



**REPUBLIC OF KENYA**

**IN THE CHIEF MAGISTRATES COURT AT NAIROBI**

**MILIMANI COMMERCIAL COURTS**

**ELECTION PETITION NUMBER 6 OF 2017**

**IN THE MATTER OF AN ELECTION PETITION FOR THE ELECTION FOR MEMBER OF THE COUNTY ASSEMBLY FOR NAIROBI COUNTY FOR MUKURU KWA REUBEN / KWA REUBEN WARD.**

**IN THE MATTER OF ARTICLES 1, 2, 4,10,38,81,82,86,88, 163 (7), 177 AND 249 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA, 2010.**

**IN THE MATTER OF THE ELECTIONS ACT NO. 24 OF 2011**

**AND**

**IN THE MATTER OF THE IRREGULARITIES AND MALPRACTICES OVER THE ELECTION PROCESS AND / OR ELECTIONS HELD ON THE 8<sup>TH</sup> AUGUST, 2017 FOR THE ASSEMBLY**

**FOR MUKURU KWA REUBEN / KWA REUBEN WARD**

**BETWEEN**

**MICHAEL MUSYOKI MWANANZIVU.....PETITIONER**

**VERSUS**

**THE INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT**

**EVANS OTISO.....2<sup>ND</sup> RESPONDENT**

**MANDE SCHOLASTICA MUTHONI.....3<sup>RD</sup> RESPONDENT**

**NZYUKO CHRISTOPHER TITO.....4<sup>TH</sup> RESPONDENT**

**CHARLES KAKUNDI KYAVOA, RETURNING OFFICER**

**EMBAKASI SOUTH CONSTITUENCY...5<sup>TH</sup> RESPONDENT.**

**JUDGMENT**

1. The Petitioner Michael Musyoki Mwananzivu filed this Petition against the Independent Electoral and Boundaries Commission, Evans Otiso, Mande Scholastica Muthoni, Nzyuko Christopher Tito and Charles Kakundi Kyavoa. The Petitioner was one of the 14 candidates who contested the position of Member of County Assembly Mukuru Kwa Reuben Ward in Embakasi South Constituency. The Petition is supported by the affidavit of the Petitioner sworn on the 4<sup>th</sup> September 2017. The Petitioner also relied on various affidavits sworn by his witnesses his oral testimony and the oral testimony of the witnesses. The Petitioner filed this Petition challenging the election of the second Respondent. The Petition is premised on the grounds that the election was marred with irregularities, voter bribery, voter intimidation and transportation of voters from Kisii, Mlolongo and Kitengela, and stealing of the petitioners votes by the Returning officers and adding the same to the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Respondent's votes.

2. The Election results were as follows

NO.	NAME	VOTES
1	Evans Otiso	5,342
2	Scholastica Mande	3,943
3	Michael Mwananzivu	3,031
4	Nzyuko Christopher	2,398
5	Ombati Joseph Mosaremo	2,331
6.	Omaturi Labans Gichana	550
7	Kahihu Erastus Karanja	449
8.	Ndiga Daniel Wambua	350
9	Oundo Bernard Lucky	146
10	Ogake Zacharia	79
11	Waluba Janet	71
12	Motari Bernard Nyabuga	45
13	Mwabali Joshua	44
14	Fidelis Joshua Omare	33

3. The Petitioner in his Petition filed on the 5<sup>th</sup> September 2017 seeks the following Orders.

- i. A nullification of the election results for County Assembly for Mukuru Kwa Reuben ward results for the election held on the 8<sup>th</sup> August 2017.

- ii. The votes in respect of the ward be recounted and the tallying thereof be examined
- iii. Fresh elections for the seat be held
- iv. A declaration that the Petitioner was duly and validly elected for the seat.
- v. Costs of the Petition

### **The Petitioner's Case**

4. The Petitioner Michael Musyoki Mwananzivu called six witnesses. He stated that his main opponents were Evans Otiso, Scholastica Muthoni and Christopher Nzyuko. Otiso was vying on the ODM Party, Scholastica on the Jubilee Party and Nzyuko Tito on the Wiper Party.

5. There was a total of 44 polling stations at Mukuru Kwa Reuben and the Petitioner had 49 agents. The Petitioner was given a short notice for training the training of agents by IEBC. None of the Petitioner's agents took part in training. Dahabour Boru was the returning officer. Boru informed the Petitioner through a text message at 10:21 that the training was scheduled for 2 P.M. The Petitioner was not able to mobilize 44 agents within 3 hours to attend the training. The other candidates were given five days notification for training. The required documents from the Petitioners agents to IEBC were the letter of appointment, oath of secrecy, and a consent from the Petitioner. The Petitioner's agents were not issued with badges. Due to lack of badges, the Petitioner's 38 agents could not access the polling stations. The limited access of the Petitioner's agents to the polling stations contributed to the stealing of the Petitioner's votes. The Petitioner had pleaded with IEBC to allow his agents to the Polling stations. Only six agents for the Petitioner signed on behalf of the Petitioner's Party.

6. The Petitioner intercepted motor vehicle registration number KAC 140 D at the gate of Maendeleo Primary school. The vehicle had three gentlemen and a brother to Evans Otiso the Second Respondent. The Petitioner called the police to assist him not to allow the vehicle inside Maendeleo polling station. The police officer told the Petitioner not to interfere with their work. The police told the Petitioner that the vehicle was from IEBC and was ferrying food to IEBC officials. The Petitioner followed the vehicle which was driven to polling station number 11. The vehicle dropped plastic seals and some forms of papers. The materials were received by agents of Evans Otiso who were talking in Kisii language.

7. Evans Otiso had brought 4 to 5 buses from Rembo Shuttle full of people. The Petitioner saw 4 buses where people alighted and were asking for directions. One bus was parked near Bhachu industries

8. The People who were dropped by the Rambo buses were not identified by the biometric kits and seemed to be known to the officials. They only showed their identification and were allowed to vote. The second Respondent Evans Otiso, Scholastica Muthoni and Tito Nzyuko were distributing defamatory publications about the Petitioner. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents were distributing the defamatory papers with the Petitioner's photograph together with money to voters. The second, third and fourth Respondents told the voters that the Petitioner was a thief. The voters were each bribed with ksh. 500 and told voters not to vote for the Petitioner. The Petitioner's voters were also bribed with ksh. 500 and ksh. 1000 and told to sleep.

9. The 4<sup>th</sup> Respondent allowed people to jump que and vote by giving them official IEBC badges.

10. The Petitioner's votes were stolen and added to the 3<sup>rd</sup> Respondent's votes and the 4<sup>th</sup> Respondent's votes. The Petitioner was not allowed in the Counting hall. Form 36B did not have rejected votes. The Petitioner believed that the rejected votes were added to the second, 3<sup>rd</sup> and 4<sup>th</sup> Respondents votes.

11. The fifth Respondent allowed the results to favour Evans Otiso. The Brother to the second Respondent pretended that they work for IEBC. The Petitioner's Chief agent reported about the stealing of the votes. Only six of the Petitioners agents signed on form 36A, The rejected votes were not recorded

in form 36 B. The Petitioner told the Court that he believes that the rejected votes were added to Evans Otiso's votes. Failure to have the rejected votes accounted for affected the final results. The results as declared were not the correct results. Had the correct results been declared, the Petitioner could have been declared the winner of the election. Form 36 A did not reflect the correct results which led to the wrong results on form 36B. The Fifth Respondent altered the results in favour of Evans Otiso the second Respondent.

