**REPUBLIC OF KENYA**

**IN THE PRINCIPAL MAGISTARTES COURT AT KAPENGURIA**

**ELECTION PETITION NO 2 OF 2017**

**IN THE MATTER OF ELECTION FOR THE MEMBER OF COUNTY ASSEMBLY OF MASOOL WARD, SIGOR CONSTITUENCY, WEST POKOT COUNTY**

**THE ELECTION ACT NO. 24 OF 2011 AND THE ELECTION (PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES, 2013 THE CONSTITUTION OF KENYA**

**BETWEEN**

**WILSON PKERER CHEKERUK…….....…**
**PETITIONER**

**AND**

**1. LOPORNA PYATICH LONYANGATODO……..…….....1ST RESPONDENT**

**2. JUMA AMACH DANIEL (RETURNING OFFICER, SIGOR CONSTITUENCY……...2ND RESPONDENT**

**3. INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (IEBC)……...……**
**3RD RESPONDENT**

**JUDGMENT**

By a petition dated the 5th Day of September 2017 and filled in court on the 6th of September 2017, the petitioner is seeking for the following orders:-

a) Declaration of whether or not the candidate (1st Respondent) whose election is in question was validly elected.

b) A declaration of which candidate was validly elected.

c) An order whether a fresh election should be held or not.

d) Cost of the Petition.

The petitioner **WILSON PKERER CHEKERUK** was one of the 3 candidates who vied for the Member of County Assembly Representative for Masool Ward, Sigor Constituency, West Pokot County, on the election held on the 8th August 2017, the candidates were:

**a) WILSON PKERER CHEKERUK**

**b) TEPALUK JAMES**

**c) LOPORNA PYATICH LONYANGATODO**

Upon counting the votes, the 2nd Respondent declared the results of the said election as follows:

a) WILSON PKERER CHEKERUK …….2074 votes

b) TEPALUK JAMES ……..……7 votes

c) LOPORNA PYATICH LONYANGATODO…….2168 votes

Eventually, the 1st Respondent LOPORNA PYATICH LONYANGATODO was declared as the winner and duly elected as a Member of County Assembly for Masool Ward in the election held on the 8th Day of August 2017 having garnered the highest number of valid votes cast. The petitioner emerged the second in the race as per the declared results, he felt aggrieved with the outcome on the ground that the Respondents were in breach of the electoral laws, the Constitution and conducted the election that were not free, accurate, verifiable, accountable and transparent specifically:-

1. The staff and agents of the 2nd and 3rd Respondents were in breach of the law and regulations in siding with the first Respondents and assisting in activities that favoured the 1st Respondent.

2. That in Lokarkar Primary school Mobile Station, Akariamet Primary school Mobile Polling Station and Kalas Manyata Polling Station, the 2nd and 3rd Respondents allowed/permitted strangers and or unauthorized persons to be in the voting room as purported nominated agents in favour of the 1st Respondent.

3. That the Petitioners agents were kept out from polling Station and did not witness opening of voting and assisted voters, specifically in Simbol Primary School Polling Station, Amolem Primary School mobile Polling Station and Akariamet Primary School Mobile Polling Station.

4. That in Amolem Primary School mobile Polling Station the Station opened at 10:00am and that voters were never compensated with time lost and were turned away at 5:00pm when the station was closed.

5. The 3rd Respondent failed to train its staff who failed to apply the law and carried out illegal activities.

6. Voters in Amolem Primary school mobile polling station who could not be captured by the electronic gadget yet they were registered voters were denied chance to vote.

7. That the 2nd and 3rd Respondents carried out the elections that were not transparent, verifiable, accountable, accurate and contrary to section 30 of the Election Act No. 24 of 2011, the Constitution Articles 81 and 86 and Rule 83 (1) (e) of the Election (General) Regulations 2012.

8. That in Simbol Primary School Polling Station the Petitioner, 1stRrespondent and all governor aspirants of West Pokot garnered equal votes of 240 each, which looked very suspicious.

The petition was supported by affidavits.

The petition was opposed.

The first Respondent opposed the same in his response to Petition dated the 2nd day of October 2017 and filed on the 3rd day of October 2017. In his response he denied the allegations as contained in the Petition. He specifically stated in his Response that:

1. The election of the Member of County Assembly for Masool Ward was held on the 8/8/17 was held in accordance with the spirit and intention of Article 81, 83, and 86 of the Kenyan Constitution, the provision of the Election Act 2011, the Election(general) Regulations 2012, the Election(general) Regulation 2017.

