



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT BUNGOMA

ELECTION PETITION NO.1/2017

SHITANDI EDITH WERE.....PETITIONER

VERSUS

1. HENRY MAJIMBO OKUMU.....1ST RESPONDENT

2. GREGORY ODHIAMBO OUKO.....2ND RESPONDENT

3. I.E.B.C.....3RD RESPONDENT

J U D G M E N T

On the 8th of August 2017 an election for the Member of County Assembly Khalaba Ward of Kanduyi Constituency Bungoma County was held. There were 8 candidates for the seat;

1. John Wandiba Mabonga who garnered 1,063 votes.
2. Makhanu Cornelius Wanjala who garnered 1,487 votes.
3. Nyongesa Joseph Wafula who garnered 358 votes.
4. Okumu Henry Majimbo who garnered 3,343 votes.
5. Shitandi Edith Were who garnered 2,789 votes.
6. Tela Augustine Nyongesa who garnered 732 votes.
7. Wanyama Peter Barasa who garnered 189 votes.
8. Waswa Collins Barasa Wafula who garnered 98 votes.

The 1st Respondent Henry Majimbo Okumu was declared the winner and the duly elected member of County Assembly Khalaba Ward and gazetted in Kenya Gazette of 22nd August 2017. The petitioner vying on a Ford Kenya ticket being dissatisfied filed this petition against the 1st Respondent Gregory Odhiambo Ouko the 2nd Respondent who was the Returning Officer and the 3rd Respondent Independent Electoral and Boundaries Commission seeking the following orders;

- a) An order for elaborate scrutiny of the principal register for Khalaba Ward of Kanduyi Constituency and all documents related, including the polling day diaries and field note books, security of the used and unused ballot papers, BVR records for the polling day and Kiems records for the polling day and a recount of all ballot papers cast during the election held on 8th August 2017.
- b) An order for verification of all statutory forms 36A and 36B.
- c) A declaration that the 1st Respondent was involved in electoral malpractices/offences and therefore was not validly elected.
- d) A declaration that the petitioner was the validly elected candidate and so be declared the valid winner of the Khalaba Ward Member of County Assembly.
- e) A declaration that the entire electoral process in Khalaba Ward from polling, counting, tallying and declaration of results was not

only unconstitutional but also illegal and irregular, null and void including the outcome and declaration of the winner of the Member of County Assembly election.

f) A declaration that electoral process in Khalaba Ward of Kanduyi Constituency Member of County Assembly election should begin afresh given the massive, widespread electoral malpractices identified in this petition and information contained in the witness affidavits.

g) An order for payment of costs of this petition.

h) Any other order that this court may deem necessary to grant.

In the petition, the petitioner alleges that there were breaches and violations of the provisions of the Election Act 2011 and the regulations thereunder by the 1st Respondent with his Agents, campaigners and supporters and by the 2nd Respondent its officers and employees including the 2nd Respondent, that the elections were not conducted in accordance with the principles of the electoral process set out in the Constitution, principles of natural justice and rule of law and democracy and that the irregularities and malpractices were to the detriment and loss of the petitioner. The petitioner further pleads that the acts and omissions of the 3rd Respondent and its officers and employees and the outcome thereunder were rampant and flawed that they completely obliterated the possibility of discerning therefrom whether the results announced were true, lawful and proper expression of the Khalaba Ward peoples will. She further pleads that the 1st Respondent singularly, jointly and severally contravened, violated and breached the provisions of the Constitution of Kenya 2010, Elections Act 2011 the regulations thereunder which render the announcement and declaration of the 1st Respondent as winner of Member of County Assembly Khalaba Ward null and void. It is claimed that the 3rd Respondent and its officers and employees failed to establish electoral systems which were accurate, secure, verifiable, accountable and or transparent and declared results which in many instances had no relation to the votes cast at the polling station and excluded the petitioner's Agents altogether from the electoral process. The petitioner further avers that the 3rd Respondent and its officers committed criminal offences under S.59(a) (b) (d) (f) (I) (k) (l) and m of the Electoral Act. The petitioner alleges ballot stuffing, multiple voting gerrymandering, and inflation of the number of votes by the 2nd and 3rd Respondents to the advantage of the 1st Respondent rendering the win invalid, illegal, null and void. In paragraph 15 and 16 the petitioner claims that the 1st Respondent personally and with its Agents heavily and with impunity engaged themselves in outright bribery and treating of voters prior to the polling day and on 8/8/17 particularly at Kanduyi DEB primary, Kanduyi Childrens home, Pamus Teachers College, West Kenya College and Mukhaweli primary, Wamalwa Kijana high school and Bondeni and Mteremko all polling centres which was illegal and intended to induce voters to cast their votes in favour of the 1st Respondent and to the detriment of the petitioner. She further pleads that the 1st Respondent directly and indirectly through his Agents and supporters engaged in physical violence against the supporters and Agents of the petitioner during the campaign and on the polling day. The petitioner accuses the 3rd Respondent of deliberately making false and inaccurate entries in the statutory forms for Khalaba Ward in particular Bungoma High School tallying centre where the entries in Form 36B were very different from those announced at the polling stations and in paragraph 19, denying the petitioner and or his lawfully appointed Agents access to documents and electoral processes information and access to sorting, counting and tallying of the Member of County Assembly election results and statutory forms and in paragraph 21 ejecting the petitioner's Agents in Kanduyi Childrens Home polling centre. Lastly the petitioner pleads that the 3rd Respondent failed to reconcile the results irredeemably compromising and tilting the election in favour of the 1st Respondent and that so widespread were the irregularities and malpractices that it is not possible to determine whether the registered votes in the Ward exercised their free will in voting for their Member of County Assembly and further that the results declared and gazetted are untenable, null and void and an abuse of the electoral system and process and that the 1st Respondent is guilty of election offences of illegal campaigns, meetings, bribery, treating, assault and physical violence and voter manipulations.

