



**Mokita & 4 others v Independent Electoral and Boundaries Commission & 2 others
(Election Petition E002 of 2022) [2023] KEHC 2083 (KLR) (24 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 2083 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
ELECTION PETITION E002 OF 2022
GL NZIOKA, J
FEBRUARY 24, 2023
IN THE MATTER OF: ARTICLES 81, 86, 87 AND 88 OF
THE CONSTITUTION OF KENYA, 2010
AND
IN THE MATTER OF: THE ELECTION ACT NO. 24 OF
2011 LAWS OF KENYA
AND
IN THE MATTER OF: THE ELECTIONS (GENERAL)
REGULATIONS, 2012
AND
IN THE MATTER OF: ELECTIONS (PARLIAMENTARY
AND
COUNTY) PETITION RULES, 2017 AND IN THE
MATTER OF: THE ELECTION OFFENCES ACT, 2016
AND
IN THE MATTER OF: THE SENATORIAL ELECTIONS
FOR NAROK COUNTY, COUNTY NO.33 HELD ON 9TH
AUGUST 2022
BETWEEN
JULIUS OLE MOKITA 1ST PETITIONER
MARY CHELANGAT KIRUI 2ND PETITIONER
PAUL TAPUKAI OLE MEBARNE 3RD PETITIONER**



TIAMPATI OLE KETUYIO LAMPESHUA 4TH PETITIONER
LETIYIA OLE MAINE 5TH PETITIONER

AND

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST
RESPONDENT

DR SIDNEY R I NAMULUNGU NAROK COUNTY RETURNING
OFFICER 2ND RESPONDENT

HON. OLEKINA LEDAMA 3RD RESPONDENT

JUDGMENT

The Parties

1. The Petitioners are described as citizens of Kenya by birth and registered voters in Narok County. That the 1st Petitioner was the Deputy Chief Agent for the United Democratic Alliance Party, (herein “UDA Party”), Senatorial candidate.
2. The 1st Respondent is a constitutional body established under Article 88 (1) of the Constitution of Kenya, 2010, (herein “the Constitution”) charged with the responsibility of conducting and supervision of referenda and elections to any elective body or office established by the Constitution and any other elections as prescribed by an Act of Parliament.
3. The 2nd Respondent was at all material times the Returning Officer duly appointed by 1st Respondent to conduct and supervise the Senatorial Elections held on the 9th August 2022, in Narok County.
4. The 3rd Respondent was the Orange Democratic Movement, (herein “ODM Party”) Senatorial Candidate for Narok County, in the 9th August 2022, and was the declared the winner of the elections.

Background Facts

5. On 9th August 2022, general elections were held in Kenya. Consequently, the 1st and 2nd Respondents conducted and supervised the Senatorial election in all polling stations within the six (6) Constituencies in Narok County. The six (6) Constituencies are: Narok North, Narok South, Narok West, Narok East, Kilgoris and Emurua Dikirr, with a total 398,784 registered voters.
6. The 1st Respondent cleared a total of eleven (11) candidates to participate in the Senatorial elections. The candidates were: Nelly Chepkemai Bett, Gideon Konchella, Lenard Cheruiyot Kipkemai, Jimmy Paranyumbe Luka, Godfrey Maloi Mapelu, Kiranto Ole Nabaala, Ledama Olekina, Joel Meitamei Olodapash, Zakayo Rotiken, Salaton Tompo and Samuel Kuntai Tunai.
7. At the conclusion of the election exercise, the 2nd Respondent announced the final results for the respective candidate as follows:
 - a. Nelly Chepkemai Bett----- 3,315
 - b. Gideon Konchella-----11,827
 - c. Lenard Cheruiyot Kipkemai-----11,079



- d. Jimmy Paranyumbe Luka----- 4,402
 - e. Godfrey Maloi Mapelu-----1,544
 - f. Kiranto Ole Nabaala-----1,453
 - g. Ledama Olekina-----135,180
 - h. Joel Meitamei Olodapash-----9,661
 - i. Zakayo Rotiken-----1,263
 - j. Salaton Tompo-----2,038
 - k. Samuel Kuntai Tunai-----117,869
8. Pursuant to the aforesaid results, the 2nd Respondent declared the 3rd Respondent as the duly elected Senator of Narok County.

The Petitioners Case

9. The Petitioners are aggrieved by aforesaid results and declaration of the 3rd Respondent as duly and validly elected as the Senator of Narok County and seeks for the following orders herein: -
- a. An order be and is hereby issued for the audit and scrutiny of the statutory results forms 38As, 38Bs and 38C respecting the Narok County Senatorial Elections held on 9th August 2022.
 - b. A specific order of scrutiny and recount of votes be and is hereby issued in Saleita Primary School with registration code No. 028, Ole Nkanai Primary School with registration code No. 059, Sitoka Primary School with registration Code No. 097 and Emurua Dikirr Primary school with registration code No. 003.
 - c. A declaration be and is hereby issued that the Narok County Senatorial election held on 9th August 2022 was not conducted in accordance with the principles laid down in the Constitution and in legislation governing elections.
 - d. A declaration be and is hereby issued that sum effect of the irregularities, malpractices, the non-compliance with the *Elections Act* No.24 Of 2011, the *Elections (General) Regulations*, 203, in the administration of the Narok Senatorial election held on 9th August 2022 substantially affected the results of that election.
 - e. A declaration be and is hereby issued that the Narok County Senatorial election held on 9th August 2022 declaring the 3rd Respondent as the Senator Narok County is invalid.
 - f. An order be and is hereby issued directing the 1st Respondent to organize and conduct a fresh Senatorial election for Narok County in strict conformity with the *Constitution* and the law.
 - g. Costs of this Petition be borne by the Respondents



The Petitioners' Case

10. The petition was fully heard with the Petitioners calling a total of sixteen (16) witnesses while the 1st and 2nd Respondent called a total of four witnesses and the 3rd Respondent's case being supported by evidence of two (2) witnesses.
11. The Petitioners case is that, prior to the election day, the UDA Senatorial candidate, in compliance with the law and to ensure transparency and accountability in the elections, recruited, trained and deployed: one (1) Chief County agent, one (1) Deputy County Chief agent, six (6) Chief Constituency agents and Polling Station agents and submitted their particulars to the respective County Returning Officers for accreditation and records.
12. However, the Petitioners aver that 1st and 2nd Respondents did not conduct the elections in a free, fair, transparent and accountable manner, in that the 1st Respondent's officers and in particular the Presiding officers in various polling stations were compromised and employed a systematic and systemic electoral fraud and electoral malpractice to help and ensure the 3rd Respondent won the elections to the disadvantage of the UDA Senatorial candidate, thus overturning the will of the voters of Narok County.
13. That UDA Senatorial agents were unlawfully denied access for a long period of time or completely, to the majority of polling stations in all the six (6) 6 constituencies. Therefore, they did not have an opportunity to; inspect and observe ballot boxes before the commencement of the voting exercise, monitor the voting exercise and in particular the process of assisting voters. That, the aforesaid infraction was rampant in polling stations listed under paragraph 12 of the petition.
14. Further, while purporting to attend to "assisted voters" the Presiding officers deliberately prompted, misled, conned, unduly influenced, coerced, took advantage of the said voters and marked their ballot papers in favour of the 3rd Respondent, without the informed consent of these voters and despite their protest and protests of Petitioners preferred candidate agents, rendering the elections a sham and hence invalid. That, the infraction occurred in the polling stations listed under paragraph 13 of the petition.
15. That, in furtherance of the aforesaid, the Presiding officers, denied the UDA Senatorial candidate's agents the opportunity to observe the Presiding officers attend to assisted voters, only permitting the 3rd Respondent's agents whom they colluded with to ensure that the assisted voters involuntarily voted for the 3rd Respondent.
16. Furthermore, the Presiding officers in various polling stations illegally refused to record in the polling station's register the names of assisted voters, the fact that the voters were assisted and the reason for the assistance.
17. The Petitioners' further aver that the Presiding officers in various polling stations turned away voters, including a voter by the name Simon Ngayami at Mpeuti Primary School, who could not be biometrically identified thus effectively and illegally denying them their right to vote.
18. In addition, the Presiding officers in various polling stations illegally closed the polling station at exactly 5 p.m. and turned away voters who were already on the queue thus illegally denying them their right to vote. That, at Sitoka Primary School, Registration No. code 097, one Denis B Parshami witnessed more than 100 voters who were already in the queue turned away.
19. That the Presiding officers in some polling stations were compromised and unapologetically served the partisan interests of the 3rd Respondent, by deliberately making wrong entries of the votes garnered by



