



Republic of Kenya

In the Senior Resident Magistrate's Court

At Kilgoris

Election Petition Number No. 2 of 2017

In the matter of Elections Act, 2011

And the Elections Parliamentary and County Elections Petition Rules, 2017

And in the matter of members of the county assembly elections

Kilgoris Central Ward, Narok County

BETWEEN

Olonana D. Ololtulet.....Petitioner.

VERSUS

Munka Nanyokie Julius Ole.....1st Respondent

Macharia Ombogo Elijah.....2nd Respondent.

Independent Electoral and Boundaries Commission.....3rd Respondent.

Judgment

A. Introduction.

1. On the 8th day of August, 2017, the people of Kilgoris Central Ward in Kilgoris Constituency within Narok County, like the rest of Kenya woke up at cockcrow rising to the occasion and call to turn up and vote according to the dictates of democracy. This was the second general elections since the promulgation of the Constitution of Kenya, 2010. Six elections were rolled into one. Eleven candidates were cleared by the Independent Electoral and boundaries Commission to battle it out for the position of Member of County Assembly to represent the Ward. After the poll, it turned out this was a two-horse race between Munka Nanyokie Julius Ole the 1st Respondent and Ololtulet Olonana D- the Petitioner. They were declared to have garnered 4,161 and 3913 votes respectively.

2. The 1st Respondent was declared the winner and was issued with a certificate. He was subsequently gazetted on 22nd August, 2017 as MCA for the ward. Dissatisfied with the process that led to election, announcement and declaration of the 1st Respondent as MCA, the Petitioner lodged this petition.

B. The Petitioner's Case.

3. On 25th August, 2017, the Petitioner, through masseurs Geoffrey Otieno and Co. Advocates, filed petition against the three Respondents. He prays for orders that;-

- a. It be ordered that there be a scrutiny and recount of all the votes recorded as having been cast and the data on the KIEMS system used in the elections in the thirty six 36 Polling stations of Kilgoris Central ward.
- b. It be determined and ordered that the Petitioner is the duly elected Member of County Assembly for Kilgoris Central Ward if the scrutiny and recount of the ballots cast shows that he received the most votes in the County elections for Member of County Assembly for Kilgoris Central Ward.
- c. It be determined and ordered that the 3rd Respondent to issue a certificate of elections to the petitioner if the scrutiny and recount of the ballots cast shows that he received the most votes in the County elections for Member of County Assembly for Kilgoris Central Ward.
- d. In the alternative, it be determined and ordered that a fresh election be held election for the Member of County Assembly for Kilgoris Central Ward.
- e. Such further or other relief or orders be made as may be just.

4. The petition is presented based on a number of grounds set out in the petition and supported by affidavit sworn by the Petitioner on the 25th August 2017. He avers that the 2nd and 3rd Respondents by themselves and or through officers and agents acting under them or under their direction committed an election offence by breaching their official duties and Code of Conduct in;-

- a. Failing to serve impartially and independently and perform their duties in good faith. There were incidence of double voting in over ten 10 polling stations, which issues were raised by the Petitioners agents to the Presiding officers.
- b. Performing their duties under the influence of the 1st Respondent and his political party.

5. The Petitioner in paragraph 12 of his Petition cites the 3rd Respondent through its Chairman and Commissioners as having committed an election offence by breaching their official duty and code of conduct by;-

- a. Declaring results which they knew or had reasonable cause to be false or he did not believe to be correct and
- b. Succumbing to the influence of the 1st Respondents Political party in declaring results which he knew or had reasonable cause to believe to be false or that they did not believe to be correct.

6. The Petitioner in his testimony in court, his affidavit and that of his witness further avers that there were grave illegalities, irregularities and breach of electoral law in Mutenkuarr, Oloshaiki Primary School, Meguarra and Enenkeshui Polling stations. At Mutenkuar Polling station it is his case that between 6.00am and 9.00am voters were not identified using KIEMS system and as a result about 106 voters voted without validation and in gross violation of law and regulation. At Oloshaiki Polling station, it is his case that votes declared as cast exceeded the number of registered voters an anomaly that shows there had been manipulation of the electoral process. As regards Oloshaiki Primary school it was further his averment that the results he garnered and recorded in form 36A was 94 which was changed to 2 at the Tallying Centre to his detriment without any valid explanation. As regards Meguarra Polling station he avers that the total number of votes cast was 518 yet only 498 were captured in the final results and which by implication he argues twenty 20 votes were unaccounted for.

