



**REPUBLIC OF KENYA**

**IN THE CHIEF MAGISTRATE'S COURT AT BUNGOMA**

**PETITION 3 OF 2017.**

**JEREMIAH KULOBA ..... PETITIONER**

**VERSUS**

**JOSEPH MAGUDAH OKHABA..... 1ST RESPONDENT**

**GREGORY ODHIAMBO OUKO ..... 2ND RESPONDENT**

**I.E.B.C ..... 3RD RESPONDENT**

**JUDGEMENT**

This petition filed by Jeremiah Kuloba contests the return of Joseph Magudah Okhaba as the member of County Assembly for Township Ward in Kanduyi Constituency following the general elections held on 8<sup>th</sup> August 2017. The declared results of the above election was as follows:

Haroun Suleiman Hamisi	615 votes
Jeremiah Kuloba	4550 votes
Joseph Okhaba Magudah	4561 votes
Ben Karuga Ndichu	1966 votes
Omar Swaleh Omar	249 votes
Rose Nanjala Wafula	229 votes

The Petitioner being dissatisfied filed this petition based on the grounds stipulated in page 1 to 5 of his petition and which can be summarized as follows.

1. That the election held on 8<sup>th</sup> of August 2017 for the Member of County Assembly for Township Ward in Kanduyi Constituency did not comply with the Constitution and the Electoral laws.
2. That the Respondents committed irregularities in the conduct of the election.
3. That the Respondents were involved in massive election malpractices or election offenses.

The Petitioner thus sought for the following reliefs:

1. An order for elaborate scrutiny of the principal voter register for Township Ward of Kanduyi Constituency and all documents related, including the polling day diaries and filed notebooks, a security of the used and unused ballot papers, BVR records for the polling day and a recount of all ballot papers cast during the election held on 8<sup>th</sup> August 2017.
2. An order for verification of all statutory forms 36A and form 36B.
3. A declaration that the 1<sup>st</sup> Respondent was involved in electoral malpractices, offences and therefore was not validly elected.
4. A declaration that the Petitioner was validly elected candidate and so be declared the valid winner of the Township Ward of Kanduyi Constituency Member of County Assembly seat.
5. A declaration that the entire electoral process in Township Ward of Kanduyi Constituency Member of County Assembly election from polling, counting, tallying and declaration of results was not only unconstitutional but also illegal and irregular. And that the process therefore is null and void, including the outcome and declaration of the winner for the member of county election.
6. A declaration that electoral process in Township Ward of Kanduyi Constituency Member of County Assembly election should begin afresh, given the massive and widespread electoral malpractices identified in this petition and information contained in the witness affidavits.
7. An order for payment of costs of this petition.
8. Any other order that this honourable court may deem necessary to grant.

The 1<sup>st</sup> Respondent in his response to the petition dated 05/09/2017, denied all the allegations against him.

The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed a joint response to the petition dated 05/09/2017 in which they denied the allegations against them by the Petitioner.

The parties then filed their statements of issues for determination and pre-trial directions taken.

At the hearing, the Petitioner testified as PW1 and called four other witnesses (PW2 to PW5) who testified in support of the petition.

At the end of the Petitioner's case, I heard the Petitioner's application for scrutiny and recount. After considering the application and the arguments, I allowed partial scrutiny and recount.

The 1<sup>st</sup> Respondent testified as DW5 and called four(4) witnesses DW1 to DW4. the second (2<sup>nd</sup>) Respondent testified as DW6. The 3<sup>rd</sup> Respondent called seven (7) witnesses other than DW6. They testified as DW7 to DW13.

### **Issues for determination**

It is not very clear from the Petitioner's submissions the issues he would wish to be addressed. However I have considered the issues the Petitioner filed on 11<sup>th</sup> October 2017 and the issues raised by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent in their submissions and the evidence on record and come up with the following issues.

1. Whether the Respondents committed any irregularities and illegalities in the conduct of the said election.
2. Whether the irregularities and illegalities if any are sufficient ground for nullification of the result of the said election.
3. Whether the Respondents were involved in any election malpractices or election offences.
4. To what extent did the election malpractices or election offences if any affect the result of the said election.

