



**REPUBLIC OF KENYA.**

**IN THE CHIEF MAGISTRATE'S COURT AT BUSIA.**

**ELECTION PETITION NO. 2 OF 2017.**

**SILVANUS JUMA..... PETITIONER**

**VERSUS**

**FRED MUSIRIMBA.....1<sup>ST</sup> RESPONDENT**

**INDEPENDENT ELECTORAL**

**AND BOUNDARIES COMMISSION.....2<sup>ND</sup> RESPONDENT**

**PETER TIYO.....3<sup>RD</sup> RESPONDENT**

**JUDGEMENT**

On the 8<sup>th</sup> day of August 2017, Kenyans went to a general election where every eligible citizen had a chance to exercise their right to choose leaders of their own choice. There were six elections vide, presidential, gubernatorial, senatorial, women representative, Member of Parliament and Member of County Assembly (hereinafter referred to as "MCA").

Kenyans also had a chance to exercise their right to political participation by offering themselves as candidates for the various political posts. The petitioner herein was of them and had offered himself to vie as a candidate for Bunyala North Ward, Budalangi Constituency, Busia County.

The elections were conducted and supervised by the Independent Electoral and Boundaries Commission, ((hereinafter referred to as "IEBC").

The petitioner was dissatisfied with the manner in which IEBC handled the elections as well as the results announced by IEBC and hence he filed this petition praying for the following reliefs;

(a) A declaration that the said Fred Musirimba was not duly elected and the election for Member of County Assembly in Bunyala North was void.

(b) Costs of this petition.

By consent the parties in this petition agreed that the following issues should be determined by the court:

1. Whether the election of MCA Bunylala North ward was conducted in accordance with the Constitution Election Laws and Election Regulations.

2. Whether the 1<sup>st</sup> respondent was validly elected as the MCA North Bunyala Ward

### 3. What are the consequential orders that this court should make.

The court has endeavored to examine the evidence, submissions and the pertinent law with a keen eye on every issue and sub-issue raised by the parties and their witnesses in determining these broad issues. The court navigated through this case as follows;

#### **THE EVIDENCE**

##### **PW1 CATHERINE ACHIENG ODHIAMBO**

She said she was an agent at Rwambwa polling station which had two streams. She was in Room 1. She had an IEBC accreditation letter. She however did not produce it in court. Further stated that she arrived at 5.30 a.m. at the polling station. They were briefed by IEBC. They were told that each party would have their own agents. They were to sign a polling day diary by IEBC. Page 27 of the 2<sup>nd</sup> and 3<sup>rd</sup> Response dated 30.10.17. PW1 said she was supposed to sign every party had agents. She said that at Page 35 Jubilee had agents. They were two of them and that she was one of them. It was written that she entered at 6.00 a.m. PW1 affirmed that she signed at 6.00 a.m. and she is literate. She said was denied entry to the polling station. PW1 said they were all allowed in first at 5.30 then they realised that they were not supposed to be two of them. They realised that she was supposed to be in Room 1. Further she stated that her co-agent was Silvia Nabwire, she signed the polling day diary (page 35). She then went to room 1. Silvia Nabwire remained in room 2. PW1 said she understood why she was being taken to room 1 from room 2. It says Silvia Nabwire was there (room 2) confirming the serial numbers, Jubilee agent was there. At page 42 closed polling day diary Silvia Nabwire was present at page 14(Form 36A) Silvia Nabwire was there when they were recording the result. She said at page 14(supplementary list) Silvia was there. PW1 said it was her evidence that from the beginning to the end there was a Jubilee agent in room 2. She however did not know the results in room 2. She did not know how much Silvanus got but the form (36A) showed he got 16 votes there (see Form 36B page 15 of 1<sup>st</sup> and 2<sup>nd</sup> respondent reply). PW1 affirmed that Para 3 of her affidavit showed she was in room 2 but she then left Silvia there. She was sent to room 1 and (page14) witnessed the counting. PW1 said her name was not in the 36 A for Jubilee. The name appearing there is Silvia. Lastly, she observed the Presiding Officer was not transparent when sorting in at 12.00 midnight. But she was not sure the exact time. There was a gas lamp. She said that the Presiding Officer was not showing it to the agents. That the Presiding Officer was about 1 metre away on the same table. Agents were sitting behind the clerks. They poured the ballots. None remained in the ballot box. The Presiding Officer started to sort them out. He was dishing them out to clerks. Each clerk had been allocated a candidate. He was announcing whose vote each was and giving it out to the clerks. PW1 said she was not satisfied that the votes owners were correct. All agents were about 10 in number plus the police and IEBC officials. She said that she did not know whether other clerks complained. PW1 also said she did not know how much Silvanus got in room 1 but it shows 19. Musumba also got some but she did not know how much. PW1 stated that she was not expecting special treatment, but they were not showing her the votes prints.

##### **Cross-examined by Mr. Ngige:**

PW1 said she was an agent at Rwambwa 1. That polling stations shows that Flora Nabwire was in No. 1 but it was her who was there. Further that she was a jubilee agent not a candidate's agent. Page 35 says she was a jubilee agent, but it was her who was. Affirmed to have been taken to stream 2. She did not produce a letter of appointment. PW1 could not confirm how many agents were in the room. She did not remember how many but stated that she was trustworthy. The ballot box was emptied in their presence. The Presiding Officer was dishing out votes. He was separating them. PW1 said she did not know whether other agents were dissatisfied but she did not like the way the Presiding Officer was doing.

##### **Re-examined:**

PW1 said she would not be allowed to sign the polling station diary if she was not an agent duly appointed. She further testified that she was not specifically satisfied with the sorting out exercise. She

did not expect any special treatment but was not satisfied with the sorting out.

## **PW2 BENEDICT OTIENO OJIAMBO**

He said he had no letter to show he was a polling clerk. He stated he could have searched with Kenya National Examination Council if he wanted to know a person's level of education. Cynthia had gone to school, but he had no evidence in court. PW2 said he did not report to the police that an unqualified person was employed. He had no evidence in court to say that she was from Budalangi.

### Cross-examined by Ngige:

PW2 said that Cynthia was a polling agent at Budalangi primary. He however did not know which stream. Cynthia Barasa was a clerk (malpractice) but he had no evidence of complaints.

### Re-examined:

Pw2 further testified that Cynthia Barasa had not qualified academically to be employed by IEBC. He is married to her sister. Cynthia is his sister in law, personally known to him. PW2 said Cynthia had not gone beyond Std 8.

## **PW3 EUNICE MAJUMA**

She stated that she was at Siruma primary school room 1(one)

She said further that the Presiding Officer refused her entry. She had a budge but no accreditation letter. She said she had no letter of accreditation at all. She did not produce any. She only had a budge. PW3 further said her candidate gave her a letter. She did not have the letter at the polling station. She only had a budge. PW3 testified that as Per para 4 the IEBC were right in turning her away due to lack of accreditation. At page 90 PW3 said she signed the polling station diary. She entered the polling station at 5.45 a.m.

PW3 said Voting began at 7.00 a.m. She had been given a note book by her candidate to make notes from the beginning to the end. She did not have the record. Page 86 IEBC said they opened at 6.00a.m. At page 87 when voting began, it shows she was not there. There are 6 agents who signed at 6.00a.m. PW3 said she was in the room she had been refused entry. She got in at around 11.00 a.m. that is when she was allowed in between 5.45 to 11.00 a.m. she had been standing. The Police had told her to leave. PW3 said she went to the gate at 9.00a.m. to vote. She had to queue to vote. PW3 further stated that when in the polling station at 11.00 a.m. there were government officers coming in. She saw a candidate called Fred Musirimba. She was still on the line. He came, and she saw him enter into the polling station. PW3 said he (Fred Musirimba) held one woman by the hand, led her in, then a second and a third one. PW3 did not know where he was taking them. She knew there were Presiding Officer, Deputy Presiding Officer and IEBC clerks helping people to vote. She never reported that Musirimba was assisting people to vote. She did not know what was happening inside. The women were left inside. He came out and took another. PW3 further testified that she did not know whether there was a young clerk. There were police to keep peace and observe law and order. Musirimba was never arrested by the police for any offence. PW3's main complaint was his taking people inside, but she did not know what was happening inside. She acknowledged that pregnant women with young children or elderly or disabled, were being given first preference. It was not wrong to do that. She said as a candidate, Musirimba should have done so. She did not know the names of the people who were taken in by Musirimba.

Page 90 Polling station diary she said she signed it. At page 93 closing station diary. After counting, she signed (close of counting.) She was not present. (page 95) PW3 said she was there but did not sign. Page 23 (Form 36A she signed). PW3 testified that the meaning of signing was to confirm that she was a witness when voting and counting. She confirmed that these were the result of that station. She was there when counting was done. She said she confirmed the results and signed. She could not have signed by

force. PW3 said Silvanus got votes but she guessed it was 12 votes which what is was reflected in Form 36A. Lastly, PW3 said Musirimba got some votes but she did not remember how many.

Cross-examined by Mr. Ngige:

PW3 said a candidate could be allowed presence at the polling station. She did not know the names of the women Musirimba took in, neither did she live near that polling station. She knew many of the people who were voting there. Only the 3 she saw but did not know their names. PW3 said Musirimba never told them (the women) anything. He never campaigned here. That he also never gave them any inducement. PW3 said the problem was that the candidate was picking voters from the queue and leading them inside. Police officers were present. PW3 lastly stated that she did not report Musirimba because she was in the queue as a voter not as an agent, she confirmed that results in Form 36A were the ones in the polling room where she was being ok.

Re-examined: PW3 affirmed that she saw the candidate leading the voters into the voting room and handing her over to an official.

**PW4 KEVIN JUMA**

He said he was not given an accreditation letter by the jubilee party. He did not know that it was an offence to do work he was not qualified for. Further stated that he arrived between 4 a.m. and 5.30 a.m. The station was opened between 5.00 – 6.00 a.m. They were a number of agents. He could not tell how many. He was in room number 1. PW4 said there was an incident which he recorded in a book given to him by his candidate. He however did not remember whether he wrote and incident. He didn't have that book in court. They had been told to record incidents. PW4 said he bought himself lunch. That their candidates came to see progress. His candidate was Silvanus Juma who came to visit the station in the afternoon. He told him what was happening. He entered into the polling station. He also told him that in the morning between 10-11 a.m Fred Musirimba, a candidate had come, talked to his agents gone on the Presiding Officer (whispered to) PW4 said he had complained of the habit. When his candidate came he spoke loudly. Musirimba came between 10 -11 a.m.

Spoke to his agent Lawrence Opiyo. PW4 said he did not know whether there was anything wrong with him talking to his agent. He spoke for a period of ten to twenty minutes.

PW4 said all this was at the polling station, clerks were on another side. The Presiding Officer was in another corner. Agents were in the room. Police was at the door. PW4 further states that he did not know whether it was wrong for a candidate to talk to the Presiding Officer after speaking he left. That, when he moved close to hear what they were saying, they stopped their discussion suddenly. He complained/prottested but the Presiding Officer was speaking with a candidate in low tones, Musirimba then left. PW4 said his candidate just came in and talked to him. He was given permission by the Presiding Officer. He also spoke to the Presiding officer. Many other candidates came. He did not know whether they spoke to the Presiding Officer. They came into the room to find out how the process was going on. PW4 said not only Musirimba came. Others including Silvanus Juma came. The Presiding Officer was the one incharge of giving people permission to talk to her agents. PW4 however stated that he did not know if all of them spoke to the Presiding Officer to get permission. He also did not know when Musirimba left. He did not know for how long he stayed there, neither did he know whether he stayed there the whole day. PW4 further said there was a form being confirmed by agents. He did not know the forms name. He also did not know which was being used at the polling station to record results. That the Presiding Officer did not say which form had been finished. The form was being used by the disabled, elderly etc. PW4 further testified that the Presiding Officer said that form was no longer available but voting continued. Also, that the forms were finished did not interfere with voting much but those who needed assistance were not being helped as was their constitutional right. PW4 said the agents were not helping voters in reading the names of the candidates. This was so for the stream (1) they were reading the names

-Asking him whom he/she wanted

-They then marked

-Many wanted to vote secretly

PW4 said the agents were witnessing the marking of the candidates. That the Presiding Officer would still be required to assist if a blind person came to vote. The one accompanying would know who the voter's choice was. The assistant would know. It is no longer private voting.

At paragraph 8 PW4 listed that they assisted voters. None of them was a witness here. None was recorded at the register to prove that they were registered to vote at Sufugwe primary school. Not even in the registered page 8 (of the Sup Form 36A PW4 said he signed to say that he had witnessed the counting. Silvanus garnered 187. He did not know whether the figures put there are what he garnered. He garnered 161 according to the form. PW4 said he was only interested in his candidate.

Cross-examined by Ngige:

PW4 said the station opened between 5.30 – 6.00 a.m. upto 10.00 a.m. assisted people were coming. He did not know how many but they were just a few. He confirmed that there were some people who were assisted. That when forms for the assistance were finished, the Presiding Officer announced he did not know whether to put it in the polling station diary. That it was recorded in the Polling station diary the fact of the shortage of the forms 32A and 32 and that action taken were namely:

(1) borrowed forms from

(2) polling station 2 respectively.

PW4 did not agree to the fact that the shortage was recorded in the Polling station diary. He also did not know whether the Presiding Officer is allowed to assist voters who cannot vote without aid. Further stated that they were all seeing when the Presiding Officer was assisting the voters. He assisted them till evening. He never got the forms from station 2. Nobody complained. All those who came were not prevented from voting. The assistance by the Presiding Officer was an open exercise. They never witnessed a voter saying he/she wanted a certain candidate, but they were allocating the votes on different candidate. If the Presiding Officer was assisting, then he was putting the mark where he was instructed. PW4 further stated that Musirimba talked to the Presiding Officer. He claimed it was wrong. He could have talked to a different officer. They were speaking in low tones. If he had any complaint PW4 did not hear and would not have heard. PW4 said he did not know Musirimba in any other way except that he was a candidate. He witnessed the Form 36A.

Re-examined:

PW4 said he did not agree with Polling station diary page 42) because the Presiding Officer said he borrowed forms from P. Station 2 which was not true. His complaint about the Presiding Officer assisting people was that he assisted by a person representing his candidate. Agents should have been helping. That if forms were there assisted voter would have voted in a suitable environment. Further stated that it was the Presiding Officer who announced the depletion of the forms. He drew the attention of everyone in the station and said that due to unavoidable reasons the forms for helping assisted voters had been depleted. PW4 affirmed that when Musirimba came, he spoke in low tones and took too long.

**PW5 THOMAS OJIAMBO NGAI**

He said he was (para 4) in room NO. 1. But his para 5 says room no. 2. That the ballot papers were issued by clerks employed by IEBC. Clerks were allowed to issue them. PW5 explained that one entry was identified by the KIEMs kit and then given the ballot. One of the clerks was tearing it off from the booklet and stamping. That there was a time there were many people but the crowd was controlled

outside. They were entering in turns. The clerks was stamping at the back and at the same time giving the ballots. No one else other than an IEBC official gave out ballots. PW5 testified all those ballots plucked from the counterfoil in advance were for use to vote. No ballot came from outside. No one in his affidavit was given more than one ballot.

PW5 said the ballots were openly on the table. He did not hide any. The Presiding Officer came and said that what the clerk had done was wrong in law. He did not know how many ballots they were.

That those ballots which had been pre-plucked were given out to voters until they were finished. The voters used them to vote. He did not know if they were accounted for.

PW5 stated that Deputy Presiding Officer is an IEBC official. They never had a problem with forms for assisting voters. If there was, he did not witness. There were assisted voters, he thought so. They were assisted by the Deputy Presiding Officer or Presiding Officer. All agents had been taught so by IEBC. They were told that a spoilt vote would be replaced with another. PW5 said he did not know if replacement of a spoilt vote was allowed. Further testified that the Deputy Presiding Officer was assisting voters who were illiterate. Agents witnessed the Deputy Presiding Officer assisting voters. Two voters were found. The two were together and were being used by assisted both. He had two ballots. PW5 said he protested to the Presiding Officer, that the two votes were issued in error. One of the ballot was returned to the issuing clerk. He did not know whether it was re-issued to another voter. The station was closed but he did not remember. PW5 said he had a note book given by his candidate to record occurrences/ any incidence at the polling station. He wrote but he did not have the book in court. It was at home. PW5 said he did not return it to his candidate because he was annoyed. He also did not report anywhere because he got angry. PW5 clarified that nowhere had he stated that Silvanus votes were stolen. He said Silvanus got votes there but he did not remember neither did he know about Musirimba. PW5 signed form 36A. He said he knew that he was supposed to take care of his candidate's interest. He had been told that he should protest if he did not agree. PW5 said he signed because he was under pressure. He signed but he did not agree.

Cross-examined by Mr. Ngige:

PW5 said he saw voters being given one ballot only. And that the one who had two was a voter. The extra one was retained.

### **PW6 SILVANUS JUMA**

He stated that he had agents in all the polling station. He voted at Budalangi polling station. PW6 also said he went around to some polling station to see how voting was going on. He went to about 7 stations. His intention was to see how the exercise was going on. All these he said was after getting the permission of the Presiding Officer to access the polling station. The permission was verbal. He spoke to the Presiding Officer so he could talk with agents after getting the permission. He said he was not allowed to shout in the polling station. He had to talk in an orderly manner. Especially in a low tone in one way of speaking entirely but shouting is prohibited. He stated at para 21 that Hon. Musirimba at sifugwe primary school spoke to the agents and held a conversation with Presiding Officer in low tone. PW6 said there's no mistake in talking to the agent and the Presiding Officer after talking to the agent what matters is what happened after talking to the Presiding Officer. PW6 further said that, he (Musirimba) came and then he started engaging election officials (para 21) page of the petitioner.) PW6 said that Musirimba came but he did not indicate how many times. That there's nothing wrong with a candidate talking to agents and the Presiding Officer. PW6 further said that the Presiding Officer had run out of form 32(b). He was reliably informed by his agents. He did not know if the Presiding Officer announced that publicly.

He said at Para 21 that following this episode the Presiding Officer spoke to some then announced that the voter assistance forms were depleted, he was the only one to assist the voters. PW6 said that the Presiding Officer said he was the one to announce to assist the assisted voters. That the Presiding Officer did not say that he would get the forms from room 2.

PW6 further said it was not indicated to him whether any voter was denied voting or whether any voter complained that his privacy had been infringed. That it was no longer a secret ballot. All agents were surrounding, and anybody could see who they were voting for.

Regulations 72 (page 2 of the response) Para 7(b) where a person (needs assistance) it says that assistance should be in the presence of agents. Pw6 said it was wrong for the Presiding Officer to assist when the voter has an assistant. Furthermore, some voter assistants were turned away. He said that fact was in the affidavit. (para 8 of the Kevin Juma affidavit) my petition para 25, if person regulations 72 (2) a voter assisted the presiding officer shall assist in the presence of all the agents.

At Rwambwa polling station No. 1. PW6 said his agent was Catherine Ajiambo. He gave a letter of accreditation there in this petition. PW6 said he knew that agents were supposed to have such a letter in court to show that she was her accredited agent. IEBC allowed one agent per polling station for particular party. There was another Jubilee agent at that particular station. PW6 said IEBC did not turn him away. She was told to go to the other room. They did not send our agents due to specific reasons. She assessed room at first and was sent to the other room. PW6 said his agent was not denied entry into that particular room. In Rwambwa 01 there was Silvia Nabwire all along. He had an agent there in that particular room but Silvia Nabwire did not come to testify. That Catherine was not in room 1. She was there at first but she left to the next room . During the rest of the exercise, she was in room 2. PW6 acknowledged that Catherine was not an agent in 01. She therefore cannot tell us whether or not the counting there was opaque.

PW6 further testified that at Munami polling station the votes in Form 36A were not tallying page 21 form 36A is present. It was his evidence that the form was not certified. He said he garnered 35 votes at Munami polling station On Form 36(b) IEBC stated that I got 35 votes at Munami polling station Musirimba got 124 votes. The same votes are what were transferred to IEBC tallying centre. No variation. Para 32 (total vote case are different from presidential, women rep. senator etc) PW6 said he knew there are instances where people come to vote for a particular person and then leave the others. There are also allegations of rejected votes, etc.

He further said the variation was not normal, six ballots are issued but if they are half used, they will still be accounted for. He said he gave his agents note books. They were only recording the number of voters. He did not record any other incident. Further stated it was not a must to report an election offence. PW6 therefore never reported any election offence. Para 47 (page 10) Sirumba primary school had 2 polling station. True para 47 mentions a room complained of.

PW6 said Cynthia, was employed at Sirumba primary school room 2. Presented the list in court claiming it is an IEBC document (page 3&) Later said the list is not IEBC document. It does not bear any IEBC stamp. It is handwritten. It is not official.

He said he got the document from an IEBC staff. He went to IEBC to complain but it was in vain. There was no official authorization from IEBC to obtain the document. It is not an IEBC document. PW6 also confirmed that he had no evidence from Kenya National Examination Council of her education level.

#### Cross-examined by Mr. Ngige:

PW6 said he had agents in all the polling station. Most of them signed Form 36A. He agreed with the results as declared by IEBC as declared. He was not challenging the results. He got 1991 votes. His competitor got 2742 votes. He is not challenging that.

Para 33 of the petition (page 8of the petitioner) It says PW6 got 81 votes. The same were transferred in Form 36B. His competitor got (Para 22 of the response) he got the same votes were transferred. PW6 confirmed what was in Form 36 (B)

PW6 said the jobs were advertised many applied, interviews were conducted, but that he did not see the

list of successful candidates

PW6 said he came to know Nancy Barasa after the voting. He said that he also came to know Kevin Oduor Okello after the election.

Rwambwa polling station1. PW6 emphasized that there was a mix up. The person who told him there was a problem with sorting and counting was in Rwambwa 1. He said his pleadings indicate that it was 1. He was confirming that the problem was in naming of the rooms.

