



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT OF KENYA
AT KISII
THE ELECTIONS ACT, 2011
ELECTION (PARLIAMENTARY AND COUNTY ELECTIONS)
PETITION RULES 2017
ELECTION PETITION NUMBER 7 OF 2017
BETWEEN
HON. KERONCHE MARANGA SAMMY.....PETITIONER
AND
THE INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION.....1ST RESPONDENT
MR. MARK MANCO.....2ND RESPONDENT
NTABO BENSON ONGERI.....3RD RESPONDENT
JUDGEMENT

Case summary

In the general elections held on 8th August 2017, the petitioner and the 3rd respondent were candidates in respect of a representative for the county assembly for Gesusu ward, within Kisii county.

The 3rd Respondent was declared by the 1st and 2nd respondent to have emerged the winner. The petitioner being dissatisfied with the conduct of the election and declaration of the results filed the petition herein.

It is the petitioner's case that he is a registered voter and was a candidate for the seat of county assembly, Gesusu ward. The following were the candidates for representative of the county assembly Gesusu ward:-

1	Amboga Samwel Ontita
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2	Angwenyi Felix Matoke
3	Atuti Thomas Moturi
4	Benard Magenda Omete
5	Isoe Christopher Kerage Nyangau
6	John Josephat Nyansikera
7	Kerage Antony Onkundi
8	Keronche Maranga Sammy
9	Lukas Rashid Omari
10	Maranga Evans Fed
11	Maroko Richard Nyagaka
12	Matoke Charles Obwogo
13	Matonda John Kerage
14	Mbeche Nyamweya Elijah
15	Mogeni Julius Nyambane
16	Motuka Knowlers Jeremiah
17	Moturi Mercy Kwamboka
18	Mwebi Nyamweya Elikanah
19	Ndege Christopher Ongige
20	Ntabo Benson Ongeru
21	Nyakoe Nelson Onkoba
22	Nyamoko Jared
23	Ogao Zablon Ogero
24	Omae Dennis Asanyo
25	Omwoyo Nehemiah Charles Onsembe
26	Saka Zachariah Ouko

The returning officer declared the 3rd respondent, Mr. Ntabo Benson Ongeru, as the duly elected candidate.

It is the petitioner's case that the election process and declaration of the 3rd respondent as the winner was unlawful, shambolic and illegal and did not meet the standards of a free, fair and transparent election.

It is the petitioner's case that the 3rd respondent did not garner majority of the votes declared if proper voting, counting and tallying was done in all the polling stations. The petitioner accuses the 3rd respondent and his agents of electoral malpractices before and during the elections which was condoned and acquiesced by the 1st and 2nd respondents.

The petitioner accuses the 3rd respondent of attending a record of 23 fundraisers during the campaign period where he bribed voters with money contrary to the law and the 1st respondent failed to act. The petitioner also blames the 3rd respondent of planning and executing violence against him by using goons who barred the petitioner and other aspirants from campaigning in some zones. The petitioner averred that he was attacked by goons while he was campaigning at Gesusu, Chironge, Getacho, Masabo Market, Riatirimba and Kiomokama primary school. He reported the incidences to the 1st and 2nd respondents who failed to discipline the 3rd respondent and thus acquiesced in the 3rd respondent's criminal acts.

The petitioner further averred that the agents of Safina party were barred by 1st and 2nd respondents and chased away by the agents of the 3rd respondent from witnessing the election exercise in the following polling stations:-; Kegogi Primary, Riatirimba primary, Kiomiti, Geteri, Riasibo, Moi Gesusu, Riabegi, /Masabo/Riongata, Riaisoe, Chibwobi, Nyamesocho, Kiomokama township, Kiomokama primary, Chironge, Masabo primary, Getacho primary, Kiomiti primary, Ikenye primary, Geteri, Mesabisabi and Masabo market. He avers that the act of chasing away the agents of his party tainted the integrity of the election process.

The petitioner further alleged that the 3rd respondent in the company of one Mp aspirant known as Ezekiel Machogu hosted all presiding officers at the latter's house in Nyansiongo settlement scheme. That the presiding officers took an illegal oath to help them manipulate the votes in their favor. A report was accordingly made to the 2nd respondent but he failed to act on it.

Further that the 3rd respondent massively bribed voters through his agents on 8th August 2017 at Kiomokama, Gesusu and Masabo. Officers of the 1st and 2nd respondent who had been bribed were arrested and charged at Keroka law courts but were still allowed to conclude the voting exercise.

The petitioner also accused the presiding officers at Kiomiti polling center for altering and manipulating the results in favour of their preferred candidate and it was not clear how many votes one Atuti Thomas Moturi got there. An alteration on the votes garnered by one Motuka Knowlers Jeremiah at Geteri primary was not explained by the presiding officer. An alteration for the votes of one Mwebi Nyamweya Elkanah at Riosibo primary school was not explained by the presiding officer. At Riatirimba primary the total number of valid votes cast was changed without countersigning or an explanation being given.

The petitioner avers that all the form 36 As used in the entire Gesusu ward have no security features and that the entire elections for the said ward was a nullity as the same was susceptible to manipulation. That the total votes cast reported on the forms 35 As differ with the tally presented at form 36 B by 356 votes which difference stretches to 560 votes. The declared winner was said to have garnered 1,898 votes and the difference of votes aforesaid is so significant that it goes to the core question as to whether or not the 3rd respondent was validly elected. That there was a variance between the total number of votes cast for the President and Member of county assembly within the ward where the latter exceeds the former by a total of more than 1060 votes depending on the reports in forms 34As, 34Bs, 35As, 35Bs, 36As, 36Bs and the IEBC portal.

The petitioner avers that the manner in which the 1st and 2nd respondent conducted the elections falls short of the test of a free, fair and transparent election and the credibility of the results is therefore impeached.