2. The 1st Respondent was legally and lawfully declared the duly elected Member of County Assembly for Masool Ward with a total of 2168 votes against the Petitioner's 2074 votes.

3. That the election was true, transparent thus enabling voters to exercise their political rights, besides it was an exercise that was free from violence,, intimidation, improper influence or corruption, on the part of the 1st Respondent and his agents. Further the same was administered in an impartial, neutral efficient, accurate, verifiable and accountable manner.

The 1st respondent's response was also accompanied with his witnesses' affidavits.

The 2nd and 3rd Respondents jointly opposed the Petition through their response to petition dated the 20th day of September 2017 and filed on the 21st September 2017. They denied the allegations in the Petition and confirmed that the election held on the 8th August, 2017 respected the sovereign will of the people of Masool Ward and upheld the Constitutional principles of free and fair elections as they were administered in an impartial, neutral, efficient, accurate and accountable manner. They further confirm that the tallying process was accurate and the results were as follows:

1. LOPORNA PYATICH LONYANGATODO…….2168 votes

2. WILSON PKERER CHEKERUK …….2074 votes

3. TEPALUK JAMES ……..……5 votes

They denied that the elections were void or marred with fatal irregularities, election offences or malpractices and aver that the election was conducted substantially in accordance with the dictates of the Constitution and the Election Act. And it complied with the provision of Article 81 and 86 of the Constitution. They denied having committed any election irregularities or malpractices and affirm that the election was free, fair, transparent and credible and results as declared were true reflection of the people's choice based on universal suffrage and free expression of voters will. The response was also accompanied by affidavits for the witnesses.

Two application were thereafter filed in respect to the petition the first application dated the 28th day of September 2017 sought orders for Leave for extension of time for filing of the petitioner's further and/or additional witness affidavits in support of the petition the same was dismissed in Ruling dubbed No. 1. The second application dated the 29th day of September 2017 sought Orders that the 2nd and 3rd Respondents to deliver to the court the Electronic Voting Gadgets (KIEMS KIT) and voters registers on the trial days in respect of the following polling stations.

a) Amolem Primary School Mobile Polling station Code No. 037 in Masool Ward Sigor Constituency, West Pokot County

b) Lokarkar Primary School Mobile Polling station Code No. 040 in Masool Ward Sigor Constituency, West Pokot County

The same was also dismissed.

The petitioner testified and adopted his affidavit sworn on the 5th September, 2017 in line with the provisions of rule 12 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017. He further presented 5 other witnesses, these were:-

1. WILSON PKERKER CHEKERUK …….. the petitioner

2. KAKUKO SAMWEL LOKAMARNGELECHI……PW2

3. ISAAC MNANGAT KALIMOI……..…PW3

4. HELLEN LOKAMORENG NGELECH…….….PW4

5. PHILLIP TOISE LOMONGIN……..PW5

6. APEKUT DOMOKAMAR KALIAMOI……...PW6

The petitioner testified and stated that on the 8th August 2017, he did contest the election of Member of County Assembly of Masool Ward under the KANU party. And that the ward had 16 polling stations, he garnered 2074 votes against the 1st Respondent who garnered 2168 votes. According to the Petitioner he did not expect this results and claimed that the peoples will did not prevail. He stated that the 2nd and 3rd Respondents allowed strangers into the polling station to pose as agents who assisted the 1st Respondent this he claimed was in Lokarkar Primary school Polling Station and Surumpen Nursery School Polling Station. Further he claimed that the 2nd and 3rd Respomdents locked out his agents at Amolem Primary School polling Station, Akiriamet Primary School Mobile Polling station, Simbol Nursery school Mobile polling station, and Kokorosion Manyatta Mobile Polling Station and that at Simbol Nursery School Mobile Station his agent was ejected from the polling Station. In Weiwei Secondary school the 1st and 2nd Respondent allowed the 1st Respondent to have agents who were excess in number. In Simbol Nursery school polling station the results therein were suspect as the aspirant in Governorship and Member of county Assembly garnered equal votes which stood at 240 votes each.