5. Whether the exercise of scrutiny and recount supported the Petitioner's allegations.

6. Whether the elections conducted on 8<sup>th</sup> August 2017 by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in respect of Township Ward of Kanduyi Constituency was in compliance with the constitution and the Election laws.

7. Whether the 1<sup>st</sup> Respondent was validly elected and declared as a member of Township Ward of Kanduyi Constituency.

8. Who should bear the cost of this petition.

### **The burden and standard of proof**

Section 107 of the Evidence Act 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 fact it is said that the burden of proof lies on that person.*

Under **Article 81 (e)**, the electoral system should comply with the principles of free and fair elections. Elections are free and fair when they are by secret ballot, free from violence and intimidation, improper influence or corruption conducted by an independent body, transparent and administered in an impartial neutral efficient, accurate and accountable manner.

**Article 86** provides that at every election the Independent Electoral & Boundaries 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 result announced promptly by the presiding officer at each polling station.

c) The results from the polling stations 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 safekeeping of electoral materials.

The burden of establishing the allegations of non-compliance with the constitution and the law, electoral malpractice, irregularities and illegalities which would result in the election being declared invalid rests on the Petitioner. The court will not interfere with the results of the elections unless it is established to the required standard of proof that such non-compliance with the constitution and the law, the irregularities and electoral malpractices complained of, render the said elections invalid.

In **Raila Odinga and others vs Independent Electoral and Boundaries Commission and 3 others SCK Petition No. 5 of 2013 (2013) eKLR**, the Supreme Court held that the Petitioner bear the **burden of proof**. It observed that:

*“This emerges from a long standing common law approach in respect of alleged irregularity in the acts of public bodies, **omnia praesumuntur et solemniter esse acta**, all acts are presumed to be done rightly and regularly. So the Petitioner must set out by raising firm and credible evidence of the public authority departures from the prescriptions of the laws”*

As regards the **standard of proof**, the court went further and held that

*“The threshold of proof should in principle, be above the balance of probability, though not as high as beyond reasonable doubt save that this would not affect the normal standards where criminal charges linked to an election, are in question.”*

The circumstances under which the election court will invalidate an election are set out in **Section 83** of the **Election Act**. Although this provision was amended by the **Election Laws (Amendment) Act, 2017 (Act No. 34 of 2017)**, the amendment, which came into force on 2<sup>nd</sup> November 2017, is not applicable to these proceedings as it is not retrospective. Prior to the amendment, section 83 of the Act, which is applicable to this case, read 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.”*

Having the above background I will now look at the issues for determination

### **1. Whether the Respondents committed any irregularities and illegalities in the conduct of the election.**

The Petitioner stated that the election process was marred with massive irregularities and electoral malpractices that rendered the election untenable null and void. The petitioner did not give any specifics or evidence to substantiate his allegations. They remained mere allegation.

The Petitioner alleged that the 1<sup>st</sup> Respondent and his agents engaged in unlawful campaign and meetings outside the stipulated campaign period. There was no further evidence on this and this also amounted to mere hearsay.

#### **Assisted voters**

The Petitioner alleged that the 1<sup>st</sup> Respondent and his agents conspired with the elections officials where assisted voters were manipulated to cast ballot papers in favor of the 1<sup>st</sup> Respondent. His witness PW5 stated that

*“ At the start of the exercise the presiding officer refused to allow all the agents to observe what was going on in respect to the assisted voters. This went on for a while until 10:00am when he allowed us to witness after several complaints from the agents and observers.”*

Despite the fact that this was a serious allegation that would affect the votes for both the Petitioner and the 1<sup>st</sup> Respondent, the witness signed form 36A as agent of the Petitioner. No formal complaint was also raised by the witness or any other agent.

PW5 also stated that the ballot box was taken to the tallying center

without the top seal and that form 36A were signed before counting. On cross examination by Mumalasi, PW5 admitted that there was a top seal.

DW1 who was agent of ODM at Central Baptist Primary School where PW5 was also an agent stated that it is not true that agents were prevented from observing how voters in need of assistance were assisted. The agents were surrounding the ballot boxes. DW1 stated further that he signed form 36A and Allan, PW5, also signed. He stated that the agents could not accompany the ballot boxes to the Tallying Centre on the same motor vehicle as it was not enough to carry them all.

