



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE’S COURT AT EMBU

ELECTION PETITION NO. 1 OF 2017

IN THE MATTER OF THE COUNTY ASSEMBLY OF EMBU, MAVURIA WARD

AND

PATRICK NGARI NJERU
PETITIONER

VERSUS

INDEPENDENT ELECTORAL

AND

BOUNDARIES COMMISSION **1ST**
RESPONDENT

THE RETURNING OFFICER,

MBEERE

SOUTH CONSTITUENCY **2ND**
RESPONDENT

JOHN NGARI MBAKA **3RD**
RESPONDENT

1.3.2018

Coram

Before me. M.N. Gicheru – C.M.

Petitioner – Present

1st Respondent

2nd Respondent

3rd Respondent – Present

Mr. Gachuba for the Petitioner - Present

Miss Mbwiria holding brief for Kathungu for the first and second Respondent – Present

Mr. Njagi Wanjeru for the third Respondent – Present

J U D G M E N T

Patrick Ngari Njeru the Petitioner herein filed this petition on 6th September 2017 seeking, inter alia, a declaration that the election of John Ngari Mbaka the third Respondent as the Member of County Assembly for Mavuria Ward in Embu County is invalid, null and void.

The first and second Respondents have been joined in the petition because the first Respondent the Independent Electoral and Boundaries Commission, is the body that conducted the elections held on 8th of August 2017, while the second Respondent the Returning Officer for Mbeere South Constituency, is the one who declared the third Respondent as duly elected Member of County Assembly after garnering a total of 3,029 votes against the Petitioners 2,862.

The other orders sought in the petition include:-

- i. Scrutiny.*
- ii. Recount of all votes cast.*
- iii. A declaration that the petitioner was the validly elected candidate.*
- iv. An order that the first Respondent do issue a certificate of Election to the Petitioner.*
- v. Costs of the Petition.*
- vi. Any other relief and order that the court may deem just and fit to grant.*

The grounds for seeking to nullify the election of the third Respondent are found in paragraphs 13 to 23 of the petition and they are as follows:-

- 1. The first and second Respondents denied the Petitioner's agents reasonable participation in the vote count, tabulation, collation and transmission and thereby violated the National Values and Principles of Governance under Article 10 of the Constitution of Kenya.*
- 2. Refusal to accredit the Petitioner's agents contrary to section 42 of the Election Act 2011*
- 3. Denial of the Petitioner's agents a chance to scrutinize the cast votes thereby violating the Values and Principles of transparency, accountability and good governance.*
- 4. Use of inaccurate, insecure and unverifiable method of counting, tabulation, collation, transmission and announcement by the first and second Respondents thereby violating the general principles of the election system under Articles 81 and 86 of the Constitution of Kenya.*
- 5. That vote counting, tabulation, collation, transmission and announcement method adopted by the first and second Respondents was unfair, unlawful, unprocedural and inefficient and breached the Petitioners right to fair administrative action guaranteed under Article 47 of the Constitution.*
- 6. That the vote count, tabulation, collation, transmission and announcement method adopted by the first and second Respondents was not impartial, neutral, simple, secure, accurate, verifiable and accountable and is therefore contrary to Articles 81, 82 and 86 of the Constitution.*
- 7. That the first Respondent did not put in place appropriate structures and mechanisms to*

eliminate electoral malpractice and thereby breached Article 86 of the Constitution.

8. That the first Respondent used, accepted and transmitted forms 36A and 36B that were not duly signed by the Petitioners agents to declare the results for the member of County Assembly.

9. That the first and Second Respondents refused to display the tabulated and collated results on the wall at the polling stations and constituency tallying centre and thereby breached Regulation 79(2) (d) of the Elections (General) Regulations, 2012.

10. That non compliance with the Constitution, the Elections Act 2012 and the Electoral Code of conduct undermined the sovereign will of the people of Mavuria Ward to be represented by a member of the County Assembly of their choice.

In support of the Petition, the Petitioner filed an affidavit in which he lists the irregularities that happened at Gataka, Rurii, Kanothi, Iriamurai, Kavingori, Kaura ciri, Gatururi, Irabari and Karuiro polling stations.