PW6 said he does not know where Musirimba votes. Neither did he know what time he went to vote. He would not deny that he voted there (Sirumba and not Sifugwe) and that he voted between 10.-11 a.m.

He would however deny if he was told that he was not at Sifugwe.

PW6 further testified that he had the voters who were turned away. The voter assistance forms were exhausted and not voters. That Only 5 people needed voter assistants. Out of 5 three came roughly 500 voters. The gap between him and Musirimba was around 700. PW6 said he knew that agents, Presiding Officer and clerks sign with oath of secrecy. His agents did. They signed the oath. Still at Sifugwe, there was a shortage of voter assisted Form 32A. PW6 further stated that he knew that issue was noted in the Polling station diary. His agent signed the Polling Station Diary. They did not remark. He confirmed that as a candidate, one is allowed to go to a polling station.

#### RE-EXAMINED:

PW6 acknowledged that the one who is entitled to the secrecy of voting is the voter. Not agents. He said that Mercy Barasa was a clerk at Budalangi. His witness said that she went upto class 6. PW6 said Kenya National Examination Council would not have evidence of or date for class six drop out.

Catherine signed the Polling Station Diary in the capacity of agents. Para 31 of his petition (page 8) Munami polling station he complained that the election official votes are 329 while for 36B states 338. PW6 said this fact has not been denied by IEBC. The one who files Form 36A is the Presiding Officer. Form 36B is completed by the Presiding Officer. The Returning Officer does not have authority to alter 36A.

PW6'S complaint about assisted votes is that at Sifugwe primary school, which is his stronghold, the assistant voters came with people they were trusting; forms got depleted. They were to be served by clerks and Presiding Officer. Their secrecy in voting was not respected.

Regulation 72. The pre-condition. These people were not accompanied by people who were not qualified.

#### DW1 SILVESTER MUSIRIMBA

He said that he was an agent for Mr. Musirimba at Sirumba primary school. There was no letter of appointment. He said he took it to IEBC and was given a budge which he used to enter the polling station. DW1 further testified that all agents were being treated equally with only budes being required. Mr. Musirimba is his brother. He said that there were 3 ways of voting;

Unassisted voting

Assisted voting

To come with an assistant

Assisted voting (without an assistant

To be assisted by the Presiding Officer as agents were observing. That is what they were taught.

DW1 said he knew the petitioner's complaint about Sirumba 2 of 2. It was explained to him that he was complaining that some papers were torn out unfortunately they were MP.

He did not understand the 2<sup>nd</sup> complaint.

That those are the only ones he knew from Sirumba 2 of 2. DW1 also said he knew of no voter witness for the respondent from Sirumba polling station.

### RE-EXAMINED

He stated as regards paragraph 5(b) of his affidavit that a voter was free to have assistance of his or her choice. DW1 said a voter was choosing their own assistant. Where there was assistance by Presiding Officer agents were observing. Presiding Officer called in everyone and all agents observed

They had all taken an oath of secrecy. The petitioners claim was about torn papers for MP (wrongfully destroyed by clerk No. 3) This was seen by the Deputy Presiding Officer.

### DW2 OKUMU ODUORY

He stated that at Rwambwa there were two classes used as polling stations. Before the classes, there was an IEBC arrow indicating that this is a polling station, but it did not indicate which polling station (People, voters and agents) were being directed by IEBC.

That at one time they were in the same room with Catherine in room 1. She was later sent out by IEBC. Confirmed that before him was the Polling Station Diary for Rwambwa (2<sup>nd</sup> and 3<sup>rd</sup> respondent sup list of documents filed on 30.10.17)

It is for Rwambwa 01 page 3 of the response. DW2 said names on the page showed he was there in that room. Catherine's name is also here.

Page 4 – that was the Polling Station Diary closing station. His name was there. DW2 confirmed Catherine's name is not there when they were closing.

Page 51 for Rwambwa 02 the station was closed before counting. Catherine's name was there page 66. She has signed. DW2 said its true Catherine was in one of these rooms when counting.

### Re-examined by Mr. Okeyo:

DW2 said Catherine was there in the morning (page 35 of the response). Page 39 of 42, Catherine was not there. That IEBC noted that there were two Jubilee agents instead of 1. IEBC allowed her out. One Jubilee agent removed. Her name is Silvia Nabwire page 35. Silvia Nabwire was there.

At Page 39 she was still there page 42 she was there during closing. Form 36A (page 14) shows she was in room 1. Catherine's affidavit – she complains about Rwambwa 1 station room 1. DW2 said Catherine was not in this station (room 1). She never witnessed anything about room 1. There was no complaint about room 2.

He said the Presiding Officer was the one identifying rooms. He pointed out room 1 and 2. DW2 said he was in room 1 throughout.

### DW3 FLORENCE AMAMBIA OPIYO

She confirmed that she was an agent in Sifugwe station 1.

She said she was not given an appointment letter. She was sent by the party to the IEBC who gave her the authority. He therefore had no appointment letter.

It was DW3'S evidence in para 12 that she could not read English.

The affidavit of Florence Amambia Opiyo was expunged from the records.

#### **DW4 FRED MUSIRIMBA**

He said he had agents in the election. Amongst them are his witnesses. The agents did not have an appointment letter attached to their affidavits. There was none there. He said his agents signed the IEBC Polling Station Diary . That even his opponent had agents who have signed in the Polling Station Diary without an appointment letter. Same goes to his agents if they did not have a letter of appointment it was okay.

Sifugwe primary station 1; they say that forms 32A for assisting voters got depleted. DW4 said his agent told him so. He went to Sifugwe Primary school himself. He arrived at around 4- 4.30 p.m.

In his affidavit para 10, DW4 confirmed that he arrived there at 4.30p.m. He said he knew that legally a polling station should be closed at 5. 00 p.m. and/or thereafter. That it could not be true that at 4.30 p.m. the station could be closed. DW4 further testified that he did not know if that is what happened at Sifugwe. There were many complaints. Nobody complained and asked to leave.

DW4 said that when he went out of the station, the Presiding Officer told him that his presence there was being complained of. He said that the Presiding Officer asked him to leave. He said the people outside were saying that he should not be there and the Presiding Officer told him so. The Presiding Officer told him to leave that place but he told people that he had a right to be there. He does NOT know one by name Majuma.

DW4 testified that he knew many other people called by that name. He has a sister called Majuma who votes there at Sifugwe. He however did not know where she voted. DW4 alleged that his lawyer said that the petitioner was still a police officer, while he was not aware.

#### **Re-examined:**

Dw4 said he went to Sifugwe between 4.30 – 5.00 p.m. That Kevin Juma's statement that he was there at 10.00 a.m. is a lie. He was then voting at Sirumba.

He further said that when he came at 4.30, the claims that he talked to the Presiding Officer and agents are misplaced. He talked to the Presiding Officer who gave him authority to speak to his agents. He had to get his permission. DW4 said he did not talk in a suspicious manner to the Presiding Officer and his brother. That there was a police officer who heard them speaking. He said he was told later by his agent Florence that the assisted voter forms were depleted earlier in the morning before he had arrived. As a candidate he was allowed to visit the polling station.

DW4 clarified that as a contestant he was not involved in the depletion of forms. After he spoke to the Presiding Officer and his agent he met other young men who asked him what he was doing there. They were about 3 angry men. DW4 said the Presiding Officer explained to them that he was a candidate and then asked him to leave. Lastly, that it was not true that he did all the matters explained in that station.

#### **DW5 SYLVIA NABWIRE ONDENG'**

She said she was involved in the 8<sup>th</sup> August 2017 election. She was the P.O. at Sifugwe primary school in Bunyala North Ward. The Petitioner filed a petition. She swore an affidavit in respect to that complaint on 27.9.17. She wished to adopt it as evidence in chief.

### **DW 6 LUCAS AHENDA MATHOGO**

He said he was involved in the 8.8.17 election as the Deputy Presiding Officer Sifugwe polling station No 1. Bunyala North ward, Budalangi Constituency. He was aware of the complaint before the court. He signed a witness affidavit on 27.9.17. He wished to adopt it as evidence.

### **DW7 SAMANYIYA AKUNGLU NANGILA**

She stated that she was involved in the 8.8.17 elections. She was at Sirumba II as a Deputy Presiding Officer for Sirumba 2. She knew that the petitioner brought some complaint about Sirumba 2 and she swore an affidavit on 27.9.17. she wished to have it adopted as evidence in court.

Cross-examined: DW7 said she came across a voter with 2 ballot papers in the voting booth. It was true. This was an unusual incident. It should have been reported in the Polling station diary, but she did not record it in the Polling station diary.

Re-examined: DW7 confirmed that those two ballot papers were for the Member of Parliament. One was not cast. They were returned to the clerk.

### **DW8 EMMANUEL WESONGA BWIRE**

He said he was involved in the 8.8.17 elections as the Presiding Officer for Rwambwa polling station 1(one) He understood the contents of the petitioner case involving that polling station. He answered through a statement on 27.9.17. That is the statement he wished to have adopted as evidence.

### **DW9 EMMANUEL BAHATI OTAMBO**

He said he was involved in the 8.8.17 election as the Presiding Officer for Sirumba polling station 1 in Bunyala North ward. He understood the complaint by the petitioner. He swore a statement in response on 27.9.17. He wished to adopt it.

He said Eunice Majuma Kajaju was No. 7 an agent at his polling station. The Polling station diary (page 53) has his evidence to that fact. Page 52 agent No. 2 was the agent Eunice M. Kajajau. As per his own affidavit, he said it was not true that she was not an agent.

### **DW 10 PETER TIYO male adult Christian sworn in English:**

He said he was involved in the 8.8.17 elections as Returning Officer for Budalangi constituency. He said he knew ward called Bunyala North ward; one of the 4 wards from Budalangi Constituency. That the Petitioner herein was from Bunyala North Ward. DW10 swore a statement on 27.9.17. He wished to rely on the statement.

Cross-examined by Mr. Ongoya:

DW10 said he understood the electoral laws procedures and provisions. To his knowledge the results having been declared at the polling station, he had no authority to alter dates.

### **SUBMISSIONS**

After the court heard the evidence of the parties and their witnesses, court gave directions for submissions to be filed both electronically and in hard copies.

### **PETITIONER'S SUBMISSIONS**

Counsel for the Petitioner explained that on 8<sup>th</sup> August 2017 Kenya held a general election to the offices of President (and his Deputy), Governors (and their Deputies), Senators, Members of the National

Assembly, Women Representatives in the National Assembly, and Members of County Assemblies.

He stated that the Petition before court related to the election of the Member of County Assembly for Bunyala North Ward in Busia County in which the 1<sup>st</sup> Respondent was declared the winner by the 3<sup>rd</sup> Respondent.

### **Petition/Affidavits & Responses/Affidavits**

Counsel said that the Petitioner challenged the election outcome vide an election petition dated 4<sup>th</sup> September 2017. He explained that the 1<sup>st</sup> Respondent filed his response as well as witness affidavits on 18.09.2017. Further that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed their Response to the Petition together with witness affidavits on 29<sup>th</sup> September 2017.

### **Issues for determination**

The parties framed the following issues for determination:

1. Whether the election for Member of the County Assembly for Busia North Ward in Busia County held on 08.08.2017 was conducted in accordance with the Constitution, election laws and regulations.
2. Whether the 1<sup>st</sup> Respondent was validly elected Member of the County Assembly for Busia North Ward in Busia County.
3. What consequential orders should this court issue.

### **Burden of Proof – the Law**

Counsel stated that the emerging jurisprudence on the questions of burden and standard of proof in election Petitions, which he said had a bearing on the Petition, is as follows:

The legal burden of proof in election petitions lies and remains with the Petitioner throughout the case. The justification for this principle being that it is the Petitioner who seeks relief from the court and, in particular, the nullification of an election. *See case of Raila Odinga Vs Independent Electoral and Boundaries Commission & 3 Others, Supreme Court Petitions Numbers 3, 4 and 5 of 2013 (consolidated). See also Section 107(1) of the Evidence Act.*

The evidential burden of proof in election petitions initially lies upon the Petitioner. The evidential burden, however, may shift, and often shifts between the parties. *see Raila Odinga Vs Independent Electoral and Boundaries Commission & 3 Others, Supreme Court Petitions Numbers 3, 4 and 5 of 2013 (consolidated). See also Raila Amolo Odinga vs. IEBC & 2 Others, Supreme Court, Petition 1 of 2017 paragraphs 127 to 133 of the Majority Decision at pages 24-25.*

Counsel relied on the recently decided case of **Raila Odinga Vs Independent Electoral and Boundaries Commission and Others, Supreme Court Presidential Petition Number 1 of 2017**, in which the Court held as follows regarding burden of proof:

133 ... In other words, while the petitioner bears an evidentiary burden to adduce ‘factual’ evidence to prove his/her allegations of breach, then the burden shifts and it behoves the respondent to adduce evidence to prove compliance with the law.

### **Test for nullification of an election outcome**

Counsel referred the court to paragraph 212 of the judgment and reproduced it as hereunder;

Having analyzed the wording of Section 83 of the Elections Act, bearing in mind its legislative history in Kenya and genesis from the Ballot Act and also in light of the need to keep in tune with Kenya's transformative Constitution, it is clear to us that the correct interpretation of the Section is one that ensures that elections are a true reflection of the will of the Kenyan people. Such an election must be one that meets the constitutional standards. An election such as the one at hand, has to be one that is both quantitatively and qualitatively in accordance with the Constitution. It is one where the winner of the presidential contest obtains "*more than half of all the votes cast in the election; and at least twenty-five per cent of the votes cast in each of more than half of the counties*" as stipulated in Article 138(4) of the Constitution. In addition, the election which gives rise to this result must be held in accordance with the principles of a free and fair elections, which are by secret ballot; free from intimidation; improper influence, or corruption; and administered by an independent body in an impartial, neutral, efficient, accurate and accountable manner as stipulated in Article 81. Besides the principles in the Constitution which we have enumerated that govern elections, Section 83 of the Elections Act requires that elections be "*conducted in accordance with the principles laid down in that written law.*" The most important written law on elections is of course the Elections Act itself. That is not all. Under Article 86 of the Constitution, IEBC is obliged to ensure, inter alia, that:

***"Whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent; the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station; the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials."***

### **Finality of Polling Station Results**

Counsel reproduced paragraph 263 of the Raila case (supra) in this regard;

Clearly, with this provision in mind, the Court of Appeal in **Maina Kiai** decision, was categorical as it rendered itself thus:

***"We are satisfied that with this elaborate system, the electronic transmission of the already tabulated results from the polling stations, contained in the prescribed forms, is a critical way of safeguarding the accuracy of the outcome of elections, and do not see how the appellant or any of its officers (read 1<sup>st</sup> respondent) can vary or even purport to verify those results..."***

Further, the Court of Appeal stated thus:

***"The appellant, as opposed to its chairperson, upon receipt of prescribed forms containing tabulated results for election of president electronically transmitted to it from the near 40,000 polling stations, is required to tally and "verify" the results..."***

The appellate Court had earlier made a pronouncement with which we are in total agreement, to the effect that:

***"It is clear ...that the polling station is the true locus for the free exercise of the voters' will. The counting of the votes as elaborately set out in the Act and the Regulations, with its open, transparent and participatory character using the ballot as the primary material, means, as it must, that the count there is clothed with a finality not to be exposed to any risk of variation or subversion."***

### **Provisions of the Evidence Act to be Borne in Mind**

Counsel invited the Court to bear the following material provisions of the Evidence Act in mind as it determines this matter, namely

Section 17 of the Evidence Act which provides that an admission is a statement, oral or documentary, which suggests any inference as to a fact in issue or relevant fact, and which is made by any of the persons and in the circumstances hereinafter mentioned.

Section 18 (1) of the Evidence Act which provides that Statements made by a party to the proceeding, or by an agent to any such party, whom the court regards in the circumstances of the case as expressly or impliedly authorized by him to make them, are admissions.

No fact need be proved in any civil proceeding which the parties thereto or their agents agree to admit at the hearing, or which before the hearing they agree, by writing under their hands, to admit, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings

### **Application of the foregoing provisions of the Law, and jurisprudence to the present case**

He explained that the Petition had particularized a number of claims touching on the conduct of the election which, once proved, as we submit has been done, confirms that this election violated the following requirements of the Constitution, namely;

Article 81(e) requires, in mandatory terms, that our electoral system “*shall comply*”, inter alia “*with ... the principles ... of free and fair elections, which are—*

*(i) by secret ballot;*

*(ii) free from violence, intimidation, improper influence or corruption;*

*(iii) conducted by an independent body;*

*(iv) transparent; and,*

*(v) administered in an impartial, neutral, efficient, accurate and accountable manner.*

Article 86 of the Constitution demands that “[a]t every election, the Independent Electoral and Boundaries Commission shall ensure that—

*(a) whatever voting method that is used, the system is simple, accurate, verifiable, secure, accountable and transparent;*

*(b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;*

*(c ) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer, and*

*(d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place including the safe keeping of election materials.*

He urged the court to interrogate the petitioner’s claims, together with the Respondents’ responses in light of the foregoing legal stipulations.

### **Improper engagement between the P.O and the 1<sup>st</sup> Respondent at Sifugwe Primary School**

The Petitioner contended that at Sifugwe Primary School Room 1 polling station, the 1<sup>st</sup> Respondent, Fred Musirimba, came and talked to one of his agents and then proceeded to have conversation in low tones with the presiding officer, one Odongo Nabwire Sylvia. It was between 10 and 11 am.

Counsel invited the court to note the following inconsistencies and discrepancies from the Respondents in

dealing with this contention:

*Allegation by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents that this episode happened after close of voting vis a vis contention by 1<sup>st</sup> Respondent that it was at 4.30 pm*

He invited the court to consider the contents of paragraph 23 of the Affidavit of **Peter Tiyo (page 9 of the bundle constituting the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent's response to petition).**

He also invited the court to consider the contents of paragraphs 3 – 4 of the affidavit of **Lucas Matogo (page 46 of the bundle constituting the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents response to the petition).**

From the foregoing two affidavits, counsel stated that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents present a narrative that the 1<sup>st</sup> Respondent visited Sifugwe Primary School after close of the voting exercise.

He added that the 1<sup>st</sup> Respondent, on the other hand, vide his affidavit and in cross examination by counsel for the Petition contended that he arrived at the said polling station at 4.30 pm. In fact, he was emphatic that the voting exercise could not have closed at the time.

Counsel maintained that there was an inconsistency between the narrative by the 1<sup>st</sup> Respondent, on the one hand, and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents on the other hand which inconsistency is inimical to truth.

He said that this inconsistency must be understood in the context of the admission by **Lucus Matogo** at paragraph 4 of his affidavit that the presence of the 1<sup>st</sup> Respondent at the polling station caused protests from the crowd present at the polling station.

He submitted that considering that the law on voting is that voters must leave the polling station upon casting their respective votes, the fact that there was a crowd at the polling station can only lead to a conclusion that voting was still going on. This is the only justification for the presence of the general public at the polling station.

*No entry of this occurrence in the Polling Day Diary*

Counsel submitted further that in spite of the fact that the 1<sup>st</sup> Respondent's presence at the polling station caused protests, the officer's subordinate to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents did not even record this incident in the Polling Day Diary.

He said that the court was therefore treated to "*oral literature*" on this particular episode and wondered whether an electoral process that treats this court to such *oral literature* pass the test of accurate, verifiable, secure, accountable and transparent; He maintained that it does not.

### ***Exhaustion of Oath of Secrecy Forms for Assisted Voters***

Counsel said further that it was the Petitioner's contention that following the episode of the 1<sup>st</sup> Respondent's improper conduct at Sifugwe Primary School, the Presiding Officer took some time and announced that the oath forms that voter assistants for assisted voters filled/signed sighting they were depleted hence he was the only one to assist voters. He stated that this disfranchised the many assisted voters who were then deprived their right to voting by secret ballot since assistance by the Presiding Officer must be witnessed by all agents present in the room

Counsel submitted that the constitution creates an entitlement for a vote by secret ballot under article 81 of the Constitution.

That the election regulations then make provisions for structured limitations to this requirement of the constitution under regulated circumstances.

He relied on **Regulation 72 of the Elections (General) Regulations, 2012 provides for assistance of voters.** Regulation 72 (1) of the Regulations provides that on the application of a voter who is, by reason of a disability or being unable to read or write, and therefore unable to vote in the manner prescribed in the Regulations, the presiding officer shall permit the voter to be assisted or supported by a person of the voter's own free choice, and who shall not be a candidate or an agent.

That Regulation 72 (2) of the said Regulations further provides that where the person who applies to be assisted is not accompanied by a person who is qualified to assist him or her, the presiding officer shall assist such voter, **in the presence of the agents.**

He submitted that it is conceded by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents that at Sifugwe Primary School, there was a shortage of the oath of secrecy forms for assisted voters.

Counsel faulted the 1<sup>st</sup> Respondent and his witnesses for flatly denying that such a thing ever happened and said it presents them as dishonest witness ready to deny the undeniable.

He said that inconsistent explanations were offered by the 2<sup>nd</sup> Respondent and his Presiding Officers.

Counsel went further to state that whereas the Presiding Officer for Polling Station 1 (Sylvia Nabwire Odongo) indicated in the Polling Day Diary that she wrote validated names in note book, one wonders what *validated names* has to do with shortage of oaths of secrecy for assisted voters. Further, that she indicates that she borrowed forms from Poling Station 2. The Presiding Officer for Polling Station two was not called upon to corroborate this fact and that there was no corresponding Polling Day Diary from Poling Station 2 to show that in fact a corresponding entry was made to corroborate this fact. The depositions by Sylvia Nabwire, on the one hand, and the Returning Officer, Peter Tiyo, on the other hand show a very impersonal approach to this subject. This is in the following depositions:

At paragraph 3(VII) of her affidavit (see page 25 of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent's bundle), Sylvia Nabwire depones that *I also informed the tallying Centre who advised me to borrow from the other street as they organize to bring.* One is excused to believe that by *tallying centre* Sylvia is referring to the Returning Officer who is the person she was answerable to.