DW13 was the Presiding Officer at Central Baptist Primary School and stated that there was a top seal on the ballot box and the serial number was in the polling station diary.

I have considered the evidence of PW5, DW1 and DW13. PW5 stated that the ballot box had no top seal and in cross examination by Mumalasi he admitted that there was top seal. He further stated that he signed form 36A before counting without giving any good reason why he did so.

I do not believe PW5 was telling the truth.

PW2 also stated that *“voting went on well and smoothly until at around 8:00am when the agents to observe what was going on in respect to the assisted voters.*

*That the presiding officer was adamant that no agent should observe and/ or hear what the assisted voters wanted before proceeding to mark votes for them.”*

PW2 also alleged that the 1<sup>st</sup> Respondent interfered with the voting process for about 20 minutes.

DW2 who was agent of ODM and at the same polling station with PW2 stated that the 1<sup>st</sup> Respondent did not interfere with the voting process at all. That the 1<sup>st</sup> respondent voted and left. That PW2 signed form 36A and he also signed and they signed after counting was over.

DW2 also stated in his affidavit that the agents who were keen to observe whenever an assisted voter was being assisted were given the opportunity to do so.

DW10 who was the Presiding Officer at the polling station where PW2 and DW2 were agents stated that he did not deny any agent access to the polling station or to any statutory forms. That he did not eject any agent from the polling station or prevent any agent from observing how voters in need of assistance were assisted. He stated further that the 1<sup>st</sup> Respondent voted at the polling station and left without interfering with the voting process and that both the agent for Ford Kenya and ODM signed form 36A.

The evidence by DW2 is corroborated by the evidence by DW10 and since DW2's testimony contradicts PW2, I find that PW2's evidence is not reliable and I disregard the same.

Petitioner also alleged that some forms 36A were not closed and therefore subject to manipulation. However the Petitioner did not point out any form 36A which was manipulated and therefore the allegation is mere hearsay.

There were allegations of erasures alterations and/or over writing. These also remained mere allegations as there was no evidence that the erasures, alterations and/ or over writings were meant to give undue advantage to the 1<sup>st</sup> Respondent.

PW3 alleged that he saw one polling clerk issuing extra ballot papers to some voters and complained to the presiding officer. That during counting, the Presiding officer instructed them (agents) to sit far away from the counting desk and that the lights went off and they were forced to use lights from gas cylinder which were dim.

DW4 on the other hand was the agent for ODM in the same polling station with PW3. He stated that the lights never went off and they used electricity throughout.

DW4 also stated that PW3 never raised any objection that some voters were being issued with extra ballot papers. That it was the agents who arranged the tables and the agents sat around the table when counting was going on and they were able to see the ballot papers. That he signed form 36A and PW3 also signed.

I do believe DW4 since his testimony supports the contents of form 36A. On the other hand PW3's testimony suggests that the contents of form 36A not correct.

PW4 alleged that some voters were issued with 2 ballot papers.

DW3 who was agent for ODM and in the same polling station as PW4 stated that no voter was issued with 2 ballot papers.

That she signed form 36A and so was PW4 and another agent for Ford Kenya.

That none of them was forced to sign form 36A.

It is difficult to believe PW4. If she saw 2 ballot papers being given to some voters, why should she sign form 36A?

I find that PW4 allegation is not proved.

Therefore I find no evidence to prove that the respondents committed any irregularities or illegalities in the conduct of the said election.

## **2. Whether the irregularities and illegalities if any are sufficient ground for nullification of the result of the said election.**

Since I have made a finding that the Respondents committed no irregularities or illegalities, the issue of sufficient ground to warrant nullification of the result does not arise.

## **3. Whether the Respondents were involved in any election malpractices or election offences:**

### **i. Bribery**

Bribery is one of the election offences provided for in the **Election Offences Act No. 37 of 2016. Section 9** of the Election Offences Act creates the offence as follows

*1) A person who during an election period*

*a) Directly or indirectly offers a bribe to influence a voter to*

*i. Vote or refrain from voting for a particular candidate or political party.*

*ii. Attend or participate in or refrain from attending or participating in any political meeting, march, demonstration or other event of a political nature or in some other manner lending support to or for a political party or candidate.*

*b) In any manner unlawfully influences the result of an election.*

*c) Directly or indirectly, in person or by any person on his behalf, in order to induce any other person to agree to be nominated as a candidate or to refrain from becoming a candidate or to withdraw if they have become candidates.*

*2) A person who, during an election period, accepts or agrees to accept a bribe that is offered in the circumstances described in subsection (1) commits an offence.*

*3) A person who commits an offence under this section shall be liable, on conviction to a fine not exceeding two million shillings or to imprisonment for a term not exceeding six years or to both.”*

Bribery is therefore a criminal offence as well as an election offence and the standard of proof required is beyond any reasonable doubt.

