



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT
AT MALINDI
ELECTION PETITION NO. 7 OF 2017
(SHELLA WARD)

MOHAMED TWAHER ABDULKARIM..... PETITIONER

VERSUS

INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION (IEBC)1ST RESPONDENT

MASHA SUDI 2ND RESPONDENT

KADENGE MWATHE THE ADAMSON 3RD RESPONDENT

JUDGMENT

Introduction

The Petitioner not being satisfied with the outcome of and declaration of the 3rd Respondent as the winner of Member of County Assembly for Shella Ward in the General Elections held on 8th August, 2017, filed this petition. In that election, the Petitioner was one of the contestants of Member of County Assembly (MCA) seat in Shella Ward, Malindi Constituency, Kilifi County, wherein the 3rd Respondent was declared the winner garnering 6,234 votes and the 1st Petitioner being declared the second by garnering 3,784 votes.

In support of the petition, a total of sixteen (16) affidavits were filed by the Petitioner and other persons who were to be called as witnesses. However at the hearing of the petition eight (8) witnesses who swore affidavits testified.

The 1st and 2nd Respondents opposed the Petitioner's petition filed on 9th September, 2017, by filing their responses and affidavits (witness affidavits) and four (4) witnesses testified. The 3rd Respondent opposed the petition by filing his response and affidavits. Three (3) witnesses testified for the 3rd Respondent.

Petitioner's case

Various allegations were made by the Petitioner in the petition.

1. The Petitioner contended that the 1st and 2nd Respondents violated constitutional provisions particularly **Articles 38(2) (a), 88(4) (h) 88(5), 81(a) (d) (e) (u) (iii) (iv) (v), 84, 86(d), 88** and or other legal obligations namely **Section 109** of the Elections Act 2011 and Part XII, XIII of the Elections (General Regulations, 2017).

2. The Petitioner contended that the 1st and 2nd Respondents deliberately intimidated the Petitioner's agents from raising complaints and that where the agents were adamant, they were ejected out of the polling station and tallying centre. That the 1st and 2nd Respondents were hostile, unfriendly and intimidative to the Petitioner's agents. That most polling stations opened late and closed early.

3. The Petitioner further contended that the agents were placed that far at the polling stations that they were not able to verify the identification at the voter register (Manual Register) and KIEMS kit and were also not able to ascertain how many ballot papers were given to voters.

4. The Petitioner contends that the 1st and 2nd Respondents allowed persons who were not registered as voters to vote which action affected the results of the election.

5. That the 1st and 2nd Respondents were biased, when it came to assisted voters by the Presiding Officer inciting voters to cast their votes in favour of Orange Democratic Party (ODM).

6. The Petitioner accused the 1st and 2nd Respondents of not allowing the agents to verify votes during sorting out and counting of votes and that they further allowed the ODM agents and supporters to campaign in and around the polling stations in disregard of the law.

7. The Petitioner contended that the 1st and 2nd Respondents declared results at Sir Ali Bin Salim Primary School Polling Station number Eight (8) without the declaration of results Form 36A being signed by the Presiding Officer and further that they declared results at Town Primary School Polling Station number 1 and 2, Airport Primary School Polling Station number 4, Al Nidhamia Women Group Hall Polling Station number 2 and 4, Upweoni Primary Polling Station number 1, Karima Primary Polling Station number 5, 6 and 7, Uhuru Gardens Polling Station number 4, Malindi High School Polling Station number 2 and 3 and Sir Ali Bin Salim Polling Station number 1, 2, 3 and 4 without declaration of results Form 36A being stamped.

8. That the aggregate unlawful votes (results) are 6,234 while the margin of votes between the declared winner and the candidate who was number 2 (Petitioner) is 2,450.

9. That for the undermentioned reasons, there were no results declared for the election of Member of County Assembly for Shella Ward;

a) The results were declared in Form 35B and not Form 36B as required by law.

b) Form 35B was clearly indicated to be for a declaration of Member of National Assembly, not Member of County Assembly.

10. The Petitioner also alleged that the election as conducted by the 1st and 2nd Respondent, was not based on universal suffrage and free expression of the will of electors, was not free from influence and corruption, was not transparent, accurate, accountable and further that the 1st Respondent was not independent, impartial, neutral, and or efficient.

Consequently, the Petitioner asked this Honourable Court for a determination that;

1) The 3rd Respondent, Mwathethe Adamson Kadenge was not validly elected as Member of County assembly for Shella Ward.