The petitioner also filed affidavits by this agents who included Evans Kithaka, Tabitha Nginya, Eston Ileri Ngari, Annrita Karimi, Mercy Njeru, Nicholas Njue, Agnes Njeru, Moreen Muthoni and James Munene.

The complainants raised in the affidavits of the agents include:-

i. Being locked out of the tabulation and counting halls.

ii. Not given a chance to scrutinize the votes to verify their accuracy.

iii. The Presiding officers did not read out the full names of the candidates and where the only name read out was Ngari, it was not possible to tell which Ngari as both the Petitioner and the third Respondent have a similar middle name of 'Ngari'.

iv. The Presiding Officers did not display the tabulated results on the walls at the polling stations.

v. Some Presiding Officers made the Petitioners agents sign the results forms without letting them confirm the correctness thereof.

vi. Some Presiding Officers rejected the request of taking photographs.

vii. Some Petitioner's agents were not allowed by the Presiding Officers to witness the scanning and transmission of the results through the KIEMS Kit.

viii. The Petitioner's agents were not allowed at the tallying centre.

ix. The agents for the petitioner were not allowed to accompany the ballot boxes from the polling station to the tallying centre.

x. The results were not displayed on the wall at the tallying centre.

xi. The Petitioner's agents were not given a copy of the collated results from the polling stations.

xii. At Rurii polling station the Presiding Officer accepted as valid some ballot papers where the voters had written the candidates name at the back as opposed to marking them in the prescribed space on the face of the ballot.

xiii. At the same polling station the Presiding Officer accepted as valid votes ballot papers which had two marked boxes.

xiv. *At the same station the Presiding Officer declined a request to take a photo of the election results (form 36A).*

xv. *At Kanothi polling station, 120 votes were read out for “Ngari” without distinguishing which one.*

xvi. *At Iriamurai polling station, the Petitioner lost 7 votes after the presiding Officer declared them spoilt on the ground that the voters had marked on the Petitioners photo and not on the space provided.*

xvii. *At Kavingori polling station the Presiding Officer read the name John without differentiating between John Njoka Runji and John Ngari Mbaka the third Respondent making it impossible to tell which candidate the votes were cast for.*

xviii. *At Kauraciri polling station, the Presiding Officer did not allow the Petitioners agent to sign form 36A as he insisted that only three (3) people were allowed to sign. To date the agent does not know the result from that polling station.*

xix. *At Gatururi polling station, the Petitioner lost 3 votes after the Presiding Officer declared them spoilt on the ground that the voters had signed in the prescribed space as opposed to marking with either a tick or a cross.*

xx. *At Irabari polling station, Becky Mwendia who was well known to the Petitioner’s agent and is not an employee of the first Respondent read out the votes that the candidates scored.*

xxi. *At the same polling station the Petitioner lost three (3) votes after the Presiding Officer declared them spoilt on the ground that the voters had signed in the prescribed space as opposed to putting either a tick or a cross.*

xxii. *At Karuiro polling station the Petitioner lost 3 votes for the same reason as (xxi) above.*

Annexed to the affidavits were various certificates of appointment of agents, certificate of nomination of the Petitioner as a candidate, a duly executed electoral code of conduct by the Petitioner and his statutory declaration to the effect that he was legally qualified to contest as a candidate in the general election.

On 19th September 2017, the first and second Respondents through their counsel on record filed a response to the petition in which they denied each and every averment in the petition saying that they complied with the Constitution and Electoral Laws and the petition has no merit and should be dismissed.

The Returning Officer, Consolata Muthoni, swore a replying affidavit in which she deposes that the Petitioner’s agents were allowed into the vote casting hall. She adds the following:-

i. That the counting and tabulation of the cast votes was simple, accurate, verifiable, secure, accountable and transparent as the agents were in a position where they could clearly see what was going on as the whole process took place in a classroom save for Kauraciri where voting took place in a tent at the Chief’s office and a copy of Form 36A was displayed at the door to the Chief’s office.

ii. That the agent purportedly appointed by the Petitioner for Rurii is different from the one officially appointed on the appointment form.

iii. That the law provides for the space to be marked on a ballot paper by a voter.

iv. That there is no requirement that all agents of all candidates must accompany the ballot boxes from the polling station to the constituency tallying centre.

v. That the Presiding officers at Gataka, Iriamurai, Kauraciri, Karuiro and Irabari polling stations perused forms 36A and some of them even signed as per the five (5) annexures she has exhibited.

