



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT BUNGOMA

ELECTION PETITION NO.4 OF 2017

ELIUD MUSIKONGO TENGE.....PETITIONER

VERSUS

1.NYONGESA SOSPETER ERASTUS.....1ST RESPONDENT

2. I.E.B.C.....2ND RESPONDENT

3. NOBERT KIMEI.....3RD RESPONDENT

J U D G M E N T

On the 8th of August 2017 an election for the Member of County Assembly West Bukusu Ward, Bumula Constituency Bungoma County was held. The seat attracted 11 candidates among them the petitioner herein and the 1st Respondent. The 11 candidates and their respective scores were as follows:

<u>Candidate</u>	<u>Votes scores</u>
1. Barasa Joseph Khaemba	245
2. Barasa Woah Simiyu	577
3. Busolo George Wekesa	524
4. Juma Gabriel Wafula	106
5. Musikongo Eliud Tenge	1229
6. Nyongesa Sospeter Erastus	1240
7. Wabwire Christopher Mulati	1214
8. Wafula Fred Juma	120
9. Wamalwa Bendele Juma	45
10. Wangunda Dennis Juma	380
11. Wekesa Simpson Kenyeny	92

Nyongesa Sospeter Erastus the 1st Respondent herein garnered the highest votes and was declared to have been duly elected as the Member of County Assembly for West Bukusu ward of Bungoma County in the said elections and was issued with a certificate to the effect by the Constituency Returning officer Mr Nobert Kemei on 9/8/17. The 1st Respondent was gazetted in Gazette Notice no.8240 of 22/8/17 as the elected Member of County Assembly West Bukusu Ward but with majority vote of 1,214. The petitioner herein Eliud Musikongo Tenge who vied in a Jubilee party ticket being aggrieved by the declaration filed his petition on 6/9/17 within the prescribed period of 28 days after the declaration of results against the declared winner the 1st Respondent the Independent Electoral and Boundaries Commission and Norbert Kemei the Returning Officer. The petitioner according to tallied results from the polling stations within the Ward emerged the 1st runner up. He challenges the election of the 1st Respondent on grounds of breaches and violations of the elections Act and regulations thereunder,

massive irregularities and malpractices and for not being in accordance with the principles of the electoral process as set out in the Constitution to the detriment and loss of the petitioner. In paragraph 8 of the petition the petitioner pleads that the 2nd Respondent and its officers acts and omissions were rampant and flared in such a fundamental and grave sense that taken together or viewed separately they completely obliterate the possibility of discerning therefrom whether the results awarded were free, lawful and proper expression of the West Bukusu Ward peoples will.

The petitioner further contends that the 2nd Respondent and its officers, staff and other persons who had duties and functions to perform in the elections committed criminal offences under the Elections Act. He also contends that the discrepancies in various document provided by the 2nd and 3rd Respondent are unexplainable and suggest actual ballot stuffing, multiple voting or gerrymandering or inflating the number of vote in tallying by the 2nd and 3rd Respondents to the advantage of the 1st Respondent. He suggests that forms 36A for Nangeni primary polling station 1, Nangeni primary polling station 2, Machwele polling station 1, Ngoli primary station 1, Lwanja polling station and Wacholi primary polling station 1 as reflective of the above stated ills. In paragraph 13 of the petition, the petitioner pleads that form 36B issued by the 3rd Respondent is most offending and indicative of a process that was manipulated.

In paragraph 14 and 154, the petitioner contends that the 1st Respondent personally and/or with his Agents and servants heavily and with impunity engaged in outright bribery and treating of voters prior to the voting day and on 8/8/17 in Machwele, Lwanja and St Jude Nabuyeye primary school which was illegal and irregular but was intended to and did influence voters to cast their votes in favour of the 1st Respondent.

The petitioner further contends that the officers of the 2nd Respondent did deliberately or by way of commission or omission make false and inaccurate entries in statutory forms, that the 2nd Respondent deliberately knowing and intentionally denied the petitioners' lawfully appointed and accredited agents access to the sorting, counting and tallying and declaration of results, to documents and other election process information and even access to polling stations. He further alleges that the 2nd Respondent and its electoral officers failed or refused to reconcile and scrutinize the results from various polling stations to the extent that it was not possible to tell which results were the correct and true reflection of the voting held for the Ward elections, that the results gazetted in favour of the 1st Respondent was greatly at variance with other electoral documents, that the electoral process was irredeemably compromised and tilted in favour of the 1st Respondent, that the results declared and gazetted are untenable, null and void and an abuse of the electoral system and process and that for the above stated illegalities, irregularities and malpractices the 1st Respondent is guilty of election offences including illegal campaigns and meetings, bribery, treating and voter manipulations.

The petitioner wherefore prays for orders that:

- a) An order for elaborate scrutiny of Kims (sic) machines, polling day diaries, scrutiny of the used and unused ballot papers and recount of all ballot papers cast. The court at interlocutory stages considered this prayer and declined it for reasons that sufficient resolutions not shown (see 2 rulings herein).
- b) A declaration that the entire electoral process in West Bukusu Ward from polling, counting, tallying and declaration of results was not only unconstitutional but also illegal and irregular, null and void including the outcome and declaration of the winner of West Bukusu Ward.
- c) A declaration that the electoral process in West Bukusu Ward should begin afresh given the massive and widespread electoral malpractices identified in this petition and information contained in the witness affidavits.
- d) Any other order the court may deem necessary to grant.