In light of the above the petitioner seeks for the following orders:-

1. That there be scrutiny and recounting of all votes cast at the election in Nyaribari Masaba constituency for the seat of the member of national assembly.
2. That there be a determination that the said Ntabo Benson Onger, the 3rd respondent herein was not duly elected.
3. That there be a determination that the manner in which the elections were conducted by the 1st and 2nd respondents violates the petitioner's constitutional rights a voter and aspirant and the rights of other voters to a free, fair and credible election and order for a fresh election.
4. That the respondents be condemned to pay the costs of this petition jointly and severally.

It is the duty of this court to analyze all the evidence on record and to determine whether the election of the representative for the county assembly for Gesusu ward was conducted within the law or whether the allegations by the petitioner that the said elections were marred with such irregularities and illegalities that render the elections unconstitutional and liable to being quashed are founded in fact and law.

The Petitioner's Case

The petitioner(PW1) adopted his affidavit evidence and was cross examined on the same. He testified that he defended his position in Gesusu Ward, Nyaribari Sub County where Benson Onger Ntabo was however declared the winner.

He said that his agents were not allowed in to almost all the polling stations. He felt that some aspirants had incited the public against his agents because the other aspirants ganged up against him even as he was defended his seat. He said that the IEBC officers were issued with a letter from his party and advocate by his agents but claimed that they were fake. Further that the 3rd Respondent assaulted some of his agents at Masabo.

At Chironge Primary School, an IEBC clerk was found issuing several ballot papers to a voter. The said clerk was charged with an offence. He said that the details of the offence were contained in his supplementary affidavit. He said that the elections were not successful. He thus prays for a nullification of election and fresh elections in compliance with the Constitution and Election Acts.

During cross examination he stated that the vote was by secret ballot and that voters were allowed to vote as per their conscious. He was not satisfied with the process because not all agents oversaw the results.

He said that at paragraph 5 of the petition, he had indicated the names of the candidates but not the results. He also admitted that he had not indicated the date of declaration of results in the petition.

He said that the 3rd respondent conducted fund raising at Kiamokama Ward Gesusu, Mesabisabi, Geteri and other places but he did not take any step over the fund raisings as it was the duty of 1st respondent to do so. He said that he did not specify the places he was barred from campaigning. He did not report to I.E.B.C because they ought to have intelligence on such things.

He did not make any report to I.E.B.C. or elsewhere that propaganda was used against him during the campaign period. He said that the I.E.B.C. ought to have known as its the custodian of elections. He did not give the names of his agents that were chased away neither did he include the names of the agents in his affidavits.

He said that his agents had oath of secrecy from I.E.B.C however the same was not part of his evidence. He said that even if his agents lacked one or two of requirements they should not have been barred from accessing the polling stations. He did not make a formal complaint to the returning officer over the refusal of his agents from accessing the polling stations. He did not witness the taking of illegal oaths by the presiding officers to manipulate the elections.

He said that the 3rd Respondent bribed voters and he witnessed it but he did not report to the I.E.B.C. He did not witness the issuing of extra ballot papers to voters or the sealing of ballot boxes.

In reference to the proceedings in Keroka Criminal case number 661 of 2017 at page 9, he said that the Presiding Officer confirmed that the two extra ballot papers were marked as spoilt votes which were not included among the cast votes. He confirmed that the votes captured in form 36 A for Chironge primary school tallied with the number of votes in form 36 B. He said that the spoilt votes were captured by the Presiding Officer in the proceedings in Keroka but not in form 36A.

He noted that the votes cast at Kiomiti Primary School polling station 2 of 2 in form 36 A tallied with that in form 36 B. For Getero Primary School he noted that the valid votes cast tallied in forms 36 A and 36B.

On Riasibo Primary School polling station, he noted that there were alterations for candidade, Mwebi Nyamweya Eikanah which was counter signed. The said form 36 A was not clear like the form 36 B. On Riতিরimba Primary School polling station 1 of 1 he noted that the figures were altered by the Presiding Officer who did not countersign . There were no agents and no comments. He said that he didn't trust that form 36A as no agent signed. He said that his lawyer would explain more on the missing security features in the form 36 As, the discrepancy between the results in the IEBC portal and the forms 36As and 36 Bs and the figures for the six posts at the elections that did not tally.

During further cross examination, the petitioner said that he garnered 481 votes whereas the 3rd respondent got 1,888 votes. The difference was 1,417 votes. He said that the results did not indicate the will of the voters of Gesusu Ward. He said that the alterations in the form 36 As were not explained by the Presiding Officers contrary to the law. He however could not specify the law breached. He also alleged that his agents were chased out of polling stations. He however did not give his list of agents to court. He did not attend the meeting reported at paragraph 14 of the petition. He said that his votes were not subtracted but the process was not fair. In his further testimony, the petitioner said that form 36B formed part of his petition as it was the declaration of results.

He said that at paragraph 11 of the petition he listed the places that he had been attacked during campaigns. He said that The 1st and 2nd Respondent did not deny that he was attacked. It was also not denied that he made a report to I.E.B.C.

He said that the Respondents did not deny that his agents were sent away, nor was any explanation given. The Returning Officer did not explain in his affidavit why his agents were sent away. He said that form 36A was not signed by any agent at Riতিরimba polling station and the alterations thereon were not countersigned. The Presiding Officer did not make any remarks nor explain why the agents did not sign the form 36A in question. It was therefore not a transparent election. He said that the 1st respondent did not deny having received a report about a secret meeting between Presiding Officer and the 3rd Respondent.

On Chironge polling station and the proceedings of Keroka CR 661of 2017, he noted that PW2 therein, confirmed that there were double issuing of ballot papers. He said that Presiding Officer did not explain or remark on the rejected ballot papers. A layman could not link the 2 rejected ballot papers to those in the proceedings in Keroka CR. 661/017. He said that the I.E.B.C official was fined Kshs. 300,000 in default 3 months imprisonment in the said case. Further, that the election process was therefore flawed since the 2nd Respondent did not indicate whether the said convict was re-deployed or stopped from conducting the elections. He could not know how many extra ballot papers the convicted I.E.B.C. official had issued before he was caught.

He pointed out that his agent did not sign form 36A at Chironge polling station and that the Respondents did not deny that the 3rd Respondent attended many fund raisings or that he bribed voters. He said that he wished to abandon the first prayer(for scrutiny and recount) in his petition.