7. It is further his averment that crucial statutory documents were altered and number of votes changed without countersigning by the responsible officers. That related to this is that there was malpractice at Enenkeshui Polling station where the P.O was reported to have altered the results of Presidential election, which incident was reported to Kilgoris Police station and he was subsequently charged in Kilgoris Principal Magistrates Criminal Case No. 715 of 2017.

8. He also point out that in the declaration form there was a discrepancy between the votes declared as garnered by him in words and in figures declared in numbers and terms it a pointer of irregularities and mal-practices witnessed during the tallying. Further that he believes a total of 92 votes due to him were unaccounted for, 277 votes were either not validated or accounted for and believes there was manipulation and misrepresentation which cost him victory hence his call for scrutiny and recount. In his assessment there was no free and fair election and that the overall will of the electors is not reflected in the declared results. His prayer is that the declaration of first Respondent be declared null and void.

C. The Respondents' Case.

9. The 1st Respondent in his Response to the petition, in his affidavit in support, in the affidavit dated 11th September, 2017 and that of his witnesses as well as the testimonies deny all the allegations in the petition. He avers that the elections at Kilgoris Central Ward were conducted in accordance with the provisions of the Constitution of Kenya 2010, the Elections Act and the Regulations thereof. He denies that the elections were marred by irregularities and malpractices. He also denies that he was given preferential treatment by the 2nd and 3rd Respondents nor that his political party had any influence over them. He maintains the results declared were correct.

10. On the questions raised over Mutenkuar polling station, the 1st Respondent avers that the failure by the clerk to validate the voters by use of KIEMS did not prejudice the Petitioner given that voting was secret ballot. And therefore no one could tell whose votes were cast.

11. As regards the number of voters at Oloshaiki, he terms the entry on Form 36B showing the number of voters as 402 instead of 245 was a mere clerical error. He further avers that the tally that was declared at the polling station and recorded in Form 36A was the final tally of the results which were eventually collated by IEBC.

12. On the issue raised over Meguarra Polling station, the 1st Respondent states that that the final tally provided by 2nd and 3rd Respondents shows the results as collated from the polling station had 498 valid votes cast and not 518. That there was no discrepancy between the votes cast as shown in form 36A and the final tally by the 3rd Respondent.

13. In admitting there was a malpractice at Enenkeshui Polling station, the 1st Respondent says the said malpractice only affected the Presidential election and not the Member of County Assembly. Further that there were six ballots and each election was unique and had no relation to each other.

14. On the prayer for recount and scrutiny, the 1st Respondent avers that the Petitioner has not particularized the specific stations he wishes a recount or scrutiny on and that the Petitioner should not be allowed to use the court in his fishing expedition to gather evidence to build on the petition. The 1st Respondent calls for the dismissal of the Petition arguing that there was no breach of law, that the electoral process was valid, there were no electoral offences committed and that the decision of the electorate in electing him should be respected.

15. The testimony of the 1st Respondents witness- Stephen Longit Tialal- who was his Chief Agent essentially supports his defence that the election was free and fair. That there were no incidences save for an issue he was informed over Mutenkuar polling station where an issue arose in the morning over validation of voters. He testified that the issue was sorted out amicably and the process went on smoothly. He says the process concluded and the counting and announcement was made. He further says the

Petitioner had agents who signed on Form 36A. That by so doing they gave the process of election and results a clean bill of health.

