



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATES COURT AT BUSIA
ELECTION PETITION NO. 8 OF 2017

YAITE PHILIP OKORONONPETITIONER

VERSUS

JAKAA GARDY ODARA.....1ST RESPONDENT

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION (IEBC)2ND RESPONDENT

JUDGEMENT

On the 8th 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 Bukhayo North Walatsi Ward, 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 Jakaa Gardy Obara 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 Bukhayo North Walatsi Ward was conducted in accordance with the Constitution Election Laws and Election Regulations.
2. Whether the 1st respondent was validly elected as the MCA Bukhayo North Walatsi 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 PHILIP OKARONON YAITE:

PW1 said he did not have another affidavit other than the one filed herein. He filed his list of witnesses on 6.9.17. and was named as the 1st witness. Further stated that the booklet before him did not have his affidavit. His lawyer was to explain where it was. In his petition paragraph 7, PW1 said that he observed that the whole process was flawed and the results were a sham a fraud and nullity. The election did not meet the threshold. He quoted the Election Act in para 7. But did not specify the section of the Election act. He also did not state what amounted to the flawed election. A sham and fraud and nullity is specified.

Paragraph 9 – There was unprocedural irregularities NOT stated. In para 10, PW1 said the elections did not conform to the Constitution but did NOT specify which Article was breached.

Para 13(1) the grounds of petition

- Violence and intimidation – not specified who committed the violence
- No names of victims of the violence
- People were relocated not stated who was re-located.

He said that paragraph 14– PW1 said he would call for documents. He was NOT aware that none have been served on the respondents

He confirmed that there was No named agent who was bribed. None of the bribery substance money, food, etc. PW1 said it was not in the petition. No name recipient of the bribe or place and date of the bribe in the petition was stated.

PW1 further said that In his petition, there specific station where he stated that his votes were miscalculated or understated. He was voting at Lupida primary school. He said he did visit Otil primary school and virtually accessed all other polling station. He however did not state in his affidavit where he found any bribery. In his affidavit, he did not state he found anybody bribing anyone. He said he would have stated it if he found. PW1 further did not state where he witnessed violence anywhere. Nothing in his affidavit says he saw officials of IEBC doing anything unlawful. He did not state that in his affidavit.

There are 15 polling station but in total 22. PW1 said he went to 15 which were in the same compound. He was vying on an ODM party. He was aware that each party was sending an agent to the polling station. No single agent called him to claim that they were denied access. PW1 said that in his affidavit he had not identified any agent who called him to say they were denied access.

Document No. 3 the first document is Form 36(b). According to it the person who had the highest votes is the 1st Respondent. He garnered 1,910 votes. Nyongesa had 1694 votes. According to the document PW1 said he led 1620 vote some 7 agents signed this document (form 36(b). Two of the agents were from ODM. He confirmed the form has a stamp from IEBC and is on IEBC letter head. He however said the document on page did not have any letter head. Anyone can type that document. Further stated that those documents (page 5 and 6) are not signed by anybody. They do not show where they come from Page 7 a computer printout form. He did not know it. He voted at Lupida station 1

Form 36A (1st respondent list of witnesses) (page 22) PW1 identified the document before him as a form 36A. He said no one stopped him from voting. No one was stopped from voting within the 5 minutes he

was there. He also did not see anyone being bribed or being beaten

He said he garnered 186 votes according to the form 36 Ijaka Odara got 150 votes there . There was an agent from ODM there who signed Form 36 A. PW1 confirmed the agent's signature there. He said he had his own 36(A) from that station. That the one he had was not different from the one before him. He had the agent for ODM as William O. Barasa. Same was in his form 36A. He said those were the votes he got in that station but he could not verify. He also did not have another figure for that station. He said he tried to know how many votes he got at the polling station he was voting at. When the results were announced they said he had 186 votes. He further stated that he did not raise an objection because he presumed that was the correct tally. 1st Respondent list page 9 he gave Rosemary 1 of 1. He said he garnered 17 votes there. There was an ODM agent by name Christine Nakuye. PW1 said his ODM agent did not sign that form 36A. She was not his agent. PW1 further said that the agents were party agents, but they were supposed to be candidates' agents but seconded by the candidate. Candidates took their agent...as the agent served to be for a specific candidate. But they are all party agents. PW1 presented some agents.

He said he recommended and appointed them not the party. Number 6 Stephen Mugenyi was one amongst many agents (petitioners list of witnesses).

Stephen was an agent personally appointed by him. He however did not confirm that candidates recommend and the party appoints. PW1 said it was not true that candidates give and the party appoints. The candidates appoint. One whom he appointed was witness No. 6 Stephen Mugeni. He said he gave respondent page 10) list of witnesses Form 36A for Katira primary school 1 of 1. He had it. That form there was Paul Wekesa, agent for ODM he signed the form.

Page 1 Otili primary school polling station from 36 (A) form signed by ODM agent.

Lupida Health centre 1 of 1 pat 12. Form is signed. PW1 said he just saw the name (ODM) there is a name. ID number from under and a signature.

Mwangaza primary school 1 of 1 (page 13) there is an ODM agent who signed.

Page 14 Igara primary school 1 of 1 3 agents signed the form 36A. There were all candidates. 8 candidates did not have agents here where only 3 agents signed, the last agent is an ODM agent.

Igara primary 1 of 2 page 16 there were 9 agents two ODM agents signed.

Igara primary 2 of 2 (page 17) three agents signed. None from ODM. None from Ford Kenya. None from Independent candidate.

Further stated that they did not have all the agents represented. He also did not know if in some stations some candidates did not have agent.

PW1 did go to Igara primary school as he was visiting around. Agents were in Igara primary school. A few who he did not count were there. He said he went there at around 9.00 a.m. he did see an ODM agent at Igara 1 of 2 but he was outside the polling station. He was Stephen Mugeni. He was not inside. He told him that they were not allowed into the station. He complained to the Presiding Officer that as a candidate he could be present or his agent. PW1 said it was a big issue if candidates were denied access. However his affidavit does not state he complained. It was not in his petition. By the time he left the polling station he (Stephen) had not entered. PW1 further said that Stephen signed 36A for Igara primary school that he was present when he was committed at the time. He did not dispute that Mugeni signed. In some specific polling station where counting and tallying was improper he stated it was Lipida Health centre. There, he total number of Registered voters is 392. He said there was only one spoilt vote. In both there was a specific candidate who has zero vote. That is William Ekasiba candidate No. 7 which does not tally with Form 36B stating he got 21 votes. An anomaly. For Lupida Health centre. PW1 affirmed that the form was a carbon copy from IEBC. He said the Presiding Officer was matching the

names and votes by a straight line. There was a vote of Zero zero net matched to specific name No. 11 (36A) for Lupida primary school No votes shown to represent any particular candidate. The zero zero (next to 9) had also not been allocated to any particular candidate. The votes list (No. 7) missing 124 for the 1st candidate. The 7 candidates. It showed zero vote. One was left out. He said that form was signed by an ODM agent.

At Lupida Health Centre William Ekasiba on Form 36B he got a total of 1694 votes. He was given 21 votes. If he were to be given 21 votes he would still not have been the winner. In station within Ekasiba was given 21 votes but according to the form 36A it was 02 line 1-6 lines matching the votes. For votes 21 was not from the 7th candidate.

PW1 said he was not aware of any IEBC official who was charged with any election offence. He was not aware of any person who was charged or any property which was damaged during this election.

Further said he had not complained at Lupida that tallying was not proper. He had not complained.

He also had all forms 36. He got them from IEBC. Form 36B, he got them from IEBC. He said he got all the documents he needed from IEBC. Affidavit connection to the Notice of motion for scrutiny dated 6.10.17. PW1 said that was not his signature. The affidavit was however his. In his documents, he said he had not stated any particular station they asked about the centre ward for a recount. He voted at Lupida primary school, he said he had given reasons for requiring a recount. Allowing clerks to count and announce results. Not stated but results were erroneous.

In the 5 stations there are no specific affidavit para 16 1(d) IEBC was negligent. He said he would still stand by that position that invalids were delivered to in favour of the respondent.

In the affidavit he had not stated. In 16. 1(2) clerks to vote without assistance were not able to vote. The person supposed to assist was unknown to PW1.

He said he had voted 5 times since 1992. This was the first time to vote there at (Bukhayo/Walatsi North).

PW1 said he had not complained about Form 36B (tallying of votes) he only complained about irregularities. He also had not written any complaint to the IEBC. He had not provided any material evidence of agent having been injured during the election. In his petition and affidavit evidence, no material documents. He wanted a recount. PW1 said he was looking at the transparency. He had no complaint about the numbers. His complaint was about the integrity of the process. The election was not free and fair.

Free and fair. He however said he had not quoted any instance where elections were not free and fair

He said that NASA was a coalition of parties. It was not a political party. PW1 said that when moving around he did not see anyone who needed assistance being refused to assistance.

Cross-examined by Miss Nabulindo:

Paragraph 11 of his petition (page 4) riddled with blatant electoral malpractice. He said he had witnesses but had not sworn in the affidavit. Para 13 (page) violence there was not report of any violence.

Para 16.0 (page 6) instances of interference

- 1) Refusal – no report made on refusal
- 2) Refusal to provide (there was no report)
- 3) Although his counting of votes.... there is no complaint by him

- 4) Complaint of violence – no written complaint
- 5) Failure of IEBC C ... – no report
- 6) Allowing clerks to count and announce. He had not reported.
- 7) Clerks who were announcing instead of the Presiding Officer no complaint in his affidavit.

PW1 said he voted at Lupida primary school station 1 of 2. He woke up went to Lupida around 7 went in the queue. They verified his finger prints – cleared his name in the register. Given ballot papers went to the ballot booth. He looked on the respective candidate for each of the 6 ballots papers cast my ballot papers to the respective ballot boxes. He then left the station. He said he queued like any other voter. He did not miss any step.

All steps were undertaken. The environment was calm. There was no voter who he saw who did not follow the steps he followed. PW1 said one voter was ahead of him. His fingers were not identified by the KIEMs kit.

He then went around the stations to see what was happening. There were so many calls from the agents from different polling stations. He did decide to take the chief agent of himself. He said he did not make any complaint anywhere before coming to this court. Page 5 and 6 of list of documents this document was from the IEBC portal but nothing to prove that (e.g logo, stamp or signature) they just printed it. In may documents PW1 said he talks about bribery and violence.

He did not inform IEBC official of a voter being bribed.

His petition and affidavit do not mention the form of bribery.

As a candidate, he was aware that agents were supposed to be appointed by the party under our (candidates recommendations) in his petition and affidavit he had not stated that he was not satisfied with the results and the reasons given.

PW1 further testified that he knew who an agent was supposed to be. His/her role was to take care of the persons going on him representing candidates . NOT true to say that all the forms which were signed by his agents were true.

One signed by Stephen Mugeni. PW1 ascertained that Stephen Mugeni was called at the polling station Igara Polling station stream 1 and he was told to append his signature to Form 36A. He did not know whether it was voluntary or under duress.

Lupida No. 12 of list of witnesses (polling station 1 of 1). That document was from IEBC. An agent signed in agreement of these results. PW1 said his representative did not sign. He was in ODM. He saw no signature for ODM. That form indicates that a person purported to be his agent but PW1 could not see his/her signature. The essence would have been to ascertain the results after the voting process. The person who purported to sign for him at Lupida was not his agent.

PW1 stated about violence. He said he witnessed violence at the polling station. He reported to the OCPD. He did not report to IEBC officials. He further denied that the results for Lupida in 36A confirmed with the results of 36B.

RE-EXAMINATION BY MR. OKUTTA:

PW1 said yes he filed a petition. He was not a complainant of the election process. It was a complaint filed in court

In his petition, he stated the legal foundation of his petition (Constitution or Elections Act)

Para 5 of the petition it states which laws he relied on. There are specific Acts in the Constitution and Elections Act on the conduct of elections.

Para 10 of his petition PW1 complained about, he said that the declaration and return of justice does not conform to the law and is not a true reflection of the democratic will of the voters.

Para 18 of the affidavit in support of his notice of motion for scrutiny.

PW1 said they allowed counting of votes which were spoilt be counted in favour of the 1st respondent.

He said he mentioned specific polling station which he wanted a recount (for around 5 polling station) scrutiny and recount

Agents – PW1 said was to elect his own agent and recommend to the party. Each party allowed only 2 persons but only 1 is supposed to sign.

The IEBC document (page 16) of the 1st Respondent evidence Igara primary school. There was 2 ODM agents who signed for Igara primary school station. Page 12 some 3 agents signed. That was independent candidate. No explanation comments by the Presiding Officer. No reason given why they did not sign. Page 23 Lipida Primary school seen 2 agents signed for independent party. Other agent did not sign but reasons were not given. There were 3 independent candidates but only 2 signed. PW1 said it was put to him that Lupida health centre 1 of 1 there were some unspecified ODM agents who purportedly signed. There was however no signature (page 12) ODM agents purported to have signed is fishy. He did not know the one who purported to have signed there was one of his agent.

Lupida Health centre 9page 12) the right-hand side. PW1 said he could not with certainty confirm what the 4th candidate Nathan Nangira got.

The information does not tally with the form 36B. He was not happy with the manner in which the elections were conducted. He was concerned with the integrity and the numbers. He said an Election was a process not just about numbers.

PW1 said that in his petition the source of his information was not only from what he got but also from some of his witnesses who will testify.

PW2 AKAPETUS WILLIAM EKASIBA NYONGESA:

He confirmed that he was a contestant for the MCA seat. He garnered 1,694 votes according to IEBC declared results. He was number 2 in the race. He however has not filed an election petition challenging those results. Paragraph 8 of his affidavit. PW2 said he had not named specific station where votes were wrongly counted.

He said at Lupida Health Centre he was informed that” he has not disclosed who informed him. He had also not said the name of the woman who was beaten or why she was beaten. The same happened at Kapina (para 9) It might have happened. He further testified that all assisted voters without input of agents. PW2 said he went to 6 polling stations. He did not disclose which station. But he said he did not visit all polling stations. The rest he was told by his agents.

In view of that paragraph he had said he saw a woman being beaten. He had not specifically stated where there was violence.

Compromise between 1st respondent and 2nd respondent (para 7) He said he had not stated anywhere which compromise. He also said he reported but did not have the OB number. He had not written it there and he did not have it. Further averred that nobody was charged with violence pursuant to that ref. PW2 said he voted at Igara and denied voting in Bujuru. He said he was only born there but he had lived at

Igara for a long time.

Cross-examined by Miss Nabalindo:

PW2 said he voted at Igara. The process was

- (1) Identification by IEBC clerks identified by KIEMs Kit
- (2) Given ballot papers
- (3) Gone to the voting booth
- (4) Casting the votes
- (5) Ink to signify he had finished

All the steps were in order. He said all other voters were undergoing the same process. Paragraph 6 of his affidavit –PW2 said the results were doctored but had not filed a petition challenging the election himself.

Para 8 votes not valid were counted in favour of the 1st respondent. He had also not stated which or where. He said there was violence but he did not tell the court where there was violence. He said he did not report anywhere. That he saw someone hitting somebody but did not report to the police. In all 22 stations (para 10) affidavit of IEBC assisting voters without involving agents but he had not stated which or which IEBC official were assisting or how many officials did that. He said he did not state all these.

Para 11 “other station agents were chased away but he had not explained the agents who were chased away. He also had not stated. PW2 said he voted. Further stated it was hard to know who voted for who because it was by secret ballot. He would not know who would have voted for Yaite

Para 13 “other people eligible could not vote. PW2 said he had again not explained who could not vote. He visited polling station but he was not stopping for long. Thus he would not know who stayed at a polling station for how long.

Para 15 integrity not in accordance with the law. He did not state which law. He affirmed he was the 2nd runner up. He said he complained to the Returning Officer but did not bring it to court.

Re-examined:

PW2 said he had come there as a witness, a voter and candidate. He was not happy with what happened at North Walatsi

He said the Returning Officer advised him to file a petition in court. He however had not filed his own petition. He decided to support his co-petitioner instead (as a witness). PW2 said the results were not satisfactory. He did not understand how many votes he garnered. PW2 said he had 3 different result involving. One declared is from Nambale IEBC from Nairobi, he did not know 15610, another 1673 and 1694 (Form 36B)

At Lupida Health centre he said he was not satisfied. Kapina, there are 2 stations Form 36(B) reads different. PW2 said he saw violence at Lupida and Siere. It was involving a man and his wife but it was an election offence.

PW3 JOSEPH SHIKUKU NEKESA:

He said he was a super agent of ODM in 8 polling station Para 3 of the affidavit. He had not recorded any station where he was a super agent. From page 9 to 29 of the 1st respondents list of witnesses. He

however had not signed on (any of these forms (IEBC) forms.

Agents do sign oath of secrecy. PW3 said he did not sign any oath of secrecy. No letter to indicate he was an agent. He had no appointment letter. Para 4 during voting he said he saw IEBC clerks refusing to assist old women. PW3 however did not name any station where elderly women needed assistance.

Para 8 in some station, agents were not allowed to get into the station earlier. PW3 said he had not stated which station. He voted at Otil polling station. Nobody prevented him from voting. He did not report to IEBC that agents were prevented from voting. He said other voters at Otil were in a queue. Nobody was beaten up or prevented from voting.

PW3 said he visited 4 stations in the 4, he did not see any violence or bribery. Nobody was beaten or bribed. Their agents were available. He went to Igara primary (para 16 of 1st respondent reply) 2 agents (Stephen Mugeni and Lydia Kundu) signed.

Cross-examined by Miss Nabalindo:

PW3 said he was a super agent of ODM. He had no appointment letter in court.

He said he saw IEBC officials denying agents assistance to old women. He had however not told the court who these IEBC officials or the old women were.

PW3 said he knew the elderly women who were refused assistance. He signed the affidavit drawn by Mr. Okuta. He had again not stated how many women were denied assistance. He said it was difficult to know who was voting for who since it was by secret ballot.

He further testified the results for that ward were not ok. Agents were denied representation of their candidates. He was assisted by the Presiding Officer but did not include it in his affidavit.

Para 6 of PW3's affidavit he had not explained what was wrong with the allegations. Certain agent from Otil, Sire and Msokoto B agents were not allowed to enter early enough. He did not say who the agents were. Voting procedure was at Otil as

(1) Identification by KIEMs kit and ID register

(2) Ballot papers issued

(3) He told them he had sight problem he stood there for about 2 minutes. P.O. came. He did not see the ODM agent. He was asked all the position. He stated candidate of choice. Presiding Officer was marking it for him.

(4) Casting of votes assisted by a clerk to identify the boxes

(5) Ink to signify he had voted. He was reading the Presiding Officer and clerks badges.

PW3 said his work was to see how the IEBC officials were helping people. He knew Gabriel Okeyo. 1st Respondent replying (page 11) this is Otil polling station he can read. The 1st agent who signed was Gabriel Okeyo. He signed this document to confirm that results were ok. He said he was not at the polling station throughout.

Re-examined:

PW3 said he was co-ordinator in ODM MCA. He witnessed what happened. He knew Gabriel Okeyo who was at Otil. He did not see him signing. He knew not when he signed. IEBC could to be trusted because they prevented agents from assisting elderly women. Elderly people who could not be identified

by the KIEMs were chased out.

PW4 STEPHEN MUGENI AFUBWA:

He said he was an ODM agent. Paragraph 18 of the petitions list of witnesses is his letter from NASA that the signature of Raila Amolo Odinga. There is no party called NASA. It is just a coalition.

He said he was trained Msokoto to be an ODM agents. They were taught about Form 36A which report the result of particular polling station. They were to sign these forms after vote counting. The form was to have candidates, results and occurrences. Further that signing meant being satisfied with the results. If one was not satisfied, he/she refuses to sign and gives reason. PW4 said it had a statutory declaration that when results were being announced, the agent were present, and the results were accurate. They were taught so.

He signed form 36A. He witnessed the counting. Lydia Kundu was also there. She signed. PW4 signed form 36A when he entered. Form 36A is signed after vote counting. He entered at 1.00p.m. vote counting started at around 9.00 p.m. PW4 said the 6 agents signed after counting. Lydia Kundu was an ODM agent who signed. Igara primary polling station.

Para 16 of 1st respondent list (1 of 2) this was a form 36A. He said the entries are correct. Nobody requested for a recount. PW4 was satisfied with the results. He arrived at the school at 5.00 a.m. Many agents were out there. Only 9 agents signed eventually. The 9 were allowed to enter after producing their credential. He said he was personally told to wait because an ODM agent was already in.

That person was Lydia. When he entered at 1.00p.m. she went out. When counting, Lydia was called in. ODM was covered all the time.

PW4 said he voted at Igara dispensary at 10.00 a.m. there were other voters before him. He queued. He voted. He was not prevented from voting. No one was prevented from voting. He further testified that nobody was bribed not to vote or to vote for a particular candidate. Nobody was beaten up to vote or not to vote.

He was outside Igara primary school. He was told to stand at the gate. The queue was moving.