2) A scrutiny and recount of votes in all polling stations in Shella Ward to ascertain the valid votes and correct number of votes the Petitioner and the 3rd Respondent obtained.

3) That the Respondents, jointly and severally to pay costs of the petition.

11. The 1st and 2nd Respondents denied all the contentions by the Petitioner and set out in detail the steps they took to ensure that the elections were free, fair, credible and in accordance with the laws of election and the Constitution 2010, including the use of KIEMS kits, engagement of stakeholders in the preparation of elections like training of the agents and their own staff and officers who were to preside over the elections, proper set-up of the polling stations and pulling up security measures at the polling stations and during voting. They denied any harassing or intimidation of the agents and further stated that no agent was ejected from the polling stations or at all and that no party was favoured when it came to assisted visitors. That no agent complained of the set-up of the polling stations as was designed where all the agents had a designate place and that where elections or voting materials delayed, time was extended to cover for the time lost. It is the 1st and 2nd Respondents case that the aggregate to be lawfully declared as per Form 36B where the 3rd Respondent got 6,234 votes as against the Petitioner who got 3,784. It is the 1st and 2nd Respondents position that the results were announced and declared to all the candidates on 10th August 2017 and Form 36B being the declaration of results was issued to all the candidates on 14th August 2017 after receiving all Form 36As from the Presiding Officer.

According to the 1st and 2nd Respondents, the 3rd Respondent was declared the winner in the August 2017 elections on 10th August 2017 and not 14th August 2017 and further stated that the printer developed a problem on 10th August 2017 hence could not print the declaration of results in an A3 paper and that after notifying all the agents of the contesting parties of the problem, with the agreement of all the agents, he printed the results in an A4 paper but the agents refused to sign it. That also the contestants of the MCA seat refused to sign it saying they will sign the one printed in A3 paper once the printer will be in a position to print, and consequently Form 36B was filled and signed on 14th August 2017.

It was also the 1st and 2nd Respondent's position that only registered voters were allowed to vote. To the 1st and 2nd Respondents, if there were any defects on the forms, this did not invalidate the results as posted in Form 36As.

The 1st and 2nd Respondents asked this court to dismiss the petition with costs terming it as frivolous.

12. The 3rd Respondent denied all the allegations of the Petitioner.

13. The 3rd Respondent denied any scheme between himself and the 1st and 2nd Respondents to rig elections in his favour and further stated that during the election day neither himself or his agents harassed, intimidated or interfered with the activities of agents of other candidates. That he is not aware of any election or threat to any of the agents of his opponents or to his opponents by the 1st and 2nd Respondents and further that it is false that the agents were placed far away from the KIEMS kit or manual register that they could not verify the identification of the voters and also the number of ballot papers given to voters.

14. It is the 3rd Respondent's position that all voters who voted were registered and further that despite the results of Shella Ward being printed in Form 35B, the results in the said Form 35B all show the particulars for Shella Ward.

15. That the irregularities if any, made could not affect the outcome of the Member of County Assembly for Shella Ward.

16. The 3rd Respondent also denied the allegation that declaration of results was made on 14th August 2017 and further denied that to his knowledge, the 1st and 2nd Respondents vitiated the Constitution or

any election law or at all which tilted the election in his favour.

17. The 3rd Respondent asserted that he was given a certificate in Form 36C on 10th August 2017 at Barani Secondary School in the tallying room and that on 14th August 2017 they were going to get the results printed on A3 paper and further that on 14th August 2017, he did not go to the tallying centre but to the IEBC officers where he was issued with Form 35B, took it and signed it then went away.

It was the 3rd Respondent's position at the hearing of the petition that he did not know that a candidate can get or receive a certificate under Form 36C without receiving Form 36B and further that it is true that he got or received Form 36C without Form 36B. It is the 3rd Respondent's response at the hearing that he does not know that it is illegal to have Form 36C without Form 36B and that they told the returning officer that what was remaining was just paper work and that he could just declare the winner and that on the time of declaration of winner in Form 36C no Form 36B had been issued and further that he is the only candidate and person who signed Form 35B.

18. It is the 3rd Respondent's case in re-examination that the presiding officer had told them that a printer had collapsed and that the presiding officer prepared the documents in form paper A4 but that they refused to sign it.

19. The 3rd Respondent asked this court to dismiss this petition with costs terming it frivolous, vexatious and an abuse of the court process and that this court to reach a determination that he was duly elected, and further that the election was valid.