In support of her petition, the petitioner PW1 testified and adopted her sworn affidavit as did the six witnesses she called.. I have perused her affidavit it generally reiterates her pleadings. She annexed a copy of her National Identity Card, her Certificate of Nomination, her Certificate of Clearance, copies of the results and gazette notice thereof as SEW1-5 respectively. She testified that there was rampant voter bribery by the 1st Respondent in all polling stations. She claimed the 1st Respondent was giving out money openly and in West Kenya polling station, he was chased away for dishing out money and he threatened those chasing him away "Nikipita kura nitakuua". She claims in Mteremko and Khaweli, his Agents were dishing out money. She stated too that her Agents and supporters were intimidated and his Agent Kenneth Wanjala beaten at Perfectors High School and these supporters were known to the Agent. The incidents were reported at Bungoma police station and are pending investigations. She claimed that at Perfectors high school the violence was perpetrated at the main road leading to the polling station as a result of which her supporters were not able to vote. At Kanduyi DEB stream 3 there were people demanding to see Agents of Ford Kenya. She testified that at Kanduyi Childrens Home her Agent was locked out as there was no space and it took the intervention of his chief Agent for him to be allowed inside. She claims further that some of her Agents did not witness the opening of ballot papers and that some drunk men were threatening his supporters in the queue telling them they would see when the election was over. For illegalities she stated that in Kanduyi polling centre, form 36As were signed and others were unsigned. She identified form 36A Kanduyi DEB primary stream 3 of 4 which indicated John Mabonga got 40 votes which figure is altered. This form she denies this form was not signed by any Agent. On conspiracy she claimed that Philip Wanjala presiding officer Kanduyi Childrens Home was a campaigner for Hon. Majimbo. It is her evidence too that on the polling day the 1st Respondent and his Agents campaigned outside the poling station.

Under cross-examination, she admitted that one would not know who would be voting for whom in a poling queue. She admitted too that she signed the results form, that in her perpetrated she does not mention any malpractice or irregularities, eye witnesses or Agents or presiding officer by name, election officials or ODM party members or sources. Her petition too does not name any eye witnesses or supporters who were intimidated. She states she did not get form 36A from her Agents though she accessed 24 of them. She admitted too that she did not file any complaint to IEBC abut malpractices. She claims most of what she has stated she ws told. She admits too that she was not at West Kenya when her Agent was chased away. She did not also complain to the police who were at the polling station about bribery. Cross-examined by Mr Musumba, she stated she did not witness any malpractice. She claims she came to know of the malpractices on 10/8/17 after the results when she reported the incidents to the police but could not remember the OB number. Cross-examined by Ms Mumalasi, she stated that the results of Kanduyi DEB was reflatd in form 36B and that the difference between the 1st Respondent and herself was 554 votes and that even if she got all the votes cast there, she would still not be the winner. She admits that she has not particularized how the stage managing and rigging was done and that she has not stated who chased away her Agents. She admits that the Ford Kenya Agent signed

the West Kenya station form 36As, the form 36A of Pamus Teachers College, Wamalwa Kijana secondary school form 36A, Bondeni form 36A, Mteremko form 36A, Kanduyi Childrens home, Kanduyi DEB primary polling station form 36As but 1 was not all 4 form 36A for Perfectors high school polling station as well as all form 36As for Mukhaweli primary polling station. She admits she has not stated what conspiracy there was and when it was done or the Articles of the Constitution or Sections of the Elections Act were not complied with. She admit she has not presented a witness who received a bribe.

PW2 Griffin Wafula Kisaka adopted his affidavit dated 5/9/17 as his evidence. He attached his ID Card to his affidavit. He states he is a registered voter at Perfectors High School polling station. He deposes that on 8/8/17 at around 11.00am he was going to the polling centre when he met a group of people who identified themselves as supporters of ODM party and Henry Majimbo Okumu and identified him as one of the supporters of Ford Kenya party and they threatened to kill him if he went to the polling centre to vote. He states he was chased away and was unable to vote. He claims further that same group physically assaulted several other persons. However in his evidence in court, he claimed he was a registered voter at Lupida Khalaba Ward. He repeated the same claim under cross-examination by Mr Makali. It is not clear whether Lupida is the same place he is calling Perfectors high school in his affidavit. He claimed he did not know the people who threatened him and has not named them in his affidavit and on further cross-examination he stated he saw the same people assaulting the supporters of the petitioner. He states he did not make a report of the incident.

PW3 Lilian Achieng adopted her affidavit as her evidence, she is a Kenyan citizen ID Card NO.26447757 which she exhibited and is a registered voter at Mukhaweli polling station 2 of 3 where she voted on 8/8/17. She claims that after voting she met 3 brothers of Henry Majimbo Okumu the ODM party candidate one of them known to her as Godfrey Okumu who toped and searched her for money allegedly given to her by Ford Kenya candidate. She claims further that while walking away towards Mumias road, she met Majimbo Okumu's wife in a vehicle accompanied by 2 other vehicles with youths who pursued her for being a supporter of Ford Kenya candidate. She claims she jumped over a fence and sought refuge I a house where the youth followed her but she did not come out fearing they could harm her. She stated under cross-examination that she did not make a report to the police but told many people.

PW4 Ruth Sendwa Mayabi of Christ the King area ID Card NO.24278957 adopted her affidavit dated 05/9/17 as her evidence. She claimed she is a registered voter at Mukhaweli polling station stream 3 of 3 where she voted on 8/8/17 at 1.00pm. As she walked away, at the gate, she was attacked by 3 people well known to her as 2 brothers and a cousin to Henry Majimbo Okumu the ODM party candidate. She states that they stripped her naked asking for money allegedly given by Ford Kenya candidate. The assailants really embarrassed her and abused her physically, found her with Kshs.250/0 which they returned to her. She claims after that she reported to Bungoma police station and was issued with an OB number.

Under cross-examination she insisted she was attacked by 3 people known to her and 2 brothers of Majimbo, Godfrey Sege Okumu, Dosandos Okumu and a cousin to Henry Majimbo called Manu. She states she did not name them in her affidavit but she stated she knew them. She claims she was with Lilian (PW3). She claims the men left her when passersby made noise. She claims she was a campaigner for the petitioner and knew Godfrey as a campaigner of the 1st Respondent. Under cross-examination, she insisted the men pulled down her trousers exposing her backside and a passerby had to give her a lesso to cover herself. She claims some voters went back on seeing the violence.

PW5 Robert Musumba Barasa ID Card NO.26722930 adopted his affidavit dated 5/9/17 as his evidence. He adopted his affidavit dated 5/9/17 to which he annexed a copy of his ID Card no.26722930. He claimed to be a registered voter at Kanduyi Childrens Home polling station 4 of 4 where he voted on 8/8/17. He was a duly appointed Agent of Ford Kenya party at Kanduyi Childrens Home Khalaba Ward. He annexed copies of appointment letter from Ford Kenya and oath of secrecy. He claims he arrived at the police station at 3.00am that the presiding officer denied him and other Agents access until 6.30am. He clams when he entered the room, he found they had already started to work without the presence of Agents. He states he complained to the presiding officer but was put off. He claims he witnessed that the clerks were giving some voters more than 2 ballot papers for Member of County Assembly. He states that he complained with other Agents and the presiding officer admitted that was a mistake. Under cross-examination, he stated there was another Ford Kenya Agent whose name he does not know. He reiterates that he was allowed into the station at 6.30am.....had stated. He says he companied when at around 10.00am the clerks started issuing 2 ballots to voters and that he did nto sign the form to authenticate the results. He stated too that his form (Agency) was not signed by the returning officer. He claims he saw the chief Agent Ford Kenya seeking to see Ford Kenya Agents at the station which was not wrong. He does not know whether the other Ford Kenya Agents at the station signed the form. He also did not report anything to the police. He disclaimed appearing before Paulete Achieng to swear the oath of secrecy. He did not witness any violence at the polling station he was in.