16. The 2nd and 3rd Respondents did a joint response through the firm of masseurs Morara Apiemi and Nyangito Advocates. The Response is supported by Affidavit sworn by Macharia Mbogo Elijah. The response also has also affidavits sworn by Presiding officers Caroline Naimutie; David Nyandieka and Jacob Onyinkwa of Oloshaiki Primary school, Meguarra Primary School and Enenkeshui Primary School Polling stations respectively.

17. In the response, the Respondents attack the petition as raising complaints against persons in relation to the conduct of County elections for Kilgoris Central Ward without enjoining them as Respondents in the petition. They maintain that the appointment of the R.O, the POs and other staff for Kilgoris Constituency were done in compliance with Election General Regulations 2012 and 2017. That the voting in all polling stations in Kilgoris Central Ward was free and fair. That the final tallying of results was done in compliance with the law. And that the County elections of Kilgoris Central Ward was conducted in compliance with the principles laid down in the Constitution and that in case of any non compliance of the Election laws and Regulation, the same did not affect the result of the election declared.

18. It is their prayer that all allegations against persons not enjoined be expunged from the record. That it be determined that the 1st Respondent was duly elected and the election was valid. And that the results for the ward declared by the 2nd Respondent be upheld and the petition dismissed with costs to the 2nd and 3rd Respondents.

19. The 2nd Respondent who was the Returning Officer swore a 12 paragraph affidavit in support of their response and on authority of the 4th Respondent. He depones that he ensured all the clerks and polling clerks were trained. That he ensured that ballot boxes and election materials were supplied to all polling stations in the ward. That voting, counting and transmission of votes was concluded in all the polling stations as provided by the law. He depones that all the results from the polling stations were properly and accurately verified, tallied and announced in accordance with the provisions of the law. That after declaring the result for the ward, he issued the 1st Respondent with form 36C the same being certificate of an elected MCA.

20. The 2nd Respondent further depones that while tallying results he made posting errors captured in Form 36B. As regards Oloshaiki he admits he recorded 2 votes for the Petitioner instead of 94 votes. At Oloshaiki the number of registered voters was 245 but in Form 36B it was erroneously recorded as 401 valid votes. He said the aforesaid errors did not affect the results declared at all. He depones that the conduct of the elections for the ward was faced with the minor challenges but the same cannot be said to be devoid of merits and so distorted and failing short of expressing the people's electoral intent. He has annexed the following documents;- A bundle of the duly filled and signed form 36As from all the polling stations in the ward, A copy of form 36B and A copy of form 36C issued to the 1st Respondent on his being announced and declared MCA elect.

21. In support of the Response, three Presiding officers swore affidavits and attended court where they were cross-examined. They are Carolyne Naimutie, David Nyandieka and Jacob Onyinkwa of Olashaiki Primary School, Meguarra Primary School and Enenkeshui Primary School Polling Stations respectively. According to Carolyne everything went down well at her station. The same with David. According to Jacob Onyinkwa, everything went down well. He denies knowledge of any electoral offence committed at his station.

22. The 2nd Respondent in his testimony in court on 6th December, 2017 essentially reiterated the content of his affidavit. On cross examination by the Petitioners advocate, he maintains the election in the entire ward was free, fair and in compliance with the law.

D. Submissions.

23. At the conclusion of hearing parties through their advocates filed submissions. **The Petitioner** filed submissions and highlighted on 19th January, 2018. It is submitted that for the petitioner that part of the results declared for Mutenkuar polling station consisted of votes cast by voters who were not validated and hence could not be verified or accounted for contrary to Article 86 of the Constitution.

24. As regards, Oloshaiki polling station, it is submitted that there was variance between form 36A and form 36B and that the same were an irregularity and an illegality which could not be cured. That the error rendered the whole process null and void as the same was not verifiable or accurate as required by Article 86 of the Constitution.

25. The advocate for the petitioner equally submitted on the incident of arrest of the presiding officer at Enenkeshui allegedly for electoral malpractices. There is also submission on for 36A from Osupuko polling station and indicate the Petitioners results were not recorded and that the same constituted an illegality and affected the outcome of the elections.