The Petitioner alleged that the 1<sup>st</sup> Respondent directly and indirectly through his agents heavily and

unashamedly with impunity engaged in outright bribery and treating of voters prior to the election day and on actual polling day in various polling stations.

During his testimony, the Petitioner stated that he witnessed massive bribery at Moi Primary and Pinnacle Academy and reported to the Presiding officer.

Other than the Petitioner, there was no any other evidence adduced by any witness. There was no complaint file with the police and no investigation was carried out. Thus there was no cogent, credible and firm evidence to prove that the 1<sup>st</sup> Respondent and/ or his agent engaged in bribery and voter treating as alleged by the Petitioner.

The allegation of bribery and voter treating is therefore not proved.

## **ii. Violence and Harassment**

The Petitioner alleged that “... *that the 1<sup>st</sup> Respondent directly and indirectly through his agents and supporters engaged in physical violence against the supporters and agents of the Petitioner during campaigns and on the polling day.*”

Allegation of violence and voter intimidation or harassment is also a criminal offence and an election offence. The standard of proof required is therefore beyond any reasonable doubt.

The allegations by the Petitioner were not corroborated at all by any other evidence. There were no mention of the perpetrators or the victim(s) and I find that there was no credible evidence to support the alleged facts.

The allegation of violence and harassment of Petitioner’s voters therefore is not proved.

## **iii. Conspiracy and/ or Collusion**

The Petitioner alleged that the Respondents directly and/ or indirectly or by conspiracy and/ or collusion committed massive and widespread malpractices and/ or irregularities.

The Petitioner alleged that the conspiracy and/ or collusion by the Respondents were within his knowledge and several eye witnesses.

That the same was committed prior to the elections and during the elections.

Conspiracy is a criminal offence. The standard of proof required is therefore beyond reasonable doubt.

Other than the Petitioner’s allegation, there was no evidence to corroborate the same. There was no mention of the people involved in the conspiracy. The Petitioner’s allegations therefore amount to mere hearsay.

I therefore find the allegation of conspiracy and/ or collusion by the Respondents is not proved.

From the foregoing, I therefore find that the Respondents were not involved in election malpractices nor did they commit any election offence. Having made a finding that the Respondents were not involved in any election malpractices or election offence, the extent to which they affected the result of the said election does not arise and the fourth issue is dealt with.

## **5. Whether the exercise of scrutiny and recount supported the Petitioner’s allegations**

The result for the scrutiny and recount can be summarized as below:

### **1. Sinoko Primary School 1**

Petitioner

Undisputed votes            206

1<sup>st</sup> Respondent

Undisputed votes            187

NOTE

- 1) 1 vote is rejected.
- 2) 1 vote for Petitioner found in the votes for H.H. Suleiman is added to the Petitioner's votes
- 3) 1 vote alleged to overlap to another candidate is awarded to 1<sup>st</sup> Respondent
- 4) 1 vote with 2 marks is awarded to the 1<sup>st</sup> Respondent. One mark is clearly for the 1<sup>st</sup> Respondent and the other mark looks like an accidental scratch on the ballot paper.

**2. Sinoko Primary School 2**

Petitioner

Undisputed votes            203

1<sup>st</sup> Respondent

Undisputed votes            167

NOTE

- 1) 2 votes in which its alleged the mark overlaps are awarded to Petitioner.
- 2) 2 votes disputed are awarded to 1<sup>st</sup> Respondent.

**3. Moi Primary School 1**

Petitioner

Undisputed votes            205

1<sup>st</sup> Respondent

Undisputed votes            146

NOTE

- 1) 1 vote for the 1<sup>st</sup> Respondent is found in the votes for the Petitioner. The Petitioner's votes are reduced by one and the 1<sup>st</sup> Respondent's votes is increased by one.