12. There were voters who were given more than one ballot paper and the Petitioner believes that the people who voted were not registered voters. The voters were not identified by the Biometric kits. The results in form 36 A and Form 36 B are not the same.

13. Ballot box serial number 165350 had two seals instead of the five seals that each box is supposed to have. The box had a crack of two inches. Box No 4 serial number 165466 had only two seals and could easily be opened to remove the ballot papers.

14. The results in Maendeleo polling station number 3, Maendeleo polling station number 11, and Reuben primary school polling station 12, and Reuben polling station number 19 the results are the same. No data was displayed for the five polling stations.

15. There was double registration, station number 3 had valid registered votes at 427. The results for rejected votes had 7. Form 36 B shows that the valid votes were 430 and the rejected votes were zero (0). The results were changed at the tallying Centre. At Polling station number 4 Maendeleo, the valid votes for the Petitioner were 60, the votes for Otiso were 147, and votes for Scholastica were 57. In form 36B the results showed the valid votes were 489, for the Petitioner the votes were 90, the second Respondent 139 votes, the 3<sup>rd</sup> Respondent 55 votes. At Maendeleo polling station number 10, the recorded value of votes were 436, the rejected votes were 2, In form 36 B the recorded votes were 456 with no rejected votes. In polling station number 13 the valid votes were 403 on form 36 A. In form 36B the valid votes were recorded as 404. There were no rejected votes. In polling station no. 6 Maendeleo the recorded votes in form 36 A were 450 and 2 rejected votes. In form 36B the recorded votes were 448 votes, 0 rejected votes. In station 20 at Maendeleo form 36 A had 428 votes with 5 rejected votes while form 36B recorded votes were 423 with 0 rejected votes. At Gatoto Primary school polling station number 3 form 36 A recorded valid votes as 425 with 6 rejected votes. The third Respondent got 127 votes, Gatoto primary stream 3 the form 36 B valid votes were 424 votes, 0 rejected votes. Muthoni the third Respondent got 121 votes. Stream no. 4 Gatoto Primary School form 36 recorded no valid votes and there were 0 rejected votes. On form 36 B the recorded valid votes are 419. At Gatoto Primary school stream 7, form 36 A had 409 votes with 5 rejected votes. On form 36 B the results recorded valid votes as 408 with no rejected votes. At Reuben Primary school polling station number 3, form 36 A valid recorded votes were 451 with two rejected votes. The second Respondent got 93 votes. In form 36 B 453 votes were cast with zero rejected votes. The second Respondent got 95 votes. In stream no.6 at Reuben Primary school form 36 A had 453 votes with 6 rejected votes. Form 36 B the valid votes were 443 votes with 0 rejected votes. Stream 2 shows no figure recorded in form 36A and rejected votes were 5. Form 36 B the valid votes were recorded as 467 with zero rejected votes. Form 36 A was not signed by any agent. In stream 9 the valid votes recorded were 434 with 4 rejected votes. In form 36 B 431 votes were recorded with 0 rejected votes. In polling station number 13 the valid votes in form 36A were recorded as 426 with 13 rejected votes. The votes for the Petitioner were recorded as 75 votes. In form 36 B 446 votes were recorded with 0 rejected votes. The Petitioner's votes were recorded as 73 votes.

16. The Petitioner having pointed out the discrepancies stated that the results were altered and that the counting of the votes was not done properly and the elections were not free and fair. The logistical challenges like no electricity to charge the Kiems kits, lack of chairs and tables affected the election.

17. In cross examination by Bukania for the first and fifth Respondent, the Petitioner told the Court that he won the elections but the election was marred with irregularities and malpractices. Voter bribery took place at the gate and inside the polling station. The Petitioner saw Rama the agent for the second Respondent with money. The IEBC Notice board did not have information concerning the training of agents. The Petitioner had 48 agents and 44 appointment letters. The Petitioner's agents were denied

cards and entry tags which were the documents to allow the agents to the polling stations.

18. Only six of the Petitioner's agents were allowed into the polling stations and signed form 36 A. The other 38 agents were not allowed into the polling stations. The Petitioner did not report to the police that his agents were denied access to the polling stations. The Petitioner reported to the presiding officer that his agents were denied access at the polling station.

19. The Petitioner knew that the IEBC agents were bribed because the results recorded in form 36A were different from those recorded in form 36 B. The irregularities were going on and the IEBC officers did not stop the irregularities. The mathematical errors were deliberate and not just mistakes. The Petitioner saw four buses ferrying people but did not give the registration numbers of the buses. The voters were caught red handed marking more than one ballot paper. The rejected votes would not have changed the figures. The returning officer and presiding officer altered the results.

20. In cross examination by Momanyi for the second, third and fourth Respondents, the Petitioner told the Court that the results that were declared by the returning officer were not accurate. The Petitioner was disadvantaged because other candidates were given information about the training in good time while he was only given three hours' notice regarding the training of agents. The badges issued by IEBC were standard and not associated with any political Party. Only six of the Petitioner's agents were allowed in the polling stations. The petitioner told the Court that although Japheth Mutuku is alleged to have signed as agent of CCU Party, he did not sign as he was not at the polling station. In station number 8 the Petitioner's agent Beatrice Nabwire did not sign. If Beatrice had worked she ought to have come for her payment. Beatrice never came for her payment. Mercy Mutheu is not the one who signed for CCU. The identity card numbers were copied from the list the Petitioner gave to the IEBC.

21. Voters were imported from Kisii, Mlolongo and Kitengela. The Petitioner saw the second and 4<sup>th</sup> Respondents busy intimidating and bribing voters with money. The Petitioner never reported the bribery and intimidation of voters to the police. The Second Respondent's agents were caught stealing the Petitioner's votes. When pressed on whether there were observers, the Petitioner told the Court that he did not know about independent observers. The media was not inside the polling station.

22. The difference between the Petitioner's votes and the votes for the winning candidate was 2000.

23. In reexamination, PW1 told the Court that all the people signed at 6.00 a.m. There is no one who signed at 6:01. It is not possible for everyone to sign at 6 am. The Petitioner saw the second Respondent holding the Petitioner's picture with ksh. 1000 giving everyone who was passing. The second Respondent was telling the women that he will take them to Mombasa after winning the election.

24. Only six of the Petitioner's agents were able to access the polling station and they signed. The other agents purporting to have signed for the Petitioner are forgeries. The figures in form 36 A and 36 B were different.

25. PW2 Mutunga Nyamai adopted his affidavit and told the Court that he saw the 3<sup>rd</sup> Respondent giving posters with ksh 300. PW2 saw the 2<sup>nd</sup> Respondent with posters bearing the Petitioner's picture and giving people money. PW2 got a poster with ksh. 300. He also saw the 3<sup>rd</sup> Respondent give out the posters and money.

