



**REPUBLIC OF KENYA**  
**IN THE CHIEF MAGISTRATES COURT AT BUSIA**  
**ELECTION PETITION NO. 4 OF 2017**

**ZAKAYO NYONGESA HARRISON ..... PETITIONER**

**VERSUS**

**INDEPENDENT ELECTORAL & BOUNDARIES**

**COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**KIPRUTO KERICH JEREMIA ..... 2<sup>ND</sup> RESPONDENT**

**BUSERA GEORGE MUKHAYAKA ..... 3<sup>RD</sup> RESPONDENT**

**JUDGEMENT**

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

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

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

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

- 1) An order for scrutiny of all ballot booklets issued and ballot papers cast in respect of the position of Member of County Assembly, Busibwabo Ward and recount of the ballot papers cast in favour of each candidate.
- 2) A declaration that the improprieties by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent were substantial and significant and that it has grossly affected the results declared.
- 3) A declaration that the 3<sup>rd</sup> Respondent was not validly declared a winner for the position of Member of County Assembly Busibwabo Ward.

4) An Order directing the 1<sup>st</sup> Respondent to organize and conduct fresh election in strict compliance with the Constitution and the Election Act as in the alternative, if the recount of votes reveals the Petitioner to have won the election, a declaration that the Petitioner is validly elected member of County Assembly for Busibwabo Ward.

5) Costs of this Petition.

6) Any other relief the Court may deem just and fit to grant.

The petition was served upon the Respondents who filed their respective responses. All pending interlocutory issues were disposed of and the suit was fixed for pretrial.

At the pretrial stage, the parties' counsels agreed on the following contested issues; -

1. Whether the degazettment of the petitioner as the duly elected Member of County Assembly Busibwabo Ward, Matayos Constituency in Busia County was unlawful, illegal and contrary to law and the principles of natural justice.

2. Whether the 2<sup>nd</sup> respondent had the unilateral power to cancel and recall the gazettment of the petitioner as the duly elected Member of County Assembly Busibwabo Ward.

3. Whether the election for Member of County Assembly Busibwabo Ward was grossly undermined by instances of voter importation, voter bribery and voter inducement so as to affect the integrity and outcome of the elections.

4. Whether the election for Member of County Assembly Busibwabo Ward was conducted in a free, fair and transparent manner and to the required standards enshrined in the Constitution, the Elections Act and regulations thereto.

5. Whether the 3<sup>rd</sup> respondent was validly and lawfully elected and declared the winner for the election for Member of County Assembly Busibwabo Ward.

6. Whether the election for Member of County Assembly Busibwabo Ward held on 8<sup>th</sup> August 2017 should be declared null and void and a fresh election held.

7. Who should bear the costs of the petition.

At the close of hearing, counsel stated that they were asked by the court to submit on the following issues;

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1. The preliminary objection dated 22<sup>nd</sup> November 2017 brought by the 3<sup>rd</sup> respondent.

2. Submissions on disputed votes as per the report of the court as well as the 2 rejected votes from Busibwabo stream 3 of 3 and 1 vote attached outside the envelope containing votes for the 3<sup>rd</sup> respondent at Nasira A.C. stream 2 of 2.

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

## **THE EVIDENCE**

### **PW1 NYONGESA HARISON ZAKAYO**

Is the petitioner herein. He hailed from Busibwabo location, Alungosi sub location Matayos sub county,

Busia County. He had offered himself as an MCA candidate for Busibwabo Ward.

Before bringing this petition, he swore an affidavit dated 5.9.17. The said affidavit was attached in the petition. It was filed on 6.9.17. PW1 wished to have it adopted and the court did adopt the same. He had a nomination certificate. Presented it as P exh 1 (marked ZN 1)

Also presented a gazette Notice No. 8240 of 22.8.17. P exh 2 (ZN2) PW1 also brought in court a demand notice from his advocate P exh 3 (ZN3) Also presented a gazette Notice No. 8378 – P exh 4 of 28.8.17 which was a corrigendum which purported that the 3<sup>rd</sup> respondent was the duly elected MCA for Busibwabo Ward.

Cross-examined by Mr. Ngaywa for the 1<sup>st</sup> and 2<sup>nd</sup> respondents, PW1 said that by another notice No. 8140 of 22.8.17 he was duly gazetted for the MCA for Busibwabo Ward. Prior to that gazette, he had not been issued with any certificate by the RO. PW1 also confirmed that the correct procedure would have been to get a certificate indicating that he had been duly elected before gazette. He did not admit that the gazette was erroneous.