20. Having summarized each party's case as I have done, it is also important to talk about some legal matters that touch on and are crucial in determination of election petitions. The Constitutional principles governing our elections in Kenya are found under **Articles 38, 81, 83, 86 and 88** of the Constitution, **Section 109** of the Elections Act 2011, **Regulations 64(3) 79(6), 83, 66, 82(2), 72** of the Elections Regulations, amongst other provisions of relevant law.

21. It has been held in Raila 2 that an election is a process and the entire process should be within the law governing elections.

22. Unlike ordinary civil cases where the standard of proof is that of a balance of probability, in election petitions, the standard of proof is beyond the balance of probability but lower than beyond reasonable doubt which is required in criminal cases. It is referred to as intermediate standard of proof.

In Raila 2 [**RAILA ODINGA AND ANOTHER V. THE IEBC AND OTHERS (2017)** eKLR], it was held (by majority);

“In many other jurisdictions including ours, where no allegations of criminal or quasi-criminal nature are made in any election petition, an “intermediate standard of proof” one beyond the ordinary civil litigation standard of proof on a “balance of probabilities”, but below the criminal standard of “beyond reasonable doubt,” is applied. In such cases, this court stated in 2013 Raila Odinga case that the threshold of proof should in principle be above the balance of probability, though not as high as beyond reasonable doubt”

I am humbly guided by this authority, in the case before me.

23. In criminal and quasi-criminal cases, the standard of proof applicable is the one beyond reasonable doubt and in the case of **KHATIB ABDALLA MWASHETANI VS. GIDEON MWANGANGI WAMBUA (2014)** eKLR the court held thus:

“Purely from the consequences that flow from the finding that a person, is guilty of improper influence is serious conduct that has attributes akin to those of an election offence. It is now settled beyond peradventure that the standard of proof where an election offence or such conduct is alleged, is

proof beyond reasonable doubt”.

24. In an election petition, such as the one before me, it is the Petitioner to prove to the satisfaction of the court that there was not only non-compliance with the Constitution and the electoral law but also that the said non-compliance affected the outcome of the election.

Consequently in the case before me, the Petitioner has to prove that the irregularities alleged in the petition affected the will of the electorate. This was the case in **Raila Amolo Odinga v. IEBC and 3 others** (2013) eKLR where the Supreme Court held that:

“Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the Respondent bears the burden of proving the contrary. This emerges from a long standing common law approach in respect of alleged irregularities in the acts of public bodies, omnia praesumuntur rite et solemniter esse eeta; all acts are presumed to have been done rightly and regularly. So, the Petitioner must set out by raising firm and credible evidence of the public authority’s departure from the prescriptions of the law”.

Under the provisions of the Constitution herein I had already mentioned above and in particular **Articles 38(1) (2) (3) (a) (b), 81 (c) (d) (e) 83(3) and 86(a) (b) (c) (d)**, the elections should be free and fair, which reflects the will of the electorates, should be by secret ballot, free from violence, intimidation, improper influence or corruption, transparent, that are administered impartially, efficiently, accurately in accountable manner and transparent and that the voting method used is simple, accurate, verifiable, secure, transparent and that no votes are counted and tabulated and results announced promptly and that the mechanisms are put in place to eliminate electoral malpractice including the safekeeping of electoral materials.

25. For purposes of avoidance of doubt it is now triable law that all filed affidavits must be subjected to cross-examination to establish the credibility of the evidence that they contain failure to which such affidavits are not of much help to a court of law hence worthless. This is the position for any affidavit that was sworn and filed in this petition but for which the deponent was not called to testify. (See **Rule 12(3) (6) (13)** of the Elections (Parliamentary and County Elections) Petition Rules, 2017 and **MOSES WANJALA LUKOYE V. BENARD WEKESA SAMBU AND 3 OTHERS** (2013) eKLR and also the case of **NOAH MAKHALANG’A WEKESA V. ALBERT ADOME AND 3 OTHERS** (supra).

In the case of **MOSES WANJALA LUKOYE V. BENARD WEKESA SAMBU AND 3 OTHERS** (2013) eKLR, the court held as follows:

“The only safeguard design of the law is either the court does not consider such evidence at all or exercise its discretion under Section 80(1) (2) of the Elections Act and summon the witnesses. It must be appreciated that rule 12 of the election rules was deliberately tailored that the affidavits filed in an election petition are by persons whom the Petitioner intends to call as a witness. As an election petition is not an interlocutory application, but a substantive cause, affidavits evidence should be tested in cross-examination unless the parties consent to the admission of the evidence without calling the maker. If therefore, it bears repeating, the petition does not call the deponents to testify, that evidence should not be considered”

In **NOAH MAKHALANG’A WEKESA V. ALBERT ADOME AND 3 OTHERS** (supra), the court held as follows:

“In as much as the rest of the petitioner’s witnesses who deponed supporting affidavits were not availed in court for cross-examination for purposes of testing the veracity of their averments, their evidence though forming part of the petitioner’s case may be treated as being inconsequential and devoid of probative value”.