26. On the germane question whether in the sum total the irregularities affected the election, it is submitted for the Petitioner that it did. That Article 86 of the Constitution was violated. That the results and the election was not simple, accurate, verifiable, secure, accountable and transparent. It is submitted that given the margin of votes, the magnitude of the irregularities could affect the outcome of election. This is submitted on authority in *Peter Kimori Maranga & Another vs. Joel Omangwa & 2 others (2013) eKLR* where the court held that for an irregularity to be deemed to affect the result, it need not show the exact changes in the score by the other candidate.

27. On whether the Petition has met the threshold set in law, it is submitted that it has. It is submitted that although the Petitioner never pursued his claim for scrutiny and recount he had demonstrated how the discrepancies in election and tallying of results affected the election. And that the Petition should be determined in his favor with costs payable to him by the respondents.

28. The 1st Respondents submissions were filed by Messers Charles Koech and Associates and highlighted. On the question whether the election in Kilgoris Central Ward was conducted in accordance with the principles laid down in the Constitution and electoral laws, it is submitted that it was. It is submitted that the people expressed their sovereign will and elected the 1st Respondent with 4161 votes out of 12808 votes cast.

29. On whether there were irregularities and illegalities committed in the conduct of the elections in the Ward, it is submitted that the few errors that occurred and pointed out by the petition were merely clerical and did not affect the result. As regard the claims over Osupuko polling station, it is submitted that the same should be disregarded since it was not pleaded. This submission is made on the strength of authority in *Ferdinand Waititu vs. Independent and Boundaries Commission IEBC AND 8 Others Civil Appeal Nairobi No 324 of 2013*. On the question of Mutenkuar Polling Station and the claim that some voters were not validated, it is submitted that the Petitioner did not prove how he came up with the figure of 106 voters. It is submitted further that voting was preceded by production of National Identification card.

30. As regards Oloshaiki polling station and the claim that the declared votes exceeded the registered voters and the discrepancy in Forms 36A and 36B, it is submitted that former holds sway. This is submitted on authority in *IEBC vs. Maina Kiai and 5 others Nairobi Civil Appeal No.105 (2017) eKLR* where the court held that the polling station was the true locus for free exercise of voters will and the count there is clothed with finality. It is submitted that there was misposting and that the same did not affect the results. As regard Enenkeshui and the claim that electoral malpractices were committed that resulted in the arrest of the Presiding Officer one Jacob Obara, it is submitted that the incident affected the Presidential elections and had no effect on the MCA election or other elections.

31. On the question if there were any irregularities and illegalities and what their impact on the integrity of the elections, it is submitted that the integrity of the elections was not affected. On Mutenkuar polling station it is submitted validation was made using the manual process and voter's names were crossed out from the register. It is submitted the error not to validate using the KIEMS Kit did not affect the elections.

32. On whether the irregularities affected the elections, it is submitted that the few errors at Mutenkuar and Oloshaiki were mere clerical and due to human error and should not invalidate the election. This is submitted on strength of authority in Gatirau Peter Munya vs. Dickson Kithinji and 2 others SCK Petition No.2B (2014) eKLR

33. On whether the 1st Respondent was validly elected and validly declared, it is submitted that he was. That the results were correctly captured in Form 36A and the agents present including that of the Petitioner never raised any issues. On whether the Respondents committed any electoral offences, it is submitted that they did not.

34. On the issue whether the Petition meets the threshold set up in law, it is submitted that it has failed and should therefore be dismissed. It is submitted on authority in Raila Odinga 1 (2013)eKLR that the Petitioner has failed to discharge the burden of proof above the balance of probability though not as high as beyond reasonable doubt. It is submitted that the petitioner did not call any witness to support his evidence of malpractices. It is further submitted that the margin is stated as 168 votes while the true figure is 248 and this was a mistake which goes to the root of the elections. Also that the 277 votes allegedly not accounted for has not been demonstrated where they came from and render the petition speculative.

35. On the declarations and reliefs, it is submitted that this court is invited to make a declaration that the elections were free and fair. That the abandonment of prayer for recount and scrutiny of votes was fatal and denied this court a chance and opportunity to evaluate the grounds of the petition and evidence. For this reasons the Petition should be dismissed with costs to the Respondents and which costs it is submitted shall follow the cause.

