



REPUBLIC OF KENYA
IN THE SENIOR PRINCIPAL MAGISTRATES COURT
AT VOI
ELECTION PETITION NO 2 OF 2017

GIDEON NDAMBUKI MUTHIANI..... PETITIONER

-VERSUS-

FRANK KICHOI..... 1ST RESPONDENT

JOSEPH MWAFONDO..... 2ND RESPONDENT

(MWATATE CONSTITUENCY

RETURNING OFFICER)

INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION..... 3RD RESPONDENT

JUDGMENT

On 6th September 2017, the Petitioner herein Gideon Ndambuki Muthiani moved to court under certificate of urgency with a myriad of grievances about the elections which had been conducted the previous month. That was the general elections which had been conducted on 8th of August 2017 by the Independent Electoral and Boundaries Commission (herein after called the 3rd Respondent). The third respondent is a body established under Article 88(1) of the constitution of Kenya. It is charged with the responsibility of conducting or supervising referenda and elections to any elective body or office established by the constitution of Kenya 2010 and any other elections as prescribed by an Act of Parliament (see Article 88(4) of the constitution of Kenya 2010)

In the said election, the Petitioner Gideon Ndambuki Muthiani (hereinafter called the Petitioner) had contested for the position of member of county assembly for Chawia ward, which falls under Mwatate constituency. In the said election, Frank Kichoi (hereinafter called the 1st Respondent) was returned as the winner, by the returning officer in charge of Mwatate Constituency, Joseph Mwafondo (hereinafter called the 2nd respondent), after he garnered a total of 1,363 votes against the Petitioner's 1,119 votes. It is the victory of the 1st respondent the petitioner contests in this petition and therefore seeks to invalidate.

In the main petition, the Petitioner seeks the following prayers;

- a) That it be determined that the said Frank Kichoi was not duly elected for (sic) Chawia ward and

his election should be nullified.

- b) An order do issue for securing of the papers that is all the materials used in the election from being interfered with or tampered with in a manner that could cause loss of evidence pending hearing and determination of the petition.
- c) An order do issue for scrutiny and recount of all the ballot papers in all polling stations in Chawia ward and specifically Kitivo Primary, Health Centre, Mruru Primary and Mwakitutu Primary.
- d) An order do issue declaring the Petitioner as the winner and or duly elected for (sic) Chawia ward and a certificate to that effect be given to the Petitioner.
- e) Costs of the Petition be provided for.

The hearing of the main Petition was preceded by the hearing of several applications. The first application to be canvassed was the Notice of Motion instigated by the Petitioner under Certificate of Urgency. It is the application filed on even date with the petition itself. The said application was largely allowed by the consent of the parties as all the key prayers were conceded to by the 1st 2nd and 3rd respondents. The gist of the said application was to secure the voting materials used in the aforesaid election, and supply of forms 36A for all the polling stations in the ward.

The second set of applications to be heard are the 1st Respondent's Notice of Motion dated 27/9/2017, and the 2nd and 3rd respondent's Notice of Motion dated 26/9/2017. The crux of those two applications is that all the respondents in this petition were seeking leave to file their respective responses to the election petition out of time. Both applications were allowed without any objection by the Petitioner.

The next application to be considered was the application dated 9/10/2017 by the Petitioner seeking leave to amend the petition. This application was followed by a preliminary objection by the 2nd and 3rd respondents dated 11/10/2017. The gist of the said Preliminary Objection is that the proponents of the same were contending that the Petition filed herein was incompetent, fatally flawed and defective for failure to comply with the mandatory provisions of Rule 8 (1) of the Elections (Parliamentary and County Elections) Petition Rules 2017. In his submissions before court, counsel for the 2nd and 3rd respondents, Mr. Omondi argued that the Petitioner had not stated the date of the elections and the results for each candidate, which he was contesting. The court after listening to and considering all the submissions by the parties, made prompt rulings determining all the interlocutory applications, and the preliminary objection raised.

On 27/10/2017, the 2nd and 3rd respondents filed another application. The said application was seeking for orders for dismissal of the Petition for alleged non-compliance with respect to the depositing of the security of costs. However on the date the said application was listed for hearing, the applicants sought leave to have the same withdrawn. With consent of counsel of the Petitioner, the said application was withdrawn.

On 13/11/2017 counsel for the Petitioner filed an application seeking to strike out the 1st respondent's supporting affidavit and response. The said application was heard and disposed of by the court through a reasoned ruling. As the matter was just about to be listed for hearing, the 2nd and 3rd respondents made a belated attempt to revisit the application dated 27/10/2017, by reintroducing the same on 4/12/2017. The court however, citing Rule 15 (2) of the Election (Parliamentary and County Elections) Petition rules 2017, hereinafter referred to as the petition rules, disallowed the said application.

The Petition was then listed for hearing proper and to fortify his case against the respondents, the petitioner apart from himself, called two additional witnesses. The 1st Respondent testified and did not call any witness, while the 2nd and 3rd respondents availed a total of seven witnesses.

PETITIONER'S CASE

As already stated, the Petitioner herein called a total of three witnesses including himself. He dispensed with the testimony of a fourth witness who albeit having sworn an affidavit in support of the petition, did not avail herself for adoption of the averments in the affidavit as her evidence in chief and be subjected to cross-examination by the other parties.

The petitioner gave the following as the grounds for seeking nullification of the declaration of the 1st respondent as the winner of Chawia ward Member of County Assembly;

