



**REPUBLIC OF KENYA**

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

**ELECTION PETITION NO. 1 OF 2017**

**JOHN LOKITARE LODINYO .....PETITIONER**

**VERSUS**

**THE INDEPENDENT ELECTORAL**

**AND BOUNDARIES COMMISSION.....1<sup>ST</sup>RESPONDENT**

**BONVENTURE OKOCHI OBONGOYA .....2<sup>ND</sup>RESPONDENT**

**MARK LOMUNOKOL.....3<sup>RD</sup>RESPONDENT**

**JUDGEMENT**

This petition is about election of a Member of National Assembly for Kacheliba Constituency. The said election was held on 8<sup>th</sup> August, 2017 where four candidates contested for the seat. These are Mark Lumunokol, John Lokitare Lodinyo (Petitioner), Ibrahim Pkiach Longolomo and Lokoilereng Peter Alany. The political parties under which they vied are PDR, Jubilee, KANU and MCC respectively. The results were declared by the 2<sup>nd</sup> Respondent on 10<sup>th</sup> day of August, 2017 and published in a special issue of the Kenya Gazette on 22<sup>nd</sup> day of August, 2017. The announced and declared results at the tallying centre by the 2<sup>nd</sup> Respondent were as follows:-

<u>NAME</u>	<u>PARTY</u>	<u>VOTES</u>
1. Mark Lomunokol	PDR	16,833 Votes
2. John Lokitare Lodinyo	JUBILEE	15,063 Votes
3. Ibrahim Pkiach Longolomo	KANU	3,588 Votes
4. Lokoilereng Peter Alany	MCC	175 Votes

The Petitioner dissatisfied with the said results brought up this petition on 6<sup>th</sup> of September, 2017. The first ground upon which this petition is founded is that he, the Petitioner, is unable to tell the exact margin of the 3<sup>rd</sup> Respondent's votes over his number of the votes cast as the result in form 35B disclosed by the 2<sup>nd</sup> Respondent and the final tally of the parliamentary results published/gazetted by the 1<sup>st</sup> Respondent are materially different from the results that were declared at the tallying centre and the results posted in the 1<sup>st</sup> Respondent's public portal/website. The three set of results are as follows:-

**a) Result as announced at the tallying centre**

<u>NAME</u>	<u>PARTY</u>	<u>VOTES</u>
1. Mark Lomunokol	PDR	16,833
2. John Lokitare Lodinyo	JUBILEE	15,063
3. Ibrahim Pkiach Longolomo	KANU	3,588
4. Lokoilereng Peter Alany	MCC	175

No Rejected votes

**Valid votes** **35,659**

**b) Results on the IEBC Public Portal**

<u>NAME</u>	<u>PARTY</u>	<u>VOTES</u>
1. Mark Lomunokol	PDR	17,471
2. John Lokitare Lodinyo	JUBILEE	14,927
3. Ibrahim Pkiach Longolomo	KANU	3,596
4. Lokoilereng Peter Alany	MCC	176
Rejected votes		893
<b>Valid votes</b>		<b>36,170</b>

**c) Results as entered in form 35B**

<u>NAME</u>	<u>PARTY</u>	<u>VOTES</u>
1. Mark Lomunokol	PDR	17,045
2. John Lokitare Lodinyo	JUBILEE	15,317
3. Ibrahim Pkiach Longolomo	KANU	3,599
4. Lokoilereng Peter Alany	MCC	175
Rejected votes		51
<b>Valid votes</b>		<b>36,137</b>

Owing to the foregoing three set of results for the parliamentary elections in Kacheliba Constituency, the Petitioner avers that it is evident that the said elections were conducted by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent in violation of the Constitution and the principle of free and fair elections.

The Petitioner expresses disappointment by the failure of the 1<sup>st</sup> Respondent to provide a list of persons proposed for appointment as Presiding Officers and Deputy Presiding Officers for every polling station, of which if provided would have enabled him make presentations and ensured the appointment was done transparently and competitively. When he, the Petitioner became aware of the persons proposed for appointment as Presiding Officers and Deputy Presiding Officers in Kacheliba Constituency, he made his representations objecting to appointment of some of the persons who had been proposed for appointment on the ground that they had shown partisan interest in the Kacheliba Parliamentary Elections by openly declaring their support for the 3<sup>rd</sup> Respondent. These were, Naitale Enock, Lopeyok Francis, Achia Apangole Joseph, Anakimoi Lotukoi Luke, Ichumar Atapsai Joseph, Loyep Martin, Lontanyale Limo and Joseph Tudon. Despite the Petitioner having demonstrated that the said persons were biased, the second Respondent ignored his plea and the said persons were appointed as presiding or Deputy Presiding Officers and posted to polling stations in the constituency with the highest number of registered voters.

The 1<sup>st</sup> Respondent therefore failed to comply with *regulations 5 and 6 of Elections (General) Regulations, 2017* thereby rendering the conduct of the elections on 8<sup>th</sup> August, 2017 unfair.

In paragraph 18 of the petition, the Petitioner contends that the results as declared and recorded by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents contained wide spread instances of manipulation of the returns through manipulation of form 35A's and the votes cast in all the elections were at variance/different, in flagrant breach of the fundamental constitutional principles and that these grave errors constituted fundamental contraventions of the letter, spirit and objects of the Constitution of Kenya and in the circumstances there was no free or fair elections.

The Petitioner moves on in paragraph 20 and alleges that the tallying and total count of the votes cast at the said election were not accurate or correct and the data and information recorded in form 35A's at the polling stations was not accurately and transparently entered into the KIEMS kits hence the data entered in the said KIEMS kit was not consistent, comparable and verifiable with the information recorded in form 35A's. The process that relayed and transmitted results from the polling stations to the constituency tallying centre at Kacheliba Boys Secondary School was not simple, accurate, verifiable, secure, accountable, transparent, open and prompt. This led to false, fictitious unlawful and fraudulent reasons as contained in form 35B.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents, by themselves and/or through officers and agents acting under them, is argued by the Petitioner in paragraph 23, committed an election offence by marking in the election records, returns and other documents entries regarding the results of the said election which they knew or had reasonable cause to believe to be false or that they did not believe to be true. They also breached their official duties by omitting to prepare an accurate, complete and signed election returns including the certificate of the results of parliamentary election and announcing and declaring results that were unlawful, fraudulent, fictitious and false.

In paragraph 25 of the petition, the Petitioner pleads that in several polling stations on 8<sup>th</sup> August 2017, the 3<sup>rd</sup> Respondent and/or his agents with the connivance and/or collusion of the 2<sup>nd</sup> Respondent and/or the officials working under the 2<sup>nd</sup> Respondent allowed persons not identified biometrically and not in the register to vote or by procuring and/or permitting unauthorized persons to vote in the parliamentary election when they were not entitled to vote. The 3<sup>rd</sup> Respondent and/or his agents with the connivance and/or collusion of the 2<sup>nd</sup> Respondent and/or the officials working under the 2<sup>nd</sup> Respondent, are alleged to have committed an election offence by communicating with the voters who were in the precincts of the polling station for the purpose of voting and giving or causing to be given to the voters money for the purpose of corruptly influencing the said voters to vote for the 3<sup>rd</sup> Respondent.

In paragraph 27 it is professed by the Petitioner that the number of valid votes cast in several polling stations was more than the total number of voters who had been identified biometrically in the individual polling stations and the same were counted and tallied as valid votes to the detriment of the Petitioner.

It is asserted in paragraph 28 that the 2<sup>nd</sup> Respondent excluded the agents of the Petitioner in the process of voting, counting and tallying where it was observed that for all the voters who required assistance, the due process was flouted, results were declared on the basis of form 35A's that were incomplete, unverified, unsigned or signed by persons who were strangers i.e. not appointed as presiding or Deputy Presiding Officers or Party/Candidate's Agents and/or unstamped.

Petitioner's analysis of the forms revealed that the results declared by the 2<sup>nd</sup> Respondent for the Governor, Senator, County Woman Representative to the National Assembly and County Assembly Elections in Kacheliba Constituency were at variance and there were different valid votes reflected in forms 36B, 37B, 38B and 39B and those verbally announced and declared at the tallying centre. Further to this it is averred in paragraph 30 that there was no proper tallying, count or totaling of votes cast in the said election and in the circumstances there should be a scrutiny, recount and retallying of the votes cast in the said election and a scrutiny of all the polling station diaries and KIEMS kits.

In paragraph 32 the Petitioner declares that the election was rigged and unfair and therefore should be nullified.

The Petitioner therefore prays for orders that:-

- A. Immediately upon filing of the petition the 1<sup>st</sup> and 2<sup>nd</sup> Respondents do avail all the original forms 35A's, form 35B, the polling station diaries and the KIEMS kit for scrutiny and audit.**
- B. There be a scrutiny of the votes recorded as having been cast in the parliamentary election in Kacheliba Constituency.**
- C. There be a scrutiny of the rejected, void and spoilt ballot papers.**
- D. The said parliamentary election held on 8<sup>th</sup> August 2017 in Kacheliba Constituency be determined and declared null and void.**
- E. It be determined that the 3<sup>rd</sup> Respondent was not and has not been validly elected as a member of the National Assembly for Kacheliba Constituency.**
- F. The said election of the 3<sup>rd</sup> Respondent as the Member of the National Assembly for Kacheliba Constituency be determined and declared null and void.**
- G. The Respondents be condemned to pay the Petitioner's costs of and incidental to this petition.**
- H. Such further, other and consequential orders as this Honourable Court may lawfully make.**

**The 1<sup>st</sup> and 2<sup>nd</sup> Respondents responded to the petition as follows:-**

That the Petitioner's tabulation of results is erroneous and not a true representation of the outcome of the parliamentary race. They aver that the correct result of the election in Kacheliba constituency is:-

<u>NAME</u>	<u>PARTY</u>	<u>VOTES</u>
1. Mark Lomunokol	PDR	17,045
2. John Lokitare Lodinyo	JUBILEE	15,317
3. Ibrahim Pkiach Longolomo	KANU	3,599

In paragraph 7 they deny allegations in paragraph 9 of the petition and assert that the declared margin of the 3<sup>rd</sup> Respondent's win over the next candidate is 1,728 votes. Further to this, in paragraph 8, they affirm that results recorded in form 35B were the final results as transmitted from forms 35A's and based on which the 3<sup>rd</sup> Respondent, being the winner of majority votes, was lawfully so declared and published in the Kenya Gazette of 22<sup>nd</sup> August, 2017.

On appointment of Election Officials, the Respondents state that the process of recruitment, selection and placement of the election officials was the sole responsibility of the 1<sup>st</sup> Respondent's and was properly conducted in accordance with the law as there is no evidence that any official of the 1<sup>st</sup> Respondent engaged in conduct to prejudice the integrity of the elections process before and during the elections. Further to this they claim all the concerns of the Petitioner raised in paragraph 13, 14 and 15 of the petition, were addressed by the Respondents and there is no evidence to show manifest bias against any of the candidates.

In paragraph 10 they held that the elections in Kacheliba Constituency were conducted in accordance with the Constitution and the law as there were no reported instances of malpractice, no manipulation, no errors and no violation of the integrity of the electoral process as to render the election devoid of fairness and credibility, or at all.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents, in paragraph 11, denies the contents of paragraph 20, 21 and 22 of the petition, and declares that they managed the integrity of the electoral process through appropriate biometric voter registration, electronic voter identification and electronic voter transmission in a simple, accurate verifiable, secure, accountable and transparent manner to generate the results as were recorded in forms 35A and 35B.