PW2, Rose Kerubo Maranga, said that she had sworn an affidavit which she wished to rely on as her evidence. She said that On 8th August 2017 she was in Gesusu Ward where she voted at Kiomiti Primary School. She was also took food to her husband's(petitioner's) agents at the polling stations.

While she was at Masaba Mauka polling station to take food to their agent she met the 3rd Respondent who asked her what she was doing there. The 3rd respondent told her that she was not supposed to enter the polling station and he caused a scene. She said that she left when the presiding officer requested them to maintain peace.

During cross examination she said that she voted at Kiomiti Primary School at around 11 a.m. she did not know what time that the polling station had opened. she did not hear of any disputes during the voting day at her polling station. She said that she was verbally attacked at Masabo market polling station by the 3rd Respondent, his driver and another. She said that she did not have authority to enter the polling stations and they were right to disallow her entry for lack of authority. She couldn't see the name of their agent at form 36A for Masabo market polling station. On further cross examination she said that she reached Masabo market polling station at lunch hour. She had gone to four other polling stations namely;-Emonga Primary, Kiomokama Primary, Getare Primary, Chironge. At Chironge polling station she was told that there was a problem so they did not enter even though their agent one Jane Moraa was inside the polling station.

The petitioner's agents were chased away on allegations that they had fake papers. She said that she was in the company of the her driver one Kevin Omache. She said that the 3rd Respondent pushed her and asked her why she was there. She did not know what the 3rd Respondent did for a living at that time. On 8th August 2017 the Petitioner vied on a Safina Party ticket. She would not be happy if her husband lost his seat. On further examination PW2 said that there was a scuffle at Chironge polling station . She did not see the agents physically when she took the food to them. She said that she did not give food to the agent at Masabo market polling station, because she was stopped. She said that the Petitioner was working even before he became a member of county assembly.

PW 3, Michael Kevin Omachi testified that on 8th August he voted at Itenge Primary School. He assisted PW2 in supplying food to the agents of the petitioner at the polling stations. He drove PW 2 to Masaba market polling station. PW2 left him in the car and went to deliver food at Emonga Primary. He also took her to Musambo market where she left him in the car. While in the car, he heard noises and he went to the polling station where he found PW2 and the 3rd Respondent having a confrontation. The 3rd Respondent was pushing PW2 and telling her that she should not be at the polling station. He pulled PW2 from the scuffle and the 3rd Respondent abused him. He then drove away with PW2. They drove to Chironge Primary School but PW2 told him that the mood was not good and he drove her away from there.

Upon cross examination, PW3 said that he was employed as a driver in Kisii County in the year 2013 on contract but that his contract ended in August 2016. He said that he voted without any hitches at Ikenye Primary School at around 4pm. He drove PW2 to various polling stations but she would leave him in the car. They visited about five polling stations and he did not see any problems. From the window of the car, he saw PW2 and the 3rd Respondent having a bitter verbal exchange and pushing each other. They did not make any report instead he pulled PW2 away from the scuffle and they went away. He said that he did not know the agents of the Petitioner.

During further cross examination he said that he heard the 3rd Respondent asking the PW2 why she had gone to the polling station at Masaba market and PW2 answered that she was the wife to the Petitioner. He however did not indicate so in his affidavit. At paragraph 6 of his affidavit he stated that he was also

assaulted. He said that the Petitioner employed him at the county and he was helping him with his case. On further examination he said that while at Masaba market polling station, he parked about 30 meters away from the polling station. It's the 3rd Respondent who started causing a commotion.

PW4, Job Bundi Rwoti testified that on 8th August 2017 he voted at Kiamokama Primary. He was also there as an agent for the Petitioner. The polling station was opened at 6.00 a.m.

The 3rd Respondent went to the polling station and he spoke to I.E.B.C officers. The 3rd Respondent also spoke to some voters outside and they later voted. He saw the 3rd Respondent giving money to voters and he reported to I.E.B.C officials. One Wilson was bringing voters to vote on behalf of the 3rd Respondent. He said that Kiamokama primary was not the polling station of the 3rd Respondent. It had 2 streams and he was an agent on stream 1.

During cross examination he said that the voting did not continue smoothly because he saw someone escorting voters to the booths. He however did not include that information in his affidavit. He said that he had a badge from I.E.B.C and a letter from the Petitioner and Safina party to show that he was an agent. He witnessed the counting of votes in one stream until conclusion. He did not have problems with the voting in his stream. He said that he signed form 36 A as an agent. He said that he saw the 3rd respondent dishing out money to voters. He orally reported to the presiding officer. He said that the I.E.B.C official did not take any action on his report. He did not complain to the returning officer as he had reported to the Petitioner's wife.

During further cross examination he said that he secured a job with the county of Kisii without undergoing a formal interview but with the help of a member of the county assembly. He said that he worked as a county employee until 8th August 2017. He witnessed the 3rd respondent issuing money in the field near the polling station at Kiamokama Primary. He said that he did not know why the other agents did not report about the 3rd respondent dishing out money.

In further examination he said that his contract with the Kisii county had ended on 8.8.2017. He did not know what the 3rd respondent told the IEBC officials and voters when he met them. He said that he had signed form 36A as an agent.

1st and 2nd Respondents Case

the 1st and 2nd respondent's response to the petition is contained in the sworn affidavits of the 2nd respondent Mark Manco, Benard Nyamwana and Orora Dennis Ogechi all sworn on 22nd September 2017 as well as the written response to the petition of the same date.

The 1st and 2nd respondents aver that the Petitioner has raised complaints against the Presiding officers and other persons in relation to the conduct County elections for Gesusu Ward held on 8th August 2017 without enjoining them as respondents in the petition. The 1st and 2nd respondents aver that the voting in all polling stations in Gesusu ward was free and fair. Further that the counting of votes and declaration of results of Gesusu Ward was conducted as provided by the law.