- the Petitioner and reducing the votes garnered by up to 100%, for instance, at Saleita primary school, the UDA senatorial candidate garnered 26 votes however, in the final tally he was awarded zero votes.
20. That, the Presiding officers in some polling stations illegally and unjustifiably allowed unauthorized persons' access to the polling stations thus compromising the integrity of the elections.
 21. Furthermore, the Presiding officers formed an illegal network with the 3rd Respondents supporters and/or hirelings to engage in bribery and undue influence of voters and agents rendering the elections not free and fair hence invalid. That, at Masikonde and Kisiriri Primary Schools in Narok North Constituency and Chelchel Primary School in Kilgoris, Azimio team employed goons who violently intimidated voters.
 22. The Petitioners' aver that, the Presiding officers in all the polling stations refused to issue the UDA Senatorial candidate's agents with result forms 38A and to affix the said forms in places open to the public within the polling stations.
 23. Further, the Presiding officers deliberately and unjustifiably refused and/or failed to promptly count and announce results thus allowing an opportunity for the results to be fiddled with in favour of the 3rd Respondent. That, at Ole Nkanai Primary School in Narok South Constituency, the Presiding officers deliberately delayed the announcement of the results for more than 24 hours resulting into chaos and the results from that polling station were not tallied because of violence and destruction of the polls materials.
 24. It is averred that, the Returning officers at the Constituency Tallying Centres deliberately and unjustifiably refused and/or failed to promptly collate the results from all the polling stations and announce them thus allowing the results to be fiddled with in favour of the 3rd Respondent.
 25. That the 3rd Respondent's supporters and/or goons engaged in acts of threats of violence and actual violence targeted at the UDA Senatorial candidate's supporters and especially within polling centres in the Petitioners support strongholds and which acts intimidated and scared voters thus suppressing voter turnout and denying them the right to vote.
 26. Further the 3rd Respondent with the connivance of security officers led a group of ODM party candidates, supporters and/or goons in and engaged in acts of violence, vandalism and arson of election materials, threats of violence and actual violence against the election officials thereby intimidating and coercing them to compromise the integrity of the election and serve his cause.
 27. That, the ODM's Senatorial, Gubernatorial candidate and his running mate, stormed Kilgoris Boys High School; the Constituency tallying centre and brought counting of votes to a halt for about 2 hours after the Deputy Gubernatorial candidate slapped the Returning officer for allegedly delaying the declaration of the results.
 28. The Petitioners aver that the Respondents violated the Constitution and legal requirements of the law in conducting the subject elections herein as stated under paragraphs 55 to 69 of the Petition and argue that, the violation amounts to, in certain circumstances election offences.
 29. As such all the acts complained of and the violation of the law as stated in the petition rendered the elections not transparent nor accountable hence invalid.

The 1st And 2nd Respondents Case

30. The petition was opposed by the 1st and 2nd Respondents vide a response filed on 16th September, 2022 wherein it is averred that pursuant to Article 88(4) (a) of the [Constitution](#), the 1st Respondent registered



- 22,120,458, voters in the Country. Subsequently eleven (11) candidates referred to in the petition were validly nominated, registered and cleared to contest for the Narok Senatorial position.
31. That, on the 13th August, 2022, the 2nd Respondent, in his capacity as the Narok County Returning Officer of the 1st Respondent and in accordance with the provisions of the Constitution and the Elections Act, declared 3rd Respondent as the winner having garnered 135,180 votes.
 32. That the contents of paragraphs 1 to 9 of the petition are restatement of facts and do not form any grounds of a petition under the Elections (Parliamentary and County) Petition Rules, 2017. Further paragraphs 10 to 16 of the petition are couched in generalities that are misplaced and without any factual basis.
 33. That at all times, all the party agents of all the Narok Senatorial candidates were granted access to the polling stations, including the stations listed under paragraph 12 of the petition, on the polling day to oversee the electoral process, and access and/or approve the announced results provided that they had all the required documentation, as confirmed in the Petitioners witness Affidavits of; Lankisa Njoe and Dennis B. Parsham who confirmed that they were granted access even up to and until the closure of the polling stations and the Affidavits of Lydia Chepkemoi, Joel Omae and Alice Cheruiyot Cheron, all sworn on the 17 August 2022.
 34. Further, all polling stations were required to open at 6.00 am and close at 5.00 pm on the voting day. That ballot boxes were opened by the respective Presiding officers in the presence of all those agents that were present at the polling station and a cursory look at Form 38As, reveal all the UDA agents signed those forms.
 35. Furthermore, the notion that not all voters are educated or cannot read and write still does not take away the voter's constitutional right to vote for their preferred candidate since the Presiding officers of the 1st Respondent were professionally trained and mandated to assist them in the presence of agents within the said polling station. That all the assisted voters who came with assistants or not were granted assistance by the relevant Presiding officers in line with the Elections Act and regulations. Further it is incorrect and misleading to state that all assisted voters have to be recorded in the polling station register.
 36. That no voter was chased away from the polling station for the failure to be identified by the Biometrics, the Commission had put in place trained personnel who would assist such voters towards making sure that they are identified and allowed to vote in line with the 2nd Respondent's direction.
 37. The 2nd Respondent denied the averments that the 1st Respondent's officers were compromised and served partisan interests of the 3rd Respondent and stated that all the Presiding officers in the respective constituencies tallied and announced all the Narok Senatorial results as contained in Form 38As, all the county Returning Officers verified and populated all the results in the Form 38As to Form 38B and that the same was done in compliance with the law.
 38. Further, a cursory look at the Affidavit of Lankisa Njoe, indicates that the 26 votes were garnered by his Senatorial candidate at Ikirimisho Primary School, Narok East Constituency. The same is also stated in paragraph 18 of the petition where the 26 votes are also claimed to have been announced in favour of the Senatorial candidate at Saleita Primary School. That, the Affidavit of Lydia Chepkemoi dated 17th September 2022 where the results for the UDA Senatorial candidate votes tally in Form 38A and Form 38B from Saleita Primary School is adopted.
 39. That there was no illegal network with the 3rd Respondent's supporters and/or hirelings to engage in bribery and undue influence. Further, the generalized allegations against Masikonde Primary school



and Kisisiriri primary school and Chelchel are all unfounded, baseless and unsupported and aimed to taint the image of the officers of the 1st Respondent.

40. The 1st and 2nd Respondents averred that the 1st Respondent's staff issued the result Form 38As to UDA agents who signed the same without indicating any incidences. Furthermore, the officers of the 1st Respondent populated all the Form 38A's as and when received and announced the same promptly.
41. That the alleged incidence of power outage at the Kilgoris Boys High School Constituency Tallying Centre did not affect the tallying of Form 38A's and population of the results by the Returning Officers to Form 38B.
42. That the 1st Respondent worked through its ICT officers to resolve any reported issues experienced by Returning and Presiding Officers and that the 1st Respondent had equally provided 6 KIEMS Kits per ward to act as a backup in the event of failure of Kiems Kit which had additional ways of voter identification being the Biometric, alphanumeric and Face ID and the allegations that voters could not be identified at Mpeuti Primary School-Code 057 and Olanka Primary School are coached in generalities, vague and misconceived and equally lack particulars as required by law.
43. That the contents of paragraphs 27 to 54 of the petition are admitted as they restatements of law and do not disclose any grounds. Further, the Petitioners have failed to demonstrate any particulars of any alleged violations by the 1st and 2nd Respondent as enshrined under the Constitution and the Election Act. Finally, for an election court to order a scrutiny and recount of votes, there must be sufficient reason given and reference made to specific polling stations, which have not been itemed.
44. The 1st and 2nd Respondents pray for a declaration that: -
 - a. The Narok County Senatorial election held on the 9th of August 2022 was conducted in accordance with the Constitution of Kenya and the Election Act and all other relevant statutes and a valid declaration of the outcome of the Narok Senatorial election was made.
 - b. That the 2nd Respondent was not in breach of and did not contravene the provisions of the Constitution, the Elections Act or any of any other statute in declaring the 3rd Respondent as the Senate elect of Narok County.
 - c. The Petition lacks merit and should be dismissed; and
 - d. The Petitioners should bear the costs of the Petition.

The 3rd Respondent's Case

45. The petition was opposed by the 3rd Respondent vide a response dated 4th October 2022. He averred that, the petition is speculative and not based on any verifiable facts. That, he is not privy to any improper practice as alleged by the Petitioners nor of any scheme targeting UDA agents in any polling station and in particular the polling stations pleaded at paragraph 12,13,55,56,57 and 58 of the petition.
46. That every ballot paper contains the image of the candidates and the party symbol therefore an illiterate voter could still make an informed decision and no will of the voter was violated. Further, no agent was denied access to the polling station to witness the assistance to "assisted voters". Furthermore, the allegation of failing to record particulars of assisted voter is strange in law and in any event, the agents in the polling station did not record any protest.



