



**REPUBLIC OF KENYA**

**IN THE SENIOR RESIDENT MAGISTRATE'S COURT AT MANDERA**

**ELECTION PETITION NO 4 OF 2017**

**IN THE MATTER OF MEMBER OF COUNTY ASSEMBLY ELECTIONS  
(TOWNSHIP WARD,MANDERA EAST CONSTITUENCY,MANDERA COUNTY)**

**BETWEEN**

**FEISAL ABDINOOR ISSACK-----PETITIONER**

**AND**

**IEBC-----IST RESPONDENT**

**MR ADAN HARAR NOOR**

**(RETURNING OFFICER MANDERA EAST CONSTITUENCY-----2<sup>ND</sup>RESPONDENT**

**HON. ADAN MAALIMABDULLAHI-----3<sup>RD</sup>RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

The Petitioner herein was running for the seat of member of County Assembly for Township ward in Mandera East Constituency on a Jubilee party ticket in the August 8<sup>th</sup> 2017 general elections that were conducted by the Independent Electoral and Boundaries Commission, the 1<sup>st</sup> Respondent herein. The 2<sup>nd</sup> Respondent was the returning officer for Mandera East Constituency. The 3<sup>rd</sup> Respondent is the one who was declared by the 2<sup>nd</sup> Respondent as the duly elected member of county assembly for township ward after the tallying of the results.

The Petitioner was dissatisfied with the manner in which the election was conducted and filed this petition in person. The petition was supported by his own affidavit and affidavits of two people he called as his witnesses and unmarked annexures. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed their joint response to the petition dated 22<sup>nd</sup> of September 2017 through the law firm of m/s Abdullahi Gitari & Odhiambo advocates on the 22<sup>nd</sup> September 2017. The response is supported by the affidavit of Adan Harar Noor the 2<sup>nd</sup> Respondent and annexures marked AHN-1. The 3<sup>rd</sup> Respondent filed his response to the petition dated 21<sup>st</sup> September through the law firm of Prof Tom Ojienda & Associates. The response is supported by the affidavit of the 3<sup>rd</sup> Respondent himself and annexures marked AMA -1 to AMA-6.

**PETITIONERS CASE**

The petitioner made various allegations in the petition. He alleged that he was informed by his supporters on the date of elections (8<sup>th</sup> of August 2017) that there were cases of voter bribery by the 3<sup>rd</sup> Respondent's agents at Township primary school polling station, Village polytechnic polling station and Bulla Mpya Primary School Polling station. That the petitioner was denied a chance to vote at village polytechnic polling station where he had registered as a voter but instead he was transferred to Arda Hagarsu polling station in Mandera North constituency. That there were many irregularities at Geneva White House polling station stream 2 where there were 183 ballot papers marked at the back using unauthorized rubber stamp instead of the official IEBC stamp. That the results from Geneva White House stream 2 were not sent to the tallying Centre. That after the elections he learned that several presiding officers of the 1<sup>st</sup> Respondent in township ward were close relatives of the 3<sup>rd</sup> Respondent and therefore the election was not free and fair. The officers' complaint about and their alleged relationship to the 3<sup>rd</sup> Respondent and the polling stations they were posted are shown in paragraph 13 (a) to (j) of the petition. That various presiding officers were in violation of the election offences act as they were related to the 3<sup>rd</sup> Respondent or were known supporters of Economic Freedom Party that the 3<sup>rd</sup> Respondent was vying on hence the presiding officers were biased. On the basis of these grounds, the petitioner sought the following prayers:-

- a. Declaration that the 3<sup>rd</sup> Respondent was not validly elected
- b. Declaration that the election conducted by the 1<sup>st</sup> and second Respondents on the 8<sup>th</sup> August 2017 at Mandera East Constituency Township Ward was not free and fair
- c. That the court orders the IEBC to avail all equipment and materials used during the polls
- d. Determination as to whether or not electoral malpractices of a criminal nature may have occurred.
- e. That costs of this petition be awarded to the petitioner

#### 1<sup>st</sup> and 2<sup>nd</sup> Respondents' case

Generally the 1<sup>st</sup> and 2<sup>nd</sup> Respondents denied the allegations contained in the petition and more specifically the allegations contained in paragraphs 7, 8, 9, 11, 13 and 14 of the petition and put the petition to strict proof of the same. They maintained that the elections held in township ward Mandera East constituency were conducted in strict adherence to and in conformity with the law, the electoral code of conduct, the elections regulations and the constitution. They denied that there were any cases of voter bribery on Election Day in any of the polling stations in township ward. That they conducted the elections in an accountable and transparent manner. They denied that the petitioner was denied a chance to vote at the polling station he had registered and said the petitioner failed, refused and/or neglected to verify his registration status to confirm his polling station and stream where he was to cast his vote before the election date. That the 3<sup>rd</sup> Respondent was validly elected as member of the county assembly for township ward. That the petition was filed out of time. They concluded that the petition was devoid of any merit and urged the court to dismiss the same with cost.