Contention of paragraphs 23, 24, 25 and 26 of the petition are denied by the Respondents who maintains that the Presiding Officers and officials of the 1<sup>st</sup> Respondent worked together with security agents to ensure orderliness on the polling queues and that no individuals engaged in any campaigns at the polling stations, no unlawful interferences with the ballot boxes or papers or any other irregularities was committed. No such incident was reported to the security agents or the Respondents, either by the Petitioner, his agents or any other member of public or voter. Bribery or corrupt influence as alleged in paragraph 26 and 27 of the petition did not happen.

Following the allegations in paragraph 28 of the petition, the Respondents avows that election of 3<sup>rd</sup> Respondent was free, fair and credible and the tallying of the votes properly done in accordance with the law and the constitution and no evidence is availed to show that some forms 35A's were unsigned, signed by unauthorized persons or incomplete.

Allegations in paragraphs 29, 30, 21, 32 and 33 of the petition are denied by the Respondents who in reply states that voting was by secret ballot and the allegations leading to anomalies in the tallying of the results have not been substantiated as they are vague and generalized. Further to this, the Respondents hold that it was not mandatory that the number of voters voting for the Senator slot, Governor, County Woman Representative, Member of National Assembly and Member of County Assembly be the same. The valid votes announced at the tallying centres were the votes declared in forms 36B, 37B, 38B and 39B.

It is the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' contention in paragraph 17 that all the accredited agents were allowed to the polling stations in accordance with the law and in an open and transparent manner. None of the agents requested the statutory form for purpose of appending their signatures or ascertaining the results, was denied the same.

The Respondents in paragraph 18 avers that the counting or tallying process were undertaken transparently in the presence of the candidates and party agents but if there were any human errors, such errors were inadvertent and/or arithmetic and did not affect the outcome of the election and such errors should and cannot override the will of the people expressed at the polling station. They deny that any of the agents were harassed, intimidated or thrown out of the polling stations in Kacheliba Constituency.

They lastly in paragraph 20 contend that the Elections in the Kacheliba Constituency, West Pokot were duly conducted in accordance with the Constitution and the law and the winner of the majority vote duly declared as the 3<sup>rd</sup> Respondent, having garnered a total majority of 17,045 votes. The Respondents never abdicated their roles and duties. They urged this court to dismiss the petition with costs.

The 3<sup>rd</sup> Respondent as would be expected also filed a response to the petition. He ascertains in paragraph 4 that the elections were held on 8.8.2017 and he was subsequently declared duly elected member of the National Assembly in Kacheliba Constituency. In paragraph 5 he pronounces that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent conducted the elections in a free, fair, democratic, transparent and credible manner and his declaration as the winner reflected the will of the people of Kacheliba Constituency.

In paragraph 6 he contends that the tallying and transmission of results was accurate and verifiable and in case there exists any anomalies, such do not materially change the outcome of the final result and declaration of the winner.

The 3<sup>rd</sup> Respondent professes in paragraph 8 that the Petitioner must have been supplied with the list of persons proposed for appointment as Presiding Officers and Deputy Presiding Officers as his affidavit reveals he was aware of who they were. Further to this the 3<sup>rd</sup> Respondent claims that the Petitioner had a list of persons he never wanted appointed as Presiding Officers and Deputy Presiding Officers and its evident from affidavits filed in court that he was out to influence the operations of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

In paragraph 10, he asserts that the results were as announced at the end of tallying and entered in form 35B. Allegation of variance in terms of results is not true and in case it exists the same did not affect the final outcome.

The 3<sup>rd</sup> Respondent avows that he had his agents at polling stations and at the end of voting exercise they submitted to him copies of properly signed and stamped forms 35A's and it's questionable of the source of the forms the Petitioner claims were not signed and stamped.

In paragraph 12 the 3<sup>rd</sup> Respondent denies the allegation by the Petitioner that in several polling stations the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in collaboration with the 3<sup>rd</sup> Respondent allowed people to vote without being biometrically identified. He further denies that he, and his agents communicated with voters in the polling station for purposes of voting and giving them money for purposes of corruptly influencing them.

In paragraph 14 the 3<sup>rd</sup> Respondent claims the petition is fatally defective, bad in law and the prayers sought cannot be lawfully granted. Further he asserts that the Kacheliba parliamentary election was conducted in a free and fair manner and in respect to the relevant election laws. It was presided over by presiding and Deputy Presiding Officers who had been properly recruited and deployed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. The results were declared on the basis of valid forms 35A's and 35B. It is denied in paragraph 18 that the 3<sup>rd</sup> Respondent committed any electoral offence either before the elections, during the election of 8.8.2017 and after the said election. He did not authorize or act in collusion with any person to eject any agent from the polling station.

In paragraph 21 the 3<sup>rd</sup> Respondent holds that the letter dated 10.7.2017 is clear evidence that the Petitioner was determined to influence and direct the 1<sup>st</sup> and 2<sup>nd</sup> Respondent on who to recruit and also on who not to recruit, which would have compromised the process of elections and the independence of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in the discharge of their duties.

In paragraph 22 he alleges that there is no proof that the Presiding Officer for Nagwailap Polling Station failed to transmit the results electronically.

The 3<sup>rd</sup> Respondent ends up by urging this court to dismiss the petition herein and to condemn the Petitioner to pay costs.

During the pre-trial conference, parties agreed that witness sworn affidavits will be admitted as their evidence-in-chief as well as all the annexures thereon. The said witnesses would first be introduced, adopt their affidavits as evidence-in-chief and then be subjected to cross-examination and re-examination during the hearing.

The Petitioner called six witnesses, him being the first one. His evidence as per his affidavit in support of the petition is briefly that the 1<sup>st</sup> Respondent in appointment of election officials failed to comply with **Regulation 5 and 6 of the Election (General) Regulations 2012**. The Petitioner's complaint on persons proposed for appointment as Presiding Officers and Deputy Presiding Officers to the 1<sup>st</sup> Respondent fell on deaf ears, leading to a process that was not above board, transparent and competitive. Some of those Presiding Officers and Deputy Presiding Officers who were appointed had openly demonstrated that they were politically inclined to or in support of the 3<sup>rd</sup> Respondent as was evidenced by social media print outs.

The said biased Presiding Officers and Deputy Presiding Officers were deployed in areas with high number of registered voters or high level of illiteracy as follows:-

- a) **Naitale Enock, Presiding Officer Tapadany Primary School.**
- b) **Lopeyok Francis, Deputy Presiding Officer Asilong Primary School.**
- c) **Achia Apangole Joseph, Deputy Presiding Officer Sitot Primary School.**
- d) **Anakimoi Lotukoi Luke, Deputy Presiding Officer, Sitot Primary School.**
- e) **Ichumar Ataparia Joseph, Deputy Presiding Officer Nakwapwo Primary School.**
- f) **Lontanyale Limo, Deputy Presiding Officer Lokomolo Primary School.**
- g) **Joseph Tudon, Presiding Officer Akoret Water Point.**

The Petitioner further averred that under **section 44 of the Election Act, 2011** the 1<sup>st</sup> Respondent was to ensure that the technology in use for biometric voter registration, electronic voter identification and electronic transmission of results is simple, accurate, verifiable, secure, accountable and transparent. However to the Petitioner's utter dismay, from the results declared and announced in the elections conducted on the 8<sup>th</sup> August, 2017 by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, it is evident that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents altered the election process and reverted to a system other than use of technology thereby effectively introducing a completely different electoral environment with different demands for checks and balances and rules which was no other than the discredited system of the past. He alleged forms 35A's were manipulated and in some instances valid votes cast exceeded the number of voters who turned up to vote. The results in form 35B were false, fictitious, unlawful and fraudulent and were not accurate, correct, consistent, comparable or verifiable with the data entered in KIEMS kits. 1<sup>st</sup> and 2<sup>nd</sup> Respondents are alleged to have committed an election offence by making wrong entries in the election records. **Regulation 59 of Election (General) Regulation 2012** is to the effect that one person casts one vote at any particular election at a polling station. It therefore follows that huge discrepancies in total number of votes declared in parliamentary election against the other levels of election in Kacheliba Constituency is inexplicable upon any reasonable hypothesis but the existence of actual ballot stuffing, multiple voting or gerry mandering or inflation of the number of votes in the tallying. Unauthorized persons were permitted to vote. Variance of total valid votes cast between parliamentary seat and of Governor, Senator and County Woman Representative as indicated in forms 37B, 38B and 39B shows that more than one ballot paper was provided for parliamentary position or there was ballot box stuffing. The results announced and declared at the tallying centre for Governor were that Simon Kachapin – 12,683; John Lonyangapuo – 17,718 votes; Senators Julius Murgor – 9,297;

Samuel Poghio – 21,688 votes of which are different from the results in forms 35B, 36B, 37B, 38B and 39B.

The Petitioner claimed that the number of votes cast in several polling stations was more than the total number of voters who turned out to vote. He gave an example of Nagwoilap Polling Station, stream 2. He further alleged that his agents were excluded from the verification of form 35A's and the results were declared on the basis of unstamped form 35A's. He accused the 1<sup>st</sup> and 2<sup>nd</sup> Respondents of committing an election offence by making false entries in election records. They are also said to have failed to prepare accurate and complete election returns. The Petitioner further claims that the results declaration forms were filled by the Presiding Officers at the tallying centres in absence or without the agents for the candidates or political parties and they announced results that were unlawful, fraudulent, fictitious and false of which amount to an election offence. He contends that the election was rigged and unfair as there was no proper tallying, counting or totalling of votes cast. His right under **Article 38(2) of the Constitution** which entitles him to a free and fair election was violated. Article 86 of the Constitution was as well violated as 1<sup>st</sup> and 2<sup>nd</sup> Respondents failed to establish systems which are accurate, secure, verifiable, accountable and/or transparent. Polling stations developed methods which were opaque and intended to manipulate the results in the course of which his representatives were altogether excluded from the process. Comas Lolemtum and Lokiru Lokwale were excluded. The Petitioner alleges form 35A's are not properly completed by the right officers. Were completed by strangers and are unsigned and unstamped. The returns in such forms are invalid. His agents as a candidate or his party agents did not sign the forms. When he requested for the said forms they were not supplied to him. This was in contravention of **Regulation 79** which provides that candidates or their agents had to sign forms 35A's, result announced at the polling station, get a copy of declaration of the results and affix a copy at the public entrance of which was never done by the Presiding Officers. The Presiding Officers contravened **Regulation 82** by failing to transmit the results electronically to the returning officer at Kacheliba Secondary School.