Para 7 of his affidavit says people came complaining. He said he had not stated what sort of complaints. He also had not stated the name of any voter who was prevented from voting. When he entered, PW4 said voting was in progress

Cross-examined by Miss Nabalindo:

PW4 confirmed that he was an ODM agent. He had no ODM letter only a NASA letter. he had his oath of secrecy which he swore before an advocate where they were being trained at Msokoto B. He said he never went to Nairobi to sign documents.

On training they were taught that every candidate should have an agent at all times.

He was told there was another agent already. The appointment letter was emanating from the party. The party was wrong in approving 2 agents to one station thus he was told he would enter later because they were two of them.

PW4 said he was at the polling station (Igara primary) from morning to evening except for a short time when he left to go and vote. He did not know who voted for who.

At the dispensary procedure was

(1) identification using ID KIEMs and register

- (2) Issue of ballots
- (3) At voting booth
- (4) Casting the vote
- (5) Inking to signify

That he had voted.

PW4 said the procedure at the dispensary was not the same everywhere. At igara primary was a person following up who was voting for who. He never reported that person neither did he put it in his affidavit. He never saw anybody complaining about voter influence. People were just complaining but not recording the complaints. He reported the complainant to an IEBC person who had a budge.

Re-examined:

PW4 said he was an agent for ODM. He was denied entry when counting began. The person following voters was an agent for one of the candidates IEBC was not okay at Igara primary. Lastly he stated that people who needed assistance should have been asking for assistance and should not have been followed outside.

PW5 PHILIP EMOJONG OSULIA:

He was an agent at Siere polling station. There was 1 polling station He said he was allowed to enter (para 5 of my affidavit at 12.00 noon. He remained there until midnight. He was also there when votes were counted. There were also agents. From 36A is the same which agents were signing. He did not sign. This (1st respondent list page 14) This is form 36A for Siere polling station.

The 3rd agent who signed it is Margaret Omanyo of ODM. Other parties' agents are for wiper and independent agents of ANC was not there during counting UDP agent – he did not know whether agent was there.

Margaret Omanyo came from opening at 6 was there during counting and signed Form 36A. PW5 said it was not true that results were proper. There was an appointment letter but it was not in file.

Agents took oath of secrecy. He had it in the file. When there, PW5 said he received voter complaint (paragraph 6 of affidavit) there were many, but he had not stated who the complainants were or nature of their complaint. PEO 1 – 2 – 3 (para 7) Not annexed. PW5 said he was at the counting hall at Siere polling station . He also went to the tallying centre at Kisoko.

At Kisoko, he heard results being declared. The Walatsi North he heard them declare that Jakaa Gardy was the winner with 1910 votes. At Siere he voted. Nobody prevented him from voting. Nobody threatened him. He also said nobody was threatened in his presence. Nobody was bribed to vote for a particular candidate or not to.

The Presiding Officer counted the votes at Siere. He also announced.

Cross-examined by Miss Nabalindo:

PW5 affirmed that he was an agent at Siere. He entered there late. That is why he did not sign form 36. He was the only agent for Mr. Yaite. The one who signed could have been for other candidates.

Yaite could not appoint. He did not know whether one had to sign form 36A.

About 36A if one is not satisfied one should not sign and vice versa. He said he was not told why he was

denied entry. PW5 said he voted at Siere as follows

- (1) Voter identification
- (2) Issue of voting papers
- (3) Marking votes
- (4) Vote casing
- (5) Inking

PW5 stated that these steps were in order and standard. He was not denied voting. Many voters complained but he has not stated the nature of complaints and who the complainant were.

PW5 said at the tallying centre results were being announced after totalling and polling station results. There was nothing wrong with announcing results after tallying IEBC was not at fault.

Re-examined:

PW5 testified that what was wrong was that people were already celebrating before results were announced.

PW6 ALBERT EKASIBA:

He said he never went for training for agency of political parties. Neither did sign an oath of secrecy document. He was given an appointment letter but he did not produce it in court. He said he had it in his pocket. Paragraph 2 of his affidavit. PW6 said he was an agent at Igara Primary school stream. He however did not state which stream he was an agent at.

He said he entered the station at 5.00a.m. When voting started, he was inside already. That he did not stay until voting was completed. At 6.00 a.m. he was chased outside (after one hour)

PW6 stated that voting was going on ok during the hour he was there. He was allowed to get in again at 7.00 p.m. He said the Presiding Officer chased him out at 6.00 a.m. citing reasons that there was a superfluous of agents. There were many agents then, 5 of them.

Page 16 of 1st respondents list of witnesses. Igara 1 of 2 shows that 9 agents signed From 36A. For ODM, 2 agents signed. PW6 said he was an ANC agent. Agents NO. 3 David E. Ekirapa was an ANC party agent.

He affirmed he got back at 7.00p.m. when voter counting was beginning. They started with the MCA position. He stayed on until this finished and issued form 36A, nine (9) agents signed.

He however did not sign. He was in another room when From 36A was being signed. Page 17 of 1st respondent list of documents (there were 3 agents polling station 2 of 2.

In the rooms he went, PW6 also did not sign. Nobody prevented from signing but he refused to sign and did not give his reasons for refusal to sign. He confirmed he was at Igara but did not sign.

PW6 said he voted at Igara. He voted there as the 1st person. He was allowed to vote. People behind him also voted. Nobody was prevented from voting. Nobody, including himself was induced to vote for or against anybody.

PW6 further stated that nobody was beaten up or prevented from voting.

Para (5 of his affidavit) he heard people complaining that their candidates of choice did not win. He said he could not know who had voted for who. 6 people told him that their candidate of choice was not winning. They came at 11.00a.m. but by then votes had not been counted. PW6 said he was there to give evidence but not because his candidate of choice did not win. He said the 6 complainants told him who their candidate of choice William Nyongesa Akepetus (PW2) but he did not win.

He further said it was true that 6 people cannot make one to win.

Para 7 IEBC did not do their work the IEBC did not allow him enter the polling station (see para 3)

PW6 said Josephine Inyata Wanyama denied him entry into the polling station. She speaks Kiswahili.

He denied that he was unable to express himself to the Presiding Officer in Kiswahili or any other language.

He further testified that a few persons in Igara do not speak Kiteso. He said he knew his duties as an agent even though he had not attended training. He also stated that he schooled upto std 3. He did not know how to read. David was his teacher. He said he knew how to write his name. He also knew his signature. He signed his affidavit. He said he also wrote his name as Albert.

Cross-examined by Miss Nabalindo:

PW6 said he was at Igara polling station 2 of 2 He denied that he was refused entry because he did not have the proper credentials. He said he had papers but he had not brought them to court. He said he knew now the meaning of form 36A. It shows the results. He refused to sign 36A because he was chased outside. He therefore did not write the reasons for not signing. He said he complained to the Presiding Officer and police took him out. This was about 6.00 a.m.

From 36A is completed after counting. He was back at the station at 7.00 p.m. but he did not sign 36A. In the morning when he was refused entry, PW6 was outside the polling station. This was after he shouted about voting. PW6 said he remained because he was an agent. He called his candidate who insisted he remains there. PW6 said the candidate came and spoke with the Presiding Officer but he did not know what he said. He only reported the matter to the Presiding Officer nothing else. He said he did not know the importance of undergoing training.

He claimed to know the IEBC work during election. I.e. to ensure voting is done properly

He further stated that IEBC refused him to be an agent not true that he did not have the necessary credentials, but he had them in his pocket. He explained who the 6 complainant were. The said 6 people were not witnesses in this case but he said they could come if needed. He said he had spoken the truth

Voting process were

- (1) Identification
- (2) Issue of ballot papers
- (3) Marking of ballot paper
- (4) Casting of votes
- (5) Inking.

The procedure was ok and standard. His complaint was only denial with the polling cent

Re-examination:

PW6 said he was an ANC party agent. No paper to prove so but it was in his pocket. His main complaint was that they chased him out.

Secondly, IEBC did not follow the proper procedure. He disputed the tally results

THE 1ST RESPONDENT

DW1 JAKAA GARDY OBARA :

He said he did not find anything wrong with the election process. He had agents in all 22 polling station. There was no complaint from anyone. There was no case of bribery. There was no case of violence.

He further stated that he never colluded with IEBC officials to give him more votes. He did not know any of the IEBC officials. He voted at Kapina primary school. Process was

- (1) voter identification by ID and KIEMs kit
- (2) the clerk issue of ballot papers
- (3) marking in the booth
- (4) casting of votes
- (5) inking to signify that he had voted.

He said he then went to Amagoro to relax. It was his agents who told him that IEBC officials conducted the elections fairly. He never had any complaint from any voter.

Cross-examined by Mr. Okutta:

DW1 said this was his 2nd time to vote. He was also elected in 2013. He did not work for IEBC. Neither did he know how they work. DW1 knew that a person may complain if IEBC does not do its work properly. He affirmed to have voted at Kapina primary school where he got 308. After voting he said he did not know how many he garnered. He went to Amagoro after voting. There were 22 polling station in North Walatsi. He only went to Kapina polling station.

DW1 again said he did go to 8 polling station. He went there to see how voting was progressing. He stated he had able agents whom he trusted. He did not go to the 8 station to influence voters. He only visited 8 of 22 polling station. He said information about the other 14 voting station came from the agents. He however did not name the agents who told him so he did not fear if they did a scrutiny in some polling stations. None of those forms 36A was original. DW1 said they were all copies. He got from IEBC. According to him IEBC did a perfect job. DW1 said the 2nd runner up was first announced as the winner. If he had worn before the vote counting was over he did not know. He only knew the results after counting. He also said it was not true a list of his agents for every polling station he did not retain copies of the oath of secrecy forms to prove that they were his agents. He said he relied on the IEBC report in Form 36A. The form before him was a photocopy not certified that its a true copy of the original.) It had IEBC stamp and logo.

He said the originals of Form 36A are with IEBC. Those were copies. He said the petitioner is only one person. That majority elected him, and his victory was fair and truthful. Declaration of his victory was on 9.8.17. His runner up had some votes he didI not know. DW1 said he had 1910. Not true that he used his financial ability to influence voters. Also denied that he had a group called jobless corner who beat up people. Neither was a woman beaten by her husband being forced by the husband to vote for him.

Apart from Form 36b, IEBC have that form. DW1 said he did not leave out the form 36B deliberately. If

it has discrepancies IEBC shall explain.

Re-examined:

DW1 said that before him was a form 36(B) in the petitioner's response. That form 36(b) He had no dispute with the results. There was no need to bring another.

DW1 denied that he sent a man to beat up his wife for failure to support him. He heard that allegation that morning. He also never knew whether the husband was charged with domestic violence. He further stated that he went to the polling station because other candidates were also doing it. So his agents also wanted him to pass by. Nobody communicated at 3.00p.m. that another had won. These form are cast (form 36A) was never disputed by the petitioner.

DW1 also said nobody reported to the police about his issuing money to influence voters. His agents who signed for him were appointed by himself.

DW2 FRANKLIN ELISHAM OSWAGIRA:

He said he voted at Lupida primary polling station. The environment was calm. There was no complaint, no violence, no bribery. He was an agent of independent candidate there. He appointed him. DW2 said he signed 36A agreeing with the results to signify the correction of the information entered herein. There were no complaints. IEBC official conducted a fair election. They had no problem. The elderly were assisted to vote by the Presiding Officer together with party agents. He further said no one was prevented from voting.

Cross-examined by Mr. Okutta:

DW2 said he was an agent of independent candidate. He had no appointment letter. There was an oath of secrecy form he had also not carried it. Affirmed that was form 36A. He annexed to his affidavit EF2A02. He said he got a copy. Also said Lupida had 2 agents. The other was Alumas Olwera. Alumas was for another candidate. DW2 did not know who. There were 2 independent candidates. The other independent was Silvanus Okumu Opiyo. In Form 36A, he said there are 5 agents who signed. There were 12 candidates.

DW2 said he went to the polling station at 5.00 a.m. While inside the polling station he could not know what was going on outside.

Re-examined:

He said the Presiding Officer recognized him as an agent and gave him a badge From 36A shows that he was an agent same ID number as his national ID. While inside the polling station, DW2 said he did not hear anything unusual outside the station. There was nothing unusual.

Form 36A was to be signed by authorized people agents at the polling station. He also said he had taken oath of secrecy.

DW2 further stated he had an appointment letter. He said the oat and appointment letter are with his lawyer. That when he went to the polling station, he gave the Presiding Officer the letter. He was given an opportunity after he was trained.

DW3 PIUS EKASIBA:

He said he was an agent at Kipina. DW3 never witnessed bribery, violence of prevention by IEBC officials. The Presiding Officer was assisting the elderly and needy. That was being done by all agents.

The Presiding Officer and clerks and IEBC were there during counting. Results were announced by the

Presiding Officer. He said agents present were signing 36A while others got impatient and left. The voting process was fair. There was security and no violence.

Cross-examined by Mr Okutta:

DW3 affirmed that he had a letter of appointment. Copy was not before the court. Only Gardy Ijaka was the independent Member of County Assembly candidate. Anybody saying they were two or three would be lying. He did not return a copy of appointment letter. He said he still had at home the results that were declared by the Presiding Officer called Gabriel N. Oundo and Deputy Presiding Officer William Wesonga. He signed to signify that their results were true. Everline the Presiding Officer did sign the 36A. She signed it in his presence. DW3 said that In the petitioner's copy Cornelius signature is missing. But his had her signature. According to the form the agents for independent candidate's agent No. 10 is not an independent candidate agent. Same as No. 2. There was only one candidate for independent. DW3 said he was not trained. He was late. He also did not have an oath of secrecy. He was not given an agent badge. He did not show it in court. He said he had returned the badge.

DW3 went to Bungoma at 2.00p.m. on 23.9.17. He was alone. Others came and found that he had left. The advocate's name was Paul Juma not Sara Juma.

Re-examined:

DW3 stated that the Deputy Presiding Officer would not sign the 36A after he identified himself. There were 11 agents where he was signing. The Presiding Officer told them that signing meant satisfaction. He said he did not sign the other candidates. He was sent by his own candidate. The Deputy Presiding Officer signed form 36A.

DW4 PHILIP WILLIAM KIMWENE:

He said voted at Lupida Health centre. DW4 said he never saw any violence or destruction of property. Personally he never heard some or observed any bribery case. The environment was calm.

Cross-examined by Mr. Okuta:

DW4 affirmed that he voted at Lupida Health Centre. He had only an ID in court. Nothing else showed that he voted. He said he voted at 2.00p.m. In the morning he was not at Lupida. He also did not know what happened after or before he voted. He went home after voting.

DW5 BILHA AKINYI WANGANYA:

DW5 said she voted at Msokoto 3 polling station. The environment was calm. There was no violence. No bribery no voter influence. She was assisted by IEBC officials where needed.

Cross examined by Mr. Okutta:

She affirmed to have voted a Msokoto B. She said she had a voters card but this time around she used her national ID card. She did not have the voter register. Further stated that it was not true that the name Msokoto DEB there is B and DEB. She voted at 8.30 a.m. then went home. She did not know what happened before or after voting.

DW5 denied that her voters card and national ID are different. She said her ID is 136705. The voter card shows 136705. They are the same. This not true that she was an imposter.

Re-examined by Miss Mumalasi:

DW5 presented her voter card. She confirmed it. She said her ID number has 8 digits. The voter card has 7 digits. The IEBC missed number 6. Further stated it was not her who wrote the voter card.

DW5 went on to state that when she registered to be a voter she gave her ID. That IEBC gives voter cards, but voters card is not used in voting. IEBC of Kenya registers voters and not her. Last but not least, she voted and did not witness anything unusual

DW6 VINCENT ADEBI EKISA:

He said the environment at Igara was calm. He never received any complaint from any voter. No one was denied access to voting. The voting was fair. Further testified that those who could not vote by themselves were assisted by the IEBC officials in the presence of agents

Cross-examined by Mr. Okutta:

DW6 said he took an oath of secrecy. He however did not have a copy of it. He said one was not supposed to disclose information after taking oath of secrecy. His appointment letter remained with the Presiding Officer. So was the case with the oath of secrecy. He was given a budge and he left it there with the Presiding Officer. He also signed form 36A showing that he was satisfied. The form 36A was original. He said he got the forms from IEBC. ODM agents at Igara, he could not remember. He signed only for CCM candidate. DW6 further said that the elections were free and fair also for those who lost.

DW6 said his duty was to stay inside and could not see what was happening outside. Polling Day Diary for Igara - He said he did not take a copy of the Polling Day Diary. He said he had just stated what he saw at Igara. The form 36A before him had no comment (on reasons for refusal.

Re-examined:

DW6 said there were ODM agents as well. They signed. Two of them. He was only looking into Dickson Wesonga entered. Lastly, he said there was no comment as to whether or not there were any violence or problem.

DW7 GABRIEL OKOYO ALEXANDER:

He testified that nobody was denied from voting. Nobody was denied access to the polling station. The petitioner has not changed. In the station he was he got 17 votes. Nobody voted nobody complained. He wished to have his affidavit adopted.

The environment was calm. Elderly were being given first priority and were assisted by Presiding Officer's and agents together. The Presiding Officer was announcing the result.

Cross-examined by Mr. Okutta:

DW7 said he brought himself to court. He paid his own fare. He went to Bungoma on 23.9.17 to sign an affidavit. It was prepared in his presence. He affirmed that he was an ODM agent. The appointment letter was taken by IEBC. He cannot be having it. He was then issued with a budge. It was taken back after voting. He never requested for copies of the letter of appointment, budge and oath of secrecy to attach to the affidavit.

He therefore had nothing to prove that he was an agent. He undertook some training for 4 hours. They were told what was expected of them as agents. He was expected to be in the polling station $\frac{3}{4}$ of time was spent inside the polling station. DW7 said he could tell what was happening outside. He said he saw what was happening outside.

The polling was inside a classroom with door and windows. They were 8agents. There were 11 candidates some candidates (about 4) did not appear to have been having agents. He would not say whether or not there was a possibility for some agents to have been refused entry or not. Gardy was an independent candidate but DW7 said he was agent for ODM. DW7 said Gardy approached him since he saw his name. He was not compromised neither was he promised any contracts because he was not a

contractor.

Re-examination:

DW7 said he entered as an agent alone. The others were already inside. Nobody was prevented from voting or sent outside.

DW8 EMMACULATA EKELLO OMANYO:

He said the environment at Siere primary school was calm. There was no violence, no bribery or influence. She was agent for Gardy Jakaa. DW8 said no one was prevented from voting or threatened or beaten. Those who could not vote on their own were being assisted by Presiding Officer in the presence of agents. The Presiding Officer announced their results.

Cross-examined by Mr. Okutta:

DW8 said she was born in 1965. There were many candidates. The 3 appearing on form 36A are the only ones who signed. The others did not sign for reasons she did not know. Some were sleeping and others were absent. She said they signed at 3.00a.m. Some people were sleeping. The Presiding Officer was calling out only those who woke up signed. He woke up all of us together. 8 agents did not sign and she did not know why.

Re-examined by Miss Mumalasi:

DW8 further testified that after counting at 3.00 a.m. they were called to sign form 36A. Some agents were just sitting and others sleeping. No agent was refused to sign.

DW9 RAPHAEL WANJAL EKESA:

He was the Presiding Officer at Igara primary. He signed form 36A for that polling 1 of 2. (page 16 of 1st respondent list of witnesses' documents) That was the form before him. He signed it. He said nine agents who were present during counting and voting. ODM had many agents. They were nothing wrong if many of them satisfied. He does not know about Ekasiba. He did not sign. He said nobody came speaking Kiteso and asking to be an agent and he denied. He declared the results as the Presiding Officer there were 11 candidates only 9 agents signed. These are the ones present. Stephen Afubwa agent No. 9 signed. That he denied him entry not true. He was there from the time he came in as par the Polling Day Diary. He requested an oath of secrecy and accreditation letter from the party. Ekisa of CCM called Vincent Ekisa signed this form

Cross-Examined by Mr. Okutta:

DW9 further testified that he was the Presiding Officer at Igara primary stream 1 polling station. 2 had a different P. Officer. He could not tell what was happening at 2.

He also did not receive any letter of appointment by IEBC. He said he was last in Kisii when he went to n 4.1.1.17 to sign that affidavit. He met Mr. Kennedy advocate. DW9 averred to have had contact with him. He also had Form 36A. He said he gave it to his lawyer in Kisii

DW9 further testified that as a Presiding Officer many activities were mainly inside the polling station. He could not know whatever was happening outside unless he was informed. He acknowledged that it was his duty to maintain a polling daily diary. But he did not annex a copy. He said they were trained that any occurrence must be reported in the Polling Day Diary. It was the only document allowed affidavit.

Re-examined by Miss Nabulindo:

DW9 said his affidavit was sworn by Mr. Kennedy. He has his office in Nairobi but it was possible for him to travel to Kisii. The Polling Day Diary does not contain results. He said Rapahel Wanjala Wekesa was him. He was the Presiding Officer and he signed the affidavit.