47. That he is a stranger to the allegations that the voters were turned away, for failure to be identified by KIEMS. Similarly, he is a stranger to the allegations of the polling station having been closed at 5.00pm and voters on the queue locked out.
48. The Respondent denied ever compromising any Presiding officer and argued that in any case, the Petitioners were not candidates in the elections and could not have had any votes reduced and even then, there is no evidence that the UDA Senatorial candidate garnered 26 votes in Saleita primary school polling station.
49. That, the allegations in paragraph 19-62 of the petition are general and not capable of a response as there is no nexus between the integrity of elections and the alleged unnamed, and unauthorized persons alleged to have accessed the polling stations.
50. Further he is a stranger to the allegation of bribery of any person or who committed violence against the 1st Respondent's officers at Masikonde, Kisiriri and Chelchel primary schools polling stations as pleaded at paragraphs 20 and 63 of the petition.
51. That contrary to the allegation that, UDA agents were denied Forms 38A, the Forms produced reveal that the UDA Senatorial agents signed the Forms 38A.
52. Furthermore, there was no delay allowed to create an opportunity to fiddle with results and if there was any delay it was not instigated by the 3rd Respondent or his supporters. Consequently, if the results of Ole Nkanai are taken into account, they would have increased the 3rd Respondent's margin. The 3rd Respondent denied storming into Kilgoris Boys High School tallying centre or halting the tallying.
53. The 3rd Respondent also denied being privy to the alleged false and deliberate entries made in statutory results forms in Saleita and Emurua Dikirr primary schools. He averred that he is a stranger to the alleged deliberate refusal to promptly count and announce results at Ole Nkanai Primary school or any other polling station in the County.
54. He denied committing any election offence and in particular causing violence against the 1st Respondent officials with the objective of intimidating and coercing them to commit electoral malpractice. Similarly, the allegation of low voter turn-out at Masikonde Primary school or other polling station within the County, due to acts of violence, intimidation or threats to the electoral officials was denied and so was the alleged acts of violence and vandalism at Ole Nkanai primary school polling station.
55. He termed the petition as a fishing expedition since the Petitioners have not challenged the results in a single polling station in the entire Narok County. Further, they have not produced any Form 38A to prove irregularities that effected the election results. That, in totality the elections held in Narok County for Senatorial elections were peaceful, credible, verifiable, secure. That in any event the UDA party got majority of the Members of County Assembly and the Governors returns. He prayed that the petition be dismissed with costs.

Analysis and Determination

56. At the end of the hearing of the petition, the parties filed their respective submissions and highlighted the same. I have considered the entire material placed before the court and find that the following issues have crystallized for determination, whether: -
 - a. The Petitioners' agents were denied access to the various polling stations named in the petition, so as to observe, monitor the elections process



before or during the voting, tallying and counting of votes of the Senatorial election in Narok County and/or provide assistance to “assisted” voters, thus compromising the final result.

- b. The officers of the 1st Respondent prompted, misled, conned, coerced and/or unduly influenced the “assisted” voters to mark ballot papers or marked for them the ballot papers in favour of the 3rd Respondent and failed to follow laid down procedures in assisting these voters or keep proper records of assisted voters.
- c. The officers of the 1st Respondent turned away voters and/or closed the polling stations at 5pm before all voters cast their ballots, thus denying them the right to exercise their constitutional right to vote and rendering the election unfair and invalid.
- d. The officers of the 1st Respondent made wrong and/or false entries in form 38A by reducing the votes of UDA Senatorial candidate by up to 100% in favour of the 3rd Respondent, and whether such entries are adequate or sufficient to affect the results of the Senatorial elections of Narok County.
- e. The 1st Respondent allowed unauthorized persons to access polling stations and formed illegal networks thus compromising the results.
- f. The 3rd Respondent’s agents bribed voters thus rendering the results of the elections null and void;
- g. The 3rd Respondent’s agents engaged in acts of violence and vandalism against the 1st Respondent’s Returning officers, thus intimidating them to compromise the results and/or rendering the same undemocratic, unverifiable, unaccountable and invalid; and
- h. The officers of the 1st Respondent refused to issue UDA agents with forms 38As and failed to promptly count and announce the results or collate the results, thus allowing the fiddling of the results in favour of the 3rd Respondent and rendering the elections not transparent and accountable.

57. However, before I delve into those issue, I wish to make general observation on salient issues herein. First and foremost, I note that although there are five (5) Petitioners who filed the petition, it is only the 1st Petitioner who filed an affidavit in support of the petition and testified. The other four (4) did not file any affidavit and neither did they testify.

58. In that regard, it suffices to note that under paragraph 1 of the petition, the Petitioners’ aver that they “are citizens of Kenya by birth and registered voters who voted in the just concluded elections held on 9th August 2022, for the Senator of Narok County. That, they are residents of Narok County, public spirited individuals committed to the promotion of good governance and democracy in Kenya, including through free, fair, credible and verifiable elections”

59. The question that arise is; since the four (4) Petitioners did not file any affidavit nor testified, how can the aforesaid averments under paragraph 1 of the petition be substantiated or verified?

60. Be that as it were, during cross examination of the 1st Petitioner by the 1st and 2nd Respondents as to why the other four (4) Petitioners did not participate in the hearing of the petition, he stated that they had given him authority to act for them. I have looked at the subject authority at page 132 of the Petitioners’



bundle of documents and I note that it is entitled; “Authority to appear, act, plead and swear.” It is signed by all the Petitioners, including the 1st Petitioner.

61. However, the questions remain; how can those signatures be authenticated in the absence of the evidence of the other four (4) Petitioners? Even then, the subject authority does not authorize the 1st Petitioner to testify on behalf of the others.
62. Secondly, in further cross examination of the 1st Petitioner by the 1st and 2nd Respondent, it emerged that he has been involved in three (3) other petitions as here below indicated: -;
 - a. *Wilfred Gisebe Gisebe v Land Registrar, Transmara Sub-County and 4 Others*, 2015 eKLR wherein the 1st Petitioner applied to be enjoined as an Interested Party.
 - b. *Ali Fara v Moses Ole Nasisit & 9 Others* 2016 eKLR, the 1st Petitioner also applied to be enjoined in the matter as an Interested Party.
 - c. *Jane Naisianoi Munge v Oloiren Group Ranch (sued through its representative) Noiko Oloipupamiaron & 9 Others* 2020 eKLR, the 1st Petitioner was a Respondent.
63. The 1st and 2nd Respondents who cross examined him on the same argues that the 1st Petitioner is a busy body who thrives in filing petitions under the guise of protecting citizens’ constitutional rights. However, the 1st Petitioner vehemently denied the same. I shall leave the issue to rest at that.
64. Thirdly, it is noteworthy that none of the five (5) Petitioners were Senatorial candidates in the just concluded elections in Narok County. It does appear however that, this petition was filed on behalf of UDA Senatorial candidate. This is evidenced by the contents of the following paragraphs of the petition where reference is made solely to the UDA Senatorial candidate and not any other candidate who participated in the election: -
 - a. At paragraph 11; the Petitioners state that the 1st Respondent officers were compromised to employ electoral fraud and malpractice to assist the 3rd Respondent win to the disadvantage of the “UDA Senatorial candidate”.
 - b. At paragraph 18, the Petitioners states that the 1st Respondents’ officers made wrong entries in particular, in relations to the results of Saleita Primary School where the “UDA Senatorial candidate” garnered 26 votes but the final vote was zero.
 - c. At paragraph 21, it is pleaded that the 1st Respondent’s officers refused to issue results in forms 38A to the “UDA Senatorial candidate agents”.
 - d. At paragraph 24, the Petitioners aver that, the 3rd Respondent’s supporters and goons engaged in acts of threats and actual violence targeted at “UDA Senatorial candidate’s supporters”
65. In addition, the Petitioners seems to have lost sight of the fact that they were not candidates in the Senatorial elections in Narok County and refer to themselves as though they were candidates therein. This is reflected at paragraph 13, where it is averred that the 1st Respondents’ officers unduly influenced, coerced, took advantage of “assisted voters”, and influenced them to vote in favour of the 3rd Respondent without their consent and despite their protest and protest of the “Petitioners” preferred candidate agents.
66. The same reference to the Petitioners as though they were candidates is made at paragraphs 8, 18, and 24, of the petition, paragraphs; 18, 21, and 25, of the affidavit in support of the petition, paragraphs 7,



and 10 of the affidavit of; Ntayia Lema Langas, paragraphs 3 of the affidavit of David Langat, paragraph 4 of Isaac Mwaniki's affidavit and paragraph 5 of the affidavit of Edward Lekutt.

67. Similarly, most of the agents who testified being; PW3, PW4, PW5, PW9, PW11, PW13, stated that they were agents for the "UDA Senatorial candidate" and not any other candidate. It is therefore clear that the Petitioners herein are advancing the interest of the UDA Senatorial candidate.

68. Be that as it may, to revert back to the issues raised for determination, I find that as regards the first issues, section 2 of the Elections Act No. 24 of 2011 (herein "the Act") defines an agent as follows: -

"agent" means a person duly appointed by—

- (a) a political party or an independent candidate for the purposes of an election under this Act; or
- (b) a referendum committee for the purposes of a referendum under this Act, and includes a counting agent and a tallying agent"

69. Similarly, the provisions of section 30 of the Act deals with appointment of agents and states that: -

- "(1) A political party may appoint one agent for its candidates at each polling station.
- (2) Where a political party does not nominate an agent under subsection (1), a candidate nominated by a political party may appoint an agent of the candidate's choice.
- (3) An independent candidate may appoint his own agent"

70. Furthermore, Regulations 62 (1) of the Elections (General) Regulations, 2012, (herein "the 2012 Regulations") states that: -

- "(1) The presiding officer shall regulate the number of voters to be admitted to the polling station at the same time, and may exclude all other persons except —
 - (a) a candidate;
 - (b) a person nominated as a deputy to the candidate, where applicable;
 - (c) authorized agents;
 - (d) members of the Commission and election officers on duty;
 - (e) police officers on duty;
 - (f) persons necessarily assisting or supporting voters with special needs or assisted voter; and
 - (g) observers and representatives of the print and electronic media accredited by the Commission.
- (2) Notwithstanding sub regulation (1), the presiding officer shall admit to the polling station not more than one agent for each candidate or political party.
- (3) The absence of agents shall not invalidate the proceedings at a polling station.



