



REPUBLIC OF KENYA

IN THE SPM'S COURT OF KENYA AT KISII

ELECTION PETITION NO. 6 OF 2017

FRANCIS MOENGA OMESA PETITIONER

RICHARD KERIMA RATEMO PETITIONER

VERSUS

- 1. IEBC.....1ST RESPONDENT**
- 2. JULIUS MEJA OKEYO 2ND RESPONDENT**
- 3. CHACHA MAINA CHARLES 3RD RESPONDENT**

JUDGEMENT

This petition filed by Francis Moenga Omesa and Richard Kerima Ratemo contests the return of Chacha Maina Charles as the member of County Assembly (MCA) of Ibeno ward following the general elections held on 8th August 2017. The two petitioners did not contest in the said election. The 1st Petitioner was the chief coordinator for Mr. Stephen Arika who was one of the candidates. The 2nd petitioner was the chief agent for the People's Democratic Party (PDP), Nyaribari Chache constituency. On 10.8.2017, the 2nd respondent declared and certified the 3rd respondent as the winner of Ibeno ward member of county assembly elections having allegedly garnered the highest number of valid votes cast. The top five candidates were:

1. Chacha Maina Charles	-1,759
2. Stephens Arika	-1,672
3. Alfred Makori Ong'uti	-1,302
4. Chrisantus Obwocha Mayaka	-1,169
5. Paul Ondimu Nyamwega	-1,064

The 3rd respondent was gazetted as the member of county assembly Ibeno ward. The petitioner's contest the result citing a number of irregularities.

The petitioners lamented that the presiding officer at Nyankororo Primary School polling station declared the results of the member of county assembly last instead of third contrary to regulation 75 of the Elections (General) Regulations 2012. That in some polling stations, the presidential votes cast were lower than the member of county assembly votes. That due process was not followed in the transmission of results. That well known supporters of the 3rd respondent were openly campaigning and bribing and

influencing voters. The petitioners pleaded that the presiding officers, deputy presiding officers and clerks in Ibeno ward were impartial, inefficient and not neutral. That the election officials appointed by the 1st respondent conspired with the 3rd respondent's agent to commit irregularities stuff votes in ballot boxes. That in some polling stations, spoilt and wrongly marked votes were counted in favour of Chacha Maina Charles. In some rejected votes were also counted as valid votes. In all, the sorting, counting and tabulation of the votes was not properly done. It was the petitioners case that the election for the member of county assembly was not accurate, verifiable, secure, accountable and transparent and votes were not properly counted and tabulated and accurately collated. That the 3rd respondent and/or his agents engaged in electoral offences, irregularities and malpractices offering bribes to influence voters to vote for him. That the 1st and 2nd respondents were in breach of the code of conduct failed to be impartial and independent and perform their duties in good faith, wilfully preventing people from voting, being influenced by the 3rd respondent declaring results which they knew or had reasonable cause to believe to be false or incorrect, failing to carry out their duties diligently as required by the law and failing to stamp the forms as required by law. It was the petitioners case that the member of county assembly election for Ibeno ward was so badly conducted and marred with irregularities and the nature of and extend of the flaws and irregularities significantly affected the results to the extend that the 1st respondent could not accurately and verifiably determine what results any of the candidates got. That where an election is not conducted in accordance with the constitution and the written law then that election must be invalidated notwithstanding the fact that the results may not be affected. The petitioners pleaded that in the instant case, both the results and the conduct of the election were affected and should be rendered invalid. The petitioners sought all records in the custody of the 1st and 2nd respondent pertaining to the elections for the Ibeno ward member of county assembly. They sought orders of scrutiny and recount; a declaration that the member of county assembly elections for Ibeno ward was not conducted in accordance with the constitution and the applicable law rendering the declared results invalid, null and void, A declaration that the 3rd respondent was not validly elected as the member of county assembly for Ibeno ward and that the declaration by the 2nd respondent is invalid, null and void, an order for the conduct of a fresh election for the member of county assembly for Ibeno ward; A declaration that each and all the respondents jointly and severally committed election irregularities and the respondents be condemned to pay the costs of the petition.