**4. Moi Primary School 3**

Petitioner

Undisputed votes 174

1<sup>st</sup> Respondent

Undisputed votes 177

NOTE

- 1) 1 vote for the 1<sup>st</sup> Respondent found in the Petitioner's votes and deducted.
- 2) 2 rejected votes awarded to the Petitioner.
- 3) 1 vote added to the 1<sup>st</sup> Respondent which was found in the Petitioner's votes
- 4) 2 rejected votes awarded to the 1<sup>st</sup> Respondent by consent

**5. Moi Primary School 4**

Petitioner

Undisputed votes 184

1<sup>st</sup> Respondent

Undisputed votes 159

**6. Moi Primary School 5**

Petitioner

Undisputed votes 185

1<sup>st</sup> Respondent

Undisputed votes 165

**7. Bungoma DEB Primmery 1**

Petitioner

Undisputed votes 148

1<sup>st</sup> Respondent

Undisputed votes 122

**8. Bungoma High School 1**

Petitioner

Undisputed votes 133

1<sup>st</sup> Respondent

Undisputed votes 127

**9. Mupeli DEB Primary 1**

Petitioner

Undisputed votes 159

1<sup>st</sup> Respondent

Undisputed votes 234

NOTE

1) 1 vote for the Petitioner found in the votes for H.H. Suleiman and added to the Petitioner's votes.

2) 1 vote from the 1<sup>st</sup> Respondent votes rejected for having marks for 2 candidates

**10. Mupeli DEB Primary 2**

Petitioner

Undisputed votes 145

1<sup>st</sup> Respondent

Undisputed votes 230

NOTE

1) 2 votes for the Petitioner rejected.

2) 1 vote which was disputed is awarded to the 1<sup>st</sup> Respondent.

**11. Mupeli DEB Primary 4**

Petitioner

Undisputed votes 164

1<sup>st</sup> Respondent

Undisputed votes 211

NOTE

1) 1 vote rejected from the Petitioner's votes.

**12. Mupeli DEB Primary 5**

Petitioner

Undisputed votes 162

1<sup>st</sup> Respondent

Undisputed votes            210

NOTE

1) 1 vote rejected from the Petitioner's votes.

**13. Namachanja Secondary School 1**

Petitioner

Undisputed votes            196

1<sup>st</sup> Respondent

Undisputed votes            157

NOTE

1) 1 vote from the 1<sup>st</sup> Respondent's votes is rejected.

**14. Namachanja Secondary School 2**

Petitioner

Undisputed votes            179

1<sup>st</sup> Respondent

Undisputed votes            181

**15. Namachanja Secondary School 4**

Petitioner

Undisputed votes            159

1<sup>st</sup> Respondent

Undisputed votes            135

**16. Namachanja Secondary School 5**

Petitioner

Undisputed votes            176

1<sup>st</sup> Respondent

Undisputed votes            185

NOTE

1) 1 vote from the votes of the 1<sup>st</sup> Respondent's is rejected.

**17. Baptist Girls Secondary School 2**

Petitioner

Undisputed votes            86

1<sup>st</sup> Respondent

Undisputed votes            106

**18. Central Baptist Primary School 1**

Petitioner

Undisputed votes            83

1<sup>st</sup> Respondent

Undisputed votes            123

**19. Pinnacle Academy 1**

Petitioner

Undisputed votes            262

1<sup>st</sup> Respondent

Undisputed votes            132

NOTE

1) 1 vote from H.H.Suleiman found in the votes for the Petitioner and deducted.

**20. Bungoma M.T.C 1**

Petitioner

Undisputed votes            152

1<sup>st</sup> Respondent

Undisputed votes            167

**21. Bungoma M.T.C 2**

Petitioner

Undisputed votes            136

1<sup>st</sup> Respondent

Undisputed votes            165

**22. Bungoma G.K. Prison 1**

Petitioner

Undisputed votes 68

1<sup>st</sup> Respondent

Undisputed votes 121

**23. Kanduyi Showground 1**

Petitioner

Undisputed votes 194

1<sup>st</sup> Respondent

Undisputed votes 136

NOTE

1) It is indicated in form 36A and form 36B that the Petitioner got 192 votes and the 1<sup>st</sup> Respondent got 138. After scrutiny and recount it is found that the Petitioner got 194 votes while the 1<sup>st</sup> Respondent got 136 votes.