The 1st and 2nd respondent aver that that the County election of Gesusu ward was conducted in accordance with the principles laid down in the constitution and the Election Laws and Regulations save for minor arithmetic and clerical errors which did not in any way change or affect the outcome and declaration of the 3rd Respondent as the duly elected member of the County Assembly for Gesusu ward.

The 2nd respondent (Mark Manco) in his affidavit stated that he is the gazetted returning officer for Nyaribari Masaba Constituency. He averred that part of his responsibilities in the preparation for the general election was to have all clerks and presiding officers in his constituency properly trained. He averred that all polling stations in Gesusu ward were manned by a presiding officers, deputy presiding

officer and clerks. On the 7th August 2017 he said that he ensured that the ballot boxes and all other election materials were supplied to all nine polling stations in Gesusu ward.

He said that the voting, counting and transmission of the votes was conducted in all the polling stations as provided by the law and evidenced by the Forms 36A to the petition attached to his affidavit. He stated that all the results from the polling stations were properly and accurately verified, tallied and announced in accordance with the provisions of the law as evidenced by Form 36B. Upon the declaration of the results for Gesusu ward, he issued the 3rd Respondent with Form 36C the same being the certificate of an elected member of the County Assembly.

He said that the conduct of elections in Gesusu ward might have been faced with minor challenges but the same did not affect the express will of the electorate in the said ward.

Further that any errors in the recording and/or tallying of the votes did not affect the results declared. He further averred that the 3rd respondent was validly elected as a member of the county assembly for Gesusu ward.

Benard Nyamwana in his affidavit averred that he was the Presiding Officer for Nyaribari Masaba Constituency deployed at Kiamokama Primary School, Polling Centre 066 Stream 1 and I. He said that voting process commenced at 6a.m and ended at 5pm in the presence of agents, clerks and voters and that no complaint was made to him over the process.

The counting of the vote started at 5.30p.m and it was done openly and transparently and in the presence of all agents and clerks who were in the room where he openly and loudly read the results. He averred that he was not aware of the allegations that the petitioner's agents were chased away during the voting and counting process. The agents signed and witnessed the closure of the ballot boxes for Member of County Assembly before leaving. He averred that he sealed ballot boxes and other materials which were taken to the tallying centre where they were handed to the 2nd Respondent.

Orora Dennis Ogechia swore an affidavit and averred that he is the presiding officer for Nyaribari Masaba Constituency deployed at Chironge Primary School, Polling Centre 064 Stream 2 and I. He averred that the voting process commenced at 6a.m and ended at 6.30p.m in the presence of agents, clerks and voters and no complaint was made to him. He averred that the counting of votes started at 7.00p.m and the same was done openly and transparently and in the presence of all agents and clerks who were in the room where they openly and loudly read the results.

He was not aware of the allegations that the petitioner's agents were chased away during the voting and counting process. The agents signed and witnessed the closure of the ballot boxes for Member of County Assembly before leaving. The sealed ballot boxes and other materials were taken to the tallying centre where they were handed to the 2nd Respondent.

DW1, Mark Manco (the 2nd respondent) In his oral evidence, testified that he was the returning officer for Gesusu ward. He said that he recruited polling officials, deployed them, trained them and arranged for logistics. His work was to ensure that all materials were ready for the election of 8th August 2017. He tallied the results and issued a certificate to the winner.

Subsequently, forms 36As and 36B were all attached and forwarded to the petitioner when he requested for them. He said that they got the total votes from all polling stations. He noted that the petition did not contain the date of declaration of election results, nor results for each candidate.

During cross examination he confirmed that he received all form 36As from the Presiding Officers in Gesusu Ward. He said that there were no malpractices from the polling stations in his area. If there had been any issues the same would have been marked in polling station diaries. He said that he had met the petitioner once during a forum for candidates and their agents.

They trained the candidates and their agents on how to raise complaints when they arose. He did not receive any complaints of non compliance by the petitioner or any other candidate. In his view the elections were credible , free and fair.

DW2, Orora Dennis Ogech in his oral evidence testified that in the elections of 8th August 2017 he was the presiding officer at Chironge Primary School stream 2. As the presiding officer he was in charge of opening the polling station, counting the votes and filling form 36As.

He said that for an agent to be authorized to go in to a voting hall he must provide an original identity card, a letter of appointment by the political party or independent candidate and an oath of secrets duly commissioned by a lawyer or magistrate. If the agent did not have all the required documents he could not be allowed to enter in to a polling station.

He said that if an agent is turned away from a station he must be given reasons for doing so. Should an agent that has been turned away feel aggrieved, he can report to the returning officer. He noted that the voting exercise at Chironge Primary stream 2 went on smoothly.

The 3rd Respondent's Case

The 3rd respondent avers that he was declared the winner in the said elections having garnered a majority of the votes as compared to other contesting candidates who included the petitioner.

He averred that, the below were the results announced and declared at polling stations by the 2nd respondent.

No.	Candidates	No. of votes
1.	Amboga Samwel Ontita	435
2.	Angwenyi Felix Matoke	39
3.	Atuti Thomas Moturi	846
4.	Benard Magenda Omete	24
5.	Isoe Christopher Kerage Nyangau	191
6.	John Josephat Nyansikera	434
7.	Kerage Antony Onkundi	1,275
8.	Keronche Maranga Sammy	481
9.	Lukas Rashid Omari	758
10.	Maranga Evans Fed	24
11.	Maroko Richard Nyagaka	83
12.	Matoke Charles Obwogo	70
13.	Matonda John Kerage	450

14.	Mbeche Nyamweya Elijah	614
15.	Mogeni Julius Nyambane	125
16.	Motuka Knowlers Jeremiah	22
17.	Moturi Mercy Kwamboka	720
18.	Mwebi Nyamweya Elikanah	78
19.	Ndege Christopher Ongige	45
20.	Ntabo Benson Ongeru	1,898
21.	Nyakoe Nelson Onkoba	151
22.	Nyamoko Jared	26
23.	Ogao Zablon Ogero	291
24.	Omae Dennis Asanyo	27
25.	Omwoyo Nehemiah Charles Onsembe	46
26.	Saka Zachariah Ouko	95

The 3rd respondent avers that having garnered the majority votes of 1898 as compared to his closest challenger who garnered 1273 votes, the returning officer was within the law in declaring and returning him as the duly elected member of County Assembly for Gesusu Ward.