- (4) Every agent appointed by an independent candidate or political party for the purposes of these Regulations shall at all times during the performance of the duties authorized by the independent candidate or political party display the official badge supplied by the Commission.

71. Furthermore, Regulation 74 (1) of the 2012 Regulations stipulates that, no agent shall be deemed to be an agent for purposes of counting unless the candidate or political party has submitted the name and address of the agent and a letter of appointment of the agent.
72. Pursuant to the afore provisions, the Presiding officer cannot exclude an authorized agent from the Polling stations however, every agent appointed shall at all times display the official badge supplied by the IEBC but even then the absence of agents shall not invalidate the proceedings at a polling station.
73. It therefore follows that the Petitioners herein ought to adduce cogent evidence to prove that the agents who were allegedly denied access were “appointed and authorized” agents, displayed their IEBC badges and were actually denied access. Reliance is placed on the Court of Appeal decision in *Julius Makau Malombe v Charity Kaluki Ngilu & 2 others* [2018] eKLR and *M'nkiria Petkay Shen Miriti v Ragwa Samuel Mbae & 2 Others* (2014) eKLR.
74. In support of their allegations, the Petitioners avers at paragraph 9 of the petition that the UDA Senatorial candidate appointed agents in all the 750 polling stations in Narok County. However, the Petitioners did not produce the list of the names and particulars of the agents appointed by the UDA Senatorial candidate and submitted to the 1st Respondent before the election process commenced and therefore there is no proof that any agent was ever appointed.
75. Similarly, the Petitioners at paragraph 12 of the petition, lists 23 Polling stations, (although they are 17 as there is an error in numbering) where the agents were allegedly denied access to the Polling stations. However, it is noteworthy that, of sixteen (16) witnesses called by Petitioners, eleven (11) testified that they were appointed agents. But other than PW1 and PW10 who produced letters of appointment, all the other nine (9) did not produce any documents to prove that they authorized agents and therefore entitled to access the Polling stations.
76. In dealing with a similar issue in *Dickson Mwenda Kitbinji v Gatirau Peter Munya & 2 Others* (*supra*) the court had this to say: -
- “It is our considered view that if one is not entitled to be at a polling station or tallying centre, then one cannot claim to have been unlawfully excluded there at. The failure of the appellant and his witnesses to prove that they were authorized agents of any political party and failure to tender evidence that they had badges issued by the IEBC is fatal to the allegation that authorized agents were excluded from the polling station and tallying centre. For such an allegation to succeed, it must be proved that the person allegedly excluded was an authorized agent - this is the sine qua non for the allegation to have a legal foothold. Upon proof that the person was an authorized agent, then proof of exclusion is to follow.”
77. To revert back to the 17 Polling stations, it suffices to note that, the following witnesses testified that they were agents of the UDA Senatorial candidate in the respective polling stations: PW3 John Cheruiyot Ng'eno, at Emurua Dikirr Primary School, PW4 Robert Kiplangat Mutai, at Chagina Primary School, PW11 Nancy Karimi at Masikonde Primary School, PW13 Edward Turanta lekutti at Tukako Primary School, PW14 Lankisa Njoe Candidate at Ikirimisho Primary School and PW15 Isaac Mwaniki at Kisiriri Polling station.



78. However, only three (3) of the above witnesses were in three (3) of the 17 Polling stations listed under paragraph 12 of the petition. Thus no witness was called to support the allegation that they were denied access to the rest of 14 Polling stations. But even then, of the three (3); PW3 John Cheruiyot Ng'eno confirmed that, he was allowed access to the Polling station as early as 7am and remained there until it closed at 6pm after all people voted. PW13, Edward Turanta Lekutti testified that he arrived at the Polling station at 3 am and was allowed in at 6am and PW14 Lankisa Njoe, stated that, he arrived at the Polling station at 4am waited until the polling station was opened at 6am, when he presented his papers and was allowed in. So clearly none of these witnesses support the Petitioners case that they were denied access to their respectively Polling stations.
79. Furthermore, there are other agents including; PW4 Robert Kiplangat Mutai, PW11 Nancy Karimi and PW15 Isaac Mwaniki, who testified that they were agents of the UDA Senatorial candidates (in other polling station not listed among the listed 17 polling station) and were allowed access to the Polling stations.
80. In addition, during cross-examination the Petitioners' witnesses were shown several Forms 38 A and Polling Station Diaries duly signed by UDA Senatorial candidate's agents and they could not confirm whether or not those were agents appointed by the UDA Senatorial candidate.
81. Support the aforesaid, the 1st and 2nd Respondents adduced evidence through RW1, Alice Cheruiyot, Constituency Returning officer of; Emurua Dikirr, RW2 Lydia Chepkemoi, Constituency Returning officer of Narok West and RW3, Joel Omae, Constituency Returning officer of Narok East, who produced the Forms 38A and Polling Station Diaries relating to the Polling stations listed at paragraph 12 of the petition.
82. The analysis of these Forms 38A and Polling Station Diaries reveal the following:
- a. Kuteta primary school polling station Registration code 011, the results in Form 38A at pages 501 to 503 show the forms were signed by the following UDA Senatorial candidates agents: Euchabeth Chemutai, stream 1 & 3, Kelong Josphat, stream 2 of 3 Mutai Alfred stream 3 of 3. In fact, form 38A for streams 2 and 3 have been signed by the UDA Senatorial agent alone. None of these agents filed an affidavit or testified in this matter.
 - b. Chemwokter Primary school polling station, Registration code No. 013, the results at page 425 and 426 of the 1st and 2nd respondent's documents reveal that Form 38A of stream 1 was signed by; John Rono of UDA candidate and stream 2 was signed by; Patrick Ngelela for the UDA Senatorial candidate. Once again, the UDA candidate's agent is the only one who signed form 38 A for stream 2. None of the two agents filed an affidavit or testified in the matter. The equivalent PSD are in bundle volume 2 at page 434 to 447 and signed by UDA Senatorial candidate agents.
 - c. Empopongi primary school Registration Code No. 055, the results in Form 38A for the single stream were signed for by Mathew Ampai for the UDA Senatorial candidate, apparently no other candidate's agent signed that Form 38A and the comments by the presiding officer are that the counting process was a success, and there were no rejected or disputed votes. The agent who signed for the results did not file an affidavit or testified in this matter. The relevant PSD are in bundle volume 2 pages 333, 338 and 342



- d. Oloirowua primary school Registration Code No. 051. The polling station diary produced by the 1st Respondent's in its bundle of volume 2 at pages 667 to 716 shows that UDA Senatorial candidate's agents were present at the Polling stations. At page 704, the record indicates that 5 UDA agents were present and were admitted into the polling stations between the hours of 4.50am and 5 am.
- e. Olchorro-Irowua primary school polling station Registration Code 014. The forms 38A in the 1st and 2nd Respondents' bundle volume 1 at page 188 and page 189 show that, in stream 1 the only agent who signed Form 38A was Isahiah Tompo for the UDA Senatorial candidate and Wilson T. Mbaroret signed on behalf of the UDA candidate in stream 2. The reasons given for the others failing to sign is that it was already late and they disappeared.
- f. Ilikiremisho Primary School polling stations Registration 015. The 1st and 2nd respondents bundle of documents at page 593 indicates that form 38A was signed by the UDA Senatorial candidate's agents by the name Lankisa Ole Njoe. There is no remark on that form in the provision for refusal to sign. The presiding officers comment on that form 38A indicates that there were no rejected or disputed votes. The agent Lankisa Njoe filed an affidavit at page 107 of Petitioner's documents and stated as follows, at paragraph 4 to 8 that, he arrived at the polling station at 4 am, waited until it was opened at 6 am, he presented his letter of appointment, oath of secrecy and national identification card to the presiding officer and then he was allowed him in the polling station. But shortly after the closure of voting, all agents were removed from the polling station, went back at 2100 hours to witness the counting, which went on until 5am and his candidate who was the UDA Senatorial candidate got 26 votes. This completely rebuts the petitioners case that agents were denied access to the polling station. Also the PSD displayed at page 594-601 indicates that 7 UDA agents were present when the polling station was opened.
- g. Tikako primary school registration 009. The 1st and 2nd respondent's bundles volume 2 at page 644 shows that when the polling station was opened, there were 6 UDA agents who were admitted as early as 4 am. One of the agents who signed the PSD testified as PW13. Edward Turanta Lekutti and adopted his affidavit at page 126 of the petitioner's bundle of documents wherein he avers that he was an agent of UDA Senatorial candidate at Tikako primary school polling station registration 009. That the station opened at exactly 6am, he presented his documents and he was allowed in.
- h. Saleita primary school registration 028. The form produced by the 1st and 2nd respondent at page 557 of their volume 2 show that it was signed by Reuben Tajau and Shadrack Kurukaru respectively as agents of the UDA Senatorial candidate. No reason is indicated for refusal to sign but none of them was a witnesses, The PSD produced at pages 557 and 558 show that the UDA Senatorial agents were present.
- i. Oltanki primary school registration 015. The PSD produced by the 1st and 2nd respondents in their documents volume 2 at page 657 – 675 show that the UDA Senatorial candidate had 3 agents at the time the polling station was



opened and they were admitted into the polling station 4am and 9am. None of them filed an affidavit nor testified.