- 1) Bribery of voters, petitioner's agents, the security officers and the 3rd respondents officials by the 1st respondent, his officials and/ or agents and financiers.
- 2) Intimidation, bullying and threats of voters perceived to be supporters of the petitioner by the 1st Respondent, his agents and financiers.
- 3) Blocking, chasing away and or refusal of the voters perceived to be the supporters of the petitioner from walking into polling stations and or accessing the polling stations by the 1st Respondent, his agents and financiers.
- 4) Intimidation, bullying, threatening, blocking, chasing away from polling station of petitioners agents and illegally compromising some of the petitioners agents by the 1st respondent, his agent and financiers.
- 5) Arresting one of the agents of the Petitioner by security agents before chasing him with orders to go away from the polling station just but to pave the way for rigging of the election.
- 6) Inflating the votes in favour of the 1st respondent and reducing votes of some candidates which were then added to the 1st respondent.
- 7) Wrongly, illegally and unlawfully withholding and or refusing to disclose to the Petitioner the votes he obtained in 15 polling stations to date.
- 8) Wrongly, illegally and unlawfully refusing to provide to the petitioner and or his agents his rightful copies of Form 36A from 15 polling stations and other materials of the election as to enable the petitioner ascertain the votes he obtained vis-a-viz other candidates as to enable the petitioner appreciate the outcome of the election.
- 9) Wrongly, illegally and unlawfully refusing to post and reflect on the screen at the tallying centre all the results from polling stations with a view to deliberately denying the Petitioner and the Public in general knowing the results from the above 15 polling stations as a cover up of the illegalities presided over by the officers of the 3rd respondent.
- 10) The 3rd respondent conducted and managed the election for Chawia Ward wrongly, illegally and contrary to the constitution and the provisions of the law.
- 11) The officials of the 3rd Respondent and the security agents deployed at the polling stations for Chawia ward deliberately allowed themselves to be influenced, compromised, controlled and or dictated to by the 1st respondent, his agents and or financiers specifically Gabriel Mcharo in violation of the constitution, the law and the general expectations of the public.

The above is an outline of the general grievances that the petitioner made in respect of the elections for Chawia Ward representative on 8/8/2017.

In addition to the foregoing grounds, the Petitioner swore an affidavit in support of the Petition. The same was sworn on 5th September 2017. In the said affidavit, he reiterated his contention that the 1st respondent had moved round during the campaign period, illegally bribing voters. That on 30/7/2017, the 1st respondent in company of his financier Gabriel Mcharo, Chairman of miners in Chawia Ward summoned village elders from Mruru and Manyanga villages and advised them to convene a meeting of all voters from within their villages, claiming that some senior government officials will be visiting them. That the said meeting was used to illegally make people attend and bribe voters. That the 1st Respondent gave a sum of Kshs 30,000/- to be distributed to those who attended the meeting at Mruru village. That he subsequently moved to Manyanya village and gave out a similar sum of Kshs 30,000/- for the same purpose.

The petitioner avers that the 1st Respondent's financiers prevailed upon the voters to accept the bribe and vote for the 1st respondent. That during the said meeting, the 1st respondent identified who the Petitioner's agents were and that he assured the voters that he will use all money possible to bribe them so as to abandon him (Petitioner)

The petitioner further contends that on 3/8/2017 Gabriel Mcharo held a night meeting at Montana bar and restaurant with some of his agents. That he gave them money and forced them to stop associating themselves with the petitioner. That on 4/8/2017, the 1st respondent in company of Mcharo moved to all corners of Kitivo, giving out bribes to voters within the range of Kshs 200- Kshs 500/- in the company of the Petitioner's agents. That this created confusion, misunderstanding and anxiety among the petitioner's supporters. That they feared being seen or associating with the petitioner. That the 1st respondent called another meeting in Kamtonga at the home of one pastor Percian Mwazighe and gave each person in attendance Kshs 500/-. That he also moved to Landhi and Madangonyi villages on the final day of the campaign and assured voters that he had already the Petitioners agents in his payslip.

The Petitioner contents that he subsequently held a meeting with his agents and they assured him that the meeting with the 1st respondent was only for getting money. That they reaffirmed their loyalty to him, but on voting day, almost all of them disappeared.

The Petitioner also states that on the night of 7/8/2017, the agents of the 1st respondent were still campaigning, and that they had gathered a crowd of voters at Kitivo. That they were later arrested and taken to Mwatate Police Station. That the following morning, Mcharo went to Mwatate Police Station and bailed them out on condition that they vote for the 1st respondent. That on voting day, the security officers deployed, looked out rightly biased by harassing voters who were perceived to be his supporters through instructions from compromised officials of 3rd respondent. That one of his agents in Kitivo was denied access to the polling station for 30 minutes, and she could therefore not do her duties at the station and she could not eventually ascertain if the ballot boxes were stuffed in her absence or not. That the officials of the 3rd respondent allowed Mcharo to walk in freely to Mruru Primary, Mwakitulu primary and Mwatate health centre polling stations for no other purpose but to influence the outcome of the election.

The Petitioner further claimed that there were pure threats and intimidation of voters who were perceived to be his supporters. That the 1st respondent and his agents threatened them that if they voted for the Petitioner, there would be ethnic war. That this created terror and fear within the Kamba Community. That the 1st respondent and his team had perceived him as an alien in the election and could therefore not assume leadership in the ward.

The Petitioner further contends that during polling day, many voters were disenfranchised after they were blocked by goons of the 1st respondent on the way to Mkuki Polling station as they were perceived by the 1st respondent to be his supporters.

The petitioner alleged inflation of votes in favour of the 1st respondent at Kitivo Primary School Stream

2. He also contends that Form 36B from Kitivo Primary School indicated that the 1st respondent had gained 208 votes contrary to what his agent told him that the 1st respondent had gained 197 votes. The petitioner contends that as at the time of announcement of results, only results from five polling stations had been displayed on the screen yet there was no reported failure of any kiems kit at any polling station. That he later learnt that the delay in displaying the results, was a ploy to enable the adjusting of votes by reducing those of other candidates and adding the same in favour of the 1st respondent.

The Petitioner contends that the officials of the 3rd Respondent had allowed themselves to be compromised at the constituency tallying centre in Kenyatta High School, hence affecting the integrity of the vote. That Gabriel Mcharo and two of the employees of the 1st Respondent had forced the 2nd Respondent to declare the 1st Respondent as the winner and issue them with a certificate. He urged the court to declare the election of the 1st respondent as the Member of the County Assembly for Chawia ward as null and void and order scrutiny and recount of votes.

PW2 is Sammy MutuaMwandi. He stated that he was an agent for Wiper Party assigned to Kamtonga Primary School. He stated that the counting was done from Kamtonga Polling station whereof the petitioner got 702 while the 1st respondent got 38. He stated that later he went to the constituency tallying centre, where he met with Mcharo, who bragged to him about the much money pumped into the campaign of the 1st Respondent. That only five polling stations results were only display at the screen. That at around 5 pm, the deputy returning officer announced the results for Chawia Ward and declared the 1st respondent the winner with 1,363 as opposed to the Petitioner who garnered 1,119 votes. That this surprised then and when they sought to know why not all the results were on display, the official became hostile.