In support of his petition, the petitioner filed a supporting affidavit in which he reiterates the averments in the pleadings and attaches form 36B EMT1 and forms 36A EMT2, the gazetted results in favour of the 1st Respondent EMT3 and the total votes for the presidential, gubernatorial and Senatorial positions EMT4. This annexure (EMT4) relates to different elections and is of no probative value to the present petition. At hearing of the petition, the petitioner testified and called 7 witnesses. I will consider the evidence later to determine whether the grounds raised by the petitioner have been proved.

The petition was opposed by the 3 Respondents. The 1st Respondent in his response states that the petition does not disclose any cause or election malpractices that could necessitate disturbance of the results declared by the 3rd Respondent, that the petitioner has not complied with the condition depositing security which is incorrect as a deposit was paid and duly receipted a copy of which is in file. He avers further that no single irregularity has been disclosed, that the petitioner has not compiled all relevant documents, exhibits or official results for full discovery, that at close scrutiny of forms 36A and 36B shows agent and polling officials signed the said forms. He further pleads that the form 36B at the Constituency tallying centre shows clearly the outcome and that the 1st Respondent had a commanding lead with 1240 votes which form is signed and stamped. He denies the allegations of agents having been chased or prevented at the polling centre. He denied the pleaded violations, contraventions and breaches whose particulars are not given and pleads that they are wholesale and blanket allegations. The forms 36A for Nangeni primary polling station 2, Machwele primary polling station, Ngoli primary polling station 1, Lwanja polling station and Wacholi primary polling station 1 disclose no irregularities or discrepancies.

The 1st Respondent denies engaging in any electoral malpractices, unconstitutional conduct or bribery or treatment of voters in Nangeni primary polling station, Kibuke primary polling centre and Mwomo polling centre stating that it was the petitioner who got majority of the votes in those centres. He maintains that all primary forms to the Constituency tally were accurately, transparently and credibly filed and signed and that he still emerged the winner upon final tally and what appeared on the gazette notice may have been a typing error which did not affect any of the processes involved. He states his campaigns and meetings were peaceful without any malpractices alleged, that the minor typographical error on the gazette notice cannot be used as a basis to annul the will of West Bukusu Ward voters and that the 2nd and 3rd Respondents conducted the elections transparently in a free and fair manner as required of them by the law and that the petition should be

jettisoned with costs. He filed an affidavit wherein he reiterates his response and further filed 4 witness affidavits by Antony Wasike, Robert Khisa, Betty Nanjala Kachoma and Kennedy Wekesa Wechuli who testified as DW4, DW3, DW2 and DW5.

The 3rd Respondent filed a response to the petition on his own behalf and on behalf of the 2nd Respondent. The Respondents contend that the 2nd Respondent was the returning officer Bumula Constituency in Bungoma County wherein the petitioner was one of the 11 candidates who participated in the elections held on 8/8/17 for Bukusu West MCA seat, that after tallying the 1st Respondent was declared duly elected having garnered the highest number of votes which results were duly recorded in statutory forms 36A and 36B and later on duly gazetted vide the Kenya Gazette Notice dated 22/8/17 which had an error and which error was subsequently corrected vide Kenya Gazette notice of 25/8/17. They contended that they conducted the election in accordance with the Constitution of Kenya 2010, the electoral laws and regulations, that the elections were free and fair and reflected the will of the voter in the Ward and that the 3rd Respondent conducted himself professionally. The respondents further contend that the petition is vague, that it discloses no offences attributable to the 2nd and 3rd Respondent that the petitioner does not give evidence of alleged ballot stuffing, gerrymandering or vote inflation that would vitiate the election, that all statutory documents in respect to Nangeni primary school polling station 1 and 2, Machwele primary school polling station 1, Ngoli primary school polling station 1, Lwanja polling station and Wacholi primary polling station are accurate and disclose no error or defect.

Respecting form 36B, the 2nd and 3rd Respondents contend that it was in conformity with the electoral rules and no defect has been dissatisfied by the petitioner, that the allegations of bribery lacks in particulars and that the allegations are a creation of the petitioner who has in fact contravened S.13(1) of the elections Act in making a false statement, that the statutory forms have no discrepancies that the petitioner's Agents were not denied access to information and polling stations, that there is no evidence of document tampering and that the tabulations on forms 36A and 36B are accurate, that the petition is an abuse of the process of court. It is further contended that the 1st Respondent was validly elected in a free and fair election, that the petition should be dismissed and that the 1st Respondent was duly elected and that the election was valid.

The 3rd Respondent filed an affidavit in opposition to the petition reiterating the response. He attached a declaration certificate NK1, Kenya Gazette notice dated 22/8/17 and Kenya Gazette notice of 25/8/17, NK3 copies of forms 36A for the polling stations complained of and NK4 copies of form 36B. He further filed affidavits by 8 witnesses who were all called.