PW1 further stated that the demand letter as P Eh 3 is dated 24.8.17. It was received by IEBC on 24.8.17. He had the response (page 2827 (KJ5) dated 23.8.17. from Kerich Jeremiah who was the returning officer (hereinafter referred to as the R.O). PW1 knew that the said Kerich Jeremiah was the Returning Officer and the 2<sup>nd</sup> respondent herein. The letter was authored on 23.8.17. His exhibit No. 3 are after KJ 5. PW1 stated that Busibwabo Ward had 6 polling station. In total 11 station (because some had multiple streams).

Amongst his complaint were Nasra AC stream 2 and Busibwabo stream 3. He stated that in paragraph 11 of his affidavit, he had indicated that he had made a protest. PW1 reported the matter to the Presiding Officer (Hereinafter referred to as The P.O.) for Busibwabo stream 3 but he was not personally present there. He was rang by someone who told him what was happening. He made the protest but did not put it in writing. PW1 further stated that the allegation of voter bribery was an offence. He admitted that there are specific channels through which such should be reported. One such channel was making a formal complaint to the police so that they could investigate an allegation. PW1 further admitted that there was nothing to show that any complaint was formally made over Busibwabo or Nasra. He confirmed that no formal complaint was made to the R.O. who was the overall boss of the exercise. On the material day he went to many polling stations.

Other than what he was told, PW1 could not confirm that his agent was denied access at Nasra. He could not personally confirm because he was not there. PW1's agent at Busibwabo (stream 3) did not tell him that at around 4 a.m. there were chaos from people who were outside the counting station (Essi station) There was no communication between him and his agent there. PW1 went on to state that at Nasira AC Primary School the RO was intimidating threatening his agents. Again, no formal complaint was made to IEBC. He stated that his agents were ordered but he did not make any formal complaint. His agent at Nasra AC stream 2 (two) was Richard Nyongesa Otele. PW1 confirmed that his agent gave out his particulars which were captured in the polling station diary. Only him can confirm /authentic his signature. His details were captured. Pages 42 and 43 of IEBC response - .... of the ballot box and served number capture the details of his agent. Page 46 of the IEBC response – Richard Otele captured at the closure at the tallying he was present as captured (page46) Richard Otele details were captured At page 49 it showed that Richard was present at the sealing of the packets. PW1 confirmed that Richard was present at the closure of sealing the others are captured.

Further stated that according to the IEBC record Richard Nyongesa was present upon verification process. PW1 then went on to state that at Busibwabo stream 3 his ODM agent was Oundo Bahati. He confirmed that in conducting an election it was not mandatory to ensure that at each and every station IEBC had no duty to ensure that candidates agents were present.

CROSS-EXAMINED BY MR. MAKOKHA for the 3<sup>rd</sup> respondent, PW1 said he garnered 1379 votes according to IEBC. He was not given a certificate of elected member of the Assembly. He claimed that

he did not know who was given. Further stated that the tallying centre was in Matayos, Busia County where he was not declared the winner. He claimed that he did not know who was declared the winner. PW1 said he was supposed to be the MCA in his petition and other documents, he sued one George Busera Makhayaka because after tallying the corrigendum gazette notice deleted his name and inserted George Busera's name instead. George Busera participated in the election as an independent candidate Busibwabo Ward. PW1 referred to Par 7 (c) of the petition where he had stated as follows:

“declaring the 3<sup>rd</sup> respondent winner when the 3<sup>rd</sup> respondent had only garnered 423 votes”.

PW1 further said that there was a Form 36(A) for Busibwabo, polling station 1 of 3. The number of valid votes was 401.

PW 1 confirmed that Juliet Auma ODM signed form 36 A. Juliet Auma was PWI's agent there. He confirmed that she signed the form and at Page 13-Form 36A (Busera) P.O. Busera polling station 2 of (3) PW1 also confirmed that at that station he had 4 agents whose details were captured. His agents were Humphrey Odede. At Page 14 Busera Primary. school polling (3) of (3) PW1 picked issue with Busibwabo polling station 3. There Erick Bahati Oundo was his agent. His details were captured in 36A page 17 Form 36A. For Nasra RC primary school station 2 of (2) PW1 confirmed that down there, the agents signed but there is no ODM agent. But had no issue with this particular station in his petition. At Page 11 Nasra AC polling station, his agent was Richard Nyongesa. His particulars were captured.

Page 16 Nasra RC primary stream 1 of (2) there PW1 said he got 57 votes. At Busera he got 159 votes. PW1 did not have any complain over that station. Form 36(A) the tally would give (262 NOT 362). PW1 went on to state that at Page 23 of that petition that was £6 B for Busibwabo MCA. Form 36B indicated the correct figure as 262 votes. It read he got 57 votes while Gunya Busera got 159 votes. PW1 knew that a P.R. has no power to amend documents. PW1 also said it was True that the R.O. was supposed to verify whatever results.