Further that the declaration of the 3rd Respondent as winner of the said election was lawful, legal, and met all the standards of a free, fair, transparent and credible election. The 3rd respondent avers that his closest challenger had 1273 votes and he thus won with a margin of 623 votes, which the petitioner has not challenged.

The 3rd respondent denies involvement in any acts of illegalities complained of by the petitioner. He denies that his agents were involved in the chasing away of the petitioners agents from the named polling stations.

The 3rd respondent denies the allegation that he bribed voters either personally or through agents at Kiamokama, Gesusu and Masabo as claimed by the petitioner. The 3rd respondent avers that he had no role in the alleged illegalities committed by a polling clerk and in any event such an incident is only claimed to have occurred at Chironge Primary School which, in any event, was not his 3rd respondents' stronghold. The 3rd respondent notes that any of the clerical errors complained of did not affect the declared results of the said election.

The 3rd respondent avers that he did not benefit from the alleged issuance of double or triple ballot papers at Chironge Primary School polling station since he did not get majority votes at the said station.

The 3rd respondent denies any difference in votes cast in different elective seats within Gesusu Ward and states that this court lacks the jurisdiction to inquire on the other elective seats in the said general elections other than that for the member of County Assembly.

The 3rd respondent sought to strike out the petition for failure to comply with the requirements set out under **Rule 8 of the Elections (Parliamentary and County Election) Petition Rules, 2017**.

DW 3, Benson Ongeru Ntabo (3rd respondent) in his oral testimony testified that he was the elected member of county assembly in Gesusu ward on 8th August 2017.

He said that he had agents in the election and none complained about the exercise. In his opinion the election was free and fair. He said that he followed all procedures that he told to follow by the 2nd respondent's officials. He pointed out that the petition did not state the votes garnered by each voter or the date of the declaration of results.

He said that he was actively engaged in campaigns and he was never attacked during the campaigns. He said that no other candidate was attacked in Gesusu ward. He asked that this court finds that he was validly elected as member of county assembly for Gesusu Ward.

He asked that the court do decline the petitioner's prayer for invalidation of the elections and that the election in his favor be upheld.

The submissions

The submissions made on behalf of the 1st and 2nd respondents together with the relevant authorities were filed by the firm of Morara Apiemi & Nyangito on 18th January 2018. The firm of Aboki Begi filed its submissions on behalf of the 3rd respondent on 22nd January 2018. The petitioner's advocate had not filed its written submissions by the time I retired to write this judgement. During the hearing of the petition, Mr. Nyamwea Mogusu appeared for the petitioner, Mr. Morara Apiemi appeared for the 1st and 2nd respondents whereas Mr. Aboki Begi appeared for the 3rd respondent.

The 1st and 2nd respondents submitted that the present petition has not complied with the requirements set out in **Rule 8 of the Election (Parliamentary and County Elections) Petitions Rules, 2017** which require that every petition must *inter alia* state; the date when the election in dispute was conducted, the results of the election, if any, and however declared and the date of declaration of the results of the election.

It was submitted that courts have always maintained that the requirements set out in **Rule 8 of the Election (Parliamentary and County Elections) Petitions Rules, 2017** are not mere technical requirements but substantive to the extent that they go to the root of the issues before an election court.

He cited the decision in the case of **Hon. Martha Wangari Karua –Vs- Iebc And 3 Others** where the court dismissed the petition for non-compliance with **Rule 8(1) (c)**. The court further observed that non-compliance with Rule 8(1) (c) goes to the root of the dispute and cannot be cured by **Article 159 of the Constitution**. The court further observed that failure to comply with **Rule 8(1) (c) and (d)** touches on the dispute and goes to the jurisdiction of the court with the same effect of want of compliance with **Article 87 (1) of the Constitution**

He also relied on the case of **Jimmy Mkala Kazungu –Vs- IEBC & 2 Others** where the Honourable Court dismissed the petition for want of compliance with **Rule 8 of the Elections (Parliamentary and County Elections) Petition Rules 2017**. Further that in the case of **M'NKIRIA PETKAY SHEN MIRITI –VS- RAGWA SAMUEL MBAE & 2 OTHERS** The court held that the invocation of **Article 159(2) (d) of the Constitution** will not necessarily salvage an election petition which does not comply with the requirements set out in **Rule 8 of the Elections (Parliamentary and County Elections)**

Petition Rules 2017.

The 1st and 2nd respondent urged the honorable court to dismiss the petition with costs for failing to comply with **Rule 8 of the Elections (Parliamentary and County Elections) Petition Rules 2017.**

On the allegation that the 1st and 2nd respondents acquiesced the 3rd respondent's acts of bribery and violence it is submitted that petitioner failed to prove the those allegations.

It was further submitted that the petitioner's agents did not prove that they had the statutory Documents (i.e. oath of secrecy and letter of appointment) as required which fact the petitioner confirmed during cross examination. Furthermore that under **Regulation 62 (c) of the Elections (General) Regulations 2012**, Presiding Officers should only allow authorized agents to the polling station.

On the burden and standard of proof the 1st and 2nd respondent relied on the case of **Hassan Mohammed Hassan & Another –Vs- IEBC & 2 Others, Election Petition No. 6 Of 2013, Garissa** Where the court observed that the implication of the Section 83 of the Elections Act is that unless the irregularities or malpractices proved by the petitioner are such that they actually interfere with the free choice of the voters, the court will not be willing to interfere with the existing voters' choice. The court further observed that the petition must go to the sufficient extent to persuade the court to interfere with the election results in the context of **Section 83 of the Elections Act.**

It was submitted that in the case of **Raila Odinga –Vs IEBC & 3 Others** the court observed that he who alleges commission of election offences must prove such offences beyond reasonable doubt.