The petitioner is supported by the affidavits of Francis Moenga Omesa and Richard Kerima Ratemo, Martha Moraa, Robinson Maranga Ratemo, Anackled Ogari Bwogi, Ronald Onsombi Keraro, Stephen Sirimani, Samwel Ben Getenga, James Osoro Omwenga, Kingoina Dominic Sitima, William Omwanza Michira, Alfred Onsombi Mogunde, Kayaka Jared Oimeke.

The 1st and 2nd respondents filed 5 replying affidavits in response and opposition to the petition. Those who swore affidavit in response are Meja Julius Okeyo, Makori Japhet Mogaka, Omari Elsheba Mokeira, Oimeke Benson Kerage, Onkoba Geoffrey Ondicho. The 3rd respondent also filed a response to the petition and replying affidavits on 20th September 2017. Those are the affidavits of Chacha Maina Charles, Kerama Edward, Amboga Paul Onwonga, Alfred Nyangeri Nyandago, Jared Ombati Tongi, Wycliffe Maranga Omoke, Tom Gesicho Motonu. The respondents denied the allegations against them by the petitioners.

The petitioners filed two applications seeking to strike out the responses and affidavits filed by the respondents. That they were filed out of time. The applications were heard and determined. The 3rd respondent filed an application seeking of enlargement of time within which to file a response. That application was heard and determined. The ruling of the three applications was delivered on 6.11.2017 and is on record. Thereafter, the petitioners filed two other applications, one seeking additional evidence polling station diaries, and another seeking orders of scrutiny and recount. The two applications were heard and determined. There is a ruling on record delivered on the 6.12.2017. The application for scrutiny was deferred until after the taking of evidence in the petition. After the taking of evidence, this court ordered for a scrutiny and recount in half the polling stations and recount only in the other half. At the conclusion of the exercise, a report was compiled which report forms part of these proceedings and the record.

The petitioners case

PW1 Richard Kerima Ratemo, He adopted the affidavit he had filed in support of the petition. He participated in the August 8th 2017 general elections as a voter at Nyakebako Primary School polling station, Ibeno ward and also as a chief agent for PDP. He stated that form 36A and 36B had lots of irregularities. That form 36B did not bear the name of one of the candidates who had participated in the election, one Getenga Samwel Ben. He also complained that other form 36As did not bear the names of the agents and official rubber stamp of the IEBC and also had obvious alterations, in another polling station, Gesere 1, the PDP agent was not allowed in the polling stations, that KIEMS Kits failed to identify voters at Irungu Primary School one ballot paper missing at Nyankororo Polling station and the announcement of the MCA results as last. He complained that the results as announced were not accurate, fair, transparent and did not reflect the will of the people of Ibeno Ward.

PW2 William Omwanza Michira adopted his affidavit sworn on 5th September 2017 in support of the petition. He complained that when votes were being counted, the presiding officer did not show it up to the agents and that the sorting was left to the agents. That spoilt votes were counted as valid votes and further that some people came in late, 15 minutes after 6.00pm and were allowed to vote.

PW3 Anackled Ogari Bwogi adopted his affidavit sworn on 5th September 2017 in support of the petition. He was an agent and he observed that some people were denied the right to vote because the machine could not capture their print. The voters on the que after 5.00pm were not allowed to vote. Some votes were said to be spoilt yet they were not. He witnessed the deputy presiding officer assist more than three voters. He was biased. The Kiems kits failed to identify some voters and they were chased away. After 5.00pm about 10 people were on the que and they were not allowed to vote. He further complained that on rejected votes, they did not agree. PW4 Kingoina Dominic Sitima also adopted his affidavit in support of the petition sworn on 5th September 2017. He complained that rejected votes were counted as valid votes.