He explained that when one refers to the Returning Officer's affidavit at paragraph 28 (page 10) he depones thus *the Presiding Officer for Sifugwe Primary School stream 1 also stated that when she had exhausted form 32B she called the Tallying Centre which advised her to borrow from Sifugwe Stream 1 as they deliver to them additional forms.* When the Returning officer also refers to the tallying centre as "they" one wonders whether such a conversation took place and with who.

In a nut shell, counsel said that the Petitioner had made out a case that yet again, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have failed the tests of accountability and transparency in their handling of assisted voters at Sifugwe Primary School.

He explained that by failing to supply sufficient numbers of oath forms for assistants of assisted voters, the Presiding Officer, took away the voters' primary rights under regulation 72(1) and compromised the secrecy of the vote of the said voters.

**At Munani polling station form 36A bears total valid votes cast as 329 while the form 36B has 338.**

He faulted the Returning Officer for answering this contention in the most casual manner.

At paragraph 32 of his affidavit, he contends that *there is an arithmetic error in total votes cast at Munani Polling Station.*

Counsel explained that even if an assumption was made in his favour that such an arithmetic error existed, in light of the **Maina Kiai** decision by the Court of Appeal, did he have the authority to vary the

said figures at the Tallying Centre while making entries in Form 36B? He admitted in cross examination that he did not have such mandate. Counsel wondered why the Returning Officer did it and said that he had simply committed an illegality.

**The total votes cast for the MCAs, MPs to President varies within the ward. This is confirmed by the form 36 B where the MCAs votes were 9038, Women rep 7813, Senator 9117, Governor 8992, and President 8992.**

Counsel stated that the Petitioner had presented a meticulous analysis of these votes at page 22 of the Petitioner's bundle.

He said that for some strange reason, the Returning Officer responded to this very serious claim by reference to some unparticularized *clerical errors, arithmetic errors and stray ballots which are not counted or recorded.*

He wondered which rule or law sanctions a failure to count and or record stray ballots? Won't a stray ballot constitute a rejected vote in any event which must be both counted and recorded as such?

He maintained that against the test of accountability was failed by this response on the part of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and added that that suggests that there are those that voted for the MCA and never voted for other seats.

**At Nabuchwi polling station, the rejected votes on form 36A bears 3 votes while the form 36B has 84 votes.**

**This fact was admitted by the Returning Officer at paragraph 36 of his affidavit.**

Counsel explained that the foregoing discrepancies are in totality a breach of article 81 of the constitution which expressly states that the electoral process should impartial, neutral, *efficient, accurate and accountable* and Article 86 of the constitution that mandates the IEBC to ensure the system in place is simple, accurately collated, verifiable, secure, accountable and transparent.

He maintained that the explanation by the Returning Officer at paragraphs 36 and 37 of his affidavit in fact confirms that this election did not pass the test of *efficient, accurate and accountable.*

**At Sirimba Polling Station 01, the 1<sup>st</sup> Respondent, personally took about 3 voters from the queue one by one to the polling clerk inside the polling room. In one of these instances he called out one Ms Majuma to assist them to vote.**

He invited the court to consider the admission by the Returning Officer at paragraph 38 of his affidavit that the 1<sup>st</sup> Respondent got to Sirimba Polling Station with unauthorized persons.

Further, he invited the court to treat Emmanuel Bahati Ofumbe (see at page 49 of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' bundle) as an incredible witness for the reason that he denied at paragraphs 4 and 5 of his affidavit that Eunice Majuma Kujaju was an agent at his polling station. He stated that in cross examination, he has referred to the annexures to his own affidavit, at pages 62, and 65, where the said Eunice Kujaju has in fact signed the Polling Day Diary as an agent!

Counsel relied on Regulation 65 of the Elections General Regulations (2012) created pursuant to Section 109 of the Elections Act 2011 which he said clearly provide for the manner in which communication should be done at the polling station. He stated that the Regulation provides categorically that it is only an election officer or police officer that is allowed to communicate with a voter who is in, or in the immediate precincts of a polling station for the purpose of voting. That any other person who wishes to communicate with a voter at the polling station is strictly allowed to do so with the authority of the presiding officer.

He explained that the regulation allows the companion of an assisted or supported voter to communicate with that voter. And even that as it may the election officer, candidate or agent attending at the polling is only allowed to communicate for purposes authorized by law.

From the foregoing, he submitted that it is clear that the 1<sup>st</sup> Respondent was in violation of regulation 65 of the Elections General Regulations (2012)

He added that the above actions by the 1<sup>st</sup> Respondent were committed in the presence of the presiding officer stationed at Sirimba Polling Station 01, one Emmanuel Bahati Ofumbo.

Counsel further relied on Regulation 59 of the Elections General Regulations (2012) which makes it an offence by the members and staff of the commission who have a duty to perform under the election laws under 59(b) by permitting any person whom they know or have reasonable cause to believe to be able to read or write to vote in the manner provided for persons unable to read or write, under 59(l) by willfully contravening the law to give undue advantage to a candidate and lastly under 59(m) by failing to prevent or report to the commission and any other relevant authority, the commission of an electoral malpractice or offence under the Elections Act 2011.

**At Sirimba polling station 02, the agents found the Deputy Presiding Officer with two ballot papers for the Member of County Assembly at the voting booth while in the process of assisting an assisted voter hence confirming at the station collusion at the station.**

He explained that the Presiding Officer for the said polling station Marius Omodo Salamba, on the one hand purported to suggest that the said ballot paper was in respect of Member of National Assembly elections. See paragraph 3(I – IV) of his affidavit (page 72 of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent's bundle).

He explained that in a surprising turn of events, at paragraph 10 of his affidavit (page 73 of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' bundle) he depones that *there were no any incidents in my polling station. If there was any, I would have recorded the same in my Polling Station Diary.* This begs the question; how did he treat the two ballot papers he admits to have seen a voter with? Counsel said that it was that lack of candor that sends a message that we are dealing with election officials that did not treat their obligation to be free, fair and impartial casually.

Counsel explained further that if it was true that this double issuance of ballot papers was in relation to the National Assembly election and not the MCA election, why didn't the officials make an appropriate entry in the Polling Station Diary in the interest of transparency, accountability and verifiability? Can an election where this simple test is failed pass the test of scrutiny? He submitted that it does not.

**At Sirimba Primary School, the polling clerk who was in charge of issuing MCA ballot papers from the booklet had torn and stamped many ballot papers lying on his desk. One of the agents protested and inquired why he was doing this and he explained that he was doing that to prepare for the incoming voters in advance.**

He stated that at this same polling station one of the polling clerks by the name Kevin Oduori Okello is a first-born son to the 1<sup>st</sup> Respondent's brother

**He** relied on **Section 59 (K)** of the election law which prohibits an official from colluding with any party or candidate so as to give any undue advantage to the political party or candidate.

**As part of the efforts to secure the principles laid out in the Constitution and the laws, the 2<sup>nd</sup> Respondents set out the requisite qualifications for persons desirous of serving as polling officials.**

He stated that in respect of polling clerks, the qualifications were the following:

KCSE aggregate C- and above

Must be of good character and non-partisan

Must be available the entire period of the General Elections

Must be residents of the County Assembly Ward where the polling centre applied for is located.

He explained that in total violation of its own standards, at Sirimba Primary School Polling Station, the 3<sup>rd</sup> Respondent recruited clerks some of whom did not have the requisite academic qualifications, including one Cynthia Mercy Baraza at Budalangi Primary School Room 2.

He invited the court to take note of the evasive approach by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to this question. That the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents did not procure an affidavit to controvert this narrative from Cynthia Mercy Baraza. He faulted the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents for not presenting the papers on the strength of which she was recruited as an election official.

He said that in total violation of the duty to be transparent, the 2<sup>nd</sup> Respondent simply stated in his affidavit that *due to the large number of documents we had in our possession, we discarded the copies of certificates and application letters for all the applicants after the interview (see paragraph 21 of the Affidavit of Peter Tiyo – page 9 of the bundle)*. He explained that to the extent that elections are a process and not an event, recruitment of election officials is part of the electoral process. Does this deposition on the part of the Returning Officer present the electoral process as having been transparent, accountable and verifiable? He submitted that it does not.

Counsel stated that the explanation offered by Mr Peter Tiyo at paragraph 23 of his affidavit is a perpetuation of the unacceptable theme that *the end justifies the means*. He said that this philosophy is not acceptable in electoral democracies – in a free and democratic society founded on the principles of transparency, accountability and verifiability.

## **Conclusion**

For the foregoing reasons, counsel invited the court to make the following conclusions, namely;

The election of Member of County Assembly for Bunyala North Ward was **not** conducted in accordance with the Constitution, the Elections Laws and Regulations.

The 1<sup>st</sup> Respondent was **not** validly elected as a Member of County Assembly for Bunyala North Ward.

The Petitioner should, in any event, be awarded the costs of this Petition.

## **RESPONDENTS' SUBMISSIONS;**

On their part, the respondents also filed submissions in support of their clients defences.

## **1<sup>ST</sup> RESPONDENT'S WRITTEN SUBMISSIONS**

Counsel humbly submitted that the petitioner has not proved his case to the required standard hence the petition dated 4<sup>th</sup> September 2017 should be dismissed with costs. Before the start of hearing, parties framed the following contested issues; -

- Whether the election for Member of the County Assembly for Bukhayo North Ward in Busia County held on 08.08.2017 was conducted in accordance with the Constitution, election laws and regulations.
- Whether the 1<sup>st</sup> Respondent was validly elected as the Member of County Assembly for Bukhayo North Ward in Busia County.

- What consequential orders should this court issue.

## **APPLICABLE LAW**

- **BURDEN OF PROOF**

Counsel for the 1st respondent was very equivocal that the burden of proving any allegation of electoral breach, misconduct and/or irregularity lies squarely upon the petitioner. The legal principle is that ‘*he who alleges must prove*’. He cited the case of **Gideon Mwangangi Wambua VS. IEBC & 2 Others E.P. 4 OF 2013** where it was held that it is a presumption of law that elections were properly conducted and as such the burden is always upon the petitioner to prove otherwise. He stated that this was further buttressed in the case of **Joho Vs. Nyange & Another (2008) 3 KLR E.P** where the Court in upholding the position that the burden of proof lies with the petitioner held as follows;-

***“Election petitions are no ordinary suits but disputes in rem of great public importance. They should not be taken lightly and generalized allegations are not the kind of evidence required in such proceedings. Election petitions should be proved by cogent, credible and consistent evidence.....The burden of proof in election petitions lies with the petitioner as he is the person who seeks to nullify an election .....*”**

He further submitted that it has also been held that if there is some appearance of compliance with the principles laid down in the Constitution and the law in the conduct of an election an election court will be slow in upsetting the will of the people as expressed in the results unless the noncompliance with the law affects the results (**Ben Njoroge & another v Independent Electoral Boundaries Commission (I.E.B.C) & 2 others [2013]eKLR**). This view was similarly shared by the Supreme Court in **Raila Odinga and Others vs Independent Electoral and Boundaries Commission and 3 Others Nairobi Petition No. 5 of 2013 [2013] EKLR** where the Court pronounced itself as follows at paragraphs 196 and 197:

***“Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. 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. Omnia praesumuntur rite et 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 prescriptions of the law. IEBC is a constitutional entity entrusted with specific obligations, to organise, manage and conduct elections, designed to give fulfilment to the people’s political rights [Article 38 of the Constitution]. The execution of such a mandate is underpinned by specified constitutional principles and mechanisms, and by detailed provisions of the statute law. While it is conceivable that the law of elections can be infringed, especially through incompetence, malpractices or fraud attributable to the responsible agency, it behoves the person who thus alleges, to produce the necessary evidence in the first place – and thereafter, the evidential burden shifts, and keeps shifting.....The lesson to be drawn from the several authorities is, in our opinion, that this Court should freely determine its standard of proof, on the basis of the principles of the Constitution, and of its concern to give fulfillment to the safeguarded electoral rights. As the public body responsible for elections, like other public agencies, is subject to the “national values and principles of governance” declared in the Constitution [Article 10], judicial practice must not make it burdensome to enforce the principles of properly-conducted elections which give fulfillment to the right of franchise. But at the same time, a Petitioner should be under obligation to discharge the initial burden of proof, before the Respondents are invited to bear the evidential burden.”***

As to the standard of proof, Counsel submitted that the Supreme court further explained in the **Raila Odinga & Others vs. IEBC & others** (*supra*) that it is higher than the civil law standard of balance of probabilities and below the criminal law standard of beyond reasonable doubt, save for matters which manifest themselves in criminal offences. The court said as follows;

***“The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable-doubt- save that this would not affect the normal standards where criminal charges linked to an election, are in question.”***

He further explained that section 83 of the *Elections Act* is also instructive on the question as what could invalidate an election. He quoted the section that provides as follows: -

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

It was their submission that the above provision dictates that an election cannot be invalidated unless it offends the Constitutional standards and the electoral laws, or it fails to comply with the written law in a manner as to affect the results of the election. They further submitted that a valid election must in principle accord constitutional standards and that in case of non-compliance with the laws enacted to give life to the constitutional principles, such non-compliance must not affect the results of the election because then the will of the electorates would be defeated rather than upheld as required under Article 38 of the Constitution. The 1<sup>st</sup> respondent referred this court to the case of **Paul Gitenyi Mochorwa v. Timothy Moseti E. Bosire & 2 others (2013) eKLR.**

Counsel for the 1<sup>st</sup> respondent submitted that the Petitioner has not laid sufficient evidence before court to prove interference with the actual will of the voters so as to place the 1<sup>st</sup> respondent's win on course for nullification. That the petitioner has not demonstrated, to the required standard, any form of interference with the election process and has also not demonstrated an iota of evidence showing that the sovereign will of the people of Bunyala North Ward was interfered with and/or subverted at any particular time. It was therefore their humble submission that the petitioner has not discharged the burden as well as the standard of proof as expected of him in an election petition.

#### • **ANALYSIS OF EVIDENCE**

Counsel submitted that the petition is premised on the following allegations; -

- Communication between the 1<sup>st</sup> respondent and the Presiding Officer at Sifugwe Primary School Room 1 polling station.
- Shortage of Form 32A (oath forms) at Sifugwe Primary School Room 1 polling station.
- Lack of transparency in the sorting and counting of votes by the Presiding Officer at Ruambua polling station 1.
- Differing number of valid votes cast at Munani Polling Station, that is 329 votes on Form 36A and 338 votes on Form 36B and also difference in votes cast for President, Governor, Women Representative, Member of Parliament and Member of County Assembly.
- Differing number of rejected votes at Nabuchwi Polling Station, that is 3 votes on Form 36A and 84 votes on Form 36B.
- Communication between the 3<sup>rd</sup> respondent and voters on the cue at Sirimba Polling Station 1.
- Tearing and stamping many ballot papers for MCA at Sirimba Primary School. The polling station was not specified.
- The employment of one Kevin Oduor Okello who is said to be a first-born son to the 1<sup>st</sup> respondent's brother.
- The employment of one Cynthia Mercy Barasa as a clerk at Budalang'i Primary School Stream 2 and who is said not to have the requisite academic qualifications.

Counsel for the 1<sup>st</sup> respondent was of the view that the petitioner did not place sufficient evidence to quantify the foregoing allegations into grounds for nullification of the election by demonstrating how it interfered with the sovereign will of the electorate.

**Communication between the 1<sup>st</sup> respondent and the Presiding Officer at Sifugwe Primary School Room 1 polling station and Shortage of Form 32A (oath forms).**

The petitioner relied on PW4's evidence to advance this ground. The witness testified that he was a Jubilee Party agent at Sifugwe Primary School room 1 where he saw the 1<sup>st</sup> respondent having a conversation with the Presiding Officer and that he moved close and protested. He also testified that thereafter the Presiding Officer announced that oath forms for assisted voters were depleted and that the Presiding Officer proceeded to help assisted voters in the presence of all agents. He testified in cross-examination that many other candidates also came to the polling station and had conversations with the presiding officer. He further testified that the incident of depleted forms was captured in the polling day diary as recorded at page 42. He further testified that none of the listed voters under paragraph 8 of his affidavit whose right to secret ballot was allegedly violated are witnesses in this petition.

Counsel further explained that this evidence was however rebutted by DW7, DW8 and the Returning Officer. The Returning Officer explained that the presiding officer for Sifugwe primary school stream 1 ran out of oath forms and gave voters the latitude to choose between being assisted by the presiding officer or for those with preferred voter assistants they should wait for the forms to be supplied before they vote. This incident was captured in the polling day diary for the station. Counsel further submitted that DW7 testified that she was the presiding officer for Sifugwe primary school and that she followed due process of law in the conduct of elections. She denied any interference by the 1<sup>st</sup> respondent and further stated that she ran out of Form 32B at which point she gave voters the latitude to elect on either being assisted by the presiding officer or wait for the forms to be availed upon which they would be assisted by their preferred voter assistants. She further testified that all agents including the petitioners were satisfied with the process and signed Form 36A and the polling day diary in acknowledgement. DW8 testified that he was the DPO for the polling station and that he ushered in the 1<sup>st</sup> respondent after polling had closed and that the 1<sup>st</sup> respondent never influenced the election process.

Silvester Sikitu Musirimba testified that he was a Ford Kenya party agent at the polling station and that the presiding officer took time to explain the manner in which the commission would handle assisted voters. He denied assisting any voter at the station as all assisted voters with no assistants were assisted by the presiding officer in line with regulation 72 of the Election (General) Regulations.

They humbly submitted that the petitioner has not established how the presence of the 1<sup>st</sup> respondent at the polling station and the depletion of Forms 32 interfered with the voting exercise at the polling station and the sovereign will of the electorate. Counsel relied on Regulation 62(1)(a) of the Elections (General) Regulations provides that a presiding officer shall allow into the polling station, among other people, a candidate. Regulation 63 thereof gives the presiding officer the authority and mandate to keep order at the polling station and this includes regulating the number and class of persons entering the polling station. They humbly submitted that the 1<sup>st</sup> respondent's presence at the said polling station was therefore lawful and procedural as he sought permission from the station's presiding officer with whom he went on to communicate in an orderly manner so as not to interfere with the election process.

Counsel stated that the law has also provided an avenue for dealing with depletion of oath forms at the polling station. This is captured under Regulation 72 of the Election (General) Regulations 2017 which provides as follows; -

***"72. (1) On the application of a voter who is, by reason of a disability or being unable to read or write, and therefore unable to vote in the manner prescribed in these Regulations, the presiding officer shall permit the voter to be assisted or supported by a person of the voter's own free choice, and who shall not be a candidate or an agent.***

***(2) Where the person who applies to be assisted is not accompanied by a person who is qualified to assist him or her, the presiding officer shall assist such voter, in the presence of the agents."***

Counsel submitted that it was the presiding officer's testimony and that of the 1<sup>st</sup> respondent's agent at the polling station that upon depletion of Form 32, the presiding officer made an announcement to that effect and gave assisted voters the choice of either being assisted by the presiding officer or awaiting supply of more Forms 32 upon which they could be assisted by their preferred voter assistants. It is further on record that the said forms, upon consultation with the Tallying Center, were supplied from Sifugwe primary School room 2 and that no particular voter ever complained of his right to secret ballot being interfered with. It was also the respondents' case that all clerks and agents had taken an oath of secrecy and as such the choice of an assisted voter remained a secret throughout and beyond the voting exercise.

It was therefore their humble submission that the petitioner had not established any electoral malpractice resulting from the depletion of Forms 32 at the polling station as assisted voters were given the latitude to choose the manner in which they wanted to vote and that no report of a protest from a single voter at the station was ever received either by IEBC, by the police or by this court in the course of this petition. They further submit that the petitioner hasn't demonstrated with clarity how the right to secret ballot was interfered with as no assisted voter was ever compelled to vote against their wish neither is there a report on voter assistants being turned away from the polling station as a result of depletion of Form 32.

It was also their submission that the law vide Regulation 72(2) of the Election (General) Regulations 2017 foresaw this scenario and gave it a remedy by providing that in the event of lack of oath forms or a preferred voter assistant then an assisted voter would be assisted by the presiding officer in presence of the agents. They further humbly submitted that to construe the law along the approach being taken by the petitioner would be to adopt an inconsistent approach with Regulation 72(2) as the said regulation allows the presiding officer to assist voters in the presence of party agents and that such a legally sanctioned action cannot be said to be in breach of the right to secret ballot. In any event, poll agents take an oath of secrecy just like vote assistants hence falling under the cover of 'poll secrecy' as is envisaged by law.

- **Lack of transparency in the sorting and counting of votes by the Presiding Officer at Ruambwa polling station 1.**

Counsel for the 1<sup>st</sup> respondent submitted that PW1 testified that she was a Jubilee Party agent at Ruambwa Room 1 where she was denied entry at the opening of polling but that she was allowed in at the close of polling before counting commenced. She raised allegations of opaqueness in the manner in which the Presiding Officer was sorting and counting votes. She pointed out in cross-examination that as per the records filed in court, she wasn't present at the station at the start of polling, at the close of polling, at the close of counting and that she never signed Form 36A for the polling station. This is captured at Pages 35, 39, 42 and 14 of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' Supplementary List of Documents dated 30<sup>th</sup> October 2017. He further stated that the witness testified that there was another Jubilee Party agent at the polling station when she reported in the morning and that she went to Room 2 upon being denied entry into Room 1. They therefore humbly submitted that the evidence of this witness cannot be relied on as she was never present in the room during the entire exercise hence her averments are wild gazes which should not see the light of the day.

Be that as it may, the 1st respondent submitted that Okumu Oduori Obujo testified that he was a Ford Kenya party agent at Ruambwa Orimary School Room 1 and that the sorting and counting of votes at the polling station was transparent and further that a vote was only granted to a particular candidate after due verification. DW10 also testified that the petitioner's agent Catherine A. Ojiambo left the polling station shortly after her arrival in the morning and that she wasn't present during sorting and counting as alleged.