The 1st and 2nd respondents also cited the case of **Kiarie Waweru –Vs Beth Wambui Mugo & 2 Others (2008) Eklr**, the court observed that election petitions should not be taken lightly.

Generalized allegations as the ones made in this petition are not the kind of evidence required to prove election petitions. The court further held that there is a consensus by electoral courts that generally the standard of proof in election petition cases is higher than the one applicable in ordinary civil cases i.e. that of proof on a balance of probabilities but lower than the standard of proof beyond reasonable doubt required in establishing criminal offences.

The 3rd respondent in his submissions on the issue of the standard of proof in election petitions, reiterated the 1st and 2nd respondent's submissions on the same. He relied on the case of **Col. Dr. Kizza Besigye v Electoral Commission & Museveni Yoweri Kaguta** where it was observed that a free and fair election is not only determined by the number of votes garnered but by looking at the entire voting process and considering the will of the voters. It was submitted that the 1st respondent is established under Article 88(1) of the Constitution and is mandated to conduct and supervise referendum and elections.

He submitted that the court should always consider whether the election with all its imperfections, was substantially conducted in accordance with the principles enshrined in the constitution and the electoral law.

The 3rd respondent noted that the petitioner's counsel lost interest in the matter and failed attend the respondents' case hearing for cross examination of the respondents' witnesses. He termed the petitioner's case herein as mere propaganda. He cited the case of **Shashi Bhushan v Prof Balraj Madhok & others(1972) AIR1251**, where the supreme court of India observed that the confidence in the electoral machinery should not be allowed to be corroded by false propaganda. Further that it of utmost importance that the electorate should have full confidence in the impartiality of the election commission.

It was submitted that the petitioner failed to challenge any of the documents and the entirety of evidence adduced by the respondents to controvert his propaganda. Further that the petitioner abandoned the opportunity to pursue his prayer for scrutiny and recount despite the respondents being open to the same. The alleged irregularities and illegalities on their own, were not sufficient to nullify the elections.

He cited section 83 of the Elections Act and the case of **Steven Kariuki V George Mike Wanjohi & 2 others (2013) eKLR** the court observed that the statutory and evidentiary burden of proof rests with the petitioner. It was submitted that not all malpractices lead to nullification of the result and that regard must also be had to the political rights enshrined in **Article 38** of the Constitution and the general principles set out in **Articles 81 and 82 of the Constitution**.

He cited the cases of **Morgan and others vs Simpson and another (1974) 3 All Er 722, Kakuta Maimai Hamisi vs Peris Pesi Tobiko and others Nairibi High Court election petition 5 of 2013(unreported), Gideon Mwangangi Wambua vs IEBC and others, Mombasa high court petition 4 of 2013 eKLR**

He urged court to heed to the Election Act 2011 and the Election(General) Regulations 2012.

The 3rd respondent submitted that the citizens of Gesusu ward voted for the 3rd respondent as their leader of choice.

He pointed out that the 3rd respondent won by a margin of 623 votes as compared to his closest competitor. The margin between the 3rd respondent was a whooping 1417 votes. It was submitted that election was conducted in strict compliance with the relevant law and that the 3rd respondent was validly elected as a member of the County assembly for Gesusu ward.

The 3rd respondent reiterated the submissions of the 1st and 2nd respondents on the consequences of the non compliance with **rule 8 (1)(c) of the Elections(Parliamentary and County Elections) Petition Rules 2017**.

On this issue he relied on the decisions in **Mukala Issa Kombo vs IEBC and others High court in Malindi Election Petition case No 10 of 2017 & Hon. Martha Wangari Karua & another vs IEBC and 3 others** where the respective courts struck out the petitions for non compliance. In the latter case the court noted that the requirements of rule 8 are not mere technical requirements. They are substantive as they go to the root of the issue before an election court. A petition which has failed to state the date of declaration and the results of the elections is fatally defective and must be struck out.

Analysis of issues and the findings

The parties herein framed the issues for determination which I have looked at and narrowed down as below:

1. Whether the petitioner has discharged the burden and standard of proof required by law to prove the allegations contained in his petition?
2. Whether the illegalities, irregularities and malpractices complained of were so substantial as to affect the outcome and result of the election?
3. Whether the 3rd Respondent was duly elected and declared as the Member of County Assembly for Gesusu Ward?
4. What is the consequence of non disclosure of the date of declaration and the results of the elections in the petition?
5. Which party is liable for the costs of the proceedings herein?

Issue number 1

The court in the cited case of **Kiarie Waweru –Vs Beth Wambui Mugo & 2 Others (2008) Eklr At page 6** the court held as below;

“As regards the standard of proof which ought to be discharged by the petitioner in establishing allegations of electoral malpractices, there is a consensus by electoral courts that generally the standard of proof in election petition cases is higher than the applicable in ordinary civil cases i.e. that of proof on a balance of probabilities but lower than the standard of proof beyond reasonable doubt required in establishing criminal cases”.

The petitioner made several allegations against the respondents of numerous electoral malpractices and offence.

The petitioner produced proceedings in **Keroka Criminal case no. 661 of 2017** wherein one **Edwin Okari Nyambane**, the accused was charged and convicted with the offence of breach of official duty , contrary to section 6(j) of the Election offences Act no 37 of 2016.

It is my considered view that the petitioner proved that there was electoral malpractices and offences at Chironge primary school polling station.

The petitioner has alleged both electoral offences and violation of various election regulations by the respondents. The petitioner alleged that the 3rd respondent engaged in bribery through fundraisings. During cross-examination, neither the petitioner nor his witnesses had any proof of such fundraisings neither did he report the same to the 1st respondent.

The petitioner also alleged that he was barred from campaigning in some zones and was attacked in some places during his campaigning. However on cross examination, the petitioner stated that he never reported the incidences to the police and/or IEBC.

The petitioner also alleged that his agents were chased away from witnessing the election exercise at some polling stations. On cross-examination, he neither provided the names of the said agents nor did he produce any evidence to prove the identities of his agents.