PW5 Martha Moraa placed reliance on her affidavit sworn in support of the petition and adopted the contents thereof fully she was a Narc Kenya agent a registered voter at Kirwa where she voted. She complained that the presiding officer was assisting people to vote without the agents input. She also complained that they took a very lengthy break of about one hour. Again the presiding officer plucked some ballot papers from a booklet.

PW6 Alfred Onsombi Mogunde swore an affidavit on 5th September 2017 in support of the petition and he sought to rely on the contents thereof fully. He adopted the same. He was a candidate in the election on a maendeleo chap chap ticket and he voted at Kabosi Primary School polling station. He did not have any problem and according to him, the IEBC did a good job. It is only when he went round particularly at Nyanturago polling station that he realised that there was a problem. Voting had been put on hold and when he inquired he was told that there was a technical error. He complained of irregularities in form 36A and form 36B and also about assisted and influenced voting. That the 3rd respondent's daughter worked as a clerical officer in one of the polling stations.

He, PW6 gained 36 votes in the entire ward and those are the votes that were announced. He complained of bribery on the part of the 3rd respondent that took place in a tea and mandazi kiosk nearby christened safe time hotel.

He further complained that the tallying was not properly done, that forms 36A and 36B did not tally. That forms 34A and 36A had irregularities and that some forms had not been signed by the agents and no reasons had been given for not signing.

PW7 Samwel Ben Getenga swore an affidavit supporting the petition and he chose to list and adopt and rely on the contents thereof as his evidence in chief. He was a candidate in the election, an independent candidate. He complained that his name had been left out in the results form 36B, but taken to task, he conceded that his name appeared in each and every form 36A in every polling station.

PW8 Francis Moenga Omesa the 1st petitioner told court that he had sworn an affidavit in support of the petition and he sought to rely on the same as his evidence in chief. His candidate was Stephene Arika of Jubilee Party. He PW8, was the coordinator. The MCA vote and presidential vote were different by a number of votes. There was campaign and bribery and some voters were denied the right to vote. There was stuffing of ballot boxes. He also complained that at Nyankororo, the presiding officer announced the results without following the order. According to him the election was not conducted as required by law.

After the 8th witness testified Mr. Moenga advocate for the petitioner informed court that the petitioners were closing their case. He did not intend to call any more witnesses. Mr. Ochwangi advocate for the 3rd respondent asked the court to strike out and/or expunge from the record the affidavits in support of the petition whose deponents had not been called to testify. Mr. Kibet for the 1st and 2nd respondents supported the position but Mr. Moenga was of the view that the argument could be taken up on submissions. The court took note of this observation which will be dealt with at a later stage.

The 1st and 2nd stage respondents called seven(7) witnesses RW1 Julius Meja Okeyo, the returning officer in charge of Nyaribari Chache relied on his replying affidavit in opposition to the petition. According to him the elections were free and fair. He denied the fact the the number of those people who actually voted exceeded the number of registered voters. The irregularities, if any were minor and could not nullify an election. Though Samwel Ben Getengas name was missing, it was a minor error because he had lost and he knew he had lost the election and he did not raise any complaint.

RW2 Japhet Mogaka makori was a presiding officer at Irungu polling station. He prepared form 36A. He adopted the contents of his affidavit in opposition to the petition. Nobody was denied the right to vote.

RW3 Alshaha Omari the presiding officer Nyanturago Tea Buying Centre station 2 fully adopted and relied on his affidavit. His deputy was one Kennedy. The process at his station was free, fair and verifiable meeting the requirements. He prepared form 36A, endorsed his name and signed it. He denied that the agent had been left to sort the ballots cast. He stated that those who were in the que after 5.00pm were allowed to vote.

RW4 Dickson **Nyagaresi** the presiding officer Kirwa Primary School prepared form 36 A and signed it. He relied on his affidavit. The process went on well though he had some problems with network. He denied plucking any ballot papers and placing them on the table.

RW5 Benson Kirage Oimeke the presiding officer Rikendo polling station 1 also testified placing reliance on his replying affidavit which he adopted as his evidence in chief, he prepared forms 36A.