PW6 Kennedy Mukhebi Wanjala adopted the evidence in his affidavit dated 5/9/17 in pp.35 of the petition. He deposes that he is a Kenyan holder of ID Card no.11785976 attached to his affidavit. He is a registered voter at Bondeni Mteremko polling station 2 of 2 where he voted on 8/8/17. He attached a copy of his appointment letter from Ford Kenya and oath of secrecy from KMW2 and his job was coordinating the Agents of Ford Kenya. He went to Kanduyi at around 7.00am and found Ford Kenya Agent Paul Khamala who had been ejected by the presiding officer on allegation that the room was small to accommodate all Agents. He then proceeded to Mteremko polling centre and found Ford Kenya party Agent by the name Richard Wanyoni Makhanu who informed him that all assisted voters were only assisted by the presiding officer in absence of party Agents contrary to regulations. At around 1.00pm he was attacked at Perfectros high school and injured by known supporters, Agents and followers of Henry Majimbo Okumu. He also witnessed some of their supporters being beaten by supporters of Majimbo and quite a number of them prevented from voting. On his way to hospital, he passed by Mukhaweli primary school where he was attacked by another group of ODM followers led by the wife of the 1st Respondent saying he was interfering with the 1st Respondent's re-election as Member of County Assembly. He avers that he was treated at Bungoma Referral Hospital after which he reported to Bungoma police station and was issued with a P3 form. He states that he has attached a copy of the treatment notes and P3 form KMW3 and KMW4. He states the followers and Agents of Henry Majimbo Okumu continued to threaten and harass him. However, the treatment note admitted to is not attached. His affidavit is on pps.35 and 36, copy of his ID Card on pp.37, his Ford Kenya Agency letter pp.38, Oath of Secrecy pp.39, P3 form pp.40 and pp.41 and in pp.42 is the affidavit of another witness. Under cross-examination, he stated that Paul Khamala was the Ford Kenya Agent who had been thrown out at Kanduyi Childrens Home but he is not a witness in the petition. He intervned and he as allowed back to the room which was claimed to be too small. He admits the results at that station was signed by Ford Kenya Agent. He admits he did not know the Agents of Majimbo who attacked him and has not named the followers involved in assaulting him or those that attacked Ford Kenya followers or that were attacked. He claims he reported to the police the following day 9/8/17 at 6.30pm. He admits the P3 form is indicated to have been filled on 8/8/17 and age of injuries 3 days to the incident. He reluctantly

admitted that PW7 Kevin Matere was his son.

PW7 Kevin Mabwe Mukhebi ID card no.30286550 adopted his affidavit dated 5/9/17. He is a registered voter at Perfectors High School polling station 3 of 4. He annexed a copy of his ID Card KMM1, a copy of Agent Appointment letter and Oath of Secrecy KMB2. He states he arrived at the station at 5.0am and was allowed in by the presiding officer with other Agents to observe what was going on. The voting went on smoothly but the presiding officer declined to show the Agents the total number of registered voters although he had recorded 453 yet when votes were counted there were 463 valid votes with 5 rejected votes which showed more people had voted than were registered.

The 1st Respondent filed a response dated 28/9/17 stating he is the duly elected Member of County Assembly for Khalaba Ward within Kanduyi Constituency Bungoma County on an Orange Democratic Movement ODM party ticket. He admits that the persons named in the petition in paragraph 6 of the petition were the candidates in respect of Khalaba Ward Member of County Assembly election held on 8/8/17. He admits also that he emerged the winner and was subsequently announced and declared by the 2nd Respondent as the winner on 10/8/17 and subsequently gazetted as duly elected Member of County Assembly Khalaba Ward Kanduyi. He denies being privy to any alleged irregularities either singularly, jointly, or severally with Agents, campaigners or supporters. He avers he is totally unaware of any alleged acts or omissions by the 3rd Respondent officers which vitiated the electoral process as to obliterate the possibility of discerning whether the results were true, lawful and a proper expression of Khalaba Ward peoples will and that on the contrary to 3rd Respondent its officers and employees being an independent organ performed its role and validly declared the 1st Respondent as winner and that the announcement and declaration were a reflection of the sovereign will of the people of Khalaba Ward which ought not to be interfered with. He puts the petitioner to strict proof that the Constitution of Kenya 2010, the Elections Act 2011 and the election regulations made thereunder were breached, contravened and or violated. On the contrary the 1st Respondent avers tat his win and subsequent declaration as a Member of County Assembly of Khalaba Ward was valid,genuine and bona fide and a stamp of confidence by the people and cannot be deemed null and void. In response to paragraph 12 of the petition, he states that the 1st Respondent is a stranger to the contends therein and that the 3rd Respondent being an independent constitutional body could only act within the law and that the steps taken were geared towards safeguarding the electoral processes from manipulation. He further denies being party to any criminal offences under the Elections Act. He also denies knowledge of any huge discrepancies in the votes declared which discrepancy is neither pleaded nor particularized or being privy or beneficiary to any alleged ballot stuffing, multiple voting or gerrymandering or inflation of votes in tallying and avers that claims are merely speculative and based on conjecture the petitioner having acknowledged the results without raising a finger. The Respondent denies having engaged in acts of bribery and treatment on or prior to the polling day in the centres mentioned or at all. He denies too that the votes cast in his favour were a product of inducement and contends that the averments are shallow and hollow. He also denies having engaged in acts of violence directly or otherwise during the campaigns or on the polling day and further denies the contents of paragraph 18 that the officers of the 3rd Respondent engaged in making false and inaccurate entries in the statutory forms for Khalaba Ward Member of County Assembly election results. He equally denied the contents of paragraph 19, 20, 21 and 22 of the petition. He denies that the entire electoral process for Khalaba Ward Member of County Assembly election was compromised or tilted illegally in his favour. He avers there were no irregularities and electoral malpractices and hat the announcement and declaration by the 2nd Respondent of his win was valid, legal and lawful as well as the gazettement. He avers that the petitioner had made general allegations of fact without offering particulars making the petition frivolous and an abuse of the process of court. That the 2nd Respondent is an independent commission not subject to the control of any person or authority and that the allegations of conspiracy or collusion made are outrightly false and malicious,that the election was conducted in accordance with the Constitution, National legislation and all relevant regulations, that the petitioner won validly and was declared winner of the elections in respect of Khalaba Ward/Kanduyi Constituency having garnered majority votes, that the petitioner did not garner majority vote to be declared winner fo the election, that the petitioner having signed for and accepted the declared results is stopped from challenging their validity, that having participated in the electoral process from polling, counting, tallying and declaration of results is stopped from raising allegations of unconstitutionally, illegality and or irregularity, that the prayer to declare the entire electoral process in Khalaba Ward Member of County Assembly elections should start afresh is untenable, unrealistic and impractical, that he was never involved in any electoral malpractices or irregularities singularly or jointly and lastly that the results were a true reflection of the people and that he was validly elected. He seeks that the petition be dismissed, that a declaration do issue that the election of the 1st Respondent was valid and that he be awarded costs of the petition.