Regulation 62 (1) (c) of the Elections (General) Regulations 2012, requires the presiding officers to only allow authorized agents to the polling station. An authorized agent is required to have an oath of secrecy and a letter of appointment by the political party. I concur with the respondents submission that neither the alleged agents nor their statutory documents of appointment were presented during the hearing. Furthermore, he did not complain to the 1st Respondent that his authorized agents had been turned away from the polling stations.

Under **Regulation 62 (3) of the Elections (General) Regulations 2012** the absence of agents shall not invalidate the proceedings at a polling station.

On the allegation that presiding officers were hosted by one of the parliamentary aspirants and that they took an illegal oath, the petitioner at cross examination said that he did not witness the same and that he had relied on hearsay.

I concur with the respondents’ submission that the petitioner’s allegations were largely based on hearsay and cannot be relied on as the same are unsubstantiated. Hearsay evidence is not admissible under **Section 63 of the Evidence Act**.

Issue No. 2

I have considered whether the above mentioned electoral malpractices more so by the polling clerk of Chironge ward convicted of an election offence at by the Keroka court, affected the outcome of the election to the detriment of the petitioner.

I have looked at the availed form 36 A for Chironge ward stream 1 of 2. The petitioner got 5 Votes, the 3rd respondent got 51 votes whereas the winner got 101 votes. The two ballot papers were rejected and

the total number of votes cast were 305. The petitioner did not explain how the issuance of the two ballot papers and the subsequent cancellation of the same and marked as spoilt votes affected him and/or benefited the 3rd Respondent.

In my humble view the impropriety of the polling clerk at the said ward and the two votes rejected ballot papers could not have made a difference in the votes garnered by the petitioner as to affect the overall outcome of the elections of Gesusu ward.

The other electoral offences and/or malpractices were not proved to the required standard and so I will not belabor them.

Section 83 of the election Act provides that:-*“No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect results of the election”.*(Emphasis mine)

In the case of **Raila Odinga and 5 others – vs – Independent Electoral and Boundaries Commission & 3 others, Supreme Court Election Petition No. 5 of 2013**, the Supreme Court held inter alia, that

“ A petition seeking to nullify an election should clearly and decisively demonstrate that the conduct of the election was so devoid of merits and so distorted as not to reflect the expression of the peoples’ electoral intent and that the evidence should disclose profound irregularities in the management of the electoral process,”

The Supreme Court in the **Raila case** (Supra) went on to further to say that:-

*“Where a party alleges non conformity with electoral law, the petitioner must not only prove that there had been non-compliance with the law but that such failure and non-compliance did affect the validity of an election. It is on that basis that the respondent bears the burden of proving the contrary. This emerges from a long standing common law approach in respect of alleged irregularity in the acts of public bodies **Ominia Praesumuntur rite solemniter esse acta** (All acts are presumed to have been done, rightly and regularly). So, the petitioner must set out by raising firm and credible evidence of the public authority’s departures from the presumption of the law “*

The alleged malpractices touching on form 36A, B and C were not proved by the petitioner. In any event, the evidence given by the 2nd Respondent on behalf of the 1st and 2nd respondents as well as that of the 3rd respondent was sufficient to put to rest the petitioner’s unsubstantiated allegations. The 2nd respondent was not cross examined and his testimony was candid that the results complained of were carefully aggregated in form 36C after he tallied the results from each polling station as given in form 36 A.

From the foregoing, it is my finding that the petitioner did not present sufficient evidence to the required standard in support of his allegations that the respondents and /or their agents committed acts of electoral impropriety. I find that, the petitioner’s allegation did not meet the legal standard of proof as required in the **Kiarie Waweru case** (Supra) for proving electoral malpractices to warrant the nullification of the election herein. Furthermore, the electoral offence proved for Chironge ward did not in my view affect the outcome of the election to the detriment of the petitioner and to the benefit of the 3rd respondent herein as is required by **section 83 of the Elections Act**.

Issue No. 3

On this issue am duly guided by the decision in the case of **Nicholas Salat – vs- Independent Electoral and Boundaries Commission and others – Kericho High Court Election Petition No. 1 of 2013 in which Muchelule. J** considered what legal sufficiency in an election means:-

“I understand legal sufficiency in the election mean that the election was conducted in a free, fair

and credible manner and that it accurately represented the will of the electorate. It would not necessarily mean that the election was devoid of errors mistakes or irregularities. It means that if, there were such errors, mistakes or irregularities, they were not of such magnitude that they substantially or materially affected the result.”

The petitioner alleged that there were alterations of figures recorded in form 36As of Kiomiti primary school polling station 2, Gateri primary school, Riasibo primary school and Riatirimba primary, without the corresponding countersigning by the respective presiding officers.

The petitioner abandoned the statutory remedy for scrutiny and recount as provided for by **Rules 28 and 29 of the Elections (Parliamentary and County Elections) Petition Rules, 2017.**

Where a petitioner is in doubt as to the number of votes cast and the validity of the votes cast, he can always make an application for scrutiny and recount at any stage before judgment. The petitioner herein opted not to do so. The petitioner therefore forfeited this right. The scrutiny and/or recount if sought would have settled the petitioner’s fears on the alleged alterations in the aforesaid Form 36As.

It is my finding that the petitioner’s allegations are bare and unsubstantiated.

There was only one returning officer, the 2nd respondent herein and he told court that he received all form 36As from Presiding Officers in Gesusu Ward. Further that no malpractices were reported to him in his area. If there had been any issues the same would have been marked in the polling station diaries. He said that the said elections were credible, free and fair. The testimony of the 2nd respondent was not challenged at cross examination.

In as much as there were some irregularities and mistakes, I do not think that such irregularities and mistakes substantially or materially affected the result of which the petitioner complains. Notably the petitioner repeatedly and admittedly said he had no evidence to prove any of the allegations he set out in the petition. The petitioner did not also plead any particulars in the petition to warrant a finding by this court that truly the election of the 3rd respondent was not conducted in accordance with the Constitution, the Elections Act and the rules and regulations. In the absence of such evidence, the petitioner’s case has no legs to stand on and must fail. I have reached the conclusion that the 3rd Respondent was validly elected member of the county assembly for Gesusu ward.