Further to the affidavit by the Returning Officer, Nathan Mwanja Kimeu the Presiding Officer at Karuiro polling station, Peter Nyaga Njue the Presiding Officer at Gataka polling station, Hesbon Njeru Nguku the Presiding Officer at Kanothi polling station, Rachel Kirigo Nderi the Presiding officer at Rurii polling station, Danson Mativo the Presiding Officer at Iriamurai polling station, Peter Muinde Musyoki the Presiding Officer at Gatururi polling station, Mercy Muringo Njagi the Presiding officer at Kauraciri Chiefs Camp, Simon Muriuki the Presiding officer at Irabari polling station and James Ndwiga Nyaga a candidate for the same post as the Petitioner and the third respondent swore replying affidavits.

In summary, they depose as follows:-

i. That they allowed the Petitioner's agents to scrutinize the accuracy of the process and that all agents present were allowed to confirm the accuracy of the results that went through the KIEMS Kits.

ii. That where the voters put their signatures in the prescribed space as opposed to marking with either a tick or cross the votes were declared as rejected.

iii. That copies of form 36A were displayed as required by the law.

iv. That polling station agents were not allowed to go to the constituency tallying centre since the candidates had different agents at the tallying centre.

v. That no agent was ejected from the counting hall and the agents who left did so on their own volition.

vi. That while announcing who each ballot was marked for, the Presiding Officers read all the three names of the Petitioner as Patrick Ngari Njeru and the third Respondent as John Ngari Mbaka especially at Kiritiri polling station.

vii. That while announcing who each ballot was marked for at Kanothi Primary School, the Presiding Officer read the full names of the Petitioner and the third Respondent.

viii. That at Rurii Primary School no ballots with names of the candidates marked on the back were accepted.

ix. That at Iriamurai polling station some ballots were rejected for having been marked elsewhere than in the prescribed box.

x. That at Gatururi polling station some ballots were declared rejected because they had not been marked as required by the law.

xi. That at Irabari polling station, it is the Presiding Officer who read out the candidates votes and not Becky Mwendia who is even unknown to the Presiding Officer.

xii. That the tabulation of the results was done in an open manner and the elections were conducted in a free, fair and credible manner.

On 22.9.17 the third Respondent filed a response to the petition in which he avers that the Petitioner lost the election fairly; that no malpractices were reported at the polling and tallying stations; that the Petitioner is on a fishing expedition; that the petition lacks merit as it is vexatious and frivolous, that all candidates were given an equal opportunity to present their agents; that the Petitioner's case is founded on allegations, hearsay, speculation and suspicion; that the third Respondent was validly elected and declared

winner and that the Petitioner is not entitled to the orders sought.

The response was not supported by an affidavit as required by Rule 12 (5) of the Elections (Parliamentary and County Election) Petition Rules 2017.

At the pre-trial conference held on 14.11.17 the parties recorded a consent in the following terms:-

“By consent of all the parties, it is agreed that the contested issue is the accuracy of the ballots counted, tabulated and announced and scrutiny is the way to resolve the dispute.”

Later on 22.11.17 an application was made by the third Respondent to revoke the consent order of 14.11.17. The said application was dismissed on 11.12.17 for reasons given in the ruling of the same date.

Pursuant to the above consent, scrutiny took place on 14th, 15th, 19th, 20th, 21st, 22nd and 23rd of December at the first Respondents warehouse at Kiritiri.

The Executive Officer Embu Law Courts was in charge of the exercise. He was accompanied by seven (7) officers from the station. The three counsel on record were present or were represented. The Petitioner and the third Respondent were also present together with their agents.

The report which complies with rule 29 of The Elections (Parliamentary and County Elections) Petition Rules, 2017 as regards scrutiny captures the material features of all the 46 ballot boxes and their contents.