#### 3<sup>RD</sup> RESPONDENTS' CASE

On his part the 3<sup>rd</sup> Respondent in his response to the petition, supporting affidavit and Annexures, set out in great detail how he conducted himself before during and after the elections in Township ward which culminated in him being declared the winner and was issued with certificate of elected member of county assembly for township ward in the election held on the 8<sup>th</sup> August 2017 by the returning officer the 2<sup>nd</sup> Respondent herein on 10<sup>th</sup> of August 2017. In his response and sworn affidavit the 3<sup>rd</sup> Respondent denies the allegations of voter bribery against his agents and maintains that the election held on the 8<sup>th</sup> of August 2017 for member of county assembly for township ward in Mandera East constituency was free, fair and transparent and that the same was conducted in accordance with the spirit and intention of article 81 of the Constitution, the elections Act 2011, the elections regulations 2012 and other relevant provisions of the law. That he was a registered voter at Township primary polling station. That he was

nominated to contest the election as member of county assembly township ward by the Economic Freedom Party and was issued with a certificate of nomination. That he was cleared by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to contest the election after they confirmed his eligibility within the provisions of Articles 177 and 193 of the constitution of Kenya 2010. That he did contest in the election on 8<sup>th</sup> of August 2017 while adhering to the constitution and the law. That after the casting of the ballots was closed he moved to the tallying Centre at Mandera secondary school where the results from the polling stations were collated and after tallying, the 2<sup>nd</sup> Respondent declared the result as follows-

Adan Maalim Abdullahi of EFP----5038

Abdi Hassan Hajj of MCC--- 1390

Ali Feisal Dahir of NARC-K-----143

Ibrahim Abdullahi Shukri of SAFINA PARTY----232

Ismail Adan Billow INDEPENDENT-----650

Issack Feisal Abdinoor of JUBILEE PARTY-----1607

Maalim Abdullahi Rashi of TWA -----23

Mohammed Siad Sheikh INDEPENDENT -----38

That he was declared winner with 5038 voters while the petitioner was second with 1607 votes. That the petitioner did not dispute the result declared but later filed this petition as an afterthought.

On the allegation that the 3<sup>rd</sup> Respondent's agents were seen bribing voters at Township primary school polling station, Polytechnic polling station and Bulla Mpya Primary School Polling Station and that indeed some were arrested and booked at Mandera police station vide OB 16/8/8/2017, the 3<sup>rd</sup> Respondent denied that any of his agents or his party's agents was involved in voter bribery in the polling stations alleged or at all. He said after the allegation was made he visited Mandera police station and established that the persons booked under OB 16/8/8/2017 were Mr Ibrahim Alio Hassan who had Ksh 16000 and Mr Issack Ibrahim Mohammed who had Ksh 27000 in denomination of 500 who were intercepted by police at Mandera D.E.B Primary School Polling Station in Neboi Ward. He denied that the two or any of them were his agents. On allegation that some of the presiding officers in township ward were his relatives, the 3<sup>rd</sup> Respondent denied the allegation and put the petitioner to strict proof of the same. He denied involvement in any electoral malpractice and maintained that he was validly elected and urged the court to dismiss the petition with costs.

#### Petitioners reply to the Respondents' responses.

On 19<sup>th</sup> of October 2017 the petitioner appointed M/S Kakai Mugalo & company Advocates to act for him in this matter. The said law firm filed a reply to the responses dated 30<sup>th</sup> October 2017 reiterating the allegations made in the petition.

#### Issues for determination

The petitioner through his advocates filed the following issues for determination:-

1. Did the 3<sup>rd</sup> Respondent and/or his agents engage in voter bribery on the 8<sup>th</sup> of August 2017 during the election of the member of county assembly in Township Ward?
2. Did the 3<sup>rd</sup> Respondent have relatives who were working for the 1<sup>st</sup> Respondent as presiding officers in some polling stations in Township Ward during the August Elections/
3. Did the 1<sup>st</sup> and 2<sup>nd</sup> Respondents conduct the August 2017 in township Ward in an efficient, accurate

and accountable manner?