It was their humble submission that this ground of the petition has not been proved with specificity and clarity to the required standard in an election petition. The witness was never present at the station during sorting and counting hence her testimony cannot be used to establish the allegations. Counsel went on to say be that as it may, the agents at the polling station were satisfied with the sorting and counting process and signified their approval by signing Form 36A for the polling station and at no particular time did the petitioner or his alleged agent at the polling station ever raise a complaint on the veracity of the process hence the testimony is unreliable. They urged the court to find and hold, in applying the Best Evidence

Rule, that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents have demonstrated that the sorting and counting of votes at the said polling station was proper as they have supplied evidence of the agents being satisfied with the process and results by signing Form 36A. Counsel submitted that the 2<sup>nd</sup> respondent has also demonstrated at Pages 35, 39, 42 and 14 of the Supplementary List of Documents dated 30<sup>th</sup> October 2017 that the witness was never at the polling station during the entire voting, sorting and counting exercise hence her testimony cannot be relied on to advance this ground. It was therefore their humble submission that the petitioner has not demonstrated that the presiding officer for Ruambwa Polling station 1 wasn't transparent in the sorting and counting of votes at the said polling station. The petitioner has also not demonstrated how this interfered with the will of the electorate.

- **Differing number of valid votes cast at Munani Polling Station, that is 329 votes on Form 36A and 338 votes on Form 36B, differing number of rejected votes at Nabuchwi Polling Station, that is 3 votes on Form 36A and 84 votes on Form 36B and also difference in votes cast for President, Governor, Women Representative, Member of Parliament and Member of County Assembly.**

The 1st respondent explained that the Returning Officer testified that there was an arithmetic error in total votes cast at Munani Polling Station where 338 valid votes were cast but the presiding officer indicated the total as 329 votes instead of 338 votes and that this error didn't affect the final results as the valid votes on Form 36A and Form 36B remained the same. Further, the Returning Officer also testified that there was a transmission error for Nabuchwi polling station where the clerk indicated 84 rejected votes instead of 3 and that this human error did not prejudice any of the candidates since no candidate lost votes or gained votes as a result of the error.

It was their humble submission that for an election result to be invalidated, the petitioner must go to the very core of the elections, that is the number of votes, and establish by evidence that the will of the people of that electoral unit was interfered with. This would require evidence demonstrating that valid votes for a particular candidate were either added or reduced so as to tilt the election in favor of a particular candidate. They invited the court to consider the fact that the valid votes cast per candidate in Munani Polling Station and Nabuchwi Polling Station remained the same both in Form 36A and Form 36B and that the only difference is the total number of votes cast and rejected votes respectively. It was the Returning Officer's evidence that this was a genuine human error as a result of fatigue on the stations' presiding officers and that the same did not affect the results as the valid votes remained the same.

Counsel further brought to the attention of this court that Courts in Kenya have over the years excused genuine human errors especially if such errors don't affect the election results for a particular polling station. One such pronouncement was made in the case of **Richard N. Kalembe Ndile & Another vs. Patrick Musimba Mweu & 2 Others [2013] eKLR** where the court excused an inadvertent human error by stating as follows;

***“One of the principles governing the electoral process under Article 82 of the Constitution is that the election must be transparent and administered in an accurate manner. An election is a human endeavor and is not carried out by programmed machines. Perfection is an aspiration, but allowance must be made for human error. Indeed, the evidence is clear that the counting and tallying was being done at night and in less than ideal conditions hence errors, which were admitted, were bound to occur particularly in the tallying of the results. What is paramount is that even in the face of such errors, whether advertent or otherwise is that the ultimate will of the electorate is ascertained and upheld at all costs.”***

They humbly submitted that the genuine human error by the presiding officers for Munani Polling Station and Nabuchwi Polling Station did not affect the results of the elections as the valid votes remained the same in Form 36A and upon transmission to Form 36B hence the will of the electorate remained unchanged. They urged the court to uphold the will of the electorate by declaring that the human error did not affect the results of the polling stations.

Counsel submitted that the petitioner also raised issue with the difference in the total number of votes cast

for President, Governor, Senator, Member of national Assembly, Women Representative and MCA. It was their humble submission that in any ordinary elections involving different categories of seats, it is difficult to get the same number of votes cast in all the positions as there is room for spoilt, rejected and stray ballots and further that there are voters who may not be interested in voting for candidates in certain positions hence the variance. Last but not least, counsel submitted that the petitioner has not raised issue with the award of valid votes to candidates at any of the polling stations neither has he alleged that he lost any vote across the ward hence this ground and his entire petition is a case of sour grapes.

- **Communication between the 1<sup>st</sup> respondent and voters on the queue at Sirimba Polling Station 1.**

Counsel started by pointing out that PW3 testified that she was a Jubilee Party agent at Sirimba Primary School polling station 1 where she was denied entry into the polling station. She alleged that the 1<sup>st</sup> respondent took 3 voters from the cue to the polling clerk and called out his sister to assist them. She testified that she was later allowed into the station to discharge her duties as an agent. In cross-examination, she testified that she had no letter of accreditation as an agent and further that she has never been accredited as an agent by IEBC. She also testified that she was at the queue when the 1<sup>st</sup> respondent came to the polling station and that she could not tell what was happening inside the polling station. They therefore submitted that the witness could not account for the 1<sup>st</sup> respondent's activities inside the polling station as she was on the queue when the 3<sup>rd</sup> respondent is said to have taken 3 voters into the polling station and allegedly directed his sister to assist them. This witness is further unbelievable as she paints the picture of a polling station that is under the control of a candidate despite the presence of the police and IEBC staff at the polling station and who are ordinarily in control of admission into the polling station.

DW11, the presiding officer for the polling station, testified that the 1<sup>st</sup> respondent came to the polling station, had a conversation with his agent as authorized by law and left and that the petitioner's party didn't have an agent at the polling station as evidenced at pages 56, 60, 62 and 67 of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' Further List of Documents. They humbly submitted that this witness rebutted PW3's account as he was the one in charge of the polling station and that the documentary evidence availed indicates that PW3 was never at the station at any particular time during the voting exercise hence she cannot raise complaints about the station.

Counsel urged the court to apply the Best Evidence Rule and hold that no evidence has been tabled before court to demonstrate that PW3 was present at the polling station during the voting exercise hence her evidence cannot be used in support of an election petition. In any event, other than demonstrating that she was an agent at the polling station, PW3 would have at least established that she is a voter at the polling station either by producing her voter's card or locating her name in the Register for the polling station that was supplied by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents upon the petitioner's request. They further urged this court to find and hold that the petitioner has not established any wrongdoing on the 1<sup>st</sup> respondent's part at Sirimba Polling Station 1 and that what is on record are invented allegations targeted at interfering with the sovereign will of the people of Bunyala North Ward.

- **Tearing and stamping many ballot papers for MCA at Sirimba Primary School. The polling station was not specified.**

It was their submission that PW5 testified that he was an agent for an Independent Candidate at Sirimba polling station 1. He alleged that the station's Deputy Presiding Officer was found with 2 ballot papers for MCA while in the process of assisting an assisted voter and further that the issuing clerk had torn and stamped many ballot papers which were lying on his desk. It is however not clear which polling station the witness was talking about as Paragraph 4 of his affidavit indicates that he was an agent at Sirimba polling station 1 while paragraph 5 places him as an agent at Sirimba polling station 2. He testified in cross-examination that each voter was given one vote per position and that the extra ballot paper found by the DPO was returned to the issuing clerk.

Counsel further explained that DW9 testified that she was the DPO at Sirimba Primary School stream 2 and that they followed due process in sorting and counting votes and further that she intercepted a voter with 2 ballot papers for Member of National Assembly at the polling booth and that the extra ballot paper was returned to the issuing clerk upon the presiding officer's intervention. She denied that Silvester Musirimba ever assisted voters at the polling station as alleged.

It was their humble submission that the petitioner has not demonstrated any electoral malpractice at the polling station. The station's DPO indicated that she intercepted a voter with two ballot papers for Member of National Assembly and that one ballot paper was returned to the issuing clerk. It is the petitioner's case that the issuing clerk had stamped many ballot papers. It was again their humble submission that the petitioner has not demonstrated how this incident affected the election process as it came out in evidence that no voter was ever issued with more than one ballot paper and that upon complaining, the issuing clerk for MCA ballot papers begun stamping a vote at a time when voters would enter the polling station.

They further submitted that the petitioner has not raised an issue with the number of ballot papers issued and votes cast at the polling station and as such no complaint goes to the voting exercise at the polling station other than the stamping of many ballot papers by the issuing clerk for MCA votes. Thus counsel reiterated that nothing has been tendered before this Honorable Court to demonstrate that the elections at Sirimba primary School room 1 were not conducted in accordance with the Constitution and election laws as what is before court against that polling station doesn't amount to an election malpractice.

- **The employment of Kevin Oduor Okello who is said to be a first born son to the 1<sup>st</sup> respondent's brother and Cynthia Mercy Barasa as a clerk at Budalang'i Primary School Stream 2 and who is said not to have the requisite academic qualifications.**

Counsel submitted that PW6 testified that Kevin Oduor Okello who is a son to the 1<sup>st</sup> respondent's brother was retained by the 2<sup>nd</sup> respondent as a clerk during the elections. He however raised no issue with the voting exercise at the polling station in which Kevin Oduor Okello was retained as a clerk. PW2 on his part testified that he is a brother-in-law to Cynthia Mercy Barasa who was a clerk at Budalang'i Primary polling station and that the said Cynthia Mercy Barasa never went beyond class 8 in her schooling. He testified in cross-examination that he had no evidence that Cynthia was a clerk at the said polling station and further that he had no evidence from the Kenya National Examination Council indicating the level of education of Cynthia Mercy Barasa. He further testified that he doesn't know which polling station among the 3 in Budalang'i Primary School was Cynthia employed as a clerk and further that there was no report on malpractice reported at the station by virtue of alleged lack of qualification. In re-examination, the witness testified that Cynthia schooled up to class 8 hence there's a possibility of her records being availed from KNEC.

Counsel further submitted that the Returning Officer laid down the procedure for recruiting polling clerks and stated that upon verification of certificates and testimonials, the documents are always discarded owing to the high number of applicants. He further testified that nobody protested over the employment of Kevin Oduori or Cynthia Mercy Barasa despite the information being made public before the election. He further testified that no complaint was ever registered from the two polling stations in which Kevin Oduor and Cynthia Mercy Barasa were employed as polling clerks hence their inclusion in the electoral process never interfered with the will of the people of Bukhayo North Ward.

It was their humble submission that the petitioner has not demonstrated with evidence the level of education of Cynthia Mercy Barasa. He who alleges must prove. He said it is common knowledge that the Kenya National Examination Council keeps records of all persons who have schooled in the country and that the education status of an individual can be availed upon request. It was further their submission that in the event that a person did not school, the KNEC would be in a position to confirm that fact vide a letter as records of such a person would not appear in the system hence proving the petitioner's allegations. Thus, they submitted that the petitioner did not prove the level of education of Cynthia Mercy Barasa hence this limb of the petition flies through the window. That in any event, the recruitment of IEBC officials is always done online, and a physical verification of documents done during interviews

hence there is no possibility of recruiting a primary school dropout to handle an election in a country with more than 60% levels of literacy.

Be that as it may, they submitted that no complaint was raised against the two polling stations in which Kevin Oduor Okello and Cynthia Mercy Barasa were employed as polling clerks hence their participation in the election process did not in any way prejudice the sovereign will of the people of Bunyala North Ward. The complaint against Kevin Oduor Okello is far-fetched as the clerk was recruited on merit and that nothing stops the commission from recruiting distant relatives of contestants so long as they are qualified and perform their duties as instructed by the commission and as required by law.

They submitted that no particulars of malpractice or any form of complain whatsoever on the performance of this two clerks has been availed to court hence their inclusion in the election process had no bearing on the outcome. These clerks were retained as junior officers working under the instructions of the respective presiding officers hence there was no possibility of interfering with the election process. They urged the court to dismiss this ground as being mere assertions that are unfounded in fact and in law.

- **WHETHER THE COURT SHOULD STRIKE OUT DOCUMENTS ATTACHED TO THE PETITIONER'S SUPPORTING AFFIDAVIT DATED 4<sup>TH</sup> SEPTEMBER 2017**

Counsel for the 1<sup>st</sup> respondent submitted that the documents annexed to the petitioner's Supporting Affidavit should be struck off from the record for failure to comply with Section 80 of the *Evidence Act*. PW6, in cross-examination, wasn't clear on how he obtained the documents and failed to avail evidence of a request to the IEBC to use the said documents in these proceedings. He said a look at the documents reveals that they are photocopies of the original documents although some of them such as Form 36B and the other forms declaring results for other positions in the elections are undated and not signed hence lacking in authenticity.

He also testified in cross-examination that the said documents were not certified as a true copy of the original despite him being aware of that legal requirement. Section 80(1) of the *Evidence Act* provides for the procedure of producing public documents in court proceedings in the following terms; -

#### **80. Certified copies of public documents**

***(1) Every public officer having the custody of a public document which any person has a right to inspect shall give that person on demand a copy of it on payment of the legal fees thereof, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies."***

They thus submitted that the documents that the petitioner seeks to rely on in this petition were never certified hence the same cannot be used as evidence in view of the forgoing provision.

In this regard, counsel referred the Court to the case of *Abraham Mwangi v S. O. Omboo & Ors HCCC No. 1511 of 2002* as per the Ruling of Hayanga J. (as he then was) who had found that fly papers are misleading and fraught with uncertainty. He held:

***"Exhibits to affidavits which are loose fly sheets for identification attached to them and do not bear certification marks on them directly must be rejected. The danger is so great. These exhibits are therefore rejected and struck out from the record. That makes the affidavit incomplete hence it should also be rejected. That being the case the application fails and is dismissed."***

They urged the court to find and hold that the documents annexed to the petitioner's affidavit in support of the petition do not comply with the foregoing mandatory provisions of law and have all the documents

annexed thereto struck off from the record.

- **WHETHER THE PETITIONER HAS ESTABLISHED SUFFICIENT GROUNDS TO NULLIFY THE ELECTION**

Counsel submitted that the question this court is asked to consider is whether the 1<sup>st</sup> Respondent acted in compliance with the requirements of the Constitution and the Elections Act. In the case of **Re Kensington North Parliamentary Election [1960]2 ALLER 150** Streatfield stated that;-

***“It is for this court to make up its mind on the evidence as a whole whether there was a substantial compliance with the law as to elections or whether the act or omission affected the result”.***

Counsel reiterated that the burden of establishing the allegations in an election petition regarding the conduct of the said election and the results announced thereafter is on the petitioner. As rightly stated in the case of **Raila Odinga & others vs, IEBC & Others (supra)**, the standard of proof where electoral offences have been alleged which are of criminal nature must be proved in the same standard of beyond reasonable doubt as applicable in criminal proceedings. They urged the court to hold that the petitioner failed to discharge the burden of proof and the standard of proof of commission of the alleged offences within the standards as prescribed by law. They further submitted on Section 107 and 109 of the *Evidence Act* which puts the burden of proof and proof of particular fact, which he has failed to. That other than the bare statements of the allegations raised in this petition, no evidence was adduced that such purported irregularities affected the results of the election.

- **WHETHER THE ELECTION WAS CONDUCTED WITHIN THE CONSTITUTIONAL FRAMEWORK AS WELL AS IN LINE WITH THE PROVISIONS OF THE ELECTIONS LAWS AND REGULATIONS THEREUNDER**

Counsel submitted that Article 81 of Constitution of Kenya places the obligation on the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent to ensure that elections are conducted in a free, fair and transparent manner. Article 86 thereof obligates the 2<sup>nd</sup> respondent to ensure that the voting method is simple, accurate, verifiable, secure, accountable and secure; the votes cast are counted, tabulated and results announced promptly at the polling station; the results at the polling station are openly and accurately collated and promptly announced by the Returning Officer; and to put in place structures and measures to eliminate electoral malpractices.

It was their humble submission that the 2<sup>nd</sup> Respondent with the stewardship of the 3<sup>rd</sup> Respondent strictly adhered to the above Constitutional threshold and the petitioner has not in any way attributed any abrogation of the same to them. The Respondents reiterate that the elections are conducted in accordance with the law; it is incumbent upon the petitioner to adduce cogent, credible and consistent evidence which show that the elections were not conducted in accordance with the law and that the non-compliance affected the results thereof. Counsel further explained where therefore the witnesses allege that they were present at the polling stations and participated as either voters or agent's facts which would be peculiarly within their knowledge, it behooves them to bring forth sufficient material that would show that indeed they were present at the Polling Stations on the material day. That PW1, PW3 and PW5 never adduced documentary evidence that they were agents at the stated polling stations neither were their details captured in the polling day diaries for the respective polling stations to place them within the scene so as to testify on what transpired in the polling stations. None of them produced their voter's card or pointed out their names in the registers provided by the 2<sup>nd</sup> respondent so as to create an impression of their being at the stated polling stations.

It was therefore their humble submission that section 83 of the *Election Act* is explicit as to when an election court can invalidate elections on the grounds of non-compliance with the law. Invalidation of election can only be occasioned by substantial non-compliance with the law. He further submitted that irregularities in the conduct of an election will not vitiate the result unless the irregularities either were so

serious that the election was not in accordance with principles laid down in the law or the irregularities affected the result. That again, the overriding objective of the Act, it has been held, is to promote the right to vote and this requires that the Act should be interpreted in such a manner as to provide citizens with every opportunity to vote and that the primary duty of the court is to give effect to the will of the electorate. Therefore, reasonable compliance as opposed to strict or absolute compliance with the procedures set out in the legislation is the modern jurisprudence when considering procedural matters.

Counsel further submitted that much of the law points out that the obligations imposed by election statutes on election officials such as a Returning Officer, are directory as opposed to mandatory. The difference is that, if mandatory provisions are not complied with then the thing done is invalid or void, while it is sufficient, if a directory enactment is obeyed or fulfilled substantially, courts will strive to uphold an election as being substantially in accordance with the law, even where there has been serious breaches of the Rules or of the duties of the election official providing that the result of the election was unaffected by those breaches.

He explained that the availability of proportionate judicial remedy for rectifying the result and declaring the true result of the election following scrutiny and a recount prevents the necessity to choose between vitiating the entire election and allowing an erroneous result to stand. Thus, it is inappropriate for the court to declare that an election should be avoided where breaches of the Rules at the counting stage have not, in fact affected the result. See Ramadhan Seif Kajembe v Returning Officer, Jomvu Constituency & 3 others [2013] eKLR. They further wished to support this submission by the court's decision in Richard N. Kalembe Ndile & Another vs. Patrick Musimba Mweu & 2 Others [2013] eKLR where the court held as follows;

***“One of the principles governing the electoral process under Article 82 of the Constitution is that the election must be transparent and administered in an accurate manner. An election is a human endeavour and is not carried out by programmed machines. Perfection is an aspiration but allowance must be made for human error. Indeed the evidence is clear that the counting and tallying was being done at night and in less than ideal conditions hence errors, which were admitted, were bound to occur particularly in the tallying of the results. What is paramount is that even in the face of such errors, whether advertent or otherwise is that the ultimate will of the electorate is ascertained and upheld at all costs.”***

• **WHETHER THE PETITIONER HAS PROVED HIS CASE TO THE REQUIRED STANDARD**

In determining if the grounds raised in the petition affected the integrity of the election, they invited the court to consider Lord Denning's principle in Morgan v Simpson [1974]3 All ER 722 where the learned judge made the following observation;-

***“Collating all these cases together, I suggest that the law can be stated in these propositions:-***

***i. If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result is affected, or not...***

***ii. If the election is so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by breach of the rules or a mistake at the polls...”***

Counsel stated that this position is codified in Kenya under Section 83 of the *Elections Act* which provides as follows:-

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

It was their submission that the above provision dictates that an election cannot be invalidated unless it offends the Constitutional standards and the electoral laws or it fails to comply with the written law in a manner as to affect the results of the election. They invited the court to observe that the petitioner has all along not disputed the results and that he had no issue with the valid votes garnered by each candidate in all the polling stations across the ward. This means that the constitutional principle of respecting the sovereign will of the people in electing their leaders ought to be respected as there was substantial compliance with the constitution in the elections of 8<sup>th</sup> August 2017. It was therefore their humble submission that the sovereign will of the people of Bunyala North Ward should not be interfered with as the petitioner did not prove any interference with the voting, counting and tallying of valid votes for each candidate and further that there is a huge margin of votes between the petitioner and the 1<sup>st</sup> respondent hence relying on the grounds stated to nullify the election will be against this constitutional provision.

It was further their submission that it is the duty of this Honorable Court to respect and uphold the sovereignty of the people in electing their leaders. That in the Ugandan case of ***Tinyefuza vs Attorney General, Constitutional Petition 1 of 2006*** Munyindo DCJ observed of that;-

***“.....the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the Constitution...all provisions concerning an issue should be considered all together, the Constitution must be looked at as a whole”***

Further the Court of Appeal in the case of ***Centre for Rights Education and Awareness and Another vs John Harun Mwau & 6 others, Civil Appeal No.74 of 82 of 2012*** the court stated that,

***“....These principles are not new. They also apply to the construction of statutes. There are other important principles which apply to the construction of statutes which in my view, also apply to the construction of a Constitution such as presumption against absurdity – meaning that a court should avoid a construction that produces an absurd result; the presumption against unworkable or impracticable result meaning that a court should find against a construction which produces unworkable or impracticable result; presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an anomaly or otherwise produces an irrational or illogical result and the presumption against artificial result – meaning that a court should find against a construction that produces artificial result and, lastly, the principle that the law should serve public interest – meaning that the court should strive to avoid adopting a construction which is in any way adverse to public interest, economic, social and political or otherwise....”***

They humbly submitted that the petitioner has not placed before court sufficient evidence to justify this court to interfere with the sovereign will of the people of Bunyala North Ward. The petitioner, they submitted, never attacked the number of valid votes garnered by the 1<sup>st</sup> respondent or any other candidate in the elections neither did he prove any impropriety on the part of the 2<sup>nd</sup> and 3<sup>rd</sup> respondent that gave any of the candidates unfair advantage over the rest. That in any event, the petitioner herein emerged 3<sup>rd</sup> in the elections with a difference of more than 755 votes between him and the 1<sup>st</sup> respondent in such a small election unit. This required the petitioner to provide cogent evidence so as to shake the credibility of the elections hence interfering with the sovereign will of the people.