Out of the 46 ballot boxes 37 were intact with all the seals in place. The remaining nine had one or more anomalies. Those with one broken seal were from Ngoiri, Gikondi, Rugongwe, Mutus stream 2 and Kauraciri polling stations. At Kirathe polling station two seals were missing. At Karuiro all seals were intact but loose leaving a gaping hole of 2cm at the edge. At Kauraciri polling station the ballot box had one missing seal and the aperture seal was broken with a gap of 1.05cm at the edge of the missing seal. At Mutus stream 1, one seal was missing and the other four were loose. At Gatirari polling station the ballot box was covered with a light green lid and one seal was loose revealing a gap of 1.1cm. Photographs showing the condition of each of the nine (9) boxes are annexed to the Executive Officer's report.

More importantly the report shows that the petitioners votes increased from 3029 to 3045, a variation of 16 votes (though the Executive Officer says 17) while those of the third Respondent increased from 3192 to 3211, a variation of 19 votes.

On 8.1.2018 the Petitioner filed a supplementary affidavit which is sworn by his agents present at the scrutiny namely John Mwangi and Peterson Njue. The affidavit discredits the results of Mutus polling station stream 2 and Irabari polling station on the following grounds:-

- 1. Broke seal.***
- 2. Absence of written complaints of the candidates.***
- 3. Absence of unused ballot papers***
- 4. Absence of counterfoils of used ballots***
- 5. Absence of statement on number of rejected ballots.***
- 6. Absence of written statements by the Returning Officer.***
- 7. Gaping hole in the ballot box.***
- 8. Absence of copy of results (Form 36A).***

9. Ballot No. CA00004431 marked in favour of Joseph Mwaniki Nyaga counted in favour of the third Respondent.

10. Ballot NO.CA 0004884 marked in favour of James Mwaniki Munyi counted in favour of Joseph Mwaniki Nyaga.

11. Ballot CA 0004728 marked in favour of Judith Mwendia Muriuki, John Njoka Runji and Patrick Ngari Njeru counted in favour of Patrick Ngari Njeru.

12. Ballot No. CA 00007683 at Kathuri polling station marked in favour of the Petitioner but rejected without explanation.

13. Ballot No. CA 0009589 at Karuiro polling station marked in favour of the Petitioner but rejected without explanation.

14. Ballot No. CA 0004139 at Kirathe polling station was not marked but counted in favour of the third Respondent.

15. Ballot NO. CA 00012172 at Iriamurai polling station stream 2 clearly marked in favour of the petitioner and rejected without explanation.

Consequently the Petitioner's agents depose that the total for the Petitioner should be 2879 while the 3rd Respondent total comes to 2867. This puts the Petitioner ahead by 12 votes.

In a replying affidavit filed in court on 11th January 2018 the second Respondent Consolata Muthoni replied as follows:-

1. That the written statements, the polling station diary, the printed copy of register of voters and the marked copy of register were not available as they were locked up vide an order of the High Court in High Court Election Petition 1 of 2017. A copy of the order is annexed .

2. That though two seals were found to be missing in Kiritiri polling station steam 2 the ballot box was intact and the correct results were recorded even though there is an error in Form 36A.

3. That the five (5) missing ballots were stray and could be in the other five (5) ballot boxes for President, Governor, Senator, Member of Parliament or Women Representative which were never opened during the scrutiny.

4. That the seals which are made of plastic could have been broken at the handling or transportation stages.

5. That the missing material at Mutus polling station stream 2 were erroneously placed in one of the other boxes and this can be attributed to the hectic activities after the counting exercise. However, the results tally with those in Form 36A which is duly signed by all the agents who were present.

6. That at Irabari polling station 12 copies of Form 36A were made by the presiding Officer one of which was placed at the door of the polling station and another copy issued to the Returning Officer at the tallying centre which she used to key in the results on Form 36B. This Form 36B a copy of which is attached is signed by 14 agents including the petitioner's. The Presiding Officer forgot through human error to seal in a copy in the ballot box but this did not affect the results in any way.

7. That the 3 ballots mistakenly counted in favour of the petitioner, Joseph Mwaniki and the third Respondent were counted in error which did not affect the overall result because the total votes in favour of the third Respondent increased by 3 votes to 166 as opposed to the earlier

margin of 163.