The Petitioner claims that to date he is not able to tell the exact number of votes the 3<sup>rd</sup> Respondent and himself got in the election held on 8.8.2017, owing to the three different set of results:-

a) Result as announced at the tallying centre

<u>NAME</u>	<u>PARTY</u>	<u>VOTES</u>
1. Mark Lomunokol	PDR	16,833
2. John Lokitare Lodinyo	JUBILEE	15,063
3. Ibrahim Pkiach Longolomo	KANU	3,588
4. Lokoilereng Peter Alany	MCC	175
No Rejected votes		
<b>Valid votes</b>	<b>35,659</b>	

b) Results on the IEBC Public Portal

<u>NAME</u>	<u>PARTY</u>	<u>VOTES</u>
1, Mark Lomunokol	PDR	17,471
2, John Lokitare Lodinyo	JUBILEE	14,927
3. Ibrahim Pkiach Longolomo	KANU	3,596
4. Lokoilereng Peter Alany	MCC	176
Rejected votes		893
<b>Valid votes</b>	<b>36,170</b>	

c) Results as entered in form 35B

<u>NAME</u>	<u>PARTY</u>	<u>VOTES</u>
1. Mark Lomunokol	PDR	17,045
2. John Lokitare Lodinyo	JUBILEE	15,317
3. Ibrahim Pkiach Longolomo	KANU	3,599
4. Lokoilereng Peter Alany	MCC	175

**Valid votes****36,137**

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents were unable to determine what result any of the parliamentary candidate got. His party agents complained of irregularities but were ignored. The tallying process was shrouded in secrecy. The 3<sup>rd</sup> Respondent did not win fairly. He alleged the election of 8.8.2017 is invalid for failure to comply with **Article 81, 83, 86 and 88 of the Constitution** and breaches of other laws in the electoral process.

On cross examination by Mr. Muyundo, the advocate for 1<sup>st</sup> and 2<sup>nd</sup> Respondents the Petitioner stated that over 5000 voters appear to have voted for only the MP and not other positions. He further alleged his agents were chased from some polling stations and votes in some stations voted without identification by KIEMS kits. He continued to say in two or three stations the returning officers agreed the election was not free and fair as machines did not identify voters and many voters voted than identified by the machines. He alleged the machine could not send the result and the figures were reduced for it to accept. His own tallying is that he had 15,063 votes and 3<sup>rd</sup> Respondent 11,575 votes. He did not go to the tallying centre at Holy Cross Boys Secondary School. He was told of what happened there by Moses Atupamoi, his chief agent. He had no public portal result print out.

On 10.7.2017 by a letter he complained against David Lotanyale, a deputy returning officer and he was dropped. He complained about 6 others and never provided evidence against them as it was obvious. Most of those were recruited. He could not tell the number of registered voters in stations where the persons he complained against were posted. He had no date of when the list of Presiding Officers was pinned on IEBC door offices in Kapenguria. Where Ajore Joseph presided, an officer he had complained against, he had 65 votes and 3<sup>rd</sup> Respondent 16 votes. Voters were 114. Where Agnes Mong'are presided, at Akoret Mobile Polling Station, the registered voters were 172. Petitioner got 65 votes and 3<sup>rd</sup> Respondent 52 votes. Where Ichumer Atapasia Joseph presided, at code number 0652, polling station 1, Petitioner had 217 votes, more than those of 3<sup>rd</sup> Respondent. The Petitioner agreed he also had his own sympathizers as presiding and Deputy Presiding Officers but were few. He agreed that he had not disclosed where KIEMS kits did not work and the station where forms 35A's were manipulated. He also agreed that form 35B was signed by the agent for Jubilee but not his own agent. Save for the name of one agent who was allegedly excluded, other names were not given. He did not get forms from his agents but from IEBC public portal. They were downloaded and printed by his technical team.

The IEBC provided forms were corrected by stamping and signing. The signatures purported to be of his agents are fake. He denied that he tried to have his preferred persons appointed as presiding and Deputy Presiding Officers. He provided a list of 100 persons for appointment as it was within their right to be appointed. Some of them were appointed. Elizabeth Chebet Chemosop who was in the list is his daughter. He did not push for her to be employed though she is in his list. He did not disclose that she is his daughter. He did not attend interviews. From his list less than 10 were appointed. Others were left out as they were thought to be his sympathizers. He did not have copies of documents they used in the application. He accessed Whatsapp and Facebook Communications through his computer. He placed no certificate for it. Results in form 34B and in Kenya Gazette are similar. Some of his complaints in the letter dated 10.7.2017 were addressed by IEBC.

**On cross examination by Mr. Nyamu the advocate for 3<sup>rd</sup> Respondent the Petitioner stated as follows:-**

He did not indicate the polling station where voters were compromised. No voter is a witness to the effect that he was compromised or there was an attempt to do so. Money given to electorate is not disclosed. It is his agent Cosmas who told him about it.

Paul Eletet did not allude to the stations where KIEMS kits allegedly failed or was not used. John Lotuu disclosed at Nagwoilap Polling Station. The complaint letter of 10.7.2017 was not copied to other candidates. There is no correspondence to the allegation that 3<sup>rd</sup> Respondent influenced recruitment of Presiding Officers. He has no certificate from Whatsapp Operators. He is not aware of how the Whatsapp and Facebook accounts were opened. He did not supply IEBC or Registrar of Political Parties with a list of his agents. He also did not supply court with one. Jubilee had agents and not all were known to the Petitioner. There is no mention of those who signed forms 35A's in disputed polling stations. Jubilee document of agents has the names of persons the Petitioner claimed were fake agents. His tallying centre got information from his agents. Result from Public Portal was not extracted. He does not know John Bororio Advocate. He never appeared before him. The secretary stamped the affidavit. The advocate was not there.

On re-examination by Mr. Ingosi the Petitioner disclosed that the 3<sup>rd</sup> Respondent did not complain about appointment of the Presiding Officers to IEBC because they were his sympathizers. The claim that more than 5,000 voted for MP and not for other positions was derived from forms at his tallying centre which are annexed. He had agents in most of the polling stations and not all. His agents did not sign some of the forms. His complaint is about the process of employment of Presiding Officer's and not the votes garnered in their respective presiding stations. By exclusion of his agents at tallying centres, he means exclusion in signing the forms. He knew his agents though he did not supply a list of them to IEBC. When he says they did not sign, he is capable of telling that.

**PW-2** is Atupamoi Lokwacira Moses, the chief agent for the Petitioner at Kacheliba Tallying Centre. His evidence is that the Returning Officer did not announce or declare the total number of rejected votes in the election of Member of the National Assembly. The total number of votes cast for the Member of National Assembly, County Assembly, Governor, Senator and County Women Representative to the National Assembly was at variance in each of the six elections. The polling system is that it ought to be similar as one voter must cast one vote for each. He believes the variance in votes cast in each level is as a result of manipulation of the election results and hence the elections were not carried out in a free, fair and transparent manner. The occurrence leads him to conclusion that the technology used by IEBC was not simple, accurate, verifiable, secure, accountable and transparent or it failed thereby allowing persons not allowed to participate in the election to vote. That the final results of the election of Member of National Assembly as tallied and declared by the Returning Officer at the tallying centre Kacheliba boys Secondary School, and the results entered in the form 35B and on the public portal are different and as follows:-

a) Result as announced at the tallying centre

<u>NAME</u>	<u>PARTY</u>	<u>VOTES</u>
1. Mark Lomunokol	PDR	16,833
2. John Lokitare Lodinyo	JUBILEE	15,063
3. Ibrahim Pkiach Longolomo	KANU	3,588
4. Lokoilereng Peter Alany	MCC	175

No Rejected votes

**Valid votes** **35,659**

b) Results on the IEBC Public Portal

<u>NAME</u>	<u>PARTY</u>	<u>VOTES</u>
1. Mark Lomunokol	PDR	17,471
2. John Lokitare Lodinyo	JUBILEE	14,927
3. Ibrahim Pkiach Longolomo	KANU	3,596
4. Lokoilereng Peter Alany	MCC	176
Rejected votes	893	
<b>Valid votes</b>	<b>36,170</b>	

c) Results as entered in form 35B

<u>NAME</u>	<u>PARTY</u>	<u>VOTES</u>
1. Mark Lomunokol	PDR	17,045
2. John Lokitare Lodinyo	JUBILEE	15,317
3. Ibrahim Pkiach Longolomo	KANU	3,599
4. Lokoilereng Peter Alany	MCC	175
Rejected votes	51	
<b>Valid votes</b>	<b>36,137</b>	

From the above results the people of Kacheliba Constituency are at a loss as to the number of votes garnered by each candidate. That the returning officer despite his insistence refused to give him a copy of form 35B.

**On cross-examination by Mr. Muyundo he revealed the following:-**

He voted at Kosamung and Petitioner's agent and that of Jubilee were there. He voted well and there was no incident. Ebeyo Isaac was the agent for Jubilee at the tallying centre. They both worked together and stood in for each other. He did not see form 35A's. Isaac Ebeyo signed from 35B. PW-2's name is not in the form presented to the IEBC of the agents at the tallying centre. He has nothing to show that he was there. He has a letter of appointment and oath of secrecy. He signed no form on 8.8.2017. Rejected votes were not declared orally at the tallying centre. He did not indicate notes catered for President, Governor, Senator, Women Rep and County assembly. He insisted that votes cast for MP were more than those for other positions.

Manipulation was carried out at the tallying centre. Oral announcement is not what is in form 34B. Have no evidence of oral announcement figures. He agreed to having no evidence that KIEMS Kits failed and of the record of on public portal results. Where he voted he assumed the agent for Jubilee was for Lodinyo. They were working together. At Kasamung Manyatta stream 1 and 2, the Jubilee agent signed the results were free and fair.

**On cross-examination by Mr. Nyamu the following was revealed:-**

He had not disclosed where manipulation took place and was by who. Was checking forms 35A's from polling stations.

He had no form which was manipulated. He had not compared figures in forms 35A and 35B. Voter could be identified manually with consent of agents. Electronic Identification was not the only allowed mode. He had no evidence that he was at the tallying centre.

In re-examination by Mr Ingosi he stated that he did not sign form 35B. He was not given a copy of it. Variance of results in various levels made him believe technology may have failed.

**PW-3** is Cosmas Lolemtum. His evidence is that he was an agent for Petitioner at Kakou Polling Station, stream 2. While there he saw PDR Candidate (3<sup>rd</sup> Respondent) and his agent Elijah Lopuke communicating with voters within precincts of the polling station for the purpose of voting and they gave or caused to be given to the voters money for purpose of corruptly influencing the said voters to vote for the PDR candidate. After the close of the polling station and before the process of counting votes started Elijah Lopuke in presence of the Presiding Officer mobilized members of the public and had him (PW-3) ejected from the polling station. He was thus excluded from the process of vote counting. The Presiding Officer did not intervene and must have been working in cahoots with PDR candidate agent.

**On cross examination by Mr. Muyundo he revealed that:-**

The oath of secrecy by him does not have a signature. He voted at Kituti Primary School and all there was in order. He had no document to show Elijah Lopuke was an agent for 3<sup>rd</sup> Respondent. Form 35A's for Kakou Primary School, Alale, shows the agent for PDR was Locho Lonyale, for Jubilee Elijah Takaramoi. He insisted it is him who was the agent for Jubilee and not Elijah Takaramoi. He did not see 3<sup>rd</sup> Respondent communicating to voters. I did not hear what he told voters. I saw him talking to people on the queue. I did not see Elijah Lopuke giving out money or causing it to be given. I thought 3<sup>rd</sup> Respondent gave out money. I thought him, and his agent talking to electorate in the queue was something. Election was taking place outside. Everybody was outside. He was ejected from the polling station.