PW2 contended that they were ordered to sign form 36B as agents of the various parties, but they declined. That Gabriel Mcharo and some two others signed as ODM Agents. That they came to learn later from the Petitioner that Gabriel Mcharo had gone to all polling stations bribing voters, agents of the petitioner, security agents and officials of the 3rd respondent during voting day. That all agents for the petitioner from 15 polling stations had been compromised and disappeared and so he was depending on the results on display at the constituency tallying Centre.

PW3GuershonMakanya Martin testified that he was an agent for the petitioner, deployed to Kitivo Polling Station. That he was working with his colleague Muema James. That they were working in shifts. That at around 2.30 pm, he was handcuffed by a police officer when it was his time to get out and allow his colleague to get in. That after 30 minutes he was unchained and released. That he saw the 1strespondents agent freely solicit for votes in the polling station, while threatening those perceived to be supporters of the Petitioner. That he came to learn that Gabriel Mcharo who had also visited Kitivo Polling Station, was distributing money to security officers and the IEBC officials to harass agents of the Petitioner.

1ST RESPONDENT' S CASE

The 1st Respondent filed a response to the petition on 28th September, 2017. He preceded the same by filing an application seeking leave of court to file and serve the same out of time. That application, as already stated, was allowed without any objection by the petitioner. The 1st Respondent denied all the allegations of fact as set out in the Petition, and put the Petitioner to strict proof thereof. He averred that the elections were free and fair. That there was no violence, intimidation, improper influence or corruption.

He further contends that the elections were transparent and administered in an impartial neutral, efficient, accurate and accountable manner. That the same was conducted by an independent body in strict conformity to the Constitution, the law and regulations relating to the elections

The 1st Respondent in his response to the election petition urged the court to make a finding that the petition herein is non- meritorious and dismiss the same with costs. He also urged the court to declare that

the elections for member of county assembly for Chawia ward were valid and uphold the same. Finally, he prays that the honorable court declares that the 1st Respondent was duly elected as the member of county assembly for Chawia ward.

The 1st Respondent filed an affidavit in support of his response to the Petition. The same is sworn on 22/9/2017. He contends that the elections were held on 8/8/2017, with a total of 14 candidates for the member of county assembly seat for Chawia ward. That the total number of registered voters in the said ward is 8032, voting in 20 polling stations. That after voting, counting and tallying, the 2nd respondent declared him as the duly elected ward representative in the county assembly, after he garnered a total of 1,363 votes out of 5,767 who turned out to vote.

The 1st Respondent denied bribing voters in Mruru and Manyanga Villages, on 30/7/2017. He denied bribing voters in Kitivo on 4/8/2017. He denied bribing voters in Landhi, Madangonyi and Kamtoinga. He denied convening meetings to bribe or influence the voters. He contends that any meetings he held within the ward, were campaign meetings which were permissible by law to familiarize himself with his voters and sell his track record as the incumbent member of county assembly and seek votes based on his agenda for the people.

The 1st Respondent denied holding any meeting on 3rd August 2017, by Gabriel Mcharo with agents of the Petitioner. He contends that Gabriel Mcharo was his agent who did not make any illegal movement as he would have been acted upon by the security officials.

The 1st Respondent denied bribing any of the Petitioner's agents. He denied knowing any of them. He denied meeting them. He denied campaigning on the eve of Election Day. He denied bailing out any persons on 8/8/2017, with any conditions. He denied any threats to any person or intimidation of any person perceived to be a supporter of the Petitioner, whatever their ethnic background. He denied having any goons who blocked voters from Mkuki trading centre not to access the polling station. He denied knowledge of an agent of the petitioner who had been arrested and chased away from any polling station.

The 1st Respondent contends that there was no possibility of his agents or himself exercising any influence over the officials of the 3rd respondent, as well as the security officials, to tilt the result in his favour.

He contends that the Petitioner is simply emotionally aggrieved over the loss of the election and is simply impugning an otherwise free and fair election process. He urged the court to dismiss this petition.

2ND AND 3RD RESPONDENT'S CASE

The 2nd and 3rd respondents filed a joint response to the Petition on 27/9/2017. The same was preceded by an application seeking leave of court to file and serve the same out of time, justlike the 1st respondent before them. The said application, as already stated, was allowed by consent of the parties.

In the response to the election petition, the 2nd and 3rd respondents deny each and every allegation of fact as set out in the petition, and put the petitioner to strict proof thereof. They contended further that the election for member of county assembly for Chawia ward was conducted in accordance with the Constitution, the Independent Electoral and Boundaries Commission Act, the Elections Act, the regulations thereunder and all other relevant provisions of the law. They further contended that the employees of the 3rd respondent entrusted with the role of facilitating the election of member of county assembly for Chawia ward discharged their role with utmost fidelity to the constitution and statutory instruments on the conduct of elections. The 2nd and 3rd respondents therefore prayed as follows;

- a) That the court makes a finding that the election for member of county assembly of Chawia ward was conducted in accordance with the Constitution and the Elections Act and all other relevant statutes and a valid declaration of the outcome made.

- b) That the 1st Respondent was validly elected member of county assembly of chania ward.
- c) That the Petition lacks merit and should be dismissed.
- d) That the Petitioner bears the costs of the Petition.

To fortify the response, the 2nd and 3rd respondents filed affidavits by seven witnesses. The said witnesses are the 2nd respondent himself, who is the returning officer in charge of Mwatate Constituency. The other witnesses are ManyareMwanyikaMwangambu, Silvan Kitonga, Wilfred WamudaNdali, CrispusMwafinya, Kofia Gift Mwawaza and DorahMkang'ombe, who testified as RW3, RW4, RW5, RW6, RW7 and RW8 respectively.

The 2nd respondent testified as RW2 in this case. In his affidavit, he confirmed that he's an employee of the 3rd Respondent designated as the constituency Returning Officer for Mwatate Constituency. That he acted as such in the elections held on 8/8/2017. That in conformity with his statutory role, he tallied all the results in the prescribed form from each polling station, and proceeded to declare the 1st Respondent as the duly elected member of county assembly for Chawia ward. That he made the declaration after receiving all the Forms 36A from the polling stations in Chawia ward.