On 15.1.2018 the third respondent filed a replying affidavit which contains 59 paragraphs. He replied as follows:-

- 1. That he associates himself with the affidavit of the second Respondent.**
- 2. That the parties did not agree on the validity of ballot No. CA 0003361.**
- 3. That during the scrutiny the materials inside the ballot box at Kiritiri polling station stream 2 were intact.**
- 4. That the Executive Officer incorrectly recorded in the scrutiny form No. 16 that there were 5 rejected votes yet there were only 2 bearing numbers CAM 00015232 and 00015114 noted in the report.**
- 5. That the scrutiny also revealed that the counterfoil batch No. CA 15002-15050 had 49 ballots and not 50 owing to the unused ballot No. CA 00015001 which was recovered loose and recorded in the Executive Officer's report as item 5 of the unused ballot.**
- 6. That the ballot box for Mutus polling station stream 2 shows that it had been sealed with a lid meant for use in the election of the Women Representative showing confusion during the sealing of the ballot boxes. The correct lid for the box could not be obtained without a court order.**
- 7. That the Petitioner is not sincere and he is opportunistically challenging issues that were well sorted out by the scrutiny and agreed upon.**
- 8. That the Petitioner has not substantiated how he arrived at the total votes of 2879 for himself and 2867 for the third Respondent.**
- 9. That the scrutiny clearly shows that the third Respondent got an extra 17 votes to push his tally to 3210 while the Respondent got an extra 13 votes to push his final tally to 3042. In this regard the third Respondent has a table for all the 46 stations showing what was recorded in Form 36A, the results of the scrutiny and the variation.**
- 10. That the scrutiny revealed that the election materials had been properly secured and his initial apprehension in that regard was unfounded.**

On 22.1.18 the Petitioner field his last affidavit which was sworn by the same agents mentioned earlier. The affidavit which has 31 paragraphs repeats that some materials were not available that the scrutiny was a court process and the parties opinions and deliberations are immaterial; that the discrepancies affected the outcome; that there were mystery votes counted in favour of the third Respondents; that the Presiding officer of Mutus polling station was charged at Siakago Law Courts with an election offence; and that Gikondi polling station results ought to be nullified as the votes cast were 12 more than the used ballots found in the ballot box.

On 29.11.18 counsel for the first and second Respondents filed written submissions in which he identified four issues for determination as follows:-

- 1. Did the scrutiny and recount exercise that was carried out affect who won the election?**
- 2. Was the will of the people re-affirmed after the exercise?**
- 3. Do the technicalities observed in the exercise affect the results?**
- 4. Has the Petitioner established his case?**

Counsel is of the view that the scrutiny exercise confirmed that the third Respondent won the election and the exercise was conducted in accordance with the Constitution and Electoral Laws.

Several authorities were cited to support the submissions. They included the following:-

1. Hassan Abdalla Albeity vs Abu Mohamud Abuchiaba & Another eKLR 2013 where it said “the will of the people is expressed by the majority votes secured by the winning candidate and the primary duty of an election court is to sustain that will by giving it full effect.”

2. Morgan 2 others vs Simpson 2 Another (1974) ALLER 722 where the court held,” If the election was so conducted that it was in accordance with the law as to elections it is not vitiated by a breach of the rules or mistake at the poll provided that it does not affect the result of the elections.

3. Colonel Kizza Besigiye vs Yoweri Kaguta Museveni and Electoral Commission of Uganda, Presidential Election Petition No. 1/2001 where the Judge said, inter alia, “To my understanding therefore, the expression non compliance affected the result of the election in a substantial manner can only mean that the votes the candidates obtained would have been different in a substantial manner, it is were not for the non compliance substantially”.

4. Sarah Mwangudza Kai vs Mustafa Idd Salim and 2 Others. Election Petition No. 8 of 2013 Where it was stated “Election Petitions are not like ordinary civil suits. They are unique in many ways. Besides the fact that they are governed by a special code of electoral laws, they concern disputes which revolve around the conduct of elections in which voters exercise their political rights enshrined under Article 38 of the Constitution. This means that electoral disputes involve not only the parties to the election petition but also the electorate in the electoral area concerned. It is therefore obvious that they are matters of great public importance and interest and their resolution cannot be overemphasized. And because of this peculiar nature of Election Petition the law requires that they be proved on a higher standard of proof than one required to prove ordinary civil cases.”