**When cross-examined by Mr. Nyamu the following emerged;-**

He schooled in Uganda and his father is from there. His grandfather lives in Kenya. In 2013 he applied to be a Kenyan or for a Kenyan ID feigning to be a Kenyan. The name given in the application form as of his parents was for his uncle. He never disclosed Augustino was his father. He also did not disclose that he was born in Uganda. He as well did not disclose his mother was a Ugandan. His ID was issued on 4.8.2016. It is indicated he was born in Pokot North in Kacheliba Constituency. He was however actually born in Amdet District in Uganda. His mother is alone and she is a Ugandan. He is not married. He never reported the alleged bribery of voters. He did not disclose the voter who was given money and how much. He just suspected money was given. He never appeared before Mr. Robert Mngat Katina for oath. He did not disclose the name of the Presiding Officer.

On re-examination by Mr. Ingosi he insisted that what he has stated in his affidavit took place.

**PW-4** was Paul Eledet Tukomoi. His evidence is that on 8.8.2017 he was a Jubilee Party agent at Nagwoilap Polling Station, stream 1. He attested that the level of illiteracy in the area is high and most of the voters would need or require assistance or support to vote. He claimed that the Presiding Officer at the polling station allowed one Kolmokor Godfrey to assist all the voters who required assistance. They were assisted in absence of the agents. The said Kolmokor Godfrey is known to be a supporter of the 3<sup>rd</sup> Respondent and could not have assisted the voters impartially. The variation of the election outcome at different levels indicate there was ballot stuffing, persons who should not have been allowed to vote were allowed to or voters were given more than one ballot paper for the parliamentary election.

**The outcome at different levels as announced are as follows:-**

a) Member of National Assembly	389 votes
b) County Women Representative to the National Assembly	388 votes
c) Governor	371 votes
d) Senate	372 votes
e) County Assembly	369 votes

He claimed that he was not allowed to sign form 35A or record reasons for his refusal. The results were not displayed at the public entrance.

On cross-examination by Mr. Muyundo it emerged that he did not sign his oath of secrecy. He was an agent for Jubilee party or Mr. Lodinyo. Godfrey Kolmokor was assisting voters mark the vote. That is the only wrong thing he did. No voter complained that he or she was wrongly guided by him to vote for a candidate he or she never intended to. He was not there till the end. Cannot remember the votes each candidate garnered. When they started counting the votes he left at 5.00pm. They started counting the votes for the president and he left.

**Cross examination by Mr. Nyamu revealed the following:-**

He got the votes figures after they were casted. He was there till they started counting. He was not there as they finished. He was not there when the final tally was given. He left after they had counted. He knows Kolmokor Godfrey as a supporter of the 3<sup>rd</sup> Respondent at home. He had no evidence to support the allegation. He does not know whether he assisted the 3<sup>rd</sup> Respondent to get votes. He alleged a person was given an extra vote but had not revealed so in his affidavit. He could not tell the name of the alleged person. He informed the Presiding Officer about it and not the police. Identified voters are the ones who were given ballot papers. He signed his affidavit in the office of Mr. Ingosi and not Mr. John Bororio. He does not know Mr. John Bororio.

On re-examination by Mr. Ingosi he revealed that he does not trust that voters were assisted by Godfrey Kolmokor as they wanted. They were assisted as they wanted. The signatures purported to be his are not his.

**PW-5** is John Lotuu who said he was an agent for Jubilee party at Nagwoilap stream – 2. The number of votes cast for the member of County Assembly Election were more when compared to those cast in other levels, and total number of votes cast did not tally with what was captured in KIEMS kits hence Presiding Officer was unable to transmit the results in form 35A electronically. Persons not identified by KIEMS kits and who were not in the register must have been allowed to vote. The Presiding Officer did not allow him to sign or record reasons for his refusal, and was not given a copy of form 35A. The results were not fixed at the public entrance to the polling Station.

**Cross examination by Mr. Muyundo revealed the following:-**

He was guarding votes for Mr. Lodinyo. Mr. Lodinyo got 115 votes. Lomunokol got 278 votes. He voted in stream-2 and was well identified by KIEMS kit. He said he neither understood English nor Swahili Language, but the court noted he did by the way he was answering questions without waiting for interpretation to be done. He said Mr. Lodinyo translated what he told the advocate. Form 35A indicates Mr. John Lodinyo got 105 votes and Mr. Lomunokol got 261 votes. He did not sign to the effect that elections were free and fair. His affidavit does not disclose that he did not sign the form. It does not disclose his signature was forged. His signature is not on oath of secrecy.

**When cross-examined by Mr. Nyamu he revealed the following:-**

His affidavit does not show how many people voted for the MP. At the end the phone could not send the results. He does not know how KIEMS kits were working and used. He does not know whether they worked or not. Did not state the number of voters who were identified by KIEMS kit and those identified manually. He does not know whether any unidentified person voted. His work was to ensure those assisted to vote voted for candidates of their choice. He was not obstructed from doing that by anyone.

**When re-examined by Mr. Ingosi we got the following:-**

He did not sign form 35A. He knows his signature well. The machine did not send the results for more people voted than those identified.

The last witness, PW-6 is Mr. Lokiru Lokwale. His evidence is that he was at Nasal Primary School Polling Station as an agent for Jubilee Candidate. He went to the polling station and the Returning Officer had him ejected therefrom.

**On cross examination by Mr. Muyundo, the following emerged:-**

After he was chased away he voted at Kadich. He had an appointment letter as an agent. He however had no any other document. He took oath of secrecy as an agent for Lodinyo. It was given in a meeting. He was appointed on 7.8.2017, a day before the elections.

**Cross-examination by Mr. Nyamu revealed the following:-**

He was denied access to the polling station by the Returning Officer. Does not know whether he was turned away by the Presiding Officer. Could not tell the difference between a Presiding Officer and a Returning Officer.

**When re-examined by Mr. Ingosi he stated:-**

He presented only one document given by Mr. Lodinyo. He was not told why he was chased away. Does not know the person who chased him away. The senior person at the Polling station chased him away. He knew the person was the senior most as he was the one ticking.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents called four witnesses. One, Respondent witness 4, was Bonventure Okochi Okongoya. Briefly, his evidence is that he was the returning officer in Kacheliba Constituency. He conducted a free and fair election in Kacheliba Constituency of West Pokot County, that was administered in an impartial, neutral, efficient, accurate and accountable manner in compliance with the law and the constitution. Electronic Management System did not fail to work and was not interfered with in any manner whatsoever. The allegations that KIEMS kits were logged in 50 metres away is strange, extraneous, unsupported and baseless.

No errors that would impact on the final results as declared, and the alleged inconsistencies and inaccuracies are not founded on reason and evidence.

**When cross-examined by Mr. Akenga the following came out:-**

In West Pokot he is the Returning Officer with most petitions of all the Returning Officers. He met the Petitioner once while he was complaining about the Deputy Returning Officer. The issue was resolved. Deputy Returning Officer contract was suspended. The complaint by the Petitioner is not the one which led to his suspension. He is the one who made the decision to suspend him. Four days to the

election the Petitioner complained about 8 election officials. The issue was resolved. No basis were found for the said complaint. He did not fail to address the Petitioner's complaint till the time he went to the County Election's Manager. He did not employ Presiding Officers who were biased. He made the final list of Presiding Officers on 7.8.2017. The appointment letters did not show the station each will be. Polling agent is for a party or a candidate but polling officials are appointed by IEBC. On 8.8.2017 he was at the tallying Centre. He received forms 35A's and authored form 35B's. Form 35A's has provisions for votes for all candidates, registered voters, rejected ballots, rejected objected to ballots, disputed and total number of valid votes. Failure to fill some parts does not invalidate the form. Some areas are however crucial. The form does not declare that the signature of the Presiding Officer or his deputy can do. Form 35A's he received had the mandatory requirements. They are carbonated and only the original is stamped. Agents receive a copy. Original goes to IEBC – Headquarters. Returning officers were scanning the original. Forms on IEBC Portal should have a stamp. The forms in page 77 to 108, 35A's do not have IEBC stamp. The forms filed by the Petitioner have no rubber stamp. Those filed by IEBC have. Petitioner did not ask to be supplied with forms 35A's. One could download them from IEBC Public Portal. He cannot tell whether forms filed by the Petitioner are from IEBC. Forms filed by the Petitioner have authentic features. Alterations of figures in the forms should be countersigned for by the Presiding Officer. The form on page 124 has total valid votes altered and is not countersigned. Forms on page 107 have total valid votes cast corrected without countersigning. The forms on page 79 have figures corrected and moved to the far end without countersigning. Failure to countersign has no effect. He received no report that KIEMS kits failed in some stations. Petitioner forms have all the other necessary features, save for the stamps. He received complaint of failure of KIEMS in one centre and he sent a technician. Form 35A should not have such a report. The report should be in polling station diary (PSD). Form 35A on page 104 for Lodwar Station, the Presiding Officer recorded KIEM's failed due to network. The form is not signed by the Presiding Officer. The form on page 78, it is indicated KIEM's failed in the morning and caused a difference of 12 votes. Number of votes cast in all level of position in one polling station ought to be the same. Total number of valid votes cast plus rejected votes plus astray votes, should be the same at all levels. If there is a disparity then there must be a problem. He authored "B" series in all levels. The totals are not agreeing for the different positions. Stray votes are not given. Figures can't be the same without consideration of the stray ballots. Polling station diaries have the figure of stray ballots. The vote is determined by valid votes. The difference in figures is as a result of stray votes. The results were announced on 10.8.2017. The Petitioner was there. What he announced and what was in the public portal was different. Form 35A's declares the results. The correct result is what is in form 35B. He could not tell why the figures at Bomas were different. He does not know how they tabulated it. He announced results that reflected the truth on the ground. He did not deploy officers biased for the 3<sup>rd</sup> Respondent in areas with huge number of voters. The suspended Deputy Returning Officer was a member of a Whatsapp group. He had communicated expressing bias against the Petitioner. Naitole Enock was also a member, Lopeyo Francis and Atapasia Joseph. None had been posted to a polling station. The filed petition in paragraphs 8(a) to (h) indicates where they were posted. Some were posted as indicated. All worked with IEBC as Deputy Presiding Officers, save for Enock Naitole who was a clerk at Tallying Centre. This was against the complaint in the letter. He does not know who relates to which candidate. He is not aware of assisted voters. When Presiding Officer assists a voter he does not fill a form. Form is filled when a voter goes with his own assistance or aid. They fill a declaration of secrecy form.

#### **Cross-examination by Mr. Ingosi further disclosed the following:-**

He received the list of agents from Jubilee Party. It was to enable him know their agents. He could not deny anyone entrance who was given as agent. In polling station number 2, Ngegechwa, the Jubilee agent in the list was Rebecca Lonkotum. Form 35A for the said polling station was signed by Simon Chato Pyatich, Pasiach Lokilese and Everlyne Chepkorkor. Kacheliba Mixed Primary, code 003, the list of Jubilee shows the agent was James Abongo. Form 35A was signed by Pius Shikuku. The one for Kuron Primary School 004, list of Jubilee agents shows Lopakale Loitamar Joseph. Form 35A is not signed by him. No reason is given as to why he did not sign. At Tiyinei the Jubilee agent was Lootuu Lokori. The form was signed by Michael Sorich. Nakuyen Primary the Jubilee agent was Peter Poghishio. He did not sign form 35A. No reason is given. Kopulio Primary the agent is Wilson Ngorian. The one who signed is Ibrahim Meringiro. Code 010-Kopulio Mining Centre, the agent was Manuel Napatakala. The one who signed is different. He could not tell whether more than 95% of those who were in the list of Jubilee Party Agents, never signed form 35A's. The candidate agent can be got from forms 35A's and (PSD's) – Polling Station Diaries.