PW2 testified that he was appointed by the Petitioner to be his agent at Amolem Primary School polling station during the election that was held on the 8/8/17. According to him the voting began at 10:00am and that the presiding officer closed the polling Station at 5:30 pm and sent away those still in the queue denying them a chance to vote, when he protested he was thrown away by police officers on instruction from the Presiding Officer, and as such he did not sign Form 36A. That during the voting some voters were turned away for reason that they could not be identified by the electronic gadgets.

PW3 testified that he was appointed the Petitioners agent during the election held on the 8/8/17 at Simbol Primary School polling Station where the Station was opened at 6:00am, though voting began at 7:00 am due to hitches caused by the electronic voting gadgets. According to him the polling Station was opened at 6:00 pm and the presiding officer refused to compensate voters for the time lost and voters who were on the line were forced to go away without voting.

He further stated that during the counting the presiding officer was even counting disputed and/ or rejected ballot papers in favour of the 1st Respondent and when he protested he was ejected out of the room. And that the results that were announced were flawed for reason that the outcome looked suspicious. The governor aspirants and the Member of County assembly aspirants each garnered 240 votes. He then refused to sign form 36A as the presiding officer refused to record his objection/ protest.

PW4 testified that on the 8/8/17 she was an agent for the Petitioner at Lokarkar Primary school polling station. That voting process began at 9:00 am due to malfunction of the electronic voting gadgets. She stated that the presiding officre allowed strangers into the voting room as agents these according to her were; Tepkakwang Sarich and Lilian Kokwang who were working together with jubilee agents to favour the 1st respondent, she further testified that many voters were denied the chance to vote after the

electronic gadget failed to identify them.

PW 5 and 6 testified that they were registered voters at Amolem Primary school polling Station and that when they went to the polling station on the 8/8/17 the electronic voting gadgets could not identify them despite having registred to vote at the polling Station. The presiding officer then turned them away, and they were denied to vote.

The 1st 2nd and 3rd Respondents testified and also called witnesses, they further adopted evidence as contained in their respective affidavits filed in Court, these witnesses were:-

1. LOPORNA PYATICH LONYANGATODO…….. 1st Respondent

2. KISUR LOKWADOW……..RW2

3. DANIEL JUMA AMACH…… 2nd Respondent

According to the 1st Respondent he testified that he was a candidate for the position of Member of county Assembly Masool ward and after the election of 8/8/17 he was declared the winner by the 2nd Respondent having garnered 2168 votes against the Petitioner who garnered 2074 votes. He testified that the election was well conducted without any intimidation, corruption and violence. He stated that party agents were allowed to the polling Stations upon identification. He denied allegations that the petitioners agents were locked out of polling Stations as claimed. He further testified that the petitioner witnesses' affidavits were close relatives this were PW 2, 3, 4, 5 and 6. In his affidavit he stated further that there was no voter to his knowledge who was denied a chance to vote as claimed. He concluded by saying that the allegations were baseless and void of proof as the elections was free, fair, transparent and credible.

RW2 testified that on the elections held on the 8/8/17 he was an agent for the 1st respondent at Simbol Nursery School polling Station. He reported to the polling station at 6:00am on the 8/8/17 he witnessed the setting up of the systems and the devices were confirmed functional and at 7:00am voting started. He stated that at no time did the KIEM devices failed. According to him the polling Station was closed at 6:00pm and those who were still on the queue were allowed to vote. In his affidavit he stated that the agent for the petitioner PW3 was a blood brother to the Petitioner and when the results were announced in the polling Station he became emotional and stormed out only to come back and sign the Statutory form to confirm the results.

The 2nd Respondent also testified on behalf of himself and the 3rd Respondent. He testified that he was the 3rd Respondent Returning officer for Sigor Constituency in the elections held on the 8/8/17 and that Masool ward was within his jurisdiction. He stated that the election in respect of Member of county Assembly was free, fair, democratic, transparent and credible and was conducted in accordance with the dictates of the constitution and the Election Act. And that the candidates were three; these were the Petitioner who garnered 2074 votes, the 1st respondent who garnered 2168 votes and Tepaluk James who garnered 5 votes. His work involved tallying the results in form 36A from the polling Stations which was done methodically, accurately and transparently to the satisfaction of the party agents who were duly present and appended their signatures to forms 36A. He further testified that all the party agents were allowed at the polling stations so long as they were able to identify themselves to the officials and that no agent was denied entry

The parties agreed to put in written submissions and thereafter highlighted their submissions. After careful perusal of the evidence and the submissions by the parties, and issues as framed by the parties, I would conclude that these are some of the inherent issues arising out of this petition:-

1. Who bears the burden of proof, and what is the standard thereof?

2. Whether there were Electoral offences, irregularities and improprieties in the elections for member of County Assembly for Masool ward?