The 2nd respondent termed the allegations of voter bribery as false. That the same were neither reported to his office nor that of the 3rd respondent. That by didn't of Section 64 (1) of the Elections Act 2011, voter bribery is an offence and if such cases emerged, then it was incumbent upon the Petitioner to notify the police and or his office, or that of the 3rd Respondent so that an investigation could be carried out. He too denied that the allegations of voter intimidation made by the Petitioner, were ever brought to his attention nor that of the 3rd respondent, and were therefore false. He recognized undue influence as an offence under Section 63(1) of the Elections Act 2011, hence the need to have the same reported to his office or to the police if it occurred.

The 2nd respondent further contends that on 8/8/2017, he moved from one polling station to the next to ensure that voting went on smoothly, and he did not witness anything out of the ordinary. That he did not receive any complaints from either the candidates or their agents or presiding officers on any incident with Chawia ward. That the role of the Kiems kit was limited to the identification of voters and transmission of results from the polling stations to the constituency tallying centre. He contends that it is not true that the Kiems kit transmitted results from only 5 polling stations. He denied that any results from the polling stations were doctored in favour of any of the candidates, and that the results contained in Form 36B reflected the results contained in Forms 36A across the polling stations within ChawiaWard. He further stated that entry into the Constituency tallying centre was not restricted. He denied being forced to declare results for member of county assembly of chania ward as alleged by the Petitioner. That he had only declared the results after receiving all Forms 36A from the polling stations.

The other six witnesses were presiding officers employed by the 3rd respondent during the 8/8/2017 elections. ManyareMwarikaMwangambu was attached to Mwakitutu Polling Station, Silvan Kilonga was assigned to Kamtonga Polling Station 1 of 2, Wilfred Kamuda was attached to Kitivo Polling Station 2 of 2, CrispusMwaginya was in charge of Mruru Polling station, while Gift Mwasaru was presiding at Mwatate health Centre Polling Station 2 of 2. On her part, DorahMkangombe was attached to Mwatate healthcentre polling station 1 of 2. The contents of the respective affidavits, save for the personal details and name of polling station i.e all the averments are the same. The common thread in all of them is that the deponents were deposing to the fact that there was no delay in counting and transmission of results as alleged by the Petitioner. They too denied that Gabriel Mcharo was at their respective polling stations bribing voters and or attempting to influence the outcome of the election.

After all the witnesses both for the Petitioner and the respondents testified in court, the parties were asked to make submissions on the request for scrutiny and recount of votes.

In a considered and detailed ruling dated 1/2/2018, the court allowed scrutiny of the votes as requested for by the Petitioner. The court citing the case, Election Petition No. 8/2017 HabilNangendoBushuru- Vs- I.E.B.C. and 3 others (2017) eKLR, noted that orders for scrutiny and recount cannot be ordered in the same case. As clearly demonstrated in Rule 28 of the Election rules, an order for recount of the votes or examination of the tallying may be made if the only issue for determination in the Petition is the count or tallying of votes received by the candidates.

SCRUTINY OF VOTES

Pursuant to the order of Scrutiny made by the court on 1/2/2018, the Executive Assistant Mr. Richard Walukhanjah of Voi Law Courts oversaw the process on 5th and 6th February 2018. He filed a report on the outcome of the said process on 7/2/2018. The report is dated even date. The said report covers the five stations which the Petitioner in his evidence in court stated he disputes the results. It is the same stations he targeted for scrutiny right from the word go, as is clear from the prayers in his petition. The five polling stations are Kitivo Primary Polling Station 1 of 2, Kitivo Primary Polling Station 2 of 2, Mwatate Health Centre polling Station 1 of 2, Mwatate health Centre polling Station 2 of 2 and Mruru Primary polling station.

As per the directions issued by the court, the said report was shared with the parties to enable them make and or file their final submissions. The matter was mentioned on 15/2/2018 with a view to confirming the filing of the submissions. During the mention date, it emerged that Mr. Mwinzi counsel for the Petitioner who ought to have filed and served his submissions by 12/2/2018 had not done so. It turned out that he was actually filing and serving his submissions in the morning of 15/7/2018. This promptly made Mrs. Isika counsel holding brief for both Mr. Aywa counsel for the 1st respondent and Mr. Omondi counsel on record for the 2nd and 3rd respondents, to seek for an extension of time to file their respective submissions. That request was allowed in the interest of fairness considering that they had just been served with the submissions of the Petition. A further mention was given for 19/2/2018 for the respondents to put in their respective submissions.

On 19/2/2018, the matter was mentioned in court and the respondents, through their counsel on record confirmed filing their respective submissions, whereupon the court reserved the matter for judgment on 28/2/2018.

SUBMISSIONS OF THE PETITIONER

In his submissions filed herein on 15/2/2018, which for all intents and purposes were final submissions, the Petitioner did not address any other issue as raised in his petition apart from the scrutiny exercise. He zeroed in his focus on the scrutiny report. As part of his preamble to the written submissions, the Petitioner contended that for any meaningful scrutiny to take place and enable verification and validation of the votes cast in the 5 polling stations, the election register and the Kiems kits had to be availed.

The Petitioner then proceeded to highlight the issues he deemed necessary to buttress his petition.

In respect to Kitivo Primary 1 of 2, he stated that there was no tally sheet in the ballot box. For Mwatate health centre 1 of 2, he contends that the original Form 36A was supplied during the second day of the scrutiny exercise. He further contends that the carbon copy affixed on the side of the ballot box bore serial number CA000020, while the one found inside the box bore serial number CA000019. He further submitted that the second original form 36A availed on 6/2/2018 bore serial number CA000025

With respect to Mwatate Health Centre 2 of 2, the petitioner stated that, in the absence of scrutiny on the Kiems kit, no meaningful scrutiny would be done on that station. That the original Form 36A was availed the following day i.e. 6/2/2018, and was not in the box. That there was no tally sheet in the box. That another unused form 36A No. CA000037-42 of book No.7 was found in the ballot box for the said station. He submits that the said forms were readily available and could be misused.

For Mruru Primary, the Petitioner submits that Form 36A being serial No. CA00009 was found inside the

box, while the copy affixed on the side of the box, bore serial Number CA00007. That there were three spoiled ballots which were from the ballot box but were not captured in form 36A. That a further three ballot papers could not be accounted for.