#### **Cross examination by Mr. Nyamu revealed the following:-**

**Under Regulation 5(4)** Presiding Officers and Deputy Presiding Officers perform the same duties. Any form 35A's signed by either is valid. **Under Regulation 79(6)**, failure to sign or to record reasons does not invalidate the results. **Under Regulation 79(7)**, absence of a candidature or an agent at the signing post does not invalidate the result. Enock Naitale was a Presiding Officer at Tapadany. In the polling station John Lodinyo got 19 votes and Mark Lomumokol got 22 votes. Ibrahim got 37 votes and Peter Alany 2 votes. No undue advantage was conferred to Mark Lomunokol. Enock Pyeko did not interview candidates as alleged on page 24 of the petition. He was a clerk. At page 26, those who were allegedly qualified and were not considered, only eight of them had applied. The rest had not. The 8 taken were all Presiding Officers and Deputy Presiding Officers. The letter of 1.8.2017 was acted upon and no substance was found in it. He had Whatsapp and Facebook Communications. Owners were not revealed. Some persons in the letter were deployed. He found no relationship between the 3<sup>rd</sup> Respondent and persons named in the list. Strangers were not allowed in as Jubilee agents. Mr. Lodinyo had no list of his agents. He just recruited and sent them to the polling stations. Some were not in the list of Jubilee agents. Comas Lolemum was not in Jubilee Party Agents list. He was at Kakou Polling Station. In his affidavit at page 147, his letter of appointment is from Mr. Lodinyo. His letter of appointment however shows he was getting in as a jubilee agent. Oath of secrecy is also of Jubilee party. Strangers never signed as his agents. Agents were allowed in using letters of appointment, oath of secrecy, ID and also the party's list of agents. For candidates, no list was submitted.

Lokiru Lokwale was sent by Mr. Lodinyo to Masal Polling station. He is not in Jubilee Party list as an agent. He says he was denied entry. He must have lied. Form 35A's from the Petitioner are not stamped. Original is stamped and a copy for the agent on request. Form 35A's were submitted at IEBC headquarters and were uploaded in public portal. The Petitioner submitted list of alleged deployment of Presiding Officers and their deputies is not the one he used in their deployment. His was complete with deputies, unlike the one submitted. It's lacking his signature and stamp, and is with no heading, "Kacheliba constituency."

Results for code 153-2 of 2, Kakou Nursery, the 3<sup>rd</sup> Respondent votes in form 35A's were awarded to the Petitioner in form 35B. They were wrongly interchanged. The percentage turnout at different levels of Gubernatorial 84.3%, parliamentary 84.9%, Senator 83.4% and women representative 85.4% shows a difference which is as a result of stray ballots. Rejected votes could also account for the variation. The percentage did not consider rejected votes, but valid votes cast. Where the persons Mr. Lodinyo had complained about worked, he had more

votes. The appointment of Presiding Officers was not done in a way to influence the outcome in favour of the 3<sup>rd</sup> Respondent. Alterations done were to give the correct figure. Where it was reported KIEMS kits failed in the morning the results were given and the Petitioner was not disadvantaged. At Nasal Primary Petitioner sent Lokwale Lokiru. The oath of secrecy is from Jubilee Party. He was not told during recruitment that Kolmoko Godfrey was a supporter of 3<sup>rd</sup> Respondent.

**Re-examination by Mr. Muyundo yielded the following:-**

Alteration for Tapadany, code 027, of figure 80 was to give the correct count of votes. Deployment of officials was done randomly but there was assurance that one did not go to his or her home ward.

The other witness for 1<sup>st</sup> and 2<sup>nd</sup> Respondents was James Losili Pyator, (RW-1). He said he was the Presiding Officer attached to Nagwoilap Primary School Polling Station, stream – 2. The voting in the station started, proceeded and ended in accordance with the law and the constitution. He counted the votes in presence of the accredited agents of the candidates. He verified the votes in an open and transparent manner. He recorded the results for the Member of National Assembly in forms 35A. The results were as follows:-

1. John Lodinyo Lokitare	105
2. Lomunokol Mark	261
3. Longolomo Ibrahim Pkiyach	00
4. Peter Lokoilereng Alany	00

The said results were announced at the polling station in the presence of candidates present and their agents. A list of the results was pinned at the entrance to the polling station for easy access by members of the public. It was also transmitted to the constituency tally centre. It is not true as alleged by John Lotuu that there is a big or any variance in the number of votes cast for the various contested seats in the general election. He received no report that any ineligible voter was allowed to vote in the station. There was as well no reported incidence of voter bribery. The KIEMS kit functioned properly throughout and the voter identification and or transmission of results done in accordance to the standing instructions on election management. The Petitioner and his agents were allowed in the polling station for purposes of verification and tallying of the results. He confirmed that voting at Nagwoilap Primary School Polling Station stream 2 was conducted in accordance to the law and the will of the people well exercised in a free, fair and democratic way, thereby declaring the 3<sup>rd</sup> Respondent as the winner of majority votes.

**On cross-examination by Mr. Ingosi the following came out:-**

He had an attendance list but did not have it in court to show who were there. John Lotuu was a Jubilee agent. He had a polling station diary. He made a mistake in form 35B.

**Mr. Nyamu in cross-examination revealed the following:-**

He did not see 3<sup>rd</sup> Respondent on the voting day. 3<sup>rd</sup> Respondent had 156 more votes than the Petitioner. Noted error could not change the winner. Transmission of results was effectively done.

**Mr. Muyundo re-examination disclosed the following:-**

MCA votes given is off-head. Did not look at form 36A. MP position figure is from form 35A. He did not make the form with figure 388 as votes cast. There was a wrong entry in form 35A of 372 rather than 366 as total number of valid votes cast. The error does not affect the outcome. The tallying centre was at Kacheliba. Transmitted result was to Kacheliba and to Nairobi.

The next witness is Festus Ben Omuse (RW-2). His evidence is that he was the Presiding Officer attached to Kakou Nursery School – 2 polling station. The voting at the place started, proceeded and ended in accordance with the law and the constitution. The voting ended at around 10pm and he commenced the process of counting the votes in the presence of accredited agents of the candidates. He received no report that the Petitioner's agent was ejected from the polling station. The result at the polling station of which he entered informs 35A areas follows:-

1. John Lodinyo Lokitare	33 votes
2. Lomunokol Mark	406 votes
3. Longolomo Ibrahim Pkiyach	00 votes
4. Peter Lokoilereng	01 votes

The said results were announced at the polling stations in presence of the candidates or agents who were present and members of the public. All agents were allowed at the polling station in accordance with the law. None of the agents who requested for the forms for purpose of either appending their signature or ascertaining the result was denied access to the same. No individuals engaged in any campaigns at the polling stations and no such incident was reported.

He confirmed that the voting in Kakou Nursery School 2 was conducted in accordance with the constitution and the law and the will of the people well exercised in a free, fair and democratic way. The 3<sup>rd</sup> Respondent was the winner of majority votes.

**Cross examination by Mr. Ingosi reveals the following:-**

He could not remember the names of agents present or even their number. He could remember Cosmos Lolemtum as an agent for Jubilee Party. Those who voted were 440. Those who voted for Mr. Lodinyowere 33. For Mr. Mark were 406. Not all the agents signed the forms. Presidential agent for ODM did not sign. Cosmos Lolemtum did not sign. Reasons for failure to sign are not given. For Jubilee, Takarang Elijah signed. IEBC Jubilee agents form shows the agent was Aywas Logwarale. I allowed a person who was not a party agent to sign. Did not deny Cosmos Lolemtum from signing. He did not see Mark Lomunokol there. He was only told that he was there. Cosmos Lolemtum was not ejected from the station. He did not have polling station diary. Form 35B shows mark had 33 votes. To him he had 406 votes. Lodinyo had 33 votes. Form 35B shows he had 406 votes. Entry in form 35B is wrong. He completed form 35A as required by law. Some agents did not sign and no reason is given. The law required him to indicate reasons.

**Mr. Nyamu in cross-examination, elicited the following:-**

Three agents signed form 35A for code 153 stream 2. Mr. Lodinyo had 33 votes. Mark had 406 votes. Form 35B shows Mr. Lodinyo had 406 votes and Mr. Mark 33 votes. Mr. Mark votes were exchanged for Lodinyo in form 35B. He had no list of agents and allowed those who had letters of appointment and oath of secrecy. He saw no one chasing Cosmos Lolemtum away. He, Cosmos Lolemtum was not there as the station closed. Cosmos Lolemtum was to go to Kakou Nursery School. There were two streams and the stream is not given. He does not know Elijah Lopuke and never heard that he caused chaos at the polling station. The polling station diaries were given to the returning officer. Voting took place in an open place.

**Mr. Muyundo finally re-examined this witness and the following came out:** - Nobody was refused to sign form 35A. Whoever refuses to sign is the one to give reason for indications in the form. There is no requirement that if the agent is absent such should be indicated.

The last witness gave evidence as (RW-3) One, Joshua Kibet. His evidence is that he was the Presiding Officer attached to Nagwoilap Primary School Polling station, stream 1. The voting at the place started, proceeded and ended in accordance with the law and the constitution. At the close of the polling station at 8.00pm he commenced the process of counting votes in the presence of accredited agents of the candidates. Paul Eletele Tukomoi's name is not in the list of Jubilee party agents. The results at the polling station for the Member of National Assembly were as follows:-

1. John Lokitare Lodinyo	93 votes
2. Lomunokol Mark	294 votes
3. Longolomo Ibrahim Pkiach	00 votes
4. Peter Lokoilereng Alany	00 votes

The results were announced at the polling station and record in form 35A in presence of candidate agents present and members of the public. Voters assistance exercise was carried out by all polling officials in accordance with the law. None of the agents who requested for the forms for purpose of either appending their signature or ascertaining the result was denied access to the same. There was orderliness on the polling queues and no individual's engaged in any campaigns at the polling stations. He received no report of either bribery or manipulation of the voter assistance exercise in favour of any candidate.

The tabulation of results by Paul Eletele Tukomoi is erroneous and not a true reflection of the official results. He confirmed that voting at Nagwoilap Primary School Polling Station stream – 1 was conducted in accordance to the law and the 3<sup>rd</sup> Respondent was the winner having garnered majority votes.

**Cross-examination by Mr. Ingosi revealed the following:-**

He was in Uganda for 2 years. The language used there is English and Swahili. The agents present were three. Paul Eletele Tukomoi was an agent for Jubilee. He was in stream – 1. Jubilee list of party agents shows their agent was Isaac Lomotongiro. He assisted 13 voters. Geoffrey Kamulokoi was a clerk. He is not aware that he assisted all the voters. Those who voted for MP were 388 including rejected votes. Governor 388 and senator 388. He filled forms 37A for Governor. 37B reflects Governor had 387 votes. 39B for Women Representative shows 388 votes. For Governor form 37A and 37B results do not tally. The Deputy Presiding Officer did not sign form 37A. He had gone for a call. Both of them should sign.