5. Mbowe vs Elilifoo (1967) EA 240 where it was held “The burden of proof lies on the Petitioner. The standard of proof is higher than a balance of probabilities, and where there are allegations of fraud or election offences, a very high degree of proof is required.”

Given the above counsel submits that the petition is not proved to the required standard as no substantial errors were proved to vary the outcome and the petition should be dismissed with costs.

Counsel for the third Respondent filed his written submissions on 1.2.18. He raised the same issues raised by the counsel for the other Respondents about the will of the electorate and whether the errors were sufficient to change the outcome.

On the grounds raised in the petition counsel summarized them into one namely:- “....That the Petitioner was only aggrieved by the vote count, tabulation, collation, transmission and announcement ...” It was pleaded that the said electoral activities were so badly conducted or flawed such that they affected the subject election results.

It is the submissions of the third Respondent’s counsel that since it was agreed by consent of both sides that scrutiny was the only way or method to resolve the dispute, oral evidence was dispensed with and the court should decide the case with the evidence arising from the scrutiny exclusively.

Regarding scrutiny counsel submitted as follows:-

1. Scrutiny and recount established vote tallies in Form 36B were accurate. Only 8 votes for the petitioner were discredited while 3 ballots still remain disputed while only 4 ballots for the third Respondent were discredited.

2. Invalidation of ballots marked outside the box affected all the candidates with the third Respondent being most affected with 15 votes and the Petitioner 6 votes.
3. Ballot CA 0003361 was clearly marked in favour third Respondent as the intention of the voter can be discerned from the express tick.
4. Under regulation 76 (3) candidates Vote Tally Sheets are prepared before Form 36A so the Petitioner should not be heard to say that he got 64 votes when the tally sheet shows he got 57.
5. That under regulation 81 (l) (f) stray ballots are disregarded and not recorded in Form 36A.
6. That by the authority of High Court ***Election petition No. 1 of 2013 at Busia involving Philip Osose Ogutu*** vs Michael Ongura Aringo and 3 others it was held “A party who alleges must prove and even if the Respondents were silent on the averments, the Petitioner was not unburdened from proving the allegations that the ballot boxes were manipulated in favour of the third Respondent.
7. On interpretation of Section 83 of the Elections Act counsel cited a passage in ***Civil Appeal No. 36 of 2013 in the case of Issa Timany Abdalla vs Swaleh Salim and 3 Others as follows***, “... Given the complexity of administering a federal election, the tens of thousands of election workers involved, many of whom have no on-the –job experience, and the short time frame for hiring the training them, it is inevitable that administrative mistakes will be made. If elections can be easily annulled on the basis of administrative errors, public confidence in the finality and legitimacy of election results will be eroded. Only irregularities that affect the result of the election and thereby undermine the integrity of the electoral process are grounds for overturning an election”.
8. That under regulation 77 (2) (c) any ballot which bears marks or writing which may identify the voter shall be rejected and the Presiding Officer was justified in rejecting such ballots

a. That the scrutiny disproved the petitioners allegations and the petition should be dismissed with costs to the third Respondent.

The Petitioners counsel in his submissions filed in court on 12.2.18 identified two issues for determination namely:-

i. Whether the electoral process leading to the return of the third Respondent as the member of the County Assembly for Mavuria was valid?

ii. Who should pay the costs?

It is submitted by counsel as follows:-

1. That the Petition substantially succeeded because the consent order allowed prayers 1 and 2.
2. That the standard of proof is as stated in ***Raila Odinga & Others vs IEBC and 3 Others (2013) eKLR*** where the Supreme Court held “...”a Petitioner should be under obligation to discharge the initial burden of proof, before the Respondents are invited to bear the evidential burden. The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond reasonable doubt- save that this would not affect the normal standards where criminal charges linked to an election are in question”.
3. That Section 83 of the Elections Acts should be interpreted disjunctively and not conjunctively as happened in the case of ***Raila Odinga & Another vs Independent Electoral and Boundaries Commission and 2 Others in 2017*** also known as Raila 2 where it was held by the Supreme Court, “Guided by these principles, and given the use of the word ‘or’ in Section 83 of the Elections Act as well as some previous decisions, we cannot see how we can conjunctively apply the two limbs of that Section and demand that to succeed, a Petitioner must not only prove that the conduct of the

election violated the principles in our Constitution as well as other written law on elections that the irregularities or illegalities complained of affected the result of the election as counsel for the respondents assert. In our view, such an approach would be tantamount to a misreading of the provision.”