The Petitioner concluded his submissions by stating that the 3rd respondent had failed to comply with the order made for availing materials for scrutiny. They urged the court to rely on **Election Petition No. 7 of 2013, Peter Kimori Makanga and Another –Vs- Joel Omagwa and 2 others** where the court held that the irregularities and illegalities noted in the election were massive and made the election not fair and free. That the court had faulted the 2nd respondent in the case (IEBC) for failure to produce in court key election materials for scrutiny.

The petitioner too relied on Presidential **Election Petition No. 1 of 2017, Raila Amolo Odinga and Another- Vs- IEBC and Another**, where the superior court faulted the IEBC for failing to comply with the order of the court in opening the servers which was termed as concealment of materials fact, and the court used it to annul the presidential election.

The Petitioner urged the court to find that the 1st Respondent's election was not to the set legal standard and invalidate his election as member of county assembly for Chawia ward.

SUBMISSIONS BY 1ST RESPONDENT

The 1st Respondent filed his submissions on 19th February 2018. He reiterated the averments in his affidavit that the general elections for member of county assembly for Chawia ward conducted on 8/8/2017 was free and fair. He referred to the testimony by the 2nd respondent, that the said elections were transparent and administered in an impartial, neutral, efficient, accurate and accountable manner.

The 1st respondent submitted that the allegations made by the Petitioner were without proof, and the witnesses who testified were merely giving the court hearsay and therefore not credible evidence.

With regard to the scrutiny exercise, the 1st respondent submitted that the report filed confirmed that the same election was free and fair and that the petitioner in his submissions, resorted to pointing out minor mishaps occasioned by human error, but which did not compromise the integrity of the election.

The 1st respondent pointed out to the court an observation made by the High Court in the case of **Rishad Hamid Ahmed Amara –Vs- Independent Electoral and Boundaries Commission and 2 others** as follows:

“ A petitioner is not only required to establish that there were irregularities which were committed during the elections, he must also establish that such irregularities (non- compliance with the law) where of such magnitude that it affected the outcome of the results. This is what is referred as the materiality test. Apart from that, the petitioner is required to establish that the errors and irregularities were either occasioned by outright negligence or deliberate action on the part of the guilty party. Irregularities which can be attributed to an innocent mistake or an obvious human error cannot constitute a reason for impeaching an election result.”

The 1st Respondent concluded by urging this court to make a finding that the petitioner failed to adduce credible and sufficient evidence to warrant the invalidation of his election as member of county assembly for chawia ward. The 1st Respondent accordingly urged the court to dismiss the petition with costs, by didn't of provisions of Section 84 of the Elections Act and Rule 30 (1) of the Election (Parliamentary and County Elections) Rules.

2ND AND 3RD RESPONDENT'S SUBMISSIONS

The 2nd and 3rd respondents filed their written submissions on 19th February 2018. They submitted that

the Petitioner has not satisfied the threshold for grant of the reliefs he's seeking from the court.

With respect to the allegations of bribery, the Petitioner did not avail proof of the same. They submitted that bribery is an offence, and as was held in the case **Karanja Kabage- Vs- Joseph Kiuna Kamambegu Nganga and 2 others (2014) eKLR**, by the court of appeal, "where the allegations amount to commission of election offences, however they must be proved beyond reasonable doubt"

On the allegation of intimidation of voters, the 2nd and 3rd respondent submitted that no proof or evidence of the same was availed, and so is the case with the allegation of arresting of one of the agent of the Petitioner by security agents at Kitivo polling station.

On the allegation of inflation and manipulation of votes, the 2nd and 3rd respondents submitted that the same were without any legal or factual basis or merit. That the scrutiny report conducted concluded that the number of votes declared for each candidate at the polling station was genuine and valid.

The 2nd and 3rd respondents submitted that on the alleged non provision of Forms 36A to the petition, it was clear that the Petitioner did not have agents in all the polling stations and that there was no refusal to supply them.

The 2nd and 3rd respondent relying on the case **Jackton Nyawingo Runguma- Vs- IEBC and 2 others (2018) eKLR**, submitted that the requirement for electronic transmission and publication of polling result in a public portal is only in respect of presidential election. They also denied the claim that their officials were manipulated and or influenced by the agents of the 1st respondent.

ISSUES FOR DETERMINATION

The parties were presented with an opportunity to file an agreed list of issues for determination. They did not agree on one and each party was asked to file theirs. It is however the Petitioner who generated a list of the issues. The same was filed on 8/11/2017.

The issues identified by the Petitioner for determination are as follows;

- a) Whether the 1st respondent committed election offences of bribery, intimidation, threats, bullying, blocking and or preventing supporters of petitioner from voting, compromising agents of the petitioner and officers of the 3rd respondent.
- b) Whether the declared votes for the 1st respondent were out of inflation by the 2nd and 3rd respondent.
- c) Whether the 2nd and 3rd respondents contravened the rule of law and principles of conducting a free, fair and credible election by use of intimidation, corruption and compromise by the 1st respondent.
- d) Whether the 2nd and 3rd respondents deliberately and or openly ignored to accurately collate and promptly announce the results from 15 polling stations at the tallying centre contrary to the Law

ANALYSIS AND DETERMINATION

I'll now embark on considering the issues recorded herein vis-a-viz the evidence adduced and the law applicable in this matter.

At this point in time, it is significant to quote from the words of Elisha Z. Ongonya, dean Kabarak University School of Law. In an article he wrote on the book Balancing the Scales of Electoral Justice

edited by Dr. Collins Odote and Dr. Hindi Musumba, he stated as follows;

“With proof an election petition succeeds, without proof an election petition fails”

From the above quote, it is clear that a petitioner who moves to an election court seeking certain relief (s), must be equipped with proof of the grievances they have, in order for them to succeed in getting those reliefs. It is a cardinal rule of the law of evidence that he who alleges must prove. Section 109 of the Evidence Act Cap 80 Laws of Kenya States as follows;

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, where it is provided by any law that proof of that fact shall lie on any particular person”

The first grievance made by the petitioner against the respondents is that there were committed election offences of bribery, intimidation, threats, bullying, blocking and or preventing supporters of the Petitioner from voting. The Petitioner in his evidence in court alluded to a series of meetings held on different dates at different venues. He stated that those meetings held at the behest of the 1st respondent were used as avenues for bribing and in an undue manner influence the voters. The Petitioner was cross-examined in regard to an alleged meeting held on 30/7/2017 as per his affidavit. He responded as follows;