3. Whether the said Electoral Offences, irregularities and improprieties (if any) were substantial and significant and affected the results of the election?

4. Whether the 1st Respondent was validly elected as Member of County Assembly for Masool Ward?

5. Whether the 3rd Respondent should be ordered to conduct fresh elections for the Member of County Assembly for Masool ward?

6. Who should bear the cost of the petition?

In all circumstances the Petitioner bears the burden of proof. The Petitioner is tasked with the burden to prove all the allegations he/she has brought forth. In ***Raila Odinga and others v Independent Electoral and Boundaries Commission and 3 Others*** **SCK Petition No. 5 of 2013 [2013] *e*KLR**, the Supreme Court held that the petitioner bears the burden of proof. It observed that;

> *"This emerges from a long standing common law approach in respect of alleged irregularity in the acts of public bodies,* ***omnia praesumuntur rite et solemniter esse acta****, all acts are presumed to be done rightly and regularly. So the Petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescriptions of the laws."*

As regards the standard of proof, the Court went further and held that;

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

The petitioner has urged the court under section 80(1) of the election Act that:-

> *"The Court is to decide all matters that come before it without due regard to technicalities."*

And further that Rule 4 and 5 of the Elections (Parliamentary and county elections) petitions Rules 2013 have a philosophy of the overriding objective of the Court to do substantial justice. In this he relied in the case **of Nairobi HC EP Appeal No 2 of 2013 William Onyango vs IEBC and Anor.**

The election Petition and the responses thereto constitute the pleadings in Election dispute resolution in **Benjamin Ogunyo Andama** vs **Benjamin Andola Andayi and 2 Others EP (Kakamega) No.8 of 2013** drew distinction between pleadings and affidavit/evidence, and held that the affidavits cannot introduce matters not set out in the Petition. **In Gitarau Peter Munya vs Dickson Mwenda Kithinji and 2 others Suporeme Court Petition No. 28 of 2014** and in **Ferdinand Ndungu Waititu vs IEBC and 8 others EP (Nairobi) No 1 of 2013.** Shared a similar view.

The petitioner is bound to prove the case it has pleaded, and not outside his/her pleadings, in **Jackton Nyanungo Ranguma v Independent Electoral and Boundaries Commission and 2 others E.P No 3 of 2017 High Court Kisumu, Justice D S Majanja**, stated that a petitioner is not permitted to make a case outside the pleadings and his affidavits and testimony must be consistent with and support the case pleaded. *Justice D S Majanja* in the above case relied on the Supreme Court decision in ***Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission and 2 Others*** **SCK Presidential Petition No. 1 of 2017 [2017] eKLR**, where the Supreme Court quoted with approval the Supreme Court of India in ***Arikala Narasa Reddy v Venkata Ram Reddy Reddygari and Another*** **Civil Appeal Nos. 5710 -5711 of 2012[2014] 2 SCR** where it stated that;

> *"In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and*

*they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings."*

In addition to the above decisions justice Kimaru in ***Mahamud Muhumed Sirat v Ali Hassan Abdirahman and 2 Others*** **Nairobi EP No. 15 of 2008 [2010]** eKLR stated as follows;

*"From the outset, this court wishes to state that the petitioner adduced evidence, and even made submissions in respect of matters that he had not specifically pleaded in his petition. It is trite law that a decision rendered by a court of law shall only be on the basis of the pleadings that have been filed by the party moving the court for appropriate relief. In the present petition, this court declined the invitation offered by the petitioner that required of it to make decisions in respect of matters that were not specifically pleaded. This court will therefore not render any opinion in respect of aspects of the petitioner's case which he adduced evidence but which were not based on the pleadings that he had filed in court, and in particular, the petition." (Emphasis mine)*

In my considered view this Court accordingly limit its observations to what is pleaded in the petition and supported by the testimony and other evidence, I have noted in the Petitioner's submissions matters that were not pleaded but have been introduced as evidence, if this court would place itself to consider those issues at this point then the Respondents would be disadvantaged in the sense that they would luck a chance to rebut the same.