The 1st Respondent filed a 52 paragraph affidavit attaching a copy of his ID Card, averring that he is a voter in Khalaba Ward, that he was nominated by ODM party to vie for the Khalaba Ward Member of County Assembly in the elections of 8/8/17 and that prior thereto was a civil leader in the defunct local authority and 1st elected Member of the County Assembly in the 2013 elections. He attached a copy of his nomination certificate and was issued with a certificate of elected Member of County Assembly HM03. He also in his affidavit denies the allegations by the petitioner and the 6 witnesses called. At hearing, he adopted his affidavit as his evidence. He stated that there were no irregularities and denied that he was engaged in open bribery. He states that no bribed person was mentioned as it takes 2 to tangle. He states that as a seasoned politician since 2002, he was alive to the electoral code and could not breach it. He denies any acts of violence by himself, his Agents or anyone known to him. He states he was never summoned by any Government Agency over any violence. He states he got 3343 votes against the petitioner's 2787 and that the petitioner signed the form with another contestant Cornelius Makhanu. The petitioner did not contest the result, did not ask for a recount. He states it would be unfair to have the elections nullified. He considers it wishful thinking for the petitioner to ask to be declared the winner when she garnered less votes than what he garnered by over 500 votes.

He stated that Godfrey is his brother and not an Agent and what is alleged against him should not be taken as having had his authority. He testified further that candidates supporters are not allowed to don party colours and that one cannot identify a party supporter in a queue by looking at the. Under cross-examination he stated that he knew Ruth Sendwa (PW4) as she was in the past a sister in law cohabiting with Godfrey his brother. He claimed they are no longer together and that their relationship his not cordial. He testified further that he had not appointed any Agent and that there were only party Agents.

The 2nd Respondent testified as DW2. He stated that for purposes of Khalaba Ward he was the Returning Officer Kanduyi Constituency Bungoma County. He filed a response to the petition on behalf of the 3rd Respondent and on his own behalf and an affidavit in support of the Response to petition dated 22nd September 2017. the 2nd and 3rd Respondents denied the averments in the petition save for paragraph 1,2,3,4 and 5 which are descriptions of the parties and restate the provisions of the law on elections. The 2nd and 3rd Respondents also admitted paragraph 6,7 and 8 of the petition restating the candidates and the parties in the election and the votes they garnered and that the

3rd Respondent published a notice in the Kenya Gazette dated 22/8/17 declaring the 1st Respondent duly elected Member of the County Assembly for Khalaba Ward Kanduyi Constituency Bungoma County under the Orange Democratic Movement party. The Respondents denied there were any acts of commission or omission on the part of the employees and officers that can render the outcome of the election in the Khalaba Ward Member of County Assembly elections flawed in any fundamental or grave manner to negate the true expression of the Khalaba Ward people or any acts of omission that materially went against the root and purpose for which the electoral dispensation is created by the Constitution and other electoral laws to warrant nullification. The Respondents further denied the averments in paragraph 11,12,13,14,15 and 16 and with respect to paragraph 17 stated that they are strangers to the averments therein. They stated they are strangers to paragraph 18 and 19 and restated that their officers and employees faithfully executed their Constitutional and legal mandate as best as they could in Khalaba Ward. In paragraph 13 of the response they deny the allegations in paragraph 20 of the petition. They equally denied paragraph 21 and 22 of the petition and aver that the election results announced in respect of Khalaba Ward Member of County Assembly elections are a true reflection of the voters will and was not compromised in any way. They also deny paragraph 23 and 24 of the petition and put the petitioner to strict proof. The 2nd and 3rd Respondents state that the petitioner was not duly elected for the following reasons:

- a) The Respondents conducted a free and fair election.
- b) The petitioner did not at the Elections garner the majority of the valid votes cast.
- c) There is no proof either singularly or cumulatively any breach of the law that occurred and or substantially affected the conduct, result and outcome of the results as would warrant a nullification and a declaration of invalidity of the election.
- d) No basis within the parameters of the burden and standard of proof has been laid that should upset the sovereign will and chance of the electorate of Khalaba Ward, Kanduyi Constituency, Bungoma County.