4. Did the 1st and 2nd Respondents adhere to the regulations and laws governing elections?

5. Were there any anomalies in the form 36As from all the 27 polling stations in Township Ward?

6. Did the anomalies have an effect on the final tally of the votes? Later on 8th November 2017 he filed two additional issues as follows:-

7. Did the 1st and 2nd Respondents allow the petitioner to vote at his designated polling station

8. Did the 1st Respondent avail the list of all the presiding officers to the petitioner?

The advocates for the Respondents were agreeable to statement of issues filed by the petitioner and the petition proceeded to hearing.

## **THE HEARING**

The hearing commenced on 15<sup>th</sup> January 2018 by hearing the petitioner and his two witnesses and continued the following day when the 3<sup>rd</sup> Respondent testified. In his examination in-chief the petitioner Feisal Abdinoor Issack (pw1) told the court that during the general elections held on the 8<sup>th</sup> of August 2017, He contested for the seat of member of the county Assembly for Township Ward in Mandera East constituency on a Jubilee Party Ticket. That he was a registered voter at village polytechnic polling station. That on the voting day he went to vote but was surprised to find that he had been transferred to Arda Hagarsu polling station in Ashabito Ward in Mandera North Constituency and hence he did not vote. He said that on 8<sup>th</sup> of September 2017 he filed this petition because he was denied the right to vote by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, that there was no fair competition and that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent did not do their work fairly, that the officers recruited by the 1<sup>st</sup> Respondent to conduct the elections in Township Ward were relatives of the 3<sup>rd</sup> Respondent. That he was given the list of those recruited by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents on the 7<sup>th</sup> August 2017 and was surprised to see that they were relatives of the 3<sup>rd</sup> Respondent. That he did not raise his complaint before the elections allegedly because the 2<sup>nd</sup> Respondent was busy giving out election materials and had no time to listen to their pleas concerning posting of presiding officers and deputy presiding officers who were instrumental in the election in Township ward. He said he had concerns about officers posted to the following Polling Stations;-

1. Bokolo Duse

2. Township Primary School

3. Village Polytechnic

4. Geneva white House

5. Khadija Primary School

6. Kamor Primary School

7. Border Primary School

8. Ali Ibrahim Primary School

9. Duse Primary School.

He said that all the presiding officers were persons known to him even prior to the 8<sup>th</sup> of August 2017. He said that Ali Ibrahim Farah presiding officer at township primary school was a teacher by profession and was from Oitera, a sub clan of the Garre just as are Abdimajid Khalif Mohamed, Abass Haji, Dugo Mohammed Farah, Abdiaziz Salat Hassan and Abdirahman Abdi Hassan. He alleged that the elections conducted by the 1<sup>st</sup> and 2<sup>nd</sup> respondents were not free and fair. He alleged that the elections were not by

secret ballot. That there were allegations of voter bribery at Bulla Mpya Primary School Polling Station and that he was informed by his agents that some culprits were arrested by CID officers and booked at Mandera Police Station under OB 16/8/8/17 but did not know what happened to those persons. He said the 3<sup>rd</sup> Respondent won by 5038 votes in the results which were declared on 11<sup>th</sup> August 2017. He urged the court to declare that the 3<sup>rd</sup> Respondent was not validly elected and grant the reliefs sought in the petition.

On being cross examined by Mr Wachira and Mr Makokha counsels for the Respondents, the petitioner said the certificate of elected member of county Assembly issued to the 3<sup>rd</sup> Respondent by the 2<sup>nd</sup> Respondent was dated 10<sup>th</sup> August 2017 and that he had nothing to prove that the results were declared on the 11<sup>th</sup> August 2017 as he had alleged. Asked if he voted he said he did not vote. He said long before the voting day he had discovered that he had been transferred as a voter from Village polytechnic polling station in Township Ward to Arda Hagarsu Polling station in Ashabito Ward and that he had raised the issue with the 2<sup>nd</sup> Respondent and he was promised that the error could be rectified. He said he presented his complaint through dated 15<sup>th</sup> May 2017 addressed to the 1<sup>st</sup> Respondent a photocopy of the same was annexed to the petition. He had no evidence to show that the original of the same was sent to the addressee and that if sent it was received. The petitioner said he witnessed voter bribery and that some people were arrested by the police. That he did not know their names but when pressed by Mr Makokha to disclose the people he said he knew one as Omar. He said he did not know the persons bribed or how much they were given. Asked when he received the list of pressing officers, he said on 7<sup>th</sup> August 2017. He did not annex ballot papers from Geneva White House polling station which had unauthorized stamp at the back and that he did not receive form 36B. Referred to the copy of form 36B at page 71 of the 3<sup>rd</sup> Respondents response he said it contained all polling stations in Township Ward and that it had all the results. He said that he did not have any evidence that any of the persons he had alleged were relatives of the 3<sup>rd</sup> Respondent. He said that he had not annexed any form 36A from any of the 27 polling stations to show it had irregularities. That he was unable to pinpoint the irregularities which were witnessed by his agents and that he was not calling any of those agents as his witness. He said he was not aware that most form 36A were signed by his Jubilee Party agents. Asked by Mr Wachira about prayer (c) of his petition he said he only wanted to confirm that the materials used by The IEBC were safe. He said that he was at the tallying Centre when the 2<sup>nd</sup> Respondent received the results and when he declared the winner. He said that he did not lodge any complaint with the 2<sup>nd</sup> Respondent at that time.