## **SUMMARY**

Counsel for the 1<sup>st</sup> respondent therefore prayed that the court makes the following findings; -

- A declaration that the petitioner has not established substantial and significant grounds to grossly affect the results declared.
- A declaration that the petitioner has not established sufficient cause for the sovereign will of the people of Bunyala North Ward to be upset and reversed through nullification of the elections.

- A declaration that the 1<sup>st</sup> respondent was validly elected as the Member of County Assembly, Bunyala North Ward.
- The 1<sup>st</sup> respondent to have costs of this petition.

## **2<sup>ND</sup> & 3<sup>RD</sup> RESPONDENTS' SUBMISSIONS**

On their part, counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondent had the following submissions;

### **Introduction.**

The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents stated that the Petition emanated from the election of the Member of County Assembly for Bunyala North Ward in Busia County which was held on 08.08.2017 whereby the 1<sup>st</sup> respondent was declared the winner by the 3<sup>rd</sup> respondent. They said that the petition had been challenged by way of a response to the petition and witness affidavits. They explained that from the onset the petitioner did not dispute the results as declared by the 3<sup>rd</sup> respondent but alleged certain electoral malpractices and irregularities in the process the basis upon which he wanted the election to be invalidated. They said that they had sufficiently rebutted the malpractices and irregularities vide witness statements that had been filed.

### **Issues for determination**

The parties sieved issues for determination as follows:

Whether the election for Member of the County Assembly for Bunyala North Ward in Busia County held on 08.08.2017 was conducted in accordance with the Constitution, election laws and regulations.

Whether the 1<sup>st</sup> Respondent was validly elected Member of the County Assembly for Bunyala North Ward in Busia County.

What consequential orders should this court issue.

### **Electoral malpractices and irregularities alleged in the petition.**

#### **Talking to the presiding officer in low tones and the depletion of the voter assistant forms at Sifugwe Primary School Polling Station 1.**

They began by giving an account of the petitioner's allegation that the 1<sup>st</sup> respondent visited Sifugwe Polling Station 1 at round 10a.m and 11a.m whereby he proceeded to have conversation in low tones with the presiding officer who thereafter immediately announced that the voter assistant oath forms had been depleted. The allegations were countered by the respondents in totality as follows;

They stated that the 1<sup>st</sup> respondent did not visit Sifugwe Primary Polling Station 1 between 10.00a.m and 11.00a.m as he was casting his ballot at Sirimba Primary School where he is a registered voter at the time.

They explained that when the voter assistant oath forms were depleted the same was announced and the presiding officer assisted voters who were not accompanied by their assistants and thereafter borrowed additional forms from Polling Station Number 2. They maintain that the event was recorded in the Polling Station Diary in the course of duty. They said that it was therefore their considered opinion that there is no malpractice or irregularity that has been disclosed. That the claim as pleaded is flat footed considering the evidence tendered, more importantly the evidence of the presiding officer Sylvia Nabwire Odongo which was not challenged by way of cross examination.

They said that despite the depletion of oath forms there is no voter who was disenfranchised of his right to vote and that everyone was given an equal chance to cast his vote to his candidate of choice. They posited

that the allegation that the secrecy of the ballot was compromised is farfetched as all the agents who witnessed the voters being assisted had taken the oath of secrecy.

Furthermore, they relied on Regulation 72 (2) of the Elections (General) Regulations, 2012 which allows the presiding officer to assist voters who are not accompanied by an assistant in the presence of agents as was the case herein. That does not compromise the secrecy of the vote in any way.

### **Sorting and counting of votes at Ruambwa Polling Station 1.**

They turned to interrogation of the allegations in the petition that the presiding officer did not show the ballots to the agents when he was sorting and counting. They stated that the allegations were made by the petitioner's agent by the name Catherine Achieng Ojiambo. They said however, that upon cross examination she conceded to the fact that she was not an agent in Ruambwa Polling Station 1 as she went to Ruambwa Polling Station 2 upon realization of the fact that there were two agents for the same party in Ruambwa Polling Station 1. They stated that evidence was cemented by the witness affidavit of Emmanuel Wesonga Bwire, Presiding Officer, Ruambwa Polling Station 1, which confirmed the fact that Catherine Achieng Ojiambo was absent in Ruambwa Polling Station 1 at the time of sorting and counting. In short, they contended that the allegation was not supported by cogent evidence, the petitioner blatantly failed to discharge his legal and evidential burden.

They relied on Regulation 62 (2) of the Elections (General) Regulations, 2012 which provides that the presiding officer is not allowed to admit more than one agent for each candidate or political party. They explained that it was therefore in order for Catherine Achieng Ojiambo to leave Ruambwa Polling Station 01 as there was another agent by the name Sylvia Nabwire for the same party.

### **Denial of petitioner agents to access the polling station.**

They contended that there was no evidence that was tendered before the honourable court on this head. They explained that the presiding officer has powers to limit people in a polling station under regulation 62 of the Elections (General) Regulations, 2012. They further explained that party agents are only allowed into the polling station upon satisfaction of the fact that they are duly appointed and have taken the oath of secrecy, see the decision in ***Hon. Basil Criticos Vs. Independent Electoral And Boundaries Commission & 2 Others (2013 ) Eklr***. Consequently, they have to produce letters of appointment. They maintained that there was no evidence that was tabled before the Honourable court of an agent who had all the requisite documents but was denied entry. They therefore humbly urged the court to dismiss the assertion and find that the presence or absence of an agent under regulation 62(3) of the Elections (General) Regulations, 2012 cannot be a basis to invalidate the proceedings in a polling station.

### **Discrepancy in forms 36A and 36B with regard to munani polling station and Nabuchwi Polling station.**

They stated that the petitioner alleged that there was a discrepancy between forms 36A and B at Munani Primary School with regard to the total valid votes. They admitted the same to be true but said that it did not affect in anyway the votes cast for each candidate. They termed it as a clerical error which did not affect in anyway the outcome of the election.

They stated that there was a similar discrepancy on rejected votes between form 36A and 36B with regard to Nabuchwi Polling station. They explained that the said discrepancy did not affect in any way the votes cast for each candidate and was caused by an excusable error in the transfer of results from form 36A to 36B.

They maintained that irregularities which can be attributed to an excusable human error or mistake cannot be a basis for an impeachment of an election result. They relied on the decision in Paul ***Gitenyi Mochorwa vs. Timothy Mosei E. Bosire & 2 Others (2013) eklr*** where the court relied on the decision of Justice Maraga ( as he then was) in Joho Vs. Nyange (2008) 3 klr and held as follows;

**“irregularities which can be attributed to an innocent mistake or an obvious human error cannot constitute a reason for impeaching an election result. This court is mindful of the fact that at the state where election officials are required to tally the results, some of them would have stayed awake for more than thirty six hours and therefore simple arithmetic errors are bound to happen. “**

They likened the case herein to the general election which involved six elections in one such clerical errors in transfer of results from form 36A to 36B are bound to happen due to human error or mistake. They similarly referred the court to the decision in **Richard N. Kalembe Ndile & Another vs. Patrick Musimba Mweu & 2 Others [2013] eKLR** where the court excused an inadvertent human error by stating as follows;

***“One of the principles governing the electoral process under Article 82 of the Constitution is that the election must be transparent and administered in an accurate manner. An election is a human endeavor and is not carried out by programmed machines. Perfection is an aspiration but allowance must be made for human error. Indeed the evidence is clear that the counting and tallying was being done at night and in less than ideal conditions hence errors, which were admitted, were bound to occur particularly in the tallying of the results. What is paramount is that even in the face of such errors, whether advertent or otherwise is that the ultimate will of the electorate is ascertained and upheld at all costs.”***

### **1<sup>st</sup> respondent assisting voters at Sirimba Polling Station 1.**

They stated that the allegations in the petition were that the 1<sup>st</sup> respondent personally took 3 voters one by one from the queue and called one Ms. Majuma who assisted them to vote. They said that the allegation was made by one Ms. Eunice Majuma Kujaju who was the petitioner’s agent at Sirimba Polling Station 1. They said however that during cross examination she was put task as to her exact location considering that as an agent she was expected to be inside the room where voting was taking place and not outside. More importantly they said was the fact that as per the polling station diary she was not present at the time of opening of the station but came thereafter during the time of closure and if it all she was present one would expect her to have signed the polling station diary in the morning which she never did.

Additionally, they said that those allegations were rebutted by the 1<sup>st</sup> respondent who denied in totality having done so and similarly the presiding officer Sirimba Polling Station 1 denied the same. He narrated how the 1<sup>st</sup> respondent came to the station and left, at no time did he pick a voter from the queue as there was a queuing clerk and a security officer stationed there.

### **A voter found with 2 (two) ballot papers at the voting booth in Sirimba Polling Station 2.**

They narrated that at Sirimba Polling Station 2 the deputy presiding officer found a voter with two ballot papers at the voting booth, she notified her presiding officer who ordered the surrender of one of the ballot paper to the issuing clerk.

They explained that there had been a lot of contention as to which candidate the ballot paper belonged to; the Deputy Presiding Officer Sirimba 2 stated that the ballot paper belonged to the candidature of the Member of Parliament whereas the petitioner agent insisted that the same belonged to the candidature of the Member of County Assembly. However, they said that the evidence of deputy presiding officer was not challenged by way of cross examination and the same stands.

They said further that the extra ballot paper was not cast and therefore did not affect results in a material way.

### **Tearing and stamping of many ballot papers at sirimba primary school.**

They stated that the petition indicates that the 2<sup>nd</sup> respondent issuing clerk had stamped and teared many

ballot papers which were lying on his desk. They note that the allegation in the petition does not indicate which polling station in Sirimba where this happened. They cautioned that a party is bound by his pleadings and the petitioner did not seek leave to amend considering that Sirimba had two polling stations.

They revisited evidence by the Deputy Presiding Officer Sirimba Polling Station 2 one Samantha Nagila Akumu who they said averred at paragraph 6 of her witness affidavit that only one ballot paper was being issued to the voters and only one was being drawn from the counterfoil at a time. They added that her evidence to that effect was not challenged by way of cross examination. They urged the court therefore to dismiss the claim.

### **Employment of Kevin Odouri Okello as a polling clerk by the 2<sup>nd</sup> respondent.**

They revisited the petitioner's evidence which they said challenged the results on grounds that one of the polling clerks at Sirimba Polling Station by the name Kevin Odouri Okello was a first-born son to the 1<sup>st</sup> Respondents brother. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents averred that Kevin Odouri Okello was recruited on merit and he did not engage in any form of electoral malpractice with the aim of benefiting the 1<sup>st</sup> respondent.

They referred the court to *Paul Gitenyi Mochorwa vs. Timothy Moseki E. Bosire & 2 Others (2013) ekr* in which the court considered the issue of involvement of the members with close degrees of consanguinity and held as follows;

**“ No matter how close the affinity or relationship of itself is not sufficient ; it must be shown that it had an effect on the election, that the relative of the candidate was in a position to and did alter or otherwise influence the outcome of the election. “**

### **Recruitment of an unqualified polling clerk by the name Cynthia Mercy Baraza.**

They also revisited the petitioner's averment that Cynthia Mercy Baraza was unqualified to act as a polling clerk based on her academic qualification. However, they stated that the same was not reported to the relevant investigating agencies such EACC or KNEC. The 2<sup>nd</sup> and 3<sup>rd</sup> averred that Cynthia Mercy Baraza was recruited based on the academic documents she presented. On this one, they explained that the petitioner wanted to turn the Honourable Court to be an investigative agency instead of forwarding the matter to the relevant government agencies mandated to do so.

They explained that Cynthia Mercy Baraza was a polling clerk at Budalangi Primary School Room 2, and that there was no irregularity of malpractice that has been reported with regard to the station indicating clearly that she was competent enough to handle the job. They contended that it was not enough for a party to allege an irregularity he must also demonstrate how the same affected the result. They relied on the case of **RAILA ODINGA Vs IEBC & 3 OTHERS, ELECTION PETITION NO. 5 of 2013 in which** the Supreme Court made it clear that;

**“where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections.”**

### **ANALYSIS OF THE APPLICABLE LAW, STANDARD AND BURDEN OF PROOF.**

#### **Burden of proof,**

They explained that the legal burden of proof lies with the petitioner and the respondents cannot be called upon to fill in the gaps where the petitioner has failed. They relied on the decision in *Hon. Basil Criticos Vs. Independent Electoral and Boundaries Commission & 2 Others (2013) Ekr* where the court held as follows;

**“In my understanding, that implies that even if the respondents had not responded to any issue which had been raised by the Petitioner in the election petition, the Petitioner would still need to discharge his initial burden of proof. Therefore, if a petitioner failed to discharge that initial burden of proof, the respondents would not need to be called upon to bear the evidential burden. The first question that needs to be addressed is about the assertions which the Petitioner put forward, coupled with the question whether or not he discharged the burden of proof.”**

They submitted therefore, that the petitioner had failed to prove the assertions raised in the petition to the satisfaction of the court and the respondents cannot be called upon to aid the petitioners case. The court went further to explain the meaning of the satisfaction of the court as follows;

**“There has been much argument at the meaning of the term ‘proved to the satisfaction of the court’ In my view, it is clear that the burden of proof must be on the Petitioner rather than the Respondents, because it is he who seeks to have the election declared void.”**

They reiterated that the issue was considered in detail in **RAILA ODINGA Vs IEBC & 3 OTHERS, ELECTION PETITION NO. 5 of 2013**, in which the Supreme Court of Kenya made it clear that;

**“the lesson to be drawn from the several authorities is, in our opinion, that this court should freely determine its standard of proof, on the basis of the principles of the Constitution, and of its concern to give fulfillment to the guaranteed electoral rights. As the public body responsible for elections, like other public agencies, is subject to the ‘national values and principles of governance’ declared in the constitution, [Article 10]. Judicial practice must not make it burdensome to enforce the principles of properly conducted elections which give fulfillment to the right of franchise. But at the same time, a petitioner should be under obligation to discharge the initial burden of proof, before the respondents are called upon to bear the evidential burden.”**

They said that it was their considered opinion that for the court to upset an election there ought to be two limbs one being substantial non-compliance with the law and secondly irregularities, mistakes or malpractices that substantially affects the results. They relied on the decision in **Paul Gitenyi Mochorwa vs. Timothy Mosei E. Bosire & 2 Others (2013) eklr at page 11 where the court held as follows;**

**“Accordingly, where breaches of the election rules, although trivial, had affected the result, that by itself was enough to compel the court to declare the election void even though it had been conducted substantially in accordance with the law as to elections. Conversely, if the elections had been conducted so badly that it was not substantially in accordance with the election law it was vitiated irrespective of whether or not the result of the election had been affected”**

They similarly referred the court to **Section 83 of the Elections Act**, which also provides as follows;

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

They stated that in the foregoing two issues arise, one is whether there was a substantial non-compliance with the law or secondly whether there was a substantial breach that affected the results.

#### **Substantial non- compliance with the law.**

They maintained that there was no evidence adduced to the required standard before the honorable court to show that indeed the 2<sup>rd</sup> respondent breached the law or to show that the election was conducted so badly contrary to the constitution and the electoral laws. They opined that the petitioner failed to discharge his legal burden.

## **A substantial breach that affected the results.**

Similarly, they maintained that there was no evidence tabled before the honorable court to show that indeed there was a substantial breach, irregularities, error or mistake that affected the results. They stated that the petitioner actually admitted that he was not disputing the results as declared by the 3<sup>rd</sup> respondent.

Lastly, they stated that the petition as drawn was incompetent. They said that the documents annexed to the petitioners supporting affidavit did not originate from the 2<sup>nd</sup> respondent, notably, that the statutory forms are not signed or stamped, neither have they been certified as true copies of the original. On that basis alone, they submitted that the supporting affidavit should be struck out and the petition consequently dismissed.

In view of the above and the totality of evidence tendered they urged the court to dismiss the petition with costs.

## **THE COURT’S ANALYSIS AND FINDING.**

### **1. APPLICABLE LAW.**

Electoral laws are as established by the said Constitution of Kenya (2010), Elections Act 2011, and **Elections (Parliamentary and County Elections) Petitions Rules, 2017**

The Independent Electoral and Boundaries Commission is established under Article 88 of the Constitution and mandated to conduct and supervise elections to any elective office established by the Constitution.

***“As provided for by Article 88 (4) of the Constitution, the Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by the Constitution, and any other elections as prescribed by an Act of Parliament...”***

***The Independent Electoral and Boundaries Commission Act, No. 9 of 2011*** outlines the powers and functions of the Commission in the language of Article 88. Section 4 of the Independent Electoral and Boundaries Commission Act, 2011 sets out the functions of IEBC as follows;

The General principles under which the IEBC has a mandate under section 4 of the Independent Electoral and Boundaries Commission Act, 2011 to conduct elections are stated as follows;

“In fulfilling its mandate, the Commission shall, in accordance with the Constitution, observe the following principles—

- a. ....
- b. ....
- c. ....
- d. Universal and equal suffrage based on the aspiration for fair representation and equality of votes,
- e. free and fair elections, which are;
  1. By secret ballot
    - a. free from violence, intimidation, improper influence or corruption;
    - b. conducted independently

c. transparent and

d. administered in an impartial, neutral, efficient, accurate and accountable manner.

In addition to these constitutional, statutory and regulatory provisions, there is a plethora of case law which guide this court on how to navigate around this case. Of major importance is **Raila Odinga V Independent Electoral and Boundaries Commission & 3 Others (2013) Sc Ep No.5 Of 2013** (the so called **Raila 1**)

Most notably, **Raila 1** reaffirmed the much-acclaimed legal position on the **burden and standard of proof**. This is an essential part of the legal procedure and in an election petition like the one before this court, light must be shed on the burden and standard of proof. Their disposal is the ultimate finding of this court.

The Supreme court in **Raila Odinga vs IEBC & Others 2013** expressed itself as follows; -

“191. Comparative judicial practice on the burden of proof helps to illuminate this Court’s perceptions, in a case which rests, to a significant degree, on fact. In a Ugandan election case, Col. Dr. Kizza Besigye vs Museveni Yoweri Kaguta & Electoral Commission Election Petition No. 1 of 2001, the majority on the Supreme Court Bench held: -

“...the burden of proof in election petitions as in other civil cases is settled. It lies on the Petitioner to prove his case to the satisfaction of the Court. The only controversy surrounds the standards of proof required to satisfy the Court.”

In **John Kiarie Waweru vs Beth Wangui Mugo & 2 others (2008) eKLR**, the court held,

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

In **Joho v Nyange & another (supra)** the court further observed that evidence adduced must be cogent, credible and consistent and that generalized allegations will not do in an election petition.

In determining whether a Petitioner has discharged the burden of proof required to nullify an election, the court must be guided by **Section 83** of the Elections Act which states 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 compliance did not affect the result of the election.”*

The threshold of proof envisaged by Section 83 of the Elections Act has been interpreted by a long line of authorities both locally and in other jurisdictions which have given meaning to the term “affected the result” of an election.

This was discussed by the **High Court of Tanzania in Mbowe v Elilifoo [1967] EA 240,242** where Georges CJ stated as follows: -

“In my view in the phrase ‘affected the result.’ the word “result” means not only the result in the sense that a certain candidate won, and another candidate lost. The result may be said to be affected if after making adjustments for the effect of proved irregularities the contest seems much closer than it appeared to be when first determined. But when the winning majority is so large that even a

substantial reduction still leaves the successful candidate a wide margin, then it cannot be said that the result of the election would be affected by any particular non-compliance of the rules.”

Mulenga JSC further expressed himself in **Col. Kizza Besigye v Yoweri Kaguta Museveni & Election Commission Presidential Election No. 1 of 2001** on the issue of the result being affected in a substantial manner. He said that it can only mean that the votes a candidate obtained would have been different in a substantial manner. That to succeed the petitioner does not have to prove that the declared candidate would have lost. It is sufficient to prove that the winning majority would have been reduced. Such reduction however would have to be such as would have put the victory in doubt.

The discharge of the burden and the standard of proof is what this court shall consider in addressing all the issues raised by the petitioner.

The court is also mindful of the binding authority in the case of **Raila Odinga Vs Independent Electoral and Boundaries Commission and Others, Supreme Court Presidential Petition Number 1 of 2017 (Raila 2)**, in which the Court held as follows regarding burden of proof:

133 ... In other words, while the petitioner bears an evidentiary burden to adduce ‘factual’ evidence to prove his/her allegations of breach, then the burden shifts and it behoves the respondent to adduce evidence to prove compliance with the law.

Since **Raila 1** is still good law, the court will be bound by the said decision in determining whether the elections of 8<sup>th</sup> August 2017 were in “substantial compliance with the law” as far as Bunyala North Ward was concerned. Whereas Raila held that the test as to whether an election could be declared a nullity is whether there was “substantial compliance with the law” Raila 2 held that the election process is not just a matter of figures, but the integrity of the process also matters. Indeed Raila 2 held that the qualitative and quantitative performance by IEBC is what should be the test.

This court notes that the issues of integrity involved in Raila 2 were to do with transmission of the results. In this case, no issue arose about transmission of the results. This court will therefore follow the authority in **Raila 1**.

The other distinction between **Raila 1** and Raila 2 is on the issue of the burden of proof. \

While **Raila 1** held that the burden of proving the existence of electoral malpractices lay on the person alleging such malpractices, Raila 2 held that the burden shifts to IEBC and where IEBC does not comply a negative inference could be drawn against IEBC.

Because this court is bound by both judicial authorities this court will use each of the case wherever it is appropriate in the particular circumstances.

This court however observes that IEBC may not be to blame for every electoral malpractice that one can think of.