- j. Esinoni primary school registration 002. The forms 38A produced at pages 452 and 453 of the 1st and 2nd respondents bundle indicates that, the UDA Senatorial candidate's agents by the name of Nixon Samoe and Gordon Kirui signed for the results in form 38A without indicating any reasons for refusal to sign and did not testify. The equivalent PSD is in 1st and 2nd respondents bundle volume 2 page 457 and 459, and proves the UDA Senatorial candidate's agents were present.
- k. Kiptendeni Primary School registration 007. The results in Forms 38A were signed for by two agents for UDA Senatorial candidate by the name of Wilson Chepkoigat and Philip A. Biwott, and the presiding officer's comments are that the voting was smooth.
- l. Emurua Dikirr Primary School registration 003. The record in 1st and 2nd respondents at volume 1 at page 298 indicates that the form 38A was signed by Bernard Rono an agent of the UDA Senatorial candidate and had no comments for reasons to refuse to sign and neither did he testify.
- m. Kapsinende primary school registration 063. The 1st and 2nd Respondents documents; volume 2 page 735 indicates that the form 38A was signed by David Langat an agent of UDA Senatorial candidate and has no comment on reason for refusal to sign and neither did he testify. The Polling Station Dairy produced by the 1st and 2nd respondents in their documents volume 2 at page 736 to 743 show that UDA had four (4) agents at the time the polling station was opened and they were admitted into the polling station 5am and 5:30am.
- n. Chelchel primary school registration 071. The record in the 1st and 2nd Respondents documents; volume 2 page 727 indicates that the form 38A was not signed by agent of any party or candidate and has no comment of the reason for refusal to sign and neither did he testify. The polling Station diary produced by the 1st and 2nd respondents in their documents volume 2 at page 728 to 734 show that the UDA Senatorial candidate had one (1) agent at the time the polling station was opened and he was admitted into the polling station at 5:37am. Further, that Daniel Ngeno an agent of UDA Senatorial candidate was present at the time of the sealing of the packets.
- o. Enabelibeli Primary School registration 051. The record in the 1st and 2nd Respondents at volume 2 page 5 to 6 indicates that the Forms 38A was signed by Malei Murkuku, Collins Maitai and Dancan Maitai agents of UDA Senatorial candidate and has no comment for reason for refusal to sign and neither did he testify. The Polling Station Diary produced by the 1st and 2nd respondents in their documents volume 2 at page 7 to 36 and page 221 to 227 show that the UDA Senatorial candidate had 2 and 5 agents for stream 1 and stream 2 respectively at the time the polling station was opened.

83. There were no documents produced in relation to the results of; Empaash primary school stream 2 registrations 049 and Oloika primary school registration 011. However, above analysis is an adequate sample and reveals that indeed in almost all the listed Polling stations the UDA Senatorial candidate had



agents although the majority who signed Forms 38A on behalf of the UDA Senatorial candidate did not testify and it is not clear why they were not called to testify as to whether they were ever prevented or delayed from accessing the polling stations. In the absence of their firsthand evidence, the evidence of the Petitioners' first and key witness (PW1) remains hearsay.

84. Be that as it were, Regulation 79 (7) of the 2012 Regulations, states that, the absence of an agent at the signing of declaration form or announcement of results, shall not by itself invalidate the announced results.

85. In conclusion, I associate myself with the holding of the Supreme Court of Kenya in the case of; *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR Mutunga, wherein retired Chief Justice stated as follows: -

“(247) Constitutional provisions are by themselves not enough. The duty-bearers, be they individual voters, political parties, agents, the media, IEBC, the Registrar of Political Parties, the Constitutional Commissions, the arms of the State, must all invest in emancipating and protecting the vote. Once the Constitution gives citizens the right to vote, the freedom to choose, and conditions are created for the realization of that right, it is not the business of the Court to aid the indolent. If party agents are required to be present, sign statutory Forms, and undertake any other legitimate duty that is imposed upon them as part of the political process in an election, then they are under obligation to do it. To fail to do so is not only to fail one's party, but also to fail our democracy. The Courts must frown upon any such inaction, reluctance, or delay.

(248) The election is first and foremost the citizen's election. Every Kenyan must protect his or her right to vote³the right to participate in the political affairs of the nation. It is upon exercising all the rights which the Constitution bestows upon the citizen, that she or he can claim the sovereign power that she or he donates to her or his representative.

(249) It is, therefore, time for us to develop our election-petition litigation: we must depart from the current practice in which a petitioner pleads 30 grounds for challenging an election, but only proffers cogent evidence for 3. A candidate, or her agent, cannot abscond duty from a polling station, and then ask the Court to overturn the election because of her failure to sign a statutory form. Every party in an election needs to pull their own weight, to ensure that the ideals in Article 86 are achieved: that we shall once and for all have simple, accurate, verifiable, secure, accountable, transparent elections. The election belongs to everybody, and it is, therefore, in everybody's collective interest, and in everybody's collective and solemn duty, to safeguard it.”

86. The upshot is that I find the allegation by the Petitioners that the UDA Senatorial agents were denied access to the Polling stations was not proved and dismiss it accordingly.

87. The next issue relates to assisted voters. The relevant Regulation is Regulation 72 of Regulations 2012, which states that: -

(1) On the application of a voter who is, by reason of a disability or being unable to read or write, and therefore unable to vote in the manner prescribed in these Regulations, the presiding officer shall permit the voter to be assisted or



supported by a person of the voter's own free choice, and who shall not be a candidate or an agent.

- (2) Where the person who applies to be assisted is not accompanied by a person who is qualified to assist him or her, the presiding officer shall assist such voter, in the presence of the agents.
- (3) The presiding officer may make such necessary and respectful inquiry in order to establish that the voter and the person the voter has chosen to assist him or her satisfies the provisions of this regulation.
- (4) The person chosen by the voter is not required to be qualified to vote but is required to have attained the age of eighteen years.
- (5) The following shall apply with respect to a person who assists a voter under this regulation—
 - (a) the person shall, before assisting or supporting the voter, make a declaration of secrecy before the presiding officer in Form 32 set out in the Schedule;
 - (b) a person who breaches his or her declaration commits an offence under the Act;
 - (c) the person shall assist or support only one voter at that election and have a mark as proof of assisting or supporting a voter.
- (6) Where a presiding officer grants the request of a voter under this regulation, the presiding officer shall record in the polling station register against the name of the voter the fact that the voter was assisted and the reason for the assistance.
- (7) No person other than a person acting under this regulation shall be present in a compartment of a polling station while a voter is in the compartment for the purpose of marking his or her ballot paper and any person who contravenes this sub-regulation commits an offence.

88. In the instant matter, the petitioner listed five (5) polling stations where the voters are alleged to have been “deliberately prompted, misled, conned, unduly influenced, coerced” and taken advantage of and relied on the evidence of; PW12 Elisha Omere, PW13 Edward Turanta, PW15 Isaac Mwaniki and PW16 Florence Wangare Muigai.

89. However, the analysis of the evidence of these witnesses reveals that, only PW12 Elisha Omere was a voter. The other witnesses testified that they were agents of UDA Senatorial candidate. But even more so, PW12 Elisha Omere, who allege that he was influenced to vote for 3rd Respondent and not a candidate of his choice being; the UDA Senatorial candidate, cast his vote at Mpeuti Primary School polling station, which is not among the five (5) polling stations listed at paragraph 13 of the petition.

90. Furthermore, PW13 Edward Turanta who testified that he was denied an opportunity to assist a voter who needed assistance and was thrown out of the polling station when he protested, was not even an agent in any of the five polling stations mentioned at paragraph 13 of the petition.

91. On the other part, PW 15 Isaac Mwaniki who was an agent at Kisiriri Primary School polling station testified that, he was told by another agent that, the Presiding officer was not calling out names of all candidates, to the assisted voters. That the presiding officer stopped at the 3rd Respondent’s name.



However, the witness did not name the agent who gave him that information and neither did that agent testify. Therefore, the witness's evidence is hearsay. Furthermore, none of the voters he allegedly witnessed being influenced at the Kisiriri Primary School polling station testified to corroborate his evidence. In fact, that witness signed Form 38A without protest, disclaimer or reservation and indication of coercion or otherwise of assisted voters.

