees at shillings 1,500,000/- per certified counsel, that is three times the minimum scale fee for instructions for petitions under the **Advocates Remuneration Order**.

181. I consider that two counsel were sufficient to deal with the petition for each of the parties and jointly for the 2nd and 3rd respondents on a concerted basis. Indeed, this is what was exhibited by the 2nd and 3rd respondents who managed their case satisfactorily with two counsel. Accordingly, I certify the matter as suitable for two counsel only for each party and jointly for the 2nd and 3rd respondents.

Conclusion

182. As already noted, the overarching premises of the petitioner's petition were the allegations that:

- *The Parliamentary Election for Ruaraka Constituency was so badly conducted, administered and managed by the 2nd and 3rd Respondents that it failed to comply with the governing principles enshrined under Constitution;*
- *The massive, systematic, deliberate and blatant non-compliance with the Constitution and the Law as will be shown and proved by the Petitioner:*

goes to the very core and heart of holding elections; Erodes the foundation of the Kenyan system as a sovereign republic;

and severely undermines the very rubric and framework of Kenya as a nation State...

- *The Parliamentary Election was so badly conducted and marred with irregularities that it did not matter who won or was declared as the winner of the Parliamentary Election.*
- *The nature and extent of the flaws and irregularities significantly affected the results to the extent that the 2nd and 3rd Respondent cannot accurately and verifiably determine what results any of the candidates got."*

I find and hold that these allegations were not proved to the satisfaction of the court as demonstrated.

Disposition

183. Given the various conclusions I have reached on each of the issues identified for determination, I now answer each of the petitioner's prayers for relief in paragraph E of the petition as follows:

- a. Prayers i, ii and iii have abated or been acted upon in the course of the hearing of the petition, and accordingly, attract no further action or orders herein.
- b. Prayers iv, v and vi all fail and none of the declarations shall issue herein.
- c. Prayer vii fails and no orders issues herein.
- d. With regard to Prayer viii, whilst the court found that there were mistakes and omissions such as

failure to stamp Forms 35A, the cumulative effect of such failure does not satisfactorily found a basis for a declaration of irregularity of such magnitude that no reasonable tribunal would uphold it. Prayer viii therefore fails, and no declaration issues.

e. No election offences having been found, prayer ix fails.

184. Accordingly, I hereby **dismiss this petition** with costs:

- a. Costs shall be borne by the petitioner except as otherwise specifically allocated herein or ordered during the proceedings or in interlocutory rulings.
- b. Instructions fees are hereby capped at shillings 1,500,000/- per certified counsel.
- c. Costs shall be taxed by the Deputy Registrar.
- d. Such costs as may be recovered from the security deposit, shall be deducted therefrom and may be paid to the respondents in equal shares.

185. The original Forms 35A deposited in and held by this court are hereby released to the 2nd and 3rd Respondents for statutory custody and preservation in accordance with the law.

186. Costs are hereby certified for a maximum of two counsel each for the 1st respondents, and jointly for the 2nd and 3rd respondents.

Certificate as to validity of election

187. The court is required, pursuant to **Section 86** of the **Elections Act**, to issue a certificate as to the validity of the election. Accordingly:

- a. The court hereby certifies that at the conclusion of the hearing of this petition the determination of the court on the date hereof is that the petition herein is dismissed, and the election of Francis Kajwang' Tom Joseph is hereby confirmed as valid.
- b. A certificate to this effect shall forthwith be issued by the Deputy Registrar to the Independent Electoral and Boundaries Commission and the Speaker of the National Assembly.

Report on Electoral Malpractices

188. Pursuant to **Section 87** of the **Elections Act**, no report on electoral malpractices issues at the conclusion of the proceedings herein.

189. Orders accordingly

Dated and Delivered at Nairobi this 16th Day of January, 2018

RICHARD MWONGO

PRINCIPAL JUDGE

Delivered in the presence of:

1. Mr Manduku.....for the Petitioner

2. Mr Magina & Mr Kaluma.....for the 1st Respondent

3. Mr Makhanu.....for the 2nd & 3rd Respondent

Court Clerk:Jeff Omuse