Wherefore the Respondents pray that the petition be dismissed with costs and that it be determined that Henry Majimbo Okumu was duly elected and the election was valid. He filed a 29 paragraph affidavit in support of the 2nd and 3rd Respondents response which at hearing he adopted as his evidence. Basically he swore that he is a Kenyan citizen bearer of ID Card number 10820758, that he is an employee of the 3rd Respondent as a returning officer charged with the statutory duty of organizing and supervising elections, that he was appointed and gazetted as a Returning officer for Bungoma on 5/5/17 for the elections held on 8/8/17, that he had authority from the 3rd Respondent to swear the affidavit, that the petitioner was one of the candidates in the election held on 8/8/17 for Member of County Assembly for Township Ward (?) and participated on the basis of her nomination a Member of Ford Kenya party, that the results were tallied at the polling station using form 36A in the presence of candidates, their Agents and observers as required by Article 86 of the Constitution, that he prepared forms 36B which reflect the aggregate results in good faith and fulfillment of his oath of office to act without fear and favour. He deposes that as required by rule 21 of the election rules he has produced and delivered forms 36A marked Goo1 and form 36B marked G002. He denies that any party accredited Agents were denied entry into any polling station or tallying centre, that due to the limitation in size of polling centres the number of Agents to be admitted cannot be open ended and this the parties and candidates were aware. He deposes that vague and general accusations in the petition and depositions are imprecise, without particulars and incapable of direct rejoinder, that the elections were conducted peacefully in Khalaba Ward, that the affidavit of Kevin Wanjala Kisaka, Lilian Achieng, Ruth Sendwa Mayabi, Robert Musumba Barasa, Kennedy Mukhebi Wanjala, Kevin Matere Mukhebi do not raise any substantial issues that can warrant the court to interfere with the election results herein. In paragraph 18, he deposes that the petitioner has made generalized allegations none of which prove the existence of any electoral offences, malpractices and or irregularities sufficient to invalidate the election for Member of County Assembly Khalaba Ward. He states that he did not witness any alleged bribery, he never favoured the 1st Respondent before, during or after the elections. In paragraph 21, he deposes that voting Agents or political parties were given access to polling stations and the tallying centre and were treated with utmost respect and were consulted by presiding officers on matters where their input was required. He deposes that no details of Agent who were allegedly denied entry were given or the officers who denied the entry, that election petition is not an apt procedure for enforcement of fundamental human rights and that the election was an exercise of fundamental political rights by the people. He deposes in paragraph 24 that there is no proof that singularly or cumulatively any breach of law as may have occurred affected or substantially affected the conduct result and outcome of the results as would warrant a nullification and declaration of invalidity of the elections. He further deposes in paragraph 25 that despite such clear poll victory the petitioner has continuously disparaged the electoral win. He has been advised by his advocate that the petition does not establish any legal reason to justify an order for nullification of the 1st Respondent as Member of County Assembly of Township Ward (?). He deposes that the court considers and balances not only the interest of the petitioner but all interests of the people of Khalaba Ward in order to arrive at a decision that firmly achieves the ends of justice for all. Lastly, he pleads that it is not in the interest of the people of Township (??) Ward to impose on them a by election or a leader who did not secure the majority of votes cast in the election of 8/8/17.

DW3 Erick Wanyonyi Webi the presiding officer Mukhweli primary polling station 2 adopted his sworn affidavit dated 30/9/17 as his evidence. He attached a copy of form 36A to his affidavit. He attached a copy of his ID card and stated that he was the presiding officer Mukhweli primary school station 2 of 3. He deposes he did his duties in accordance with the law without fear or favour that party Agents in polling station 2 of 3 were allowed to enter the polling station as soon as it was opened at 6.00am and none of them was ejected at any time, that the Agents signed form 36A and were given copies thereof, that counting went on smoothly, that he did not see any bribery or treating of voters at the station and that none even reported the same to him. He further deposes there was no violence at the polling station, that assisted voters who did not have someone to assist were given the necessary assistance by himself or the presiding officer (?) in the presence of party Agents. He deposes that he did not commit any electoral malpractice as a presiding officer and that what he has stated is true. Under cross-examination, he was firm. He stated that the Agents for Ford Kenya was Ignatius Wanjala Nyongesa who signed form 36A and never complained to him. He says he did not receive any report of assault and that after declaring the results there was no protest and in his view the election was free and fair. He states that for rejected votes there was an alteration which he owned up by countersigning. He stated there was no vacuum when he exited the room as his Deputy, the Agents and the security officers remained to assist.

DW4 Philip Wabwile Wanjala testified that he was the presiding officer in Kanduyi Children Home stream 2 of 4. He signed a statutory form 36A which he annexed to his affidavit which affidavit he adopted as his evidence. He denied that he denied Robert Musumba Barasa (PW3) (entry). He deposes that there was an Agent from Ford Kenya Enock Simiyu. He claimed that Robert Musumba was not an Agent for Ford Kenya at the station. He denied being related to the 1st Respondent or his wife. He states the only complaint he received was that the line

was sluggish and that some people were trying to jump the queue. He stated that the petitioner came to the station, talked to him but did not raise any complaint. He denied being a chief campaigner for the 1st Respondent and countered that as a teacher he was at school during the campaigns. He also stated that he commented on form 36A that all Agents agreed with the process.

DW5 said Hassan Ramadhan testified that he was a presiding officer at West Kenya College polling station Khalaba Ward. He swore an affidavit and attached form 36A which he adopted as his evidence. He states that the petitioner and the Respondent did not visit his station. He did not receive a report of assault, bribery or treating of voters. He states further that Ford Kenya Agent signed form 36A as did other Agents.

DW6 Sarah Anyango Angira was the Deputy presiding officer West Kenya College polling station 2. She adopted her affidavit as evidence to which he attached form 36A. She states there were 8 Agents and Agent N.7 was from Ford Kenya. Under cross-examination, she stated that the station had 557 registered voters which figure was deleted and countersigned by the presiding officer. She states she does not know why the presiding officer deleted. On re-examination, she stated that the lines on form 36A were for closing the figure to ensure there was no tampering. The form was signed by the Agents and the figure on form 36B is 557. He stated that according to Kiems there were 557 registered voters.

DW7 Joseph Siekise Wamalwa testified that he was the Deputy presiding officer in the August 8th elections for Wamalwa Kijana 2 of 2. He swore an affidavit which he adopted as his evidence to which he attached form 36A signed by 4 Agents for ANC, Wiper, ODM and Jubilee. He stated that nobody signed for independent, Ford Kenya and UDP and that no Agent present was denied opportunity to sign the form 36A. He had also signed the form himself. He denied restraining any Agent of any political party from accessing the polling station. He adds that it was the responsibility of political parties to have Agents representing them and that the Agents did not need permission to leave as he has no power to force an Agent to remain at the station. In re-examination, he stated he had no explanation for the absence of the party Agents who did not sign the forms.

DW8 Florence Nekoye Wamukoko stated that she was involved in the August 8/8/17 elections as a presiding officer at Kanduyi DEB primary stream 2 of 4. She adopted her affidavit as her evidence which affidavit is attached, a copy of her National ID Card and form 36A. She avers that there was an Agent for Ford Kenya, Mark Otongoro, an Agent for Jubilee, ODM, ANC, UDP, Wiper and independent. He claims no Agent disputed the results and that nobody was denied access. Under cross-examination, he stated the elections were free and fair, there were party Agents who cooperated during counting of ballots, there were observers too. He states no Agent was forced to sign form 36A and no Agent expressed any dissatisfaction.