**Cross –examination by Mr Nyamu brought out the following:-**

The Presiding Officer and his deputy need not both sign form 35A. The one who witnessed the counting of votes is the one who signs. Valid cast votes for MP were 388. Mr. Mark got 294 votes. Mr. John Lodinyo got 93 votes. The difference is 201 votes. Paul Eletele provided documents for Jubilee party agent. Difference of votes at different levels was not due to stuffing of ballot papers.

**Lastly from Mr. Muyundo's re-examination we got the following:-**

Form 35A shows votes cast were 388. Paul Eletele does not say where he got the figure of 389 from. Stray ballots are not counted.

The 3<sup>rd</sup> Respondent had two witnesses, himself and another called Paul Lopusingiro.

The evidence by the 3<sup>rd</sup> Respondent is that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents conducted the election on 8.8.2017 in a free, fair democratic, transparent and credible manner. His declaration as the winner reflected the will of the people of Kacheliba Constituency. The tallying and transmission of results was accurate and verifiable and if at all there are any anomalies the same are anomalies that do not materially change the outcome of the final result. He had agents at the polling stations and at the end of the voting exercise his agents submitted to him copies of properly signed and stamped forms 35A. It's not true that in several polling stations the 1<sup>st</sup> and 2<sup>nd</sup> Respondent in collaboration with him allowed people to vote without being biometrically identified. He did not act in collusion with 1<sup>st</sup> and 2<sup>nd</sup> Respondent in recruitment and deployment of the Presiding Officers and Deputy Presiding Officers. Polling stations named in paragraph 8 of the supporting affidavit do not have a high number of voters but instead some have very small numbers of voters. He has never committed any electoral offence either before the election, during the election on 8.8.2017 and after the election. He did not collude with the 1<sup>st</sup> Respondent to exclude one Cosmas Lolemum and Lokiru Lokwale from the polling station. He was never at Kakou Polling Station on 8.8.2017. He did not give money to any voter on 8.8.2017 and neither did any of his agents do it on his instructions. He as well did not collude with any person to eject any agent from polling station. The letter of 10.7.2017 by the Petitioner to the 2<sup>nd</sup> Respondent is clear evidence that the Petitioner was determined to influence and direct 1<sup>st</sup> and 2<sup>nd</sup> Respondent on who to recruit and also on who not to recruit which would have compromised the process of election. The said letter was not copied to all the other candidates and was not therefore written in good faith.

The persons who were named in the letter dated 10.7.2017 are not his relatives and neither have they been his agents. The tallying and declaration of the winner was done at Holy Cross Boys and not Kacheliba Secondary School or Kacheliba Boys Secondary School as alleged by some of the Petitioners' witnesses.

#### **His cross examination by Mr. Ingosi elicited the following:-**

He was the incumbent MP. Returning officer for Kacheliba Constituency is known to him. He has never been with him at Comfy Hotel in Eldoret. He had no problem with appointment of Presiding Officers and Deputy Presiding Officers. The returning officer did not recruit persons the 3<sup>rd</sup> Respondent wanted. The Petitioner is complaining that in the 3<sup>rd</sup> Respondent strongholds the election was not carried out properly. Petitioner had more votes in some of the areas in which he had complained about deployment of Presiding Officers and Deputy Presiding Officers. The 3<sup>rd</sup> Respondent never had some of his favourite Presiding Officers and their deputies deployed in areas where he had less support so as to cushion him. They were not posted there to ensure that at least he got some votes. He was not aware of IEBC public portal. He was not a beneficiary of a flawed process. The process was fair as form 35B declared him the winner. Forms 35A's can tell the winner if the IEBC public portal results were different. He had party agents and no personal agents. Elijah Lopuke is his constituent but does not know whether he supports him. He was not an agent of his party. He voted at Kameri's Primary School at 8.00am and went home. He was at home that day till 5.00pm. The level of literacy in the constituency is low. This is about 40%. That does not mean many voters would need assistance. Form 35A's were delivered by his party agents before the petition was filed. The stamps for the forms he provided and those provided by IEBC are at the same place. One is even stamped down side up on both. The copies he provided and those provided by IEBC were not made from the same original. The forms he received were originally stamped. They were stamped by the same officers that is why the stamp is at the same position. The list of Presiding Officers and Deputy Presiding Officers was served on 7.8.2017. He needed the list to know where to strategically place their agents. Never intended to place them where his people were not posted. There were anomalies in the election. Some occasioned unfairness. It's a legal requirement that forms be stamped, be signed by Presiding Officer and Deputy Presiding Officer. If not stamped and signed a form in an electoral process is still valid. He does not know agent Mark Lodinyo. He, 3<sup>rd</sup> Respondent, was the only Honourable in Kacheliba Constituency in the parliamentary level. He does not know who would be called Munoo. PDR party had many candidates. He is not Munoo. He saw Whatsapp and Facebook Communications. The number of cast votes is not the same in the 6 levels of the election. Discrepancy in the number of valid vote's cast in different levels at the same polling station does not mean illegitimate voters were allowed to vote.

#### **Cross examination by Mr. Muyundo revealed the following:-**

He only went to Kameris Polling Station on 8.8.2017. No complaint is raised for the place. Vote for parliamentary candidate had photographs of candidates and parties had symbols. Many voters had voted before and had experience. One needed not be literate in order to vote. Voters can however make mistakes. A vote can be placed in the wrong ballot box. For Sapire Nursery School, the Presiding Officer commented, "two stray ballot papers." Such could raise a difference in valid votes cast at different levels. Elijah Lopuke never signed any form on his behalf or behalf of his party. The 3<sup>rd</sup> Respondent's agent presented to him forms 35A's. The agents received them from the polling stations. He is known as Mark Lomunokol. His ID reads that name. He is known that way and not otherwise. He took no part in appointment of Presiding Officers and Deputy Presiding Officers. It is only the input of the Petitioner which was considered in their appointment and deployment. He is not aware of any bias perpetrated by the officers the Petitioner was not comfortable with. Petitioner had more votes where those he was complaining about presided. He was at the tallying centre when the results were declared. He got 17,045 votes, Mr. Lodinyo 15,317 votes, Mr. Ibrahim 3,599 votes and Mr. Alani 175 votes.

The other witness for the 3<sup>rd</sup> Respondent is Paul K. Lopusingiro. The affidavit which contains his evidence reveals that he was the chief agent for the 3<sup>rd</sup> Respondent in the election held on 8.8.2017, and was stationed at Holy Cross Boys tallying Centre. At the said centre the results were announced and the winner declared in accordance with the contents of form 35B. At the said tallying centre all the chief agents for all the candidates and various political parties were required to sign an attendance sheet. Jubilee was represented by Epeyo Isaac and not Atupamoi Lokwachira Moses. The returning officer after tallying results from the polling stations announced the results in accordance to contents of form 35B as follows:-

- |                            |              |
|----------------------------|--------------|
| a) Lokoilereng Peter Alany | 175 votes    |
| b) Lodinyo Lokitare John   | 15,317 votes |
| c) Mark Lomunokol          | 17,045 votes |

d) Ibrahim Pkiyach Longolomo	3,599 votes
e) Total valid votes	35,204 votes
f) Rejected ballots	51 votes
g) Registered voters	42,632 voters

**On cross examination by Mr. Akenga, the following emerged:-**

He was an agent for mark Lomunokol and not for the party. The annexed list shows he is a tallying clerk. Chief agent is indicated as Abokotum Kaparay. The letter produced has a head for PDR party. It shows he is a chief agent. He saw Epeyo Isaac a member of Jubilee. Total votes for all the candidates is 36,204. The difference unaccounted for is 932. 36,136 total valid votes is not in his affidavit. He said what he heard announced. He signed form 35B on 14.8.2017. Others signed it on 11.8.2017. He went to sign it. Did not sign it on 10.8.2017. This is because the certificate was issued and they went celebrating. He picked form 35B on 14.8.2017. He is not aware whether Abokotum signed form 35B. He signed form 36B for member of county assembly, on 14.8.2017. (Court noted he feigned ignorance of what public portal is when he was asked). He is not related to Mark Lomunokol by blood. Hon. Munoo got 17,045 votes.

Cross examination by Mr. Muyundo of this witness did not yield anything new.

**Re-examination by Mr. Nyamu reveals:-**

He does not know Munoo. When he said Munoo got 17,045 votes he was not sure of what he was responding to. Results were declared on 10.8.2017.

At the close of hearing of the evidence, parties put in written submissions and highlighted on them on 16.2.2018.

Mr. Akenga eloquently kicked off the submissions. He took court through the law governing elections in Kenya of which are the Constitution, Elections Acts and the Regulations therein, among others. He averred that the Petitioner has discharged the burden required in an election petition which should be above that required in criminal cases. He relied on *Raila Odinga's case 2013*. He further submitted that the election is free and fair if it complies with the provisions of the law. When legal provisions are not adhered to substantially by IEBC, the court should annul the election. He alleged that they have demonstrated that the election in Kacheliba Constituency was not free and fair. It was not simple, not accurate; there was no transparency, the documents presented cannot be verified in regards as to who won and with how many votes. He depended on the case of *Raila Odinga 2017* to buttress the point that election is not always about numbers; It is also about quality and quantity. Where there are irregularities and illegalities affecting the outcome of the election, the court should annul the election.

The advocate invited this court to *Regulation 83 of Election (General) Regulations Rules* which govern the process of tallying and announcement of results. Immediately after the results are collected from all polling stations, according to *regulation 83(1)(f)*, the relevant forms should be signed and dated, and returning office announce the results. After that he is to issue a certificate – form 35C. On this it was submitted there was breach of the regulation and the court was invited to find that form 35B was not used on 10.8.2017 to show the winner.

The rest of submission is on evidence adduced and what conclusions to be drawn out of it. I wish not reiterate it. At the tail of it I was urged to be guided by the case of *Ahmed Abdullah and Ahmed Muhumud versus Hon. Mohamed Abdi Mohamed, Gichohi Gatuma Patrick and IEBC Election Petition No. 14 of 2017* where the election was invalidated for failure to comply with clear provisions of the law.

Mr. Muyundo went next in submissions and was agreeable that the case of *Ahmed Abdullah and Ahmed Muhumud versus Hon. Mohamed Abdi Mohamed, Gichohi Gatuma Patrick and IEBC Election Petition No. 14 of 2017* will help in resolving some of the issues arising out of this case, more so the issue of assistance of voters. He submitted that failure to produce form 32 does not invite the court to make an adverse finding. Form 32 is only used where a voter is accompanied by his own assistant. When the Presiding Officer assists a voter the said form is not filled as it is an oath of secrecy. In the submitted case the court found so.

He further urged this court to disregard anything in the Petitioner's submissions which was not pleaded as parties are bound by their own pleadings. The Petitioner attached forms downloaded, allegedly, from IEBC public portal, Whatsapp Communication and Facebook, downloaded from a computer. *Section 106(b) of the Evidence Act* was not complied with in their processing. There was no certificate on how it was retrieved. It was submitted that all that evidence is inadmissible.

What was allegedly downloaded from the public portal is challenged in that the adduced evidence does not indicate when and the time it was on public portal. The results at the public portal were not constant. Public portal was managed at the National Tallying Centre for IEBC at Bomas of Kenya. The results at the tallying centre as was entered in form 35A is final. The Petitioner has not effectively challenged the results in form 35A. With no contest in what is in form 35A, there should be no contest in what is in form 35B and whether the winner was given a certificate.