In conclusion on this issue, I make the finding that the election of Gesusu ward for the seat of the member of county assembly was done in accordance with both the Constitution and the Elections Act.

Issue No. 4

The respondents submitted that the petition is incurably incompetent and an abuse of the court process as it failed to state the results of election and the date of declaration of the results of the election contrary to the mandatory statutory provisions set out in **Rule 8 (1) (c) and (d) of the Election (Parliamentary and County Elections) Petitions Rules, 2017.**

This fact was admitted to by the petitioner during his cross examination. The petitioner’s advocate in his oral submissions stated that the law did not make it mandatory to include the results in the petition. Further that an application to strike out the petition ought to have been made at the onset of the trial.

He distinguished this case to that of the **Martha Karua vs Ann Waiguru** and that of **Hassan Joho**(cited by the respondents) and observed that the issue of striking out the petitions in the cited cases was raised at the onset of the trial unlike in the instant case.

On whether or not the rules are mandatory in nature, I looked at the decision of the **High court at Meru in Election Petition No 5 of 2103 M’Nkiria Petkay Shen Miriti vs Ragwa Samuel Mbae and 2 others**, where the High court held as follows:-

“The conclusion I come to after studying the Rules, is that the Act and the Regulations and Rules made there under, have the legal sanction and authority of the Constitution and of the Act, respectively. Indeed in my view and finding, matters touching elections, and in particular petitions which are not provided for by the Constitution, are taken up and provided for in the Act, and likewise those not provided in the Act, are provided for in the Rules and/or Regulations.”(Emphasis mine)

Both of the respondent’s advocates relied on the decision in the case of **Martha Wangari Karua & another vs IEBC and 3 others (2017) eKLR** where at pages 10-11 the court held on this issue as follows:-

“ My view is that failure to comply with Rule 8(1) (c) and (d) touch on the dispute and goes to the jurisdiction of the court. Article 87 (2) of the Constitution provides:

“Petitions concerning an election, other than a presidential election, shall be filed within 28 days after the declaration of the election results by Independent Electoral and Boundaries Commission.”

The court went on to hold as follows:

“ The date of declaration is crucial in determining the dispute. I am of the view that a petition which has not complied with Rule 8(1)(c) and rule 8(1)(d) even remotely is not compliant. The definition given of results talks of outcome, effect and consequence. It is not sufficient to talk of results without giving numbers. It is an outcome based on numbers which made her to come to court and the date when the results were declared. The omissions are fatal.”

The court cited the decision in the case of **Mukala Issa Kombo vs IEBC & 3 others Election Petition Case No. 10 of 2017**. The court in dealing with Article 87(2)-failure to state the date of declaration or results and contravention of rule 8(1) (c) and (d) and 12(2)(c) and (d) where the court in striking out the Petition for non compliance found that:-

“ The provision of rule 8(1)(d) &(c) and 12(2)(c) and (d) are mandatory though in the petition he had given a brief over view and ground, the full results were not disclosed anywhere as well as the date of declaration of results. That the petitioner should have given a tabulation of results and date of declaration to trigger computation of time so that the court establishes when time to file petition would start to run and end”

Having perused the cited authorities and the relevant law, I hold the view that the petition has not complied with the provisions of **Rule 8(1)(c) and (d) of the Rules**.

The petitioner urged the court to consider the omissions as procedural technicalities which can be cured under Article 159(2)(d) of the Constitution. I am guided by the findings in the **Martha Wangari Karua case (supra)** where the learned judge held that:-

“ The non-compliance is substantive and cannot be cured under Article 159(2)(d) of the constitution.....”

In the case of **M’nkiria Petkay Shen Miriti –Vs- Ragwa Samuel Mbae & 2 Others** the court held that the invocation of **Article 159(2) (d) of the Constitution** will not necessarily salvage an election petition which does not comply with the requirements set out in **Rule 8 of the Elections (Parliamentary and County Elections) Petition Rules 2017**.

I find that this petition was like a patient that arrives at the hospital half dead and not even Article 159(2) (d) of the Constitution had the superpowers to resurrect it. Consequently, the petition herein is dismissed with costs to the respondents.

Issue No. 5-Costs

Section 84 of the Elections Act and Rule 30(1) of the Rules obliges the court to award and cap costs.

The 1st and 2nd respondent did not specify the amount of costs whereas the 3rd respondent asked court to cap costs at Kshs 1,800,000/=.

In the case of **Kalembe Ndile and another vs Patrick Musimba and others Machakos HC EP No. 1 and 7 of 2013 (2013) eKLR** it was stated that:-

“Costs awarded should be fairly adequate to compensate for work done but at the same time should not be exorbitant as to unjustly enrich the parties or cause unwarranted dent on the public purse or injure the body politic by undermining the principle of access to justice enshrined in Article 48 of the Constitution.”

I note that the issues raised by this petition were straight forward as is evident from the pleadings, number of witnesses, nature of evidence on record and submissions tendered. I have considered all these factors in capping the costs.

Therefore, I cap the instructions fees for the petition for the 1st and 2nd respondent and the 3rd respondent at Kshs 200,000/= each.

Conclusion

The final orders are as follows:-

1. The petition be and is hereby dismissed.
2. The respondents are awarded costs in the following terms:
 - i. Instruction fees for the 1st and 2nd respondents are capped at Kshs 200,000/=
 - ii. Instruction fees for the 3rd respondent are capped 200,000/=
3. A certificate of this determination shall issue in accordance to **section 86(1)** of the Elections Act, 2011, to the Independence Boundaries and Electoral Commission and the speaker of the county assembly of Kisii.

Dated, signed and delivered at Kisii this 23rd of February 2018.

S.N MAKILA

SENIOR RESIDENT MAGISTRATE

In presence of:-

Court assistant- Jael

For petitioner-Mr Mirembe holding brief for Mr Nyamwea

For 1st and 2nd respondent-Mr Begi holding brief for Mr. Morara Apiemi

For 3rd respondent-Mr Begi