92. Similarly, PW16 Florence Wangare Muigai while being cross examined was unable to state whether it is the clerk issuing the papers who tried to influence her or the Presiding officer. She was also hard pressed to prove she was an agent at Kisiriri Primary Polling station, in that she had no document to prove she was appointed as such. She then stated that, she went to the polling station as a voter but when the agent of Honourable Tamoo; the MCA candidate of Olorropil ward was evicted from the station, she was requested by the candidate to assist and she stepped in as an agent. However, although she stated in cross examination that she assisted 100 to 200 voter that evidence is not in her affidavit and neither has any of these assisted voters testified.
93. Pursuant to the aforesaid I find insufficient evidence to prove that the assisted voters did not exercise free will in casting their vote. The other related issue is the alleged failure of the Presiding officers to record particulars of the assisted voters in the register. In response to the subject allegation, the 1st Respondent's witness RW4 Dr. Sydney Namulungu testified that the requirement under sub-regulation (6) of the 2012 Regulations applies where a manual register as opposed to electronic register is used in the election process, where the manual register has a provision for recording that information.
94. Furtherance the 3rd Respondent submitted that, the Court of Appeal ruling given on the eve of election, the 8th August 2022, directed the 1st Respondent to use electronic voting system being KIEMS Kit and not manual registers as such Regulation 72 (6) did not apply in that the manual registers were used in exceptional cases. These submissions by the respondents were not rebutted.
95. Be that as it may, assuming that the 1st and 2nd Respondent failed to comply with the requirements of Regulation 72 (6), have the Petitioners adduced adequate evidence to support the fact that the non-compliance substantially affected the results. The answer is found in the analysis of the results of the five polling stations where the assisted voters are alleged to have been influenced to vote for the third Respondent.
96. In that respect the results indicate in; Oldonyo Rok Primary School Polling station, the UDA Senatorial got 189, 200, and 192 votes in stream 1, 2, and 3 while the 3rd Respondent got 5, 15, and 7 respectively. In Kiptende Primary School Polling station, UDA Senatorial candidate got, 105, and 108, in the 1st and 2nd streams, while the 3rd Respondent got zero (0) and 4 respectively. In the Chelchel Primary School Polling station, the UDA Senatorial candidate got 147 and 3rd Respondent got 2. In Kisiriri Primary School Polling station, the UDA Senatorial candidate got, 159, 162, and 160 in the three stream while the 3rd Respondent had 189, 203 and 162. Finally, in Kilgoris County Hall stream 3 Polling station, the UDA Senatorial candidate got, 124 while 3rd Respondent got 134. Therefore, these results show that, the UDA Senatorial candidate performed far much better than the 3rd Respondent and does not support the allegation that influence upon assisted voters aided the 3rd Respondent's win.
97. In conclusion I find that the Petitioners have failed to prove that, the assisted voters were unduly influenced to vote in favour of the 3rd Respondent to the disadvantage of the UDA Senatorial candidate or any other candidate.



98. The next issue for determination relates to; whether the 1st and 2nd Respondents turned away voter and closed the polling station before 5pm, sending away voters on the queue. In that regard, Regulation 66 (1) & (2) of the 2012 Regulations provides that: -
- “(1) Subject to regulation 64, voting shall commence at 6 o'clock in the morning and end at 5 o'clock in the afternoon on the polling day.
- (2) Notwithstanding sub-regulation (1), a person who is on a queue for the purposes of voting before 5 o'clock in the afternoon shall be allowed to vote despite the fact that the voting time may extend to after 5 o'clock.
99. Further, Regulation 64 (3) of the *Elections (General) Regulations* allows the Presiding officer in consultation with the Returning Officer to extend the hours of polling at the Polling station and states: -
- (3) A presiding officer shall, in consultation with the returning officer—extend the hours of polling at the polling station where polling has been interrupted under this regulation or for other valid cause, and where polling in that polling station has started late, extend the hours of polling by the amount of time which was lost in so starting late.
100. To revert back to the evidence adduced, the Petitioners called four witnesses; PW6 Peter Kakesio, PW7 Peemko Ole John Shira, PW8 Saakui Tabula Nasiti and PW9 Moses Rameti Riton, in support of this allegation. All of them were voters at; Sitoka Primary School polling station and their testimonies were similar to the effect that, they arrived at the polling station between 3:30 pm and 4:00pm and at about 4:30 pm the presiding officer ordered the Police officer manning the station not to allow them to vote.
101. However, during cross examination, the witnesses who allegedly went to the Polling station at the same time contradicted themselves as to the time they arrived at the station and the number of people who were on the queue when the polling station closed. PW6, stated that he arrived at the polling station at 3.30pm, PW7 at 4.30 pm, while PW8 and PW9 testified that they arrived at 4pm.
102. Similarly, PW6 Peter Kakesio, stated that there were about 5 to 10 sent away. PW7 Paemko Ole John Shira said they were about 50, while PW8 Sakui Tubula Nasiti testified they were 100 and PW9 Moses Rameti Riton approximately 50 people.
103. To rebut the Petitioners evidence, the 1st and 2nd Respondents produced the PSD of Sitoka Primary School Polling found at pages 721 to 723 of their bundle volume 2, to prove that when the station closed at 1700 hours, there were 99 people on the queue and polling ended at 18.30 hours. The PSD is signed by one Denis B. Parshami, the agent of UDA Senatorial candidate who apparently filed an affidavit but did not testify.
104. In conclusion I find and hold that, the evidence of the four witnesses that relates to only one polling station out of the 750 polling station cannot be a ground to nullify the results herein. Even then, results thereof indicate that, the UDA Senatorial candidate got 351 votes while the 3rd Respondent got 154 votes. It is also not possible to predict and confirm these voters and any other (if at all) were sent away would for.
105. The next issue relates to alleged wrong entries. The Petitioners grievance in the pleading relates to one polling station only, that is, Saleita Primary School. However, at the hearing of the case, the Petitioners adduced evidence in relation to two more polling station; that is; Ilikiremisho and Emuria Dikirr primary schools. It is settled law that parties are bound by their pleadings.



106. Be that as it were, it is noteworthy that one, Eric Nkounua the UDA Senatorial agent at Saleita Primary School polling station did not testify to support the alleged wrong entries in the results. Further, PW14 Lankisa Njoe testified that he was the UDA Senatorial Candidate agent at Ilikirimisho Primary School. That his candidate got 26 votes and that he signed for it in Form 38A.
107. Furthermore, PW3 John Cheruiyot Ng'eno, testified that he was an agent of UDA Senatorial candidate at Emurua Dikirr polling station. However, his evidence was in relation to votes gathered by Leornard Cheruiyot Kipkemoi, who was an independent candidate. That, Leornard got 140 votes in stream 1, zero (0) in stream 2 and 132 in stream 3 and argued that it is not significantly possible to have a candidate score zero in one stream and votes in another.
108. However, it became clear in cross examination that he was in stream 3 and not stream 2, where the alleged zero (0) votes were recorded and therefore could not support his allegation. He did not even know who was in stream 2. In fact, one Kipkemoi who was the agent in stream 2 and who allegedly told PW3 about the results did not testify, as he allegedly left the polling station early. Neither did the independent candidate whose results were allegedly interfered with complain or testify herein. Even then the evidence revealed that the confirmed UDA Senatorial candidate garnered the highest votes in the subject polling station.
109. To revert back to the 26 votes which were allegedly recorded as zero (0), the court observed that Form 38 A for Ilikirimisho Polling station it indicates that the UDA candidate is listed as the last on the list of candidates and the entry of the results show he got zero (0), but there is an entry of 26 votes where there is provision for total votes garnered by all candidates.
110. However, when the votes garnered by all candidates are added, they do not add to 26 votes but 314 votes which figure is indicated in the box on the left of Form 38A. Therefore, entry of 26 votes may have been a genuine mistake or occasioned by fatigue as argued by the Respondents or even carelessness. It cannot be attributed to ill motive per se.
111. It is also noteworthy that, the agents who signed Form 38A (s) did not notice the wrong entry. Even then, the 26 impugned votes cannot narrow the gap in the results between the UDA candidate and the 3rd Respondent. I therefore find that the Petitioners have not proved the issue of wrong entries therefore that ground fails.
112. The next issue relates to the allegations that, the 1st Respondent allowed unauthorized persons into the polling stations. The Petitioners did not actually adduce any evidence nor submit on the same. However, the Respondents submitted that no evidence was adduced to support the allegation either through an affidavit filed or witnesses to testify. I concur with the submissions by the Respondents that no evidence was led to support the allegations and similarly that ground fails.
113. The next issue relates to the allegations of bribery. Again the Petitioners did not submit on the issue. On their other part, the 1st and 2nd Respondents submitted that, the allegation of bribery is of a serious nature yet the Petitioners failed to give particulars thereof, and/or state who gave the bribe and who was given.
114. That, PW11 Nancy Karimi who testified concerning Masikonde Primary Polling station and PW16 Florence Wangari did not mention about bribes in their affidavits. Further PW10 David Kipngeno Lagat testified stated that he was informed by Chepngeno Caroline that she witnessed Joseph Rono giving a bribe at Chelchel Primary School, yet Chepngeno Caroline did not testify. Therefore, the evidence of PW10 remains hearsay.



115. Having considered the arguments of the parties on the issue of bribery, I note section 9 of the [Election Offences Act](#) provides for offence of bribery and states that; -

- (1) A person who, during an election period—
 - (a) directly or indirectly offers a bribe to influence a voter to—
 - (i) vote or refrain from voting for a particular candidate or political party;
 - (ii) attend or participate in or refrain from attending or participating in any political meeting, march, demonstration or other event of a political nature or in some other manner lending support to or for a political party or candidate;
 - (b) in any manner unlawfully influences the result of an election;
 - (c) directly or indirectly, in person or by any person on his behalf, in order to induce any other person to agree to be nominated as a candidate or to refrain from becoming a candidate or to withdraw if they have become candidates, commits an offence.
- (2) A person who, during an election period, accepts or agrees to accept a bribe that is offered in the circumstances described in subsection (1) commits an offence.
- (3) A person who commits an offence under this section shall be liable, on conviction, to a fine not exceeding two million shillings or to imprisonment for a term not exceeding six years or to both.