PW1 said he did participate in voter registration he was registered at Alunguli primary school in Busibwabo. He also knew that transfer of voter station was allowed at will. Petitioner said that the 3<sup>rd</sup> Respondent transferred people to register from Buhayo station to vote in Busibwabo.

According to PW1, some of those voters who were transferred were

- 1) Masnate Alex
- 2) Teresian Nafula
- 3) Pascal Wafula
- 4) Engoi Waweri
- 5) Charles Duma
- 6) Roselyne Were
- 7) Martin Poxy

PW1 claimed that these people were registered at Simengi primary school but currently they are registered in Busibwabo ward. PW1 acknowledged that one can transfer willingly. PW1 stated that in his petition he did not say they were coerced. It was in his affidavit para 4 of the affidavit of Victor Mdogo Alex Masinde was mentioned. Further PW1 said he did not raise an objection during voter exercise. PW1 knew Beatrice Akola. She is Respondents sister. That she also has a clothes shop at Busibwabo market and many other businesses. The petitioner did not see her buying food. He only heard that she was buying food for the voters.

REEXAMINED BY MR. OKEYO, PW1 said he had not been issued with any certificate prior to the gazettement. He also stated that he had heard of instances where certificates were denied. PW1 recalled a situation where Joho had been elected and denied the certificate. He stated that it had occurred before. An email (page 27) of the IEBC correctly the gazettement portion one sent on 23.8.17 and the 2<sup>nd</sup> one was on 11.9.17. PW1 said by 11.9.17 there were already 2 gazette notices. These emails did not indicate where they were sent to. The petitioner said they were sent by the Deputy RO one Ochieng. (one of 23<sup>rd</sup>) in the email, it did not allude to what was to be attached to the gazette notice. No one was indicated as recipient. The petitioner went on to say the 2<sup>nd</sup> one from Jeremiah Kemuli talks of No. 8239

On the issue of agents, PW1 confirmed that he officially captured against saw the assistant chief intimidating at Nasra AC stream 1 of 2. He was only there at 7.

At Stream 2 of 2 PW1 said he appeared at 1 a.m. and again at 4 a.m. in the morning. That in Nasra AC there were instances of violence. PW1 said he read in the 3<sup>rd</sup> respondent affidavit that there was violence. His agents did report to him that there was violence.

Page 39 (Richard ...) Nasra AC stream 1 of 2 PW1 further said at page 39 there were 11 agents at these stations of the poll. At page 43, there were 12 agents. Page 49 at the close of the poll, there were 9 agents. At page 51 (seals) there were 9 agents. Page 19 Form 36(A) at the county and affirming the ballots. Only 4 agents there was only 1 independent candidate George Busera Makhayaka 3<sup>rd</sup> respondent. At Page 17 there were 2 agents for independent none for ODM. At page 14 independent agent were 3. Page 15-3 agents for the 3<sup>rd</sup> respondent.

On alternations and confirmations by RO, PW1 said there was a problem with the total.

At Nasra RC primary school stream 1 of 2 (page 16 of the response. There, the R.O. says the total were 362 but according to PW1, they were 2652 votes. PW1 also said the part for remarks page 16 there is no remark. PW1 said he was never informed of the variation on Form 36B (page 23) The figure of 100 disappeared. There was no statement of the RO on the variation of 100 votes. At Page 13 of Busibwabo primary stream 2 of 3 PW1 confirmed that there was an alteration on the number of the votes. Not countersigned or explained. Also said that at Page 19 alteration was present. No explanation or remarks.

At Page 22 PW1 states that the signature for Fredrick Wamalwa had no remarks or explanation. At Page 20, there was an alteration on PW1's identity. No explanation no remarks. PW1 said he was informed the form 36B is a total of all form 36A.

PW1 said there was a reduction of 100. The Form 36B did not match with 36(A) votes. There is a variance of 100 (page 23) the difference was 44 votes only.

PW1 said by gazette No. 8240 he was declared the winner. That is what is brought out in this petition. That prior to the gazettement the 3<sup>rd</sup> respondent was never declared the winner.

PW1 said he did a demand for the certificate. He was shown the email for correction. But was not informed.

As for voter importation from Bukhaya West, PW1 said he learnt that on the day of voting. He learnt through one witness (Clement Washington Mande) who called him on phone and informed him voters were being induced. Para 9 – 12 Particularly 10. PW1 lastly said he knew Beatrice bought meat.

## **PW2 ERICK BAHATI OUNDO**

From Bahili Witikhaya Navakhoma sub location, Busibwabo location Matayos sub county, Busia County. PW2 identified himself as a farmer and that he signed an affidavit on 5.9.17 filed together with the petition. He adopted it as his testimony.