36. The 2nd and 3rd Respondents did joint submissions. On the burden and standard of proof, it is submitted that the burden lies with the petitioner. On authority in Raila Odinga 1 (2013)eKLR as cited in subsequent authorities, it is submitted that it is not enough for the Petitioner to cite irregularities and or illegalities; the Petitioner has to show that non-compliance with the law did affect the validity of elections. That it is on that basis that the Respondents bear the burden of proving the contrary.

37. On whether the elections were conducted in accordance with the Constitution and electoral law, it is submitted that it was. It is submitted on authority in National Super Alliance (NASA) vs. IEBC & 2 Others (2017) eKLR . Petition No. 328 of 2017 that, the system allowed manual identification of voter in the event of failure of electronic devices and that Regulations 69 and 83 of the Elections General Regulations 2012 and section 44 of the Elections Act was complied with.

38. On whether there were irregularities and illegalities committed and their impact on the integrity of the elections, it is submitted that they did not and that they were not proved to have.

39. On what consequential orders and reliefs to issue it is submitted the petition has not met the threshold necessary for nullification of an election. That the challenges and human errors experienced cannot be said to have substantially interfered with credibility and integrity of the election and are excusable by dint of Section 83 of the Elections Act. They pray for a declaration the 1st Respondent was validly elected, that the election were credible, free and fair and finally the Petition be dismissed with costs to be borne by the Petitioner.

E. Issues for determination.

40. The issues as framed can be condensed into the following;-

1. Whether the 2nd, 3rd and 4th Respondents conducted elections that were credible, free, and fair and in compliance with the constitution, Elections Act and the Regulations made there under.
2. Whether election malpractices, illegalities, irregularities and errors were committed, if yes, by whom and whether the same affected the integrity of the election and the declaration made by the

2nd Respondent.

3. Whether the 1st Respondent was lawfully and validly elected as member of County Assembly for Kilgoris Central Ward.

4. What consequential orders, declarations and reliefs should the court grant?

5. Who should be condemned to pay the costs of this petition and to whom?

F. General Principles.

41. In the conduct of elections the IEBC is enjoined to do so with strict regard to the Constitution and the law. It is to ensure the elections are free and fair, free from violence, intimidation, improper influence or corruption, simple and transparent. See Art. 81 and 82 of the Constitution of Kenya. The law as to the election as MCA is governed by the Elections Act and the Elections General Regulations, 2012. Votes are to be counted and tabulated and announced. They are then sent to the Constituency tallying centre where they are collated and declared.

42. Crucial questions in every election petition are these: were there irregularities, did the irregularities affect the result? It is not envisaged that an election that is free from errors and irregularities anywhere in the world. The jurisprudence on elections acknowledges this reality. The laws have always been put in place to take care of those minor irregularities. Section 83 of the Election Act - which prior to Election Laws (Amendment Act) Act No. 34 of 2017- provided as follows:-

"No election shall be declared to be void by reason of non compliance with any written law relating to the 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..."

43. Whence does the burden of proof lie? What standard of proof must a court trying an election petition look out for? When is a petitioner considered to have succeeded in proving an election was a sham? The Supreme Court of Kenya in Raila 2, 2017 eKLR in interpreting Section 83 prior to the latest amended referred to above stated as follows;

"[211] In our respectful view, the two limbs of Section 83 of the Elections Act should be applied disjunctively. In the circumstances, a petitioner who is able to satisfactorily prove either of the two limbs of the Section can void an election. In other words, a petitioner who is able to prove that the conduct of the election in question substantially violated the principles laid down in our Constitution as well as other written law on elections, will on that ground alone, void an election. He will also be able to void an election if he is able to prove that although the election was conducted substantially in accordance with the principles laid down in our Constitution as well as other written law on elections, it was fraught with irregularities or illegalities that affected the result of the election"

44. Under Article 86 of the Constitution, IEBC is obliged to ensure, inter alia, that:

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

G. Analysis and Determination.

45. A number of issues have been raised over the election at Kilgoris Central Ward. The issues are raised

over specific polling stations. It suffices to analyze the issues one after the other with a view to assessing the magnitude and overall effect on the integrity of the election.