RW6 Geoffrey Onkoba Ondicho the presiding officer at Nyamecheo polling station 2 of 2 also adopted his affidavit filed in response to the petition. He had prepared form 36A for his polling station.

RW7 Carren Kemunto Ondara also placed reliance on her affidavit she adopted the contents of her affidavit as her evidence in chief. She was the presiding officer at Rikendo polling station 2 of 2. She prepared and signed the form 36A for Rikendo 2 of 2. According to her, the elections were free, fair and verifiable.

The 3rd respondents case:

The 3rd respondent testified and called eight (8) witnesses including himself.

1. Chacha Maina Charles, RW8
2. Alfred Nyangeri Nyandoro, RW9
3. Jared Ombati Tongi RW10
4. Amboga Paul Onwonga RW11

5. Tom Gesicho RW12
6. Edward Keraha RW13
7. Musa Nyahaga Mobisa, RW14
8. Wycliffe Maranga Omoke RW15

Each adopted and placed reliance on his affidavit being his evidence in chief. Advocate for the parties had agreed that each witness would adopt the contents of his/her affidavit in chief and be cross-examined on the same. When asked questions by Mr. Kibet for the 1st and 2nd respondents, Mr. Chacha Maina Charles told the court that he was a current MCA having garnered 1,758 votes. The 1st petitioner was in Jubilee while the 2nd petitioner was in PDP and they had agents who had signed form 36A. According to him, he had won the election fairly. He was asked questions by Mr. Moenga for the petitioners and he stated that Nancy Maina was his niece. He voted at Rikendo polling station before going round other stations to witness what was happening. According to him, the exercise was free and fair and he was validly elected.

According to Alfred Nyangeri Nyandoro a KSC party agent at Rikendo polling station 1, the exercise went on well. He did not witness any anomaly and the exercise was free and fair.

Jared Ombati Tong'i RW10 was a Narc Kenya agent at Kabosi polling station 1 stated that he did not witness any irregularities. Everything went on well and the exercise was free and fair. His candidate got one(1) vote and he was satisfied. RW11 Anchonga Paul Onnonga was a KSC agent at Irungu polling station 1 of 1. He did not witness any irregularity. Everything went on well.

RW12 Tom Gesicho an ODM party agent at Nyamecheo polling station 2 accepted the result. Voting went on well.

RW13 Edward Karaba a KSC agent at Rikendo polling station 2 told court that the elections were free and fair.

RW14 Musa Nyabuga Mobisa, a KSC agent at Kirwa polling station 1 told court that the election was free and fair and he was satisfied with the exercise.

RW15 Wycliffe Maranga Omoke, the chief agent for Chacha Maina Charles told the court that according to him, the elections were free, fair, credible and verifiable and IEBC did a good job. He had access to all polling stations except Nyankororo.

The 3rd respondent closed his case and so soon thereafter on 17.1.2018; the court delivered a ruling on the application for scrutiny and recount which had been deferred until the hearing and/or the taking of evidence on the petition. In about half of the polling stations, the court conducted scrutiny and recount and in the other half, the court conducted a recount only and a report was prepared which report was prepared which report forms part of the record.

Now that the petitioner told court that he was relying on the contents of his affidavit in support of the petition, we have to go back to the petition and the supporting affidavit to discern his complaint. The petitioner complained that at Nyankororo Primary School polling station, the presiding officer declared the results for MCA last contrary to regulation 75 of the elections, general regulations 2012 which gives the order as:

- a. President
- b. M.P
- c. MCA

- d. Senator
- e. County Women Representative
- f. County Governor

They further complained that the presidential vote cast were lower than the MCA votes in some polling stations. That due process was not followed in the transmission of results. That there was bribery and voters were being advised on whom to vote for and were improperly influenced; that voters were denied their right to vote. They further complained of impartiality, neutrality, inefficiency, inaccuracy and non accountability on the part of the 1st and 2nd respondents; stuffing of ballot boxes.