The parties in this petition besides setting their cases in the petition and responses, filing affidavits in support, calling their witnesses who were exhaustively cross-examined filed written submissions which were quite lengthy and relied on numerous authorities. The petitioner filed the following authorities:

- 1. James Mangara -vs- Manson Nyamwoya (2010) eKLR**
- 2. Raila Amolo Odinga & Another -vs- Independent Electoral and Boundaries Commission & 4 others and AG and Another (2017) eKLR**
- 3. Musikari Nazi Kombo -vs- Moses Masika Wetangula & 2 others (2013) eKLR**
- 4. Richard Kalembe Ndile & 2 others (2013) eKLE**
- 5. Mediwake & others -vs- Dayananda Aissanayake, Commissioner for elections & other (2000) Sri Lanka.**

The 1st Respondent relied on 1 authority: Sitati Peter Juma -vs- Sitati Daniel Wanyama and IEBC Bungoma High Court petition no.3 of 2017 for the holding that rubber stamping of forms 35A against the presiding officer's signature is not a requirement of the law and may simply be termed as an extra caution taken by IEBC and this cannot be an illegality.

The 2nd and 3rd Respondents filed 6 decisions:

- 1. Joseph Kapondi -vs- Independent Electoral & Boundaries Commission (2013) eKLR**
- 2. Langat Donnie Kiptoo Arap -vs- Shikuku Martin Simotwo Constituency returning officer Langata Constituency & 2 others (2017) eKLR**
- 3. Wavinya Ndeti & Peter Mathuki -vs- Independent Electoral & Boundaries Commission & 2 others Machakos High Court Petition No.1 of 2017**
- 4. John Mbaabu Mithui -vs- Jacob Mwingi Muthui & 2 others (2013)eKLR**
- 5. Musikari Nazi Kombo -vs- Moses Masika Wetangula & 2 others (2013)eKLR**
- 6. Emmanuel .O. Achayo -vs- Orange Democratic Movement & 4 others (2017) eKLR**

I have considered what the parties have presented right from the petition, responses, witness affidavits, the witness evidence in court, the submissions to the authorities and issues. To dispose of the petition before the court I propose to briefly state;

- a) Constitutional and legislative context of electoral disputes

- b) the burden and standard of proof in election petitions
- c) Whether the grounds in support of the petition are proved as required in law
- d) the position of costs in electoral disputes.

Article 1 of the Constitution of Kenya 2010 provides for the Sovereignty of the people of Kenya which can be exercised directly or through their democratically elected representatives. Further, Article 38 of the Constitution which provides for political rights states as follows:

- 1) Every citizen is free to make political choices which includes the right-
 - a) to form or participate in forming a political party;
 - b) to participate in the activities of, or recruit members for a political party; or
 - c) to campaign for a political party or cause
- 2) Every citizen has a right to free, fair and regular elections based on universal suffrage and the free expression of the will of electors for -
 - a) any elective public body or office established under this Constitution; or
 - b) any office of any political party of which the citizen is a member
- 3) Every adult citizen has the right without unreasonable restrictions -
 - a) to be registered as a voter;
 - b) to vote by secret ballot in any election or referendum; and
 - c) to be a candidate for public office or office within a political party of which the citizen is a member and if elected to hold office.

Article 81(e) is relevant to this petition as it sets out the principle of free and fair elections which are -

- i) by secret ballot,
- ii) free from violence, intimidation, improper influence or corruption,
- iii) conducted by an independent body
- iv) transparent; and
- v) administered in an impartial, neutral, efficient, accurate and accountable manner.

Article 86 of the Constitution is also relevant to the petition. It is on voting and provides:

At every election the independent electoral and boundary commission shall ensure that-

- a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent.
- b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station,
- c) the results from the polling station are openly and accurately collated and promptly announced by the returning officer; and
- d) appropriate structures and mechanisms to eliminate electoral malpractices are put in place including the safe keeping of electoral materials.

Article 10 of the Constitution is also relevant so far as it requires all state organs to apply and interpret the Constitution and all laws in a manner that promotes national values and principles of governance therein states and courts are a state organ.

Article 159(2) of the Constitution is relevant as it requires the courts to administer justice in a manner that promotes and protects the purpose and principles of the Constitution and without undue regard to procedural technicalities.

S.83 of the Election Act 2011 is relevant in this petition. It provides as follows:

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

The section (see Bench book on Electoral disputes resolutions) requires the court to strive to preserve the outcome of an election as much as possible. The courts are guided however that the section is not a panacea for curing all the errors, irregularities or malpractices that may conceivably occur at an election and courts will nullify an election that is conducted in a manner that is inconsistent with the principles laid down in the Constitution even if the result is not affected by errors, irregularities or malpractices in question.

Burden of proof and standard of proof in election petitions.

Burden of proof is set out in the evidence Act S.107 thereof provides as follows:

- 1) 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.
- 2) When a person is bound to prove the existence of any facts it is said that the burden of proof lies on that person.

The burden of proof in Election disputes lies on and remains with the petitioner throughout the case that was the holding in the Supreme Court in the precedent of ***Raila Odinga -vs- Independent Electoral and Boundaries Commission & 3 others petition no.5 of 2013*** but the burden shifts as the weight of evidence given by the parties varies. In ***Suleiman Kasuti Murunga -vs- IEBC & 2 others Bungoma High Court Election petition no.2 of 2017***, Justice A.C. Mrima stated that;

“...the legal burden of proof is static and rests on the petitioner throughout the trial. It is only the evidential burden of proof which may shift to the Respondent depending on the nature and effect of evidence adduced by a petitioner”.