“In limb five, I have stated that the meeting was used to illegally hire people and bribe voters. I wasn’t one of the people who attended the said meeting. I haven’t availed any witness who attended the meeting. I was informed about the meeting and its activities from my supporters who called me on phone. The supporters are not witnesses in this case. They haven’t filed any affidavits”

The petitioner too had made reference to a meeting held on 4/8/2017, where he claimed that the 1st respondent, in the company of Gabriel Mcharo, moved to all corners of Kitivo giving out bribes to voters within a range of Kshs 100- Kshs 500 depending on the influence of the voters. In cross-examination he responded as follows;

“ I wasn’t in attendance of the said meeting. I wasn’t going round the said corners of Kitivo”

In the elaborate cross-examination conducted by both Mr. Away (for the 1st respondent) and Mr. Omondi (for the 2nd and 3rd respondent), the Petitioner was taken through in a blow by blow manner on the averments in his affidavit. The common thread in all his responses is that he had made the allegations of bribery and undue influence of voters on the strength of reports he received from his unnamed supporters. He conceded to the fact that he had personally not attended any of the alleged meetings. He also conceded that none of the said supporters had sworn an affidavit and attest to those allegations.

Allegations of bribery are of a criminal nature. The superior courts have in a number of decisions addressed their minds on the standard of proof required to establish the same. In Election petition 11 of 2013, the case of **Hosea Mundui Kiplagat –Vs- Sammy Komen Mwaila and 2 others (2013) eKLR** , the High Court sitting in Eldoret while dealing with the standard of proof in offences of a criminal nature stated as follows;

“The degree of proof varies depending on the nature of allegations made. This is because where election petitions are concerned, a certain allegation may only be of the civil kind thus the lower standard of balance of probabilities suffices. Whereas where allegations made amount to criminal offences, being electoral offences under the laws then the higher standard of proof is required”

The Petitioner as already stated conceded that he personally did not witness any bribery incident, by the 1st respondent or any of his agents. He stated that his claims of wide spread voter bribery in the electoral ward were based on reports he received from third parties. Those parties did not record statements with the police or file affidavits in the matter.

The Petitioner had alleged bribery on the election day as well as bribery on the pre-election period. However in all those instances, he went no more than say, that he was informed about the bribery by the unnamed supporters. He had no direct evidence to adduce to fortify his contention that the 1st respondent, either in person or through his lead agent Gabriel Mcharo were going round the villages and or polling stations on election day dishing out money to voters. By relying on what he was told by third parties, who are not witnesses in this matter, the Petitioner was simply acting on hearsay evidence. It is trite law that hearsay evidence is no evidence at all, and the probative value to be given to the same is insignificant.

In **Election Petition No. 5 of 2013, Phili Mukuli Kasike- Vs- James Lusweti Muthure and 2 others (2013) eKLR** the Hon. Justice H. Omondi while dealing with allegations of bribery quoted from the Halsbury's Laws of England 4th Edition Volume , 15 at Page 534 as follows;

“ As a general rule, due proof of a single act of bribery by or with the knowledge and consent or approval of the candidate or by the candidates, agents however insignificant the act may be is sufficient to invalidate the election. A court is not at liberty to weigh its importance nor can it allow any excuse whatever the circumstances may be”

The evidence on record to say the least does not proof even a single incident of the alleged bribery of voters with regard to the elections of Member of County Assembly for Chawia Ward, held on 8th August 2017.

On the matter of voter intimidation and threats, the Petitioner was cross-examined on the same. He rendered himself as follows;

“There is no evidence I have availed that there were threats. I have the messages. The text messages are not part of the evidence before court”

On cross-examination again, the petitioner stated that though he had claimed that his voters had been blocked by goons of the 1st respondent from voting, he conceded that he had not availed any of such voters as his witnesses, nor had any of them filed an affidavit. It is also important to mention here that apart from the seat for the member of county assembly, there were several other seats i.e. for President, Governor, Senator, Women Representative and Member of Parliament, that were up for grabs. It was a general election which presented very high stakes. There were various candidates seeking to clinch the various positions. The Petitioner did not explain to the court how he pre-determined that persons from a given village were only going to the polls to vote for him and not any other candidate for any other position but were disenfranchised.

The Petitioner was cross-examined by Mr. Omondi with respect to the averments about the alleged blocking of voters, and he rendered himself as follows;

“ No report was made to the IEBC or the Police. None of the voters who were blocked has recorded a statement. Neither IEBC nor the police could take any action in the absence of a report being made. I am not calling any of the said persons as my witnesses”

With respect to the averment in paragraph 28 of his supporting affidavit alleging adjustments of results, the Petitioner upon cross-examination had the following to say;

“ I was not there when the adjustments were being made. I do not have any affidavit from any agent showing that the results had been doctored. I do not have any evidence in court to show that there were campaigns that day. No one has filed any affidavit to show that the people were campaigning”

I have carefully considered and assessed the evidence of the Petitioner in cross-examination and it is apparent that he negated all the averments contained in his affidavit which averments he adopted in his evidence in chief.

As already stated in the foregoing paragraphs of this judgment, he alleged widespread bribery and undue influence of the voters at the behest of the 1st respondent within the electoral area, both prior to and on the election date. However from his testimony, he clearly had nothing to offer as proof. He was not able to name even a single person who was blocked from exercising his or her franchise. He clearly raised bare assertions of bribery, intimidation, threats and undue influence, but the same remain devoid of any evidential fortress or backing.

The Petitioner availed Sammy Muthia Mwandia as his witness (PW2). He (PW2) stated that he was an agent for Wiper Party and not Ford Kenya, the Party for the Petitioner during the elections. PW2 like PW1 before him was cross-examined on a number of averments contained in his affidavit.

On the bribery allegations, he stated that he did not see the giving out or the receiving of the bribes. He did not see anyone give out bribes to the voters, agents of the Petitioner, Security Agents or officials of the 3rd respondent. He had particularly rendered himself as follows;

“ I am not able to confirm the authenticity of the bribery claims”

On further cross-examination, he stated as follows;

“ I also learnt from the Petitioner that he had been in the dark over the results of the 15 polling stations because all his agents had been compromised and disappeared.