This court was also invited to consider the credibility of witness number 3 and 6 who were not truthful with the court and with employees of the government.

Mr. Nyamu adopted fully the submissions by Mr. Muyundo. He further submitted on burden of proof in an election petition and its standard. He relied on the case of *Raila Odinga versus IEBC 2013* and submitted that it's higher than in civil matters and lower than in criminal matters. He alleged that the Petitioner's case does not meet the standard. Relying on *Election Petition Number 6 of 2013 of*

*Hassan Mohammed Hassan and Another versus IEBC and 2 others, Garissa High Court*, he averred that not all alleged malpractices should lead the court to annul an election unless it's shown how it affected the outcome. On costs, I was urged to award it at 4 million.

Having gone through the pleadings, Evidence adduced and submissions, the issues which have emerged for determination are:-

1. **Had the stated presiding and Deputy Presiding Officers shown publicly the candidate they were supporting? Were they posted in polling stations with the highest numbers of registered voters? If the answer to the two questions is yes, what was the effect of that in the outcome of the election?**
2. **Did KIEMS kits fail or did it function properly? If it failed what effect did it have in the outcome of the election?**
3. **Were form 35A's manipulated? Were they incomplete and signed by the wrong persons? If yes, in whose favour did it happen?**
4. **Were the results in form 35A's at variance with what was entered in KIEMS kit?**
5. **Were there 3 different results, making it impossible to tell which was the genuine one and who won? If yes, what is its legal implication in the election?**
6. **Were the results intentionally falsified in form 35A's?**
7. **Did unregistered voters vote?**
8. **Were voters communicated to during voting on 8.8.2017, and bribed to vote for the 3<sup>rd</sup> Respondent?**
9. **Is the number of valid votes more than the number of registered voters in several polling stations?**
10. **Is it true that all voters who required assistance were assisted without the due legal process, and in favour of the 3<sup>rd</sup> Respondent?**
11. **Were other elective positions votes at variance with parliamentary position votes? If yes, to whose benefit? Is there any justification for that?**
12. **Was the Kacheliba Constituency Parliamentary Election rigged in favour of the 3<sup>rd</sup> Respondent?**
13. **Does the declared results in form 35B reflect the actual outcome of election in terms of who won?**

Before considering the arising questions of law, it's important to establish the factual position on the foregoing issues.

The first issue is guided by **Regulation 5 and 6 of Elections (General) Regulations, 2017**. **Regulation 5(1)** provides that the commission shall transparently and competitively appoint a Presiding Officer for every polling station and may similarly appoint such number of Deputy Presiding Officers as may be necessary. The key words here are **transparently** and **competitively**. **Regulation 6** is about appointment of polling clerks. 6(2) provides that the commission shall make the list of the persons appointed under sub regulation(1) available to political parties and independent candidates within 14 days from the date of appointment to enable them raise any objections. This provision is similar to 5(2) save for that the last words are ".....to enable them make any representations."

The evidence by the Petitioner that the Presiding Officers and their deputies were biased for the 3<sup>rd</sup> Respondents is a social media communication printout. They are in Facebook and Whatsapp. The alleged officers, who had commented positively about re-election of the 3<sup>rd</sup> Respondent, had referred to him as Munoo. Let me consider what is actually Facebook and Whatsapp.

Facebook is defined as a popular free social networking website that allows registered users to create profiles, upload photos and video; send messages and keep in touch with friends, family and colleagues. One joins a group of friends, family and colleagues through a request for invitation and an acceptance by a member of the group. Only members access the information posted by anyone of them through allowed means.

Wikipedia defines Whatsapp manager as a freeware and cross-platform instant messaging and voice over IP Service. The application allows the sending of text messages and voice calls, as well as video calls, images and other media, documents and user location. In this one, I am aware there is an administrator who creates it and pick members. Mostly consent of members is not sought before they are picked, but there is a way of vacating if one is disinterested. Communication is free and hardly controlled within the group. For both Facebook and Whatsapp, one needs an electronic gadget and a network in order to access to it. It's normally accessed in soft unless printed for whatever reason. If one is not a member of a Whatsapp group he or she can hardly access the communication through the allowed means.

The Respondents in their submissions asserted that the social media printouts are inadmissible in evidence for failure to comply with provisions of **section 106(b)(4)** which requires a certificate to be made identifying the electronic record and describing the manner in which it was produced. The certificate is signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate). In this case no such certificate is availed. It's not very clear on how the alleged information was accessed and printed out. The legally established safeguards in admissibility of electronic evidence as carried from

**section 106A up to section 106(I) of the Evidence Act**, is crucial as electronic messages, reports, photos, writings etc, while still in soft is capable of being manipulated to reflect something totally different from what it was originally and then printed out. That is why a certificate is necessary to ascertain to the court that no manipulation took place in the entire process. The fact that at pre-trial conference all evidence was admitted does not exonerate the court from its duty of ensuring all evidence submitted meets the legally required standard. I accordingly agree with the Respondents that the printouts are inadmissible. The evidence is not safe to rely on.

As I had earlier on expressed, the list of proposed presiding, Deputy Presiding Officers and the polling clerks was to be availed within 14 days prior to the date of appointment to the political parties and independent candidates to enable them make any representations. The Petitioner claimed that he was not served with the list within the 14 days. The legal provision is clear that he was not supposed to. He was not an independent candidate as his party was PDR. Equally to this, he was not the one expected to make a presentation but his party officials. If he had any complaint he should have presented it to his party officials to make presentation to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, and not himself given that he was a candidate with direct interest in the entire electoral process.

There is no evidence presented that the 3<sup>rd</sup> Respondent made any presentation to the 2<sup>nd</sup> Respondent on who should be appointed as an election official and who should not. The evidence we have, and of which I find very interesting, is that the Petitioner tried to. He complained against some and presented himself a list of a100 candidates, with intentions of having them appointed. Though he was saying it was their right to be appointed, it is clear that if the 2<sup>nd</sup> Respondent had accepted the request and appointed the 100 proposed persons, of which one was a daughter of the Petitioner, the persons would have been inclined to favour the person who helped them get the job. Eight of them were employed and if there is anyone entitled to a complaint is the 3<sup>rd</sup> Respondent and not the Petitioner. The Petitioner was inclined, in doing so, to influence the process unfairly in his favour. He never disclosed to the 2<sup>nd</sup> Respondent that one of those proposed was his own daughter and never shared the list with other candidates for transparency and fairness in the process. He did it clandestinely and appears to have been of the mistaken belief that whoever would have a hand in appointment of the election officials would win the elections. Given his action he is the least expected person to have complained about their appointment. The Petitioner had also expressed disappointment on the way the said biased officials were deployed. He claimed they were deployed in areas with high number of voters and high level of illiteracy. However on cross-examination it turned up that the claim was not correct. Some were in areas with very few voters and the level of illiteracy was not ascertained in the said areas. In some of those areas, as it emerged during cross-examination, the Petitioner had more votes than the 3<sup>rd</sup> Respondent, a fact to which he responded to during re-examination that he was complaining about the process in those polling stations, rather than the votes he garnered. There is no reliable evidence that the alleged officials were biased against him and manipulated the process in favour of the 3<sup>rd</sup> Respondent.

The second issue is on the use of KIEMS kits. The Petitioner alleged they failed and were not used. However, he himself and all his witnesses, at the polling stations where each one of them voted it worked well. The second Respondent in his evidence said election management system did not fail to work and was not interfered with in any manner whatsoever. The only evidence of failure of KIEMS kit came out during cross-examination of the second Respondent where he said he received complaint of failure of KIEMS kit in one polling centre and he sent a technician. The form for Lodwar Station had indication by the Presiding Officer that KIEMS failed due to network. The one for Longorkan Cattle Dip Polling Station, the Presiding Officer commented the KIEMS failed to count votes in the morning for some minutes causing a difference of 12 votes. That is the only evidence we have of where KIEMS failed. The evidence is not that it failed throughout. The effect is only stated in one that it caused a difference of 12 votes. This difference can only be understood to mean the difference between those who voted and those who were identified through KIEMS. This would not have worked to the disadvantage of any candidate. KIEMS was not the only method used in identification of voters. **Under section 44A of the Elections Act** there was a complementary mechanism which was manual. There is no evidence that the complimentary mechanisms was not used in the three polling centres where KIEMS is indicated to have failed, for the time it failed, and if used it was to the detriment of the Petitioner. The failure as expressed was temporal and just in very few polling centres and there is no evidence that it affected the outcome of the election in any way.

I now turn to form 35A's. The Petitioner alleged they were manipulated. They were not stamped and signed and those signed were by strangers. Some areas were not filled and there were cancellations of which were not signed for. The second Respondent on cross-examination on the issues stated that form 35A has provisions for votes for all candidates, registered voters, rejected ballots, rejected objected to ballots, disputed and total number of valid votes. He expressed that failure to fill some parts does not invalidate the form. It is only the original that was stamped and a carbonated copy on request by an agent. Originals were scanned and sent to IEBC portal. The hard copy was also sent to IEBC headquarters. It emerged that the forms filled by the Petitioner had no stamps while those by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent had. The Petitioner argued they were stamped after the petition was filed to defeat their claim. 1<sup>st</sup> and 2<sup>nd</sup> Respondents denied it and said they were not aware of where the Petitioner got his forms from. The Petitioner alleged they were downloaded from the public portal by his technical team. However no certificate was put by one of those who allegedly downloaded them and in law they are inadmissible as evidence. However other claims about the forms agree to those filed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. For Nagwoilap Primary School Polling Station, total number of valid votes cast has an alteration of the last figure – 388 and there is no countersigning. The votes for John Lodinyo Lokitare are 93 and for Lomunokol Mark 294. The count for total valid votes cast should therefore be 387. The same applies to Kakou Nursery School Polling Station where total valid votes are altered in the last figure to read 425. Here Mr. John Lodinyo Lokitare got 26 votes, Lomunokol Mark 396 votes, Longolomo Ibrahim Pkiyach 2 votes and peter Lokoilereng Alany 1. The total count is 425 votes. Here it is clear the figure as corrected is correct. For Nakurapuo Primary School, the figures on the left were corrected and moved to the far right. Here John Lokitare had 53 votes, Lomunokol Mark 40 votes, Longolomo – 95 votes and peter Lokoilereng – 00. Total valid votes cast is 188. The last one is for Tapadany Primary School where a total valid vote is corrected to read 80. John Lodinyo had 19 votes, Lomunokol Mark 22, Longolomo 37 and Peter Lokoilereng 2. The total count gives 98 votes.

The other issue raised is that the list of agents for jubilee does not correspond with the agents for jubilee party who signed the forms in some polling stations. The Petitioner also claimed some forms were signed by some other persons as his own agents while they were not.

Regarding the uncountersigned for amendments, there is no evidence that the corrections made were in favour of any candidate. Save for one, the rest were in number of total valid votes cast. That is the total of votes for all the candidates. This does not determine who wins. The winner is determined by total votes for each candidate which is done in form 35B. Otherwise there is no evidence that in the four forms any of the candidates did not get the reflected votes. The corrections did not therefore prejudice any candidate.