In the recent case of ***Jackton Nyamugo Ranguma -vs- IEBC & 2 others Kisumu High Court petition no.3 of 2017***, Justice Majanja remarked that;

“the burden of establishing the allegations of non compliance with the Constitution and the law, electoral practice and misconduct which would result in the elections being declared invalid rests with the petitioner”

Standard of proof

The standard of proof in civil case is balance of probabilities, but election disputes are not ordinary civil suits. In the case of ***Hassan Mohamed & Another -vs- Independent Electoral & Boundaries Commission & 2 others Garissa election petition no.6 of 2013*** the court observed that S.83 of the Elections Act 2011 lays down the standard of proof required in election petitions in Kenya which section states:

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

The standard is higher in election disputes than the civil standard of balance of probabilities but lower than the criminal standard of proof beyond all reasonable doubt (see Bench book on electoral disputes resolutions). That is the standard declared by the Supreme Court in ***Raila Odinga -vs- Independent Electoral and Boundaries Commission & 3 others Supreme Court petition no.5 of 2013***. The Supreme Court in ***Raila Amolo & Another -vs- IEBC & 2 others (2017) eKLR*** in the majority decision reiterated the standard of proof in the following terms:

“we maintain that, in electoral disputes, the standard of proof remains higher than the balance of probabilities but lower than beyond reasonable doubt and where allegations of criminal or quasi criminal nature are made, it is proof beyond reasonable doubt. Consequently, we dismiss the petitioner's submissions that the court should reconsider the now established legal principle as discussed above and find the standard of proof in election petitions, is on a balance of probabilities”.

Whether the grounds in support of the petition are proved as required in lawfully

PW1 Eliud Musikongo Tenge the petitioner testified that he was a candidate in West Bukusu Ward through Jubilee Party and was declared no.2. He says he was not given form 36B but had to download it. He says it showed he got 1229 votes while the winner got 1240 vote. He states his total on the form should have been 1314 and should have been declared the winner. He states that some form 36A were not signed by the chief Agent and some were not signed by a single Agent like Nangeni polling station and Kibuke polling station yet his Agents told him they had signed. He states too that some forms were not stamped like Lwanja primary, Ngoli primary polling stations. Under cross-examination, he stated that his announced results was 1314 votes and the winner 1392. His complaint is that the figures at the national tallying centre were different and different from what was gazetted. He further stated that he has no proof of ballot stuffing, that he has no claim of criminal activities, that he did not witness a bribery, that no election offences were reported.

PW2 Bernard Kibelenge testified that in the election of 8/8/17, he was a Jubilee Party Agent at Kibuke polling station 1. He states he was allowed into the station and voting continued upto 5.00pm. The station, was closed and counting started. He says he signed form 36A. He identified form 36A for the stations which bore no signatures by Agents. Under cross-examination he says voting was smooth and that there was no violence, counting took place. He was present when results were announced. He did not dispute the results in form 36A. He states his signature is not on the form. He admits he did not attach anything to prove he was an Agent at the polling station. He further states he was satisfied with the form and is still satisfied with the numbers and that the form is signed though in his affidavit he states it was not signed.

PW3 Godfrey Kundu testified that he was an Agent for Jubilee Party at Nangeni polling station stream 2. They counted votes and delivered them at 4.00am. He says he signed form 36A but the form in the petition documents not signed. The form he had signed indicated his candidate had 94 votes but the exhibit form 36A shows he got 84 votes. Under cross-examination, he states there were no irregularities at the station. He states that when the results were announced there was a mess. He did not indicate anywhere that the votes cast for the petitioner were the incorrect ones.

PW4 Gabriel Wangila Juma was a candidate for MCA on People Empowerment Party. He claims that in almost all polling stations, his Agent were not allowed to sign and verify the forms most of which do not have rubber stamps. The results announced at the tallying centre were not the results on form 36B. He further states that he witnessed massive voter bribery by the Agents of the 1st Respondent. In St Jude primary he found the 1st Respondent giving money to a huge crowd of voters which matter he reported to the police at the polling station. He also reported to the presiding officer who promised to take action. He states further that form 36B was not signed by the candidates or Agents. Under cross-examination he indicated he did not report to the police station, that he did not name the Agents who bribed voters neither did he photograph them. He does not also know any person who was bribed.

PW5 Joseph Khaemba Barasa vied as an Independent candidate for MCA in the elections of 8/8/17 for Bumula Ward. He states that form 36B did not indicate his votes. It showed he had 245 votes but that was not the correct tally which should have been 259 votes. The total for Tenge was 1229 when it should have been 1314. He takes issue with the figures for the 1st Respondent too showing discrepancies. He denies that counting was not transparent for reason that there were 2 Barasas' and the presiding officer was not properly identifying their votes. He blames an external hand for the totals to be wrong. Under cross-examination, he indicated voting went on smoothly but breakdown started at counting.

PW6 Christopher Mulati Wabwire of West Bukusu Ward was a candidate for MCA in the elections of 8/8/17 for the Ward and emerged 3rd with 1241 vote but at the tallying centre was announced to have garnered 1214 vote. He could not understand the variations. He stated further that in Mayanja which had 2 streams, candidates were getting the same number of votes which he consider crafted. Under cross-examination he stated he had no problems with form 36A but only form 36B. He claimed he left the station before the full results were announced. He claimed in Mayanja stream 1 and 2 he got 79 and 77 votes, Joseph Barasa Khaemba 8 votes and on the other stream 8 votes while Bedele Wamalwa got 11 votes in one stream and 11 votes in the other stream which he considers a malpractice.