I am humbly guided by these authorities and therefore, save for the affidavits of the witnesses who testified in this case, the rest remains of less probative nature to this court for failure on the part of their deponents to come and testify for purposes of cross examination.

26. I have carefully looked at and considered the submissions by the parties herein. Consequently, the following issues which emerges from this petition are for determination.

- 1) Whether the Member of County Assembly (MCA) elections for Shella Ward, Malindi Constituency, Kilifi County held on 8th August 2017 was in accordance with the electoral laws.
- 2) Whether there was any electoral malpractice or irregularities in the said elections that affected the outcome of the election.
- 3) Whether the 3rd Respondent was validly elected as Member of County Assembly for Shella Ward, Malindi Constituency within Kilifi County on 8th August 2017 in the 2017 elections.
- 4) Who bears the costs of this petition.

In my view, the 1st and 2nd issues herein are intertwined and therefore I will consider them all together at a go.

i) Whether the Member of County assembly elections for Shella Ward held on 8th August 2017 was in accordance with the electoral laws or whether there were irregularities or malpractises which affected the outcome of the elections.

To make a proper finding on this issue, we must look at the way the elections for the MCA Shella Ward were conducted on 8th August 2017 by the 1st and 2nd Respondents and the various allegations made by the Petitioner in attempting to discharge his burden of proof.

(i) **Assisted voters**

After the scrutiny exercise, it is clear that there was a marked register (of hand copy) in the following polling stations as follows:

- a) Upweoni Primary School Polling Station number 1, 15 (fifteen) assisted voters.
- b) Malindi High School Polling Station number 2, 21 (twenty one) assisted voters.
- c) Sir Ali Bin Salim Polling Station number 1, 3 (three) assisted voters.

In the 8th August 2017 elections, there were two registers, electronic and hard copy register. Under regulation 72, it is a requirement that Form 32 be filled and that the presiding officer does mark the register in respect of the assisted voters whom he assists for a good reason. This is for purposes of fulfilling the **constitutional requirement** that an election should be transparent, accountable verifiable and credible and in the absence of Form 32, as is the case in this petition, the 1st and 2nd Respondents are not able to account for the assisted voters. No Form 32 was ever availed as evidence by the 1st and 2nd Respondent to this court. It is imperative that the register and Form 32 goes hand in hand, one assisting the other a supportive document for purposes of verifiability and accountability.

In the circumstances, there was irregular and unprocedural and illegal assisted voters and voting which obviously compromises **Article 86** of the Constitution.

(ii) **Invalidity of statutory forms**

The Petitioner alleged that the 2nd Respondent relied on forms not signed by the presiding officers, not stamped nor signed by the agents (Form 36A) to declare the winner of the elections. It was further the Petitioner's contention that Form 36C was issued to the 3rd Respondent before and without declaration of results in Form 36B as required by law. My understanding of the petitioner is that the results relied on to declare the 3rd Respondent as the winner were not authenticated nor verifiable. To the Petitioner, these resulted into unlawful aggregate votes which gave unlawful results. Upon conducting the scrutiny (inquiry) and inquiring report filed in court it emerged that:

At Al Nidhamia Women Group Hall Polling Station number 4,

- a) The total aggregate of invalid votes in this polling station was not indicated in Form 36A.

At Upweoni Primary School Polling Station number 1,

- a) Form 36A was not stamped by IEBC stamp, the number of valid votes cast was not indicated, the number of rejected ballot papers was not indicated and there was no indication as to the number of disputed votes.

At Karima Primary School Polling Station number 6;

- a) Form 36A was not stamped by the IEBC officers using IEBC stamp.
- b) In Form 36A, the votes for one Mohamed Abdul Karim were erased and changed from 86 to 21 but the erasure and change **not countersigned** by the presiding officer or any officer of IEBC.
- c) In Form 36A, votes for Nyanje Anderson Masha was erased and changed from 21 votes to 86 but the erasure and change not countersigned.