116. Further, it is trite law that, while the standard of proof is in an election petition is between beyond reasonable doubt and a balance of probability, where there is a criminal election offence the standard of proof is beyond reasonable doubt. In that regard reference is made to the Supreme Court of Kenya decision in [Moses Masika Wetangula v Musikari Nazi Kombo & 2 others](#) [2015] eKLR where it states that: -

“(117) As already remarked hereinabove, election petitions fall neither within the realm of civil law nor that of criminal law. However, the legal framework for electoral dispute-settlement confers upon the Court a quasi-criminal jurisdiction which is not part of the established criminal code. Being derived from the fundamental elements of the criminal law, which imposes strict penalty in respect of prohibited acts, and which is attended with established trial safeguards, such quasi-criminal offences as are provided for in the electoral law, too, are required to be strictly proved, as a basis for any penal consequences.”

117. The court went on to state that:-

“We may draw analogy with the Supreme Court of India decision in *M. Narayana Rao v G. Venkata Reddy & Others*, 1977 AIR S.C 208, in which it was thus held:



“The charge of commission of corrupt practice has to be proved and established beyond doubt like a criminal charge or a quasi-criminal charge, but not exactly in the manner of establishment of guilt in the manner of a criminal prosecution giving liberty to the accused to keep mum. The charge has to be proved on appraisal of the evidence adduced by both sides especially by the petitioner”

118. As already stated no witness testified in this matter as to who bribed who and how or the nature of the bribe. Therefore, the Petitioners allegation to that effect falls by the roadside.

119. The next issue relates to alleged violence. In that regard, I note that section 11 of the [Election Offences Act](#) which creates an offence of violence states that: -

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

- (a) so as to induce or compel that person to support a particular candidate or political party;
- (b) on account of such person having voted or refrained from voting; or
- (c) in order to induce or compel that person to vote in a particular way or refrain from voting, commits an offence and is liable on conviction to a fine not exceeding two million shillings or to imprisonment for a term not exceeding six years or to both.

120. Furthermore, it is settled law that for violence to affect results it must be wide spread. The Court of Appeal in [Julius Makau Malombe v Charity Kaluki Ngilu & 2 others](#) [2018] eKLR stated that: -

“48. We have considered the allegations on violence and intimidation of voters. Proof of violence per se cannot vitiate the results of an election. To vitiate the results, the violence must inter alia be widespread. In English dictionary, widespread means extending over a wide area, to a large extent or to a great extent”

121. Similarly, in the case of [Ferdinand Nabimana & Jean Bosco Bayaragwiza & another](#) (Media case) (ICTR-99-52) the Appeals Chamber of the International Criminal Court (ICC) at paragraph 920 of its judgment observed that:

“Widespread” refers to the large-scale nature of the attack and the number of victims, whereas “systematic” refers to “the organized nature of the acts of violence and the improbability of their random occurrence.” Patterns of crimes – that is the non-accidental repetition of similar criminal conduct on a regular basis – are a common expression of such systematic occurrence.”

122. Finally, in the case of; [Dickson Mwenda Kithinji v Gatirau Peter Munya & 2 others](#) [2013] eKLR, Meru High Court Election Petition No. 1 of 2013, the court observed that in electoral context, widespread violence can only be taken to mean a systematic, planned or organized infliction of injury, harm, damage or loss on any person because they have voted in a particular way or to induce them to vote in any particular way. There must be evidence to prove the widespread violence. Widespread violence may also include indiscriminate violence.



123. In the instant matter, the Petitioners case was supported by the evidence of; PW5 Ntaya Lema Langas who testified that, ODM party and its Senatorial candidate caused chaos at the tallying centre at Kilgoris Boys High School thus disrupted counting and tallying of elections for two (2) hours. Further, there was power black-out for two (2) hours which interfered with the tallying process. A video was produced to prove that there was violence.
124. However, when PW5 Ntaya Lema Langas, was cross examined, he stated that it was not the 1st and 2nd Respondents who caused the violence at the tallying centre at Kilgoris High School and further the incident involved tallying of Gubernatorial and not Senatorial elections results. That, he signed Form 38A for the Senatorial results as chaos ensued after counting of Senatorial votes.
125. The Petitioners also relied on the evidence of; PW11 Nancy Karimi who was UDA Senatorial candidate's agent at Masikonde Primary School who testified that she was informed of violence and found mob beating one John Kamau. That, the violence caused fear among voters who left and only returned when Kamau was persuaded to return, while others simply stayed away. The witness stated that she was profiled, became apprehensive and left.
126. However, the documents produced by the 1st and 2nd Respondents' indicate that Antony Githu signed Form 38A of Masikonde polling station for UDA Senatorial candidate, casting doubt as to whether PW11 Nancy Karimi, was an agent as alleged.
127. The Petitioners further averred that, violence occurred at Ole Nkanai Primary School Polling Station where the election material was burnt and that, indeed the 2nd Respondent has admitted in his evidence that, there were many instances of violence in the polling stations and Narok County in general.
128. However, the 1st and 2nd Respondent through the evidence of, Dr Sydney Namulunga denied that there was any violence that affected the results. It was submitted that the video produced played for less than two (2) minutes and only showed someone trying to snatch a document from the Returning officer. Further, the agent of the UDA Senatorial candidate did not capture the issue of violence in the Form 38B which he signed.
129. The 3rd Respondent termed the allegation by the Petitioners that the violence caused low turnout as baseless, on the ground that no one can pre-determine voter turnout and that the Petitioners did not prove how voter suppression occurred. Further the violence if any at Kilgoris High School tallying Centre did not affect the Senatorial elections as the results had already been tallied when the violence erupted. That it involved the gubernatorial results. Furthermore, it is the 3rd Respondent who lost votes at Ole Nkanai Polling station due to the destruction of the election materials.
130. Pursuant to the aforesaid, the Petitioners allegations of violence relate two Polling stations only being; Ole Nkanai Polling Station and the Kilgoris Tallying centre. It is noteworthy that, first and foremost, there were no results at all at Ole Nkanai Polling station therefore all the candidates suffered in equal measures. Secondly it is conceded the violence at the Kilgoris tallying centre involved tallying of the Gubernatorial elections results. Thirdly, the agents of the UDA Senatorial candidate signed all Forms 38A, 38B and PSD diaries without any remarks of violence anywhere in relation to Senatorial election. Fourthly, if there was any violence at Ole Nkanai or Kilgoris that it is isolated incidents and cannot be said to have been widespread. Finally, no evidence was led on how violence substantially affected the elections, as such the issue of violence is not proved.
131. The other issue for determination relates to the alleged failure of the 1st and 2nd Respondents' to issue the agents of UDA Senatorial candidates with copies of Forms 38A and/or affix them in open places for the public. The Petitioners argue that the failure to do so amounts to a criminal offence under



- Regulation 79(2) of the 2012 Regulations. Further the excuse that the same were few is not reasonable as they should have been photocopied. Even then, PW2 Obadiah Rono (PW2), the chief agent in Emurua Dikirr Constituency for the UDA Senatorial candidate is the only witness who testified on the issue.
132. However, the 1st and 2nd Respondents, submitted that the Petitioners allegations at paragraph 21 of the petition that the Presiding officers refused to issue copies of Forms 38A in all Polling stations is misleading as PW5 Langisa Njoe testified he got a copy of the Form 38A and PW3 John Cheruiyot Ng'eno testified that he got to know of the results Emurua Dikirr stream 2 through Form 38A.
 133. Further Dr. Namulungu testified the booklet of Forms 38A had only five copies and one original, yet there were eleven candidates therefore the Presiding officers advised the agents who did not get copies to take photos thereof. That, a carbonated copy was pinned at the entrance of the Polling stations.
 134. The 3rd Respondent submitted that of the six copies available, the original went to the County Returning officer, one copy to tamper proof envelope sealed in the ballot box and the third copy was placed in the ballot box facing out to enable identification of the box. Therefore, the three (3) remaining copies were not sufficient to distribute to eleven (11) agents.
 135. Having considered the subject issue, I find that, Regulations 79 (1) of 2012 Regulations state that, the Presiding officer, the candidates or agents shall sign the declaration in respect of the elections. Sub-regulation (6) thereof states that, the refusal or failure of a candidate or an agent to sign a declaration form under sub-regulation (4) or to record the reasons for their refusal to sign as required under the regulation shall not by itself invalidate the results announced under sub-regulation (2)(a).
 136. It suffices to note that, the Petitioners did not call the agents who were denied copies of Forms 38A or even a single one to testify in support the allegation and therefore that remains just an allegation. Secondly there is no evidence as to how the failure to supply the agents with copies Forms 38A affected the results announced. Indeed, the court takes judicial notice of advanced technology where transmission of information through hard copies is becoming (if not yet) a thing of the past. Therefore, there is no excuse that the agents were denied the subject copies.
 137. Finally, even if that were the case, that per se will not invalidate the results. It also suffices to point out that, a perusal of the Forms 38A produced show that most of those forms were signed mainly by agents of UDA Senatorial candidate and in several cases they were the only ones who signed them. I therefore find no basis in the allegation that the agents of the UDA Senatorial candidates were not supplied of with copies of Forms 38A and it affected the results announced.
 138. The last issue relates to whether a case has been made for invalidation of results. The Petitioners submitted that they have adduced adequate evidence to prove irregularities, illegalities and non-compliance with the law. That, as stated by the Supreme Court of Kenya, in *Raila Amolo Odinga v IEBC & 4 Other & Attorney General & Another* (2017) eKLR, the elections must be both qualitative and quantitative in accordance with the Constitution and therefore it is not enough to just focus on the numbers.
 139. However, the 1st and 2nd Respondents argued that the petition is frivolous as none of the eleven candidates or the Chief County Agents testified. That, despite failure to adduce evidence the 1st and 2nd Respondent produced all Forms; 38A, 38B and PSD. Further, the allegations of; compromise, electoral fraud and malpractice were framed in generality and no specificity and none of the 16 witness who testified supported it.
 140. The 3rd Respondent submitted that the Petitioners have failed to discharge the burden of proof herein as the witnesses relied on were of doubtful credibility and contradicted themselves. That, the