26. In cross examination, PW2 told the Court that he did not have evidence to show that the votes were stolen. In Reexamination, PW2 told the Court that he was given ksh. 300 with several posters. PW3 Eunice Akinyi Golo adopted her affidavit as evidence. PW2 told the Court that she was attached at stream 5 polling station at Reuben Primary school. During the counting of votes at her stream, the Petitioner had 79 votes. PW2 saw the agent for 2<sup>nd</sup> Respondent taking the Petitioner's votes and gave them to the 1st Respondent's clerk to add them to the 2<sup>nd</sup> Respondent's votes. PW2 intervened and the 8 votes which were found in the 2<sup>nd</sup> respondent's bundle were put back in the Petitioner's bundle of votes. The presiding officer was forcing everyone in the counting room to sleep in the middle of counting on the

pretext that everyone was tired.

27. In cross examination by Bukania for the 1<sup>st</sup> and fifth Respondent, PW3 told the Court that the votes for the Petitioner were added to the votes for other candidates. PW2 screamed when the malpractice was detected and the error was rectified. PW2 did not have documentary evidence that the votes were stolen.

28. In cross examination by Momanyi for the 2<sup>ND</sup>, 3<sup>RD</sup> and 4<sup>th</sup> Respondents, PW3 told the Court that she was trained as an agent by IEBC. She was informed about the training a day to the training by the Petitioner's Chief agent. PW3 did not have an IEBC card and other agents did not have cards. PW3 did not see two ballot papers being given for county Representatives. PW3 screamed when she saw two ballot papers being given to a voter. She could not tell the candidates the voters with more than one ballot papers for member of County Assembly were voting for. PW3 saw Beatrice Atieno and Beatrice Nabwire who were agents for the Petitioner. The malpractices and irregularities led to the Petitioner's loss.

29. In Reexamination, PW3 told the Court that the extra ballot papers were kept aside after the clerk gave them to the presiding officer. The clerk apologized and informed the presiding officer. The figure on form 36 A was put by the presiding officer.

30. PW4 Benjamin Kyalo adopted his affidavit and told the Court that on the 8<sup>th</sup> day of August 2017 on his way to Maendeleo learning Centre, he saw the 2<sup>nd</sup> Respondent seated inside a car distributing printed posters with defamatory information about the Petitioner. The second Respondent gave several copies to PW4 and told PW4 that the Petitioner was a thief who has cases in Court and carries a gun. The second Respondent was also giving people ksh. 500 and told them not to vote for the Petitioner. PW4 was given ksh. 500 by the second Respondent. There were other posters at the entrance of the polling station which voters picked and vowed not to vote for the Petitioner. The agents for the 2<sup>nd</sup> Respondent also gave people money and told them to vote for the Respondent. The copies of the posters were also thrown at the entrance of Reuben Primary School polling Centre and Gatoto Primary polling Centre entrances. The Second Respondent's agent was distributing the posters outside the polling stations.

31. In cross examination by Bukania for the 1<sup>st</sup> and 5<sup>th</sup> Respondents, PW4 told the Court that the second Respondent gave him a poster and ksh 500. In cross examination by Momanyi for the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Respondents, PW4 told the Court that he saw the car 10 minutes to 6 am. PW4 told the Court that he is a cousin to the Petitioner. The second Respondent was in the vehicle with three other men

32. PW5 Boniface Ochieng adopted his affidavit sworn on the 4<sup>th</sup> September 2017 and stated that he saw the 3<sup>rd</sup> and 4<sup>th</sup> Respondents at various polling stations talking to voters and taking the voters to jump the queue. During the counting, PW5 was locked out of the counting hall and did not sign form 36 A. The 4<sup>th</sup> Respondent's agent attacked the Petitioner after the Petitioner had cast his vote.

33. In cross examination BY Bukania for the first and fifth Respondents, PW5 told the Court that he saw the 3<sup>rd</sup> and 4<sup>th</sup> Respondents talk to voters from morning to evening. The 4<sup>th</sup> Respondent attacked the Petitioner by calling him a thief.

34. In cross examination by Momanyi for the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Respondents PW5 TOLD THE Court that he has not named any polling Centre that was difficult to access. PW5 did not know what was happening in each station.

35. In reexamination by Angwenyi for the Petitioner, PW5 told the Court that he could not move without a badge and could not enter a polling stream without a badge.

36. PW6 Elphas Wakhisi adopted his affidavit and stated that on the 7<sup>th</sup> August 2017 he saw a Rembo Shuttle at 11: 45 pm parked at Gateway full of people. The lights were on but the vehicle did not have a driver. Rama and the second Respondent's agent were inside the Shuttle. PW5 saw the 4<sup>th</sup> Respondent's agent giving money to people. On the 8<sup>th</sup> AUGUST 2017, at around 5:00 a.m. the second Respondent and

his agent parked a vehicle 50 meters from Maendeleo Learning Centre and they gave money to voters who walked to the polling Centre to vote. So many irregularities and malpractices were occasioned against the Petitioner in favour of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents

37. In cross examination by Momanyi for the 2<sup>nd</sup> 3<sup>rd</sup> and fourth Respondents, PW6 told the Court that Rembo Shuttles are not owned by the 2<sup>nd</sup> Respondent. PW6 saw the second Respondent with his agents. They had a T shirt with the Second Respondent's Photograph.

38. In reexamination by Angwenyi for the Petitioner, PW6 told the Court that the second Respondent tried to give him money in the morning but he did not take the money. Rama is the one who was giving out money to people.

39. PW7 Joseph Kitheka Munuve adopted his affidavit and stated that on the 8<sup>th</sup> August 2017, he submitted his duly signed CCU Party appointment letters, Oath of secrecy to the Presiding Officer so that he could be issued with an agent's badge. The Presiding officer told PW7 that there were no badges. Without a badge PW7 could not serve as an agent. Agents for the other candidates were allowed to stay. PW7 also saw Rama very drunk and acting arrogant causing trouble and intimidating voters.

40. In cross examination by Bukania for the 1<sup>st</sup> and 5<sup>th</sup> Respondents, PW7 told the Court that the agents were not allowed in 39 polling stations. Only six agents were allowed into the polling stations. The Petitioner's Chief agent was notified about the training for agents late.

41. In cross examination by Momanyi for the 2<sup>ND</sup> 3<sup>RD</sup> AND 4<sup>th</sup> Respondents, PW7 told the Court that in 2013 he was trained as an agent by election officers. He was also trained in 2002 as an agent.. PW7 did not go to Maendeleo no. 14 after he voted. PW7 went to several streams at around 3 pm. PW7 did not report to the police station that Rama was mishandling and intimidating voters. He did not follow Rama all over to determine how many voters Rama was talking to, intimidating and manhandling. Rama was an agent for the 4<sup>th</sup> Respondent.

42. In reexamination by Angwenyi for the Petitioner, PW7 told the Court that Rama committed an election offence.

43. PW8 Mercy Maundu adopted her affidavit and stated that she was issued with an agent's badge and told to share the same with other agents. As voting continued, she saw an IEBC official give one voter two ballot papers for the position of Member of County Assembly. PW8 alerted the presiding officer and the extra ballot paper was stamped as rejected.

44. In cross examination by Momanyi for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents, PW8 told the Court that the registered voters in Reuben polling stream no. 15stream were 673 and 460 voted.