The duty of this court is to analyze all the evidence on record and to determine whether the member of county assembly election for ibeno ward was conducted within the law or whether as alleged by the petitioners the said elections were marred with such irregularities as to render the elections unconstitutional, illegal null and void and liable of being quashed. The petitioners have made allegations against the respondents. The burden of proof lies on the shoulders of the petitioners, section 107 of the Evidence Act Cap 80 laws of Kenya. The petitioner has to prove or show the existance of facts pointing to the unconstitutionality, illegality and nullity of the elections. Every citizen has the right to free, fair and regular elections. Free and fair elections are by secret ballot free from violence, intimidation, improper influence or corruption and conducted by an independent body, transparent and administered in an impartial, neutral efficient, accurate and accountable manner.

The method used should be simple, accurate, verifiable, secure, accountable and transparent. The votes cast should be counted tabulated and the results announced promptly by the returning officer at each polling station. The results from each polling station should be openly and accurately collated and promptly announced by the returning officer. Structures should be put in place to eliminate electoral malpractices.

Whoever desires any court to give judgement as to any legal right or liability dependent on the existance of facts that those facts exist. When the person is bound to prove the existance of any fact, it is said that the burden of proof lies on that person

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.

In this petition, the issues for my determination are:

- a. Whether the elections for member of county assembly Ibeno was were conducted in accordance with the constitutional principles of free and fair elections.
- b. Whether it has been proved that the elections were marred with illegalities, irregularities and malpractices.
- c. Whether the 1st and 2nd respondents manipulated the results in a manner that gave undue advantage to the 3rd respondent
- d. Whether the illegalities, irregularities and malpractices if any were so substancial as to have affected the outcome and results of the election.
- e. Whether the 3rd respondent was validly elected as the member of county assembly for Ibeno Ward.
- f. Were the elections accurate, verifiable, secure, accountable and transparent. Did the 1st and 2nd respondents commit electoral offences and/or were they in breach of the code of conduct.

g. What is the effect of failure to follow the order of announcement of results. Is it total. Presidential, MP, MCA, Senator, Women Representative, County Governor

h. Were any voters denied the right to vote, was the process of counting and tallying in accordance with the law.

i. Has it been proved that the 3rd respondent and/or his agents committed electoral offences, corrupt practices bribery.

j. Whether should be the order on costs.

On affidavit filed but whose deponents were not called as witness, I find the contents thereof of little or not of any value because the contents thereof were not tested on cross-examination

On alterations, evidence has to be led that there was an immoral unlawful and illegal motive. An amended document by itself does not speak of the motive behind the amendment. Without more an altered or amended document is as genuine as one which is not amended. Occasion may genuinely arise necessitating an alteration or an amendment.

Election petitions comprise a special category of cases that must be heard and determined within set statutory timelines. A petition seeking to nullify an election should clearly and decisively demonstrate that the conduct of the election was so devoid of merits and so distorted as to reflect the expression of the people's electoral intent and that the evidence should disclose profound irregularities in the management of the electoral process "Raila Odinga and 5 others, SCK petition number 5 of 2013".

When a party alleges non conformity with electoral law, the petitioner must not only prove that there had been non-compliance with the law but that such failure and non-compliance did affect the validity of an election. It is on that basis that the respondent bears the burden of proving the contrary. For acts of public bodies, all are presumed to have been done rightly and regularly. The petitioner must set out by raising firm and credible evidence of the public body's departure from the presumption of the law.

The petitioners sought orders of scrutiny and recount. In the cause of recount and scrutiny there were minor discrepancies noted. The discrepancies were minor and of material effect to the overall outcome of the results. At Nyamecheo Primary School polling station 1 of 2, I remember inquiring from the 2nd respondent which particular officer was in Charge of that station and he responded that it was one Elijah Mautia Oanya. I made this inquiry because the voters who had voted at 5.00 pm. The number of registered voters, the seals used at the end of counting for the sides and the other material had not been indicated. The contents of the ballot box were only the ballot papers, votes cast, nothing else.