DW10 JOSEPHINE KIMINGA WANYAMA:

He said she prepared this form and signed it. There were 11 candidates 3 agents signed. She testified that there were many agents since morning. When signing in the evening many had left. Independent candidate agent did not sign neither the ODMs. They opened at 6.00a.m. DW10 said agents were merely informing her that they were leaving for health breaks or lunch. She could not force them to stay. Joseph Sitapakan did not sign. She also never prevented anyone from signing. Neither did she see anybody objecting after signing. IShe further testified that she gave copies of the forms to the agents. Nobody disputed anything Nobody contested anything. While inside, she did not see anybody being bribed or being beaten up.

Cross-examined by Mr. Okuta:

DW10 said she had been given an appointment letter by IEBC but IEBC never had it. She also had nothing to show that she travelled to Kisii on 4.11.17.

She said as regards Paragraph 6 of her affidavit that there was no violence or abnormality or any event. She also had not attached a copy of any Polling Day Diary. DW10 said it was not true that she refused to bring because it contains a lot of conflicts. She also did not object to scrutiny for that polling station. She was at Igara 2 of 2. Only 3 agents signed. There were 11 candidates. Agent for 8 candidates did not sign. She also did not indicate the reason but when she explain that they were not there when she asked them to sign It was around midnight.

It was not at 3 a.m. the agents were not there not that they were asleep.

She did not have a list of the agents in that polling station. For the 3 who signed, she did not have their letters of appointment. Even oath of secrecy and evidence they underwent training. She did not have the letters. She also did not have their badges. DW10 said she declared the results. She could see that form.

She confirmed it was a photocopy of the form she filled. It was however not a certified true copy of the original.

Re-examination:

She was the Presiding Officer (Josephine Kiminga Wanyama) DW10 said she signed her affidavit at Kisii before an advocate. She did not receive any complaint from anyone. She wrote nothing in the Polling Day Diary or Form 36 A. It was not her who has custody of the IEBC documents.

DW11 HUMPHREY ITISI KAFWA:

He said he was the Presiding Officer at Otil primary which had one stream List at page 11 From 36A for Otil primary school. He signed it. He also counted the votes and announced the results.

He said the election were free, fair and peaceful. Nobody protested or objected.

DW11 further testified that there was an ODM agent. He was not in this form. Nobody asked for a re-count. There was no case of bribery or voter beating, intimidation or influence. He said he signed the form as the Presiding Officer and that only Presiding Officer could sign the form. He gave out copies to agents and the others to the Returning Officer. The agents did not sign. Only agents present signed.

Cross-examined by Mr. Okutta:

DW11 said he was given an appointment letter but he did not have it in court. He also had no badge. He did not request for it for purposes of this suit. The day was a public holiday.

He had no Polling Day Diary. It was not annexed neither did he bring it with him. He further testified that the election were free and peaceful according to him.

He did not have a list of agents or copies of their letters of appointment. They were recruited in the Polling day diary. After voting and counting, they requested the credential to enable them get paid.

And they gave them back to them(agents). DW11 said his duties were carried out inside but he did not see or hear anything unusual. His Deputy Presiding Officer was one David Ouma. He said he opened the station at 6.00 a.m. and closed at 5.00 p.m. Total votes cast were 402. DW11 had his ID but did not annex it to his affidavit

Re-examined:

DW11 said his name is Humphrey Okafwa. He was not teaching. He signed form 36A. He could have not been allowed to sign it without a formal appointment letter. Only the Polling day diary contains the results. It does not contain everything in form 36A. DW11 said he did not see anything unusual. The agents credential had already been seen earlier and used to allow them in.

DW12 WILBRODAH AUMA OBORA:

He observed that it was 36A prepared by her. It was the same as the one prepared by the Returning Officer she signed it. An ODM signed it she is Christine Nakoye Opapu. She said only a duly appointed Returning Officer, Presiding Officer and Deputy Presiding Officer and agents are allowed to sign this form. She was therefore authorized to sign it. She further said she was at Igara dispensary. She declared the results. There was no unusual occurrence such as beating threats or bribery.

Joseph Shikuku Nekesa was an agent claiming that she chased him. DW12 said she did not chase him. He did sign the form. He is not in the form. She further testified that 2 rejected ballot papers were recorded. She did not give them to Ijaka. That here in that station Ijaka got 3 votes.

Form 36B Igara dispensary is no. 6 shows Gardy got 3 votes which tally with the entries on 36A.

Philip garnered 17 votes in the station – Form 36B this tallies with the entry in 36A. Dw12 said she gave the forms to the Returning Officer.

Cross-examination by Mr. Okutta:

DW12 swore her affidavit. She had not annexed any credential to show that she was a P.O. at Igara. Not even her ID copy. She also had no list of agents at the polling station, she had not annexed it. Copy of Polling day diary not annexed. Affirmed that the 36A was a photocopy of what she completed. The original was with IEBC

While at polling station she could not see or know what was happening outside unless voters raised alarm that there was some unusual occurrences.

They would have recorded that at the Polling day diary.

Re-examined:

DW12 said she signed the form as the P.O. She did not receive any complaint from anybody

DW 13 JUMA FREDRICK TABATA:

A teacher residing in Busia county. He swore his affidavit at Kisii before Kennedy Otieno advocate. He wished to have it adopted.

Cross-examined by Miss Mumalasi:

DW13 said he counted votes in Msokoto Polling station B 2 of 2. Confirmed that was Form 36A of the station. It was a photocopy of the original which he prepared. He signed it. His Polling day diary also signed. There were 10 agents considering that they were 10 agents and 11 candidates only 10 agents appeared and he allowed them to sign. He further testified that he had some 3 rejected ballots. Petitioner Philip Yaite got (44) votes. Ijakka Gardy got 11 votes. 3 were rejected. From 36B by IEBC the entries for Msokoto B are the same 11 votes for the petitioner. Gardy got 44 votes and 3 votes rejected as per the form 36B. All are reflected in accordance with what is reflected in 36A. He declared the results. No agent refused to sign his 36A. He signed that document by the authority of IEBC as the Presiding Officer. He was appointed by IEBC.

Cross-examination by Mr. Okutta:

DW13 said he is a teacher. He had nothing to show that he was a Presiding Officer there. Neither did he annex a copy of his ID. He was at Msokoto B(2) of (2)

He identified the form 36A photocopy. He said it was not certified to be a true copy of the original.

No certification of IEBC that it is a true copy of the original. It does not say this is a true copy of the original. He also said he had no letter of appointment, no list of agents no badges. He had surrendered them to the IEBC.

Re-examined:

DW13 said he was not in custody of the badges and letters of appointment of the Presiding Officer and Deputy Presiding Officer and agents original. He found the forms and sent them through the KIEMs Kit

DW14 KONDITA NYANGWESO:

He said she was the Presiding Officer at Lupida Health centre. Inside the polling she was not told of para 12 of list of documents

She recognized a copy of the form 36A. She prepared it. It is a photocopy of what she made. On one date, voters are appearing on other the names are inside and the votes are outside. She said the original was okay by her carboned copy was wrong so she drew this line to match the number of votes with the candidates. The 4 candidates in Makunda Manuel Njira. He had zero votes. She did not draw a line for him. Gardy got 124 which also appeared in from 36B. Faith Karati got 17 votes also reflected on 36B. 3rd was Enock Kulundu got 4 votes which is the same entry in 36B. Yaite got 127. The same is reflected in both 36A and 36B. Wafula David got 0 zero votes in 36A and in 36B. Nyongesa Agapetus got 2 votes. The follower is Silvanus Opiyo had 21 votes (36A). Nyongesa got 21 votes (36b). In 36A it indicates he got 2 votes. The filing in 36A got 21 votes and 2 votes in 36B. Munyekenye had 2 votes Nyongesa 21. Okumu zero (0) when drawing lines to help in tallying, the discrepancy arose. Silvanus got 21 instead of 2 votes. DW14 said this could not change the final votes because the winner had 1910 which subtraction 21 from 1694 bring 1673 and the 2 which he got comes to 1675 which shall not make a difference in the final results.

Philip Yaite would still be in the same position. She testified that they completed the form at Midnight. She was fatigued. They had started working at 5.00 a.m. They had not slept on 7. They had gone to the polling station on 7th. She was exhausted. When she declared the results, there was an ODM agent who signed this for Nyongesa. Their ID was phone a signature and indicated.

Only 5 agents were present at the time of signing. That the form 36A is similar to the one by IEBC.

DW14 said 36A is a copy of what she prepared.

Cross-examined by Mr. Okutta:

DW14 said she did not show a copy of her ID. Not even an extract. No letter of appointment no badge form IEBC. The form 36A is a photocopy of a carbonated copy of which she completed. The original was left to the IEBC. The court could get a copy. She said there were some mistakes in the copy she prepared. It affected the results of some of the candidates.

Re-examined:

The form 36A shows she was the PO. DW14 said she completed it. She gave her credential i.e. her certificate, ID for her to be given an appointment letter by IEBC.

DW15 NOAH KIPKOGEI OWINO:

He said he was the senior-most official in the constituency. He acknowledged to have sworn the affidavit. He was the one who instructed the lawyer. He said he was here on behalf of IEBC. He had been in court throughout. He further stated that the petitioner had several form 36A several of them were referred in the cross-examination they are the same as his.

Form 36(b) has 2 papers. That was in the list of petitioners documents. It is a form 36B. He issued copies of 36B to the petitioner as well as his agents. Answer marked KUN (b) is the same form 36B. He said it was one and the same document as that which has been brought to court.

DW15 denied the allegation that clerks were declaring results. He said he was the one who declared results after receiving 36A from the respective Presiding Officers. On the allegation of multiple and instances of violence, he said he did not receive any complaint at all. Allegation that his officers were compromised and had criminal conduct by the respondent are not true. None of the 22 Presiding Officers or Deputy Presiding Officers or clerks were charged with any criminal offence. He said he had not been bonded to appear in any criminal case in respect of any offence.

DW15 further stated that clerks refused the agents para 16 not true that agents assist the people who are unable to vote as follows:-

- 1) voter comes with assistance
- 2) voter comes without assistant the Presiding Officer assist but agents are allowed to witness

Invalid votes counted in favour of the 1st respondent.

He said that Invalid vote doesn't apply they only have categories like rejected votes and disputed votes. Form 36B shows 34 rejected votes. The tallying shows that Ijaka Gardy had got 1910 votes

2nd Nyongesa Agapetus 1694 votes

3rd Philip with 1612 votes.

The issue of Lupida Health centre allegation is that the forms are distorted.

There was no query about Lupida concerning 36A. Before agents signed, they certified. At the tallying centre, DW15 said no query complain was raised by anybody before generating 36B. The petitioner never made a complaint about any particular station. No one has complaint at all. His petition does not show any place where he complained.

That the error at Lupida Health centre did not affect the final results. What the petitioner and respondent got properly reflected in 36B. It did not affect the final position or overall station from No. 1 – 11. Furthermore, there was no complaint registered with the petitioner that his Presiding Officer had abdicated their role and left it to clerks. The Polling day diary records/captures

(1) deeds of operations

i) IEBC

ii) Agents

iii) Observers

(2) Captures the number of ballot papers and serialization ad

(3) Turn count at particular time

(4) Any serious incidences worth noting

He said there was no complaint raised that Polling day diary had denied entries or missed entries. There were no issues involving the PSDs. The Polling day diary does not capture any results. Results are only in 36A.

Photocopies of Polling day diary were given to the agents. They do not give the agent photocopy. After the vote count, the Polling day diary is brought to the Returning officer for custody. He said he has never received any report for any station Polling day diary. He declared the results on 9.8.17 using 36B after tallying. Documents at page 7 and 8 of the list of documents by the petitioner and page 5 and 6. He denied knowledge of those documents. He said he only knew documents on page 3 and 4.

Cross-examined by Mr. Okutta:

He said he had no document as evidence that he was the Returning Officer. He was trained in terms of elections. Results for each polling stations are announced at the polling station by the Presiding Officer. In North Walatsi ward we had 22 polling stations.

The number of Presiding Officers was 22 also. That the people responsible for preparing 36A were those 22 Presiding Officers. What they prepared could not be changed by anybody. He however did not have a list of his 22 Presiding Officers. The court can only rely on what he was saying. DW15 said they had a number of clerks apart from Presiding Officers and Deputy Presiding Officers but he did not have a list for them. He said it was not true that in his custody in the office he had no letter of appointment for all the 22 Presiding Officer and Deputy Presiding Officers and clerks but that they were in his office.

All those who gave evidence here were his Presiding Officers.

In the sworn affidavit in support to this petition no supporting document was provided to prove their status. List of documents annexed to the affidavit at 36As are photocopies not originals. He said he signed to confirm they are photocopies. The carbon copies are inside the ballot boxes. The original are in the custody of the court, they were supposed to seal them. He said he could tell where they were since he had them as the Returning Officer,

Of all the forms he produced they were authored by Presiding Officer. They are better placed to produce them.

He further clarified that invalid votes is not applicable in electoral law. Votes are either

(1) Rejected or

(2) Disputed

The terminology invalid does not apply. Disputed are valid as per the judgment of the IEBC officials.

Votes which are irregularly pushed wrongly enter 36B is in error, without specified terminology. He went on to say that

1) Polling day diary is among the important document carrying important information. It is one of the many documents, but not the only document. If there is bribery and somebody complain, it must be reported in the Polling day diary.

Without the Polling day diary they would still know some things which happened. In certain from 36A also has a place for comments.

Form 36A is supposed to be done after counting and tallying of an incident after form 36A is entered, the information would be recorded in the Polling day diary.

He said Polling day diary has little space. Not everything can be captured there.

That his Presiding Officers told him what happened. He also went around seeing what was happening, but not at the same time. It could have been reported to a call centre if anything happened. He said he relied on information coming from 3rd party partially.

Its^t law, each party may appoint or may decide not to. There is no specific number of the S. 30 of the elections act IEBC regulates of the situation allows.

He confirmed he swore the affidavit in Kisii.

Results in 36A which differs from 36B amount to an error. An error can arouse when transposing.

He had annexed all affidavits by all 2 Presiding Officers to show what happened in all stations

Re-examined:

From 36B. He said he signed it as the Returning Officer. He was the Returning Officer for Bukhayo North/Walatsi Ward. The 36A were signed by the respective Presiding Officers. He was the only one in custody of all the letters of appointment. They gave them originals and retained the copies. He said he duly appointed all of them.

Rejected vote which cannot be rejected to any of the candidate for such reasons

- 1) Marked for errors,
- 2) Leadership
- 3) Not manual for any candidate.
- 4) Disputed – completely marked and intended to a particular candidate but agents claim to be for the irrespective principals.

Form 36 A the nature of counts should be

a) Count that tally about the particular standard not different from the PSD because it is a summary of what happened.

He also said that if he had received a bribery complaint the police were supposed to deal with it.

He could not manage all 22 stations by himself. His Presiding Officer would be briefing him. They brought photocopies. The original are in court.

The form 36A in the ballot boxes are carbon copies. The originals were in his custody before he brought them to court.

SUBMISSIONS

After the close of the parties' evidence, counsels for the parties also submitted on issues of law and facts as follows

PETITIONER'S SUBMISSION.

Counsel explained that by a Copy of Petition dated 6.9.2017, the Petitioner, Phillip Yaite Okoronon presented his Petition to this court seeking specific Reliefs in accordance to specific Articles of Constitution of Kenya 2010, and Election Petition Act No. 24 of 2011, and Rules 2017.

He said that among the prayers sought is the preservation of electoral materials and also scrutiny and recount of votes cast for candidates on 8.8.2017 in respect of Bukhayo North Walatsi Ward for Member of County Assembly.

Significantly however, counsel said that the Petitioner seeks an order declaring that the election of one Gardy Jakaa Obara as Member of County Assembly Bukhayo North Walatsi Ward on 8.8.2017 was null and void and further order that repeat poll be conducted for that ward in accordance with the Constitution and Elections Act No. 4 of 2011 and Regulations thereunder.

Counsel stated that in support of the Petition, the Petitioner swore an affidavit in accordance with the Rules and also filed those of his witnesses. He said that Phillip Yaite, the Petitioner, who was also a candidate in the same race for Member of County Assembly brings the Petition in such capacity and lists 3 broad grounds namely that of;

- i) Violence and intimidation;
- ii) Voter bribery;
- iii) Negligence on part of I.E.B.C officials in handling the said election.

He stated that the petitioner avers further in his Petition that there occurred evident electoral malpractices and illegalities that compromised the election of the declared candidate, Gardy Jakaa Obara, and therefore the election is voidable on those grounds.

Counsel stated that at the said election, Gardy Jakaa Obara was declared the winner with 1, 910 votes, while the second runners up got 1, 994 votes. Phillip the Petitioner got 1, 612.

Counsel said that the court, during Pretrial and by agreement of all the parties listed the following issues for determination among, others:-

- i) Whether the election conducted on 8.8.2017 at Bukhayo North Walatsi Ward was done in accordance with the dictates of constitution of Kenya 2010 and Election Petition Act and Rules.
- ii) Whether there were instances of violence, and whether such instances of violence affected the election.
- iii) Whether there were instances of bribery, and if same affected the said election.
- iii) Whether the election of Gardy Jakaa Obara was valid; and if not whether it can be nullified.

iv) Whether there should be an order of Repeat election in respect of Member of County Assembly, Bukhayo North Walatsi Ward.

v) Who should pay cost of this Petition?

Counsel submitted that in the Petition, and with evidence provided by the Petitioner and those of his witnesses, it is that the election of Gardy Jakaa Obara was not in accordance with the dictates of the constitution, and also Election Petition Act and Rules 2017.

He said that the Petitioner categorically demonstrated by way of evidence that the persons entrusted with the conduct of such election failed to comply with the Articles of Constitution on Election, and also infringed on the election Act No. 24 of 2011 and Rules.

Counsel reiterated that not only were there proven instances of violence affecting voters, and voting pattern in the said ward, but such violence had the net effect of discouraging eligible voters from voting thus affecting the whole exercise. That some of the willing voters were therefore disfranchised cannot be gainsaid. He said that the Petitioner through his witnesses PW2, PW3 and PW4 demonstrated that indeed violence existed and were perpetrated by known supporters of the M.C.A elect, Gardy Jakaa Obara. Further through evidence of the witnesses it was shown that known agents of rival candidate were locked out from witnessing voting exercise and counting at specific Polling Station. He submitted that the net effect is that there was infringement of Electoral Laws making the whole exercise a sham, and therefore voidable.

Counsel explained that in Response, the 1st and 2nd Respondent only provided mere denial without categorically responding to the factual issues raised in the Petition and rebutting the evidence provided by witnesses.

He urged the court to allow the petition and condemn the Respondents to pay costs after looking at the analysis of law applicable and principles in conduct of election Petitions analyzed below.

ANALYSIS OF EVIDENCE AND LAW APPLICABLE IN THE PETITION

Election is a Process Not an Event...and Every Step Counts

Counsel relied on the landmark ruling in Presidential Petition No. 1 of 2017, in which the Supreme Court of Kenya (SCOK) held as follows, *inter alia*:[\[1\]](#)

“**[224]** On our part, having considered the opposing positions, we are of the view that, the contentions by the 1st and 2nd respondents ignore two important factors. One, that elections are not only about numbers as many, surprisingly even prominent lawyers, would like the country to believe. Even in numbers, we used to be told in school that to arrive at a mathematical solution, there is always a computational path one has to take, as proof that the process indeed gives rise to the stated solution. Elections are not events but processes. As Likoti, J.F. opines “[e]lections are not isolated events, but are part of a holistic process of democratic transition and good governance...”[\[2\]](#) Incidentally, IEBC’s own **Election Manual (Source Book)**[\[3\]](#) recognizes that an election is indeed a process.

[225] There are many other authorities which speak to this proposition. In *Kanhiyalal Omar v. R.K. Trivedi & Others*[\[4\]](#) and *Union of India v. Association for Democratic Reforms & Another*[\[5\]](#), the Supreme Court of India, for example, stated that the word ‘election’ is used in a wide sense to include the entire process of election which consists of several stages and it embraces many steps, some of which may have an important bearing on the result of the process. These stages include voter registration; political party and candidate registration; the allocation of state resources and access to media; campaign activities; and the vote, count, tabulation and declaration of results.[\[6\]](#) Lady Justice Georgina Wood, the former Chief Justice of Ghana, made the same point and added other stages when she stated:

“The Electoral process is not confined to the casting of votes on an election day and the subsequent

declaration of election results thereafter. There are series of other processes, such as the demarcation of the country into constituencies, registration of qualified voters, registration of political parties, the organization of the whole polling system to manage and conduct the elections ending up with the declaration of results and so on”[7]

And according to the European Human Rights Committee, the process also includes the right to challenge the election results in a court of law or other tribunal.[8]

Here in Kenya, the issue of elections as a process was discussed in the case of *Karanja Kabage v. Joseph Kiuna Kariambegu Nganga & 2 Others*[9]108 where the High Court observed that:

“an election is an elaborate process that begins with registration of voters, nomination of candidates to the actual electoral offices, voting or counting and tallying of votes and finally declaration of the winner by Gazettement. In determining the question of the validity of the election of a candidate, the court is bound to examine the entire process up to the declaration of results....The concept of free and fair elections is expressed not only on the voting day but throughout the election process....Any noncompliance with the law regulating these processes would affect the validity of the election of the Member of Parliament.”[10]

He said that the Supreme Court further observed that: “...In this judgment, we have settled the law as regards Section 83 of the Elections Act, and its applicability to a presidential election. *We have shown that contrary to popular view, the results of an election in terms of numbers can be overturned if a petitioner can prove that the election was not conducted in compliance with the principles laid down in the Constitution and the applicable electoral law...*”[11]

Counsel stated that it was the humble submission of the Petitioner that the entirety of the process in the election of Member of the County Assembly for Bukhayo North Walatsi Ward was so tainted that the election cannot stand the test of credibility, legality and legitimacy.