The Petitioner while being cross-examined cited his supporters (unnamed) as the source of the information he had sworn in his affidavit. PW2 on the other hand cites the Petitioner as the source of the information he had averred to in his affidavit. What is clearly deducible from the testimony of both PW1 and PW2 is that none of them was adducing direct evidence vis-a-viz the far reaching claims of bribery, voter intimidation, undue influence or compromising agents. None of the two gave eye-witness accounts on those allegations.

The third witness for the Petitioner is Grishon Malenga Martin. He testified that he was an agent of the Petitioner deployed at Kitivo polling station. This witness had nothing to identify him as a duly accredited agent of the petitioner in the said elections. He stated that he had been forcefully removed from the polling station, and therefore he did not witness the counting of votes.

This particular witness was referred to form 36A for the said polling station. When cross-examined about it, he responded as follows;

“ It is true my name is not in the form. The Petitioner was vying through Ford Kenya Party. In the form there is a Ford Kenya agent called Elizabeth Wanjiru. In my affidavit I haven't stated that I had been denied the opportunity to report my grievances to the IEBC or the police”

From the above excerpt from the testimony of the said witness, it is clear that for Kitivo Primary, the Petitioner had an agent who signed Form 36A

PW3 too addressed his mind to the bribery claims. He conceded he had stated in his affidavit that later he 'came to learn that Gabriel Mcharo was distributing money to security officers and IEBC official'. He further conceded that he had not seen the said Gabriel Mcharo dishing out money as claimed.

From my assessment of PW3's evidence, it was without doubt couched in similar manner and style as the testimonies of both PW1 and PW2. To use an analogy of embroidery, I can say without doubt that their testimonies were tailored using pieces of fabric material cut from the same garment!

They claimed having been informed about the electoral vices by third parties but the informers remain faceless and unknown. The Petitioner however beseeches the court to rely on those claims to make an adverse finding about the entire electoral process and annul the victory of the 1st respondent, as the elected representative of the people of Chawia ward in the county assembly.

POLLING STATION RESULTS

This was another key grievance by the Petitioner. He contended that he had not been furnished with copies of the polling station results. The said results are contained in a statutory form referred to as Form 36A. During Cross-examination, one of the most conspicuous concession the petitioner made, is that he did not have agents in all the polling stations. He specifically named Mruru, Mwakitutu, Kumalu, Sechu, Manoah dispensary, Zare trading centre, among others as the polling centres he did not have any agents.

By didn't of the provisions of Section 30 of the Elections Act, 2011, agents are appointed either by a political party, a candidate or a registered referendum committee. It is clear that it is not the duty of the electoral body to appoint or provide agents for the political parties or candidates. It was incumbent upon the Petitioner to ensure that his agents appointed by himself were at the polling stations, to receive the Forms 36A. In the absence of his agents, the 3rd respondent could not be faulted as they could not give the forms to a party not present or represented at the polling centres.

SCRUTINY OF VOTES

In his final submissions, the Petitioner contends that there were irregularities noted in the conduct of elections and so the court should invalidate the election of the 1st respondent as Chawia Ward Member of the County Assembly.

All the respondents too submitted on the said aspect. They dismissed the errors noted as minor occasioned by human mistakes, which do not go to the root of the election. I have had occasion to consider **Civil Appeal No. 38/2013 Dickson Mwandu Githungi- Vs- Gatirau Peter Munya** and two others. In this case, the court of appeal sitting in Nyeri addressed itself on the principles governing irregularities in elections and affecting the results of an election. The learned Judges of the superior court rendered themselves as follows;

“Irregularities in elections refers to mistakes and serious administrative errors in the conduct of election. In determining whether irregularity affects the results of an election, one has to look at the number by which irregular votes exceed the probability of the winning candidate. The margin between the winning and losing candidate is a factor in determining whether the irregularity affected the results of the election”

The petitioner in his submissions did not demonstrate how the alleged irregularities affected the votes he secured vis-a-viz those of the 1st respondent. The scrutiny report prepared by the Executive Assistant of Voi Law Courts dated 7/2/2018 was filed on even date. According to the report, the scrutiny was conducted in presence of all the parties. That each ballot paper, counterfoil, form 36A and candidate vote tally sheet were examined. Among the observations made, is that all the five ballot boxes were intact, the original Form 36A were not in the box but were availed by the 3rd respondent during scrutiny. That the votes tally was accurate for all the stations scrutinized.

In his submissions, the petitioner contends that no tallying sheets were availed. This comment runs counter with what the scrutiny report states. At page 11 of the report, it is made crystal clear that the tallying sheets were available.

In his submissions too, the Petitioner laments that for any meaningful scrutiny to be done, several election materials had to be availed. He singled out the election registers and the kiems kits. If the Petitioner's intention was to scrutinize those election materials, in my view, nothing would have been easier than for him to say so. In his submissions filed herein on 17/1/2018 with regard to the request for an order of scrutiny, it is clear that the petitioner was only training his eyes on the ballot boxes and Forms 36A for the five polling stations. In fact the cross-examination of the respondents and their witnesses largely revolved around the contents of the said statutory forms. To fortify the foregoing let me pick an excerpt from the said submissions. At page 7 of the written submissions by the Petitioner, he states as follows;

“ All those unanswered questions leaves no doubt that there is more than what was testified in court. Consequently, the Hon. Court should order for further scrutiny of the ballot boxes at the warehouse”

Nowhere in his entire Petition did the Petitioner signify of his intention and or desire to have scrutiny of the kiems kits. The scrutiny of kiems kits being technology based gadgets would have involved the court making specific orders on ICT Personnel to be available during the scrutiny to give their input. In its ruling delivered on 1/2/2018, allowing the scrutiny, this court had cited the case of Hassan Mohammed Hassan and another –Vs- IEBC and 2 others, Petition No.6 of (2013) eKLR. In this case, the superior court had stated as follows;

“ The decision to grant scrutiny or recount, is clearly not only discretionally, it is also judicious. That is to say the court’s reasons to grant such order must be good, must be logical and must be necessary for the purpose of arriving at an expeditious, fair, just, proportionate and affordable resolution of the issues raised in the Petition”

Taking guidance from the above decision of the superior court, this court would not have had any basis to order for scrutiny of the kiems kit, where none of the parties especially the Petitioner had raised any issue about them. In my view, the Petitioner could not ask for scrutiny of the ballot boxes, but somehow hope to get an order for scrutiny for the kiems kits. The Petitioner from the word go knew the existence of those election materials. He laid basis for scrutiny of the ballot boxes and an order to that effect readily issued. His lamentations in regard to the kiems kit is just but belated and an afterthought. He raised the same at the final submissions stage and in my view nothing could be done about it

The Petitioner submitted that the IEBC (3rd respondent) had failed to comply with the order of the court for scrutiny of the kiems kits. I have looked at the order made by the court in regard to the scrutiny, and I am satisfied that there were no reference made to the kiems kits. He relied on presidential Petition 1 of 2017, Raila Amolo Odinga and Another –Versus- IEBC and another where the supreme court faulted the IEBC for failure to comply with the order of the court in opening the servers.