DW9 Job Wafula Masimbo was at the elections of 8/8/17 a presiding officer Bondeni Mteremko polling station 1. He swore an affidavit dated 30/9/17 to which he attached a copy of his ID and form 36A for the station. He swears that he discharged his duties at the station in accordance with the law and without fear or favour and that all party Agents at Bondeni Mteremko were allowed to enter the polling station as soon as it was opened at 6.00am and none was ejected at anytime. He avers that voting went on smoothly without any problem. He did not see any bribery or treating of voters in the polling station and no one ever reported to him of the same. There was also no violence or assault of any voter, party Agent and any one at Bondeni Mteremko. He states further that any voter who needed assistance to vote but did not have someone to assist them was given necessary assistance by himself or his Deputy in the presence of party Agents, that Agents were allowed to sign form 36A and were given copies thereof, that all persons who came to vote were given an opportunity to vote and no one was chased away. He states he did not commit any electoral offences or malpractice while discharging his duties as a presiding officer and that what he has stated is true and correct. Under cross-examination by Mr Makali, he stated that no candidate for MCA came to the station and that the only person who came and introduced himself was Wamunyinyi a candidate for MP who did not lodge any complaint. He states he did not receive any complaint from the petitioner and that nobody came claiming he was a chief Agent who had a complaint to raise. He states that no Agent for Ford Kenya by the name Richard Wanyonyi Mukhama was there and that the one who was there was James Khamadi who did not raise any complaint to him. He also denies that the Agents were not allowed to witness how assisted voters were voting. He denied there was tampering of his form as any tampering would have affected the whole form. He indicates the rejected votes were 009.

DW10 Nelly Lydia Wandera was the Deputy presiding officer Perfectors High School stream 3 of 4. He swore an affidavit dated 30/9/17 to which he annexed his ID Card the form 36A for the station which he signed. He also adopted his affidavit as his evidence. He states there was no way one could add or remove figures as the figures were closed. There were Agents in the station. 1 Agent per candidate. This form he states was signed by UDP Agent, Jubilee Agent, ODM Agent, ANC Agent and Ford Kenya Agent. He adds that no Agent came to sign the form and was denied. It is his evidence that elections ran smoothly and no cases were reported. An Agent for Ford Kenya Edwin Kolondo signed the form and that there was no name of Kevin Matere Mukhebi (PW7) and he does not know him. He denies that the said Kevin Matere came and was denied to know the turnout and that more people voted than are on the Kiems kit. He states under cross-examination that if there was a dispute the Agents would not have signed and would have indicated on the form why. He denies that there is an alteration on the form and denies that there was a dispute of the results. He did not get a report of any assault from Mukhebi or any other person. He admits one Makhanu Cornelius Wanjala came to the station. He reiterates that nobody was restrained from voting and no such complaint was received. He did not also receive any allegations of bribery or treating of voters. He adds that the presiding officer remarked on the form that the election was free and fair which was the true position. He denied that the voters who turned up were more than in the Kiems kit. He clarified that the candidate Makhanu Cornelius Wanjala came in to vote and not to complain.

The last witness DW11 Lucy Nekesa Sitati was the presiding officer at Pamus TTC stream 1 in the elections of 8/8/17. She adopted her affidavit sworn on 30/9/17 to which she attached a copy of her ID Card and the form 36A she signed. In her impression, the election was free and fair and there were Agents who verified that. She had 7 Agents from Ford Kenya, Independent candidate, Jubilee, ODM, ANC and UDP. It is her evidence that there was no Agent present who did not sign the form. She adds that there was a request for a 2nd Agent for Ford Kenya whom he allowed to sign on request. There was no request for a recount from any candidate, she did not get a complaint of bribery or treating and the form (36A) was distributed to them and confirmed on the Kiems. The same form filled is the one before coming. The form had no alteration and the election was free and fair. Under cross-examination, she stated the station had 381 valid votes cast and that there was no dispute about the votes cast for each candidate and no dispute on the rejected votes.

Basically that is the evidence for the petitioner, 1st Respondent, 2nd Respondent and the 3rd Respondent. I have almost reproduced the

evidence presented word for word so that no vital evidence is left out. The petitioner referred the court to 1 authority; **PAUL POSH ABWORA -VS- IEBC & 2 OTHER (2013)** Kakamega High Court Election petition no.9 of 2013 as relates to electoral violence in her submissions. It was submitted that the court should order the verification of all statutory forms 36A and 36B and should declare that the 1st Respondent was involved in electoral malpractices/offences and was therefore not validly elected, that the court should make a declaration that the entire electoral process was unconstitutional, illegal and irregular and that the process was null and void including the outcome and declaration of the winner for Member of the County Assembly, a declaration that the process should begin afresh given the massive malpractices. She submits that Article 8(1(a)-(o) of the Constitution of Kenya was not complied with on the basis that the election was marred with violence and voter intimidation on the part of the 1st Respondent and his supporters. It was submitted that Griffin Wanjala Kisaka PW2 was unable to vote because known supporters of the 1st Respondent were threatening voters which caused voters to flee in fear. This was reported to the police and witnesses issued with P3 forms. PW4 and PW3 were harassed at Mukhaweli polling station by known people who were campaigners of the 1st Respondent with PW4 being undressed in public. PW5 was also attacked at Mukhaweli polling station, by people well known to him, it was submitted which incident was reported to Bungoma police station and P3 form issues after witness was treated. It was submitted also that at Perfectors High School Kennedy Mukhebi Wanjala witnessed massive harassment and intimidation of the petitioner. She stated that under S.63 and 65 of the Elections Act it is an offence to inflict violence, use force, injure or damage to induce a person to vote for a particular candidate or compel a person to support a certain candidate, it is submitted that the 1st Respondent was a beneficiary of this violence. These acts were reported to the 3rd Respondents yet they did nothing to control the situation. She submitted that form 36A of Kanduyi DEB primary stream 3 of 4 and form 36A Kijana Wamalwa stream 2 of 2 were lacking in signatures. The election therefore was not free and fair and the court should find the petitioner to have proved her case against the respondents and uphold the petition with costs.

The 1st respondent filed a list of 6 authorities; 1. Joho -vs- Nyange (2008) 3KLR, 2. John Kiarie Waweru vs- Beth Mugo & 2 others (2008) KLR, 3. Wavinya Ndeti -vs- IEBC & 4 others (2013) eKLR 4. Karanja Kabage -vs- Joseph Kiuna & 2 others (2013) eKLR, 5. Muhamed Ali Mursal -vs- Sadie Mohamed & other (2014) eKLR and 6. Jackton Nyamongo Ranguma -vs- IEBC & 2 other.

He submitted that it was incumbent upon the petitioner who pleaded irregularities to prove her case. The 1st respondent filed a response denying all the allegations as did the 2nd and 3rd respondents who called the presiding officers in the stations complained of and it was incumbent upon the petitioner to prove her case. He submitted that the law is that the burden of proof lies on the petitioner under S.107(1) of the evidence Act and that she has not discharged that burden. He further submitted that the petitioner had not proved that there was non compliance with the law.