The petitioner's allegations and grounds are contained in page 2 and 3 of his petition. Which states (verbatim):-

*" And the Petitioner hereby presents his petition and states that the Respondents were in breach of the electoral law, the constitution and Conducted the elections that were not free, accurate, verifiable, accountable and transparent and in particular carried out the following activities, deeds, and conducts that were contrary to the law:*

*1. The staff and /or the agents of the 2nd and 3rd Respondents were in breach of the law and regulations in siding with the 1st Respondent and assisting activities that favoured him (1st Respondent).*

*2. In many polling Stations of Masool Ward, in Sigor Constituency, the 2nd and 3rd respondent allowed/ Permitted strangers and/ or unauthorized persons to be in the voting room as purpoted nominated agents in favour of the 1st respondent for example in Lokarkar Primary School mobile Polling station, Akiriamat Primary school mobile polling Station and Kalas Manyatta Polling station.*

*3. There was misconduct and breach of the law on the part of the 2nd and 3rd respondents in that they kept out the Petitioners agents from polling Stations who therefore did not witness the opening of voting and did not witness the voting by assisted voters for Example in at Simbol Nursery School mobile polling Station, Amolem Primary School Mobile Polling Station and Akariamet Primary school mobile polling station.*

*4. That 2nd and 3rd Respondent opened some polling Station late and closed them at 5pm without compensating the voters the time lost in late opening this denying many voters who were on the line an opportiunity to vote for example. Amolem Primary school Polling Station opened at 10:00am without compensating the voters for lost time.*

*5. The 3rd Respondent failed to properly train its staff/ agents who failed to apply the law and thus carried out illegal activities.*

*6. That many voters were turned away and did not vote as their names were not captured/ revealed in the voting electronic gadgets used by the 2nd and 3rd Respondents, for example various voters in Amolem Primary school polling station were denied chance to vote.*

*7. That the 2nd and 3rd Respondents carried out the elections in Masool Ward, Sigor constituency, West Pokot county that were not transparent verifiable, accountable, accurate and contrary to section 30 of the Election Act No. 24 of 2011, the Constitution Articles 81 and 86 and Rule 83 (1) (e) of the election (general) Regulations,2012.*

*8. There were many malpractises, illegalities and misconducts in many polling Stations of Masool ward and ….Simbol Nursery School polling Station Code 042 where the Petitioner, 1st Respondent and all Governor Aspirants of West Pokot County garnered equal votes of 240 each. This is very suspicious coincidence of uniformity in votes garnered."*

In respect to the first ground of the Petition the petitioner has generalized the allegations and one cannot specifically state which particular polling station the petitioner is referring furtherthe allegations are imprecise to the extent that they do not identify the specific activities that took place. This, of course, made it difficult for the respondents to answer those allegations with particularity. It is the petitioner's duty to plead his case with specificity and this defect is not cured by having a detailed affidavit making broad allegations. Justice Kimaru in **John Kiarie Waweru vs Beth Wambui Mugo and 2 others** when faced with a similar situation stated:-

*"The Petitioner made generalized allegations against the Respondent with the hope that when the said allegations are considered in totality a picture would emerge that the elections were conducted in a manner that was not free and fair…"*

I find that although pleaded, there was no evidence that there was collusion between the 1st Respondent in one hand the 2nd and 3rd Respondent on the other to favour the 1st Respondent or influence the results returned.

In the second ground the Petitioner alleges that the 2nd and 3rd Respondents allowed strangers into the polling station in favour of the 1st Respondent specifically in:-

*1. Lokarkar Primary School mobile Polling station*

The stranger according to the petitioner was one Tepekang Sarich and Lilian Lokwangar

*2. Akiriamat Primary school mobile polling Station*

The name of the alleged stranger was not mentioned.

*3. Kalas Manyatta Polling station.*

The name of the alleged stranger was not mentioned.

*4. Surumpen Nursery school polling Station*

He alleges that Form 36A was signed by a stranger one Samson Lokoyen who was an agent to an outfit called NASA and that there was no signature from any agent from either Jubilee party, KANU or independent candidate.

In the response to petition filed by the 2nd and 3rd Respondent to which they attached the polling Station Diary (Page122 to 143) for Lokarkar Primary School polling Station, it shows that Tepekang Sarich and Lilian Lokwangar were agents and they signed the polling station Diary at the opening of the polling Station and subsequently participated as agents. Thus, the allegations that they were strangers is

unfounded.