### **The 1<sup>st</sup> and 5<sup>th</sup> Respondent's case**

45. DW1 Charles Kakundu the returning officer stated that there were 70 candidates for member of County Assembly spread in various wards. There were 14 aspirants in the ward in question. The ballot papers and presiding officers were escorted by police to the tallying Centre.

46. The training of agents was conducted by IEBC. The information relating to the training was posted on the IEBC Website. The timelines for Embakasi South were printed and posted on the Notice Board. All candidates were sent text messages.

47. The agents were categorized as per the positions. There were 24,973 agents. The agents were told to come with their appointment letters and oath of secrecy. There was a shortage of badges which was mitigated by asking the agents to come with their oath of secrecy and appointment letter.

48. IEBC had carried out voter education, displayed election offences the name of the OCS and his contact. All the candidates signed the code of conduct and all the candidates were given the contact of the returning officer. Six toll free numbers had also been given for members of the public to report any malpractices detected. There was no report of malpractice or a vehicle carrying ballot boxes. There was a police officer at every polling station. It is an election offence for an unregistered voter to vote. The Kiems kits did not fail.

49. Kwa Reuben ward had 29,706 registered voters who were divided in 3 centers. Kwa Reuben had 10,774, Maendeleo 13,700 and Gatoto Primary 5,232. The valid votes were 19041 for the MCA position. The number of the votes cast was not higher than the registered voters.

50. There has to be an incident report when a vote is stolen and OB number.

51. The issue of long queues was mitigated by having a maximum of 700 voters per polling station. A badge could not assist any voter to jump the queue. All agents were given the forms to countercheck before the form is signed. The agents were allowed to peruse the results.

52. The agents were identified by the letter of appointment and oath of secrecy. Each agent was supposed to have the original letter of appointment and Oath of secrecy. Those who came with photocopies were not allowed to enter the polling station.

53. There were 26 polling stations where CCU agents signed. In Maendeleo CCU agents signed in stream 3,5,6,7,8,11,12,13,15,17,18 and 19. In Reuben CCU agents signed in stream 1,3,4,5,12,13,15 and 16.

54. There were no badges for Chief agent. All badges had “political Party agent” and did not give the name of any political Party. The agents were allowed to move from station to station.

55. There was a central place to charge the Kiems kits together with a power Bank. Maendeleo Learning center did not have electricity. The IEBC provided the officials with power banks.

56. The rejected votes were 187 and would not have changed the outcome of the results.

57. In cross examination by Angwenyi for the Petitioner, DW1 told the Court that he had a telephone number with six hotline numbers. He did not receive any report of any incident. He counterchecked the accuracy of the results. The results were verified and the winner was announced and a certificate was issued to the winner. The returning officer reads the results as they are in form 36 A. The wrong results in form 36 B can be changed if there is an error after verifying. A statutory form cannot be changed. In preparing form 36B, DW1 relied on form 36 A. There are differences in form 36 A and form 36 B. The rejected votes were not recorded. The difference was caused by the typing of wrong figures by IEBC clerks. Form 36 A from Maendeleo learning Centre has no entry and no one has signed. Form 36 A is one of the statutory forms. A statutory form cannot be changed. The results were correct irrespective of the anomalies.

58. There was no case of stolen votes reported. There was no ballot shifting.

59. In cross examination by Momanyi for the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Respondents, DW1 stated that there was a shortage of badges because the number of agents was overwhelming. The agents were allowed to use their appointment letters and oath of secrecy.

60. All employees of IEBC signed a code of conduct and were trained to be non-partisan. There was no report of a partisan clerk. The role of IEBC was to ensure a free and fair election.

61. All ballot papers were serialized and each had a counter folio to detect any serial number that is not in the folio. A vote that is stuffed is detected at the counting. There were no incidents of ballot stuffing. The voter turnout was 64.7%. Any vote stuffing would have resulted in an anomaly between voter turnout and the ballots cast. There was no possibility that the 144 clerks could collude in favour of one candidate.

62. The missing seals on the ballot boxes did not affect the results of the election. There was no possibility that form 36 A was tampered with.

63. DW2 Jackson Mwathe Ndeti stated that he was the presiding officer in charge of Kwa Rueben stream 5. He relied on his affidavit filed on the 5<sup>th</sup> September 2017. The agents were identified by the oath of secrecy and letter of appointment.

64. In cross examination by Angwenyi for the Petitioner, DW2 told the Court that they used the gas lanterns as there was no electricity in stream 5. There were 4 rejected votes.

65. In cross examination by Momanyi for the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Respondents, DW3 told the Court that Eunice Akinyi signed after the sealing of the ballot boxes. The logistical challenges could not change the results. For lighting IEBC had gas lanterns in place. The gas lanterns provided enough lighting.

66. DW3 Peris Nzabo the presiding officer Reuben stream 14 adopted her affidavit and stated that the agents are supposed to sign in when they report.

67. In cross examination by Angwenyi for the Petitioner, DW3 told the Court that she did not know Joseph Kitheka. At Reuben stream number 14, there was no agent for the CCU Party. No agent from CCU Party was denied access to the polling stream. There was no electricity in the counting room. The IEBC had organized the gas pressure lamps which provided adequate lighting. None of the Kiems broke down.

68. In reexamination by Bukania for the 1<sup>st</sup> and 5<sup>th</sup> Respondents, DW3 told the court that a document without a signature could not allow an agent to access a polling station.

69. DW4 Erick Mutisya Kimeu adopted his affidavit and produced the annexures to the affidavit as exhibit. He was the presiding officer for Reauben stream 15. One of the clerks gave a voter two ballot papers and the matter was reported by the Party agent. The Party agents were summoned and the extra ballot paper was stamped as rejected.

70. In cross examination by Angwenyi for the Petitioner, DW4 told the Court that there were only three badges and the agents were seven. The agents were identified by their appointment letter and oath of secrecy.

71. The Kiems kits worked and no voter was allowed to vote without identification by the Kiems. DW4 had a printed register but did not use it. The Party agents did not assist IEBC officials to count the votes.

### **The Second 3<sup>rd</sup> and 4<sup>th</sup> Respondent's case**

72. DW5 Christopher Nzyuko Tito the 4<sup>th</sup> Respondent adopted his affidavit and stated that the elections were conducted fairly by the IEBC. In cross examination by Angwenyi for the Petitioner, DW5 told the Court that there were no leaflets maligning his name. DW5 did not distribute leaflets maligning the Petitioner. IEBC informed DW5 in a text message of a training for agents. In cross examination by Bukania for the 1<sup>st</sup> and 5<sup>th</sup> Respondents, DW5 told the Court that none of his agents were denied access to the polling stations.

73. DW6 Scholastica Muthoni Mande third Respondent adopted her affidavit and stated that the allegations of malpractices against her are not true. The Petitioner and his agents were not discriminated against. DW6 saw leaflets thrown outside Maendeleo polling station maligning her name alleging that she was a changaa dealer. She did not see the person who distributed the leaflets.

74. There was no vote stealing because the agents ensured that that stealing did not take place. A total of 434 voted in Maendeleo stream 11 where DW6 got 62 votes, the petitioner got 84 votes, the 4<sup>th</sup> Respondent 72 votes. It was not possible to sit with the second Respondent to plan how to steal the

Petitioner's votes.