Even though the presiding officer made comments on the changes, it appears the agents **did not** sign anywhere of the approval.

At Uhuru Garden Polling Station number 4;

- a) Form 36A was not stamped by the IEBC officers as required.

Form 36B and 35B

The scrutiny exercise also revealed that indeed there were two forms all purported to have been used in declaring the results of the election by the returning officer (2nd Respondent)

Form 36B

- a) Is in A4 size paper which appears to be a white paper ordinarily used for photocopying.
- b) The form had no serial number
- c) The form had no IEBC stamp.
- d) The form had no IEBC logo nor water mark.
- e) The form is not signed by the agents for the candidates or by the contesting candidates for the MCA position.
- f) The form is dated and signed on 10th August 2017 by the returning officer (2nd Respondent)

Form 35B

- a) Has serial number (SN) NA003016-1.
- b) Has been signed by the returning officer.
- c) Has been stamped using IEBC stamp dated 14th August 2017.
- d) Has been signed by one KOMBO KARAU KANIKI
- e) Has watermark feature and IEBC logo.
- f) Is in original green-yellow colour paper.
- g) Is in A3 size paper.

Then there was another Form 36B in an A3 paper size and had the following features.

- a) Signed, stamped and dated 14th August, 2017 by the returning officer (2nd Respondent).
- b) Signed by M. KADENGE – ODM PARTY.
- c) Is of serial number CA0030160076-7.
- d) Has IEBC logo.
- e) Is in original brownish colour paper.
- f) Has watermark.

On the irregularities mentioned in Form 36A, it was the 1st and 2nd Respondent's position that the errors were human caused by fatigue due to long working hours during the election process.

It appears from regulation 79 of the General Regulations that only failure to sign a statutory form by an agent is the one that is excusable but not failure to sign a statutory form by a presiding officer or returning officer and is infact an election offence under **Section 6(i)** of the Election Offences Act.

In **MANSON OYONGO NYAMWEYA VS. JAMES OMINGO MAGARA & 2 OTHERS** (2009) eKLR, this is what the court had to say (**Musinga, J.** – as he was then) regarding failure to sign statutory form:

***“There was sufficient evidence that some presiding officers failed to sign and stamp Form 16A,
....***

In fact, it is an election offence for a presiding officer, without reasonable cause, to fail and/or refuse and stamp a form 16A including completing all the parts as required of him under the said regulation. These include the statistical part just above the names of the candidates, reason for refusal and/or failure of a candidate and/or his agent to sign the form and any necessary statutory comments. Such an officer is liable to imprisonment for a term not exceeding five (5) years. See section 4(g) of the election Offences Act. Where a presiding officer presents to the returning officer a Form 16A which is neither signed by the presiding officer and/or any of the candidate's agent, that declaration is of no value and cannot be used or authenticate any declared results.”

I am humbly guided.

The same position was reiterated in **abdikhaim Osman Mohamed & Another vs. IEBC & 2 OTHERS** (2014) eKLR (Court of Appeal).

In **James Omingo Magara vs. Manson Nyamweya & 2 others** (Civil Appeal No. 8 of 2010), the court held that;

“When a document is not signed by its author, it means that the author does not own it. It follows therefore that in this case the Forms 35 with no presiding officer’s signature were worthless and their results should have been excluded from the final tally”.

Faced by a similar situation, the Supreme Court in Raila 2 (majority decision) (**RAILA AMOLO ODINGA & ANOTHER VS. INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 2 OTHERS** (2017) eKLR, held;

“of the 4,229 Forms 34A’s that were scrutinized, many were not stamped, yet others, were unsigned by the presiding officers, and many more are photocopies. Five of the Form 34B were not signed by the returning officers. Why would a returning officer, or for that matter a presiding officer, fail, or neglect to append his signature to a document whose contents he/she has generated “Is’nt the appending of the signature to a form bearing the tabulated results, the last solemn act of assurance to the voter by such officer, that he stands by the numbers on that form”.

Where do all these inexplicable irregularities that go to the very hearts of electoral integrity, leave this election” It is true that where the qualitative differences in numbers is negligible, the court, as we were urged, should not disturb an election. But which of the numbers are themselves a product, not of the expression of the free will and sovereign will of the people, but of many unanswered questions with which we are faced.”

In a nutshell, from the authorities quoted, it is clear that the results from the stations (polling stations) I have mentioned already should have been excluded from the final tally.