Mr. Ngaywa in cross-examination:

PW2 said he was an agent at Busibwabo 3 of 3. He was given an appointment letter that he did not file in court. He was in Busibwabo 3 of 3. While there, PW2 confirmed that his details were captured. Page 63 of the response. PW2 confirmed that he signed at page I. Also confirmed signing at Page 70 certificate of closure before counting. At Page 73 as an agent of ODM PW2 said he was present doing the sealing of the packets but when it came to confirmation of records at closure of conducting polling HE DID NOT sign. His name is missing on page 75. Form 36A was completed after all the voting stages done. At Page (14 Form 36A) stating he signed to signify that those were the votes the candidates got, PW2 denied stating that the signature there was NOT his. He was there when form 36(P 14) was prepared and thus had seen the document before then in court. PW2 also said he had never reported forgery of the signature. That besides the P.O. he never reported to the R.O. PW2 did not know the R.O.

PW2 further said that before, the clerk was to be given for verification as a must, but they were not given an opportunity to verify. He never went to the R.O. to complain. PW2 did not know him or his office and that the Petitioner never asked him to accompany him to go and report.

CROSS EXAMINED BY MR. MAKOKHA:

PW2 presented his ID card No. 22546447 of 10 years. He said he was educated to Form 4 level. That at Page 14 (Form 36A) the ID number there is 22546447 same as the number in his ID. PW2 said that was not his signature on Form 36A (page 14) He however had no record to indicate that he was an agent. PW2 stated his duties were

- 1) To check whether voting was free and fair
- 2) Security for votes cast
- 3) To be there throughout

He underwent training for a day to be a party agent. PW2 said he was trained to refuse to sign form 36A and give his remarks and not that he had to give reason for not signing as indicated at page 14 Form 36 A. Reasons for refusal to sign.....He therefore did not give any reason for refusal to sign. At Paragraph 6 of the affidavit P.O. intentionally..... “went in out....”

PW2 said that when verifying the P.O. did not allow him or them to verify which vote would go to which candidate. That a marked ballot paper should have been indicating in whose favour it was. PW2 told the court the clerks were lined up on one side. They were 6. One was calling out the names, showing whose vote, it was, one gave it to the clerk.

At paragraph 7 Pw2 said he was a mere observer. He was not shown the votes. It's true that he expected special treatment. PW2 then said he is Eric Bahati Oundo. He signed the affidavit at the lawyer's office, Mr. Okeyo's office. PW2 said he did not go before Mr. Manwari advocate to sign the affidavit attached to the petition. He did not know him.

RE-EXAMINED:

PW2 said that the IEBC documents indicate him as agent for ODM. Details were entered in the diary. PW2 was shown page 70, which he had seen before as he was present during the closure of the polling station. They all signed the polling day diary. They were 9 agents in total. At Page 14 they were 11 agents. PW2 said the winner was an independent candidate who had 3 agents (page 14)

While at Page 70 it is indicated that the independent candidate had 2 independent agents. PW2 said he did not sign form 36 (page 14). Page 75, PW2 said he protested and did not sign because when votes were being counted, the sorting and tallying was improper.

The sorting was supposed to be

(1) Open the ballot

(2) A vote would be shown whose it was. They were never shown the votes

PW2 was not sure whose vote was whose. That is why he refused to sign. At (page 14) Titus had an argument. PW2 said he never made a formal complaint about it. He only reported to his ...the candidate. This was after the declaration of the result. PW2 confirmed he was at the polling station. That he did his affidavit on 5.9.17. By then the 3<sup>rd</sup> respondent had already been gazetted. Also said the right forum was that the case would have been in court. Pw2 further said that his ID No. ... Form 36A IEBC already had his details filed in the morning.

The entries were in the same handwriting. That IEBC had all his details since morning. Part of them made to be seen if his protest was entered. PW2 said it was not his role to enter remarks. He could not even be allowed to enter anything in that Form 36A. PW2 also said his Affidavit was sworn before Mr. Manwari but if he saw a document before Mr. Manwari he would not know that it was Mr. Manwari advocate.