Elections Must be Credible and Free of Violence and Malpractices

Counsel relied on Article 81(e) of the Constitution which he said 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;[12]

(iii) conducted by an independent body;

(iv) transparent; and,

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

In addition to these principles, counsel stated that 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. [\[13\]](#)

Counsel reiterated the decision of the Supreme Court in Raila Odinga vs IEBC where it observed that the principles cutting across all these Articles include integrity; transparency; accuracy; accountability; impartiality; simplicity; verifiability; security; and efficiency as well as those of a free and fair election which are *by secret ballot, free from violence, intimidation, improper influence or corruption, and the conduct of an election by an independent body in transparent, impartial, neutral, efficient, accurate and accountable manner.* [\[14\]](#) Page 82

He stated that the Supreme Court also made a mention of the decision of the Supreme Court of Uganda in the case of ***Rtd. Col. Dr. Kiza Besigye v. Yoweri Kaguta Museveni And Electoral Commission***³², where the Court defined free and fair elections to be where, *inter alia*, the electoral process is free from intimidation, bribery, violence, coercion, and results are announced in good time. [\[15\]](#)

He submitted that the 2nd Respondent was not only unable to guarantee and protect the electoral process in Bukhayo North Walatsi Ward, but they could not even protect their own election materials and officials as evidenced by the violence that led to ***Busia Magistrate Election Offences Case No. 11 of 2017***. IEBC officials were beaten up and ballot boxes and papers and forms destroyed. They cannot be accounted for as required by law and regulations governing elections.

CONCLUSION

He submitted in conclusion that the election for Member of County Assembly in Bukhayo North Walatsi Ward fell way below the threshold for constitutionality and legality. As the Supreme Court noted in the Raila Odinga case, “...***For, what is the need of having a constitution, if it is not respected?***” [\[16\]](#) The Court proceeded to conclude as follows: [\[17\]](#)

“It is also our view that the greatness of a nation lies not in the might of its armies important as that is, not in the largeness of its economy, important as that is also. The greatness of a nation lies in its fidelity to the Constitution and strict adherence to the rule of law, and above all, the fear of God. The Rule of law ensures that society is governed on the basis of rules and not the might of force. It provides a framework for orderly and objective relationships between citizens in a country. In the Kenyan context, this is underpinned by the Constitution....And as Soli J Sorabjee, a former Attorney General of India once wrote, the rule of law ““is the heritage of all mankind” and “a salutary reminder that ‘wherever law ends, tyranny begins’”. [\[18\]](#)

Counsel maintained that the Petitioner believed he had proven his case to the requisite standards, in both law and in fact. It is was therefore his humble submission and prayer that the declaration of Gardy Jakaa Obara and Member of County Assembly for Bukhayo North Walatsi Ward be nullified so that the people of Bukhayo North Walatsi Ward can be afforded the opportunity to elect a leader of their choice in accordance with the Constitution and the electoral laws of our land.

Counsel for the Petitioner beseeched the court to find that the petitioners case has been vindicated by the order of Recount and actual Recount which has revealed the following undisputed facts: -

- 1) The total declared votes cast were put at **7307**. However, upon Recount it was established that the same was **7294**. This also differs from what was observed in form 36 A’s which is **7318**. This makes a difference of **24** votes 7318 – 7294 so what is the position to be believed? The I.E.B.C did not conform to law by being accountable and there exist doubt which can only be resolved by an order for fresh elections.
- 2) On disputed votes declared were put at 34 whereas upon recount it was established to be 40 votes. Again, 6 votes could not be accounted for.
- 3) At Lupida polling station 2 of 2, Gardy Jakaa was said to have gotten 2 disputed votes in his

favour. Instead of 154, form 36A shows 156 where did same come from if not rigging in his favour?

4) It was established that accountable document being forms 36A for following station were never signed by agent for the petitioner giving credence to assertion that they were chased away. These were at following polling stations: -

- a) Lupida primary school polling station 2 of 2.
- b) Siera Primary School polling station 1 of 1.
- c) Igara Primary School polling station 2 of 2
- d) Musokoto primary school polling station 1 of 2.
- e) Dulionye primary school polling station 1 of 2.
- f) Kaludeka primary school polling station 1 of 1.
- g) Kapina primary school polling station 2 of 2.
- h) Igara Dispensary polling station 1 of 1
- i) Opedur primary school polling station 1 of 1
- j) Khwirale Centre primary school polling station 1 of 1
- k) Khwirale Centre primary school polling station 2 of 2

5) At Kapina Primary 1 of 2 school form 36A the presiding officer did not sign the accounting document form 36A. Again, of Kapina Primary school 1 of 1, there was no form 36A inside the ballot box? Where did it go to? Were there changes in it?

Counsel said that the total effect of what was observed upon scrutiny is that the elections were not conducted in accordance with the law. Counsel submitted that it is not enough to have numbers, but the said numbers must be gotten in procedure allowed by law on elections. That once there are doubts coupled with other factors we submitted on, nullification is unavoidable.

Counsel urged the court to find that the petitioner had established his case beyond shadow of doubt to warrant the court to nullify the election of Gardy Jakaa since same did not conform.

Counsel stated that he relied on the testimony of witnesses and results shown at scrutiny and recount.

THE 1ST RESPONDENT'S SUBMISSIONS.

On their part, counsel for the 1st Respondent explained that the Petitioner filed a Petition in the court dated 06/09/2017 seeking for the following orders;

- a) An order of the court that all ballot boxes, ballot books, votes cast, votes declared spoilt and forms used in the elections on 08/08/2017 from all the polling stations in Bukhayo North/Walatsi Ward be availed for preservation pending hearing of this Petition.
- b) An order that the Petition be provided with printouts from the Electronic voter and Identification Devices (EVID) and other electronic gadgets used for identification of voters in all polling stations in Bukhayo North/Walatsi Ward on 08/08/2017 by the Respondents within specific period prior to hearing of this petition;

- c) An order for scrutiny and recount of all the votes cast in all the polling stations of Bukhayo North/Walatsi Ward on 08/08/2017; by Petitioner and the court and result from such to form part of the decision of other prayers sought.
- d) A declaration that the 1st Respondent was not validly declared as elected Member of the County Assembly for Bukhayo North/Walatsi Ward on 09/08/2017 and such declaration by the 2nd Respondent was null and void.
- e) A declaration that the inherent rights of the Petitioner to free and fair election for Membership of the County Assembly for Bukhayo North/Walatsi Ward were infringed and therefore declare the return of JAKAA GARDY OBARA as Member of the County Assembly for Bukhayo North/Walatsi Ward null and void.
- f) Make an order that the 2nd Respondent do conduct a repeat poll for Bukhayo North / Walatsi Ward in regard to Member of the County Assembly in accordance with the Constitution and Elections Act No.4 of 2011 and Regulations thereunder;
- g) That the Respondents to pay costs of this Petition.
- h) That the court do issue any and such appropriate reliefs in the circumstances of this Petition.

He said that the Petition was supported by a supporting affidavit sworn by the Petitioner and that five witness evidence affidavits were simultaneously filed with the Petition, the same having been sworn by five other persons in support of the Petition herein.

Counsel said that the 1st Respondent filed his Response to petition together with an affidavit in support thereto. He also filed twelve witness evidence affidavits in support of his Response to Petition.

He stated that the 2nd Respondent on her part filed a Response to petition together with an affidavit in support thereto. That she also filed eight witness evidence affidavits.

He explained that the Petitioner later filed an application for scrutiny and recount and that at close of pleadings the matter was listed for pretrial conference. Directions were taken accordingly. Uncontested and contested issues were recorded. The number of witnesses and the time to be taken was also recorded as indicated hereinabove.

He said that it was agreed during pretrial conference that at the trial, the affidavits of the witnesses be adopted as evidence in chief and thereafter the witnesses be subjected to cross-examination and thereafter to re-examination.

He further said that the matter was then listed for hearing and at hearing, the Petitioner testified and called five other witnesses, then closed his case. That the 1st Respondent testified and called seven other witnesses while the 2nd Respondent called 7 witnesses who were 6 Presiding Officers and the Returning Officer.

Issues for determination

Counsel stated that the issues for determination were framed by the court as and duly recorded during the pretrial conference and that looking at the issues on record, he summarized them as follows;

- 1) Whether the Petitioner has proved the electoral malpractices, illegalities and irregularities he has alleged to have been committed by the Respondents.
- 2) If the answer above is in the affirmative, whether the proved electoral malpractices, illegalities and irregularities substantially affected the outcome of the results.

General applicable principles

1. The burden of proof

Counsel explained that the burden of proof in an election petition lies with the petitioner. That he must establish and prove all the allegations leveled against the Respondents regarding the conduct of the elections and the results announced thereafter.

He said that the first issue in an election petition is the issue of burden of proof. That a party who alleges the basic facts upon which his case is premised has the burden to prove those facts.

Therefore counsel maintained that the petitioner herein has the burden to adduce evidence to support his assertions as contained in the petition.

Counsel relied on the case of *Raila Odinga & Others VRS IEBC & Others Petition No. 5 of 2013*,

In which the Supreme Court of Kenya stated as follows as regards the burden of proof;

“A petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden.”

He further relied on the case of *John Kiarie Waweru vs Beth Wambui Mugo & 2 Others [2008]*

In which Kimaru J. held as follows;

“The burden of establishing all these allegations regarding the conduct of the said election and results announced thereafter is on the petitioner...”

Counsel submitted therefore that it is incumbent upon the Petitioner in this case to prove all his allegations of electoral malpractices, illegalities and irregularities leveled against the Respondents as contained in the petition.

2. The standard of proof

Counsel explained that standard of proof is the extent to which the petitioner should go to sufficiently persuade the court to interfere with the election results declared.

He cited Section 83 of the Elections Act which lays down the standard of proof required in election petitions in Kenya. He reproduced it 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 principles laid down in the constitution and in that written law or that the non-compliance did not affect the result of the election.”

He said that it follows that breach of the regulations or procedure laid down by the law which does not interfere with the democratic choice of voters will not persuade the court to interfere with an election result. Hence, unless the irregularities, malpractices and illegalities proved by a petitioner are such that they actually interfered with the free choice of the voters, the court ought not to interfere with the existing choice of the said voters.

Counsel further relied on the case of *John Kiarie Waweru*, in which the court stated as follows;

“this court will not therefore interfere with the democratic choice of the voters of Dagoretti constituency unless it’s established to the required standard of proof that there were irregularities and electoral malpractices that rendered the said elections null and void and

therefore subject to nullification. It will not be sufficient for the petitioner to establish that irregularities or electoral malpractices did (not) occur, he must establish that the said electoral malpractices were of such a magnitude that it substantially and materially affected the outcome of the electoral process in regard to the election held on 27th December 2007.”

The Hulsbury's Laws of England 3rd edition volume 14 paragraph 261, states as follows;

“An election ought not to be held void by reason of transgression of the law committed without any corrupt motive by the returning officer or his subordinates in the conduct of the elections if the tribunal is satisfied that the election was notwithstanding their transgression, an election really and in substance conducted under existing law and the result of the election, was not and could not have been affected by those transgressions.”

Therefore counsel maintained that the threshold set in section 83 of the Elections Act has made it trite law that the standard of proof in election cases is higher than in other civil cases. Thus it is higher than proof on a balance of probabilities but below proof beyond reasonable doubt applied in criminal cases.

Counsel further relied on the case of Hassan Mohammed Hassan vs IEBC & 2 Others EP NO. 1 OF 2013 at page 7 in which it was held as follows;

“ the standard of proof cannot be the usual standard of proof on the balance of probabilities applicable in civil cases. Such a standard in election petitions must be higher...”

Similarly, he counsel cited the Ugandan case of Toolit Simon Akecha vrs Oulanya Jacob L'okori & Another. EP 1 of 2011 [2011] UGHC 56 (Unreported) in which the High court of Uganda held that the said standard of proof is at a higher level in which the petition was to be **“proved to the satisfaction of the court.”**

Mulenga JSC of the Supreme Court of Uganda, in the case of Col (RTD) Dr. Kiiza Besigye vrs Yoweri Kaguta Museveni in Presidential Election Petition No. 1 of 2001 delivered himself on the issue of proving to the satisfaction of the court as follows;

“I do share the view that the expression proved to the satisfaction of the court connotes absence of reasonable doubt. The amount of proof that produces the court's satisfaction must be that which leaves the court without reasonable doubt.”

Counsel quoted the words of the court in the case of John Kiarie Waweru vrs Beth Mugo & 2 Others at page 5, where it was stated as follows;

“As regards the standard of proof which ought to be discharged by the petitioner in establishing allegations of electoral malpractices, there is consensus by electoral courts that generally the standard of proof in electoral petition cases is higher than applicable in ordinary civil cases i.e that 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 practices like for instance bribery require higher proof.”

Counsel also looked at the Nigerian case of Buhari vs Obasanjo (2005) CLR 7K in which the Supreme Court of Nigeria held as follows;

“The burden is on the petitioners to prove that non-compliance has not only taken place but also has substantially affected the results....there must be clear evidence of non-compliance, then that the non-compliance has substantially affected the election.”

Counsel submitted that for the Petitioner herein to succeed in his petition, he must satisfactorily convince the court, that the alleged non-compliance occurred and that proven non-compliance substantially affected

the results of the elections of Bukhayo North/Walatsi ward. This is a significant high standard of proof.

He explained that the basis for requiring this higher standard of proof was set down in the case of *Joho vs Nyange & Ano. [2008] 3KLR at page 507*, where Maraga J. (as he then was) rendered himself thus;

“Election Petitions are not ordinary suits. Though they are disputes in rem, fought between certain parties, election petitions are none the less disputes of great importance- *Kibaki Versus Moi Civil Appeal No.172 of 1999*. 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 Versus George Owiti & Another Election Petition 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.” (Underlining mine)

Similarly, in the Indian case of *Rahim Khursid vrs Khurshid Ahmed & Others (1975) AIR 290 1975 SCR (1) 643*, the Supreme court of India, though in strong words, put the same view as hereunder;

“However, we have to remember another factor; an election once held is not to be treated in a light hearted manner, and defeated candidates or disgruntled electors should not get away with it by filing election petitions on unsubstantial grounds and irresponsible evidence, thereby introducing serious elements of uncertainty on the verdict already tendered by the electorate.

An election is a politically sacred public act, not of one person or one official, but of the collective will of the whole constituency. Courts naturally must respect this public expression secretly written and show extreme reluctance to set aside or declare void an election which has already been held, unless clear and cogent testimony compelling the court to uphold the longest practice alleged against the returned candidate is adduced.” (Underlining is mine)

Counsel submitted that an election petition is a special type of litigation. Though it is civil in nature, it requires the Petitioner to prove his allegations on a higher standard than on the usual standard of proof on a balance of probability applicable in other Civil Cases.

He further stated that the elections of 8/8/2017 in Bukhayo North/Walatsi ward cost the country colossal sums of money and substantially disrupted the social economic lives of the people of the said ward. That the people turned up in large numbers to vote knowing very well the sanctity of the election exercise and what it meant to vote. He said that this was a serious exercise of great importance to the people of Bukhayo North/Walatsi ward. It therefore follows that whoever approaches this court seeking for the court to interfere with the verdict of the people of Bukhayo North/Walatsi ward, should do so with proper understanding of the magnitude of the seriousness of the recourse he is seeking from court. That the petitioner must understand that he is asking the court to ask the country to spend some significant amount of money which would have otherwise been spent on other most pressing needs like provision of healthcare or infrastructure. In addition, this person must understand that if the court grants his prayers and calls for fresh elections, all the people of Bukhayo North/Walatsi ward will have to deal with election related activities including campaigns and the election itself, which will substantially interrupt their lives. He said that having had 2 elections in 2017, this would therefore be the third time these people will be voting in a span of less than 6 months.

Counsel explained that while he agreed that the people can be asked to re-elect their leaders, it was his humble view that there must be very good and clear reasons given to the satisfaction of the court for that to happen. Counsel maintained that it was not enough to say that there was non-compliance with electoral laws. He insisted that it must be shown that the non-compliance substantially affected the outcome of the results in that whatever was meant to be the people’s verdict was clearly not.

Counsel stated in summary that the issue for determination before the court is whether the election for Member of County Assembly for Bukhayo North/ Walatsi Ward conducted on 08/08/2017 and whose result was declared on 09/08/2017 was conducted in accordance with the principles of the Constitution, the Elections Act and the Regulations. That if the court finds that there was non-compliance of the law, it ought to still go further to establish whether such non-compliance affected the final outcome of the results to the extent that the same would be unfair and unjust. He reiterated that Cogent, credible and consistent evidence to the satisfaction of the court must be presented by the petitioner showing that there was non-compliance with the law and that the noncompliance substantially and materially affected the result of the election.

Counsel submitted that breach of the regulations or procedure laid down by the law which does not interfere with the democratic choice of voters, will not persuade the court to interfere with an election result. Therefore unless the irregularities, malpractices and illegalities proved by the Petitioner are such that they actually interfered with the free choice of voters, the court will not interfere with the existing voter's choice.

He stated that the mere proof on the balance of probabilities of the grounds of the petition based on malpractices is below the standard of proof set by Section 83 of the Elections Act. The irregularities must materially and or substantially have adversely affected the free or democratic choice of the voters before the court would be persuaded to interfere with the declared election result.

Counsel listed the following allegations as having been leveled against the Respondents by the petitioner;

- 1) Violence and intimidation,
- 2) Voter bribery,
- 3) Negligence on the part of IEBC and
- 4) Flawed, shambolic, fraudulent, null, criminal, compromised, unaccountable, unverified, out rightly illegal elections and riddled with blatant electoral malpractices and glaring illegalities which offended the constitution of Kenya, the Elections Act and the Regulations.

A Violence

Counsel said that there was no cogent, credible or consistent evidence of violence from the Petitioner nor his witnesses. He stated that the petitioner together with all his witnesses do not allege to have witnessed any form of violence or intimidation. The only witness who alleges violence is one AGAPETUS WILLIAM EKASIBA NYONGESA who states at paragraph 9 of his affidavit as follows;

“That there existed violence at Lupida Health Centre whereof I am informed a woman voter was beaten to discourage voters. Same also happened at Kapina.”

Counsel explained that the witness did not state that he witnessed the violence. He says he was informed about a beating. That he does not disclose the name of the person who informed him of the same or the name of the woman alleged to have been beaten or the name of the person who allegedly beat the alleged woman.

He stated that there was no evidence of assault in terms of Medical chits or P3 form was produced in court.

He explained that the witness was one of the candidates in the disputed elections and yet he did not file any petition challenging the elections

He further reiterated that the alleged woman never testified in court to prove violence or assault.

Counsel further said that there was no evidence of anyone who was intimidated, scared, alarmed, discouraged, dissuaded, relocated or disenfranchised by violence as alleged by the petitioner in paragraph 13.1 of the petition.

Counsel stated that the petitioner also alleged that the violence was executed so deliberately, cynically and viciously by the 1st Respondent. With due respect, no single witness testified as having witnessed a single act of violence.

Counsel explained that even if violence were proved, that in itself would not be sufficient. That the petitioner must show that the same was done by the 1st Respondent or under his instructions; and that it substantially affected the election results.

He relied on the case of *Hassan Mohammed Hassan & Ano. E P NO. 6 OF 2013*, in which it was held that violence and intimidation amount to criminal conduct proscribed under section 65 of the Elections Act and that the standard of proof of such is proof beyond reasonable doubt. It was further held that mere or sketchy and generalized allegations are not sufficient to prove these serious criminal acts.

Counsel further relied on the case of *Philip Osore Ogutu versus Michael Onyura Aringo & 2 others* at paragraph 44 and 45 in which the court held as follows;

“Use of force or violence during the election period is an election offence. Section 65 of the Elections Act provides...Assault is also a criminal offence under sections 250 and 251 of the Penal code. For that reason, the law requires that proof of electoral violence is cogent and firm. That evidence must not only prove that violence occurred but also that it was associated with the Respondents.”

He therefore submitted that there was no proof whatsoever of violence in respect to the elections herein as no witness stated that he saw the 1st Respondent or his agents committing acts of violence or intimidation. That no witness testified that he was unable to vote due to violence or intimidation. This allegation therefore is false and should be dismissed.

a. Voter bribery

On the issue of voter bribery, the Petitioner alleged at paragraph 15.1 of his petition as follows;

“Your Petitioner as a candidate aver that there existed various and massive voter bribery on 08/08/2017 at a polling stations in Bukhayo North/ Walatsi Ward by known JAKAA GARDY OBARA and his known agents which compromised the integrity of the entire exercise. The Petitioner shall provide evidence at hearing of petition by leave of court and shall rely on evidence affidavit of witness.”