On the third ground of the petition it is alleged that the Petitioners agents were kept out of the polling Station at the opening of the polling station and when assisted voters were being assisted, specifically in the following polling stations; *Simbol Nursery School mobile polling Station, Amolem Primary School Mobile Polling Station and Akariamet Primary school mobile polling station.*

Pw3 who was the agent for the Petitioner at Simbol Nursery school Mobile polling station stated in his affidavit:

> *"**THAT** the polling Station was opened by the 2nd and 3rd Respondent agents/ officers at 6:00am. I went and introduced myself to the presiding officer and gave him my appointment papers which he checked, he allowed me in the station as a KANU agent for the Petitioner, I also doubled as agent for the Governor Aspirant- John Lonyangapuo of Kanu party."*

Further when being cross examined by Mr. Kiarie for the 1st respondent this is how he responded:

> "An agent is to be the eye of the candidate. I reported at the polling station before 6.00 a.m. There were some agents and IEBC officials …, they examined my documents and I was allowed in. voting began at 7.00 a.m. when I came the voters were there. Voting went on until 6.00 p.m. and there was a line outside. It should have started at 6.00 a.m. and was to end at 7.00 p.m. I am aware it was to go upto 5.00 p.m. In my affidavit stated it started at 6.00 a.m. and ended at 6.00 p.m. According to me I expected it to run upto 7.00 p.m. There was no incident that happened which was abnormal. I did not assist a voter. I observed assisted voter being assisted and everything went well. I did sign the polling station diary in the morning. I did not sign the polling diary that at the evening, that is my I/D card number 25303909. My name is in the polling station diary. There were two KANU agents and two Jubilee agents."

When reexamined by the Petitioners counsel he stated thus:-

> "The presiding officer accepted me when I presented myself at the polling station and I signed when I was entering."

From his testimony it is evident that the allegations by the petitioner are not true in respect of Simbol Nursery school Mobile polling station. The Petitioner's agent was allowed access to the polling station when voting began, he also witnessed assisted voters being assisted to vote. And accoding to him nothing abnormal took place.

In respect to Amolem primary school mobile polling station PW2 indicated that he was allowed at the polling station when it opened in the morning and even voted. He thus stated in his affidavit paragraph 6:-

> *"**THAT** I showed the presiding officer my agent appointment documents and allowed me into the polling Station."*

No evidence was placed before this court in respect to the allegations concerning Akariamet Primary school Mobile polling Station by the petitioner.

On allegations that PW2 was thrown out of the polling Station when he raised complaint and did not witness counting process at Amolem primary school polling station. He states in his affidavit thus:-

> "7. **THAT** voting started at around 10:00 am which was late by five (5) hours. But the Presiding officer closed the station at 5:30 pm without compensating the time to allow those in line to vote but were told to go away.
>
> **8. THAT** in view of what is stated in paragraph 7 as an agent I protested by asking the presiding officers to allow those in the line to vote and make up for time lost in opening late but he adamantly

refused and ordered the police to through (sic) me out of the polling station, and I was denied the opportunity to witness the counting of the Petitioners votes at the close of the polling station. The petitioner was unrepresented during the counting process and marked **KSL"2"** is **Form 36A** for the said Amolem polling Station which is signed by only the first Respondents Agent."

It is indeed true that the agent for the petitioner did not sign the form 36A for Amolem Primary school polling Station, it is also true that the agent for the 1st Respondent did sign the Form 36A in answering this allegation the 2nd and 3rd Respondent responded thus:-

"16. **THAT** it is evident that in those polling Stations where polling began late there was a pro rata extension of voting hours and as such no voters were disenfranchised. In Amolem Primary school polling Station voting began at 6:00am and ended at 7:49 pm as 138 voters were on the queue at 5:00pm."

On page 76 to 98 of the 2nd and 3rd Respondents response to the petition the 2nd and 3rd respondents have attached the Polling Station Diary. At page 86 it indicates that the polling Station was opened at 6:00am. At page 88 it indicates that by 9:00am out of 659 total registered voters 75 had cast their votes. By 11:00am a total of 140 had cast their votes, at 1:00pm 221 had cast their votes, at 3:00pm 296 had cast their votes, at 5:00pm 382 had cast their votes and 138 voters were still on the queue.

In form 36A of Amolem Primary School Polling Station, it's even strange that the Petitioner Garnered more votes than the 1st Respondent he garnered a whopping 304 vote against the 1st Respondent who managed only 213 votes.