4. That under regulation 79 (4) and (6) it is mandatory for the Presiding officer to record the fact when agents fail to sign on the declaration form.

5. That failure by the Presiding Officers to seal in the ballot box the valid votes was a breach of Regulation 81 (1) (a) and (2) (a) of the Election Regulations which put the integrity of the election in doubt.

6. That Section 83 of the Elections Act excuses minor infractions not deliberate or negligent acts which affect the election result.

I have carefully considered the entire petition including the affidavits, the annexures, the reply to petition, the submissions by learned counsel for both sides as well as the case law cited and the ratio decidendi in the cases.

I commend the counsel on both sides for aptly capturing the law applicable including the burden and standard of proof and bringing it out in a simple and clear manner. I also find that all counsel on record assisted the court by complying with directions and sticking to the timelines.

I find that there are only two issues to be decided in this case:-

1. Was the election in question substantially conducted in accordance with the Constitution and the electoral laws or not?

2. Did the errors and omissions, if any, affect the result of the election?

To answer the two questions, we shall look at the petition, the grounds, the response, the affidavits and the applicable law. We shall also look at the results of the scrutiny.

I do not agree with the counsel for the third Respondent that the court will be guided exclusively by the scrutiny. An affidavit properly filed and served cannot be ignored by a court of law. It is part of the court record. It would unjust to fail to consider evidence properly on record.

In this petition all the grounds point at what happened after the voting was over. There is no complaint relating to voter registration, secrecy at the voting, undue influence, bribery, use of violence or force during the election period or any other illegal practice.

The twenty two complaints recorded earlier and raised by the nine agents of the Petitioner needed to be proved to the standard set out in the submissions by the counsel. They were to be proved to a standard higher than in ordinary civil cases but below the standard in criminal cases.

I find that the grounds in the petition have not been proved for the following reasons:-

Firstly, the response by the second Respondent which is supported by affidavits of the Presiding Officers from Karuiro, Gataka, Kanothi, Rurii, Iriamurai, Gatururi, Kauraciri and Irabari polling stations seriously and substantially answer the twenty two complaints. The annexures to the affidavits include Forms 36A signed by the same agents who claim to have been denied entry at the counting hall. The affidavits by the Petitioner’s agents raise more questions than answers. Questions such as,

1. At what time were they ejected from the counting hall?

2. When did they come back to the counting hall to sign the Form 36A?

3. Were they the only agents denied entry?

4. How did they Presiding Officers manage to compel them to sign the forms?

Secondly, at the scrutiny, where were the ballots or votes counted in favour of the third Respondent yet they had his name written at the back and not marked on the face? No such ballots were found. Yet under the law, the Petitioner was expected to prove this and all other allegations to a very high standard beyond a balance of probabilities and near beyond reasonable doubt.

Thirdly, the Presiding Officer has discretion under Regulation 77 (2) at the proviso, to either accept or reject a ballot paper on which a vote is marked.

a. Elsewhere than in the proper place

b. By more than one mark; or

c. Which bears marks or writing which may identify the voter .

There is an elaborate procedure in rule 78 of objecting to the rejection. There is nothing in the affidavits of the agents at Kanothi, Iriamurai and Gatururi polling stations to show that they raised objections to the rejections and I believe they were present.

Fourthly, there is no legal requirement that the agents at the polling station accompany the ballot boxes to the tallying centre. I do not think that all the 15 agents for the 15 candidates could have found room in the vehicle carrying the Presiding officer, his Deputy, the clerks the security officers and the election materials.

After affixing their seals, they could have followed the vehicle carrying the materials using different means of transport to the tallying centre and note any malpractice, if at all, along the way.

Fifthly, the second Respondent has given a credible explanation in her affidavit filed in court on 11.1.2018 as to why some materials could not be availed for scrutiny. They had been locked up vide a court order. She also explained that seals could be broken due to handling and during transportation and that the missing materials could have been erroneously placed in any of the other boxes.