75. In cross examination by Angwenyi for the Petitioner, DW6 told the Court that she did not see any vehicle with marked ballot papers. Her agents could have seen the vehicle with the marked ballot papers. If there were any irregularities, her agents could have detected the same. The agents were informed about the training through a short text message.

76. In cross examination by Bukania for the 1<sup>st</sup> and 5<sup>th</sup> Respondents, DW6 told the Court that her agents were allowed in the polling station.

77. DW7 the Second Respondent adopted his response and the affidavit. He stated that the elections were free and fair.

78. The agent's training for the ward was meant for all the contestants and no candidate was given special treatment. The Petitioner has not demonstrated qualitative and quantitative irregularities and anomalies during and after voting. DW6 denied that he bribed any voters and did not engage in the production and circulation of defamatory materials.

79. In cross examination by Angwenyi for the Petitioner, DW6 told the Court that there were no malpractices and chaos. The agents were trained on the 6/8/2017 by IEBC officials. The information about the training of agents was relayed through text message.

80. In cross examination by Bukania for the 1<sup>st</sup> and 5<sup>th</sup> Respondents, DW6 told the Court that he did not bribe or import voters from Kisii. There is no polling station where the number of voters exceeded the registered voters. The agents used letters of appointment and oaths of secrecy to access the polling stations.

81. In reexamination by Momanyi, DW6 told the Court that he stopped the campaigns a week to the elections and did not allow the agents to campaign beyond the time that was provided for the campaigns. It is not possible to intimidate voters on the Election Day. Motor vehicle registration number KAC 140 D does not belong to the 2<sup>nd</sup> Respondent's relative or friend. The 2<sup>nd</sup> Respondent did not import voters from Kisii, Mlolongo and Kitengela. The second Respondent did not bribe voters or instruct his agents to bribe voters.

82. DW8 Silas Ondicho Manyu adopted his affidavit sworn on the 20<sup>th</sup> September 2017. He stated that the Second Respondent slept in at Mbotela on the 7<sup>th</sup> August 2017.

83. In cross examination DW8 told the court that the second Respondent left on a motorcycle.

### **The Petitioner's Submissions**

84. Counsel for the Petitioner submitted that the results for Mukuru Kwa Reuben Ward were altered as demonstrated from forms 36 A and form 36 B. The diaries indicate that the election materials like lighting, chairs, badges, seals were not adequate. There was double registration of voters and forgery which affected the election results.

85. The election of 8<sup>th</sup> August 2017 General elections for member of County Assembly for Mukuru Kwa Reuben ward ought to be nullified.

86. The Petitioner was not given adequate notice for training of his agents.

87. Voters were imported from Kisii, Mlolongo and Kitengela to vote for the 2<sup>nd</sup> Respondent. The Petitioner's votes were stolen during counting.

88. The results as reported indicated that form 36 A and form 36 B are different an issue that was

confirmed by the 5<sup>th</sup> Respondent.

89. The Petitioner relied on the cases of *Raila Amolo Odinga & another vs Independent Electoral and Boundaries Commission and 2 Others* [2017] eKLR, *Sumra Irshadali Mohamed vs Independent Electoral and Boundaries Commission and another* [2018] eKLR..

90. In nullifying the 8th August Presidential election, the Supreme Court held that “an election is not an event, it is a process from the beginning to an end.” Counsel for the Petitioner submitted that the process of conducting the general election was greatly flawed and that the 8<sup>th</sup> August 2017 General Elections for member of County Assembly for Mukuru Kwa Reuben Ward was marred with numerous irregularities, illegalities and malpractices and as such the Election ought to be nullified.

91. In the case of *Sumra Irshadali Mohamed vs Independent Electoral and Boundaries Commission and another* the High Court ordered for a recount of the votes. The Petitioner relied on section 82(1) of the Election Act Cap 24 Laws of Kenya which provides “ An Election Court may on its own Motion or on application by any Party during the hearing of an election Petition order for scrutiny of votes to be carried out in such manner as the election Court may determine”.

92. The Petitioner further submitted that the Court does need to be prompted by an application under section 82 of the Election Act but can make such orders suo motto. The Petitioner has sought for scrutiny of votes in his Petition.

93. In conclusion, the Petitioner submitted the elections were marred with numerous irregularities, illegalities, malpractices and ought to be nullified.

94. The Petitioner relied decision for of the High Court in the case of *Sumra Irshdali Mohamed versus Independent Electoral and Boundaries Commission and another* [2018] eKLR

### **The 1<sup>st</sup> and 5<sup>th</sup> Respondent’s Submissions.**

95. Bukania for the 1<sup>st</sup> and 5<sup>th</sup> Respondent submitted that the Petition before this Court is incompetent and does not meet all the requirements of the Election Petition Rules 2017. The Petition must comply with Rule 8 of the Election (Parliamentary and County Petitions.) The provisions are couched in mandatory terms. The Petitioner is required to have provided the figures that were announced by the IEBC at the close of the election. The 1<sup>st</sup> and 5<sup>th</sup> Respondents relied on the case of *Ali Hassan Joho & another versus Suleiman Said Shahbal & 2 others* [2014] eKLR. The declaration of the results is by way of the certificate issued after the elections which in this particular case is form 36 B. The outcome should be presented before a Court of law as was held in the case of *Ali Hassan Joho & another vs Suleiman Said Shahbal & 2 others*. The application of Article 159 (2) (d) of the Constitution cannot be a shield for a mandatory procedural requirement. In the case of *Amina Hassan Ahmed vs Returning Officer Mandera County & 2 others* (2013) eKLR where the Court held that rule 10 is not a mere technical requirement but are substantive and go to the root and substance of issues and matters prescribed. The provisions of the Elections Act and / or rules must be complied with fully. In the case of *Martha Karua & another versus IEBC & 3 Others*, the Court held that it is not sufficient to talk of results without giving numbers.

96. Rule 5 (1) of the Elections (Parliamentary and County Petitions Rules 2017 states the effect of any failure to comply with the rules and Article 159 (2) (d) of the Constitution cannot be used to exempt any Party from mandatory procedural obligations. This was the Court’s finding in the case of *Amina Hassan Ahmed vs Returning Officer Mandera County & 2 Others* (2013) eKLR and *Raila Odinga & 5 Others vs IEBC & 3 Others*. Counsel for the 1<sup>st</sup> and 5<sup>th</sup> Respondents submitted that the proper results as declared are not included in the petition then it does not show a determinable issue and does not constitute a noble cause of action.

97. Relying on the case of *Evans Nyambaso Zedekiah & another vs Independent Electoral and Boundaries Commission* Counsel for the 1<sup>st</sup> and 5<sup>th</sup> Respondent submitted that the Election is fatally

incompetent.

98. The Court should rely on the burden of proof and materiality. In the case of *Raila Odinga & 2 others vs Independent Electoral & Boundaries Commission & 2 others* the Court held that the Petitioner should discharge the initial burden of proof before the Respondents are invited to bear the evidential burden. The Court further stated that “where a party alleges non conformity with the electoral law, the Petitioner must not only prove that there has been noncompliance with the law but that such failure of compliance did affect the validity of the elections.”