It is further submitted that there was no shed of evidence that the 1st respondent met or planned any scheme with the electoral officials to subvert the electoral process.

On violence, it was alleged that violence was meted on the agents of the petitioner's supporters by the agents of the 1st respondent or his supporter but there was no evidence that the 1st respondent fanned any violence. There was no report made against him and there is no link of any form to the 1st respondent. Evidence offered was riddled with contradictions and inconsistencies. It was submitted that the P3 form by PW6 had massive flaws and is not credible. PW3 and PW4 did not produce P3 forms. Again it is not clear how the witnesses associated the attackers with the 1st respondent given that there were other candidates in the election.

On non signing of form 36A, it was submitted that nothing turns on failure to sign form 36A as was held in **John Kiarie Waweru -vs- Beth Mugo & 2 others (2008)eKLR**.

On scrutiny and recount as sought in the petition, he submitted that these prayers were spent in the court ruling of 22/12/17.

In conclusion he submits that the petitioner has not proved her case to the required standard and the petition should be dismissed with costs, to find that the elections in Khalaba Ward were free and fair, transparent and in accordance with Article 8 1(a) of the Constitution and all electoral laws and regulations, that it was a genuine expression of the free will of the voter and that the 1st respondent was duly and validly elected as the Member of the County Assembly and that the freewill of the people should not be disturbed.

The 2nd and 3rd respondents supplied the court with a list of 10 authorities and further relied on **Halsburys laws of England 4th edition paragraph 261**. After analyzing the evidence of all witnesses, she submitted that there were 2 issues for determination.

1. Whether the petitioner has proved the electoral irregularities she has alleged to have been committed by the Respondents.
2. Whether, if the answer is in the affirmative, the alleged electoral malpractices and irregularities affected the outcome of the results.

She submitted that the burden of proof in an election petition lies with the petitioner. She submitted that petitioner had not proved breach of the Constitution, elections Act and Regulations as no Article of the Constitution or election Act was cited.

On violence, threats and intimidation, it is submitted that the evidence offered was contradictory and not worthy of believe. PW2 Kennedy Wanjala who claimed to have suffered injuries produced a P3 form that had so many contradictions. Violence and intimidation being criminal conduct should be proved beyond a reasonable doubt which was not attained.

Voter bribery and treating was alleged but bribery being a serious election offence proof must be clear and unequivocal which was not attained.

It was submitted commission of electoral offences under S.59 of the elections Act was not proved as petitioner did not disclose which offence

was committed and how (s.59 of the elections Act is repealed).

It was submitted that the petitioner's Agents were denied access which claim was not proved. The respondents witnesses rebutted that claim.

I have considered the pleadings on record, the evidence in affidavits, evidence given in court under cross-examination and re-examination. I have also considered the able submissions by all counsel appearing and read the authorities supplied to the court and the jurisprudence arising therefrom. Election disputes are matters of great public importance as was held in **Joho -vs- Nyange**. It was held in this case that they should not be taken lightly and generalized allegations are not the kind of evidence required in such proceedings. It was also held in the case that the standard of proof in election petitions lies on the petitioner as the person who seeks to nullify an election.

In the present case, the petitioner alleged the election was not conducted in accordance with the Constitution of Kenya 2010 and the elections Act 2011, that there was violence and voter intimidation, bribery and treating. The burden of proof as stated above is on the petitioner. The evidence Act is clear on this. Section 107 (1) of the Act provides as follows:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of the facts which he asserts must prove that these facts exist”.

The Supreme Court of Kenya in **Raila Odinga -vs- IEBC & 3 others Nairobi petition no.5 of 2013 (2013) eKLR** addressing itself to the burden of proof held:

“Where a party alleges non conformity with the electoral law, the petitioner must not only prove that there has been noncompliance with the law but that such failure did affect the validity of the elections. It is on that basis that the respondents bear the burden of proving the contrary.....so, the petitioner must set out by raising firm and credible evidence of the public authority's departure from the prescriptions of the law.

In the **Ranguma -vs- Anyang Nyongo and 3 others (2017)** Kisumu High Court petition where the petitioner was found to have failed to present evidence to substantiate his allegations which allegations were found vague and embarrassing, on the burden of proof, Justice Majanja remarked:

“ The burden of establishing the allegations of noncompliance with the Constitution and the law,electoral practice and misconduct which would result in the elections being declared invalid rests with the petitioner”

The petitioner has to prove the following allegations in her petition;

1. Non compliance including denial of access of her Agents to polling stations.
2. Violence and voter intimidation.
3. Bribery and treating.

Respecting non compliance with the Constitution and the electoral law, the petition was vague and a generality but from the claims and evidence adduced, the petitioner was referring to the electoral system and process under Article 81 and 86 of the Constitution which among other things provide for free and fair elections by secret ballot, free from violence and intimidation, improper influence or corruption, conducted by an independent body, transparent and administered in an impartial, neutral, efficient, accurate and accountable manner and under Article 86, a voting method that is simple, accurate, verifiable, secure, accountable and transparent, counting and tabulation and announcement of results promptly by the presiding officers at each polling station and accurate collation of results and prompt announcement by the returning officer. The petitioner sought to show that there were irregularities in so far as Agents were not allowed access, did not sign the statutory forms, that the process was not transparent, accurate and impartial. These however were generalized and basically unsubstantiated claims. The respondents called witnesses including the 1st respondent, the returning officer and presiding officers who offered evidence as to the regularity, transparency, accountability and accuracy of the electoral process. The polling stations were opened in time and in good time, party Agents were given access and invariably signed form 36As in the various stations acknowledging the correctness and accuracy of the results therein. There were no protestations or disputations. The irregularities alleged were very minor and sufficiently explained to the satisfaction of the court. In the ruling on scrutiny herein, I did go through the polling stations form 36A with a tooth comb. Respecting Kanduyi DEB primary station 3 of 4, I indicated the form 36A was only faint and that the results were verifiable in the original thereof produced as Dex.1. The same results were posted in form 36B of which the original was produced as Dex.2. There were no alterations on the form as alleged. Form 36A for Bondeni Mteremko the figure for rejected vote appeared altered but the score for all candidates were clear on the form 36A provided as well as in the original. Nothing much can be read from this minor irregularity. Form 36A for Kanduyi DEB 4 of 4 was altered without countersigning but the overwritten figure of 152 in favour of the 1st respondent is verifiable from the form itself and furthermore the results in this station were not disputed.