Concerning the Form 36B (two of them) and Form 35B, it appears that the explanation given by the 2nd Respondent is that due to a defective printer which could not print the results in an A3 paper, he opted, with consultation with the agents and the contestants, who agreed, to print the results in an A4 paper, but that the agents and the contestants refused to sign the results in the A4 paper once it was printed. That this printing was done on 10th August 2017 and therefore results were declared on 10th August 2017 and not 14th August, 2017.

I have looked at the scrutiny (audit) report and noticed the shortcomings of the Form 36B in the A4 paper, which I had already highlighted herein, needless to repeat. It appears the 2nd Respondent, who was 1st & 2nd and 4th in the petition (Masha Sudi Mwakulonda) is not honest and is apparently misleading this court by his explanations for the following reasons:

The court notes that the witness did not produce an incident report.

1) It is most unlikely that agents and MCA contestants would agree that the declaration of results be made or printed in an A4 paper size which has no IEBC logo or watermark, and is not in the prescribed form (Form A3, IEBC paper), then refuse to sign it.

2) It was imperative for the witness (Returning Officer) to produce Forms 36As from all the forty two (42) polling stations so as to verify that what was in that an unofficial form, was what had been transferred from acceptable verifiable statutory Forms 36As. This **was not** done. The only thing the witness attempted to do was to compare the contents of results in the said Form 36B which is in A4 size paper, with which is contained in the Form 35B dated and signed on 14th August, 2017. This to me was not sufficient, and consequently the results in the said Form 36B in an A4 paper

size cannot be said to be verifiable in the absence of production of all Form 36As of Shella Ward by the 1st and 2nd Respondents (see NBI/HC/E.P.No. 14/17 **AHMED ABDULLAHI MOHAMAD AND ANOTHER VS. IEBC AND TWO OTHERS**).

The other question that strikes my mind is that if indeed there was a unanimous agreement by the agents and the contestants for the MCA position that the results can be printed later in an A3 paper once the printer is in a working condition, then how comes the other candidates except the 3rd Respondent, refused to sign the alleged Form 35B or even to say, the subsequent Form 36B?

From the foregoing, it is clear that the said Form 36B (in A4 size paper) Form 36B (in A3 size paper and Form 35B (in A3 size paper) are not verifiable, they fall short of credence and the results therein not capable of being accountable. This to me goes directly towards the credibility and authenticity of the results contained in those documents hence a violation of **Article 86 and 38** of the Constitution 2010. The consequence of all that I have said is that, to me, Form 36C (certificate) was issued to the 3rd Respondent by the 2nd Respondent on 10th August 2017 before the declaration of results in the statutory Form, 36B. At this point, it is also important to quote the answers by the 3rd Respondent upon cross-examination by **Mr. Abubakar**, counsel for the Petitioner on the 29th December 2017:

“I don’t know that declaration must be done in a prescribed form. On 9th August 2017, the declaration was made by word of mouth and Form 36C was given on 10th August 2017. Yes we refused to sign the results in Form 36B in the A4 paper because we told him to go and print the results in proper paper that we wanted then we can sign it in the proper paper” I did not know that a candidate can get or receive a certificate under a Form 36C without receiving Form 36B. Yes I got or received a Form 36C without Form 36B. I don’t know that it is illegal to have Form 36C without Form 36B”

From the 3rd Respondent’s own reply in cross-examination, it is clear that no declaration of results was made on 10th August 2017. Even assuming for a second that the declaration was first made by word of mouth as put by the 3rd Respondent, how can such a declaration be verified by the agents and the contestants for the MCA position or even the electorates? As I said earlier, it is clear that the 2nd Respondent’s conduct failed the test in Articles 38 and 86 of the Constitution and to me, this was grave.

In the said or quoted Election Petition Number 14 of 2017 (NBI), faced with a similar scenario, this is what the Judge had to say (**A. Mabeya, J.**); at paragraph 109:

“On the alleged “paper eating printer” or faulty and ineffective printers, that is the least that would be expected of the 3rd Respondent. An institution which gobbled over Ksh.49 billion for the said elections would not be expected to supply its officers with faulty equipments for use in such an important exercise. For the 3rd Respondent therefore to have supplied its officers with such equipment which affected the accuracy and efficiency of the election, is a tragedy. This allegation was therefore proved by the petitioner.”

The Supreme Court in **HASSAN ALI JOHO AND ANOTHER VS. IEBC & 2 OTHERS** at paragraph 94 and 95, held that declaration must be in a legal document with a legal force.