Counsel stated that the allegation was repeated in paragraph 17 of his affidavit in support of the petition. Counsel noted that the Petitioner did not state who was bribed, in what form was the bribe and the place where the bribing took place. He did not state that he witnessed any bribery. He said that none of the Petitioner’s witnesses alleged to have seen any bribery going on and they all denied ever witnessing bribery. Therefore he said that the Petitioner’s allegations of bribery are mere general allegations which are sketchy and with no substance or proof. Bribery is a very serious election offence.

Halsbury’s Laws of England 3rd edition Vol 14 page 222 at paragraph 384 on elections states regarding bribery as follows;

“As a general rule, due proof of a single act of bribery by or with knowledge and consent of the candidate or by his agents, however insignificant that act may be is sufficient to invalidate the election.....for these reasons, clear and unequivocal proof is required before a case of bribery will be held to have been established. Suspicion is not sufficient and the confession of

the person alleged to have been bribed is not conclusive. A corrupt motive must in all cases be strictly proved.”

Counsel relied on the case of *Joseph W. Khaoya vs Eliakim Ludeki & Ano. E P 12 of 1993 (unreported)* in which it was held as follows;

“ Election offences are serious matters with grave penalties. They amount to criminal charges which should be proved. The proof should be to a very high degree for the charges to be sustained before a court of law...”

Counsel submitted that no attempt was made by the petitioner to prove her allegations of voter bribery and treating of voters. He urged the court to reject this allegation as the same is hollow, vague and without basis.

b. Negligence on the part of IEBC

He stated that the Petitioner alleged several particulars of negligence on the part of IEBC officials as particularized under paragraph 16.1 of his petition.

He noted that the petitioner did not say he saw any of the IEBC officials commit the alleged acts and none of his witnesses said he saw the same being committed.

Counsel submitted that the allegations that clerks refused to allow agents to assist persons unable to vote is neither here nor there as assistance of persons unable to vote is not the work of agents, but the work of the Presiding Officer, who acts in the presence of party agents.

He submitted as regards the allegation that agents were not given forms 36A and said that the Petitioner was in court with all forms 36A, which he claimed were given to him by IEBC. His own agent one **GABRIEL OKOYO ALEXANDER –DW-7** stated that he was given form 36A by the Presiding Officer. It is therefore not true that the 2nd Respondent denied his agents forms 36A as alleged or at all.

The Petitioner also stated that IEBC allowed counting of votes declared invalid in favour of JAKAA GARDY OBARA to the detriment of other candidates. Counsel stated that no specific polling station is mentioned and no specific number of invalid votes is said to have been counted in favour of the 1st Respondent. That the Petitioner’s agents signed almost all the forms 36A and none made such complaint.

Counsel explained that during the hearing, none of the Petitioner’s witnesses alleged that invalid votes were counted in favour of the 1st Respondent.

Counsel said that the allegation that IEBC failed to act on complaints of violence affecting the voting process is false. No evidence was presented in court to show that there was violence or any report of violence.

He explained that violence is a criminal offence. No occurrence Book Number was shown to court to show that there was a report at the police station. There is also an allegation that clerks were allowed to announce results. He said that no evidence was given by any witness to prove this allegation. The Petitioner’s witnesses stated that results at the polling stations were being declared by the Presiding Officers. All the statutory form 36A which are the results were signed by the Presiding Officers and not clerks.

Therefore he maintained that these allegations are hollow and with no proof at all and the same ought to be disregarded.

c. Flawed, shambolic, fraudulent, null, criminal, compromised, unaccountable, unverified, out rightly illegal elections and riddled with blatant electoral malpractices and glaring illegalities which offended the constitution of Kenya, the Elections Act and the Regulations.

Counsel stated that the Petitioner alleged in his petition that the election for Bukhayo North/ Walatsi Ward was flawed, a sham, a fraud, a nullity, criminal compromised, unaccountable, unverified, out rightly illegal and riddled with blatant electoral malpractices and glaring illegalities which offended the constitution of Kenya, the Elections Act and the Regulations.

He explained that neither did the Petitioner nor any of his witnesses testify on the allegation and as to what acts were committed by the Respondents that could amount to a flawed, shambolic, fraudulent, criminal, blatant and electoral malpractices. No specific provisions of the Constitution, the Elections Act or the Regulations were mentioned as having been breached.

He reiterated that no IEBC official was charged with any criminal offence and neither was the 1st Respondent nor his agents.

In the case of Joho Versus Nyange Maraga J. (as he then was) stated as follows;

“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.”

Counsel submitted therefore that the allegations of breach of the constitution, the Elections Act and the Regulations herein are generalized allegations and there is no cogent, credible and consistent evidence on record proving the same.

Conclusion

Counsel concluded by stating that on all the allegations of malpractices, illegalities and irregularities by the petitioner, including allegations of violence, bribery, negligence and breach of the law; no attempt was made by the petitioner nor his witnesses to prove the same. The petitioner began and finished with a mere generalized mention of the same in his petition.

He said that from the record, there is no cogent, credible or consistent evidence to prove any of the allegations of non-compliance made by the petitioner.

He reiterated that if the court were to hold that what is on record constitutes cogent, credible and consistent evidence by the Petitioner, the next question would be whether the proved non-compliance were of such a nature as to substantially affect the result of the election. Simply put, is whether the threshold set out under Section 83 of the Elections Act has been met by the Petitioner. Specifically stated is whether the Petitioner has presented before this court, cogent, credible and consistent evidence to the satisfaction of the court to prove that violence, voter bribery, negligence and breach of electoral laws happened and if they did, whether the same substantially affected the results of Bukhayo North/Walatsi ward.

Counsel submitted that:

- 1) There was no proof of any of the electoral malpractices, illegalities or irregularities alleged by the petitioner and
- 2) That there is nothing to show that the results were affected in any way.

Ultimately, counsel maintained that there is nothing on record to show that there is need for this court to interfere with the democratic choice of the people of Bukhayo North/ Walatsi Ward.

Counsel said that it was his submission that there was no cogent, credible and consistent evidence placed before this honourable court to persuade the honourable court to grant the orders sought by the petitioner.

Having stated that the Petitioner has failed to discharge his initial burden of proof and failed to meet the

standard of proof to the satisfaction of the court, counsel submitted that the fate of this petition is an order for dismissal with costs.

1ST RESPONDENT'S SUBMISSIONS IN RESPECT OF SCRUTINY AND RECOUNT.

Counsel for the 1st Respondent stated that the court made a ruling on **15/01/2018** whereof the court ordered for scrutiny of all ballot boxes from all the polling stations of BUKHAYO NORTH/WALATSI ward. That the order was made after the parties had been ordered by the court to file final submissions, which they had done.

He stated therefore that the submissions are only in regard to scrutiny and recount.

Counsel said that scrutiny and recount in respect of all polling stations was done on 23rd and 24th January 2018 as ordered by the court.

He stated that on 29/1/2018, the court furnished all the parties with its own version of form 36B as indicated by IEBC vis a vis the results after scrutiny and recount. All the parties agreed with the courts tally of each candidate as indicated by IEBC and after recount.

He summarized the results obtained before and after scrutiny and recount as follows;

No.	Name of candidate	No. of valid Votes as per IEBC report	No. of Valid Votes upon scrutiny and Recount
1.	JAKAA GARDY OBARA	1910	1909
2.	KATAKA FAITH KEZIAH	327	326
3.	KULUNDU ENOCK NJAKO	80	78
4.	MAKANDA NORMAN ANJIA	12	12
5.	MASAKHALIA FRANCIS JEREMIAH ARWASSI	160	160
6.	MUYODI DICKSON MUNYEKENYE	66	66

7.	NYONGESA AGAPETUS WILLIAM EKASIBA	1694	1691
8.	OKUMU SILVANUS OPIYO	32	31
9.	OMUNA LAWI AKOIT	22	22
10.	WAFULA DAVID WAYNE	1392	1389
11.	YAITE PHILLIP OKORONON	1612	1610
	Total Number of Valid Votes Cast:	7307	7294
	REJECTED VOTES	34	40

Counsel made the following observations from the above;

- 1) In most polling stations there were no valid votes disputed by the parties.
- 2) The count by IEBC was accurate, verifiable, free, fair, accountable and transparent and in line with the provisions of the law.
- 3) The six votes increase on the rejected votes from 34 to 40 means that this was a mere genuine minor human error which can occur in any election as the same was done by human beings and a perfect count would be unlikely.
- 4) The votes indicated in every station is in most cases the same as the recount save for a few instances where there were minor errors.

He further made the following observations across the board;

- 1) That forms 36A were affixed outside the ballot box.

2) That forms 36A were also found inside the ballot boxes.

3) That all the forms 36A were duly signed by the respective presiding officers, their deputies and the party agents.

4) That Petitioner's party agents of the ODM party signed on almost all forms 36A.

5) That the used ballot counterfoils tallied with the votes found in the ballot box.

6) That it can clearly and unequivocally be noted that the clear winner in these elections was Mr. **JAKAA GARDY OBARA**, the 1st Respondent herein.

7) That the Petitioner's assertions that scrutiny and recount held 80% of his evidence is now clearer; that he had no evidence and was hoping to get evidence from scrutiny and recount, but as can be seen, the same exercise showed that the winner was clearly the 1st Respondent.

Counsel submitted that the recount and scrutiny has proved that the petitioner's allegations were mere allegations without any evidentiary support and should be dismissed. That the 1st Respondent averred that he was validly elected by the people of Bukhayo North/ Walatsi ward and this is distinctively clear from the scrutiny and recount. He prayed that the court upholds the Respondents' position.

He submitted that it is trite law that minor genuine errors on the part of IEBC in respect of the tally of votes cannot be a basis to invalidate an election. That the recount and scrutiny in this case has demonstrated diligence, professionalism and ethics exhibited by IEBC officials in the execution of their work, despite the pressure and conditions of work under which they worked, as they had to work continuously for over 48 hours without sleep and simultaneously handling elections of other 5 other seats involving very many candidates. They did a commendable job.

He said that it was therefore his humble submission that the petition lacks merit and it ought to be dismissed with costs to the Respondents.

2ND RESPONDENT'S SUBMISSIONS

THE BACKGROUND FACTS

Counsel explained that the matter before the Court for determination is an election petition being election petition dated 6th September, 2017 filed by one Yaite Philip Okoronon, hereinafter, 'the Petitioner'. He said that the Petition is supported by a Supporting Affidavit sworn by the Petitioner on 6th September, 2017 together with witness affidavits.

He explained that the Petitioner being dissatisfied with the election of the 1st Respondent, Jakaa Gardy Obara, on 08.08.17 as the Member of County Assembly of Bukhayo North/Walatsi ward, moved this Honourable Court to nullify the said elections. The Petition seeks for the following reliefs:

a) An Order of the Court that all ballot boxes, ballot books, votes cast, votes declared spoilt and forms used in the elections on 08.08.17 from all the polling stations in Bukhayo North/walatsi ward be availed for preservation pending hearing of this Petition.

b) An order that the petitioner be provided with print outs from the electronic voter identification devices (EVID) and other electronic gadgets used for identification of voters in all polling stations in Bukhayo North/Walatsi ward on 08.08.17 by the Respondents within specific period prior to hearing of this Petition.

c) An Order for scrutiny and recount of all the votes cast in all the polling stations of Bukhayo North/Walatsi ward on 08.08.17 by Petitioner and the court and result from such to form part of

the decision of the prayers sought.

- d) A declaration that the 1st respondent was not validly declared as elected member of the County Assembly for Bukhayo North/Walatsi ward on 09.08.17 and such declaration by the 2nd Respondent was null and void.
- e) A declaration that the inherent rights of the Petitioner to free and fair elections for membership of the county assembly for Bukhayo North/Walatsi ward were infringed and therefore declare the return of Jakaa Gardy Obara as Member of the County Assembly for Bukhayo North/Walatsi ward null and void.
- f) Make an order that the 2nd Respondent do conduct a repeat poll for Bukhayo North/Walatsi ward in regard to Member of County Assembly in accordance with the Constitution and Elections Act No. 4 of 2011 and Regulations there under;
- g) That the Respondents to pay costs of this Petition;
- h) That the Court do issue any such appropriate reliefs in the circumstances of this Petition.

According to the Petitioner, the Petition is based on three major grounds being>

- a) Negligence on part of the 2nd Respondent in conduct of election of 08.08.17 in Bukhayo North/Walatsi ward thus compromising the electoral process.
- b) (ii) violence before, during and after the elections of 08.08.17 in Bukhayo North/Walatsi ward.
- c) (iii) Bribery and corruption.

ISSUES FOR DETERMINATION

- a. Whether the election conducted on 8.8.17 at Bukhayo North Walatsi Waed was done in accordance with the dictates of the Constitution of Kenya, 2010 and Election Petitin Act and Rules.
- b. Wether there were instances of violence, and whether such instances of violence affected the election.
- c. Whether there were instances of bribery, and if same affected the said election.
- d. Whether the election of Gardy Jakaa Obara was valid, and if not whether it can be nullified.
- e. whether there should be an order of repeat election in respect of member of county assembly, Bukhayo North Walatsi Ward.
- f. Who should pay cost of the Petition?

ELECTION MALPRACTICE ON THE PART OF THE 2ND RESPONDENT: NEGLIGENCE, VIOLENCE, BRIBERY AND CORRUPTION

Counsel stated that it was clear in the evidence given out by the Petitioner that out of the eleven (11) candidates that vied for the position of the Member of County Assembly of Bukhayo North Walatsi Ward, the petitioner wished himself to be declared the winner. He garnered 1,612 votes while the 1st Respondent garnered 1,910 votes.

He stated further that the Petitioner in his Petition and all the witnesses who testified in court entirely rely on violence, bribery and corruption to challenge the election of the 1st Respondent of which was never

established nor proved to the required standard.

Counsel said that the 2nd Respondent is established under Article 88 of the Constitution of Kenya, 2010. He explained that the 2nd Respondent is charged with the exclusive mandate of conducting or supervising referenda and elections to any elective body or office established by the Constitution and any other election as prescribed by an Act of Parliament. Further the 2nd Respondent is accorded the status of an Independent Constitutional Commission pursuant to Article 248(c) of the Constitution with the principal purpose of protecting the sovereignty of the people of Kenya among other functions. In carrying out its duties under Article 88 of the Constitution, the 2nd Respondent is enjoined by Article 249(2) of the Constitution to exercise its powers subject only to the Constitution and National Legislation.

Counsel stated that in accordance with the principles set out in Article 81 and 86 of the Constitution, the 2nd Respondent conducted a General Election on the 8th August, 2017 and for the position of Member of County Assembly Bukhayo North Walatsi Ward, Busia County where the following candidates contested:

1. Jakaa Gardy Obara	1910
2. Katatka Faith Keziah	327
3. Kulundu Enock Njako	80
4. Makanda Norman Anzia	12
5. Masakhalia Francis Jeremiah Arwasi	160
6. Muyodi Dickson Munyekenye	66
7. Nyongesa Agapetus William Ekasiba	1694
8. Okumu Silvanus Opilio	32
9. Omuna Lawi Akoit	22
10. Wafula David Wayne	1392
11. Yaite Philip Okoronon	1612

Counsel explained that upon conclusion of the voting and filling form 36B without any objections raised and by any of the candidates or their agents, the 1st Respondent was therefore declared the winner and gazette as the newly elected member of the National Assembly for Bukhayo North Walatsi Ward.

Counsel reiterated that the Petitioner and any of his agents had two distinct opportunities to raise objections at the Polling Station and at the Constituency Tallying Centre over the conduct of the elections and the announced results but failed to raise any. Further it was also confirmed by the agents presented as witnesses before the court that they did not contest any of the declared results. Upon verification and there being no objection at all by any of the candidates or agents the 1st Respondent was declared as having been validly elected by the 2nd Respondent. He said that the Petition is clearly an afterthought bereft of any valid grounds.

Counsel submitted that the Petitioner and all his witnesses testified that at no point was any voter denied the opportunity to exercise their right to vote and that the voting process was simple, accurate, verifiable, secure, accountable and transparent. That the votes were cast, counted, tallied, tabulated and the results announced promptly by the Presiding Officers at each Polling Station without any objection of the Petitioner's agents or the Petitioner himself. This admission under oath by the Petitioner and all his

witnesses confirm that the 2nd Respondent met the standards set by Article 86 of the Constitution.

Counsel stated that the Petitioner in his Petition stated that there occurred multiple, systematic and well coordinated instances of violence prior to, during and after the elections of 08.08.17 at various points across Bukhayo North Walatsi Ward. He noted however that during examination in chief, the Petitioner and his witnesses stated to court that they never witnessed any instances of violence before, during and after the elections of 08.08.17. This was also confirmed by the Respondents witnesses that there never occurred any instances of violence at Bukhayo North Walatsi Ward.

He invited the court to note that PW2, Agapetus William Ekasiba Nyongesa, gave evidence during cross examination that he was told of a domestic violence between a man and his wife during the election period. That this was not in any way related to the elections conducted. He said that there was no evidence given that violence was directed to supporters of a particular candidate by the other candidate. The said domestic violence could not in any way tilt the elections of 8.8.17.

Counsel stated that the Petitioner in his Petition also states that there existed various and massive voter bribery by the 1st Respondent and his agents at Bukhayo North Walatsi Ward which compromised the integrity of the entire exercise. He further stated that the Petitioner did not bring any witness or names of those who were bribed by the 1st Respondent nor his agents or campaigners. The Petitioner himself and all his witnesses testified under oath that they never witnessed any acts of bribery by the 1st Respondent. He wondered why there was no formal nor informal report made to the IEBC officials, the police or any other authority that deals with bribery. He said that the Petitioner stated during examination in chief that he never witnessed any IEBC official being bribed nor did he see the 1st Respondent in a forum with any IEBC officials.

He said that according to the Petitioner IEBC officials were negligent by refusal to allow agents entry into the polling station, refusal to provide agents with form 36A, allowing clerks to announce results declared at the Polling station and failing to act on complaints of violence.

He said further that the 2nd Respondent witnesses testified in Court that only party agents with requisite documents were allowed into the Polling Station. He said that the said documents include the letter of appointment and an oath of secrecy and that where any agent lacked any then he or she was not allowed entry into the Polling station. He said that PW4, Stephene Mugeni Afubwa stated that he was allowed entry into the polling station at 1.00 pm because he was informed that there is an ODM agent by the names Lydia Kundu and that the two cannot be inside the polling station at a go. PW6, Albert Ekasiba on the other hand was denied entry into the polling station. He stated during cross examination that he was never trained as an agent and he did not have the oath of secrecy but only the letter of appointment from the ODM party. He said that there was no any other agent who testified that he was refused entry into the polling station. Any agent who was not allowed entry into the polling station, reasons were given for his refusal.

Counsel explained that all the agents were provided with a copy of form 36A. No witness testified in court that he or she was denied to be given a copy of form 36A. that no witness testified that he saw clerks announcing the results at any polling stations. He said that it was only the Presiding officer that announced the results in all the polling stations. He stated that the 2nd Respondent witnesses testified in court that they never received any complaints whether formal nor informal during the elections period. That they could not fail to act on any report if it could have been given to them.

Counsel submitted that the Petitioner did not raise any issue in regard to the results of Lupida Polling station in his petition thus he abandoned it by himself. Lines matched the results garnered to the candidates. He explained that a mistake came up while drawing the lines matching the results garnered to the candidates. He stated that the said mistake however does not change the final results of the 1st, 2nd and 3rd candidates. This was verified by DW14, Nyangweso Candita.

Counsel submitted that the Petitioner failed by all standards to prove any of the allegations raised in his

Petitioner and has not met the statutory and legal threshold of proof thereby failing to discharge the burden of proof upon him by statute and precedent. On the other hand the 2nd Respondent has adequately addressed the alleged irregularities and further provided proof that such irregularities, if any, were not deliberate, fraudulent and that the results were not affected.

Counsel relied on the Supreme Court of Kenya decision in **RAILA AMOLO ODINGA AND OTHERS VS IEBC AND OTHERS PRESIDENTIAL PETITION NOS 3,4 AND 5 OF 2013** stated at Paragraphs 195, 196 and 203 thus:

“195. There is apparently, a common thread is the foregoing comparative jurisprudence a burden of proof in election cases. Its essence is that an electoral cause is established much in the same way as a civil cause, the legal burden rests on the Petitioner, but depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting. Ultimately, of course, it falls to the court to determine whether a firm and unanswered case has been made.

196. we find merit in such a judicial approach as is well exemplified in the several cases from Nigeria. Where a party alleges non-conformity with the electoral law, the Petitioner must not ably 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 acts: 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 prescription of the law.