### **PW3 CLEMENT WASHINGTON MUMBO**

From Busibwabo in Muyare village Nakhokoma sub location Busibwabo location Matayos Busia County. PW3 said he recorded a statement on 5.9.17. He produced it as exhibit in court. These photos 5 CW1 – 5 are attached to the said affidavit. Pexh 5. (a) to (e). That is 5(a) the said 5 (b). The 3<sup>rd</sup> 5(c). The one of ... is 5(d)

### **CROSS-EXAMINED by Ngaywa:**

PW3 said he saw people in a hotel in the shopping centre. People normally visit the shopping centre. When PW3 went to vote, he saw people queue to vote. It was about 12.00 noon. People normally eat over lunch hours. PW3 said that when he recorded his statement he could remember what was happening. He said he saw Omondi carrying people on a motor cycle. That in those pictures no one was carried as a pillion passenger on a motor cycle. PW3 stated that IEBC ensures that people are registered as voters and one can register to vote anywhere so long as he has an ID and passport.

### **CROSS-EXAMINED BY MR. MAKOKHA:**

PW3 confirmed that no one was on any motor cycle in those pictures. That was his affidavit. PW3 said he saw Quinto but he did not say it in his affidavit which motor vehicle registration number. It would have been easy to note it down, but he did not. PW3 further said the hotel is at a shopping centre. There at Busibwabo about 300metres away from a factory which was being built. That the population increased. PW3 said people were gathered at central hotel. He saw Beatrice Okoth enticing people from Bukhayo West. In picture No. 5(a) there were 8 people. There were 3 buildings. One was a hotel. In 5(b), there were 3 buildings and 5 people. In 5(d) there was a person coming from eating he had a tooth pick in his mouth on a bicycle. PW3 said he was sure he came from eating and was sure he was going to vote.

On that day, anybody (8<sup>th</sup>) riding a bicycle and/or motor cycle was coming from eating to voting.

PW3 In paragraph 7 of his affidavit, said he saw the same people he had seen in the hotel. The affidavit does not have their names.

In paragraph 5 and 6, PW3 said he saw Beatrice paying for their meals. No evidence in those photos see photos 5(b).

PW3 said that Beatrice has a shop in those photos. The last shop was 5(c) and 5(b). It is in the last shop

that PW3 said she has a business therein. PW3 also said one was not allowed to move about on voting day.

#### REEXAMINED BY MR. OKEYO

PW3 said he did in his affidavit explain how and why people were gathering in that shop. He further explained that the reason they met was Beatrice was inviting people from Bukhayo West there. PW3 said he explained the surrounding circumstances in his affidavit. That Beatrice Akoth was doing it. PW3 showed a picture of a person on a motor cycle. Victor is on 5(c). The motor cycle he was using was his 5(c), PW3 said he knew IEBC registers people but the people he saw were from Bukhayo West. He knew some of them. PW3 further said the hotel where people were eating was 300 metres away. PW3 also stated that the factory was not operational since those people had left to their areas to vote. The people in the picture did not work in the factory. He knew some of them. At Paragraph 4 PW3 said he never used the word "crowd". He only saw people gathered at a hotel. That Beatrice had a shop 5(c). It was the last one on the extreme right side. Beatrice was there wearing something yellow and blue. The hotel was on the left side of the photo.

PW3 further said someone was also washing after eating/before eating. The man on the bicycle 5(b) was from eating. He had just come from the hotel. He had a toothpick. PW3 said he saw him when he went to vote. He was Silvester Juma from Bukhayo West. PW3 said he voted at stream 2 Busibwabo primary school whilst Silvester Juma was in stream 3. PW3 said he was sure his name was in stream 3. In paragraph 7 PW3 said he proceeded to Busibwabo polling station. The same people he saw eating are the ones he saw voting. That Beatrice has a shop there. PW3 said he knew that she replied that after voting she went straight home. That was a lie. She was feeding people from the other ....

#### PW4 VICTOR MDOGO

PW4 said he was a resident to Bukhayo West, location, Bugengi sub location. He is a businessman. On 5.9.17 he wrote his statement. PW4 wished to adopt it. This picture 5(d). PW4 knew the man on the bicycle was a member of their group Silvester Juma. He did not know the others.

#### CROSS-EXAMINED BY MR. NGAYWA :

PW4 confirmed that was his statement. PW4 said he knew Alex Masinde. At Paragraph 4. He had not said when. According to his statement they met but there was no date.

PW4 also said there was a group in which he was a member (paragraph 3) The group had to be registered. He had not annexed a certificate of the group. Party members were supposed to be listed. There was no list of members there. PW 4 further stated that nothing showed he was a member of the group. That in meeting people normally there are no minutes of the deliberations. PW4 also stated that some people registered in Busibwabo ward and voted. That IEBC could register people at will from anywhere. He knew that after registration, there was a verification process to confirm presence or absence of names. During that time, anyone with anything was allowed to complain. According to PW4, some people came from Bukhayo West and registered in Busibwabo but he did not raise any objection.