Pw2 Hassan Hussein Adan a businessman told the court that he swore an affidavit in support of the petition and that he confirmed the averments in the said affidavit which he tendered the same as evidence in this case. In cross examination Pw2 said he was a registered voter at Geneva white house polling station 2<sup>nd</sup> stream but he had nothing to prove that before court. He said that on that day he was working for ELOG (Election Observers Group) as an observer at Bulla Mpya Primary School Polling Station and that he observed electoral malpractices namely people handing out cash. He did produce anything to show he was an election observer or that on that day he was at Bulla Mpya Primary School. He did not know the people who were bribed or those who bribed them. Asked whether there was anything wrong with the forms annexed to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' response, he said everything on the forms was okay.

Pw3 Zakaria Abdinoor Issack also said he swore an affidavit on the 8<sup>th</sup> of September 2017 in support of the petition and that he had nothing more to add. He was cross examined by counsels for the Respondents and it turned out that he was a brother to the petitioner. He alleged that on the 8<sup>th</sup> of August 2017 he was an election Observer for ELOG in Mandera East Constituency. He did not have anything to prove that he was an election observer as alleged. He alleged that he noted voter bribery at three polling stations. He said that at Bulla Mpya Primary voters were being bribed by EFP chief campaigner one Ismail. He said he did not know if the bribery affected the results of the election. He did not tender his report as evidence.

In his response Adan Harar Noor RW1 who was the returning officer for Mandera East Constituency during the general election held on the 8<sup>th</sup> of August 2017 told the court he had filed his sworn affidavit in support of their joint response to the petition and that he wished to rely fully on the response, the replying

affidavit and the annexures thereto. In cross examination by MrMugalo learned counsel for the Petitioner RW1 said prior to 8<sup>th</sup> of August 2017 he had worked for the Independent Electoral and Boundaries Commission since the year 2010. He said that prior to the election of 8<sup>th</sup> August 2017 the 1<sup>st</sup> respondent advertised, recruited, trained and posted poll officers who included presiding officers and deputy presiding officers. He said the presiding officers and their deputies were trained inter alia on how to fill forms 36A. He said in case of any cancellation on form 36A the presiding officer was to counter sign but if it was an overwriting there was no cause for alarm if the number was legible. He said that it was mandatory for the presiding officers or there deputies to sign form 36A.He said some photocopies of form 36A from Township ward were stamped and some were not. He said the voting process was above board.To questions by MrMakokha learned counsel for the 3<sup>rd</sup> respondent RW1 said the annexures to his affidavit are photo copies and that the petitioner did not ask him to produce the original forms. He said that the original forms were carbonated and that depending on the quality of the photocopier it is possible that stamped forms will appear unstamped.He said that the failure by the presiding officer to sign form 36A will not invalidate the result so long as the said form is signed by the parties agents .He said that he issued the 3<sup>rd</sup> respondent the certificate of elected member of county assembly after declaration of the results on 10<sup>th</sup> August 2017.That he had not received any complaint of bribery from Township ward .That the names of the poll officials were published two weeks before 8<sup>th</sup> August 2017 and the lists were shared with the political parties through the registrar of Political Parties .He said the names of those who had been recruited was published on 4<sup>th</sup> August 2017.He said he did not receive any complaint regarding those recruited from the political parties or the Petitioner. He said there was mass voter registration in January 2017 and later voter verification .he said he did not receive any complaint from the Petitioner on the same issue.