A summary of the votes for the Petitioner and the 1<sup>st</sup> Respondent is as follows:

<b>Polling Station</b>		<b>Petitioner</b>	<b>1<sup>st</sup> Respondent</b>
1.	Sinoko Primary School 1	206	187
2.	Sinoko Primary School 2	203	167
3.	Moi Primary School 1	205	146
4.	Moi Primary School 3	174	177
5.	Moi Primary School 4	184	159
6.	Moi Primary School 5	185	165
7.	Bungoma DEB Primary 1	148	122
8.	Bungoma High School 1	133	127
9.	Mupeli DEB Primary 1	159	234
10.	Mupeli DEB Primary 2	145	230

11.	Mupeli DEB Primary 4	164	211
12.	Mupeli DEB Primary 5	162	210
13.	Namachanja Secondary 1	196	157
14.	Namachanja Secondary 2	179	181
15.	Namachanja Secondary 4	159	135
16.	Namachanja Secondary 5	176	185
17.	Baptist Girls Secondary 2	86	106
18.	Central Baptist Primary 1	83	123
19.	Pinnacle Academy 1	262	132
20.	Bungoma MTC 1	152	167
21.	Bungoma MTC 2	136	165
22.	Bungoma G.K. Prison	68	121
23.	Kanduyi Showground 1	194	136
		<b>3,759</b>	<b>3,743</b>
<b>Polling stations not subjected to scrutiny and recount</b>			
24.	Moi Primary School 2	202	154
25.	Mupeli DEB Primary 3	135	206
26.	Namachanja Secondary 3	167	177
27.	Baptist Girls Secondary 1	88	118
28.	Pinnacle Academy 2	197	162
<b>TOTAL</b>		<b><u>4,548</u></b>	<b><u>4,559</u></b>

**Voters identified by KIEMS - vs - Cast votes**

The Petitioner contended that out of the 23 polling station which were the subject of scrutiny and recount, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents election officials allowed voters to cast their votes without being electronically identified through KIEMS Kit and that a total of 39 voters voted without being identified. According to the Petitioner the following polling stations were involved:

1. Sinoko Primary 1

2 votes

2. Sinoko Primary 2	9 votes
3. Moi Primary 3	2 votes
4. Mupeli DEB Primary 1	10 votes
5. Mupeli DEB Primary 2	4 votes
6. Namachanja Secondary 1	2 votes
7. Baptist Girls Secondary	4 votes
8. Bungoma M.T.C 1	1 vote
9. Bungoma G.K. Prison 1	2 votes
10. Kanduyi Showground 1	<u>3 votes</u>

39 votes

The Petitioner relied on a case from Ghana in which the Supreme court of Ghana in **Nina Addo Dankwa Akufo & 2 others - vs - John Oramini Mahama WRIS J1/6/2013**, which was tasked with interpretation of an election regulation which stipulated that:

*“The voter shall go through a bio-metric verification process.”* Doyse J. used the following at page 339 to explain what that regulation meant:

*“ This in effect means that every prospective voter must go through the process of bio-metric verification before casting his or her vote. Any votes that are therefore found to have been cast without his bio-metric verification stands risk of being nullified.”*

The 1<sup>st</sup> Respondent on his part stated that it is not always the case that the number of voters identified by the KIEMS equate to the number of the total votes cast.

The voter turnout identification details form which was availed to all the parties during the scrutiny and recount had the following note.

*“Important notice*

*We invite you to note that obviously there will be some difference between the figures of identified voters and the number of votes.*

*.....Please also note that the voters identified manually (without using the KIEMS Kits) or the voters non validated by the operators during the identification process are not counted as identified voters.”*

Section 44 of the Election Act mandate the IEBC to put in place a complementary mechanism for identification of votes and transmission of Election results that is simple, accurate, verifiable, secure, accountable and transparent.

It therefore follows that if a voter is not identified by the KIEMS Kit, the voter can be identified by other complementary mechanism which is in place. The Petitioner did not take this into consideration when equating the number of voters identified by the KIEMS kit and the number of total votes cast.