#### CROSS-EXMAIEND BY MR. MAKOKHA:

PW4 said he voted at Siwongo primary school Bukhayo West. They got the report from their chairman that the 3<sup>rd</sup> Respondent wanted them to transfer their votes. PW4 said he knew that the petitioner and 3<sup>rd</sup> respondents were competitors.

He also knew that voter transfer without their will was an election offence for which the 3<sup>rd</sup> respondent would be prevented from counting. PW4 said he knew all that but did not report because he was a voter at Siwongo voting as of 8.8.17. IHe did not report that voters were being transferred from station/ward A to B. PW4 could see 5(d) the man in the photo was a farmer, a member of their group. The group is Kwa Sale .....8<sup>th</sup> group. But PW4 did not produce a certificate or members list. He had nothing to prove that

he was a member of the group. PW4 saw the picture 5(a) 5(b) and 5(c). He did not know that place.

REEXAMINED BY MR. OKEYO: this witness said that the 3<sup>rd</sup> Respondent approached them through their chairman. PW4 was a member of the group, not an official. The secretary keeps records Minutes. The minutes were however not minuted. PW4 said one can register as a voter at will anywhere. Para 3 – the Bukahyo West members it was not their will.

In paragraph 3, He had explained the reasons why they transferred. He did not report. PW4 said he got to know that they had changed because after verification their secretary notified them that some members had changed stations. pW4 said he did not report because he did not have any interest in Busibwabo. In Photograph 5(d), PW4 recognized Mr. Silvester Juma. He was a member of their group.

#### **PW5 JOYCE MBINYA MAWEH**

PW5 said she is a resident of Nasira sub location Mataoyos Busibwabo. She is a farmer. She recorded a statement with the counsel on 5.9.17. The statement was adopted. PW5 said she was an agent at Nasira stream 2 Of 2. Page 46 (response) she witnessed the station closure. She signed the polling day diary. PW5 said she was there throughout. She was an ANC agent. They closed at 6.00p.m. That was when he signed the polling day diary.

Page 44 of the response shows the turn out during the day. The P.O. says there were no voters after 5p.m PW5 said that was a lie. They finished at 6.00p.m. It showed that all people were identified by the KIEMS kit. (page 44) That, PW5 said was also a lie. For some people records were not found. Form 36A She did witness at the polling station (para 19 of the response) From 36A – She did not sign because they had told him that if some things happened they would not sign.

- 1) Firstly, when they were sorting they did not show them which vote was for who
- 2) The Presiding officer was hostile to them and told them he could do without them.

It came because they asked serial number for the booklet of ballot (book) he refused.

Making – some votes were signed outside the box. It was true some ballots were wrongly marked. He became hostile. PW5 said he had been trained as an ANC agent. The voters moved outside the (box) was erroneous/bad spoilt. That affected the result. There was form 36A (page 191) There are 2 rejected ballots. There were many more not just two. Some candidates were given the votes.

#### **CROSS-EXAMINED BY MR. NGAYWA:**

PW5 confirmed that he was an ANC agent (page 39 of the response) She signed when the station was opened. Page 42 and 43 of the responses. She confirmed on ballot seals ... at the start- she signed. Before court page 46, the P.O. signed and then she was asked to sign. According to the diary, the P.O. says the station was closed at 5.17 p.m. (page 46) Before she signed, the P.O. had filled the details p. 49. When the boxes were being sealed PW5 had not signed anywhere that she was there. Other than that diary, nothing else showed she was there. Also, after station closure page 51 (confirmation of serial of seals) she was not there. She did not write her name or sign. Her signature was not there (page 59)

PW5 said she knew her duties as an agent. Included

- 1) To record the S.N. she did not sign for the S.N.

Page 19 was a From 36A for Nasra. Her signature was not there.

Alot of things happened. She reported to her principal but did not report to the R.O. Her principal had not complained to date.

During sorting out, votes were being given to the poll clerks. They were around 6 of them Contestants were 6. Every clerk had been assigned a contestant. The P.O. there supervising the exercise. PW5 said when counting, there was an incident political supporter were outside the counting hall. It was not true that some of them were calling out some contestant's names.

The assistant chief was to keep law and order. He is the administrator on the ground who was represented for many around ensuring law order were observed. She did not know who reported to County Commissioner and their assistant.

**CROSS-EXAMINED BY MR. MAKOKHA:**

PW5 said she reported at 6.00 a.m. She went upto 6.00 p.m. she did not sign any other document after 5.17 p.m. PW5 said it was true that she did not sign any other document. P.O. was not showing them the votes face. She claimed that she saw many rejected votes being given to other candidates. She also stretched and saw a rejected vote being given to another candidate. That was the agents work. Not true that he could not have seen this if she was not allowed to observe. Furthermore, PW5 said she did not sign the form. The P.O. asked them for it, saying he would give them later but he did not do so. She was not given a copy and she did not see it. She saw the assistant chief was there. She didn't see him signing any ballot paper. He came thrice, and he was talking to the P.O. That was wrong he never forced anybody to do anything.