Regulation 79 (6) of the Elections (General) Regulations 2012 provides that the refusal or failure of a candidate or an agent to sign a declaration form under sub- regulation (4) or to record the reasons for their refusal to sign as required under this regulation shall not by itself invalidate the results announced under sub rule (2) (a).

In my considered view I find the allegation by PW2 unfounded in that respect, this is informed by the entries in the polling Station Diary and form 36A.

The other ground in the petition was that many voters were turned down as a result of their data not being exhibited by the electronic gadgets used by the 2nd and 3rd Respondents. PW5 and 6 who were voters at Amolem Primary school testified that their electronic gadgets used by the 2nd and 3rd Respondents failed to identify them hence denied them chance to exercise their right to vote. According to the Respondents no voter was turned away, and that all those who came to vote were subjected to the electronic identification before being allowed to vote. The 2nd and the 3rd Respondents in their response to petition at page 96 where they were required to record any incident challenge and action taken no such incident is captured. The total number of registered voters in this particular polling station was 659, those who voted were 517 meaning those who never voted were almost 142. The Petitioner emerged the victor with 304 votes against the 1st Respondent who managed 213. This shows that despite the allegations placed forth, voting went ahead.

The issue of failure of technology was captured In the case of **Raila Odinga-v-IEBC and 3 Others, SC Election Petition No. 5 of 2013,** the Supreme Court held that electronic technology has not yet achieved a level of reliability as far as Kenya`s electoral history is concerned. The court further observed that such technology is yet to be considered a permanent or irreversible foundation for the conduct of the electoral process.

Ultimately the Petitioner alleged that the election of member of county Assembly of Masool ward was not transparent, verifiable, accountable, accurate and contrary to section 30 of the Election Act and Article 81 and 86 of the constitution.

Section 30 of the Election Act deal with appointment of agents by candidates or political parties, from the

evidence on record, the petitioner has not demonstrated how this particular provision was violated. Each candidate at the election had an agent at the polling station representing their interests.

Article 81 of the constitution states:-

> *"81. General principles for the electoral system*
>
> *The electoral system shall comply with the following principles—*
>
> *(a) freedom of citizens to exercise their political rights under Article 38;*
>
> *(b) not more than two-thirds of the members of elective public bodies shall be of the same gender;*
>
> *(c) fair representation of persons with disabilities;*
>
> *(d) universal suffrage based on the aspiration for fair representation and*
>
> *equality of vote; and*
>
> *(e) free and fair elections, which are—*
>
> *(i) by secret ballot;*
>
> *(ii) free from violence, intimidation, improper influence or corruption;*
>
> *(iii) conducted by an independent body;*
>
> *(iv) transparent; and*
>
> *(v) administered in an impartial, neutral, efficient, accurate and*
>
> *accountable manner."*

Article 86 of the Constitution deals with voting and it states:-

> *"86. Voting*
>
> *At every election, the Independent Electoral and Boundaries Commission shall ensure that—*
>
> *(a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;*
>
> *(b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;*
>
> *(c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and*
>
> *(d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials."*

An election is the ultimate expression of sovereignty of the people, the electoral system is designed to ascertain and implement the will of the people. Thus the bedrock principle of election dispute resolution is to ascertain the intent of the voters and to give it effect to the fullest extent while upholding the principles that underlie a free and fair election. In **Jackton Nyanungo Ranguma v Independent Electoral and Boundaries Commission and 2 others E.P No 3 of 2017 High Court Kisumu,**

**Manjanja J** stated:-

> *"An election petition is not do-over of the just concluded election. It is not an opportunity to conduct another election through the court as every election conducted in accordance with the law is presumed valid unless it is set aside by the court. The burden of establishing the allegations of non-compliance with the Constitution and the law, electoral malpractice and misconduct which would result in the election being declared invalid rests on the petitioner. The court will not interfere with the results of the elections unless it is established to the required standard of proof that such non-compliance with the Constitution and the law, the irregularities and electoral malpractices complained of render the said elections invalid."*

Section 83 of the Elections Act, 2011, provides as follows;-

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

In **Morgan & Others-v-Simpson and Another (1974) 3 All ER 772**, Lord Denning laid down the following principles;-