Another irregularity claimed is lack of statutory comments by the presiding officer. I found no comments in 12 out of 25 form 36A but lack of comments is a minor irregularity. Lack of the Ford Kenya Agents signature on some of the form 36A was alleged as an irregularity but I found there were signatures on 23 out of 25 polling stations and only in 2 polling stations of Kanduyi DEB primary stream 3 of 4 and Wamalwa Kijana stream 2 of 2 where there were no Agents signature. It was explained to the satisfaction of the court that the Agents signed if present and that the Agents were not refused to sign the forms. This again would be a minor irregularity in the form 36A. Another irregularity claimed was failure to indicate the number of registered voters on form 36A but there was no claim of over voting in the station where the total number of registered voters was not indicated and in any case there was no allegation that the statutory number of registered voters was exceeded. Similarities of votes cast was claimed as an irregularity. Respectfully that cannot be an irregularity.

On violence and voter intimidation, the petitioner herself did not claim to have witnessed any violence or intimidation on her part. She states she was told about it. PW2 stated that he was going to Perfectors high school to vote when he met a group of people who identified themselves as supporters of ODM and the 1st respondent and who identified him as a supporter of Ford Kenya and threatened to kill him if he went to the polling station after which they chased him. He claims to have seen other persons assaulted. He claimed he did not know the people who threatened him. If he did not know them, how would they have known he was a Ford Kenya supporter? He did not substantiate. I find his evidence most incredible and do not believe it. I have disregarded his evidence as doubtful.

Another witness again on violence, PW3 claimed she was harassed by 3 relatives of the petitioner on her way home from voting and further that she was pursued by the 1st respondent's wife in a vehicle and another vehicle with youths. She claimed she was pursued for being a Ford Kenya supporter yet for the harassment she did not report to the police. She did not explain how the wife of the 1st respondent and relatives knew her as a supporter of Ford Kenya. I doubt her evidence too.

PW4 claimed she was physically harassed, searched and her trousers lowered to her embarrassment. She stated she knew her assailants and even knew their names. One of the assailants Godfrey Siege Okumu was a brother to the 1st respondent but in the next breathe she claimed she did not know him. The 1st respondent in his evidence stated in fact that she had been cohabiting with Godfrey. She was hesitant and inconsistent. She cannot be trusted to tell the truth. She also failed to prove that she reported the assault and what actions the police took. Her relationship with Godfrey is not cordial. She may be inclined to frame him. I find her evidence doubtful.

PW6 again, on violence claimed he was attacked at Perfectors high school and injured by known supporters of the 1st respondent. He was again assaulted at Mukhaweli primary school by another group of ODM followers led by the wife of the 1st respondent on allegations of interfering with the 1st respondent re election. He claims he was treated at Bungoma Referral hospital after which he reported to Bungoma police station. He was issued with a P3 form which he annexed to his affidavit. However a close look at the P3 form, the P3 form was issued on 8/8/17 yet it indicates the report was made on 9/8/17. That is an absurdity and worse, the P3 form indicates that on 8/8/17 when the P3 form was filled, the injuries complained of were 3 days old suggesting of course that the injuries were occasioned 3 days before the incident complained of. Clearly, this document completely contradicts the evidence of the victim. I am therefore unable to find that he was assaulted on the material day as alleged. At any rate who were the known supporters of ODM? He does not name them. I find the evidence to prove violence and intimidation inadequate. The petitioner has not shown that violence and intimidation of voters was widespread and that the violence and intimidation prevented voters from exercising their rights to elect a candidate of their choice.

The petitioner also made allegations of voter bribery and treating. The claim was even more generalized than the claim of violence and intimidation. The persons bribed or treated were not identified and called as witnesses. Bribery and voter treatment being criminal electoral offences the allegations require to be proved by cogent and credible evidence. In *Karanja Kabage -vs- Joseph Kiuna Kiriambegu Nganga & 2 others (2014) eKLR* the court held respecting bribery as follows:

“I find that the offence of bribery to be proved in relation to an election petition, it has to be shown that a bribe was offered and received with an intention to influence a voter for a particular candidate. The evidence on which such a finding can be made has to be conclusive and it is not open for the court to make presumptions without a clear concise basis...”

The claims of bribery are not proved. There is no evidence that there was widespread bribery within the Ward leading to influence of voters who did not exercise their free will and consequently compromising the integrity of the elections held on 8/8/17. The claims of bribery and treating are thereby rejected.

S.82 of the elections Act lays down the standard of proof required in an election petition. It states;

“ No election shall be declared to be void by reason of noncompliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles and in that written law or that the noncompliance did not effect the result of the election”.

That suggests that even if there had been a breach of regulations and procedure which did not interfere with the democratic choice of the voters such would not persuade the court to interfere with an election result unless the irregularities proved interfered with the free choice of the voters of Khalaba Ward. That is the submission of the 1st respondent which is the purport of S.83 of the Elections Act. In the case of *John Kiarie Waweru* above quoted, the court gave the section the same interpretation.

In the final analysis, the petitioner has not proved her claims with sufficient, cogent, credible and consistent evidence to the satisfaction of the court. From the evidence by the 1st respondent, the 2nd and 3rd respondents and indeed from the entire evidence, it is clear that the elections were conducted by secret ballot, were free from violence, free-from intimidation, improper influence or bribery, that the elections was conducted by an independent body the IEBC, that it was transparent, accurate, verifiable and was administered in an impartial, neutral and accountable manner. The people of Khalaba Ward spoke boldly on 8/8/17.

I would therefore not grant prayer (a) and (b) which had been dealt with in the application for scrutiny on record. I would not grant a declaration that the 1st respondent was involved in electoral malpractices and was therefore not validly elected. I would not grant a declaration that the petitioner was validly elected and declare her winner of Khalaba Ward Kanduyi Constituency Member of County Assembly. I would not declare that the electoral process in Khalaba Ward of Kanduyi Constituency should begin afresh.

Instead, I would dismiss the petition herein and declare HENRY MAJIMBO OKUMU validly elected as Member of County Assembly Khalaba Ward. The 1st, 2nd and 3rd respondents have been successful and since costs follow the cause, I would grant them costs of the petition. The court will cap the costs and then tax the costs once the parties move the court.

J.Kingori
CM

Court

Read and delivered in open court this 8th day of February 2018 in the presence of Ms Mbaka for the petitioner, Mr Makali for 1st respondent, Ms Mumalasi for Ms Barasa for 2nd and 3rd respondents and Miss Barasa court assistant.

J.Kingori
CM,8/2/18