99. The burden of proof that the election offences as alleged by the Petitioner occurred is higher than in Civil cases. The 1<sup>st</sup> and 5<sup>th</sup> Respondents relied on the cases of *Odalo Makojwando Abuor vs Dalmias Otieno Anyango & 2 others [2013] KLR*, *Wekesa vs Ongera & another (No 2 ) (2008) 2 KLR*, *Hassan Mohamed Hassan & another vs Independent Electoral & Boundaries Commission and 2 others [2013] eKLR*. The Courts held the view that a higher degree of proof is envisaged than in ordinary civil cases.

100. On the issue of materiality, the 1<sup>st</sup> and 5<sup>th</sup> Respondents submitted that the Election Act 2011 Section 83 gives clear provisions on what is required to nullify an election. And relied on the case of *Hassan Mohamed Hassan & another vs The Independent Electoral & Boundaries Commission & 2 others*.

101. The Petitioner was well aware of the training in good time and the Petitioner’s agents were given adequate time.

102. The Petitioner has not proved the offences of voter bribery and submitted that the standard of proof is higher than in ordinary cases. PW1 did not state the names of those who were bribed and the time the bribery occurred. PW2 failed to produce the posters he had been bribed to distribute. PW3 did not provide any evidence that he was an agent for the petitioner. PW5 failed to provide the registration number of the vehicle that the second Respondent was using when he was distributing bribes to voters.

103. The petitioner has not proved the allegations of ballot stuffing. The allegations that vehicle registration number KAC 140 D with stuffed ballot papers and driven by the second Respondent’s brother have not been proved by the Petitioner. There was no offence of malpractice to allow vehicles into the polling station. The allegation of importation of voters from Kisii, Mlolongo and Kitengela have not been proved.

### **The 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Respondents Submissions**

104. Momanyi for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents submitted that the standard of proof required in election petitions is higher than that in Civil cases as was held in the case of *Raila Odinga vs Independent Electoral and Boundaries Commission and 3 others*. In the case of *Moses Masika Wetangula versus Musikari Kombo Supreme Court no. 12 of 2014*, the Court held that a party who alleges commission of election offence must prove such offences beyond reasonable doubt. The Petitioner must show that irregularities or malpractices are such that they actually substantively interfere with the free choice of the voters. As was held in the case of *Hassan & another vs Independent Electoral & Boundaries Commission Garissa Election Petition No. 6 of 2013*.

105. The Petitioner has not met the threshold for scrutiny as he has filed no formal application with facts for scrutiny. The basic requirements for scrutiny have not been met as was held in the case of *Gatiru Peter Munuya vs Dickson Mwendwa Kithinji and 2 others (2014) eKLR and Independent Electoral & Boundaries Commission versus Stephen Mutinda Mule & 3 others Nairobi Civil Appeal No. 219 of 2013*.

106. On whether the Petitioner was given adequate notice for training, Counsel for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents referred the Court to paragraph 14 of the Petition and paragraph 12 of the supporting affidavit where the Petitioner stated that he was contacted on the 5<sup>th</sup> August 2017 and informed of the training. In cross examination, the Petitioner stated that he got the text message on the 5<sup>th</sup> August for the training of agents scheduled for the 6<sup>th</sup> August 2017. The first and 5<sup>th</sup> Respondents annexed the schedule

for the training prepared by the IEBC. PW3 confirmed that he received information about the training a day to the training.

107. On whether the Respondent committed voter bribery, ballot stuffing the Respondents relied on the case of *Moses Wetangula vs Musikari Kombo*, that there must be a strong nexus between the bribe taker and the 2<sup>nd</sup> Respondent, and the case of *Hosea Mundui Kiplagat vs Sammy Komen Mwaita (2013) eKLR* where the Court held that a witness who alleges having received a bribe is already compromised and an incredible witness.

108. The allegations that the second Respondent imported voters from Kisii, Mlolongo and Kitengela have not been proved by the Petitioner.

109. The Petitioner has not proved that the second Respondent imported voters from Kisii, Mlolongo and Kitengela. PW5 stated that he saw a Rembo bus parked outside Gateway in Kwa Reuben. Rama the agent for the 2<sup>nd</sup> Respondent was campaigning in and out of the bus. The Petitioner in his reexamination stated that Rama was an agent for the 4<sup>th</sup> Respondent. The Second Respondent further submitted that Rama was not in the list of agents for the 2<sup>nd</sup> Respondent.

110. The Petitioner did not point out the specific stations the alleged imported voters voted. The Petitioner did not adduce any evidence to support his claim that the alleged imported voters voted. There is no single station where the number of people who voted exceeded the registered voters.

111. The claims by the Petitioner that there was stealing of the Petitioner's votes has not been proved. The Petitioner has not demonstrated the number of his votes that were stolen.

112. The allegations on the altered results are general and lack specifications. The Petitioner has not specified the polling stations where the results were altered in favour of the 2<sup>nd</sup> Respondent. The Petitioner did not point out any mathematical miscalculation that changed his votes. The Petitioner concentrated on non-recorded spoilt votes. The Petitioner's agents signed forms 36 A in more than 29 polling stations. None of the 29 stations has been pointed out by the Petitioner for comparative purposes.

113. The Petitioner has not proved the allegations that his agents were denied entry into the polling stations.

114. The Election should not be set aside because the Petitioner has not discharged the standard of proof in none of the Election offences. The Petitioner has not demonstrated that the alleged malpractices were so massive that they affected the outcome of the results.

115. In conclusion, Counsel for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Petitioners submitted that the Petitioner's evidence was full of inconsistencies and lacks credibility. The Petitioner has not achieved the basic threshold laid down for him to succeed in the nullification of the election results.

## **DETERMINATION**

116. I have considered the evidence on record for the Petitioner, the Respondents and the cross examination. I have also considered the submissions together with the authorities relied on by the Parties.

### **Issues for Determination**

117. The main issues for determination were framed by the Court and all the Parties agreed that those are the issues for determination. The issues are;

***I. Whether the Petitioner was given adequate notice of training of the agents.***

***II. Whether the Respondents committed Electoral malpractices of Bribery, Ballot stuffing.***

**III. Whether the Second Respondent's agent and brother drove motor vehicle registration number KAC 140 D with marked Ballot papers.**

**IV. Were voters imported from Kisii, Mlolongo and Kitengela**

**V. Whether the number of votes cast exceeded the number of registered voters.**

**VI. Stealing of the Petitioner's votes and adding them to the 2<sup>nd</sup> Respondent.**

**VII. Alteration of the Election results.**

**VIII. Whether the Petitioner's agents were denied entry and access to the polling stations.**

**IX. Why the election should be set aside or nullified.**

118. Before I delve into the issues for determination, I refer to the International Law, the Constitution and the Election Act as the basis for Election Law in Kenya. The Universal Declaration of Human Rights 1948, International Covenant on Civil and Political Rights, 1966, and African Charter on Human and People's Rights. These International Instruments provide for the right of every citizen to vote and be elected in a periodic election. Article 21 of the Universal Declaration of Human Rights 1948 provides that "the will of the people shall be the basis of the authority of Governments, this will shall be expressed in periodic genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."