Malpractices could fall in different categories and could be committed by persons other than IEBC as follows;

- i. malpractices by candidates such as voter importation, bribery and influence
- ii. malpractice by other persons such as the provincial administration or security agents
- iii. malpractices by voters and such as violence, theft or damage of campaign materials
- iv. misdeeds and / commissions or omissions by agents or observers.

In this court’s opinion, the Supreme Court in Raila 2 did not open a Pandora’s box such that IEBC

becomes duty bound to prove that such malpractices or misdeeds, commission or omission by other persons did not occur. In such cases, the burden of prove remains with the person who alleges them and hence **Raila 1** becomes the applicable law.

Where the malpractices are committed by IEBC or its employees or worker, **Raila 2** is the applicable law where the burden shifts from the person alleging existence of the malpractices to IEBC to prove that the malpractices did not exist.

In addition, I have found that where the burden of prove is shifted to the IEBC, the standard of proof must be on a balance of probabilities unless in situations where the allegations fall under the Election Offences Act where the standard would be higher than probabilities but not as high as beyond reasonable doubts.

## **SUFFICIENCY OF EVIDENCE**

This court observed on the onset that the petition and the responses herein were set in such a way that the petitioner would raise an issue, align witnesses to prove that issue and in the other hand, for every issue and witness availed to prove it, there was a corresponding witness availed by the defence to counter that evidence. It therefore ended up being a case of respondents witnesses against those of the petitioner. In such circumstances, this court finds that it is duty bound to very carefully examine the evidence of each of the proponent and the opponent. The court therefore finds that examining their demeanour, consistency and the verity of the witness was imperative when examining each of the issues raised.

## **ISSUE ON EXHAUSTION OF OATH OF SECRECY FORMS FOR ASSISTED VOTERS**

It was the evidence of PW4 that various candidates went at the polling station and spoke to the presiding officer. That after a while having spoken to these candidates, the presiding officer announced that some forms had finished (referring to the oath of secrecy forms). He stated that voting proceeded as usual but that those who needed help were not adequately helped.

PW4 outlined the procedure that was involved as;

They (agents) were reading the names

Asking voter whom they wanted

They then marked

Many wanted to vote secretly

PW4 stated that when the forms were finished the presiding officer **announced** that they had been depleted. He stated that the action that was taken was borrowing other forms from stream 2 and that it was recorded in the polling day diary, but that he said that the forms were not delivered.

He said that all voters who needed assistance were prevented from voting but again added that the assistance that was given by the presiding officer was done openly but again complained that the agents were not around.

PW5 who was an agent stated in his evidence that the deputy presiding officer and the presiding officer assisted only illiterate voters and that the **agents witnessed the exercise**.

PW6 who was a candidate stated that he was informed by the agents that the presiding officer had announced that the oath of secrecy forms were depleted. He said that based on his agents, the presiding officer stated that it was only him to assist the voters and that he did not get the oath of secrecy forms from stream 2. PW6 went further to state that the process was no longer secret ballot since all **agents were surrounding and anybody could see who the voters were voting for**. He maintained that some voter assistants were turned away and that the presiding officer remained the only assistant at Sifugwe

polling station.

DW1 who was an agent gave three ways in which voting is done;

Unassisted voting

Assisted voting with no assistant

He said that the voters were choosing their assistants but where the presiding officer was required to assist a voter to vote, he did so in the **presence of agents**.

DW4 Mr. Musirimba who was a candidate for the member of county assembly race stated that he had been informed by his agent that the oath of secrecy forms had been depleted before he arrived at the station.

Sylvia Nabwire Odongo, who was the presiding officer at Sifugwe Primary School polling station stated that at around mid-day they had exhausted all forms 32B and that she informed the voters. She said that she asked the voters to remain calm and patient as she found other forms and that she could assist those in a hurry in the presence of agents. She reiterated that she indeed helped a few of the voters who were in a hurry and that she got other forms from stream 2. She said that she informed the tallying center which is backed up by the Returning Officer, which advised her to borrow other forms from stream 2 before they delivered to her other forms. She explained that when she was assisting the voters who needed assistance in voting, Kevin Juma who was the agent for the Petitioner was present and did not complain.

The evidence given by Mrs. Nabwire was backed up by Mr. Matogo who was the deputy presiding officer at Sifugwe primary school. Counsel for the Petitioner stated in his written submissions that Article 81 of the Constitution creates an entitlement for a vote by secret ballot. He said that Election Regulations make provisions for structured limitations. He reproduced the provisions of Regulation 72(1) which provide for voter assistance.

Counsel questioned the information received from the presiding officer on the one hand and the returning officer on the other. He suggested that there was a disconnect between the information given by the presiding officer to the extent that she said she called the tallying center while the returning officer said that she was advised to borrow from stream 2 while 'they' delivered other forms. Counsel contended that the failure to supply sufficient oath of secrecy forms took away the voters' primary rights under Regulation 72(1) and compromised the secrecy of the vote.

### **Disposition**

**Regulation 72(1)** of the Election Regulations provides;

***'on the application of a voter who is by reason of a disability or being unable to read or write and therefore unable to vote in the manner prescribed in the Regulations, the presiding officer shall permit the voter to be assisted or supported by a person of the voter's own free choice and who shall not be a candidate or an agent'***

**Regulation 72(2)** goes further to require that where a person who is in need of assistance comes to the station without an assistant, then the presiding officer shall assist the voter in the presence of the agents.

I find these provisions of the law to be apt enough. The petitioner together with all the witnesses he produced in court do not tender evidence to convince the court that indeed the exhaustion of the forms and the assistance given by the presiding officer affected the process. The Petitioner had multiple claims ranging from a breach of the constitutional rights of the assisted voters to an assertion of an improperly held election. The constitution indeed guarantees under Article 38 that every Kenyan citizen has a right to free, fair and regular elections based on universal suffrage. This right the petitioner argues that it was breached by the returning officer and the presiding officer through failure to provide sufficient oath of

secrecy forms.

**Article 24** of the Constitution of Kenya 2010 provides for limitation of rights. It is an acknowledgement that some of the rights guaranteed by the Constitution cannot receive full realization at all times without necessarily inconveniencing others. The right guaranteed under Article 38 indeed cannot and should not be limited at whatever cost. They speak to the very core, the root and foundation of a democracy. However, in the realization of the right under Article 38, the parliament saw it wise to come up with Regulations which would smoothen the exercise. It was apparent that there are voters who could not go through the process of voting successfully due to the technological complexities and/or illiteracy. Therefore, the parliament required that a person with such a challenge was free to come together another person that he/she trusted in order to help him vote. However, since the person assisting is not an officer of the IEBC and therefore had not taken any oath as relates to keeping private whatever the decision of the voter was, the assistant is required to fill an oath of secrecy form.

The parliament did not leave it at the oath of secrecy forms, it went further to rightfully envision a situation where the voter lacks an assistant. To remedy this, it provided that the presiding officer had the capacity to help the voter vote, though this has to be done in the presence of the agents. The Petitioner questioned the manner in which the assistance by the presiding officer was done, he claimed on the one hand that he did not involve the agents. On the other hand, he stated that the process was flawed because there were so many agents surrounding an assisted voter when the presiding officer was helping to the extent that it took away the secrecy of the ballot.

The two statements from the petitioner counteract each other. He stated that the presiding officer was not assisting the voters in a transparent manner which requires it to be in the presence of agents while at the same time he stated that the agents surrounded the voter when the presiding officer was assisting, taking away the secrecy of the ballot. This contradiction is raises doubt as to whether the plaintiff indeed was aware of the claim he was raising and the burden of proof thereof.

As regards the exhaustion of the oath of secrecy forms, this court finds that it was a breach by the election officials of election laws and regulations that govern elections in Kenya. Early preparations were conducted to ascertain what would have been an approximation of the facilities that could be enough for the election. The 2<sup>nd</sup> Respondent ought to have explained to this court why there was such a shortage when enough materials had been supplied all over the country for purposes of the election. Instead, the returning officer only states that the presiding officer called the tallying center and reported that the oath of secrecy forms had been depleted and that they at the center advised her to borrow from the adjacent stream as they organized to deliver others to them. This then means that the forms were available, but they were left at the tallying center uncollected. Was this error on the returning officer? Was it the presiding officer who failed to collect the materials? The 2<sup>nd</sup> Respondent did not give the court the benefit to hear what truly transpired.

Having found that the 2<sup>nd</sup> Respondents together with its agents, employees and/or assigns erred in law by failing to provide the necessary materials to ensure the standard of elections envisioned by the Constitution is achieved, we embark on the question of whether this warrants a nullification of the election.

I rely on **Section 83** of the Election Act 2011 which provides;

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

I quote this section with confidence having heard from the witnesses of both the petitioner and the respondent of how the process of assistance was conducted after the exhaustion of the oath of secrecy forms. The presiding officer called the station and was advised to borrow other forms from the adjacent room. He also stated that he would be assisting other voters who were in a hurry. He went further to state

that he was the only one who would assist the voters though in the presence of voters. He actually did help some voters leading to the complaint that there were so many agents surrounding and thus negating the secrecy of the ballot.

The presiding officer has the ability to assist voters pursuant to Regulation 72(2). There is no provision barring such assistance based solely on the ground that the person assisting is a presiding officer. He is an officer of the 2<sup>nd</sup> Respondent who swears an oath of secrecy to the effect that he would not reveal the choices of people he assists in the process. For transparency purposes, the presiding officer is required to assist in the presence of the agents. The witnesses deposed that there were agents present when the presiding officer was assisting the voters.

The petitioner did not provide evidence enough to dispense with doubts as to whether indeed the exercise of helping the voters was flawed to require nullification. The test set by **RAILA ODINGA V INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 3 OTHERS (2013)** that, *'where a party alleges non-conformity with the electoral law, the Petitioner must not only prove that there was non-compliance*

*with the law, but that such failure of compliance did affect the validity of the elections'* has not been met.

In this court's opinion, the allegations that the exhaustion of forms 32 B had the effect of compromising the secrecy of the assisted voters is not proved by the petitioner.

The burden was on the petitioner and he failed to reach the required standard which therefore leaves this court with no other option other than throwing out the claim for nullification based on flawed voter assistance exercise.

### **ISSUE ON UNQUALIFIED CLERK**

PW2 stated in his testimony that Cynthia Barasa was a polling clerk at Budalangi Primary School. He said that she was well known to him and that he knew she was not qualified for the job. He stated further that he knew she had not gone beyond standard eight.

PW6 who was a candidate in the election stated that Mercy Cynthia Barasa was a clerk at Budalangi and that she went only up to standard six.

The 3<sup>rd</sup> Respondent, the returning officer explained that several persons applied for clerical positions out of which some were shortlisted and interviewed on the 5<sup>th</sup> of July, 2017. He stated the names of successful persons were published in a notice board situated at Budalangi constituency IEBC offices. He further stated that the notice board was open to the public for scrutiny and no candidate raised complains over suitability of any clerk. He stated that Mercy Barasa had all the necessary documents and she met all the minimum requirements to be selected as a clerk. He said that Mercy was a clerk at Budalangi primary school which had zero irregularities and/or malpractice meaning then that she discharged her duties diligently and lawfully.

The petitioner set out the requirements as required by the IEBC as follows:

KCSE aggregate of C- (minus) and above

Must be of good character and non-partisan

Must be available the entire time

Must be residents of the County assembly ward where the polling center applied for is located

The petitioner said further that the 3<sup>rd</sup> respondent recruited clerks some of whom did not have the requisite academic qualifications, including Mercy Barasa.

### **Disposition**

I note with certainty that it is crucial to have minimum standards with which an activity as important as an election is held. An election is and ought to be as credible as the officers who are chosen to deliver it. The minimum requirements as outlined by the petitioner with which the Independent Electoral and Boundaries Commission employs her polling clerks is clear and precise. The qualification that is greatly complained of by the petitioner is that a clerk must have a KCSE aggregate of C- (minus) and above. It was contended by the petitioner that Mercy Barasa did not meet this qualification since she was a standard six drop out. On the other hand PW2 who testified that he was well known to Mercy Barasa stated that she had attended school upto standard 8. Both of these assertions affirm the fact that Mercy Barasa was indeed not qualified to act as a polling clerk. She failed the very first test of having scored a C- (minus) and above since she had not yet gotten to secondary school.

The Respondents on their part claim that they destroyed the documents submitted to them by the applicants for various opportunities since they were bulky. They did not do much to counter the claim that they hired Mercy Barasa when she was unqualified to act as a clerk. The petitioners proved their case as regards Mercy Barasa by bringing to court witnesses who testified that Mercy Barasa was not qualified. The Respondents on the other hand could have called on Mercy Barasa to be a witness and produce her application documents in court but they refrained from doing that. Applications are normally done using copies of the original certificates and any other required documents, this means that Mercy Barasa ought to have had her original documents which she used to apply for the Respondent to find her qualified.

This failure to counter the claim by the petitioner denies this court the privilege to peruse the documents used by Mercy Barasa and whether indeed she was hired unlawfully. In these circumstances, the petitioner dispensed with his burden of prove and proved to the required standard that there was an irregularity in hiring Mercy Barasa. The respondents failed to counter the claim by the petitioner since the burden now shifted to the respondent.

This claim must therefore succeed in itself and now I embark on a discussion of how this finding affects the election. Can the fact that Mercy Barasa was irregularly appointed as clerk lead to nullification of the election?

Election courts are at all times mandated to do one thing if all the rest cannot be done, to find out what the will of the people is and uphold it. Section 83 of the Election Act does not require this court to nullify an election if the election was substantially in accordance with the constitutional principles and if any non-compliance does not affect the result thereof. Failure to employ a qualified clerk is non-compliance to election laws and regulations. This non-compliance does not negate the fact that the election was generally conducted in a manner envisioned by the constitution save for a few errors attributable to the nature of human beings as imperfect beings.

I state with certainty that no complaint was made against Mercy Barasa save for the fact that she did not meet the requirements. There were no irregularities incurred by her during the election period and that she carried out her duties diligently. There was no evidence to demonstrate that her lack of meeting the said requirements tempered in any way with the result, or that it unduly benefitted one party in the polls or that it was so grave as to negate the validity of the election.

Therefore, it is the finding of this court that the petitioner proved his claim to the required standard that Mercy Barasa was irregularly appointed polling clerk by the 2<sup>nd</sup> Respondent but that the Petitioner failed to demonstrate to this court how this irregularity tempered with the result of the election or how it breached constitutional principles on election as to require nullification of the election.

### **ISSUE ON KEVIN ODUORI OKELLO**

It was the claim by the petitioner that Kevin Oduori Okello who was hired by the 2<sup>nd</sup> Respondent as a polling clerk, was a relative to one of the contestants of the MCA seat. The petitioner's contention was the fact that Kevin was hired in total breach of the regulations.

The returning officer said however that it did not come to his attention that Kevin is a nephew of the 1<sup>st</sup> Respondent. He stated that Kevin met the requirements to be hired as a clerk and that he was recruited on merit there having been no complaints against him. The returning officer stated further that notwithstanding the purported relationship, Kevin performed in an exemplary way and that he did not engage in any unlawful conduct or irregularity. This information was reiterated by Marius Omodo, who was the presiding officer at Sirimba primary school.

The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in their submissions opposed that Kevin's affinity had anything to do with the credibility of the polls. They relied on **RICHARD GITENYI MOCHORWA V TIMOTHY MOSETI BOSIRE & 2 OTHERS (2013) eKLR** in which the court stated;

***No matter how close the affinity or relationship of itself is not sufficient; it must be shown that it had an effect on the election that the relative of the candidate was in a position to and did alter or otherwise influence the outcome of the election.***

### **Disposition**

The question that seems to suffice is how the 2<sup>nd</sup> Respondent could have known about the affinity between Kevin and the purported candidate. Was it exclusively upon the 2<sup>nd</sup> Respondent to point out who was a relative of another during the interview sessions?

The Returning officer who was in charge of coordinating the interviews and employment of the merited candidates stated that Kevin had met all the requirements needed to be engaged as a polling clerk. He said that it never came to his attention that Kevin was related to one of the candidates. It is vital to note that the 2<sup>nd</sup> Respondent in an attempt to attain credible and fair elections rapidly distributes individuals around the country. This means, that the returning officer overseeing elections in a ward in busia could probably be a resident of Tana River, or Ukambani or any other place not related to Busia. This demonstration draws our attention to the fact that it is highly possible that the Returning Officer might fail to know how related people are in a particular center.

It was testified by the returning officer that after the process of interviewing the applicants is finished, they put on the notice boards of the various offices of the IEBC lists of shortlisted persons to serve with the commission during the elections. This advertisement is not for beautification of the notice boards, it is actually an invitation to the members of the public to go through the lists and raise any complaints as regards the suitability of any of the selected applicants. This is so because it is assumed that it is the members of the public surrounding a given center that know the applicants and whether or not they are suitable for the positions they are given.

There were no complaints against Kevin until the petition came up and that is when the returning officer became aware of it. This is not proper diligence. The 2<sup>nd</sup> Respondent had a role to play but so did the members of the public. Indeed it is an irregularity for a person related to a candidate to have been allowed to participate in an election as an official. The burden of this irregularity has to be carried by both the members of Bunyala North Ward in Busia County for failing to report to the relevant authorities and similarly by the 2<sup>nd</sup> Respondent for failing to conduct due diligence.

As regards the overall impact of this finding, I refer to **section 83 of the Election Act, 2011**. It was the testimony of Sirimba primary presiding officer Mr. Omodo that Kevin Oduori did not engage in any election malpractice. I am highly informed to reach the decision that even though there was non-compliance on the part of the second Respondent to Electoral laws and Regulations, this non-compliance does not have an effect to the final results. The petitioner other than claiming that there was affinity, he did not dispense with the other requirements established in **PAUL GITENYI MOCHRWA V**

**TIMOTHY MOSETI BOSIRE & 2 OTHERS (2013) eKLR** including;

Prove that the affinity or relationship had an effect on the election

Prove that the relative was in a position to influence the outcome of the election

Prove that the relative actually did influence the outcome of the election

Having failed to prove the effect of the affinity on the election, the petitioner was unable to reach the standard of proof required and therefore the claim must fail.

### **ISSUE OF TEARING OF BALLOTS IN ADVANCE**

PW5 who was an agent explained that he witnessed one of the polling clerks tearing ballot papers in advance and stamping them. He said that there were times there were big crowds of people outside waiting to vote. He further testified that all the ballots torn in advance were to be used in the voting process. He said that no one was given more than one ballot and that no ballot was brought in the voting room from outside. He stated that the torn ballots were lying openly on the table and that they were all given to the voters until they were finished.

The petitioner submitted in his written submissions that at Sirimba primary school, there was a clerk who was issuing the MCA ballots who had torn and stamped many ballot papers lying on his desk. He said that one of the agents protested and inquired why he was doing so but he explained that he was doing that to prepare for the incoming voters.

### **Disposition**

I wish to start by referring to the case of **RICHARD N. KALEMBE NDILE & ANOTHER V PATRICK MUSIMBA MWEU & 2 OTHERS (2013) eKLR**. The court in this case had an occasion to address itself on errors that occur during the electoral process. It stated as follows;

***One of the principles governing the electoral process under Article 82 is that the election must be transparent and administered in an accurate manner. An election is a human endeavor and is not carried out by programmed machines. Perfection is an aspiration but allowance must be made for human error. Indeed the evidence is clear that the counting and tallying was being done at night and in less than ideal conditions hence errors, which were admitted. What is paramount is that even in the face of such errors, whether advertent or otherwise is that the ultimate will of the electorate is ascertained and upheld at all costs.***

This postulation summarizes most of what I wished to have stated. The driving force behind any claim of an electoral malpractice should be the extent to which such malpractice affected the outcome of the election. Pw5 stated that the ballots torn in advance were to be used in the voting. She said that the ballots were openly on the table and that they were given to the voters until they were finished.

As the court stated in **PAUL GITENYI MOCHORWA CASE (infra)** that there are irregularities which can be attributed to innocent mistakes (like the one made by the issuing clerk to issue two ballots) or an obvious human error which cannot constitute a reason sufficient to impeach an election. The court in reaching the finding acknowledged that an election is an exhaustive activity and that an allowance ought to be had for a few errors that could arise from the process.

It was the submission of the petitioner that when the clerk who was tearing ballot papers in advance was asked why he was doing so, the clerk explained that he was doing so to prepare for the incoming voters. It was not shown by the petitioner that by tearing the ballots in advance, the clerk influenced the election result. For the clerk, he believed that it was a way through which work could be fastened. The petitioner did not adduce evidence to prove to this court to the required standard that the non-compliance of the clerk to election regulations had an effect to the final outcome of the election or that it was an abrogation

of the electoral principles laid out in the Constitution. I do not find it persuasive enough that the petitioner only establishes the non-compliance of the regulations but does not bother to link such non-compliance to the other limbs being the final outcome and the compliance to constitutional principles.

This link should and must have been established by the petitioner. It is part of his core duties in dispensing with the burden of proof for such claims. This claim must therefore fail because it has not been properly and adequately proved by the petitioner.

### **ISSUE ON THE TWO BALLOT PAPERS FOUND WITH THE DEPUTY PRESIDING OFFICER**

PW5 stated that the DPO had two ballot papers which he was found with. He said that he protested. He said further that the two ballots were issued in error and that one of the ballots was returned to the issuing clerk.

DW7 who was the said deputy presiding officer at Sirumba primary school said that she came across a voter with 2 ballot papers in the voting booth. She said that the ballots were for member of parliament and that one of them was marked and the other one was not. She stated that the unmarked one was returned meaning that the marked one was casted.

Marius Omodo Salamba, the presiding officer at Sirimba stated that his deputy alerted her that she had intercepted a voter with two ballot papers for member of parliament. He said that he called all the agents to witness the surrender of the extra ballot. He stated that it was an inadvertent error committed by the issuing clerk.