For Irungu 1 of 1, the number of registered voters was 515. As at 5.00 pm 415 had voted and those on the que after 5.00 p.m. were 15.

At Kirwa 1 of 1, the number of registered voters was 336. Those who had voted as at 5.00 pm were 268 and those on the que after 5.00 pm were 3.

At Rikendo 1 of 2, registered voters, 358, those who had voted by 5.00 pm 263 on the que – zero. At Rikendo 2 of 2, registered voters 359, ballots cast 259 valid 255 rejected 4. Those on the que after 5.00 pm. - zero, at Rianganbi 1 of 2, registered voters 379. Those who had voted by 5.00 pm, 301 those on the que after 5.00 p.m. 13 voters. At Rianganbi 2 of 2 registered voters 379. Those who had voted by 5.00 pm –319. Those on the que after 5.00pm. -Nil. At Chirichiro 1 of 1, registered voters 650, those who had voted by 5.00 pm 355, those on the que after 5.00 pm 165. At Nyamagwa 1 of 2, total registered voters 396; those who had voted as at 5.00 pm, 317. Those on the que after 5.00 pm Nil. At Nyamagwa polling station 2 of 2, total registered voters 397. Those who had voted by 5.00 pm 333, those on the que after 5.00 pm Nil. At Gesere 1 of 2, Total registered voters 389, those who had voted by 5.00 pm 312. Those on the que after 5.00 pm – zero. At Gesere 2 of 2, registered voters 389. Those who had voted by 5.00 pm, 332 and those on the que after 5.00 pm – Nil

At Nyamecheo 1 of 2, it is indicated that the total registered voters was 634. 489 ballot papers were issued to voters and the ballots cast minus spoilt were 471. Ballot box No.304282 Nyamecheo 1 of 2 had 5 seals intact.

Mr Richard Kerima the 2nd petitioner insisted on comparing the numbers with those in the polling station diary. For the sides, they (the numbers) were not indicated for the apparatus, it was indicated as 0107652 which matched. At Nyamecheo Primary School Polling station 2 of 2, those who had voted as at 5.00 pm were 443 voters. The total number of registered voters was 634 and those on the que after 5.00 pm were 34. At Nyanturageo Tea buying Centre 1 of 2, the total number of registered voters was 660 voters. As at 5.00 pm 279 had voted and those on the que after 5.00 pm were 110 voters. At Nyanturago 2 of 2 by 5.00 pm 345 had voted and those on the que after 5.00 pm were 104 voters. The total number of registered voters was 661. At Nyankororo Primary 1 of 1, persons who had voted as at 5.00 pm 347 registered voters 469 and those on the que after 5.00 pm were 23. Inani Buying Centre 1 of 1, as at 5.00 pm 195 had voted, registered voters 287 none was on the que after 5.00 pm.

The stations I have mentioned above are those where there was both scrutiny and recount. For the others, there was only a recount.

I have had to reproduce these stations because at paragraph 21 of the petitioners submissions. They complain that the report prepared seemingly omits the information scrutinized as relates to the people who turned up to vote. I have read through the report and I have not seen any serious omission. I was in charge of the exercise and I took down notes. I have referred to my observation, the notes I prepared and the report compiled.

Nyamecheo 1 of 2 seems to have had some problems. However, **Judge J. A. Makain in Meru High Court Election Petition Appeal number 3 of 2013** observed “it is not every non-compliance or every act in breach of the election regulations or procedure that invalidates an election for being non-compliant with the law. Minor breaches will be ignored. Error is to human. Some errors in an election are nothing more than what is always likely in the conduct of human activity. If the errors are not fundamental they should be excused or ignored.

Even if the result for Nyamecheo 1 of 2 was to be ignored from the final results after the scrutiny and recount exercise it would not alter the outcome of the result.