PW7 Amos Wamenya Wakoli was a voter and Agent for Jubilee party at Mwomo polling station stream 2. Polling took place, station was closed and counting of votes took place until 1.00am. He says all Agents signed the form but looking at the form 36A in the petition stated he did not sign that form. In the stream the petitioner got 227 but the form before court is not clear. It is also not stamped. Under cross-examination, he stated his Agent document was at home. He says polling took place peacefully without incident including the counting and that the petitioner got 1314 while the 1st Respondent got 1329 and was declared the winner but the radio announced the petitioner a winner. Under cross-examination, he stated his Agency documents are not in the affidavit and he did not show them to court. He states the form he signed is not before the court and that the form before court was signed by 2 Agents.

PW8 George Wekesa Busolo was a voter and an Independent candidate in the election held on 8/8/17 for the seat of MCA West Bukusu Ward. He came out 4th and the 1st Respondent was declared winner with 1325 and no.2 had 1314. He was announced to have garnered 550 but for form 36B he had 524, Tenge 1314 but 1229 was submitted. He claims he had found the 1st Respondent giving some people money that was in Kshs.100/- notes. He made a report to the polling station and to some police officers on patrol but as the police approached the group dispersed. He claims he also reported to the presiding officer who thanked him and told him he would put it in the diary.

DW1 Sospeter Erastus Nyongesa the 1st Respondent testified that he is the elected MCA for West Bukusu Ward. He was a candidate on ANC ticket and also voted in the elections of 8/8/17. He was announced to have garnered 1392 votes and was announced as winner by the returning officer Mr Kemei Nobert the 2nd Respondent. The 2nd person was the petitioner with 1314 votes. He states he had a commanding lead of 78 vote. He states the elections were fair as candidates were allowed to have Agents in all the 17 polling stations. He states they were allowed to have 1 Agent in the polling station at a time that polling stations opened on time and voting went on peacefully. There was no violence or uncondusive environment. He voted at Machwele polling station at 8.30am and voting closed at 5.00pm. He was kept abreast by his Agents till past midnight. He states that he went to the tallying center at 4.00am, took his position and results were announced the following day by the returning officer. When he was announced the winner, he was with the petitioner as the other candidates had left the Hall. He was then issued with a certificate. He claimed he did not meet PW8 and claims his bribery allegations are lies. He states he had been trained and knew it was a serious offence for a candidate to bribe. He states that the figures from all polling stations were correct and the only problem were the totals of the 11 candidates as the totals were not agreeing with the forms. The totals, he says affected all candidates but did not affect the results. He considers the petition ill-intentioned as the mistakes in the form did not affect the results. The

form 36B showed he had 1240 instead of 1392 and the petitioner 1229 instead of 1314.

PW2 Betty Wanjala Kachoma was on 8/8/17 an Agent for ANC party at Kibuke primary polling station. She was present during voting which took place without incident. She states she did not hear anybody complaining. She was present when ballot boxes were opened. In the station Christopher Mulati got the highest votes at 127. She was an Agent for the 1st Respondent who got 40 votes. Form 36A was filled but she did not sign. She says she did not see the need as her candidate got few votes. Under cross-examination, she stated there was no fraud, no violence and that she does not dispute the results and that the form 36A in court is genuine. She says she had an Agent letter and ID Card at the polling station. Cross-examined by Mr Kebira, she had difficulties identifying her signature in her affidavit. She admitted she was an Agent for the petitioner at the nominations stage but switched after nominations.

DW2 Robert Khisa Kituyi was an Agent for ANC for the elections held on 8/8/17 at Mayanja polling station 2. Voting took place after the station opened at 6.00am. There was no incident and the station closed at 5.00pm. He stayed on and was present when votes were counted until 11.30pm. Candidate Mulati won with 174, the 1st Respondent for whom he was an Agent got 23 vote. He claims the Agents did not sign because they got out when the results were announced.

DW4 Anthony Wanjala was an ANC party Agent at St Jude Nabuyeye in the elections of 8/8/17. There were other Agents. Voting took place peacefully. He did not witness any hitches. The station was closed at 5.00pm. He was present during counting and announcement of results. The ANC candidate the 1st Respondent won in the station with 155 votes. Form 36A was filled and he signed it. Other Agents also signed. He did not hear of any irregularity or illegality at the polling station. Under cross-examination, he stated the form 36A in court is not clear and in re-examination stated that it was a carbon copy.

DW5 Kennedy Wekesa was an ANC Agent at Mwomo primary school stream 2 on 8/8/17. The station opened at 5.00pm and voting went on upto 5.00pm after which votes were counted upto 11.00pm. The winner was the petitioner with 221 votes while the 1st Respondent the ANC candidate got 24 votes. He says he did not sign form 36A because the people of the winning candidate went into celebrations and he went home disappointed. Under cross-examination, he states he had a letter from the party, another from IEBC and ID Card and a badge. He did not witness any illegalities, any violence or disturbances.