46. On the question whether there were irregularities and illegalities committed, it suffices to say that errors have been identified as regards a number of polling stations. As regards **Mutenkuar Primary School Polling Station** there is the allegation that there was no validation of voters from 6.00am to 9.00am. The respondents admit there was such an incident. The same is captured in Polling Station Diary (PSD). A copy is annexed to the Petition. What was the effect of the omission? The law envisages and acknowledges the limitations of technology and directed that there be a complementary system of identification of voters. There was therefore the identification by National Identification card and the KIEMS Machine which carries biometric data. When the KIEMS system fails there is identification through alphanumeric. The Respondents say that during the period in question, they had used both systems. That they used the KIEMS system and that the clerk failed to do the final part which is validation by the machine. The Presiding Officer and the Returning Officer say that the manual register was crossed out after the voters passed the machine stage. The register has not been produced and no party asked for its production. The Petitioner says about 106 voter were not validated and hoped the same would be disregarded. It is not known how he came up with the figures. His testimony departs from his pleadings in that he says the voters were neither identified by identification card or machine.

47. What can one make of the issues raised over Mutenkuar Polling Station? It is not demonstrated how the same affected the integrity of the election. Election was by way of secret ballot, it has not been demonstrated how the Petitioner was prejudiced. No ill motive has been attributed to anyone. Not even the polling clerk who apparently had challenges with the equipment. There were polling clerks and agents. The Petitioner did not call any of his agents who informed him of what transpired. No one raised any issues over the mishap. I am inclined to believe the explanation by the Presiding Officer that the matter was settled amicably and the clerks swapped. This was a small issue. These were teething problems and of little effect to the election. I take judicial notice that although we are in information age, not everyone is techno-savvy. Our law acknowledges the challenges that come with technology. In the National Super Alliance Case referred to by the 2nd and 3rd Respondents in their submissions, NASA urged the court to hold that the General Elections of 2017 be exclusively electronic. The High Court in declining the invitation interpreted Section 44A of the Elections Act, 2011- and particularly as regards a complementary mechanism for identification of voters and transmission of results- as follows;-

"To our mind, what was required of the respondent was to put in place a mechanism that would complement the one set out in section 44 of the Act. The particulars of the mechanism, whether electronic, manual, or any other mode was not expressly provided in section 44A. If that was the intention of Parliament, nothing would have been easier than to specify so."

48. Our election system is still largely manual. What should the way be going forward? I am aware the polling clerks are employed on *ad hoc* basis in every election. Budgetary constraints may not allow a "standing army." Nevertheless, the electoral body ought to take proactive measures. In the process of developing policy on the "progressive use of technology" as enjoined in Section 44 of the Elections Act, it has to train polling clerks way in advance if we are to recoup on the heavy investment in technological equipment.

49. As regards **Oloshaiki Primary School Polling Station**, I have looked at the relevant form 36A and 36B. It is apparent there was mis-posting. In form 36B, Oloiptip Stanley Koiyoki is reported to have garnered 94. The Petitioner is reported to have garnered 2 votes. The 1st Respondent garnered 60. The total valid vote is reflected as 401. In form 36A, Oloiptip Stanley Koiyoki garnered "000" and not 94, the petitioner garnered "094" not 2 votes. The total valid votes cast is reflected as 201 not 401. The explanation given by the Returning Officer in his pleading and testimony in court is that the error occurred from the time a wrong entry was made for Oloiptip Stanley Koiyoki. This explains the figure of 201 which is supposed to be the total being reflected in form 36B as garnered by Saitabau Victor. Mr. Saitabau had garnered 19 and not 201.