RW2 Adan MaalimAbdullahi the 3<sup>rd</sup> respondent said he filed his response to the petition and swore an affidavit in support of the same dated 21<sup>st</sup> September 2017.He relied entirely on the response and supporting affidavit. He further stated that he garnered 5038 votes against his closest rival the Petitioner herein who managed 1607 votes a difference of 3431 votes. He said he had agents in all 27 polling stations in Township ward and that none of them committed any malpractice or electoral offences. He said he was personally going round the polling stations and that his agents stayed at the polling stations from the beginning up to the end when the results were announced.He said he received carbon copies of form 36A from his agents and did not notice any irregularities on any of them.He said he had received names of the poll officials from his Party on 26<sup>th</sup> July 2017 and that the names were displayed on public Notice Boards at Independent Electoral and Boundaries Commission offices in Manderaand at theMandera County Commissioner’s office Mandera from 4<sup>th</sup> August 2017.He denied that any of the presiding officers was a member of his family.He said that the election held on 8<sup>th</sup> August 2017 was free,fair, credible and verifiable and urged the court to dismiss the Petition with costs.

## **SUBMISSIONS**

The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed their joint submissions dated 2<sup>nd</sup> February 2017 through their advocates on record.They submitted that the petition herein was filed on the 8<sup>th</sup> of September 2017 out of the time prescribed under article 87(2) of the Constitution,section 77(1) of the election Act 2011 and rule 19 of the Elections (parliamentary and County)petition Rules 2017 and therefore the same is a nullity and ought to be dismissed on that ground alone.They relied on the case of **Andrew Toboso Anyanga vs Mwale Scott Tindi & 3 Others (2017)** where the court held:-

“In the present case the petition was filed on 07.09.2017 and clearly that was outside the twenty eight day window allowed by the law. The use of the word ‘shall ’in article 87(2) of the Constitution and section 77(1) of the Election Act 2011 means that the requirement of filing the petition within the said timeline is cast in stone and the election court is bound by it. This strict timeline is captured in the wording of rule 19 of the election (Parliamentary and County) petition Rules 2017 which provide as follows;

‘19(1) Where any act or omission is to be done within such time as may be prescribed in these Rules or ordered by an Election Court, the elections Court may,for purposes of ensuring that injustice is not done

to any party, extend or limit the time within which the act or omission shall be done with such conditions as maybe necessary even where the period prescribed or ordered by the court may have expired.

(2) Sub rule (1) **shall** not apply in relation to the period within which a petition is required to be filed, heard and determined.

The constitution of 2010, the Elections Act 2011 and the Rules do not give the election court any room for discretion where a petition has been filed out of time, even if that period by which the petitioner has failed to meet the deadline is for one day.

In light of the above, this petition has no life. It is a nullity. This court has no power to breathe life into what has not been and what is not. As has been stated by the courts over and over again, you cannot make something stand on nothing, and by extension you cannot put something into nothing.”

They also submitted that the Petitioner did not adduce any shred of evidence to prove the allegations contained in his petition and that he was an unreliable witness. They cited the cases of **John Kiarie Waweru vs Beth Wambui Mugo & 2 Others** (2008) eKLR and **Ndungu Kimanyi vs Republic 1976-1980 KLR 1444**. They also cited the case of **Joseph W Khaoya vs Eliakim Ludeki & Another EP 12 of 1993 and Joho vs Nyange (2008)**. They submitted that the court lacked jurisdiction to determine the petition and secondly that the petitioner had not proved the generalized allegations by cogent, credible and consistent evidence to warrant the nullification of the election and that the petition herein be dismissed with costs.

The advocates for the 3<sup>rd</sup> respondent filed submissions dated 2<sup>nd</sup> February 2017 and attacked the petition on the following fronts; that the petition herein was filed out of the legally stipulated time because the election for Member of County Assembly for Township Ward Manderu East Constituency were held on the 8<sup>th</sup> of August 2017 and the results of the same declared on the 10<sup>th</sup> August 2017. Any petition to challenge that result or that election ought to have been filed within twenty eight days from 10<sup>th</sup> August 2017. This petition having been filed on the 8<sup>th</sup> of September 2017 was time barred and the same ought to be struck out with costs. He also submitted that the petitioner committed criminal offences by swearing that the results were declared on 11<sup>th</sup> August 2017 and that he was present during the declaration facts which he knew were false and thus committed offences contrary to sections 110 of the penal code and section 13(j) of the election offences Act, that the petition violates the mandatory provisions of rule 8 (1) (c) of that Election (Parliamentary and County) petition Rules 2017 as the petition did state the results of the election and how it was declared. He cited the case of **Jimmy Mkala Kazungu vs IEBC & 2 Others**, Petition no 9 of 2017 High Court at Mombasa where the court held as follows;

“In the instant petition, the election date, the election results and the manner in which the results were declared are not stated in the petition. The court therefore declines the invitation to overlook this omission in the petition and deem the supporting affidavit as part of the petition for purposes of fulfilment of mandatory requirements of rule 8 (1) and finds that the petitioner failed to comply with the express mandatory provisions of rule 8 (1) of the election petition rules.