Further the Petitioner did not request to scrutinize the record of those voters who were totally not identified by the KIEMS Kit.

Therefore the Petitioner's contention that the votes cast in the ten polling stations totaling 39 votes were in excess of the identified voters cannot stand and it fails.

### **FORM 36A AND FORM 36B**

The contents of form 36A cross checked closely with form 36B. All the parties were provided with copies of form 36A and form 36B.

In form 36B the number of rejected ballots is not indicated in respect to the following polling stations,

1. Bungoma DEB Primary 1
2. Bungoma Medical Training College 1
3. Bungoma G.K. Prison 1

The reason given by the 2<sup>nd</sup> Respondent was that it was due to typographical error.

During scrutiny, 3 rejected votes were found for Bungoma DEB Primary, 4 rejected votes for Bungoma Medical Training College 1 and 3 rejected votes for Bungoma G.K. Prisons.

The rejected votes did not affect the votes for the Petitioner and the 1<sup>st</sup> Respondent.

Form 36A was found in all the ballot boxes and in most times the carbonated copies and they tallied closely with the contents of the ballot boxes.

Most form 36A were signed by agents of the Petitioner and for the ones that were not signed, there were no comment. Up to the time of filing the petition, there were no comments for not signing.

I therefore find that the result of the scrutiny and recount did not support the Petitioner's petition.

### **6. Whether the elections conducted on 8<sup>th</sup> August 2017 by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in respect to Township Ward of Kanduyi Constituency was in compliance with the Constitution and the Electoral laws.**

The Petitioner pleaded that there were diverse and massive breaches and violation of the constitution and Electoral law by the Respondents and that the same put the credibility of both the election process and the outcome thereof to question.

The Petitioner was under obligation to prove these allegations. From the arguments aforesaid, the Petitioner failed to prove these allegations and therefore I find that the election conducted on 8<sup>th</sup> August 2017 complied with the constitution and the Electoral law.

### **7. Whether the 1<sup>st</sup> Respondent was validly elected and declared as a member of the County Assembly for Township Ward of Kanduyi Constituency.**

I have already made a finding that the elections held on 08/08/2017 were conducted in compliance with the constitution and the Electoral laws.

Therefore the 1<sup>st</sup> Respondent was validly elected and declared as a Member of County Assembly for Township Ward of Kanduyi Constituency.

### **8. Who should bear the cost of this petition.**

Cost follow the event and an election court can award such costs. The costs ought to be adequate to

compensate the work done on the one hand and not to be so high as to unjustly enrich the parties or cause unwarranted dent on the public purse or undermine the principle of access to justice as provided for in the Constitution.

A total of 18 witnesses testified. I have noted the nature and quality of the submissions tendered and decisions relied on. Considerable time and research was employed in the preparation of the pleadings, the applications and the submissions as well as preparation of the witnesses and the hearing and find that a total award of Kshs. 500,000 on instruction fee is adequate for the Respondents

Having considered all the grounds in the petition and found that none was proved as required in law, I make the following final orders:

- 1. The petition be and is hereby dismissed with costs.**
- 2. The instruction fees for the 1<sup>st</sup> Respondent are capped at Kshs. 250,000 as well as the instruction of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent which are capped at Kshs. 250,000.**
- 3. The total costs shall be taxed.**
- 4. The Respondents shall share the security deposit in the ratio of 1 : 1 as between the 1<sup>st</sup> respondent on the one hand and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent on the other hand.**
- 5. A certificate of the determination of this petition in accordance with section 86 (1) of the Election Act, 2011 shall issue to the Independent Electoral and Boundaries Commission and the speaker of the County Assembly of Bungoma.**

Those are the orders of this court.

**Dated, signed and delivered in the open court at Bungoma this 28<sup>th</sup> day of February 2018.**

**G.P. Omondi**

**SRM**

In the presence of

Luyani for Watanga for the Petitioner

Ocharo for the 1<sup>st</sup> Respondent

Tsiomonjero for Barasa for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

C/A: Wesonga and Chebet

Luyani: I pray for certified copies of the proceedings and judgment.

Ocharo: No objection

Tsiomonjero: No objection.

Court: The Petitioner be supplied with certified copies of the proceedings and judgment upon payment of the requisite fees.

**G.P. Omondi SRM**

28/02/2018