The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in countering the claim of nullification based on the error by the clerk relied on **PAUL GITENYI MOCHORWA V. TIMOTHY MOSETI BOSIRE & 2 OTHERS (2013) eKLR** in which the court stated thus;

***Irregularities which can be attributed to an innocent mistake or an obvious human error cannot constitute a reason for impeaching an election result.***

### **Disposition**

It was the testimony of both the petitioner's witnesses and the respondent's witnesses that the ballot papers that the deputy presiding officer was found with had been retrieved from a voter who had been given an extra ballot. It was therefore an error committed by the issuing clerk who gave more than one ballot papers. Both of the ballots were therefore retrieved by the deputy presiding officer who then explained to the presiding officer what had transpired. The presiding officer then called all the agents to witness the occurrence. It was his testimony that the agents agreed that the voter be given one ballot as required by law and be allowed to proceed to vote. The presiding officer therefore left one of the ballots with the voter and confiscated the other one which he gave back to the issuing clerk to be issued to another voter.

It is my informed view that the presiding officer ought to have recorded the happenings in the polling day diary. However, this is not recorded and the respondents do not explain why they failed to record it. The petitioner wondered in his written submissions how the deputy presiding officer treated the two ballot papers. He stated that failure to enter the occurrence in the PDD took away the transparency of the election which is a key tenet of election. However, the deputy presiding officer explained what transpired immediately after the extra ballot was discovered. He said that he informed the presiding officer, who called all the agents that were present in the room and explained to them what had happened. He said that the presiding officer asked the agents what step they should take and they all agreed that the extra ballot should be retrieved and the voter allowed to vote with one ballot as usual. Is this not transparency?

In an election I believe, the presence of the agents is to ensure transparency. The agents represent different political parties and there are other officials like the members of the press, the observer groups among others who watch the election to ensure that it is proceeding in accordance with the law. If such an

occurrence as happened Sirimba primary school happens, the presiding officer is well advised to indulge the agents so that they may agree depending on the situation at hand, what step to be taken. There could arise minor errors which may not have been adequately covered by the law or election regulations, these errors are handled pursuant to the agreement that is reached between the election officials.

As the court stated in **PAUL GITENYI MOCHORWA CASE (supra)** that there are irregularities which can be attributed to innocent mistakes (like the one made by the issuing clerk to issue two ballots) or an obvious human error which cannot constitute a reason sufficient to impeach an election. The court in reaching the finding acknowledged that an election is an exhaustive activity and that an allowance ought to be had for a few errors that could arise from the process.

Similarly, as held in **RICHARD KALEMBE NDILE CASE (supra)** that transparency is one of the main principles that undergird the electoral process in Kenya. The court in this case went further to state;

*‘An election is a human endeavor and it is not carried out by programmed machines. **Perfection is an aspiration but allowance must be made for human error.**’*

I am convinced that the presiding officer handled the issue of the extra ballot in a transparent manner which is in line with the aspirations of the constitution. I am further of the view that the petitioner despite having raised the issue to do with the extra ballots that were retrieved, did not demonstrate to the court how the ballot papers affected the final outcome of the election.

Based on the wisdom borrowed from the two cases herein above, and further on Section 83 of the Election Act, 2011 I find that this claim is not merited, and it therefore must fail.

#### **ISSUE ON DISCREPANCIES IN FORM 36A AND 36B.**

PW3 confirmed that results in Form 36A were the ones in the polling room where she was. They were okay. She was at Sirima Primary School room 1.

PW4 also said he signed Form 36A to affirm that he had witnessed the counting. It shows 161 votes for Silvanus Juma but he said he got 187. He however did not dispute what was before him, 161 votes. He was at Sifugwe room 1.

PW5 however testified that he signed the Form 36A because he was under pressure to sign.

PW6, Silvanus said that at Munami, the votes in form 36A were not tallying. The Form **36A read 329** votes while form **36B read 338**.

Sorting and counting at Rwambwa 1 was also alleged by the Petitioner’s witness (agent) Catherine Ojiambo. However, she testified to have been in Rwambwa 2 and thus could not narrate the events in Rwambwa 1.

Counsel for the petitioner submitted that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents had taken the issue so lightly as to term it a clerical error by reference to some unparticularised clerical errors, arithmetic error and stray ballots which are not counted or recorded. He maintained that there are provisions to count and record any stray ballot. He further submitted that at **Nabuchwi polling station** the rejected votes on **form 36A bore 3 votes** while the form **36B had 84 votes**.

The 1<sup>st</sup> respondent submitted that the petitioner had not in any way shown that the presiding officer at Rwambwa1 was not transparent in the sorting and counting process.

Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents stated that from the onset, the petitioner was not disputing the results as announced by the 2<sup>nd</sup> respondent but cited the irregularities alleged to have occurred. They admitted to the discrepancies but said it did not affect in anyway the votes cast for each candidate. That it

was clerical error. The returning officer testified that the total votes cast were 338 but the P.O indicated 329 and thus this did not affect the final results.

It is trite law that the returning officer at the constituency cannot alter the results as presented by the presiding officer in form 36A (with respect to this petition) while producing the second Form 36B. Any alterations would amount to an illegality.

Thus the 2<sup>nd</sup> respondent was quick to clear himself claiming human error which is indisputable, but the Commission must recognize that although the process will not be deemed to be 100% perfect, it is not allowed to make such frivolous mistakes that would question the credibility of the process. Its officers must aim to adhere to laid down principles and provide for an accountable, credible election.

**Article 81(e) (v)** of the Constitution requires that elections be administered in an impartial, neutral, efficient, accurate and accountable manner. The accuracy of an election has however not been limited to 'perfection.' It is human nature to make errors here and there. What is paramount is that even in the face of such errors, whether advertent or otherwise is that the ultimate will of electorate is ascertained and upheld at all costs-**Richard Kalembe Ndile v Patrick Musimba [2013]**

In **Joho vs Nyange & Another (2008) 3 KLR (EP) 500**: Maraga J (as he then was) stated as follows;

*"In my view the errors made and the irregularities committed in this petition fall in two categories. The first one is the errors or mistakes that I would call innocent even though negligent. The second category is those deliberate irregularities or forgeries that were committed.*

*In respect of the first category I would like to say this: Error is to human. Some errors in an election like this, conducted under a frenetic schedule, are nothing more than what is always likely in the conduct of any human activity. If they are not fundamental they should always be excused and ignored. But where deliberate irregularities or forgeries are committed, different considerations come into play. In either case, however, serious consideration should be given as to what effect, if any, that those errors, whether innocent or deliberate, have on an election before the same is vitiated. As I have said if they are minor and do not affect the election or its results they should be ignored. This is what I understand section 28 of the National Assembly and Presidential Elections Act to be providing for when it declares that:*

*'No election shall be declared void by reasons of a 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 that written law, or that the non-compliance did not affect the result of the election.'*

*The law is therefore clear as to when an election can be nullified if it is not conducted substantially in accordance with the law as to elections. It will also be nullified, even though it is conducted substantially in accordance with the law as to elections, if there are errors or mistakes in conducting it which, however trivial, are found to have affected the results of an election.*

*But when is an election said not have been conducted substantially in accordance with the law as to elections which errors or irregularities can affect the results of an election "*

*To start with I do not think that anybody is in doubt as to the law as to the parliamentary elections which we are here concerned with. It is the National Assembly and Presidential Elections Act, Cap 7 of the Laws of Kenya together with the Rules and Regulations made there-under.*

*It is not very (sic) non-compliance or every act or omission in breach of the election regulations or procedure that invalidates an election for being non-compliant with the law. As I have said minor breaches will be ignored. An election is said to be non-complaint with the law as to*

*election when it is conducted in violation of the principles of an election by ballot. This is how Stephenson L.J expressed this point in the case of Morgan –vs- Simpson (1974) 3 All ER 722 at P 731.*

*“For an election to be conducted substantially in accordance with that law there must be a real election by ballot and no such substantial departure from the procedure laid down by parliament as to make the ordinary man condemn the election as a sham or a travesty of an election by ballot. Instances of such substantial departure would be allowing voters to vote for a person who is not in fact a candidate or refusing a qualified candidate on some illegal ground or disenfranchising a substantial proposition of qualified voters.”*

*And the result of an election is affected when the cumulative effect of the irregularities reverse it. For instance when a large proposition of the voters are by some blunder in the conduct of the election, as happened in Harrison Garama Kombe vs Ali Omar & Others, Civil Appeal No. 52 of 2006 (CA), do not turn up to vote, the result is said to be affected.”*

In his pleadings, the petitioner raised issue with the total number of votes cast for the MCAs, MPs to President varying within the ward. This is confirmed by the form 36B where the MCAs votes were 9038, Women rep 7813, Senator 9117, Governor 8992.

**Article 38 (3)** of the Constitution is an important safeguard for the right to vote. The process is very tedious and has sometimes caused the voters to associate themselves with specific positions and /or their favourite candidates. We cannot also not be expecting 100% turnout at a general election. Such is the kind of variation as shown in the form 36B for Budalangi Constituency. The issue goes much deeper than asserted by the petitioner. One must consider rejected votes, spoilt votes and the ultimately valid votes for **each position**. The petitioner thus cannot claim such. It is very farfetched and does not raise any issue with the results nor the process of voting. I therefore find that this was not sufficiently discharged.

#### **ISSUE OF THE PRESENCE OF THE 1<sup>ST</sup> RESPONDENT AT THE POLLING STATION.**

This was mentioned to have happened at Sirimba Polling Station. It was the Petitioner’s contention through his witness PW3, Eunice Majuma, who came to the station as an agent but was denied entry since she lacked the necessary accreditation. She queued to vote when she saw government officers and a candidate Fred Musirimba leading in 3 women, one after the other. She said the women remained inside and she did not know their names neither did she see Fred induce them.

PW4, Kevin Juma also testified that his candidate, Silvanus Juma came to see the election progress in the afternoon. Also said Fred Musirimba came in at around 10-11am. He spoke to the presiding officer and his agents. Pw4 protested that the PO was talking to a candidate in low tones. He however affirmed that many other candidates came to find out how the process was going.

PW6, Silvanus Juma said that he went to about 7 stations. In all he got verbal permission from the Presiding Officers. He spoke in low tones too. Shouting was prohibited.

Responding to the afore mentioned allegations, DW4 , Fred Musirimba stated that he was at Sifugwe between 4.30-5pm and not 10am as alleged by PW4.He said he got permission from the presiding officer. He further denied calling in three women from the queue as alleged by PW3

Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents further submitted that the PO’S evidence that nothing as alleged by the petitioner happened at the station was not challenged by way of cross examination.

**Regulation 62** on Admission to polling station provides;

The presiding officer shall regulate the number of voters to be admitted to the polling station at the same time, **and may exclude all other persons except-**

**(a) a candidate**

(b) a person nominated as a deputy to the candidate, where applicable

(c) authorized agents

(d) members of the Commission and election officers on duty

(e) police officers on duty

(f) persons necessarily assisting or supporting voters with special needs or assisted voter and

(g) Observers and representatives of the print and electronic media accredited by the Commission.

In my view, regulation 62(1) (a) is very clear on this question. The candidates are not limited to have access to a polling station at any time although all are expected to behave as **regulation 63** allows the police on duty to remove any person who misconducts himself or herself or fails to obey any lawful instructions. Thus, there is no harm in any of the candidates coming into a polling station to check on the process. As the petitioner put across, he was allowed into 7 stations. The 1<sup>st</sup> respondent also went to various stations. Regulation 62(1) (a) was therefore upheld and respected.

**On the question of communication between a candidate, agents and the voters still waiting in line to vote, regulation 65** limits such right. It provides that;

(1) No person other than an election officer or police officer on duty shall, except with the authority of the presiding officer, have any communication whatsoever with a voter who is in , or in the immediate precincts of, a polling station for the purpose of voting.

(2) This regulation shall not prevent the companion of an assisted or supported voter from communicating with that voter.

(3) Every election officer, candidate or agent attending at a polling station shall not communicate, unless for a purpose authorized by law, any information as to the name or number on the Register of voters of any voter who has or has not applied for a ballot paper or voted at that station.

(4) A presiding officer may, upon request, divulge to a candidate or agent of a candidate the total number of voters who have voted at the station at anytime before the poll is closed.

It was the petitioner's contention through his witness, PW3, Eunice that the 1<sup>st</sup> respondent came to the polling station, communicated with the presiding officer and led in three women to the voting room. As understood, the issue here is not only the POs reaction but also the three women that were led in.

Did he have any authority to bring in anyone from the queue? The answer is in the negative. He was not allowed in law to bring into the polling room anyone in the queue. There was a queuing clerk and a security officer stationed there as was submitted by the 1<sup>st</sup> respondent.

**Section 60 of the Elections Act** makes further provision on the maintenance of secrecy at elections that calls for no form of communication between a candidate, agents, election officers and the voters just to aid in maintaining the secrecy of the ballot.

The evidence adduced by the petitioner with regards to this matter was again not to the desired standard. None of the three women could be identified or called to court by the petitioner to strengthen his case. The court is therefore in doubt on who these women are, whether they were actually led in and if yes, what transpired in the room? These questions have not been answered.

Counsel for the petitioner submitted that this constituted an offence by the members of the commission as envisaged in **Regulation 59(l) (m)**. It is trite law that an election offence amounts to criminal charges and thus is subject to be proved beyond reasonable doubt. I don't think the petitioner has discharged this duty. The petitioner did not show this court how the three women/persons interfered with the results or process of voting at the station if any. Neither did he convince this court that the PO was in any way biased to any candidate. His agent PW3 denied witnessing any form of inducement or consideration.

I therefore find no reasons to hold that the alleged 'communication between the 1<sup>st</sup> respondent and the three women/persons' affected the results for MCA or questioned the validity or compromised the integrity of the election process.

### **ISSUE OF WHETHER THE ELECTION WAS FREE, FAIR AND CREDIBLE**

To prove that it was not, the petitioner through his counsel submitted that the election for Member of County Assembly was marred with irregularities and illegalities. That IEBC appointed persons not qualified for positions such as polling clerk, there was issue with the vote counting at Rwambwa polling station<sup>1</sup>, stamping many ballot papers at Sirimba and the presence of a candidate, Fred Sirumba who communicated with some three women/ persons at a polling station during voting.

Counsel for the petitioner submitted on the issues raised in the pleadings which they argued ultimately touched on the fairness, credibility and validity of the election. They raised eyebrows on the failure by the presiding officer to record various happenings at the polling station. These include the finding of two ballot papers with a voter and the depletion of the assisted voters forms.

The 1<sup>st</sup> respondent denied all the allegations leveled against him that amounted to questioning the credibility of his election as the MCA for Bunyala North ward.

Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents made extensive submissions regarding the validity of the election and the question of whether the election ought to be nullified. He submitted that the election was done in accordance to the standard envisaged by the election laws and the constitution. They denied various allegations leveled against them whilst rebutting the petitioner's pleadings.

On the issue of exhaustion of assisted voters' forms, they acknowledged the depletion but cited that they served those who were in a hurry then later provided more forms. The PO said that she made this as transparent as possible by announcing it and continuing with the process in the presence of all the agents. None complained until the petitioner came forth. However, no cause has been proven to show that the results were substantially affected by this.

Counsel submitted that the yardstick for determining whether the impugned elections were held in a free, fair and credible manner is provided for by Article 81(e) of the Constitution. He submitted that the petitioner had not shown that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents failed to comply with Article 86 and other provisions of the law.

He reproduced section 83 of the Elections Act 2011 as hereunder;

***'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 constitution or that the non-compliance did not affect the result of the election.'***

The mere presence of irregularities does not vitiate an election. That the objective of section 83 is to insulate the electoral process from abuse and frivolous claims and that it is the duty of the court to preserve the will of the people where it is shown that the election was done in accordance with the law. Counsel further referred the court to the words of the court in **MORGAN OTHERS V SIMPSON & ANOTHER (1974) 3 ALL ER** which enshrined the factors to be met for an election court to invalidate an election. Counsel stated that the Petitioner did not make a case on how the allegations he raised

affected the integrity of the results.

I have considered all the evidence and the submissions by the counsels. I am aware from the witnesses who testified in court that indeed there were a number of anomalies during the election process in issue herein. However, to what extent can the irregularities be said to amount to a nullification of an election? Are there trivial irregularities which a court can overlook in an election petition or should the court annul an election based on any irregularity proved regardless of the magnitude?

Section 83 is informative in this regard. The section 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 the result of the election.***

This provision requires an election court to uphold an election, which though had irregularities or non-compliance, it was in accordance with the principles laid out in the Constitution including those laid out under Article 81 and 86 and that if the irregularities did not affect the result of the election.

In the case of **MORGAN & OTHERS V SIMPSON & ANOTHER(1974) 3 ALL ER** the learned judge had the following to say;

***...an election court was required to invalidate an election:***

***(a) If the irregularities in the conduct of election had been such that it could not be said that the election had been conducted as to be substantially in accordance with the law, or***

***(b) If the irregularities had affected the results.***

***Accordingly, where breaches of election rules although trivial, had affected the results, that by itself was enough to compel the court to declare the election void even though it had been conducted substantially in line with the law. Conversely, if the election had been so badly conducted that it was not substantially in accordance with the law, it was vitiated irrespective of whether or not the result of the election had been affected.***

Was the election conducted in accordance with the law?

Article 81 of the constitution lays the background of credible elections in Kenya. Sub-article (e) of the Article provides;

***'Free and fair elections, which are***

***(a)By secret ballot***

***(b)Free from violence, intimidation, improper influence or corruption***

***(c) Conducted by an independent body***

***(d)Transparent; and***

***(e)Administered in an impartial, neutral, efficient, accurate and accountable manner'***

In **Presidential Election Petition No.1 of 2001, RTD COL DR. KIIZA BESIGYE .V. YOWERI KAGUTA MUSEVENI AND ELECTORAL COMMISSION, ODOKI CJ** defined "free and fair elections" in the following terms:

**“To ensure that elections are free and fair there should be sufficient time given for all stages of the elections, nominations, campaigns, voting and counting of votes. Candidates should not be deprived of their right to stand for elections, and citizens to vote for candidates of their choice through unfair manipulation of the process by electoral officials. There must be a leveling of the ground so that the incumbents or Government Ministers and officials do not have unfair advantage. The entire election process should have an atmosphere free of intimidation, bribery, violence, coercion or anything intended to subvert the will of the people. The election procedures should guarantee the secrecy of the ballot, the accuracy of counting and the announcement of the results, in a timely manner. Election law and guidelines for those participating in elections should be made and published in good time.**

**Fairness and transparency must be adhered to in all stages of electoral process. Those who commit electoral offences or otherwise subvert the electoral process should be subjected to severe sanction. The Electoral Commission must consider and determine election disputes speedily and fairly.”**

In Kenya, the independent body to conduct and supervise referendum and elections is the IEBC, the 2<sup>nd</sup> respondent herein. It was created under Article 88(1). Its mandate is in the Constitution but also in the Elections Act (Act No.24 of 2011) and the Regulations made thereunder and in the Independent Electoral and Boundaries Commission Act (No.9 of 2011) and the Regulations there under.

Article 86 then proceeds to provide as follows;

***‘At every election, the Independent Electoral and Boundaries Commission shall ensure that-***

***Whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;***

***The votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;***

***The results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and***

***Appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials’***

I reiterate the wise words of the court in **MANSON OYONGO NYAMWEYA V JAMES OMINGO MAGARA & 2 OTHERS** that;

***‘The court has to consider whether the grounds as raised in the petition sufficiently challenge the entire electoral process and lead to a conclusion that the process was not transparent, free and fair.’***

In this case, I find that there were no substantive complaints by the petitioner as regards the final results. In handling the question of what it means for a particular election to have failed to comply with the law, the court in a Ugandan case, **BISIGYE V MUSEVENI (2001) EP NO.1 OF 2001** stated as follows;

***“...the expression ‘non-compliance affected the results of the election in a substantial manner’ can only mean that the votes the candidate obtained would have been different in a substantial manner, if it were not for the non-compliance substantially. That means that, to succeed, the petitioner does not have to prove that the declared candidate would have lost. It is sufficient to prove that his winning majority would have been reduced. Such reduction however, would have to be such as would have put the victory in doubt.”***

The petitioner has fronted generalized allegations which are reasonably expected given the human

imperfect nature. Seeking for a nullification means being in possession of sufficient and cogent evidence which would convince the court to undo that which a good number of the people will have done. Borrowing from the words of Maraga J (as he then was) in **JOHO V NYANGE & ANOTHER (2008) 3 KLR 500** in which the learned judge correctly stated;

***“Election petitions are not ordinary suits. Though they are disputes in rem, fought between different parties, election petitions are nonetheless disputes of great importance. This is because when elections are successfully challenged, by-elections ensue which not only cost the country colossal sums of money to stage but also disrupt the constituents’ social and economic activities. It is for these reasons that I concur with the Elections court in WANGUHU NGANGA & ANOTHER V GEORGE OWITI & ANOTHER (1993) EP NO. 41 OF 1993 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. As I said they should be proved by cogent, credible and consistent evidence.”***

I am therefore convinced that the evidence does not meet the threshold of above balance of probabilities. There is a multiplicity of loopholes in the evidence as discussed in the specific issues above.

Did the Irregularities affect the result?

The irregularities complained of herein, even though not proved by cogent evidence, touch substantively on the conduct of the election which is congruent to the result obtained. It was alleged that the presiding officer did not record some of the occurrences in the PDD such as the depletion of the assisted voter forms, a voter being found with an extra ballot paper, the improper engagement between the PO and the 1<sup>st</sup> respondent and also the irregular appointment of a clerk.

In all the findings, the petitioner has not shown this court how the irregularities affected the results. They were very minimal and in my view IEBC tried as much as possible to prevent any anomalies in the events of envisioned offences such as being found with an extra ballot paper. Even though not recorded they provided oral evidence that was actually in some cases supported by the petitioner’s witnesses. For instance, PW4 said that the assistance by the PO was an open process; PW5 also said that the extra ballot was returned thus not casted. He further denied stating that the votes of Silvanus were stolen. The unqualified clerks were also not shown to have interfered in any way with the electoral process although it was an illegality.