119. Article 25 of the International Covenant on Civil and Political Rights, 1966 provides for the right and opportunity to vote and be elected at a genuine periodic election. It introduces several Human Rights aspects into the electoral process and identifies election as a central component of participation. The Human Rights Committee has also stated in General Comment 25 at para 15 that "effective implementation of the right and opportunity to stand for elective office ensures that persons entitled to vote have free choice of candidates."

120. International law is now part of Kenyan law by virtue of Article 2(6) of the 2010 Constitution and in Articles 38, 81 and 86 of the Kenya Constitution 2010, Parts II, III, IV, V and VI of the Elections Act; and the Election Regulations echo the principles in the International Covenant on Civil and Political Rights, the Universal Declaration on Human Rights with regard to holding genuine elections that reflect the will of the People. Chapter 6 of the Constitution in Article 73 (2) (a) provides for selection in a free and fair election. Article 38(2) and (3) of the Constitution for instance provides for a free, fair and regular election that respects the free expression of the will of the people. The Principles laid down in the International law are reflected in our own National laws<sup>[1]</sup> that regulate elections and the Constitution of Kenya 2010.

121. The Petition is premised on grounds of election malpractices and irregularities which if proved water down the International law, the Election Act and Constitutional requirements that Elections must be genuine free and fair.

122. On the issue of whether the Petitioner was given adequate notice for the training of the agents, I am satisfied that the first Respondent notified all the candidates about the training for the agents a day to the training. The Petitioner's witness PW2 Eunice Akinyi Golo stated that she attended a training for agents at Cheminande Primary school. She was informed of the training by the Petitioner and the Chief agent. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents also confirmed that they were notified about the training through a text message. The Petitioner has not proved that the first Respondent notified him about the training later than the other candidates. The timelines annexed as CKK 5 were displayed at the IEBC offices Notice Board in Embakasi South.

123. On the issue of whether the second Respondent's brother drove motor vehicle registration number KAC 140 D with marked ballot papers, I am satisfied that the evidence adduced by the Petitioner is not

sufficient to prove this allegation. If there were additional ballot papers the same could have been reflected in the number of voters who voted. The Petitioner has not adduced any evidence that in any of the streams at the polling station the number of people who voted exceeded the number of registered voters per stream. There is no evidence that the extra ballot papers if any were added to the votes of the second Respondent and that the additional ballot papers affected the election results.

124. In this era of technology and smart phones the Petitioner could have taken photographs of the said motor vehicle.

125. On the issue of whether voters were imported from Kisii, Mlolongo and Kitengela, the only evidence adduced by the Petitioner is that there were four Rembo shuttle buses and the occupants were talking in Kisii. There is no evidence to prove that unregistered voters voted. The onus is on the Petitioner to adduce evidence that supports his allegations.

126. On whether the number of votes cast exceeded the number of registered voters, I am satisfied that the Petitioner has not adduced sufficient evidence. The evidence on record clearly states that the people who voted did not exceed the number of registered voters in Kwa Reuben Ward. There is no proof that there were instances where the total number of cast votes exceeded the registered voters in each of the polling streams.

127. The allegation that there was stealing of the Petitioner's votes and adding them to the 2<sup>nd</sup> Respondent's votes has not been proved. The Petitioner has not given any indication of the actual number of votes he got and the number that was stolen and added to the second Respondent's votes.

128. Whether the Petitioner's agents were denied entry and access to the polling stations has not been proved with sufficient evidence. The evidence on record from both the Petitioner's witnesses and the Respondents shows that the badges were not adequate and Party agents were allowed to use the letter of appointment and the oath of secrecy to access the polling stations. The agents were required to come with the original letter of appointment and the original oath of secrecy. The Petitioner has not adduced any evidence of discrimination against him to the advantage of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents. There is no evidence that the 1<sup>st</sup> Respondent discriminated against the Petitioner's agents while favoring agents for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents to access the Polling stations.

129. On the issue of whether the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents committed the offences of voter bribery and ballot stuffing, the onus is on the Petitioner to prove the allegations. The Petitioner in his Evidence and that of his witnesses told the Court that the election was marred with malpractices which included bribing of voters before the election and on the Election Day. The Petitioner specifically pointed out that the 2<sup>nd</sup> Respondent was seen with defamatory material which he was distributing to voters. The second Respondent also gave each voter ksh. 500 as a bribe. However, the Petitioner did not adduce any evidence or point out how the bribing of voters actually affected the result of the election. The Petitioner did not single out how many voters were bribed by either the 2<sup>nd</sup> Respondent or the second Respondent's agent specifically Rama who was seen by the Petitioner's witnesses.

130. Section 9 of the Election Offences Act 2016 provides for the offence of bribery. Under this section both the giver and receiver of the bribe are guilty of an election offence. The law requires that allegations of election offences in an election must be proved beyond reasonable doubt. Under section 87 (1) of the Elections Act, the Court is mandated to report to the Director of Public Prosecutions IEBC and the relevant Speaker of a candidate's guilt of election offences. The implication of a finding of guilt of an election offence is serious and can lead to the candidate being barred in future elections.<sup>[2]</sup> I am guided by the *Halsbury's Laws of England volume 153 at para 153* which states that "due proof of bribery by or with the knowledge and consent of the candidate or by his agents, however insignificant to invalidate the election, the judges are not at liberty to weigh its importance nor can they allow any exercise whatever the circumstance may be"

131. In the case of *Muliro vs Musonye & another [2007] KLR* the Court held that it is not necessary to

prove the amount of bribery, it should suffice if it is shown that the intention is to influence voters to vote for a given candidate, bribes were given to voters.

132. The burden of proving that voter bribery occurred and that as a result of the bribery voters were influenced not to vote for the Petitioner lies on the Petitioner. Section 107 of the Evidence Act is very clear that he who alleges must prove. In the case of *William Kabogo Gitau versus George Thuo (2010) eKLR* the Court held that **“the burden of establishing that any election offence was committed to justify nullification is on the Petitioner.** To discharge the burden, the Petitioner must adduce evidence that establishes the alleged election offence and the alleged electoral malpractices to a standard of proof that is higher than that applied in ordinary Civil cases of proof of a balance of probability.”

133. In the case of *Mbowe vs. Eliufoo [1976] E.A 240* the court stated the standard of proof to be discharged in an election petition, in these terms -**There has been much argument as to the meaning of the term “prove to the satisfaction of the court.** Section 107 of the Evidence Act is clear that the burden of proof must lie on the Petitioner rather than the Respondent because it is he who seeks to have this election declared void.

134. Corruption and any illegal practice flouts the principles provided in the Constitution and the election Act and International Law. An election can only be nullified on allegations of bribery where there is sufficient proof that the Respondent is guilty of the offence of corruption. I am guided by the Court of Appeal decision in the case of *Khatib Abdalla Mwashetani versus Gideon Mwangangi [2014] eKLR*. The Court stated that **“purely from the consequences that flow from the finding that a person is guilty of improper influence is serious conduct that has attributes akin to those of an election offence. It is now settled that the standard of proof where an election offence or such conduct is alleged, proof is beyond reasonable doubt”** An analysis of the evidence adduced by the Petitioner in the Petition, supporting affidavit, his evidence in chief and the cross examination clearly points out that the Petitioner has not proved the allegations of bribery to the required standard of proof. The evidence adduced on bribery allegations was very general and no facts were provided to warrant this Court to act in accordance with the provisions of Section 87 of the Elections Act. The Petitioner has not proved how the alleged offence of bribery affected the will of the voters. The Petitioner has also not demonstrated that the results did not reflect the will of the people. There is no evidence on the number of voters who were to vote for the Petitioner but changed their minds after receiving money from the 2<sup>nd</sup> and 4<sup>th</sup> Respondents.