....following the finding in the above case, the import of omission of the results in the petition is that the petition is incomplete as the basis for any complaint is absent. Likewise all other omissions are so fundamental as to render the petition incurably defective. The advocates urged the court to be guided and strike out the petition. It has also been submitted that the burden of proof is on the petitioner to prove the allegations he has made to the required standards to the satisfaction of the court that indeed the election was not conducted in accordance with the constitution and the law and should be invalidated and nullified. The 3<sup>rd</sup> respondent cited the case of **Raila Odinga & 5 Others vs IEBC & 2 others**, 2013 and **Jackton Nyanungo Rangumava vs IEBC & 2 Others**, Kisumu election no 3 of 2017 to buttress his point. Lastly the 3<sup>rd</sup> respondent submitted that the court should not render any opinion in respect of matters not specifically pleaded in the petition arguing that during the hearing of the petition the petitioner, having realized that his petition was flippant went on a fishing expedition and testified on issues not specifically pleaded in the petition. He cited **Kimaru J in Mahamud Muhumed Sirat vs Ali**

**Hassan Abdirahman & 2 Others** Nairobi EP no 15 of 2008 where it was held;

“It is trite law that a decision rendered by a court of law shall only be on the basis of pleadings that have been filed by the party moving the court for appropriate relief. In the present Petition, this court declined the invitation offered by the petitioner that required it to make decisions in respect of matters that were not specifically pleaded. This court will therefore not render any opinion in respect of aspects of the Petitioner's case which he adduced evidence but which were not based on the pleadings that he filed in court, and in particular, the petition. I shall accordingly limit my observations and judgment to what is pleaded in the petition and supported by testimony and other evidence.”

He submitted further that in any event that the failure of the presiding officers or deputy presiding officers to sign or to stamp some forms 36A did not affect the outcome of the final results. He cited the case of **Natif Jama Adam vs Mohammed & 3 Others (2014) eKLR** and **Gatirau Peter Munya vs Dickson Mwenda Kithinji and 2 Others (2014) eKLR**.

### BURDEN OF PROOF IN ELECTION PETITIONS

The legal burden of proof in Election Dispute Resolution lies on and remains with the Petitioner throughout the case (**Raila Odinga vs Independent Electoral & Boundaries Commission & 3 Others**) Supreme Court Petition No 5 of 2013. The rationale of this rule is that the Petitioner is the one who seeks relief from the Court and, in particular, the nullification of an election (s.107(1) of the Evidence Act.

The evidential burden of proof in Election Dispute Resolution initially lies upon the party bearing the legal burden (the Petitioner). The evidential burden may shift and often shifts between the parties as the weight of evidence given by either side during the trial varies. Generally the evidential burden will shift to the respondent once the petitioner proves (1) the incidence of electoral irregularities or malpractices and (2) that the electoral irregularities or malpractices affected the result of the election.

### Standard of proof

Generally the standard of proof in Election Dispute Resolution is higher than the civil standard of balance of probabilities, but lower than the criminal standard of proof beyond any reasonable doubt. There are two exceptions to this rule. First, a party who alleges the commission of Election offences must prove such offences beyond any reasonable doubt (**Raila Odinga vs IEBC & 3 others**) Supreme Court petition No 5 of 2013 and (**Moses Masika Wetangula vs Musikari Nazi Kombo & 2 others**) Supreme Court petition No 12 of 2014. Secondly, a litigant who alleges that the successful candidate did not garner a prescribed minimum number of votes must prove such an allegation beyond any reasonable doubt.