DW6 Nobert Kemei was the Constituency Returning officer Bumula Constituency for the elections of 8/8/17. There were 11 candidates for MCA West Bukusu Ward Mr Nyongesa won the elections and was issued with form 36C. He says the elections was conducted in accordance with the electoral laws and poll officials had been trained before the polling day. They comprised the presiding officers, deputy presiding officers, clerks, tallying centre presiding officers, ICT clerks in charge of ICT, a logistician, voter educators, security and party Agents and candidate Agents because of Independent candidates. No electoral offences were reported on 8/8/17. He states he knew the petitioner as he was involved in their nominations but he knew the candidates only in matters elections but not in person. No electoral malpractices was reported to him at all or involving Machwele , Lwanja or St Jude polling stations. The Agents did not raise any issues over counting, tallying or any activity. Regarding form 36A, he testified that they were well done and the figures therein were correct. All the 17 polling stations results in West Bukusu were entered correctly in an excel sheet provided from Nairobi. He stated the excel sheet does not do an auto-sum so an ICT person had to do the sum manually in the process of which he missed Kisioyi primary polling station and this gave the sum in form 36B. He states there was no ill intention and all candidates were affected. He states that if the votes for all candidates for Kisioyi are considered, the same person who won, Erastus Nyongesa would still win. He on form 36B in Kisioyi polling station. He prays that he reconstitutes form 36B afresh and gazette the right figures.

DW7 Hildabeda Nasimiyu Makokha was the presiding officer Wacholi primary school polling station. She opened the polling station at 6.00am and closed ti at 5.00pm. She states there was no tampering at the station, no Agent was barred from accessing the polling station and no concerns were raised in respect of form 36A by either the Agents or candidates. Under cross-examination, she states that the original form 36A was stamped and hat the Agents present signed the form 36A.

DW8 Musibolo Rose was the presiding officer Mwomo primary polling station stream 2. She testified that she opened the station at 6.00am and closed at 5.00pm. She finished counting and tallying at 1.00am. All Agents were not present when she compiled form 36A. The Agents who were present signed. The Agents did not raise any queries. No electoral malpractice was raised. She says she was satisfied with the outcome. Under cross-examination, she stated the form 36A in court was not stamped because it is the original that is stamped and that the 1st Respondent got 221 votes and that nobody raised any issued regarding the results. The 1st carbonated copy went to the Returning officer and the other copies for the Agents and the public.

DW9 Florence Vutangwa Luchia was the presiding officer Nangeni polling station stream 2 02 2. She opened the stream at 6.00am and Agents were available. The Agents were required to identify themselves to her by a letter from IEBC and their identification cards without which they would not have been allowed to participate as Agents. During the polling no candidate or agent complained to her about irregularities. After closing the station the ballots were counted. During counting, no agent raised any complaint. After tallying form 36A was recorded by which time Agents had already left.

DW10 Carolyne Wanjala Masinde was the presiding officer St Jude Nabuyeye. She opened the polling station at 6.00am in the presence of Agents. The Agents were required to produce a letter from IEBC, original ID and a letter from the candidate they were representing to participate. During polling, no Agent raised any concern. She closed the station after polling and rested abit and at 6.00pm counting of ballots started. No concerns were raised at sorting, counting and announcement of results by the Agents. She then entered the results in form 36A. She allowed the Agents to sign the form. She states that no incidents of bribery were reported and that no Agent was barred from reporting any malpractice. There was no vote tampering and no Agent was barred from accessing form 36A.

DW11 Stephen Wafula Mchele was the presiding officer Kibuke primary polling station on 8/8/17. He opened the station at 6.00am and closed at 5.00pm. Polling was conducted well, it was very free and fair. Agent were present at opening and during the polling and did not raise any concerns nor did the candidates. He stated that the Agents present participated to witness the assisted voters. Shortly after closing, votes were counted. No complaints were raised during sorting and during counting. No concerns were raised about form 36A. AT the time of compiling the form 36A, the Agents had left. No candidates were present either. He states there was no voter tampering and no

malpractice was reported to him. He clarified that the Agents or candidates were to sign if present.

DW12 Timothy Wanyonyi Kinyosi was the presiding officer Nangeni primary 1. No irregularities were reported, no electoral malpractices were reported. He allowed Agents to participate. The Agents were satisfied with the polling, the closure and counting form 36A was filled and 4 Agents signed it. He stated under cross-examination that he had not stamped form 36A but in re-examination explained that he was not referring to the original and further that the stamp, may not have reached all the copies.

DW13 Jackline Martha Tundoli was the presiding officer Machwele primary school polling station stream 1. She opened the station at 6.00am. 3 Agents were present at opening and identified themselves with ID, letter from IEBC and oath from an Advocate. She stated she was not to allow any Agent to participate without these documents. No candidate or Agent during the sorting process raised any concerns as was the case with sorting, tallying and compiling form 36A. She states that no irregularities or malpractices or illegalities were reported to her at all. During cross-examination she was able to read the figure of the total votes case on what is a faint form.