50. What is the effect of the error over Oloshaiki Primary School Polling station? Justice Emukule in

Harun Meitamei Lempaka vs. Lemanken Aramat vs. and 2 others Election Petition No.2 of 2013 (2013)eKLR held that the forms at the polling station are the primary documents. Maina Kiai case says the polling station is the true locus for the exercise of the voters will. I will consider Form 36A. I agree with the Respondents that this was a mere clerical error. The jurisprudence cited by advocates all underpin the fact that courts in auditing elections have to leave room for human imperfections. The error committed at Oloshaiki is minute and inconsequential. If 92 votes due to the Petitioner were added to his count it would not change the outcome of the election. Besides there has been no proof of “criminal manipulation” as pleaded by the Petitioner. There is no proof of impartiality, lack of independence or that any official was influenced or succumbed to influence of anyone or party in declaring the results. They were just guilty of administrative failures.

51. As regards **Enenkeshui Primary School Polling Station**, evidence was led that the Presiding Officer was arrested for alteration of votes in Presidential elections. No copy of charge sheet has been presented by either party. The respondents, however, admit the occurrence of the arrest. The only contention is whether his arrest and charges affected the results concerning membership to the County assembly. The general election of 8th August 2017 had candidates for six elective positions. The officers officiating were the same. However, they were distinct elections. The Petitioner in his testimony says, the Presiding Officer having been indicted over the Presidential ballot box cannot be trusted. That the entire results cannot be trusted and hoped the officers had cancelled the results as they had promised.

52. What was the consequence of the arrest of the Presiding Officer at Enenkeshui? The case against the Returning Officer in John Murumba Chikati vs. Returning Officer Tongaren Constituency & 2 Others (2013) eKLR is instructive. The court held that the commission of an offence is one thing whilst the effect of the offence to the integrity of the election is another thing altogether. A blanket condemnation cannot be used over all the six elections. It is trite law that an individual is considered innocent until proven guilty. The standard of proof in election offences is the standard in criminal cases; beyond reasonable doubt. Other than the testimony by the Petitioner that he was a witness, no evidence has been tabled as to the status of the said case against the Presiding Officer. There is no link of any electoral official to an election offence as regards MCA election. The alleged offence is too remote to have affected the election.

53. During hearing, issues were raised over results from **Osupuko Primary School Polling Station**. This was not pleaded. The general rule is that parties are bound by pleadings. Justice Kimaru in Mahamud Muhumed Sirat v Ali Hassan Abdirahman and 2 Others Nairobi Election Petition No 15 of 2008 (2010)eKLR declined to render an opinion on aspects of the petitioners case which were not based on pleadings. What can one make of the issue raised? I agree with the respondents, that questions over stations which were not pleaded should be disregarded as was held in Ferdinand Waititu case which they have cited. That is for good measure. It is to guard against fishing expedition and element of surprise. I decline to make a finding on allegations raised over Osupuko polling station.

54. As regards **Meguarra Primary School Polling Station**, there was an allegation that some twenty votes were not accounted for and that some were instead found in the Presidential ballot box. I have looked at the form voters. Form 36A as the Petitioner says reads the total registered voters as 000. The total valid votes cast are 498. In form 36B, the registered voters are indicated as 597. The primary document is form 36A. If indeed there were stray ballots discovered in the Presidential ballot box, there can be no official to blame for them. The voter is to blame. There is no known procedure for allowing such voters to cast their vote afresh. They have no recourse unless a fresh election is ordered. The stray ballots have not been counted to the advantage of any of the candidates. The petitioner is not prejudiced. The issue does not affect the integrity of the election.

55. On whether the elections were conducted in accordance with the electoral law, it suffices to state at this point that the election was free and fair. The paper trail left behind give a vivid picture of the will of the voters. As already stated as regards each impugned polling stations, the errors pointed out were not of such a magnitude as to vitiate an election. On authority in Gatirau Peter Munya vs. Dickson Mwenda Kithinji and 2 Others SCK Petition No 2B of 2014 (2014) eKLR the shortfalls pointed out in the Petition would not justify the nullification of the election.