203. 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 concert to give fulfilment to safeguard electoral rights...but at the same time, a petitioner should be under an obligation to discharge the initial burden of proof, before the Respondents are invited to bear the evidential burden. 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. In the case of data-specific electoral requirements...the party bearing the legal burden of proof must discharge it beyond any reasonable doubt. (Emphasis ours)

Counsel said that he adopts the Supreme Court findings as part of his submissions and further state that despite the failure to discharge the burden of proof and failure to meet the standard of proof by the Petitioner, the 2nd Respondents have given reasonable explanations to debunk the myriad of unsubstantiated allegations raised in this petition. He said that despite the lack of evidence of negligence, violence, malpractice, bribery and corruption on the part of the 2nd Respondent, the allegations raised have been responded to adequately and reasonably to prove that the elections of 8.8.17 was conducted in accordance with the constitution and relevant applicable statutes.

Counsel relied on Regulation 79(7) of the Election (General) Regulations 2012 which provides:

79(7) the absence of a candidate or an agent at the signing of a declaration form or the announcement of the results under sub-regulation (2) shall not by itself invalidate the results announcement.

Counsel stated that the petitioner stated that some agents did not sign form 36A and also some witnesses who were agents testified that they did not sign form 36A. Failure to sign the said form does not invalidate the announced results as no reasons were given for their failure to do so.

Counsel cautioned saying it is pretentious, dishonest and desperate effort to mislead the Court on the part of the Petitioner by trying to push a narrative that the figures are inaccurate. That it is only the 2nd respondent who can clarify and confirm the number of votes per candidate and this confirmation was

made by the 2nd Respondent witness, KIPKOGEI BOWEN NOAH. Counsel explained that the 2nd respondent must at all times enjoy the presumption of Validity of action as was stated by EM Muriithi J whilst quoting the finding of the Supreme Court in **RAILA ODINGA VS IEBC in PAUL GITENYI MOCHORWA V. TIMOTHY MOSETI E. BOSIRE AND TWO OTHERS (2013) Eklr.**

He stated that the Petitioner has not provided any proof of incompetence, malpractice or fraud attributable to the 2nd Respondent and such allegations of inaccuracy based on averments of the 2nd Respondent is entirely misplaced and indeed a desperate attempt to mislead this Honourable Court.

He explained that the Court is mandated to award costs of the petition. He submitted that by reason of the failure by the Petitioner to meet the standard of proof and to discharge the burden of proof imposed on him by statute and precedent, the responses filed by the Respondents, the complexity and importance of the matter at hand the petitioner ought to be condemned to pay costs of the petition together with costs incidental to the petition to the respondents. He relied on **ELECTION PETITION NO. 2 OF 2017** filed at Kerugoya High Court being **MARTHA KARUA VS IEBC AND 3 OTHERS**, LW. Gitari J whilst striking out the petition awarded Ksh. 10,000,000/- it ought to be noted that the petition was struck out on technicality whereas in this petition parties have filed responses, witnesses heard and have travelled to court in diverse dates.

Counsel submitted that the 1st respondent was validly elected as a winner having been declared so through a credible, free and fair elections. He said that the issues raised by the petitioner should be disregarded as they carry no water. That the will of the people of Bukhayo North Walatsi Ward declared the 1st respondent as a winner since the election was all about secret ballot. He said that neither the constitution nor the electoral laws were flouted from the start of the electoral process to the end.

In conclusion, counsel submitted that the petition lacks merit, the petitioner has failed to discharge the burden imposed upon him by statute and the Petitioner has failed to prove the alleged election malpractice and irregularities and there is no basis whatsoever for holding that the alleged malpractice/irregularities affected the results and as such the Petition is without merit and ought to be struck out with costs to the respondents.

Counsel stated that the 2nd respondent will also rely on these decided cases:

1. ELECTION PETITION NUMBER 4 OF 2013 M'NKIRIA PETKAY SHEN MIRITI VS RAGWA SAMUEL MBAE AND TWO OTHERS
2. ELECTION PETITION NUMBER 2 OF 2013 MOSES WANJALA LUKOYE VS BERNARD ALFRED WEKESA SAMBU AND THREE OTHERS
3. ELECTION PETITION NUMBER 8 OF 2013 SULEIMAN SAID SHAHBAL AN VS IEBC AND THREE OTHERS

2ND RESPONDENT'S SUBMISSIONS ON RECOUNT

Counsel for the 2nd Respondent explained that by a Petition dated 6th September, 2017 filed by one Yaite Philip Okoronon, hereinafter, 'the Petitioner', he sought the following reliefs:

- (a) An Order of the Court that all ballot boxes, ballot books, votes cast, votes declared spoilt and forms used in the elections on 08.08.17 from all the polling stations in Bukhayo North/walatsi ward be availed for preservation pending hearing of this Petition.
- (b) An order that the petitioner be provided with print outs from the electronic voter identification devices (EVID) and other electronic gadgets used for identification of voters in all polling stations in Bukhayo North/Walatsi ward on 08.08.17 by the Respondents within specific period prior to hearing of this Petition.

(c) An Order for scrutiny and recount of all the votes cast in all the polling stations of Bukhayo North/Walatsi ward on 08.08.17 by Petitioner and the court and result from such to form part of the decision of the prayers sought.

He stated that the Court granted prayers (a) and (c) to the Petitioner where ballot boxes, ballot books, votes cast, votes declared spoilt and forms used in the elections on 08.08.17 from all the 22 Polling Stations in Bukhayo North/Walatsi Ward were availed in court. That scrutiny and recount was done of all the votes cast in all the 22 Polling Stations in Bukhayo North/Walatsi ward. That the results after scrutiny and recount were presented in court.

Counsel explained that a recount is aimed at determining the number of votes cast in favour of each candidate to examine all the votes cast, to identify ineligible votes and to establish which votes if any were valid. He said that a recount is more involved in the arithmetic of the voting process. He further said that the purpose of scrutiny on the other hand is to determine the validity of the votes cast in favour of each candidate and helps the court to understand the details of the electoral process and gain impression on the integrity thereof; it is intended to assist the court in investigating allegations of irregularities and breaches of the law.

Counsel elaborated that upon the results after scrutiny and recount, it was very clear that the 1st Respondent is still the one leading and the Petitioner is a third runner up. He said that little mistakes were made by the Presiding Officers in counting votes at the Polling station, mistakes that do not change the final results declared. E.M. Muriithi J. at paragraph 57 of his Judgment in **PAUL GITENYI MOCHARA VS. TIMOTHY MOSETI E. BOSIRE & 2 OTHERS (2013) Eklr** stated:

“The Constitutional requirement for accuracy in election system cannot be construed to mean that the statutory forms for the recording of the results of an election must never have errors, corrections or alterations. Accuracy does not mean free from error which has been corrected, an impossibility in all human endeavour, accuracy will be served, if there exists a means of verification of the entries to test their accuracy and it necessarily imparts corrections by alterations, whether counter-signed or not.”

Further to the above, counsel relied on the decision by Maraga J. (as he then was) in **JOHO VS NYANGE (2008) 3 KLR (EP)** in which he 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. This court is mindful of the fact that at the stage where election officials are required to tally the results, some of them would have stayed awake for more than thirty six (36) hours and therefore simple arithmetical mistakes are bound to happen”

E.M. Muriithi J. went further to state:

“The general election of 2013 comprised elections to six different elective positions of the President, the County Governor, the Member of the National Assembly, the Member of the Senate, the Women Representative and County Waed Representatives and this must be taken to have increased six fold the probabilities of innocent human errors...it is not inconceivable and therefore definitely not inaccessible that the election officials who conducted the six elections officials over a period of three days on the 4th, 5th and 6th March, 2013 would have in human probability made errors...”

Counsel said that the 1st Respondent who was declared a winner by 1910 votes only lost one vote upon scrutiny and recount to get 1909 votes in all the 22 ballot boxes. He explained that the one vote that was subtracted from his had been marked twice for two candidates. He further said that it is a human error that the said vote was mistakenly placed as the counting of votes was done at night and all the IEBC officials were fatigued and such confusion could exist. He said that the 2nd runner up one Nyongesa Agapetus William Ekasiba had gotten 1694 and he lost only three votes upon recount and scrutiny to get 1691

votes. The third runner up who is the Petitioner had gotten 1612 and he lost two votes upon scrutiny and recount to get 1610 votes.

In conclusion Counsel stated that some votes had been marked twice but counted and placed in a certain candidate's batch, others had not been marked but counted and placed in a certain candidate's batch and others had been marked in favour of certain candidates but had been counted and placed in another candidate's batch. These sincerely are human errors. He said that the disputed votes after recount and scrutiny were only 12 votes while the range between the Petitioner's votes and that of the 1st Respondent was 298 and now 299 after the recount and scrutiny. He maintained that even if the 12 disputed votes are added to the Petitioner he still cannot lead nor be the winner. He said that the will of the people of Bukhayo North Walatsi Ward declared the 1st respondent as a winner and he still stands so after a free and fair election conducted by the 2nd Respondent.

He reiterated that the Petitioner had insisted in Court that 80% of his evidence will be in scrutiny and recount of the votes in all the 22 Polling stations. This made the Court decide that there be a recount and scrutiny of votes in all the 22 Polling station at Bukhayo North\Walatsi Ward. He said that after the Recount and scrutiny it is very clear that the 80% evidence does not even exist.

In conclusion, counsel submitted that this petition lacks merit and the petitioner has further failed to discharge the burden imposed upon him by statute. He said that the petitioner in his fishing expedition he has completely failed to prove the election malpractice except for the human errors that are expected to be made by man. He said that the petitioner has no basis whatsoever for holding that there existed irregularities/malpractice that affected the results. He therefore maintained that the Petition is without merit and ought to be dismissed with costs.

COURTS ANALYSIS OF ISSUES AND DETERMINATION OF THE CASE

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 8th 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.

VIOLENCE

Background

PW1 who is the Petitioner herein stated during his examination in chief that he did not witness violence anywhere. He said also that he has not provided any evidence of an agent having been injured during the election. He went ahead during cross-examination to state that he witnessed violence and that he took a step of reporting it to the OCPD but that he did not report it to the IEBC officials.

PW2 who was also a candidate in the disputed elections and who was the runners up stated that he was informed of violence having occurred. He said that he had not disclosed who informed him and neither did he say the name of the woman who was beaten up or why she was beaten up. He stated that he reported the violence to the police but that he did not have the OB number in court and that no person was charged with the offence of violence pursuant to that reference.

PW4 who was an agent testified and said that nobody was beaten up to vote or to refrain from voting for a particular person and that there was no violence that he witnessed.

Similarly all of the Respondent's witnesses testified in court and stated that they had not witnessed violence of any kind. They said that the environment was calm and conducive for elections and that every person who came to vote was freely allowed to vote.

The 2nd Respondent in his written submissions testified that he never received any complaints whether formal or informal from either the Petitioner or his agents of any occurrences of violence. The 1st Respondent on his part stated that there was no cogent, credible or consistent evidence of violence from

the Petitioner. He said that the Petitioner together with all his witnesses did not allege to have witnessed any form of violence or intimidation.

Mr. AGAPETUS WILLIAM EKASIBA stated in his affidavit as follows;

‘There existed violence at Lupida Health Centre whereof I am informed that a woman voter was beaten to discourage voters from voting. That the same occurrence was repeated at Kapina.’

The 1st Respondent noted that the Petitioner did not provide court with any evidence in form of medical receipts or forms to show that indeed a person was assaulted. He further stated that the alleged woman never testified in court to prove violence or assault.

Disposition

The Elections Act No. 24 of 2011 provides as follows regarding violence or use of force in an election:

65. A person who, directly or indirectly in person or by any other person on his behalf, inflicts or threatens to inflict injury, damage, harm or loss on or against a person—

(a) so as to induce or compel that person to support a particular candidate or political party;

(b) on account of such person having voted or refrained from voting; or

(c) in order to induce or compel that person to vote in a particular way or refrain from voting,

commits an offence and is liable on conviction to a fine not exceeding one million shillings or to imprisonment for a term not exceeding five years or to both.

Violence falls among what the Elections Act has grouped as election offences. These offences are not to be casually treated as they have disastrous consequences if proven. In **HASSAN MOHAMMED HASSAN V. INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 2 OTHERS (2013) E.P NO.1 OF 2013** the court wisely noted that ‘*violence and intimidation amount to criminal conduct (...) That mere or sketchy and generalized allegations are not sufficient to prove the serious criminal acts.*’

The Petitioner only stated that ‘Not only were there proven instances of violence affecting voters, and voting pattern in the said ward, but such violence had the net effect of discouraging eligible voters from voting thus affecting the whole exercise.’ This allegation is as flat as it can get. The petitioner had the burden of providing evidence to this court to prove to the court that indeed there was violence. The Petitioner ought to have had witnesses in court to testify that they saw the 1st Respondent or his agents committing acts of violence or intimidation. This was not done by the Petitioner and neither did he provide the court with the name of the alleged victims who were injured in the process.

It is one thing claiming that a particular offence occurred, and it is another thing linking the offence to the Respondent and the electoral process. In **PHILIP OSORE OGUTU V. MICHAEL ONYURA ARINGO & 2 OTHERS**, the court reiterated this position by stating that “*Use of force or violence during the election period is an election offence. Assault is also a criminal offence under Sections 250 and 251 of the Penal Code. For that reason, the law requires that the **proof of electoral violence is cogent and firm.** That evidence must not only prove that violence occurred **but also that it was associated with the Respondent***”

It is disastrous to the Petitioner’s case the fact that none of his witnesses was able to adduce cogent evidence that showed the existence of violence. The Petitioner himself appeared mixed up during cross-examination since he also claimed that he had not witnessed any violence but that he had been informed of it. The petitioner does not reveal to the court who informed him of the violence and similarly he did not state who it was that was affected by the violence. Is this the kind of evidence that is required to prove

such a claim?

It has been established by courts in several election petitions that the burden of proving election offences is not similar to that of proving ordinary election malpractices and/or irregularities. This position was reiterated in **BENARD SHINALI MASAKA V BONNY KHALWALE & 2 OTHERS (2011)eKLR** as was similarly stated in **RAILA AMOLO ODINGA V. IEBC & OTHERS (2013)** and also in **JOHO V NYANGE & ANOTHER (2008) EP NO.4 OF 2008** that;

***“The standard of proof refers to the level or degree of proof demanded by law in a specific case in order for the party to succeed. It is now settled that in Election Petitions, the standard of proof in allegations other than those of commission of electoral criminal offences is higher than that of balance of probabilities required in civil cases although it does not assume the standard of beyond reasonable doubt. However, where the petitioner alleges commission of criminal offences, the standard of proof on the criminal charges is beyond reasonable doubt.*”**

It suffices therefore that violence and intimidation is an election offence and thus requires a higher standard of proof which is proof beyond reasonable doubt. The Petitioner leaves so many loopholes in his evidence. It is not clear why he could not produce in court the victim(s) of the said violence or at least produce whoever informed him of the violence. The Petitioner instead bases his claim on hearsay with a view of convincing this court beyond doubt that indeed there was violence. Such allegations I am convinced are synonymous to what the Learned Chief Justice Maraga (as he then was) referred to as ‘generalized allegations’ in a decision he gave in **JOHO V. NYANGE & ANOTHER (2008) 3KLR** where he stated at page 507 thus;

“... 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.”

Violence must have involved some use of force to intimidate and/or threaten voters so that they either vote for or refrain from voting for a particular candidate. The Petitioner has to demonstrate to court that there was indeed actual use of force or actual threats to influence the process. This use of force must in return be linked to the Respondent or his agents. The petitioner ought to have demonstrated that the Respondent caused the violence or authored the existence of the violence and that the violence was used to his advantage. Otherwise, the Petitioner was to demonstrate that the violence substantially affected the final outcome of the election by tempering with the electoral process.

There was no proof of any report having been made to any police station by the petitioner or any of his agents for violence during the voting period. PW2 stated that he reported the violence to the OCPD but that he did not have the OB number. All of the polling stations were allocated police officers who tasked to oversee the electoral process. These officers were not called in court by the Petitioner to testify that indeed there was violence which tempered with the voting process. They could have explained to the court what steps they took to curb the violence, what the cause of the violence was and to what extent it affected the voting process. None of the agents including those of the petitioner recorded down the complaints at the end of the election in the Form 36A which they are required to sign. Some of these procedural steps appear very insignificant when they could have played a vital role in proving the occurrence of violence.

Having looked at the evidence produced in this court regarding violence and similarly having analysed the authorities both statutory and precedent, I am of the informed view that the Petitioner has not adequately dispensed with the standard of proof required for such a claim. I note with certainty that the allegation of violence and intimidation is a serious allegation which has disastrous ramifications. The standard of proof for such a claim is that of beyond reasonable doubt. The petitioner has not dispensed with this standard given his suspicions and hearsay evidence that he presented to this court. Such kind of evidence leaves substantive doubt as to whether there was any violence at all.

The petitioner has not properly established the occurrence of violence and neither has he linked the 1st

Respondent herein to any acts of violence. The Petitioner has not demonstrated to this court how the purported violence tempered with the voting process and how it affected the final outcome of the election. I treat these allegations as nothing but suspicions and general skeleton-claims which the Petitioner hoped to flesh during the proceedings.

This claim must therefore fail for failure by the Petitioner to prove the allegation to the required standard of proof.

VOTER BRIBERY

Background

PW1 confirmed in court that there was no named agent who was bribed. He stated that there was no name of the recipient of the bribe or place and date of the bribe in the petition was stated. PW1 said in his affidavit that he did not witness any person being bribed. It was clear also that PW1 did not inform the IEBC officials of voter bribery, and that in his petition and supporting affidavit, he did not mention the form of bribery.

PW4 stated during his examination in chief that nobody was bribed to vote for or not to vote for a particular person. He stated that he never saw anyone complaining of voter influence.

The allegations of voter bribery and undue influence are serious criminal offences directed at the 1st Respondent. This thus raises the standard with which such allegations are to be proved. The ordinarily set standard is that of beyond reasonable doubt which normally is applicable in criminal matters.

Both **Sections 62, 63 and 64 of the Elections Act, No 24 of 2011** contain a variety of acts which are considered to be treating and bribery in an election. The sections provide;

62. (1) A candidate who corruptly, for the purpose of influencing a voter to vote or refrain from voting for a particular candidate or for any political party at an election—

(a) before or during an election—

(i) undertakes or promises to reward a voter to refrain from voting;

(ii) gives, causes to be given to a voter or pays, undertakes or promises to pay wholly or in part to or for any voter, expenses for giving or providing any food, drinks refreshment or provision of any money, ticket or other means or device to enable the procurement of any food, drink or refreshment or provision to or for any person for the purpose of corruptly influencing that person or any other person to vote or refrain from voting for a particular candidate at the election or being about to vote or refrain from voting, for a particular candidate, at the election;
or

(b) after an election, gives, provides or pays any expense wholly or in part to or for any particular voter or any other voter for having voted or refrained from voting as aforesaid,

commits the offence of treating.

(2) A voter who accepts or takes any food, drink, refreshment, provision, any money or ticket, or adopts other means or devices to enable the procuring of food, drink, refreshment or provision knowing that it is intended to influence them commits the offence of treating.

63. (1) A person who, directly or indirectly in person or through another person on his behalf uses or threatens to use any force, violence including sexual violence, restraint, or material, physical or spiritual injury, harmful cultural practices, damage or loss, or any fraudulent device, trick or deception for the purpose of or on account of—

(a) inducing or compelling a person to vote or not to vote for a particular candidate or political party at an election;

(b) impeding or preventing the free exercise of the franchise of a voter;

(c) inducing or compelling a person to refrain from becoming a candidate or to withdraw if he has become a candidate; or

(d) impeding or preventing a person from being nominated as a candidate or from being registered as a voter,

commits the offence of undue influence.

(2) A person who induces, influences or procures any other person to vote in an election knowing that the person is not entitled to vote in that election commits an offence.

(3) A person who directly or indirectly by duress or intimidation—

(a) impedes, prevents or threatens to impede or prevent a voter from voting; or

(b) in any manner influences the result of an election, commits an offence.

(4) A person who directly or indirectly by duress, intimidation or otherwise compels or induces any voter who has already voted at an election—

(a) to inform that person or any other person of the name of the candidate or political party for which the voter has voted; or

(b) to display the ballot paper on which the voter has marked his vote,

commits an offence.