**RE-EXAMINED:**

PW5 said she signed the last document at 5.57 p.m. She then left the station later.

She signed page 39, 43 and 46. She signed even the closing. PW5 stated that she refused to sign for certain reason being

- 1) The counting was irregular

Her refusal to sign 36A was a protest. She did not see any tracks when they were counting. PW5 said she saw the assistant chief in the polling station – four times. There were police inside the polling station whose duty was to keep law and order. The chief came and spoke to the P.O. NOT the police. PW5 further said that the polling day diary includes the police who were there. It does not show that the assistant chief was one of them. That when closing the station page 46 (at 4.17) after that, nothing shows when the P.O. left. The P.O. was sorting out the ballots by himself. In her affidavit, PW5 said she raised the issue to the P.O. (para 9 and 10) He intimidated them. PW5 said she was rendered a mere observer.

**PW6 RICHARD NYONGESA OTELE**

A resident of Nasra sub location Busibwabo Matayos Sub county Busia County. He said he is farmer and also a painter. He swore an affidavit on 5.9.17. He wished to have it adopted. The IEBC response page 46 PW6 said he signed the closure time. They closed at 6.00p.m. Voting went upto 6.00p.m. IEBC (page 44) claims that Number of voters after 5.00 p.m. – zero. PW6 said that was not true. People were still in the queues. He was present throughout not all people were identified by the KIEMS kit. There was an alternative method of identifying. And that many were identified though that alternative method. Record of voters identified by printed register (page 44) Para (22) many were not identified. Page 19 the form 36A PW6 signed as an agent. It was about 6.00a.m. They were 4 agents. When closing were about 12 agents only 4 signed. The rest of the work was the P.Os. PW6 said the counting was not ok because when they started counting they were sorting themselves without showing them. The clerks and the P.O. even counting there was no transparency. The counting was done by themselves without involving them.

**CROSS EXAMINED BY MR. NGAYWA:**

PW6 said the polling station was closed at 6.00p.m. before counting started. Page 46. He signed that he was there. According to the diary, the polling station says it was closed at 5.17 p.m. He saw that before he

signed. Pw6 however did not raise an issue with the P.O. himself. He signed on a c... reason. PW6 claimed that as an agent, he should have signed and commented. The signature at last shows PW6 was there. At Page 39 of the response, he signed as an agent of ODM put his name and ID number. At Page 49. Pw6 said he signed to signify that he was there when polling was being sealed. After closure (page 51) he did confirm that he was there when counting closed. Page 19. Of Form 36 A PW 6 again signed that he was there. That he saw each and every vote each candidate garnered. PW6 said the form showed there was a place where he could record reasons for refusal to sign. He wrote his name in the form (36A). According to this form, there is no reason for not signing the form 36A. PW6 claimed that Many people were not identified in the register.

PW claimed that at closure, they were about 12 agents. (page 51) says there were 9 people signed. When confirming packets page 49, there are 9 agents. PW6 said he explained in his affidavit that the assistant chief was coming to the station. He came four times. One of the assistant chief duties was to maintain law and order. He did not know that the assistant chief had his bosses. PW6 said he went up to std 8. He did not do geography history or social studies. There were political supporters outside. Further said some people were making noise calling out the contestant's names. He was not given a chance to see the votes. There were about 6 clerks. There were about 6 P.O. had assigned each clerk an aspirant. He was picking up a vote passing it over to the clerk without showing them. There were some spoilt votes. He saw about 10spoilt votes. When they started counting, pw6 said he stood and saw the spoilt votes.

#### CROSS-EXAMINED BY MR. MAKOKHA:

PW6 said he arrived at Nasra at 5.05 a.m. Voting started at 6.00 p.m. He signed to say that it was closed at 5.17 p.m. Nobody was prevented from voting. He was an agent for the ODM party. The candidate of ODM was Mr. Sospeter Odeke Ojamong. The Governor votes counting was completed 1t 10.30 p.m. He had been trained. They had been trained that closure time was 5.00p.m. that he was not lying by saying that the station was closed at 5.00 p.m. PW6 saw the KIEMs kit rejecting some voters but he saw some people vote. He did not remember how many. PW6 said he had been trained but was not told that he should have recorded such a person's an ID and confirm with the record. He had a pen and paper to record what was happening. He did not record who were rejected by the EVD (KIEMS) machine. PW6 confirmed P 19 had his signature. In this form ZN Hemson got 82 votes according to those forms. He claimed that the P.O. did not announce the votes garnered by each candidate. PW6 knew who won when he went to sign and he was shown. Generally, they were 12 agents in the polling station. All remained but one man came and left. He was next to him. PW6 saw 10spoilt votes when they were counting them. During the sorting, they were not shown. when counting, they were shown the spoilt. He was there when opening the boxes. They were never chased from the room. They were a distance of about 4 metres. Clerks were 2 metres away. From the P.O. to the clerks was 2 metres. There was nothing blocking the view. Considering that distance, one could not see. P.O. was just saying whose vote it was not showing them. He was unfolding it first before giving it to the clerk.