135. The incidents of Corruption singled out by the Petitioner and his witnesses have not been corroborated. The Petitioner’s Witness Elphas Wakhisi states that he saw a Rembo Shuttle at 11:45 on the 7<sup>TH</sup> August 2017. Rama the 2<sup>nd</sup> Respondent’s agent was in the vehicle giving voters money. The registration number of the vehicle is not indicated. The witness again saw the second Respondent at 5:00 am parked 50 meters from Maendeleo learning Centre giving voters money. Nduku Mulota Sila saw the 2<sup>nd</sup> Respondent on 7/8/2017 at 10 pm at Gateway distributing defamatory posters and money. Mutunga Nyamai states that he saw the 3<sup>rd</sup> Respondent on the 6<sup>th</sup> August 2017 bribing voters with Ksh. 300. These are distinct incidents that must be corroborated.

136. On why the election should be set aside or nullified the Petitioner stated that the election was marred with irregularities and malpractices. Inadequate agent badges, importation of voters, inadequate notice for the training of agents, some voters were given more than one ballot paper and errors in form 36B. The results in forms 36 A and 36 B were not the same. There was altering of results in form 3B and that the rejected votes were added to the second Respondent’s votes. In the case of *Sumra Irshadali versus Mawathe Julius* which the Petitioner relies on, a comparison clearly stated the number of votes deducted from the Petitioner. Again the margins between the Petitioner and the declared winner was relatively narrow.

137. The election held on the 8<sup>th</sup> August was a public interest event that attracted both local and International observers. The Election involved the election of President, Governor, and Senator Member of the National Assembly, Women Representative and Member of County Assembly. The Malpractices noted by the Petitioner could have been detected by other independent witnesses and observers.

138. Article 86 (d) of the Constitution requires that ***appropriate structures and mechanisms to eliminate electoral malpractice are put in place, Parts II, III, IV, V and VI of the Elections Act as well as the Election Regulations.*** The Petitioner has stated that the logistical challenges like lack of chairs, lighting and tables affected the election. From the election diary, I am satisfied that the challenges noted were mitigated by the 1<sup>st</sup> Respondent through provision of gas lamps, power bank and borrowing of electricity. Chairs and tables were also improvised. I am satisfied that the logistical challenges did not affect the results of the election.

139. On the issue of scrutiny the law in section 82 (1) of the Election Act and Rule 29 of the Elections (Parliamentary and County Elections) Petitions rules 2017. The Court must be satisfied that there are sufficient reasons to order for scrutiny and recount of the votes. The Petitioner has not laid the basis of scrutiny even though the same was pleaded in the petition. The Petitioner has not pointed out in his evidence or petition the specific polling stations in which the results are disputed. In the case of *Philip Mukwe Wasike versus James Lusweti Mukwe & 2 others, [2013] eKLR* the Court observed that the purpose of scrutiny is to investigate if allegations of irregularities and breaches of the law complained of are valid and assist the Court in determining the valid votes.

140. The Petitioner ought to have made an application of scrutiny at the close of his case.

141. The Supreme Court in the case of *Gitirau Peter Munya vs Dickson Mwenda Kithinji & 2 others* the Court stated that **“the right to scrutiny and recount does not lie as a matter of course. The party seeking a recount or scrutiny of votes in an election petition is to establish the basis for such a request to the satisfaction of the trial judge or magistrate. “.** The Court further held that an **“application for scrutiny must be couched in specific terms and clothed with particularity as to which polling stations within a constituency are to attract scrutiny, .... A prayer pointing to a constituency but lacking in specificity is not to be granted.”**

142. The Petitioner has not established a prima facie case to convince this Court to order for scrutiny. From the evidence there is only one incident where an IEBC clerk was found giving a voter two ballot papers which incident was established by the PW8 Mercy Maundu. She alerted DW4 Erick Mutisya Kimeu the presiding officer for Reuben stream 15. DW4 confirmed that one of the clerks gave a voter two ballot papers and the matter was reported by the Party agent. The Party agents were summoned and the extra ballot paper was stamped as rejected. Both PW8 and DW4 confirmed to this Court that the extra ballot paper be marked as rejected. There is no other reported incident in other polling streams where voters were issued with more than one ballot paper for the position of MCA.

143. The Petitioner also stated that the rejected votes were added onto the votes for the 2<sup>nd</sup> Respondent. The recorded rejected votes are 187 in total. The results were drawn from form 36A. The issue here is whether the rejected votes could have altered the results. The total number of rejected votes was 187. The second Respondent got 5342 votes while the Petitioner got 3031 votes. The rejected votes could not have altered the results.

144. The Petitioner also stated that ballot box no. 165350 and No. 165466 had only two seals and could easily be opened to remove ballot papers. There is no evidence that the two ballot boxes were tampered with to remove or add ballot papers.

145. I am satisfied that the discrepancies between forms 36A and 36 B did not give the 2<sup>nd</sup> Respondent any undue advantage to change the outcome of the results. The High Court in Nyeri in the case of *Michael Gichuru versus Rigathi Gachagua & two others Election Petition number 2 of 2017* the Court held that inconsistencies made in forms 35 A and Form 35B were not only negligible but did not give the first Respondent any advantage to the detriment of the Petitioner.

146. The Court has come to the conclusion that the alleged malpractices and irregularities and non-compliance with the Election Laws have not been proved to the satisfaction of the Court. The irregularities noted in forms 36 B were minor and did not affect the results of Mukuru Kwa Reuben ward in Embakasi South Constituency. There is no evidence that the primary document which is form 36A was

tampered with.

147. The Petitioner's petition is hereby dismissed with costs to the Respondents.

148. The Costs due to each Respondent shall be limited to ksh. 200,000.

149. The 1<sup>st</sup> and 5<sup>th</sup> Respondent shall be regarded as one Party.

150. The Security deposited in Court shall remain so deposited pending the taxation of costs in accordance with Rule 31 (3) of the election Rules.

**DATED SIGNED AND DELIVERED THIS 23<sup>RD</sup> DAY OF FEBRUARY 2018 IN THE PRESENCE OF;**

**ANGWENYI FOR THE PETIONER**

**BUKANIA FOR THE 1<sup>ST</sup> AND 5<sup>TH</sup> RESPONDENTS**

**MOMANYI FOR THE 2<sup>ND</sup>, 3<sup>RD</sup> AND 4<sup>TH</sup> RESPONDENTS.**

**GILBERT .....COURT ASSISTANT.**

**E.A NYALOTI**

**CHIEF MAGISTRATE.**

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[\[1\]](#) Leadership and integrity Act, Election Act, Election offences Act, Public Officer's Ethics Act.

[\[2\]](#) Section 24 (3) of the Election offences Act.