64. (1) A candidate who—

(a) directly or indirectly in person or by any other person on his behalf gives, lends or agrees to give or lend, or offers, promises or promises to procure or to endeavour to procure any money or valuable consideration to or for any voter, or to or for any person on behalf of any voter or to or for any other person in order to induce any voter—

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

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

(iii) corruptly does any such act on account of such voter having voted for or refrained from voting at any election, for a particular candidate; or

(b) directly or indirectly, in person or by any other person on his behalf, gives or procures or agrees to give or procure, or offers, promises, or promises to procure or to endeavour to procure, any office, place, or employment to or for any voter, or to or for any person on behalf of any voter, or to or for any other person, in order to induce any voter—

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

(ii) corruptly does any such act on account of such voter having voted for or refrained from

voting;

(c) in any manner unlawfully influences the result of an election;

(d) directly or indirectly, in person or by any other person on his behalf, makes any gift, loan, offer, promise, procurement, or agreement to or for any person in order to induce that person to
—

(i) procure or endeavour to procure the election of any person; or

(ii) procure the vote of any voter at any election;

(e) upon or in consequence of any gift, loan, offer, promise, procurement or agreement, procures or engages, promises or endeavours to procure, the election of any person, or the vote of any voter at an election;

(f) advances, pays or causes to be paid any money to, or to the use of any other person with the intent that such money or any part thereof shall be used in bribery at any election, or who knowingly pays or causes to be paid any money to any person in discharge or repayment of any money wholly or in part used in bribery at any election;

(g) being a voter, before or during any election directly or indirectly, in person or by any other person on his behalf receives, agrees or contracts for any money, gift, loan, or valuable consideration, office, place or employment for himself or for any other person, for voting or agreeing to vote or for refraining or agreeing to refrain from voting for a particular candidate at any election;

(h) after any election, directly or indirectly in person or by any other person on his behalf, receives any money or valuable consideration on account of any person having voted or refrained from voting or having induced any other person to vote or to refrain from voting for a particular candidate at the election;

(i) directly or indirectly, in person or by any other person on his behalf, on account of and as payment for voting or for having voted or for agreeing or having agreed to vote for any candidate at an election, or an account of and as payment for his having assisted or agreed to assist any candidate at an election, applies to the candidate or to the agent of the candidate for a gift or loan of any money or valuable consideration, or for the promises of the gift or loan of any money or valuable consideration or for any office, place or employment or for the promise of any office, place or employment; or

(j) directly or indirectly, in person or by any person on his behalf, in order to induce any other person to agree to be nominated as a candidate or to refrain from becoming a candidate or to withdraw if they have become candidates, gives or procures any office, place or employment to endeavour to procure any office, place or employment, to or for such other person, or gives or lends or agrees to give or lend, or offers or promises to procure or to endeavour to procure any money or valuable consideration to or for any person or to or for such other person on behalf of such other or to or for any person,

commits the offence of bribery.

(2) Any person who in consequence of that person's acceptance of any consideration votes or refrains from voting commits an offence.

I have handled the aforementioned issues comprising the issue of voter bribery and undue influence concurrently. The Election Act has classified these issues as electoral offences thus drawing a line in the mode of their determination. I set out in the preliminary to handle the issue of the standard of proof and

burden of proof since as the court stated in **MUSIKARI NAZI KOMBO V MOSES MASIKA WETANGULA & 2 OTHERS [2013] EKLK** that it is vital to first dispense with matters of who bears the burden of prove and to what extent. Particularly the court relied on the case of **MOSES WANJALA LUKOYE V BENARD ALFRED WEKESA SAMBU & 3 OTHERS (2013) BGM HC EP NO. 2 OF 2013** which stated that;

{34} The two terminologies; the burden of proof and the standard of proof are closely related subjects albeit distinct, (...). The legal burden of proof in an election petition rests with the petitioner; for he is the party desiring the court to take action on the allegations in the petition. Therefore, where the petitioner has laid prima facie evidence against the Respondent including the electoral body which as a matter of law must be a Respondent in an Election Petition, the law says that the evidential burden has been created on the shoulders of the Respondent who would fail if he does not adduce evidence in rebuttal.

The question that must arise from the allegations levelled by the Petitioner as regards voter bribery and undue influence is whether the Petitioner has provided this court with evidence enough to establish the occurrence of these acts after which the Respondent shall be invited to rebut. The burden in such allegations is not ordinarily as it is in other electoral disputes. These acts have been described by the Elections Act, 2011 as electoral offences whose standard of proof is beyond reasonable doubt. Unlike in other electoral disputes where the standard of proof is slightly above that of balance of probabilities albeit lower than beyond reasonable doubt, in electoral offences as the ones alleged herein, the Petitioner has the burden of proving to this court beyond any reasonable doubt that indeed the Respondent, either in person or through his agents committed the offences.

The Petitioner stated at paragraph 15.1 of the petition as follows;

‘your Petitioner as a candidate aver that there existed various and massive voter bribery on 08/08/2017 at a polling station in Bukhayo North/Walatsi ward by known Jakaa Gardy Obara and his known agents which compromised the integrity of the entire exercise. The Petitioner shall provide evidence at the hearing of the petition by leave of the court and shall rely on evidence affidavit of witnesses.’

The 2nd Respondent maintained in his written submissions that the petitioner did not bring any witnesses or names of those who were bribed. He stated further that the Respondent’s witnesses testified in court that they never received any complaints whether formal or informal of voter influence and said that had they received any such complaints, they would have acted on them.

The 1st Respondent also faulted the Petitioner for failing to disclose to the court the names of persons who were bribed, in what form the bribe was and the place from where the bribing took place.

The Petitioner only stated in his petition that there were instances of bribery and voter influence. This claim could be made by basically anyone who contested an election. Is this general statement enough to convince the court of the existence of bribery?

Disposition

I begin by quoting the **HALSBURY’S LAWS OF ENGLAND, 3RD EDITION, VOLUME 14 at pg 222** where it is stated that:

*‘As a general rule, **due proof** of single act of bribery by or with the knowledge and consent of a candidate or by his agents, however insignificant that act might be is sufficient to invalidate the election (...) for those reasons, **clear and unequivocal proof** is required before a case of bribery will be held to have been established. Suspicion is not enough and the confession of the person alleged to have been bribed is not conclusive. A corrupt motive must in all cases be strictly proved.’*

From the above, it appears like what separates suspicions from reality is due proof. It does not matter the gravity or magnitude of the bribery, all that a petitioner is required to do is prove even a single act of

bribery and that will be enough to invalidate an election.

Proof is everything. Does the petitioner convince the court that a particular thing happened. It is for the Petitioner to dispense with all doubts reasonably within the mind of the court. At that point then the Respondent is welcome to counter the evidence produced. This position was set in **RAILA ODINGA V INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 3 OTHERS (2013) SC EP NO.5 OF 2013** in which the court stated thus;

*(195) There is apparently a common thread in the foregoing comparative jurisprudence a burden of proof in election cases. Its essence is that an electoral cause is established much in the same way as a civil case, **the legal burden of proof rests on the Petitioner but depending on the effectiveness with which he/she discharges this, the evidential burden keeps shifting.** Ultimately of course, it falls to the court to determine whether a firm and unanswered case has been made.*

The duty upon the Petitioner does not cease after establishing that indeed a particular offence occurred. The petitioner also must link the occurrence of the offence to the Respondent or his agents. The petitioner must provide evidence, pictorial evidence even, in allegations of bribery as herein clearly showing the Respondent or his agents bribing the voters. The Petitioner must bring names of voters who were bribed to court and clearly explain when and where the bribery occurred. If this is too high a standard, the Petitioner must at least demonstrate to the court how a particular occurrence affected the outcome of the election. The court stated in the RAILA CASE (supra) thus;

*(196) We find merit in such a judicial approach as is well exemplified in the several cases from Nigeria. Where a party alleges non-conformity with electoral law, the Petitioner must not ably 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 Respondents bear 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 of solemniter esse acts** (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 prescription of the law*

*(203) 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 concert to give fulfilment to safeguard electoral rights ... but at the same time, **a Petitioner should be under an obligation to discharge the initial burden of proof before the Respondent is invited to bear the evidential burden.** 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 are linked to an election in question.*

The court set the standard of proving election offences as beyond reasonable doubt. Is it enough therefore for the Petitioner to generally state that there were incidences of bribery and influence and without going an inch further to state which voters were bribed and where? All of the Petitioner's witnesses distance themselves from claims of bribery and influence. They do not state that they witnessed any bribery during the period of election. None of the witnesses testifies having been bribed by the Respondent or any attempt at all of being bribed. This is detrimental to the petitioner's case. It does so little in dispensing with the statutory set standard of proof.

It is a task in futility asking a court of law to find in your favour when you fail to meet the standard of proof that is required of you. In **JOHN KIARIE WAWERU V. BETH WAMBUI MUGO & 2 OTHERS (2008)** the court reiterated this position when it stated:

'... this court will not therefore interfere with the democratic choice of the voters (...) unless it is established to the required standard of proof that there irregularities and electoral malpractices that rendered the said elections null and void and therefore subject of nullification. It will not be sufficient for the petitioner to establish that irregularities or electoral malpractices did (not) occur,

he must establish that the said electoral malpractices were of such a magnitude that it substantially and materially affected the outcome of the electoral process in regard to the election held (...)

I am guided by the Constitution which requires me to respect the will of the people and uphold the rule of law when handling matters before me. I am further guided by Section 83 of the Elections Act which sets the standard at which an election can be nullified. Pursuant to section 83, an election ought not be easily tempered with if a petitioner does not provide cogent and credible evidence either showing that the election was not in accordance with the constitutional principles on election or showing that due to the malpractice, then the final outcome of the election was greatly impugned.

In an ancient Ugandan case of **BESIGYE V. YOWERI KAGUTA MUSEVENI (2001) E.P. NO. 1 OF 2001** the court pre-empted on what exactly was meant by proving an election petition to the satisfaction of the court. The court stated thus:

'I do share the view that the expression proved to the satisfaction of the court connotes absence of reasonable doubt. The amount of proof that produces the court's satisfaction must be that which leaves the court without reasonable doubt.'

From the foregoing, I am persuaded that the Petitioner has not provided this court with satisfactory evidence to be able to convince this court beyond any reasonable doubt that bribery did indeed take place. The Petitioner has generalized allegations pointing to bribery, but he does not even attempt to prove the allegations and neither do his witnesses. Questions arise as to who were bribed, when they were bribed and where the bribery took place. Questions linger in my mind as to what the tool or commodity of bribery was. These questions ought to have been answered by the petitioner through the evidence he tendered in court. However, the petitioner does not attend to these questions and thereby leaving the court with reasonable doubt.

This claim must therefore fail for lack of sufficient proof from the petitioner to dispense with the required standard.

DISCREPANCIES IN FORM 36A AND 36B

PW1 mentioned Lupida Health Centre. Total number of registered voters was 392, one spoilt. He further stated that there is a specific William Ekasiba, who had zero votes which does not tally with form 36A that states he got 21 votes.

PW2 said results were doctored but did not file petition himself. He was the 1st runners' up. He also alleged votes not valid were counted in favour of the 1st respondent. He however did not state which or where.

He further alleged that he had three different results involving him. One declared was from Nambale IEBC, from Nairobi it read 15610, another 1673 and 1694 [form 36B]

At Kapina, there are 2 stations form 36B that read different.

In his submissions counsel for the petitioner said the total votes were put as 7318 in the form 36A while they were put as 7307.

They further claimed that even the disputed votes were not well tabulated. The Presiding Officer at Lupida health centre was again in error.

The respondents however submitted that the discrepancies in form 36As were genuine mistakes that are excusable in law. The forms are said to have been filled late in the night at around midnight or 3am thereabout. The Presiding Officer stated that at this time the agents were tired. Some slept while others had gone for refreshments and to freshen up. Also the IEBC officials were tired since they had worked all day. Thus such errors and mistakes were to occur. They however submitted that this did not affect the

totals for any of the candidates.

They further denied any form of bias against the other candidates in favour of the 1st respondent. The 2nd respondent submitted that the results were the true reflection of the will of the people.

The voting was by secret ballot as put forth by various witnesses, the assisted voters were also well attended to and their secrecy maintained by virtue of the oath of secrecy taken by all IEBC officials and the agents. The counting process was okay. All agents that were certified were present and signed the form 36A upon declaration.

I believe the nature, extent and effect of the errors were determined by the scrutiny and recount conducted by this court to ascertain the gravity of the said allegations of bias, lack of agents' signatures and differences in form 36A and 36B.

AGENTS LOCKED OUT.

The petitioner raised this issue through PW2, Agapetus. He was the 1st runners up in the August 8th election for MCA. He was unhappy with the process but did not file any petition.

PW3, Joseph Sikuku an ODM agent further averred this. He mentioned Otiiri, Shiera, Musokoto B and Igara polling stations as those that had been affected. He however did not mention any particular names of the agents that were denied entry.

It was the petitioner's submission that known agents of rival candidates were locked out from witnessing the voting exercise and counting at specific polling stations. The Presiding Officer and the clerks undertook such responsibilities including assisting voters on their own. He further submitted that this was evidenced by the fact that most agents did not sign form 36As at various polling stations.

PW6, was an ANC agent at Igara and he said that he was asked out by the Presiding Officer at 6.00am because there were many agents. He was however returned when the issue was resolved. He also did not sign the form 36A for that particular station and did not give reasons. He was there during the counting process. It is worth noting that PW6 was an unclear witness, he later said he was not allowed into the station and denied lacking the necessary accreditation.

In denial of the above facts, the respondents provided the evidence of DW2 who an agent at Lupida Primary School for was the 1st respondent. He said there was no locking out of agents at the station. They were all allowed in as soon as the polling station was opened.

DW6 also denied the occurrence of such. He was an agent of CCM at Igara primary school.

DW7 an ODM agent appointed by the petitioner said they were accorded access to the polling station and they observed the voting process until the end.

DW10, Presiding Officer at Igara polling station testified that only 3 agents signed. There were 11 candidates thus 8 agents did not sign. She said it was around midnight and some of the agents had left in the course of the voting citing fatigue and hunger.

The question that this court must delve into is; what would amount to locking out an agent?

Regulation 62 on Admission to polling station provides;

(1)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.

(2) Notwithstanding sub regulation (1), the presiding officer shall admit to the polling station not more than one agent for each candidate or political party.

(3) The absence of agents shall not invalidate the proceedings at a polling station.

(4) Every agent appointed by an independent candidate or political party for the purposes of these regulations shall at all times during the performance of the duties authorized by the independent candidate or political party display the official badge supplied by the Commission.

The above is in line with the provisions of **Section 30** of the Elections Act on appointment of agents.

It is my view that Parliament foresaw a free and fair electoral process for the people of Kenya through this enactment. That the presence of the atleast some of the persons mentioned in regulation 62(1) considering 62(3) would ensure that the will of the people is protected and irregularities and illegalities minimized. The regulation provides that there shall be only one agent in a polling station for a particular candidate. PW4 said he was asked to stay because there were many agents and he specifically mentioned that Lydia Kundu was already in. He therefore waited until she came out at 1pm then he was allowed in the station.

Regulation 63 provides that it is the duty of the presiding officer to keep order at his or her polling station. That explains the power given to him or her to regulate the number of persons in a polling station.

Although all agents have an inherent right to be at a polling station, regulation 62(4) provides that they must have the necessary accreditation, a badge, lack of which would limit that right. And thus cause an agent not to be allowed in.

Regulation 74 further provides on attendance at counting of votes.

(1) No agent shall be deemed to be an agent for the purposes of counting unless, at least forty-eight hours before the close of the poll in that election, the candidate or political party, as the case maybe, has submitted to the presiding officer-

a) the name and address of the agent; and

b) a letter of the appointment of the agent.

c)

(2) A presiding officer shall not allow a person whose name, address and authorization has not been so submitted to attend at a counting of votes notwithstanding that the appointment of that person is otherwise in order.

(3).....

- (4) The presiding officer shall permit into the counting venue-
- (a) a candidate;
 - (b) a person nominated as a deputy to the candidate, where applicable;
 - (c) members of the Commission and election officers on duty;
 - (d) agents appointed under subregulation (1);
 - (e) police officers on duty
 - (f) observers and representatives of the media duly approved or accredited by the Commission.

PW2 said the agents were denied entry at the counting at specific polling station. The petitioner did not bring any evidence as above i.e a letter of appointment of the agents if any so as to recognise those that were denied entry. This burden was on the petitioner to prove his case. It is my finding that he did not discharge it although IEBC just denied the allegations and submitted the evidence of DW7.

Signatories to a declaration:

PW3 mentioned that he did not sign form 36A. DW10 on the other had testified that only 3 agents signed out of a possible 11 for all the candidates. Does that question the credibility?

Regulation 62 provides that the absence of an agent does not invalidate the proceedings at a polling station. Furthermore, **Regulation 79(1)** provides that the presiding officer, the candidates **or** agents shall sign the declaration respect of elections.

It is therefore worth noting that the provision for signatories is disjunctive (or). That either of the persons named shall sign the declaration. Although according to the petitioner most of the form 36As were signed by the ODM agents (Katira primary school, Otili primary school, Igara primary school, Mwangaza primary among others) Furthermore, regulation **79(2A) (c)** provides that the presiding officers shall provide each political party, candidate or their agent with a copy of the declaration of the results.

The petitioner had all these in his possession thus either he or his agents were at the counting venue and thus cannot claim being locked out.

This allegation further asserts that the election officials were biased and committed an electoral offence as laid down at **Section 13(i) of the Election Offences Act** on any person obstructing or hindering any election officer, candidate or agent in the execution of their lawful duties. Thus, raises the standard of proof to that in a criminal case of beyond reasonable doubt. The petitioner has left loopholes. The names, specific stations and whether they were accredited have not been established. This must fail.

WHETHER THE ELECTION WAS FREE, FAIR AND TRANSPARENT.

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. The petitioner questioned the discrepancies in form 36A and 36B, incidences of violence and voter bribery and the locking out of the opponents' agents.

a) DID IT MEET THE LEGAL AND CONSTITUTIONAL REQUIREMENTS?

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.”

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’

The petitioner presented his issues as the following;

1. That IEBC was negligent on its part.
2. That clerks refused to allow agents to assist voters
3. That agents were not given form 36As, they were not signed.
4. That IEBC declared invalid votes for the 1st respondent to the detriment of other candidates.

The independent body to conduct and supervise referendum and elections is the 2nd respondent. 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.

It is designed to be impartial, fair and transparent in the discharge of its duty to the people of Kenya. Although perfection is not a human attribute, IEBC is expected to conduct an election that reflects the will of the people. The various legislations enacted by parliament are to tame the occurrence of such irregularities and illegalities to a larger extent.

DW4 a voter, averred that no violence occurred at Lupida health centre and no voter was turned away as alleged by the petitioner that old women were asked to leave.

DW5 who was at Msokoto B affirmed that the process was fair. DW6, a CCM agent denied any violence or bribery whatsoever at Igara Primary School.

DW7 further stated that assisted voters were helped by the POs in the presence of agents. That was as provided in law. The counting and voting process was also termed as peaceful.

It is worth noting that the petitioner's agents did not raise any issue with the counting process while at the stations. The respondents submitted that their agents even signed the form 36As at most stations to show satisfaction.

PW2 in his cross- examination stated that the process was by secret ballot. He did not have any issue with the voting at the various stations he visited. He however did not mention any. His only complaint was the discrepancies in forms 36A when compared to 36B.

The POs at Lupida Health Centre, Musokoto B and Igara polling stations affirmed their form 36As as a copy of what IEBC had.

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.

This election can therefore not be termed as a sham by the petitioner. IEBC strived to protect the will of the people, it accorded every party a fair stage to participate in the election and then counted the votes and made a declaration on the winner. The petitioner was also issued with all the form 36As as required and did not raise any issue. The process is deemed to have adhered to the laid down laws and the constitution substantially.

b) DID THE IRREGULARITIES AND ILLEGALITIES AFFECT THE RESULT?

In handling the question of what it means for a particular election to have failed to comply with the law and thus affect the results, 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 herein has presented a myriad of irregularities and illegalities that he deems to have undermined the will of the people. 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.

In his submissions he laid emphasis on the discrepancies in form 36A and B at various polling stations. Counsel for the petitioner submitted that the effect of these irregularities and illegalities had been captured in the final scrutiny undertaken by this court.

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. All matters dispensed with above, I will proceed to discuss the findings from

c) WERE THE RESULTS ACCURATE AND VALID?

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 81 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.

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”.

The petitioner has made various allegations in his pleadings, evidence and submissions questioning the veracity of the results announced by the 2nd respondents declaring the 1st respondent as the winner in the said election for Member of County Assembly for Bukhayo North/ Walatsi ward.

This should be answered by the scrutiny and recount conducted on the 23rd and 24th of January, 2018 as had been ordered by this court. The accuracy and validity of an election result ultimately determines the winner of that election as the preferred choice of the people who participated in the said election.

SCRUTINY AND RECOUNT

Background

Counsel for the Petitioner stated that the petitioner’s case had been vindicated by the order of Recount which he said revealed the following undisputed facts:-

THAT the total declared votes cast were put at **7307**. However upon Recount it was established that the same was **7294**. This also differs from what was observed in form 36 A’s which is **7318**. This makes a difference of **24** votes 7318 – 7294 so what is the position to be believed? The I.E.B.C did not conform

to law by being accountable and there exist doubt which can only be resolved by an order for fresh elections.

THAT on disputed votes declared were put at 34 whereas upon recount it was established to be 40 votes. Again, 6 votes could not be accounted for.

THAT at Lupida polling station 2 of 2, Gardy Jakaa was said to have gotten 2 disputed votes in his favour. Instead of 154, form 36A shows 156 where did same come from if not rigging in his favour?