DW14 Joseph Wabwire Wangila was the presiding officer Ngoli primary room 1 in the elections held on 8/8/17. He opened the station at 6.00pm. The Agents were not there and started arriving at 7.00am. He says he allowed them to participate in the electoral process. The Agents identified themselves with accreditation letter from IEBC, their National ID Card and an oath of secrecy document without which he would not have allowed them to participate. He denies barring any Agent from participating. He states that during voting, vote separation, counting, tallying no concerns were raised. The Agents signed form 36A. Equally no candidate raised any concern being satisfied with the outcome at the polling station. He states the form 36A presented to the Returning officer is the same as the form 36A document in court.

The agreed issues for determination in this matter are as follows:

- i) Whether or not there were discrepancies in the various documents provided by the 2nd and 3rd Respondents.
- ii) If the answer is yes what is the support (sic) thereof.
- iii) Whether or not the 1st Respondent personally or with his Agents/servants or supporters engaged themselves in acts of bribery and sticking (sic) of voters prior to and on the following day.
- iv) Whether or not the officers appointed by the 2nd Respondent deliberately by way of commission or omission made false and inaccurate entries in the statutory form.
- v) Whether or not the petitioner's party Agents were refused access to various polling stations and statutory forms.
- vi) Whether the results gazetted in favour of the 1st Respondent was greatly at variance with that obtaining on other electoral documents.
- vii) If the answer to the above is in the affirmative, what is the consequence of the declared results.
- viii) Whether the electoral process in respect of West Bukusu Ward was riddled with irregularities and breach of the law by the 1st Respondent and the 2nd Respondent Agents or officers.
- ix) Whether the declared results was reflective of the will of the people of West Bukusu Ward.
- x) Whether or not the petitioner is entitled to the reliefs sought in the petition.
- xi) Who should be condemned to pay costs of the petition.

I will deal with issue (I) (ii) (iv) (vi) and (vii) together as they relate to form 36A and 36B which resulted in the gazette of the declaration of the 1st Respondent as the Member of the County Assembly for West Bukusu Ward. Before I embark on addressing these agreed issues, I must state the issues are generalized and almost vague. The alleged documents are not stated with specificity as the 2nd and 3rd respondents provided many documents. I suppose the parties are referring to forms 36A, 36B and the declaration in the 2 gazette notices. The 17 form 36A were taken to the returning officer who tallied them and announced results wherein the 1st Respondent obtained 1392 votes and the petitioner 1st runner up with 1314 votes. That is the evidence on record from witnesses including the petitioner, the 1st Respondent and the 3rd Respondent. Those results accorded with the forms 36As from the polling stations. The form 36B that was subsequently prepared and the results thereon gazetted had different results affecting all candidates. This is apparently what raised alarm with the petitioner and although he does not admit it probably why he has brought the petition. The Returning officer DW6 has given the explanation that form 36B was prepared by entering all the 17 polling station results in forms 36A in an excel sheet that does not auto-sum and an IT person had to do the sum manually. In the process, he missed out Kisioyi primary polling station and thus gave the sum in the form 36B in file. He states there were no ill intentions. I have looked at the form 36B and agree with the returning officer that the results of Kisioyi primary polling station were left out in summation for all candidates. When the votes petitioner garnered in Kisioyi primary polling station are factored to the total votes he is shown to have garnered, it works to the total votes he claimed were announced. On form 36B his results 1229 votes. He garnered 85 votes in Kisioyi primary polling station and when 85 is added to 1229 votes shown as his results on form 36B, the figures work to 1314 which is what he is claiming was his tally. Similarly the 1st Respondent in form 36B is shown to have garnered a total of 1240 votes. In Kisioyi primary polling station he garnered 152 votes. When 152 is added to 1240 his tally from the total 17 polling stations becomes 1392 which is what he was declared to have obtained and thereby to have won the election in West Bukusu Ward. There is no indication that the officers appointed by the 2nd Respondent made inaccurate entry in the statutory form deliberately. It is accepted as an

oversight. That oversight did not affect the results. The 1st Respondent was still declared the winner and so gazetted but with less votes than he actually garnered. The only inaccurate entry is the tallying of the results for all candidates. It is correct there is variance between the gazetted declaration and the declared results at the tallying centre. The declared result so far as the votes garnered by the winner is incorrect but the winner is still the 1st Respondent already gazetted.

Bribery and treating.

I now turn to the agreed issue (iii). The petitioner has claimed that the 1st Respondent was engaged in voter bribery and treating. It was claimed by PW4 and PW8 that they witnessed the 1st Respondent bribing voters at ST Jude polling station. This was a very generalized claim. The 2 witnesses do not name any of the people they found being bribed, they have not provided evidence of photographs to back their claim. They were not together. They did not make any report to a police station but claim to have informed police officers at the polling station and the presiding officer. I find these to be mere allegations. Bribery and voter treatment being a criminal electoral offence with serious consequences for the culprit require to be proved by cogent and credible evidence. In *Karanja Kabage -vs- Joseph Kiuma Kiriambegu Nyaga & 2 others (2014) eKLR*, the court held as follows:

“I find that the offence of bribery to be proved in relation to an election petition, it has to be shown that a bribe was offered and received with an intention to influence a voter for a particular candidate. The evidence on which such a finding can be made has to be conclusive and it is not open for the court to make presumptions without a clear concise basis.”

I find it incredible the 1st Respondent would bribe people openly on the road near a polling station. The claim was rebutted by DW4 the presiding officer at St Jude who claimed that he did not hear of any illegality. I highly doubt the claims by these 2 witnesses on bribery. I find that bribery and treating is not proved.