56. Section 83 of the Election Act as interpreted by the Supreme Court in *Raila Amolo Odinga & Another v Independent Electoral & Boundaries Commission & 2 others, Presidential Election Petition No.1 of 2017 (2017)eKLR* is equally instructive in that regard. Suffice it to point out that the section has since been amended to introduce "and" in place of "or" which hitherto gave the section a disjunctive meaning. The Supreme Court of Kenya, in the above case, dealt extensively with the implication of both. Nevertheless, noteworthy that the amendment does not apply retrospectively to this Petition. This court has had opportunity to assess both the qualitative and the quantitative aspects of the election.

57. It suffices to comment on one more thing about the prayers sought in the Petition. The Petitioner called for scrutiny and recount and that if the scrutiny and recount revealed he was the winner, he be declared as such and a certificate to that effect be issued. The Petitioner however never pursued the prayer for scrutiny and recount. He abandoned it from the start and not a word of it was heard during pre-trial conference. It never featured in the issues agreed upon and adopted by this court. The closest the Petitioner talked of scrutiny is when he was cross-examined by Mr. Koech and states that if scrutiny is done the votes will be equal or he will be on the lead. The Respondents have submitted that in abandoning scrutiny and recount the Petitioner denied this court an opportunity to get the proper picture over the Petitioner's own claim. It was for the Petitioner to prove his case to the required standard referred to above. It was neither for the Respondents nor this court to direct him how to go about it. This Petition has to be determined on the pleadings, testimony of witnesses and documentary evidence tendered. A bird in hand is worth two in the bush.

58. This court is enjoined to do only one thing; to ascertain and clear the way for the will of the people in the election. What was the will of the electorate at Kilgoris Central Ward for the impugned election? The sum total of the analysis above is this; There were irregularities noted. The irregularities did not affect the integrity of the election. The 1st Respondent was therefore validly elected and declared MCA. No one is indicted of any electoral offence. The election was substantially conducted in accordance with the principles set out in the Constitution, the Election Act and the Regulations made there under. And finally the Petitioner has not met the legal threshold for nullification of an election. He has not proved either of the two limbs, that there has been violation of the constitution and the law or that the irregularities complained of affected the outcome of the election.

H. Conclusion and Disposal Orders.

59. In conclusion, allow me to revisit the important issue of proof in election petition. In civilized order of things, it is not enough to shout Thief! Thief! That is a preserve of the lynch mob. In elections the maxim *omnia praesuntur legitime facta sunt donec probetur in contrarium* holds sway. All things are presumed to have been legitimately done until the contrary is proved. It is not enough to shout Error! Foul! The Petitioner has to go ahead and prove the error or foul in question affected the outcome or the integrity of the election.

60. Having said the election was conducted substantially according to law and that irregularities, errors identified did not affect the result, the election of the 1st Respondent as the Member of County Assembly representing Kilgoris Central ward is hereby given a clean bill of health. The election and declaration of the 1st Respondent is hereby upheld. Consequently, the Petition is hereby dismissed with costs to the 1st Respondent.

61. The following orders do hereby issue:-

- a. The Petition is hereby dismissed with costs to the 1st Respondent. The costs shall be borne by the Petitioner.
- b. I declare that, in the election of 8th August, 2017, the 1st Respondent was validly elected as Member of County Assembly for Kilgoris Central Ward.
- c. The security of costs deposited in court shall be held in court pending filing and assessment of

the Bill of Costs. The security of costs shall subsequently be applied/ disbursed as part of costs payable.

d. Pursuant to section 86 of the Election Act, a Certificate of the determination of this petition AND Notice shall issue to the Independent and Boundaries Commission- (IEBC) and to the Speaker Narok County Assembly respectively.

Dated, delivered and Signed at Kilgoris this 15th day of February, 2018.

By: D.K. Matutu Esq. [Senior Resident Magistrate].

In open court, in the presence of;-

Mr. Koech for the 1st Respondent

Ms Pauline Mwencha Holding Brief for Mr. Morara for 2nd and 3rd Respondents.

Mr. Otieno Geoffrey for the Petitioner.

Court Assistant- Mr. Mutai.