THAT it was established that accountable document being forms 36A for following station were never signed by agent for the petitioner giving credence to assertion that they were chased away. These were at following polling stations: -

- a) Lupida Primary School Polling Station 2 of 2.
- b) Siera Primary School Polling Station 1 of 1.
- c) Igara Primary School Polling Station 2 of 2
- d) Musokoto Primary School Polling Station 1 of 2.
- e) Dulionye Primary School Polling Station 1 of 2.
- f) Kaludeka Primary School Polling Station 1 of 1.
- g) Kapina Primary School Polling Station 2 of 2.
- h) Igara Dispensary Polling Station 1 of 1
- i) Opedur Primary School Polling Station 1 of 1
- j) Khwirale Centre Primary School Polling Station 1 of 1
- k) Khwirale Centre Primary School Polling Station 2 of 2

According to Counsel, at Kapina Primary 1 of 2 school form 36A the presiding officer did not sign the accounting document form 36A. Again, of Kapina Primary school 1 of 1, there was no form 36A inside the ballot box? Where did it go to? Were there changes in it?

He said that the total effect of what was observed upon scrutiny is that the elections were not conducted in accordance with the law. Counsel submitted that it is not enough to have numbers, but the said numbers must be gotten in procedure allowed by law on elections. That once there are doubts coupled with other factors we submitted on, nullification is unavoidable.

Counsel urged the court to find that the petitioner had established his case beyond shadow of doubt to warrant the court to nullify the election of Gardy Jakaa since same did not conform with the law.

On the other hand, Counsel for the 2nd Respondent explained that a recount is aimed at determining the number of votes cast in favour of each candidate to examine all the votes cast, to identify ineligible votes and to establish which votes if any were valid. He said that a recount is more involved in the arithmetic of the voting process. He further said that the purpose of scrutiny on the other hand is to determine the validity of the votes cast in favour of each candidate and helps the court to understand the details of the electoral process and gain impression on the integrity thereof; it is intended to assist the court in investigating allegations of irregularities and breaches of the law.

Counsel elaborated that upon the results after scrutiny and recount, it was very clear that the 1st

Respondent is still the one leading and the Petitioner is a third runner up. He said that little mistakes were made by the Presiding Officers in counting votes at the Polling station, mistakes that do not change the final results declared.

Counsel said that the 1st Respondent who was declared a winner by 1910 votes only lost one vote upon scrutiny and recount to get 1909 votes in all the 22 ballot boxes. He explained that the one vote that was subtracted from his had been marked twice for two candidates. He further said that it is a human error that the said vote was mistakenly placed as the counting of votes was done at night and all the IEBC officials were fatigued and such confusion could exist. He said that the 2nd runner up one Nyongesa Agapetus William Ekasiba had gotten 1694 and he lost only three votes upon recount and scrutiny to get 1691 votes. The third runner up who is the Petitioner had gotten 1612 and he lost two votes upon scrutiny and recount to get 1610 votes.

In conclusion Counsel stated that some votes had been marked twice but counted and placed in a certain candidate's batch, others had not been marked but counted and placed in a certain candidate's batch and others had been marked in favour of certain candidates but had been counted and placed in another candidate's batch. These sincerely are human errors. He said that the disputed votes after recount and scrutiny were only 12 votes while the range between the Petitioner's votes and that of the 1st Respondent was 298 and now 299 after the recount and scrutiny. He maintained that even if the 12 disputed votes are added to the Petitioner he still cannot lead nor be the winner. He said that the will of the people of Bukhayo North Walatsi Ward declared the 1st respondent as a winner and he still stands so after a free and fair election conducted by the 2nd Respondent.

He reiterated that the Petitioner had insisted in Court that 80% of his evidence will be in scrutiny and recount of the votes in all the 22 Polling stations. This made the Court decide that there be a recount and scrutiny of votes in all the 22 Polling station at Bukhayo North\Walatsi Ward. He said that after the Recount and scrutiny it is very clear that the 80% evidence does not even exist.

In conclusion, counsel submitted that this petition lacks merit and the petitioner has further failed to discharge the burden imposed upon him by statute. He said that the petitioner in his fishing expedition he has completely failed to prove the election malpractice except for the human errors that are expected to be made by man. He said that the petitioner has no basis whatsoever for holding that there existed irregularities/malpractice that affected the results. He therefore maintained that the Petition is without merit and ought to be dismissed with costs.

Finally, Counsel for the 1st Respondent summarized the results obtained before and after scrutiny and recount as follows;

No.	Name of candidate	No. of valid Votes as per IEBC report	No. of Valid Votes upon scrutiny and Recount
2.	JAKAA GARDY OBARA	1910	1909
2.	KATAKA FAITH KEZIAH	327	326
3.	KULUNDU ENOCK	80	78

	NJAKO		
4.	MAKANDA NORMAN ANJIA	12	12
5.	MASAKHALIA FRANCIS JEREMIAH ARWASSI	160	160
6.	MUYODI DICKSON MUNYEKENYE	66	66
7.	NYONGESA AGAPETUS WILLIAM EKASIBA	1694	1691
8.	OKUMU SILVANUS OPIYO	32	31
9.	OMUNA LAWI AKOIT	22	22
10.	WAFULA DAVID WAYNE	1392	1389
11.	YAITE PHILLIP OKORONON	1612	1610
	Total Number of Valid Votes Cast:	7307	7294
	REJECTED VOTES	34	40

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Counsel further made the following observations from the above;

- 1) In most polling stations there were no valid votes disputed by the parties.
- 2) The count by IEBC was accurate, verifiable, free, fair, accountable and transparent and in line with the provisions of the law.
- 3) The six votes increase on the rejected votes from 34 to 40 means that this was a mere genuine minor human error which can occur in any election as the same was done by human beings and a perfect count would be unlikely.
- 4) The votes indicated in every station is in most cases the same as the recount save for a few instances where there were minor errors.
- 5) That forms 36A were affixed outside the ballot box.
- 6) That forms 36A were also found inside the ballot boxes.
- 7) That all the forms 36A were duly signed by the respective presiding officers, their deputies and the party agents.
- 8) That Petitioner's party agents of the ODM party signed on almost all forms 36A.
- 9) That the used ballot counterfoils tallied with the votes found in the ballot box.
- 10) That it can clearly and unequivocally be noted that the clear winner in these elections was Mr. **JAKAA GARDY OBARA**, the 1st Respondent herein.
- 11) That the Petitioner's assertions that scrutiny and recount held 80% of his evidence is now clearer; that he had no evidence and was hoping to get evidence from scrutiny and recount, but as can be seen, the same exercise showed that the winner was clearly the 1st Respondent.

Disposition

There seems to be a disagreement between the parties as to what amounts to or what should amount to errors that nullify the election. Is it watertight requirement that no error whatsoever is to be committed by the 2nd Respondent herein? Is there a margin that I could refer to as an 'error margin' within which an election ought not be terminated if not exceeded? How thick should this margin (if at all it exists) be?

The Learned Judge E. M Muriithi stated as follows in **PAUL GITENYI MOCHARA VS. TIMOTHY MOSETI E. BOSIRE & 2 OTHERS (2013) eKLR:**

“The Constitutional requirement for accuracy in election system cannot be construed to mean that the statutory forms for the recording of the results of an election must never have errors, corrections or alterations. Accuracy does not mean free from error which has been corrected, an impossibility in all human endeavour, accuracy will be served, if there exists a means of verification of the entries to test their accuracy and it necessarily imparts corrections by alterations, whether counter-signed or not.”

He went further to state that,

“The general election of 2013 comprised elections to six different elective positions of the President, the County Governor, the Member of the National Assembly, the Member of the Senate,

the Women Representative and County Waed Representatives and this must be taken to have increased six fold the probabilities of innocent human errors....it is not inconceivable and therefore definitely not inaccessible that the election officials who conducted the six elections officials over a period of three days on the 4th, 5th and 6th March, 2013 would have in human probability made errors...

Similarly, in 2008, the able Chief Justice Maraga (as he then was) stated in **JOHO V. NYANGE (2008) 3 KLR (EP)** as regards the question of errors in elections 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 stage where election officials are required to tally the results, some of them would have stayed awake for more than thirty six (36) hours and therefore simple arithmetical mistakes are bound to happen**”*

Both of these cases point to the fact that there is a margin of slight errors which cannot be allowed to nullify an election. Indeed, recount and scrutiny is one among the best ways of proving an election petition. Once conducted, it allows the court the privilege to come up with its own Form 36B. The court is able to analyse the votes as casted in accordance with the Election Petition Rules 2017. This way, the court is able to verify whether or not there were discrepancies numerically and to what extent the discrepancies affected the final result.

The petitioner insisted that the recount and scrutiny could contribute 80% of the evidence to prove his case. With this assertion alone, the Petition could be taken to have had a problem with the numbers of the votes as tallied. Recount deals majorly with the numbers, it is a confirmation by the court either that the numbers were correctly tallied or if there were errors. The Petitioner gave his views of the scrutiny report as I have reproduced them within this analysis. He majors on the slight differences that were noted from the recount.

The Petitioner stated that there was a discrepancy of 24 votes in the total declared votes. He said that the declared were 7307 but upon recount they reduced to 7294 and yet what was recorded on the Form 36A was 7318. He also said that there was a discrepancy in the number of disputed votes since they were recorded as 34 yet upon recount they were found to be 40 votes. He further said that at Lupida polling station, Gardy Jakaa who is the 1st Respondent got 2 disputed votes in his favor.

These are substantially the discrepancies that the Petition fronted and sought to convince this court that the election ought to be nullified. I will not depart from that set by my colleagues are reproduced herein above. I am of the informed view that indeed an election is a cumbersome endeavor. I am aware that too much is involved during the electoral period which takes away the 100% perfection rate. I note with certainty that discrepancies must give the court a reason to annul elections. However, I am persuaded by statutory and precedent that not always do discrepancies lead to nullification. I am inclined to the view of having a thin margin within which innocent and genuine errors committed by the 2nd Respondent's officers by virtue of them being human can be secured.

In the case of **HASSAN ABDALLA ALBEITY vs ABU MOHAMRD ABU CHIABA Ep Number 9 Of 2013 In the High Court of Kenya At Malindi, JUDGE C. W. GITHUA stated that** “I agree with Mr. Balala's and M/s Muraguri's submissions that where a court makes an order for either scrutiny and recount of votes or a recount of votes like the one which was ordered and undertaken by this court, the recount exercise cures any irregularities or errors that may have been committed by the 2nd Respondent in the process of tallying, counting and presentation of results in the statutory forms used to declare results”.

This court was of the opinion that the mistrust and lack of confidence emanating from irregularities which the petitioner and indeed the entire electorate of Bukhayo North Walatsi Ward may have been harbouring over IEBC and / or the 1st respondent would be cured if scrutiny and recount are done

In this case a Scrutiny and recount was done as a final test as to whether IEBC could be trusted by the parties and voters of Bukhayo North Walatsi Ward this court had allowed a scrutiny and recount of votes in three stations where malpractices were alleged. After an order for scrutiny was made, the court proceeded to conduct the scrutiny and recount exercise in open court, in a transparent manner whereby the three boxes were opened after the serial numbers of the boxes were recorded, serial number for the all the seals were recorded and the contents in each ballot boxes were noted.

Individual ballot papers were unfolded, scrutinized and allocated to the respective candidates;

2. RESULTS OF THE SCRUTINY AND RECOUNT

According to IEBC, the results as posted to for 36 B for the particular Electoral Ward were as follows;

ELECTION PETITION NO. 8 OF 2017 FOR BUKHAYO NORTH/WALATSI WARD

SUMMARY OF VOTES.

NO.	NAME OF CANDIDATE	VALID VOTES (I.E.B.C)	ADDITIONAL VOTES THAT HAD NOT BEEN COUNTED	TOTAL DISPUTED VOTES
1.	JAKAA GARDY OBARA	1910	1	2
2.	KATAKA FAITH KEZIAH	327	2	3
3.	KULUNDU ENOCK NJAKO	80	0	2
4.	MAKANDA NORMAN ANJIA	12	0	0
5.	MASAKHALIA FRANCIS JEREMIAH ARWASSI	160	0	0
6.	MUYODI DICKSON MUNYEKENYE	66	0	0
7.	NYONGESA AGAPETUS WILLIAM EKASIBA	1694	0	3
8.	OKUMU SILVANUS OPIYO	32	0	1
9.	OMUNA LAWI AKOIT	22	0	0
10.	WAFULA DAVID WAYNE	1392	0	3

11.	YAITE PHILIP OKORONON	1612	1	3
12.	TOTAL	7307	4	17

NOTES

Upon scrutiny and recount of the votes the court made the following observations:

Form 36 A for Lupida Health centre is a carbon copy and the figures on the form are not indicated directly against the candidates but instead an arrow has been drawn from the name of the candidate towards the total votes garnered by the candidate. The defence witness **DW 14** clearly demonstrated in his testimony that he was trying to correct the carbon copy of the **Form 36 A** hence they don't tally with the original **Form 36A. the court further observed that;** Further the court noted as follows;'

1. YAITE PHILIP OKORONON got **1610** votes against **1612 votes** as per the **I.E.B.C** reducing his votes by **5 votes**

2. OKUMU SILVANUS OPIYO got **31** votes against **32 votes** as per the **I.E.B.C** reducing his votes by **1 vote.**

3. JAKAA GARDY OBARA got **1909** votes against the **1910 votes** as per the **I.E.B.C** reducing his votes by **1 vote.**

5. KATAKA FAITH KEZIAH got **326** votes against the **327 votes** as per the **I.E.B.C** reducing her votes by **1 vote**

Further the court noted that the votes rejected and the reasons for their rejection were as follows;

Further, the court noted that;

5. KULUNDU ENOCK NJAKO got **78** votes against the **80 votes** as per the **I.E.B.C** reducing his votes by **2 votes.**

6. NYONGESA AGAPETUS WILLIAM EKASIBA got **1691 votes** against **1694** as per the **I.E.B.C.** reducing his votes by **3 votes.**

7. OKUMU SILVANUS OPIYO got **31** votes against **32 votes** as per the **I.E.B.C** reducing his votes by 1 vote. The following are the details of the rejected votes

The court observed the following facts upon scrutiny and therefore, this court re-distributed the votes, as follows'

NO.	BALLOT SERIAL NO.	REASON FOR DISPUTE		
NO.	NAME OF CANDIDATE	VOTES PER CADNDIDATE PAR (I.E.B.C)	VOTES REDISTRIBUTED BY COURT	VALID UPON SCRUTINY
2.	JAKAA GARDY OBARA	1910	1	1909
3.	KATAKA FAITH KEZIAH	327	2	326
4.	KULUNDU ENOCK NJAKO	80	0	78
5.	MAKANDA NORMAN ANJIA	12	0	12
6.	MASAKHALIA FRANCIS JEREMIAH ARWASSI	160	0	160
7.	MUYODI DICKSON MUNYEKENYE	66	0	66
13.	NYONGESA AGAPETUS WILLIAM EKASIBA	1694	0	1691
14.	OKUMU SILVANUS OPIYO	32	0	31
15.	OMUNA LAWI AKOIT	22	0	22
16.	WAFULA DAVID WAYNE	1392	0	1389
17.	YAITE PHILIP OKORONON	1612	1	1610
18.	TOTAL	7307	4	7294

The court

eventually re-ranked the candidates as par the votes they each garnered as follows;

Order of Ranking

NO.	NAME OF CANDIDATE	
1.	JAKAA GARDY OBARA	1909

2.	NYONGESA AGAPETUS WILLIAM EKASIBA	1691
3.	YAITE PHILIP OKORONON	1610
4.	WAFULA DAVID WAYNE	1389
5.	KATAKA FAITH KEZIAH	326
6.	MASAKHALIA FRANCIS JEREMIAH ARWASSI	160
7	KULUNDU ENOCK NJAKO	78
8	MUYODI DICKSON MUNYEKENYE	66
9	OKUMU SILVANUS OPIYO	31
10	OMUNA LAWI AKOIT	22
11	MAKANDA NORMAN ANJIA	12
	TOTAL	7294

Looking at the order of ranking hereinabove, it is clear that the winner of the elections for Bukhayo North Walatsi Ward was the 1st Respondent herein **JAKAA GARDY OBARA** who garnered 1901 **votes** followed by **NYONGESA AGAPETUS WILLIAM EKASIBA** who garnered **1691 votes and then the third runner-up was the Petitioner YAITE PHILIP OKORONON who garnered 1610 votes.**

I am sufficiently informed having witnessed the scrutiny and recount that the order of appearance of the candidates remains the same on both forms. Even though a few discrepancies were proved, I am convinced that they have not in any way tempered with the result as it were. The Petitioner has remained at number 3 while the 1st Respondent being the winner of the election as verified by the recount and scrutiny.

No doubt therefore, it is safe to concluded that the Petitioner was actually the third runner-up in the elections held on 8th August 2017 for the Bukhayo North Walatsi Ward.

The recount herein indeed reveals a few altercations in the votes, the total declared votes, the disputed votes among others. However, how different does the courts Form 36A formed after the recount look from the IEBC's form 36A?

The Petitioner has not pointed to what amounts to 80% proof within the recount and scrutiny report as he had contemplated. It is therefore the finding of this court that the recount and scrutiny conducted by this court reveals minor discrepancies caused by genuine and innocent errors and which cannot in itself justify the nullification of the election.

CONCLUSION

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.

The petitioner in this case has thrived to proof what is 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.

The court observed in **John Fitch v Tom Stephenson and 3others [2008] EWHC 501(OB)** 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 ...”

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.

On analysis, I have come to the conclusion that the election was conducted in accordance with the 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 1st respondent was validly elected as the MCA.

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.

CONCLUSIONS;

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

1. One the issue of violence, one of the candidates Mr. AGAPETUS WILLIAM EKASIBA There existed violence at Lupida Health Centre whereof I am informed that a woman voter was beaten to discourage voters from voting. That the same occurrence was repeated at Kapina.

2. In the courts opinion, the petitioner has not properly established the occurrence of violence and neither has he linked the 1st Respondent herein to any acts of violence. The Petitioner has not demonstrated to this court how the purported violence tempered with the voting process and how it affected the final outcome of the election.
3. On the issue of voter bribery, questions arise as to who were bribed, when they were bribed and where the bribery took place Questions arise as to who were bribed, when they were bribed and where the bribery took place
4. 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 1st 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.
5. The allegations of voter bribery and undue influence are serious criminal offences under Section 13 of the Election Offences Act directed at the 1st 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.
6. In the courts opinion, the petitioner was duty bound to prove that there was voter importation, voter bribery and undue influence by the 1st respondent.
7. 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.
8. 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.
9. 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.
10. 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.
11. 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
12. The petitioner further asserts that the election officials were biased and committed an electoral offence as laid down at **Section 13 of the Election Offences Act** on any person obstructing or hindering any election officer, candidate or agent in the execution of their lawful duties. Thus, raises the standard of proof to that in a criminal case of beyond reasonable doubt. The petitioner has left loopholes. The names, specific stations and whether they were accredited have not been established. This must fail.
13. On the issue of locking out some agents from the polling stations, Joseph Sikuku an ODM agent mentioned Otiiri, Shiera, Musokoto B and Igara polling stations as those that had been affected. The petitioner had all these in his possession thus either he or his agents were at the counting venue and thus cannot claim being locked out.

14. On the issue of discrepancies in form 36a and 36 B, raised by the Petitioner 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 issue of whether the election conducted in accordance with the law, the answer is in the positive

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

17. 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.

18. The scrutiny and recount were done for all the polling stations and the results were that there was no significant change in the order of ranking. It is safe to concluded that the 1st Respondent was the 1st in ranks and the Petitioner was actually the third runner-up in the elections held on 8th August 2017 for the Bukhayo North Walatsi Ward.

19. Looking at the order of ranking hereinabove, it is clear that the winner of the elections for Bukhayo North Walatsi Ward was the 1st Respondent herein **JAKAA GARDY OBARA** who garnered 1901 votes followed by **NYONGESA AGAPETUS WILLIAM EKASIBA** who garnered **1691 votes and then the third runner-up was the Petitioner YAITE PHILIP OKORONON who garnered 1610 votes.**

20. As to whether the election for Member of the County Assembly for Bukhayo North Walatsi 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.

21. As to whether **Jakaa Gardy Obara** the 1st Respondent was validly elected Member of the County Assembly for Bukhayo North Walatsi Ward in Busia County, the answer is in the affirmative.

22. Having heard this case on merits, this court hereby issues a **DECLARATION** that the **Jakaa Gardy Obara**, 1st respondent was validly elected as the Member of County Assembly, Bukhayo North Walatsi Ward in Busia County.

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

24. On the issue of costs, it is trite law that costs usually follow the event. Section 84 of the Elections Act has mandated the court to award costs of and incidental to a petition. This court therefore awards the cost of the petition to the Respondents. In that regard, the sum that was deposited in court shall remain so deposited pending the assessment of the costs as per the Advocates Remuneration Order by the Respondents.

25. I cap costs at Kshs. 150,000 /= 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 20th day of February 2018

GN. WAKAHU C. M. BUSIA

Judgement delivered in open court in the presence of;

Mr. Okutta for the petitioner

Miss Anet Mumalasi for the 1st Respondent.

Miis Nabulindo holding brief for Mr. Masire for the 2nd respondent.

GN. WAKAHIU C. M. BUSIA

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

GN. WAKAHIU C. M. BUSIA