### Analysis of evidence and findings

From the reading of the petition, the supporting affidavits and the two witness affidavits the Petitioner made four general allegations against the respondents. These are;

1. Voter bribery
2. Presiding officers were relatives of the 3<sup>rd</sup> respondent
3. Irregularities and malpractices
4. Violation of his right to vote

### Voter bribery

Bribery is a criminal offence under Section 9 of the Election Offences Act No 37 of 2016. That section states as follows;

s.9(1)A person who,during the election period-

(a) directly and indirectlyoffers a bribe to influence a voter to-

(i) vote or refrain from voting for a particular candidate or political party;

(ii) attendor participate in or refrain from attending or participating in any political meeting ,march,demonstration or other event of a political nature or in some other manner lending support to or for political party or candidate;

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

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

Commits an offence

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

From the reading of that section the offence of bribery in relation election can only be committed if the circumstances described in sub sections (1) and (2) of section 9 of the election offences Act exist. Both the person who gives and the person who accepts a bribe commit the offence. It was incumbent upon the Petitioner in this case to call witnesses and adduce evidence to prove the allegation to the required standard which because bribery is a criminal offence must be beyond any reasonable doubt (see **RailaOdinga vs IEBC** Supreme Court 2013)

In his examination in chief the petitioner told the court that on the election day he was called by his agents who informed him that there was voter bribery at Bulla Mpya Primary School and that the culprits were arrested by CID officers C.I Rubi, CplJuma and PC mganga and taken to Manderu Police Station where they were booked vide OB16/8/8/17.He said he did not know what happened to them.His two witnesses also said they noted cases of voter bribery at the same polling station but did not know those who were giving out the money or those who were receiving the bribes.The 2<sup>nd</sup>respondent denied the allegation. He said that he did not receive any report of voter bribery from the presiding officer who was at Bulla Mpya Polling Station, from the security officers at the Polling Station, from the Petitioner or from any of the agents. The 3<sup>rd</sup> Respondent denied that neither he nor any of his agents in any of the 27 Polling Stations in Township Ward was involved in voter bribery before, during or even after the elections. He said that those the petitioner alleged were arrested on election day and booked vide OB 16/8/8/17 were not his agents and further denied that they were arrested at Bulla Mpya Primary School in Township Ward and said that they were arrested at Manderu D.E.B primary School in Neboi Ward.Did the Petitioner witness any incident of bribery?He said he did not .That he was informed by his agents. He did not call the agent(s) who witnessed the incident as his witnesses to collaborate his story. His evidence was therefore mere hearsay and thus inadmissible.Although the two witnesses he called as pw2 and pw3 said they witnessed people being given cash in the queue at bulla mpya primary schoolpolling station they did not know those who were giving out the money or those who received the money.More importantly they did not know whether those who were giving out money were the 3<sup>rd</sup> respondents agents or not or which candidate those who received the money eventually voted for. None of the Petitioners witness could tell whether the bribery affected the final result of the vote or how that incident tilted the result in favor of the 3<sup>rd</sup> Respondent.It could have been much easier for the Petitioner to conclude that the 3<sup>rd</sup> Respondent was the beneficiary of the bribery had the contest been only between the Petitioner and the 3<sup>rd</sup> Respondent but the reality is that on that day the people on the queues lined up to elect the President, Governor, Senator, woman Representative, Member of National Assembly and Member of County Assembly. That being the case if there was any bribing of persons on the queue which is otherwise not proved and which I doubt, the persons bribing or those who received the bribe cannot be linked with the

3<sup>rd</sup> respondent with certainty. I find the Petitioners evidence on the allegation full of conjectures lacking in specific definitive and cogent evidence.

### Presiding officers were relatives of the 3<sup>rd</sup> Respondent

The petitioner in his pleadings and in his testimony said that most of the presiding officers in Township ward were related to the 3<sup>rd</sup> respondent and therefore he believes that the presiding officers were not fair and were biased in favor of the 3<sup>rd</sup> respondent. The 2<sup>nd</sup> and 3<sup>rd</sup> respondent refuted the allegation and it was upon the Petitioner to prove the same. The Petitioner did not have evidence to prove the allegation. Secondly the Petitioner did not prove that any of the presiding officers was biased against him or that if any of them were biased, it benefited the 3<sup>rd</sup> Respondent. I find the petitioner did not prove this allegation and hold that mere perception or suspicion however strong is not sufficient to warrant nullification of election results.

### Irregularities and malpractices

In his pleadings the petitioner made allegations that there were many irregularities committed at Geneva White House Polling Station. He specifically alleged that 183 ballot papers were stamped at the back using an unauthorized rubber stamp. He did not provide evidence of the illegal stamp. He did not provide any evidence to show that any ballot papers were stamped at all. He was not at that polling Station and his agent who informed of the irregularities was not called as a witness. In his examination in chief and in his cross examination by counsels for the respondents he said he did not know if those irregularities affected the results of the election. It was only later when the Petitioner's counsel Mr Mugalo that the issue of some forms 36A not being stamped or some of them not signed by the presiding officers was raised. That issue was not specifically pleaded in the petition. This Court is bound by decisions of the Superior Courts and for that reason I will decline the invitation offered by the Petitioner to make decisions in respect of matters that were not specifically pleaded. This court will therefore not render any opinion in respect of aspects of the Petitioner's case which were not based on pleadings that he filed in court, and in particular the Petition. I shall accordingly limit my observations and judgment to what was pleaded in the petition and supported by testimony and other evidence. That being the case, I have considered the pleadings of the Petitioner and his testimony in court and I find no proof of the pleaded irregularities. In **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others** Supreme Court petition No 2Bof 2014 the Court held that;