(iii) Intimidation of agents, hostility against agents and ejection of the agents (Petitioner’s agents) from the polling station.

The Petitioner contended that whenever his agents raised complaints about identification of voters and assisted voters, that they could be treated with hostility and intimidation by the presiding officers. The Respondents denied the allegations.

No evidence was laid before me in support of this allegations.

The allegation is dismissed.

(iv) Late opening of polling stations and delay in the beginning of the voting process.

The 1st and 2nd Respondent's witnesses, particularly 1 & 2 R 1, 1 & 2 RW 2 and 1 & 2 RW 4 admitted in their evidence in court that in most polling stations like Malindi High School, Town Primary School, the polling stations were opened late due to logistical problems and that they compensated for the lost time by extending the time of voting beyond 6.00 p.m. Ordinarily voting process starts at 6.00 a.m. and ends at 6.00 p.m.

The 1st and 2nd Respondent's position was that a ballot box for Member of County Assembly was misplaced at the warehouse and the presiding officers had to go to the polling station without the box (ballot paper box) which was later traced at 9.00 a.m. causing voting process to start at 9.00 a.m. at Town Primary School.

To me the explanation by the Respondents only reveals the inadequate preparation in the conduct of elections, yet elections are of great public interest and is the only way the citizens make a decision on how they want to be governed through their elected representatives. From the evidence tendered in court by the 1 and 2 RW1, when she got to the polling station at 9.00 a.m., she found when voters were in the queue and were yelling at them for arriving late. Consequently one is not in a position to tell how many voters got tired between 6.00 a.m. and 9.00 a.m. and decided to leave the polling station without voting and even though it is the Respondent's case that they extended time of voting, it is not possible by any scientific method or hypothesis to actually tell how many of those registered voters who left the polling station actually came back and voted.

In Raila 2, the court (Supreme Court) by majority held that election is a process and the entire process must be efficient, verifiable, free and fair and without any intimidation. To me the delay in the opening of the polling stations as we shall see herein shortly resulted into the constitutional principles I have mentioned above not met, yet they are the threshold of any proper election.

After the scrutiny exercise and the scrutiny report filed in court the following emerged:

- a) At Sir Ali Bin Salim Polling Station number 8, voting started at 7.52 a.m. and ended at 6.51 p.m. (one hour earlier).
- b) At Al Nidhamia Women Group Hall Polling Station number 4, voting started at 7.29 a.m. and ended at 6.34 p.m. (55 minutes earlier).
- c) At Upweoni Primary School Polling Station number 1, voting started at 6.56 a.m. and ended at 6.17 p.m. (39 minutes earlier).
- d) At Karima Primary school Polling Station number 5, voting started at 7.54 a.m. and ended at 6.20 p.m. (1 hour 24 minutes earlier).
- e) At Karima Primary school Polling Station number 7, voting started at 7.48 a.m. and ended at 6.41 p.m. (1 hour and seven minutes earlier).
- f) At Uhuru Gardens Polling Station number 4, voting started at 8.14 a.m. and ended at 7.17 p.m. (1 hour less three minutes earlier).
- g) At Malindi High School Polling Station number 2, voting started at 7.20 a.m. and ended at 6.45 p.m. (thirty five minutes earlier).
- h) At Malindi High School Polling Station number 3, voting started at 7.25 a.m. and ended at 6.20 a.m. (55 minutes earlier).

i) Sir Ali Bin Salim Polling Station number 1, voting started at 8.21 a.m. and ended at 6.39 pm. (1 hour 42 minutes earlier).

j) At Sir Ali Bin Salim Primary School Polling Station number 2, voting started at 8.03 a.m. and ended at 7.01 p.m. (1 hour earlier).

k) At Sir Ali Bin Salim Primary School Polling Station number 4, voting started at 7.58 a.m. and ended at 7.04 p.m.

To me these irregularities caused in regard to the time of opening and closing of the polling stations squarely flips on the face of **Article 38** of the Constitution and amounts to denying registered voters their right to vote, which is a political right. Indeed it is a violation of that provision of the Constitution and to me in my own right thinking, it affected the results of the elections.

(v) **Allowing persons who were not registered to vote to vote**

This allegation by the Petitioner was never proved. The Petitioner did not provide any name or list of those persons who may have not been registered voters yet they voted. Consequently this allegation fails.

(vi) **Not allowing the agents to verify votes during sorting out and counting of votes**

These allegations were equally not proved by the Petitioner, having failed to provide evidence.