At Nyamecheo 1 of 2,

1. Maina Charles Chacha got -97 votes
2. Benson Nyagaka Misaro got -85 votes
3. Onserio George Misaro -34 votes
4. Stephen Arika -137 votes
5. Paul Ondima Nyamweya -41 votes
6. Chrisantos O. Mayaka -24 votes
7. Alfred Makori Onguti -28 votes
8. Charles Masese Anyona -10 votes
9. Dairus Kiyaka Nyamboga - 6 votes
10. Dennis Omari Nyangweso -3 votes

11. Obed Moigi Ouko -4 votes
12. Jared Ochoki Ondimu -4 votes
13. Samwel Ben Getenga -2 votes
14. Moses Bosire Tongi -1 vote
15. Benson Momanyi Mabeya -1 vote

Should the above result be ignored from the final result – the 3rd respondent would still be in the lead.
Justice Kimaru in Malindi High Court election petition number 6 of 2013 Rishal Hamid Ahmed Amana versus IEBC and others stated;

“This court is not persuaded that an arithmetic error that does not fundamentally alter the outcome of the results can constitute an irregularity that the court should take into consideration as being a material factor. In the absence of other evidence of the irregularity which would lead to the nullification of an election result”. It has not been shown that where there were alterations that the alterations were made after the agents had signed nor the alterations were made to sabotage the democratic will of the people of Ibeno ward. The ballot boxes were sealed at the close of the whole exercise in the presence of agents. It has not been demonstrated that when the boxes were availed to court for scrutiny and recount. That they were not in the state in which they were when the agents had signed. There is no evidence that the seals used to seal the ballot boxes at the time of announcement of the results were not the ones on the ballot boxes at the time of recount and scrutiny.

The petitioners have raised issues not raised in their petition or supporting affidavits. This is contrary to the rules. The petitioner is bound by his pleadings at the trial and cannot be allowed to ambush the other party with grounds not pleaded in the petition or supporting affidavit. It has not been proved that more ballots were cast than the voters who actually turned up to vote where the form 36A's affixed on the ballot box were not signed, the one in the ballot box was found to have been signed.

It is time that Samwel Ben Getenga, who was a candidate in the election, his name was missing on form 36B. His name was however on all the form 36 A's. His agents gave him his results and he added up. It is the same result in the form 36 A. He garnered 26 votes in all polling stations. His only complaint is that his result was not captured. He was not among the top four (4).

Even if his votes was to be considered in the final tally it can not possibly interfere with the final result.

It has not been shown that announcement of the results without following the order of president, M.P, MCA, Senator, County Women Representative, Governor interfered with the final result. The petitioners were not prejudiced in any way.

It has not been proved that there was campaigning and bribery at polling stations. It has not been proved that the presiding officers and / or Deputy presiding officers in some stations assisted voters to vote for Maina Charles Chacha, the 3rd respondent. No such voter that was so assisted was called as a witness. Neither have the petitioners named the presiding officers and/or Deputy presiding officers involved. The polling stations affected have not been particularly pointed out. The petitioners have not named the presiding officers who denied the agents the chance or opportunity to witness when some voters were assisted to vote. No voter has testified and said he or she was denied the right to vote. No one has said he went to vote and was turned away for one reason or the other. One Omoke has been mentioned but he was not called as a witness neither did he swear an affidavit.

One Robinson Maranga Ratemo swore an affidavit in support of the petition but was not called to testify and / or be cross examined. The contents of his affidavit have not been tested in cross – examination. The said contents are therefore of little or no value. It is said the eight (8) voters were turned away by clerks at Irungu Primary School. No evidence has been led to that effect. The voters have not been

mentioned. They or any of them have not sworn an affidavit and / or been called as a witness none of the clerks who turned the voters away has been mentioned.

The 1st petitioner has not demonstrated what steps he or his party took after they were informed that they were not entitled to appoint agents in various polling stations within Ibeno ward and that Jubilee would appoint a common agent for all Jubilee party candidates. He did not write to complain. The party did not write to complain. This was before the elections kicked off. The allegation on non participation of Jubilee party agents will remain an allegation that has been proved. If the 1st petitioner and / or his party chose not to appoint agents, they can only blame themselves and nobody else.