“Procedural and administrative irregularities and other errors occasioned by human imperfection, are not enough, by and of themselves, to vitiate an election”.

### Violation of the Petitioner's Right to vote

In his petition and in his testimony, the Petitioner has alleged that he was denied a chance to vote at Village Polytechnic Polling station by the 1<sup>st</sup> and 2<sup>nd</sup> respondents who unlawfully transferred him as a voter from that polling station to Arda Hagarsu Polling Station in Ashabito Ward in Mandera North Constituency. The 1<sup>st</sup> and 2<sup>nd</sup> respondent denied the allegation. In court the 2<sup>nd</sup> Respondent told the court that if the Petitioner's details were not at the polling station where he had registered as a voter he had himself to blame because he failed, refused and or neglected to verify his registration status and Polling Station long before the election day. Indeed the Petitioner in his petition and his testimony confirmed that he was aware of his transfer as early as May 2017 when he wrote to the 1<sup>st</sup> Respondent requesting that the error be rectified. He had no evidence to show that the letter was ever received by the 1<sup>st</sup> Respondent. If at all his Constitutional right was violated, the right forum available to him to seek redress is the constitutional Court. Did his failure to vote substantially affect the results? My answer is no because the 3<sup>rd</sup> respondent garnered 5038 votes while the Petitioner got 1607 a margin of 3431 votes. It is logical to conclude that had the Petitioner voted for himself he could have got a total of 1608 and the margin of loss could have reduced by one to 3430. That difference alone is negligible and could not have made any difference at all and therefore cannot be the basis of challenging the 3<sup>rd</sup> Respondents' election as Member

of County Assembly for Township Ward.

In their response the 1<sup>st</sup> and 2<sup>nd</sup> Respondents pleaded that the petition was filed out of time. The Petitioner did not respond to that issue in his reply to the responses or in their submissions the Advocates for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that the petition herein was filed on the 8<sup>th</sup> of September 2017 outside the twenty eight days window allowed by the constitution under Art 87(2) and section 77(1) of the Elections Act 2011 and Rule 19 of the Election (Parliamentary & County) petitions Rules 2017. The 2<sup>nd</sup> Respondent told the court that he declared the results for Township Ward on 10<sup>th</sup> August 2017. Twenty eight days from 10.08.2017 ends on 06.09.2017. Clearly the petition was filed two days later. Guided by the High Court in the **Andrew Toboso Anyanga** case, I agree with the learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents that this petition was filed out of time. It was time barred. It has no life. It is a nullity and ought to be struck out.

**Conclusion and determination**

The Petitioner in this Petition has not proved any of the allegations in the petition. His evidence is not specific, satisfactory, definitive, cogent and/or certain to warrant the nullification of the 3<sup>rd</sup> Respondents election as the Member of County Assembly for Township Ward in Mandera east Constituency. The election was conducted substantially in accordance with the principles of the Constitution as set out in Article s 81 (e) and 86, the Elections Act 2011 and the Rules made thereunder. The allegations are dismissed and the petition being a nullity is struck out with costs to the respondents.

I declare that Hon Adan Maalim Abdullahi, the 3<sup>rd</sup> Respondent herein whose election is questioned was validly elected in the election held on the 8<sup>th</sup> of August 2017.

**Costs**

Generally costs follow the event. Costs are not awarded so as to enrich the successful litigant but on the contrary to compensate them for the expenses incurred in prosecuting or defending the petition. In this petition, I have considered the complexity of the matter, the research involved, travelling from Nairobi and back, accommodation and other incidentals and in my humble assessment an award of Kenya Shillings two million (Ksh 2000,000) will sufficiently compensate the three Respondents.

Dated signed and delivered at Mandera this 16<sup>th</sup> of February 2018

**Hon Peter Areri**

**Magistrate**

**In the Presence of**

- 1.-----
- 2.-----
- 3.-----
- 4.-----
- 5.-----

Any party aggrieved has right to appeal within 30 days from the date hereof.