The presidential petition decision is distinguishable from the facts of this case, in the sense that in this case, there was no order for scrutiny of the kiems kits and elections register as claimed by the Petitioner. All the materials ordered to be scrutinized as per the Petitioner’s request were availed. The scrutiny exercise was done and a report filed in court. The report covered all aspects mentioned within the scope of the orders of this election court. **In Election Petition 12 of 2017, Chris Muya N. Bichage and 2 others –Vs- Independent Electoral and Boundaries Commission and 2 others (2017) eKLR**, the High Court at Kisii, while addressing its mind on the purpose of a scrutiny, quite aptly rendered itself as follows;

“Scrutiny should not be used as a tool for discovering new evidence”

It is apparent that the Petitioner had no evidence to fault the functioning and or working of the kiems kit, and his mention of the same as part of the election materials required for scrutiny was therefore an attempt to gather evidence. The Petitioner did not have the said evidence when he moved to court seeking to impeach the outcome of the election in respect of Member of County Assembly for Chawia Ward.

In Election Petition 5 of 2013 John Lokitane Lodinyo –VS- Mark Lemnokol and 2 others (2013) eKLR, the High Court sitting at Kitale, rendered itself as follows;

“ An election dispute is regarded as a special category of a civil dispute and for a petitioner to successfully prosecute such dispute, he must adduce credible and sufficient evidence to support the allegations in his petition on a standard higher than is applicable in ordinary civil suits, but lower than the standard of proof required in ordinary criminal cases. However with regard to statistical facts or facts intended to establish election offences thereby imputing criminal offences, the standard of proof must be beyond reasonable doubt because such offences attract serious sanctions.”

From my assessment of the evidence adduced in support of the petition, I am of the view that the same is not sufficient to prove the allegations made against both the process and the outcome of the same. This court is alive to the fact that it has been presented with this electoral dispute to make a determination. It is a determination that it must make judiciously and conscientiously, knowing that the will of the inhabitants of Chawia Ward and the law applicable must prevail.

From my evaluation and assessment of the evidence, it is my finding that the Petition filed herein is completely bereft of any evidence vis-a-viz the allegations made. The Petitioner by any stretch of imagination cannot be said to have discharged the burden/onus placed upon him to prove the allegations raised.

In his final submissions, the Petitioner mentioned about some form 36 A not being in the ballot box. It however emerged that the same was in the custody of the 3rd Respondent and it was availed. There was no dispute that the results/figures in the Form 36A availed by IEBC was different from the result indicated in the Form 36A availed to the Petitioner earlier, or those filed in court.

The Petitioner too contends that some 3 spoilt ballots were found in the ballot box for Mruru Polling station, but were not captured in Form 36A. It is clear that the scrutiny of the same confirmed that they were spoilt and therefore not counted in favour of any of the 14 candidates. The failure to capture the same in the form 36A in my view was inadvertent, and it did not affect the overall outcome of the result. The superior courts have in a number of decisions rendered themselves on the question of irregularities. In the John Lokidany Lodinyo case (bid), the superior court rendered itself as follows;

“ Most importantly, the irregularities which were partly proved by the petitioner were not so grave or substantial as to affect the ultimate result of the election in any significant way, particularly with regard to the number of votes gained by each of the candidate ”

The scrutiny exercise conducted herein in presence of the parties, did not raise any variation of the votes that were cast in favour of each candidate. The report by the Executive Assistant of this court confirmed that all the votes scrutinized were valid and genuine. Nothing really turns with regard to the electoral process itself. It is clear that the election for Chawia Ward held on 8/8/2017 was done accordance with the constitution and statutory provisions applicable. The same was a demonstration of the will of the inhabitants of the said ward, and that is what this court will uphold.

Turning to the Petition, I note that two of the main prayers by the Petitioner i.e. one for securing of the election materials, and the second one for scrutiny of the votes have been spent. The same were considered and dealt with in the course of hearing of this petition.

Only three main prayers are remaining, and I will give directions shortly under the caption for orders. However considering the facts that the Petitioner did not adduce sufficient, cogent and or credible evidence in respect of the allegations raised, and in upholding the democratic and constitutional right of the people of Chawia ward to elect their representatives to the County Assembly, I dismiss the petition filed herein on 6/9/2017 with costs to the respondents.

ORDERS

In view of the foregoing, I make the following final orders

- a) A declaration is hereby issued that the 1st Respondent Frank Kichoi was validly and duly elected as Member of County Assembly for Chawia ward in the election held on 8/8/2017
- b) That in view of (a) above there would be no basis of issuing a declaration that the Petitioner Gideon Ndambuki Muthiani is the winner and or duly elected Member of County Assembly for Chawia Ward.
- c) The instructions fees payable is capped at Kshs 500,000/- i.e Kshs 200,000 for the 1st respondent

and Kshs 300,000/- for the 2nd and 3rd respondents.

M. ONKOBA-SRM

28/2/2018

Court

Judgment read over and delivered in open court in the presence of Mr. Kertiony holding brief for Mr. Mwinzi for the Petitioner, Mr Aywa for the 1st respondent and simultaneously holding brief for Mr. Omondi for the 2nd and 3rd respondent. Others present are Mr. Barua and Ms Mary, Court assistants.

Right of appeal duly explained.

M. ONKOBA-SRM

28/2/2018

***Mr. Kertiony:* I pray for certified copies of proceedings and judgment.**

Court

Same to issue as applied for upon payment of the requisite charges.

M. ONKOBA-SRM

28/2/2018