On the second issue of agents, the evidence reveals that the Petitioner did not share his agents list with anyone. The 2<sup>nd</sup> Respondent never had it and it was not even provided to court. There was confusion on both sides as to the agents for the party and for the candidate. This is so as even the agents themselves who gave evidence were confused as to whether they were for the party or the candidate. The Petitioner had given some of his agent's documents, that is Appointment Letter and Oath of Secrecy, with Jubilee Party Letter Head and hence the confusion. Such a scenario makes it easy for him to claim that some of those who signed the forms for Jubilee party were not in the list of their party agents and that some of those who signed as his personal agents were not. Disapproving this becomes hard given the confusion. However it was made clear that those who entered the polling stations and signed had Oath of Secrecy, Appointment Letter and Identification Card. That being the case no strangers could have signed. If the claimed strangers signed in forms where even the 3<sup>rd</sup> Respondents had lost, one would wonder why they would have been allowed to sign if at all the process was meant to benefit the 3<sup>rd</sup> Respondent. No witness was availed who said he signed as a stranger. The claim is not established to the required standard in law.

The claim that some forms are not signed is dealt with as per provisions of **regulation 79(6)** which reads:-

***“The refusal and 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).”***

When we talk of failure to comply with the law which requires such forms be signed and in case there is failure to, the reason be recorded, the law has made the position clear on the effect of such omission on the announced results. It does not invalidate it.

The next issue of whether the results indicated in form 35A's are at variance with what is entered in the KIEMS kit, only a mere claim about it was made by the Petitioner. We were not provided with evidence of what was entered in KIEMS kit. Its only PW-5, John Lotuu who was allegedly a Jubilee agent at Nagwoilap stream 2 who alleged the number of votes cast for the Member of County Assembly election were more when compared to others cast and total number of votes cast did not tally with what was captured in KIEMS kit hence presiding officer was unable to transmit the results in form 35A electronically. He was of the view that voters not identified by KIEMS kit and were not in the register, must have been allowed to vote. On cross-examination the court noted that he could understand English Language though he had said he did not. He was not therefore entirely honest. He was not conversant with how KIEMS kit was working and used. He also could not tell whether any unidentified person voted. He said his work was to ensure those who were assisted to vote voted for a candidate of their choice. Given what was his role in the polling station, that he does not know how KIEMS kit was used and worked, and was not the one sending the results using the phone, one wonders how he noted that the phone could not send the results. It is clear that either his evidence to that effect is based on hearsay or is just a cooked story. His evidence is well counteracted by the evidence of James Losili Pyator who was the presiding officer at Nagwoilap Primary School stream 2.

On the 5<sup>th</sup> issue the Petitioner stated that there were three different set of results, making it impossible to tell the actual votes garnered by each of the candidate and also who won.

**a) Result as announced at the tallying centre**

<u>NAME</u>	<u>PARTY</u>	<u>VOTES</u>
1. Mark Lomunokol	PDR	16,833
2. John Lokitare Lodinyo	JUBILEE	15,063
3. Ibrahim Pkiach Longolomo	KANU	3,588
4. Lokoilereng Peter Alany	MCC	175
No Rejected votes		
<b>Valid votes</b>		<b>35,659</b>

**b) Results on the IEBC Public Portal**

<u>NAME</u>	<u>PARTY</u>	<u>VOTES</u>
1. Mark Lomunokol	PDR	17,471
2. John Lokitare Lodinyo	JUBILEE	14,927
3. Ibrahim Pkiach Longolomo	KANU	3,596
4. Lokoilereng Peter Alany	MCC	176
Rejected votes		893
<b>Valid votes</b>		<b>36,170</b>

**c) Results as entered in form 35B**

<b><u>NAME</u></b>	<b><u>PARTY</u></b>	<b><u>VOTES</u></b>
1. Mark Lomunokol	PDR	17,045
2. John Lokitare Lodinyo	JUBILEE	15,317
3. Ibrahim Pkiach Longolomo	KANU	3,599
4. Lokoilereng Peter Alany	MCC	175
Rejected votes		51
<b>Valid votes</b>		<b>36,137</b>

For the oral result allegedly announced at the tallying centre there is no tangible evidence in support that was adduced in court. The chief agent for the Petitioner (PW-2) had not even a note where he had captured it. One wonders how he got the oral announcement if he did not record it anywhere and how correct it is. The 2<sup>nd</sup> Respondent denies that there was such an announced result. The second set is of allegedly downloaded result from the public portal. The second Respondent agreed that the results as contained in form 35B were not agreeing with what was in the public portal. Public portal captures results sent to Nairobi Bomas of Kenya through scanned form 35A's. It kept on changing on how the results trickled in. We were not told at what point the said results were downloaded. There was no evidence of screen shot of the said results. There was as well no certificate by the person who downloaded it. It is therefore doubtful and inadmissible in evidence. In **Civil Appeal number 105 of 2017**, the now famous **Maina Kiai Case**, the Court of Appeal made a declaration that constituency returning officers are the persons responsible for the conduct and declaration of the results through form 35A's. Anyone who therefore wishes to know the results if in doubt of what is declared in form 35B, would just total the results as declared in form 35A's. All form 35A's were annexed to the petition and the votes per candidate in them was clear and unchallenged. There is no evidence that they give the Petitioner more votes than indicated in form 35B and that he had beaten the 3<sup>rd</sup> Respondent. To the contrary the evidence that emerged is that at Kakou Nursery School Mr. John Lodinyo got 33 votes, Mark Lumonokol 406 votes, Ibrahim Pkiach O and Peter Lokoilereng Alany 1 vote. That is according to form 35A's which carries the determination of results at a polling station. However in form 35B, the votes for mark Lumonokol were given to John Lodinyo and Mark Lumonoko given the few notes for John Lodinyo. This made Mark Lumonokol lose unfairly 373 votes while John Lodinyo unfairly gained the same in the final tally. The evidence and law makes it clear, even if there were three sets of results as alleged, as to which one should suffice. Issue number 6 is whether results were intentionally falsified. I have already covered the instances where there were corrections in figures. There is no evidence it was done in favour of 3<sup>rd</sup> Respondent and that it does not reflect the votes actually casted. The votes in areas affected were few and could not have been made with any intention of affecting the final tally in favour of one candidate against the other. Mostly the correction is in total valid votes cast and not the votes per candidates, where it's actually the point where the rubber meets the tarmac. My finding is that there is no reliable evidence of falsification of forms 35A's.

I'll now consider whether unregistered voters voted. There is no evidence adduced of unregistered voter who voted. The evidence given was of assumption given that the votes cast in parliamentary position in Kacheliba Constituency could not agree with votes cast for other levels. While I do agree in a perfect scenario it ought be more like the same given that a voter is given 6 votes for each position and all must be cast, where stray ballots are not captured, and arithmetic mistakes are likely to occur as shown by the evidence of some figures in form 35A's and even 36B, the figures would vary.

As was well held in the petition of **Raila Odinga and Others versus the IEBC and Another (2013) (Para 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 was as a civil cause; the legal burden vests 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.”***

The Petitioners have not effectively discharged the burden of proving that unregistered voters voted, for the burden to shift to the Respondents.

I move on to consider whether voters were communicated to during voting on 8.8.2017, and bribed to vote for the 3<sup>rd</sup> Respondent. PW-3 is the one who offered evidence regarding this claim. He said that he saw PDR candidate (3<sup>rd</sup> Respondent) and his agent Elijah Lopuke communicating with voters within precincts of the polling station for the purpose of voting and they gave or caused to be given to the voters money for the purpose of corruptly influencing the said voters to vote for the PDR candidate. Before I consider other issues regarding this evidence, the use by a claimed eye witness, of the words “.....they gave or caused to be given to the voters' money.....” reveals some uncertainty of the claim and raises doubts as to whether he actually saw. This witness was an agent for the Petitioner. He claims he saw a political offence being committed, to the detriment of his candidate. How comes he did not report it even to the police? He heavily contradicted himself on cross-examination when he said,

***“I did not see 3<sup>rd</sup> Respondent communicating to voters. I did not hear what he told voters. I saw him talking to people in the queue. I did not see Elijah Lopuke giving out money”***

More interesting information came out when he was cross-examined by Mr. Nyamu. It became explicit that he was a Ugandan who cheated

his way to registered as a Kenyan citizen. The evidence of such a witness cannot be trusted. No wonder he came out clearly as a liar. Actually the police should investigate his citizenship issue and take the necessary action.

Is the number of valid votes more than the number of registered voters in several polling stations? No evidence was called by the Petitioner to establish the claim. The court was not given the stations and the figures of registered voters against the indicated valid votes in forms 35A.. The claim cannot therefore pass.

The next issue is of assisted voters. It was alleged that the level of illiteracy in Kacheliba Constituency is about 60% and so the number of voters who would need assistance is high. While this is purely an assumption without any scientific proof or tangible evidence, the evidence called was in relation to only one polling station, Nagwoilap, stream 1. PW-4 claimed the presiding officer there allowed one Kolmokor Godfrey, who was well known to be a supporter of the 3<sup>rd</sup> Respondent, to assist all the voters who required assistance.

On cross-examination he indicated that the only wrong thing Godfrey Kolmokor did was to assist voters mark the votes. No voter complained that he or she was wrongly directed to vote for the person he or she did not want. The witness said he was not at the polling station up to the end. He had given the results for different elective posts, and one would wonder where he got it from. However he contradicted himself when he was questioned by Mr. Nyamu and said he left after they had counted. He had no evidence that Kolmokor Godfrey was a supporter of 3<sup>rd</sup> Respondent. He even did not reveal what made him think or hold that he was a supporter of the 3<sup>rd</sup> Respondent. Surely the evidence by this witness does not meet the legal threshold and can't be held as a fact of what took place.

Having weighed all the foregoing issues, I wish to state that hardly would an election which involves participation of so many people as either electorates, candidates, agents and election official, be perfect. Just like in an exam where the pass mark is hardly at a 100%, the same would be expected in an election. Some errors of omission and commission which adversely occurs are understandable and excusable so long as they do not affect the outcome of the election in issue. Where the IEBC score in an election can be placed at over 80%, in my opinion, such an election cannot be said to have been conducted in contravention of the constitution and other laws governing election. We all know that elections are an expensive undertaking in terms of finances and time, and the court cannot just drive the electorate back to ballot on inadequate grounds, where all other factors remaining constant, the expected result would be the same.

I therefore hereby declare that the Kacheliba Constituency Parliamentary Election was conducted in accordance to the constitution and the other applicable laws and the 3<sup>rd</sup> Respondent declared the winner. The petition therefore fails for lack of adequate evidence and is hereby dismissed with costs to the Respondents.

Cost per Respondent is capped at 2.5 million shillings.

**S. M. GITHINJI**

**JUDGE**

**1.3.2018**

**1.3.2018**

Coram – Before S. M. Githinji – Judge

Court Assistant – Juma

Mr. Nyamu for the 3<sup>rd</sup> Respondent also holding brief for Mr. Muyundo for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent

Mr. Ingosi is for the Petitioner

**COURT**

Judgment read and signed in the open court this 1<sup>st</sup> day of March, 2018.

**S. M. GITHINJI**

**JUDGE**

**1.3.2018**

**MR. NYAMU**

On our part we apply the kshs.500,000/- posted as security by the Petitioner be paid to us as part payment of the costs.

**MR. INGOSI**

I have no objection to it.

**COURT**

Application is allowed.

**S. M. GITHINJI**

**JUDGE**

**1.3.2018**