This aptly brings to mind the authority earlier referred to in the case of **Issa Timamy vs Sweleah Salim Civil Appeal No. 36 of 2013** about officials without experience and making minor administrative mistakes.

It would be unjust to invalidate elections in the polling stations affected when the primary materials which determine the will of the voter are available. The missing materials were secondary and made from the primary ones.

Sixthly, when the scrutiny that took place in this case was consented to, I was happy about it. The reason is that in a close election, scrutiny, even if not requested for by the petitioner is one of most just ways of resolving the dispute. This was a close election with a gap of 163 votes separating the petitioner and the third respondent.

Ideally, scrutiny or recount of votes should be confined to the polling stations in which the results are disputed. This is provided for in rule 29 (4) of the Elections (Parliamentary and County) Petition Rules, 2017.

In this case, instead of confining the scrutiny to ten or so polling stations where there was alleged malpractice, there was wholesale scrutiny. This kind of scrutiny gave the Petitioner more than he had bargained for. It is no wonder that the third Respondent later opposed the scrutiny.

This unlimited scrutiny complete with the liberty to take photographs of the ballots wrongfully denied the Petitioner and the ones wrongfully marked for the third Respondent did not yield anything favourable to the petitioner. The 229 rejected votes did not seal the gap. It instead increased by 2 votes.

I find that the scrutiny was carried out in accordance with Article 10 of the Constitution in regard to participation of the people, inclusiveness, non discrimination, good governance, transparency and accountability.

I also find that the election was conducted in accordance with Section 81 of the Constitution. It was free and fair, conducted by secret ballot, free from violence and intimidation, improper influence or corruption. It was also conducted by an independent body which did not favour any of the 15 candidates.

Further, the election was transparent and administered in an impartial, neutral, efficient, accurate and accountable manner.

Finally, the voting method used was simple, accurate, verifiable, secure, accountable and transparent.

On the second issue for determination, I now come to Section 83 of the Elections Act 2011 which provides as follows:-

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

This provision was amended by Section 9 of Act No. 34 of 2017 dated 2nd November 2017 to make the it conjunctive. Before this, it was disjunctive and I agree with Mr. Gachuba for the Petitioner that the holding in ***Raila 2*** was that the provision should be construed disjunctively. The amendment does not affect this case because it came after the election and legislation does not apply retrospectively. In this case, section 83 will be construed disjunctively.

Were there errors and omissions in the elections at Mavuria ward? I find that there were errors and omissions in nine out of forty six polling stations.

Having already found that the elections were conducted in accordance with the Constitution and Electoral Laws, what remains is the second part of Section 83 i.e. whether non-compliance affected the results of the election.

I find that the errors and omissions did not affect the result of the election because even after the scrutiny, the third Respondent emerged the candidate with the highest number of valid votes cast in the election for Member of County Assembly for Mavuria Ward in Embu County.

For the above stated reasons, I find the petition by the Petitioner not proved to the required standard and I dismiss it with costs to the Respondents.

On costs, I find that there are 12 court appearances including today and scrutiny took seven (7) days sometimes goes into the night. On 11.12.17, costs of the application dated 22.11.17 were awarded to the Petitioner and the first and second Respondents and against the third Respondent.

Given the above circumstances I cap the costs at Kshs.500,000/= (Five hundred thousand) with a half of the costs going to the first and second Respondents and the other half to the third Respondent.

For avoidance of doubt the costs will be assessed in the usual manner if not consented to.

Certificate of validity of election to issue to the Chief Executive Officer, Independent Electoral and Boundaries Commission.

Right of Appeal 30 days explained.

M.N. GICHERU

CHIEF MAGISTRATE.

1.3.2018

MR. GACHUBA – I seek stay of execution on the costs for 60 days. I also pray for a copy of proceedings and judgment.

MR. NJAGI – The issue of stay of costs does not materialize. Costs have not been assessed.

ORDER – Stay of execution on costs allowed for 30 days. Copy of proceedings and judgment to be availed by 2.3.18 in the afternoon.

M.N. GICHERU

CHIEF MAGISTRATE.