> *1) If the election was conducted so badly that it was not substantially in accordance with the law as to election, then the election is vitiated, irrespective of whether the result is affected or not;*
>
> *2) If the election was conducted substantially in accordance with the law it cannot be vitiated by a breach of the rules or a mistake at the polls, provided that the breach or mistake did not affect the result of the election;*
>
> *3) If the election was conducted substantially in accordance with the law but there is a breach of the rules or a mistake at the polls which affect the result, then the election is vitiated.*

In **Gitarau Peter Munya v Dickson Mwenda Kithinji and 2 other Supreme Court Petition No 2B of 2014** the court summarized the law on nullification of elections as follows:-

> *1. An election should be conducted substantially in accordance with the principles of the Constitution, as set out in Articles 81(e) and 86;*
>
> *2. If it will be shown that an election was conducted substantially in accordance with the principles of the constitution and the elections Act, then such election is not to be invalidated only on grounds of irregularities;*
>
> *3. Where however, it shows that the irregularities were of such magnitude that they affected the election result, then such an election stands invalidated;*
>
> *4 Procedural or administrative irregularities and other errors occasioned by human Imperfection, are not enough, by and of themselves to vitiate an election.*

**In Zacharia Okoth Obado v Edward Akong'o Oyugi and 2 others Supreme Court Petition No. 4 of 2014**. The Court stated that an election should not be annulled except on cogent and ascertained factual premises. Meaning a court should ascertain the actual effect of any proved or admitted errors or irregularities on the results of the election as opposed to assuming or speculating on the effect of such errors or irregularities on the results of the elections.

In **Peter Gichuki King'ara v IEBC and 2 others Civil Appeal No. 31 of 2013,** the court of appeal gave the following general guidelines on the consideration to be made before the annulment of the election:

*a) Whether there had been substantial compliance with the law and principle;*

*b) The nature, extent, degree and gravity of non-compliance;*

*c) Whether the irregularities complained of adversely affected the sanctity of the election;*

*d) After taking into account all the foregoing factors, whether the winning majority would have been reduced in such a way as to put the victory of the winning candidate in doubt.*

The rights protected by **Article 38** are realized through the electoral system set out in **Chapter Seven** titled, ***"Representation of the People."*** Under **Article 81(e)**, the electoral system should comply with the principle of free and fair elections. According to this provision, elections are free and fair when they are 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.

Having canvassed the grounds specifically alleged by the petitioner in his petition and limited thereto, and the evidence so presented before this court as pleaded in the petition it is clear that the petitioner has failed to discharge the legal burden placed on him. He has failed to prove his case to the required standards and specifically that the 2nd and 3rd Respondent contravened the provisions of the Constitution and the Election Act. Thus, I find that the election in respect of County Assembly representative for Masool Ward, Sigor Constituency was conducted substantially in accordance with the law. I hereby declare that the 1st Respondent, **LOPORNA PYATICH LONYANGATODO** was validly elected as the Masool Ward County Assembly Representative in the general elections that was held on 8/8/2017.

On issue of costs I have taken into account the input of the advocates their wealth and knowledge in Election Petitions, the volume of research conducted on the application and the main suit. Suffice to say the court file speaks volume, it is scary in respect of size.

Having made the foregoing findings, I make the following orders;-

a) The Petition be and is hereby dismissed;

b) The Election of the 1st Respondent, **LOPORNA PYATICH LONYANGATODO** is hereby confirmed as valid.

c) The Petitioner shall bear the costs of the petition, which costs are hereby capped as follows 1st respondent cost is capped at Kshs. 600,000 and that for the 2nd and 3rd Respondent is equally capped at Kshs. 600,000, pursuant to Rule 30 of the Elections (Parliamentary and County Elections) Petition Rules, 2017;

d) Pursuant to provisions of Rule 34 of the Elections (parliamentary and County Assembly Elections) Petition Rules, 2017. The security deposit under rule 13 shall be used as cost on pro rata basis**.**

e) A certificate in accordance with section 86(1) of the Elections Act shall issue;

**JUDGMENT DATED SIGNED AND DELIVERED IN OPEN COURT ON THE 14th DAY OF FEBRUARY 2018.**

**V. O ADET**

**Senior Resident Magistrate**

**14.2.2018**

In the presence of:-

1. Mr. Onyancha for the Petitioner

2. Mr. Kiarie for the 1st Respondent

3. Mr. Yego for the 2nd and 3rd Respondent

4. Job Kasilon Court Assistant

**V. O ADET**

**Senior Resident Magistrate**

**14.2.2018**