Agents cannot be forced to sign the form 36A. If an agent chooses not to sign the form 36A; his refusal cannot invalidate an election.

It has not been demonstrated that the 1st and 2nd respondents deployed presiding officer's deputy presiding officers and clerks who were not impartial, neutral, efficient and accurate. The 3rd respondent is said to have had a daughter /niece/relative in one of the polling stations but it had not been shown what exactly the said relative did wrong that should lead to the invalidation of the election. It has not been demonstrated and/or proved that the 1st and 2nd respondents conspired with the 3rd respondent's agents to commit irregularities. It has not been proved that ballot papers were plucked, marked stuffed into the ballot boxes for member of county assembly. It has not been proved that some ballot papers were not accounted for at Nyamecheo polling station 1 even after going through the exercise of scrutiny and recount.

After going through the process of scrutiny and recount I did not witness a spoilt vote that had been counted in favour of a candidate as alleged by the petitioners. He alleged that at Rikendo Primary School, wrongly marked votes were counted in favour of the 3rd respondent. That is not true. It is not true because we all did a recount and scrutiny which did not show that wrongly marked votes had been awarded to the 3rd respondent but that at Rikendo polling station 2 of 2 one vote that had been awarded to Stephen Arika was rejected by the court for having two marks for different candidates. It is this one rejected vote that had been counted as valid in favour of Stephen Arika. -

The petitioners concern in their petition at paragraph 52, 53, 54, 55, 56, 57 and 58 on spoilt votes, rejected votes, sorting and counting and tabulation, has been answered by the exercise of scrutiny and recount conducted by the court.

There is no requirement that form 36 A be stamped – **see IEBC and another versus Stephen Mutinda Mule (2014) e KLR – Court of Appeal**

The petitioners never led evidence to the effect that extra ballot papers were used, that is illegal, unofficial and/or irregular ballot paper booklets were introduced to facilitate stuffing of ballot boxes with votes marked in favour of the 3rd respondent.

Electronics transmission and publication of result only applies to the presidential election. One can not therefore be heard to complain that the MCA result was not electronically transmitted.

It has not been proved that the 3rd respondent and /or his agents committed electoral offences of corrupt practices and / or of bribing voters. I find that the process of tallying and recounting was in accordance with law. The elections were accurate, verifiable, secure, accountable and transparent. Evidence has not been led to prove that the 1st and 2nd respondents were in breach of the electoral code of conduct. It has not been proved that the 1st and 2nd respondents committed electoral offences. It has not been proved that the 1st and 2nd respondents manipulated the results in a manner that gave undue advantage to the 3rd Respondent. The illegalities, irregularities and malpractices complained of were so minor. They could not have affected the out come and result of the election.

The petitioners have not proved that the election results were interfered with or manipulated in the manner suggested or in the manner that would lead to invalidation of the election result.

I find that the 3rd respondent was validly elected as the member of the county assembly for Ibeno ward.

The petitioner's petition is hereby dismissed with costs to the respondents.

The costs are capped at Kshs.500,000 to the 3rd respondent and Kshs.300,000 to the 1st and 2nd respondents.

A certificate of the determination to issue and the speaker of the county to be notified accordingly.

E. A. OBINA

SENIOR RESIDENT MAGISTRATE

Dated, signed and delivered in the open court this 27th day of February 2018 in presence of:

1st petitioner – present

2nd petitioner – present

2nd respondent – present

3rd respondent – present

Court clerk -

ADVOCATES

Mr. Moenga for the petitioners Mr. Mboya Oguttu for the 3rd Respondent

Mr. Rigoro for Kibet the 1st and 2nd respondent.

E. A. OBINA

SENIOR
27/2/2018

RESIDENT

MAGISTRATE

Court: The judgement to be supplied to all the parties together with the other proceedings before close of business on 28/2/2018.

E. A. OBINA

SENIOR PRINCIPAL MAGISTRATE

27/2/2018