Petitioners never availed a single Form 38A or a single result, which constituted a fatal error thus exposing the petition as bare.

141. In relation to the subject issue, I note that the provisions of section 83 (1) of the *Election Act* No. 24 of 2011 states that:

- (1) A Court shall not declare an election void for non-compliance with any written law relating to that election if it appears that-
 - (a) the election was conducted in accordance with the principles laid down in the Constitution and in that written law; and
 - (b) the non-compliance did not substantially affect the result of the election.

142. In the same vein, the Supreme Court of Kenya in the case of; *Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae)* (Presidential Election Petition 1 of 2017) [2017] KESC 42 (KLR) (Election Petitions) (20 September 2017) (Judgment) (also known as Raila II) stated as follows: -

“(212) Having analyzed the wording of Section 83 of the *Elections Act*, bearing in mind its legislative history in Kenya and genesis from the Ballot Act and also in light of the need to keep in tune with Kenya’s transformative *Constitution*, it is clear to us that the correct interpretation of the Section is one that ensures that elections are a true reflection of the will of the Kenyan people. Such an election must be one that meets the constitutional standards. An election such as the one at hand, has to be one that is both quantitatively and qualitatively in accordance with the *Constitution*.... In addition, the election which gives rise to this result must be held in accordance with the principles of a free and fair elections, which are by secret ballot; free from intimidation; improper influence, or corruption; and administered by an independent body in an impartial, neutral, efficient, accurate and accountable manner as stipulated in Article 81. Besides the principles in the *Constitution* which we have enumerated that govern elections, Section 83 of the *Elections Act* requires that elections be “conducted in accordance with the principles laid down in that written law.” The most important written law on elections is of course the Elections Act itself.”

143. Similarly, the Supreme Court of Kenya in the case of; *Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 others* [2014] eKLR stated that:

“(216) It is clear to us that an election should be conducted substantially in accordance with the principles of the *Constitution*, as set out in Article 81 (e). Voting is to be conducted in accordance with the principles set out in Article 86. The *Elections Act*, and the Regulations thereunder, constitute the substantive and procedural law for the conduct of elections.

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



(218) Where, however, it is shown that the irregularities were of such magnitude that they affected the election result, then such an election stands to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection, are not enough, by and of themselves, to vitiate an election. In this regard, we stand on the same plane as the learned Judges in Morgan, Opitz and Nana.” (emphasis added)

144. Further it is worthy acknowledging that there cannot probably be a 100% perfect election. In that respect, the Supreme Court of Kenya in *Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae)* (*supra*) while addressing the provisions of section 83 referred to herein; observed that:

“[209] Therefore, while we agree with the two Lord Justices in the Morgan v. Simpson case that the two limbs should be applied disjunctively, we would, on our part, not take Lord Stephenson’s route that even trivial breaches of the law should void an election. That is not realistic. It is a global truism that no conduct of any election can be perfect. We will also go a step further and add that even though the word “substantially” is not in our section, we would infer it in the words “if it appears” in that section. That expression in our view requires that, before vitiating it, the court should, looking at the conduct of the whole election, be satisfied that it substantially breached the principles in the *Constitution*, the *Elections Act* and other electoral law.” (emphasis added)

145. To revert back to the matter herein, the Petitioners in support of the allegations of irregularities and malpractice, adduced evidence of; PW5 Ntayia Lema Langas, who testified that he undertook a painstaking exercise of examining forms 38As and found irregularities.

However, as already observed by the 3rd Respondent, the Petitioners did not produce a single form 38A and neither did the witness produce the results of the “painstaking exercise”

146. The other issue raised in relation to irregularities is the two (2) ballot papers issued by a clerk. In that regard, PW4 Robert Kiplagat Mutai exonerated the Respondents stating that it involved the clerk alone and not the Respondents. Indeed, it is not disputed that the clerk was arrested and charged accordingly. Further evidence by the 1st and 2nd Respondents stated that, the subject ballot papers did not involve Senatorial elections, but the Women Representative and Gubernatorial elections.

147. It also suffices to note that although the Petitioners had a prayer of scrutiny and recount, it was not prosecuted at all. Probably that would have enabled the court to establish whether there were any irregularities of malpractices.

148. The upshot of the aforesaid is that, it is the finding of the court that the Petitioners have not adduced adequate evidence to prove; there were irregularities and malpractice in the conduct of the elections herein, or if any, it was massive and substantially affected the impugned elections.

149. As the curtain comes down on the issues raised for determination, I observe that, it is settled law that in an election petition the Petitioner(s) bear the burden of proof. It is only when the Petitioner(s) has discharged his burden of proof that it shifts to the Respondents to rebut the allegations levied against them.



150. In *Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae)* (*supra*), the Supreme Court stated that: -

“ [130] The law places the common law principle of onus probandi on the person who asserts a fact to prove it. Section 107 of the Evidence Act, Cap 80 of the Laws of Kenya, legislates this principle in the words: “Whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” In election disputes, as was stated by the Canadian Supreme Court in the case of *Opitz v Wrzesnewskyj*[48], an applicant who seeks to annul an election bears the legal burden of proof throughout”.

151. Indeed, is well settled that the standard of proof in election petitions lies in-between, beyond reasonable doubt and a balance of probability, except where there are criminal charges. In *Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others* (Petition 5, 3 & 4 of 2013 (Consolidated)) [2013] KESC 6 (KLR) (16 April 2013) (Judgment) (famously known as Raila 1) the Supreme Court of Kenya stated as follows; -

“203. The lesson to be drawn from the several authorities is, in our opinion, that this court should freely determine its standard of proof, on the basis of the principles of the Constitution, and of its concern to give fulfilment to the safeguarded electoral rights. As the public body responsible for elections, like other public agencies, is subject to the “national values and principles of governance” declared in the *Constitution* [article 10], judicial practice must not make it burdensome to enforce the principles of properly-conducted elections which give fulfilment to the right of franchise. But at the same time, a petitioner should be under obligation to discharge the initial burden of proof, before the respondents are invited to bear the evidential burden. The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable-doubt – save that this would not affect the normal standards where criminal charges linked to an election, are in question. In the case of data-specific electoral requirements (such as those specified in article 138(4) of the *Constitution*, for an outright win in the Presidential election), the party bearing the legal burden of proof must discharge it beyond any reasonable doubt.”

152. In the instant matter the entire evidence adduced falls far below the required standard and I find that the petition has no merit and dismiss it accordingly.

153. As regards the costs, it settled law that costs follow the event. Apparently the parties have not submitted on the same. However, in the case of *George Thata Ndia v Independent Election and Boundaries Commission & 2 Others* (2021) eKLR, this court discussed the issue of costs extensively and wish to adopt the findings therein. Taking into account that, this matter was a rather straight forward, with only one application heard and determined before the trial commenced and all the witnesses heard within one week and the fact that, travel expenses of the parties was mitigated by hearing done online or virtually including delivery of this judgment I hold the view that, reasonable and not punitive costs should be awarded.

154. The 1st and 2nd Respondent took quite an amount of time to prepare and avail documents and therefore I award them Kshs 1,500,000 and the 3rd Respondent 1,000,000 less costs awarded to the Petitioners,



in the application herein. The same to be assessed based on the relevant scale if the parties do not agree amicably.

155. Finally, I sincerely thank all the parties and in particular the lawyers who conducted themselves with high decorum and accorded the court the required assistance to conclude the matter in time. I similarly thank the judicial staff who assisted the court.

156. That then is the judgment of the court.

DATED, DELIVERED AND SIGNED ON THIS 24TH DAY OF FEBRUARY, 2023

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr. Obondi for the Petitioners

Mr. Abdikadir Sheikh for the 1st and 2nd Respondent

Mr. Odhiambo for the 3rd Respondent

Quinter Ogutu: Court Assistant