(vii) **Allowing ODM Agents to campaign in and around the polling station**

Equally, just as in under (v) above the Petitioner failed to establish this allegation.

(viii) **That aggregate unlawful results are 6,234**

To me since audit of the valid and invalid votes for the entire Shella Ward was not done as the order for scrutiny for electoral materials was just for specific polling stations, establishing the unlawful results is not practicable. These could only be established by looking at the entire Form 36As of all the polling stations within Shella Ward. Consequently this allegation fails.

(2) **Whether 3rd Respondent was validly elected as the Member of County Assembly for Shella Ward, Malindi Constituency within Kilifi County**

To determine this issue, it is imperative to look at what the superior court said in **RAILA OMOLO ODINGA AND ANOTHER VS. IEBC AND 2 OTHERS** (supra).

In this case, the court held;

“At the outset, we must re-emphasize the fact that not every irregularity, not every infraction of the law is enough to nullify an election. We it to be so, there would hardly be any election in this country, if not the world, that would withstand judicial scrutiny. The correct approach therefore, is for a court of law, to not only determine whether the election was characterized by irregularities, but whether those irregularities were of such a nature, or such a magnitude, as to have either affected the results of the election, or to have so negatively impacted the integrity of the election, that no reasonable tribunal would uphold it.”

Under **Section 83** of the Elections Act 2011, ***“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 that election.”***

In Raila 2 (supra) the Supreme Court had an opportunity to look at **Section 83** of the Elections Act and

stated as follows:

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

In the case before me, the Petitioner has proved that the election of the Member of County Assembly (MCA), Shella Ward was not conducted in accordance with the Constitution and other law governing elections in our country, the irregularities, which are grave have also been proved as clearly seen when it comes to assisted voters, lack of or failure to make a declaration of results in Form 36B, invalidity of statutory forms used to declare the elections, and opening polling stations to time of beginning of voting which all put together could not make the election verifiable, fair, credible and accountable and consequently it is the finding of this court that the 3rd Respondent was not validly elected as the Member of County Assembly (MCA) for Shella Ward on the 8th August, 2017 General Elections and accordingly for purposes of recording herein and for purposes of clarity, the Petitioner, in my view acted within his legal statutory rights to file the petition within the timing he filed it, it cannot be rightfully be argued that the Petitioner filed the petition out of time. It is on the basis of the foresaid Form 35B and the entire contents of the form, including the date herein as written, signed and stamped by the 2nd Respondent then the Petitioner filed this petition on 9th September, 2017. This petition is accordingly not time barred. Form 35B shows that the purported declaration of results was made on 14th August 2017.

Costs

Costs follow events and consequently the Honourable Court awards costs of the petition to the Petitioner.

Disposition

Sincerely, the Honourable Court thanks all the counsel for their worthy contribution in prosecuting and defending this petition, the Petitioner having been represented by **Mr. Abubakar**, the 1st and 2nd respondents who were represented by **Mr. Munyithya** and the 3rd Respondent by **Mr. Omwancha** and **Ms. Onchango**. I must also thank the litigants for their patience, co-operation and calmness during the entire process of hearing and determination of this petition. I am also grateful to all the judicial staff of Malindi Chief Magistrate’s Court particularly the Court Assistants of this court for their administrative assistance and finally I must also merit myself for the energy, time and expertise and stewardship that I dedicated to the hearing and determination of this election petition. God bless you all.

Final Orders

- a) The petition succeeds and it is hereby allowed.
- b) The 3rd Respondent was not validly elected to the position of Member of County Assembly (MCA) for Shella Ward and his election is hereby declared null and void.
- c) The 1st Respondent to hold a fresh election in conformity with the Constitution and the Election act 2011, and other laws governing elections in Kenya Republic
- d) The 1st and 2nd Respondents do jointly and severally pay costs to the Petitioner to be taxed by the Executive Officer of Malindi Law Courts, which I hereby cap at Ksh.2,000,000/-. (Two Million Kenya Shillings).

It is so ordered.

Dated and delivered at Malindi this 6th day of March, 2018.

C.O. NYAWIRI

SENIOR RESIDENT MAGISTRATE

6/3/2018

In the presence of:

Petitioner/Advocate – Mr. Abubakar – present

1st and 2nd Respondent/Advocate – Mr. Ondego holding brief for Mr. Munyithya present

3rd Respondent/Advocate – Mr. Ondego holding brief for Mr. Omwacho present

C.O. NYAWIRI

SENIOR RESIDENT MAGISTRATE

6/3/2018