### **ISSUE OF WHETHER THE 1<sup>ST</sup> RESPONDENT WAS VALIDLY AND LAWFULLY ELECTED AS BUNYALA NORTH MCA**

It is in view of the above made references that I wish to discuss the provision of Section 75 (3) of the Elections Act;

“That in any proceedings brought under this section, a court may grant appropriate relief, including-

- a) a declaration of whether or not the candidate whose election is questioned was validly elected
- b) a declaration of which candidate was validly elected; or
- c) an order as to whether a fresh election will be held or not.

Notably, these orders or reliefs can only issue if the petitioner proves to the required standard, enough reasons as to why the particular orders should issue. Orders or reliefs cannot just be given merely because they have been asked for. This is because justice cuts across both divides, the petitioner side and the respondents’ side.

In this court’s opinion, the petitioner in this case has failed to prove to the required standard, the desired threshold in an election case i.e. above that on a balance of probabilities in civil litigation but less than

that of a criminal case which is beyond reasonable doubt. The petitioner has touched on various issues of irregularities and illegalities. These included voter bribery, voter importation, the role of IEBC officials (the R.O) violence marred elections, the role of the sub chief and whether the election was free, fair and transparent.

I have considered the authorities cited by the Appellant including **Morgan v. Simpson (1975) 1 Q.B 151** and **Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others**. It was held in **John Fitch v Tom Stephenson & 3 Others QBD [2008] EWHC 501**, which followed **Morgan v Simpson (1975 1 Q. B. 151)** it was stated as follows, and I agree with the court:

*“The decided cases, including those which Lord Denning considered in Morgan V Simpson established that the Courts will strive to preserve an election as being in accordance with the law, even where there have been significant breaches of official duties and election rules, providing the results of the election was unaffected by those breaches. This is because where possible, the Courts seek to give effect to the will of the people”.*

Majanja J in **Richard Kalembe Ndile and another V Patrick Musimba Musau** at Machakos High Court petition no 1 (unreported) reiterated that;

*“...under our democratic form of government, an election is the ultimate expression of sovereignty of the people and the electoral system is designed to ascertain and implement the will of the people. The bedrock principle of election dispute resolution is to ascertain the intent of the voters and to give it effect whenever possible.”*

The court has expressed itself in **NICHOLAS SALAT VS IEBC & OTHERS in Election Petition no.1 of 2013** that legal sufficiency in the election to mean that an 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 any errors, mistakes or irregularities. It means that if there were any such errors, mistakes or irregularities they were not of such magnitude that they substantially affected the results.

**Raila Odinga 2013** looked into the irregularities and illegalities that come up in an election. The supreme court in its majority finding dismissing the petition before it, said that if the magnitude of the alleged irregularities and illegalities alleged by the petitioner is not as intense as to meet the standard of proof that is beyond that of a balance of probability in civil litigation and but less than that of beyond reasonable doubt in criminal cases, the election should be upheld.

As such, I find that the petitioner has brought before this court mere allegations that actually touched on the authenticity of the election process. He **DID NOT** provide sufficient evidence to support his claims.

I find that the election was carried out in accordance with the constitution, laid down statutes and regulations. It is my informed finding further that the process of tallying and counting was done in line with the law. The 3<sup>rd</sup> Respondent was lawfully elected the Member of County Assembly and rightfully given the certificate of nomination, which he holds to date, and whose validity was not subject of challenge before any court or institution.

Having failed to prove their case to the required standard, I find that the allegations questioning the validity of the election and whether or not the 3<sup>rd</sup> Respondent was validly elected must fail.

On analysis, I have come to the conclusion that the election was conducted in accordance with principles laid down by the electoral laws and that the anomalies raised herein were not as serious as to affect the entire election. I therefore find that the 1<sup>st</sup> respondent was validly elected as the MCA for Bunyala North Ward.

**APPLICATION OF THE DOCTRINE OF LEGITIMATE EXPECTATION IN ELECTION PETITIONS**

Legitimate expectation is a doctrine of administrative law which requires the government together with its agencies and institutions to deliver on that which the people expect from it to reasonably deliver. In Kenya the doctrine is entrenched in Article 47 of the Constitution. The Article provides for administrative action and it provides as follows;

47. (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person the right to be given written reasons for the reasons

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall-

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.

This doctrine estoppes the government or any of its institutions from rescinding a representation that it had made to the people. Based on this doctrine, the courts have been empowered to revisit an action or omission from a public body with a view of assessing its legality.

The Supreme Court of India in **J.P. Bansal v State of Rajasthan & Anor, Appeal (Civil) 5982 of 2001** observed as follows regarding the doctrine:

*“The basic principles in this branch relating to ‘legitimate expectation’ were enunciated by Lord Diplock in Council of Civil Service Unions & Others v Minister for the Civil service (1985 AC 374 (408-409)(commonly known as CCSU case). It was observed in that case that for a legitimate expectation to arise, the decisions of the administrative authority must affect the person by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do and until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn...”*

However, it is not enough that an expectation should exist; it must in addition be legitimate in order for it to be worthy of protection. This was expressed by **HWR Wade C.F. Forsyth in Administrative Law, Tenth Edition (2009) page 449:**

*“It is not enough that an expectation should exist; it must in addition be legitimate. But how is it to be determined whether a particular expectation is worthy of protection” This is a difficult area since an expectation reasonably entertained by a person may not be found to be legitimate because of some countervailing considerations of policy or law.”*

In order to place the voters’ legitimate expectation in a proper context, this court must examine the circumstances under which such expectations were raised. The Petitioner averred that firstly, an unqualified clerk was employed by IEBC, that one Kevin Okello was employed by IEBC and was a relative of a candidate and that Voter Assisted forms 32B were depleted at Sifugwe Primary School.

In discussing the legitimate expectation of candidates, the High Court of Kenya in **Diana Kethi Kilonzo & Another v IEBC & 2 others Petition 359 of 2013** held that:

*“...it is essential, in discussing the legitimate expectation of a potential political candidate in regard to an election process, to take into account the competing legitimate expectations of voters and other political parties and interested parties, all of whom have a stake in the elections.*

***Further, there are other bodies such as IEBC who are mandated to conduct the election in strict accordance with the law so as to ensure the proper legitimate conduct of the electoral process. It is amidst these competing interests that the soundness and eventual certification of the electoral process as a free and fair process in terms of Article 81 may be made.”***

In this regard, it is essential to take into account the competing legitimate expectations of the Petitioner, the Respondents *vis a vis* the expectations of the voters and other candidates in the Ward in question, all of whom had a stake in the elections.

The supreme court of Kenya stated in **RAILA AMOLO ODINGA V IEBC (2017)** that an election is not an event but a process. That all the processes beginning at the point of registration all the way to the point of declaring the winner, cumulatively make up an election. I wish to borrow this interpretation and state that the process of selection of the IEBC officials is crucial and part of the election process. The public is made to legitimately develop an expectation that the commission will select persons who are highly qualified and suitable for the sensitive task. It is expected that given the high stakes involved in election matters, nothing would be done outside the law and set regulations unless with clear and explained reasons.

### **ISSUE ON EXHAUSTION OF FORMS**

The IEBC as established under Article 88 of the Constitution is mandated under sub-article 4 to conduct and supervise elections in the country. This mandate comes with a requirement that the commission must be sufficiently funded in order to deliver. Billions of shillings are normally allocated to the commission for purchasing of equipment and setting the stage ready for elections. So much preparation is done in the period leading to the elections and especially in the 2017 general elections where huge chunks of money were expended in the preparation.

Seeing the kind of preparation done and the amount of money used, the Kenyan people must anticipate that the process will be smooth and easy. They must expect that all the materials necessary for the deliverance of an election are acquired. The people expect, which expectation must be respected, that when they wake up on the day of voting to go and vote, they will find everything at the station set and ready for the electorate to use. The people must find the station in operation, they must find the signs directing them to the station, they must see IEBC officials clothed in clothes that differentiate them from the rest of the people, they must find all the ballot boxes set, the booths in place and be issued with all the ballot papers, those unable to vote on their own must be in a position to get adequate help. The people must be able to get whatever reasonable help they may ask for and not a single person ought to be in any way disadvantaged because of an exhaustion of any material to be used during the voting period. If such a shortage occurs, then the commission must be in a position to act expediently and remedy it in order to allow an easy voting process.

It was testified by the petitioner and his witnesses that the oath of secrecy forms were depleted at Sifugwe polling station. They testified that the presiding officer at the station announced that the forms had been depleted and said that he would borrow some from stream 2 of 2. However, the witnesses testified that the forms were never delivered from stream 2 of 2. They said that for the rest of the day, the Presiding Officer remained the only person helping the voters who needed help and that some voters were frustrated and left without voting.

The presiding officer and his deputy testified that indeed the forms were depleted when the voting process was ongoing. They said that they called the center and were asked to borrow from stream 2 of 2 as the people at the center organized on delivering them other forms. However, the forms were never delivered from the center and neither did other forms come from stream 2. The shortage remained permanent since around midday until 1700hours when the station ought to have been closed.

The petitioner stated that due to the depletion, voters who needed assistance were disadvantaged because they could not get the help of the persons they trusted since it was only the presiding officer helping voters. The people understand that they are required to come in the company of the person who is

supposed to help them vote who upon filling the form proceed to help them vote. On this day however, it was not as was anticipated by the voters. Their legitimate expectation was breached unreasonably. They were informed that the oath of secrecy forms had been depleted.

It is not economically sound that a commission allocated billions of shillings to ensure that among other things the oath of secrecy forms are supplied to every polling station was unable to deliver this forms. The respondents cannot be allowed to treat this issue as a passing claim. The wrong committed by failure to supply sufficient forms cannot and must not be righted by the fact that the presiding officer stood in the gap to help the voters. Question is, were the voters expecting to have their assistants turned away and assisted instead by the presiding officer alone?

The answer must be in the negative. The voters' legitimate expectation was breached by the commission and for that they must be condemned. Accountability is taking root in Kenya after being entrenched heavily in the constitution 2010. It must begin with simple things like asking how and why forms so crucial to an election can be depleted when there were sufficient funds to acquire the forms. The commission did not explain to this court why the forms were insufficient and why it did not remedy the situation with expediency. For this reason, the commission must be condemned to bear the costs of this petition for unreasonably and unjustifiably breaching the legitimate expectation of the voters to vote with the help of their trusted assistants. The commission represented to the public their readiness for the election and made the public to believe without doubt that the election would proceed as usual and that all the materials to the election would be sufficiently available. In this courts opinion, the voters legitimate expectation that even the elder the ignorant and the physically and mentally as well as the intellectually needy voters would get a chance to vote though assistance which should be recorded in a particular for and no reasonable person would expect that such crucial forms could be inadequate or unavailable for any reasons.

### **ISSUE ON UNQUALIFIED CLERK**

It was the evidence of PW2 that Mercy Cynthia Barasa, who was a polling clerk at Budalangi primary school was a relative to one of the contestants of the member of county assembly seats. He said that he was well known to Mercy since he had married from her family. He testified that he was certain Mercy had not gone beyond standard eight. To rebut this evidence, the Respondents only stated that they had already destroyed the application documents that had been used by the applicants due to bulkiness. They further stated that Budalangi Primary school in which Mercy was a clerk had zero irregularities which mean that Mercy performed her duties with diligence and lawfully.

During the process of selecting people to help the 3<sup>rd</sup> Respondent herein with the electoral process, the 3<sup>rd</sup> Respondents posts on its website the requirements with which different persons shall be selected. These requirements are what the petitioner reproduced in his submissions one of them being that the applicant must have a K.C.S.E aggregate of C minus and above. The main contention of Mercy's selection surrounded this requirement because it was testified in court that Mercy had not studied beyond standard eight.

The doctrine of legitimate expectation covers both procedural and substantive aspects of an activity. It basically asks the question of what would a reasonable person in the circumstances have expected? Would the people of Bukhayo expect that the commission would employ an unqualified person to handle an election?

It is disturbing how the 3<sup>rd</sup> Respondents wish away the claim by the petitioner that they engaged an unqualified person. It is more irksome when they admit to hiring an unqualified person and stating that the said unqualified person had no errors when performing her duties, and therefore to them it is all merry and we should not interrogate the matter. What then would be the essence of setting requirements for people to be hired? This court will not treat the issue lightly as the respondents would wish it done. This court is alive to the special and delicate duty placed upon the 3<sup>rd</sup> Respondent herein, that of delivering among other things a credible election. Credibility of an election directly points to qualified and credible stuff. The fact that a ten-year-old can comfortably operate a KIEMS kit does not and must not mean that

the 3<sup>rd</sup> Respondent can engage the minor to operate the same during an election exercise. We need to get to the point where we allow our systems to work and for systems to work there ought to be rules and regulations set and which in turn the standards and requirements of engagement.

### **ISSUE ON KEVIN ODUORI OKELLO, A RELATIVE OF A CANDIDATE**

Kevin Oduori Okello was one of the clerks during the general election held on the 8<sup>th</sup> of August 2017. He was selected as an officer of the 3<sup>rd</sup> Respondent herein and mandated to serve as a clerk in Bukhayo ward. The Petitioner stated to the court that Kevin was irregularly and illegally engaged by the 3<sup>rd</sup> Respondent because he was related to one of the candidates who contested for the Member of County Assembly seats.

In rebuttal to the claim, the 3<sup>rd</sup> Respondent did not deny the existence of the affinity but only stated that the said affinity did not affect the credibility of the polls in any way. This is the much the 3<sup>rd</sup> Respondent said concerning the claim that had been proved by the petitioner to the required standard.

The 3<sup>rd</sup> Respondents are guided by *inter alia*, the Constitution in conducting their activities. The Constitution requires at article 81 (e) that the electoral system shall comply with a number of principles among them being free and fair elections which are;

- iii. conducted by an independent body
- iv. transparent, and
- v. administered in an impartial, neutral, efficient, accurate, and accountable manner.

Question then becomes, what amounts to independence, transparency and neutrality? Leaving aside what the Commission might be required to do based on their rules and regulations, it is expected that they cannot hire a person who is related to any of the candidates as an official of the election. The words independent body, transparent and administered in a neutral manner do not require rocket science or any other and further legislation for the commission to understand what it involves.

The 3<sup>rd</sup> Respondent put forward the defence that Kevin Oduori's affinity to the candidate did not in any way affect the outcome of the polls. Allowing such vice to continue would be setting an extremely dangerous precedent for the purposes of the elections to be held in future. It will be a future whereby the commission would freely commit offences and seek to justify such errors based on how the outcome of the election is. This trend must be avoided, and a message sent to the Commission to the effect that such mistakes as hiring relatives to candidates will not be condoned as it has the likelihood of conflict of interests.

Having stated the above, I find that the Commission was wrong to hire an individual who was related to a candidate to the polls. This is against the expectation of the voters that the election would be neutral and transparent. Regardless of how the outcome was, I am convinced that the procedural aspect of the doctrine of legitimate expectation was not met and the action by the commission breaches this expectation unreasonably.

### **THE UPSHOT OF ANALYSIS**

I have carefully examined the evidence, submissions and the results of the scrutiny. I have also considered the law pertaining to all the issues raised in the petition and the responses herein as well as my own analysis on the law in all aspects and circumstances of this case. The upshot of my analysis is that;

### **CONCLUSIONS:**

In view of the above analysis, this court has endeavored to answer the questions set out as the issues in this suit as follows;

1. The allegations of voter bribery and undue influence are serious criminal offences under Section 13 of the Election Offences Act directed at the 1<sup>st</sup> Respondent. This thus raises the standard with which such allegations are to be proved. The ordinarily set standard is higher than of a probability but not as high as beyond reasonable doubts.
2. In the courts opinion, the petitioner was duty bound to prove that there was voter importation, voter bribery and undue influence by the 1<sup>st</sup> respondent.
3. The court having listened to the witnesses, observed their demeanour and analysed their evidence finds that the petitioner did not discharge that duty to the required standard. In the absence of sufficient evidence, this court finds that the allegations for voter bribery and undue influence have not been proved and they therefore must fail.
4. There is a multiplicity of loopholes in the evidence and questions abound as to why the agents having well understood their mandate could not follow the laid down procedures in communicating their grievances.
5. Failure by the Petitioners, or any party's agents to be keen on what was happening at the polling station, or to sign the required documents or to exercise their rights of protest and demands for retallying at the polling station cannot be blamed on anyone else other than themselves. No-one else can be blamed for them having slept on their job.
6. There is a multiplicity of loopholes in the evidence and questions abound as to why the agents having well understood their mandate could not follow the laid down procedures in communicating their grievances.
7. None of the agents called as witnesses in this case proved any malpractice or irregularly or illegality which is capable of forming the basis upon which this court would nullify the elections in question
8. On the issue of Sifugwe Primary School Polling Station exhaustion of all forms 32B which are used to assist needy voters, I find that 2<sup>nd</sup> Respondent erred in law by failing to provide the necessary materials to ensure the standard of elections envisioned by the Constitution is achieved.
9. However, in this court's opinion, the allegations that the exhaustion of forms 32 B had the effect of compromising the secrecy of the assisted voters is not proved by the petitioner to the required standard.
10. On the issues of employment of Cynthia Barasa (alleged to be unqualified and Kevin Okello (alleged to be a relative of a candidate) I find that Prove that the unqualified clerk or the relative actually did influence the outcome of the election was required to the prescribed standard.
11. The Petitioner failed to prove the effect of the unqualified clerk and the affinity of the said Kevin Okello on the final result of the election. The petitioner was unable to prove to the prescribed standard of proof required and therefore the claims against IEBC relating to the employment of Cynthia Barasa (of incompetency) and Kevin Okello (of relationship to a candidate) must fail.
12. On the issue of tearing of ballots in advance I believe the 2<sup>nd</sup> respondent's IEBC's explanation that the torn ballots were lying openly on the table and that they were all given to the voters until they were finished and that no one was given more than one ballots and that no ballot was brought in the voting room from outside.

13. On the issue of the deputy presiding officer being found with two ballot papers which had been retrieved from a voter who had been given an extra ballot, I find that the presiding officer handled the issue of the extra ballot in a transparent manner which is in line with the aspirations of the constitution. I am further of the view that the petitioner despite having raised the issue to do with the extra ballots that were retrieved, did not demonstrate to the court how the ballot papers affected the final outcome of the election.

14. The complaints regarding unparticularized clerical mistakes in Form 36 As and 36B, I find that it is very farfetched and does not raise any issue with the results nor the process of voting. I therefore find that the burden of proof was not sufficiently discharged to the required standard.

15. On the question of communication between a candidate, agents and the voters still waiting in line to vote, I find no reasons to hold that the alleged 'communication between the 1<sup>st</sup> respondent and the three women/persons' affected the results for MCA or questioned the validity or compromised the integrity of the election process.

16. On the issue of the presence of **Fred Musirimba** the 1<sup>st</sup> respondent at the polling station, I find that regulation 62(1) (a) is very clear on this question. The candidates are not limited to have access to a polling station at any time. I further find there is no harm in any of the candidates coming into a polling station to check on the process. As the petitioner put across, he was allowed into 7 stations. The 1<sup>st</sup> respondent also went to various stations. Regulation 62(1) (a) was therefore upheld and respected

17. As to the general allegations of voter bribery and undue influence which are serious criminal offences under Section 13 of the Election Offences Act directed at the 1<sup>st</sup> Respondent. This thus raises the standard with which such allegations are to be proved. The ordinarily set standard is higher than of a probability but not as high as beyond reasonable doubts. The court finds that the said allegations were too generalized and were not proved to the required standard.

18. On the issue of whether the election conducted in accordance with the law, the answer is in the positive

19. On the issue of whether the election was free, fair and credible, the answer is in the positive

20. On the issue of whether the Irregularities affected the results, the answer is in the negative and I hold that the alleged irregularities did not affect the final results of the elections.

21. As to whether the election for Member of the County Assembly for Bunyala North Ward in Busia County held on 08.08.2017 was conducted in accordance with the Constitution, election laws and regulations, the answer is in the affirmative.

22. As to whether **Fred Musirimba** the 1<sup>st</sup> Respondent was validly elected Member of the County Assembly for Bunyala North Ward in Busia County, the answer is in the affirmative.

23. Having heard this case on merits, this court hereby issues a **DECLARATION** that the **Fred Musirimba**, 1<sup>st</sup> respondent was validly elected as the Member of County Assembly, Bunyala North Ward in Busia County.

24. The consequential orders which this court shall issue are that this Petition is dismissed.

25. On the issue of costs, I apply the doctrine of expectation and order that cost be paid by IEBC, 2<sup>nd</sup> the respondents. I cap costs at Kshs. 200,000 /= for each of the parties entitled to costs.

I take this opportunity to thank Counsel for all the parties herein for their indefatigable efforts in engaging in excellent legal research and well-presented legal work as well as their decorum in court.

This judgement is printed in duplicate and a soft copy stored in an electronically protected data bank. A copy of this judgement can be obtained upon payment of court fee amounting to Kshs. 60 /= per page.

**Dated, signed and delivered at Busia this 20<sup>th</sup> day of February 2018**

**GN. WAKAHIU C. M. BUSIA**

Judgement delivered in open court in the presence of;

Mr. Ongoya for the petitioner

Okeyo for the 1<sup>st</sup> Respondent.

Okeyo holding brief for Mr. Ngaiywa for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents

Mr. Ongoya for the petitioner

I ask for an advance copy of the judgment since it is in soft form.

Mr. Ongoya for the petitioner

I pray that the Security for costs deposited by the Petitioner be released to the Petitioner.

Mr Okeyo

No objection. The same may be released to the petitioner

I also ask for an advance copy of the judgement. The 1<sup>st</sup> respondent is thanks the court and the counsels for the general conduct of this petition.

Court. The Security deposited herein may now be released to the depositor upon proper identification

**GN. WAKAHIU C. M. BUSIA**

A certificate to issue under Section 86 (1) of the Elections Act 2011.

**GN. WAKAHIU C. M. BUSIA**