On issue no.(v) about denial of access by Agents to polling stations and statutory forms, the claim is a mere allegation that is not backed up by cogent evidence. PW2 claimed he signed a form at Kibuke but the form is not before court. His claim was rebutted by DW11 who stated that when he compiled form 36A the Agent had left. PW2 did not adduce evidence that he was an Agent. His claim of not accessing documents is not proved. PW3 also claimed being denied the form 36A he signed but he did not prove that he was an Agent at Nangeni polling station by documentary evidence of accreditation and Oath of Secrecy. PW7 also claimed that he was an Agent at Mwomo polling station stream 2 and that he did not access the form 36A that he signed. He disclaimed the form 36A in court for the station. However this witness did not prove that he was an Agent at that polling station. Like the other agents above, he did not demonstrate that he was an Agent in the 1st place. DW5 an Agent for ANC testified that when the petitioner was announced the winner the people of the winning candidate went into celebrations. He also went away and did not sign the forms. The allegation by PW7 of denial of access to form 36A is not proved.

Whether the electoral process in respect of West Bukusu Ward was riddled with irregularities and breach of the law by the 1st Respondent and 2nd Respondent Agents or officers

It is submitted that some forms 36A were irregular in that they did not have signatures of parties Agents, did not have statutory comments. Regulation 7 6(4) which provides for the comment by the presiding officer where an Agent refuses or fails to sign was cited by the petitioner. I have gone through the 17 forms 36A in the petitioner's bundle EMT2 and find only 2 form 36A are not signed by party Agents. The other 15 were. In the case of those 2, it was explained that the Agents, just like in the other 15 forms 36As for other polling stations, witnesses signed if they were present. As a matter of fact the form 36A speaks for itself. It is expressed “Agents or candidates (if present). It was explained that Agents were admitted on identification with ID card, oath of Secrecy form and letter of accreditation. The presiding officers were clear that nobody was refused access or to sign the forms. In *John Kiarie Waweru -vs- Beth Mugo & 2 others (2008) eKLR* it was held that nothing turns on failure to sign the forms. With regard to the 2 stations where Agents did not sign the forms, Kibuke primary 1 of 1 and Nangeni primary 2 of 2, in Kibuke, for refusal to sign the presiding officer remarked N/A. To my understanding that would suggest that there was nobody present who refused to sign. There is nothing adverse to make of the presiding officer. In Nangeni primary 2 of 2 the comment by the presiding officer was “the election was free and fair”. Nothing turns on this. I see no irregularity. For the rest of the 15 polling station, the form 36A was signed. I do not see any irregularities.

Whether results were reflective of the will of the people

The people of West Bukusu on 8/8/17 went out to the 17 polling stations within the Ward and cast their votes peacefully without intimidation, without influence by bribery or treating, their votes were sorted, counted and tallied in form 36A. The results were not challenged or disputed. The presiding officers submitted the form 36As to the Returning officer who captured the results therein correctly, tallied the results and declared the 1st Respondent the winner and accordingly issued him with a certificate of elected Member of the County Assembly. His tally was 1392 and the petitioner was 1st runner up with a tally of 1314. I have in the foregoing shown that the petitioner has not proved his grounds to the required standard. The election in my view was conducted in accordance with the principles of the Constitution and the Elections Act as set out at the onset in this judgment. The people of West Bukusu Ward elected their Member of County Assembly. I am not to nullify the election on the omission at the Constituency Tallying Centre where incorrect results were entered by inadvertently omitting the votes from Kisioyi polling centre for all candidates. The error did not affect the results as the winner remained the winner less Kisioyi. The people of West Bukusu spoke loudly and their will must be given effect. In the results, I dismiss the petition and declare the 1st Respondent the duly elected member of County Assembly for West Bukusu Ward. The Returning officer is to reconstitute afresh from 36B with the correct tallies for all candidate and gazette the right tally for the 1st Respondent and serve copies of the form 36B to the other contestants on request.

Respecting costs, the petitioner has submitted that in the event I should not find for the petitioner, then I should consider that the petitioner was stirred by the circumstances created by the 2nd and 3rd Respondents, that it was not ill intended and order that each party bears its own

costs or the burden be borne by the 2nd and 3rd Respondents. The 1st Respondent submitted that the petitioner should pay costs and proposes Kshs.1,000,000/-. The 2nd and 3rd Respondents submit that costs follow the event as stated in S.84 of the Elections Act. I have considered the submissions on costs and order that the petition is dismissed with costs to the 1st Respondent and to the 2nd and 3rd Respondents. I cap the instruction fees at Kshs.500,000/- for 1st Respondent and Kshs.500,000/- for the 2nd and 3rd Respondents. Total costs to be taxed by the court. The security deposit to be shared equally between the 1st Respondent and the 2nd and 3rd Respondents upon taxation of costs.

I further order a certificate of determination to issue to the Speaker Bungoma County Assembly and copy to IEBC and the Hon. The Chief Justice.

J.Kingori

CM

Court

Read and delivered in open court this 2nd day of March 2018 in the presence of Miss Nafuye for Mr Ocharo for petitioner, Mr Sichangi for the 1st Respondent and Mr Baraka for the 2nd and 3rd Respondents and Ms Barasa court assistant.

J.Kingori

CM

2/3/2018