In his book PW6 said he did record that incident. He saw when he stood up that there were 10 spoilt votes. Only the MCAs votes were counted that way. Before signing, PW6 said he did not know how many votes his candidate got.

#### REEXAMINED BY MR. OKEYO

The witness claimed tat at Page 46 he said the polling station was closed at 6.00 P.M but diary says 5.17. He did not sign the Polling station diary because they said unless one signed the polling station diary they could not be given 36A to go with them home. i.e. they were given a condition. Page 36 nobody was prevented from voting. Voting should have stopped at 5.00p.m. sharp. He says there were no people at 5.00 p.m. but he did not close.

Page 19 From 36A the issue of protesting and if it was recorded. PW6 said It was the P.O. who should have recorded NOT agents. He could not write on IEBC document

The assistant chief's duty was to ensure security. The assistant less did so. It was the police duty. The

P.O. did not indicate anywhere whether the assistant chief came. PW6 had explained the circumstances and time when assistant chief came. There was a claim that people outside had a fracas. PW6 said It was NOT true there was. He did not see any. The 10 spoilt votes he knew the difference between sorting and counting. The 10 spoilt votes. He saw them after sorting. They were clerks 2 metres, they were 2 metres behind the clerks. There was a clerk assigned to spoilt votes. He saw 10 spoilt votes. That he did not discover the 10 during sorting but during counting. The governor's vote counting was completed at 10.30 p.m. the MCA's vote-counting was finished at 6.00 a.m. the following day. They were to start with

- 1) President
- 2) Mp
- 3) MCA
- 4) Senator
- 5) Women rep
- 6) Governor

That would have been the order. That is what they were trained. At Page 71 of the response the presented sequence of counting was not followed. PW6 again said he explained that in his affidavit. There were other lawful material of identifying voters. He did not have any reasons and explained the reason for refusing to sign.

#### **PW7 JANE ARAMISI**

PW7 is from Muditi B village Nasra sub location Busibwabo location Matayos Sub County.

She is a farmer. She signed an affidavit on 5.9.17. She was at Nasra polling Ac stream 2 of 2.

She entered as they were starting. She signed the diary (43) agent for jubilee. On counting (page 46 PW7 said she was there and signed. The station was closed at 6.00 p.m. she knew as an agent that voting should have gone upto 5.00 pm. But they extended because there were people in the queue. NOT true that there were zero voters, on the queue. Voting continued upto 6 p.m. PW7 said at (Page 44) that there was an alternative means of identification. The names were in the name register but pictures could not be found. They were tallying their names (KIEMS kit) Forms were used for those who could not be identified. There were some people who were not identified. Details were in the KIEM kit.

(Page 19) (Form 36A) For Nasra – she was an agent there. She did not sign form 36A but was there when others signed. She did not sign because the conditions were not conducive.

1. When sorting the proper procedure was not followed. They were not allowed to see which ballot was whose. Ballots were just being tossed like playing cards. They were not able to know the way they were supposed to be shown.

The P.O. was doing it himself. He was showing the backside only. PW7 said that she contested the issue of sorting out. When counting, she was there as an agent.

The results (rejected, cast and spoilt). Page 19 the rejected were shown to be 10. PW6 said she saw the 10 votes because she stood to stretch herself and noted that the P.O. had written 10.

She witnessed the counting. She saw the rejected votes. In the form, they wrote 10 rejected votes.

#### **CROSS-EXAMINED**

Page 39 (response) she entered at 6.49 a.m. she signed. Page 42-43, she signed the box seal. Page 46 closing of the centre. She was there and signed. The P.O. had already fed the details. PW7 confirmed that the station was closed at 600p.m. She had seen the details keyed in by the P.O. She signed. At Page 49 (sealing of packets) She did not sign. Page 51 closing the station. PW7 did not sign. She also did not confirm sealing and counting because she was not satisfied. PW7 said the P.O. recorded the station was closed at 17.17 but she signed although we closed at 6.00p.m. At Page 19 – the P.O. completed 36(a) agents present wrote their names without being forced. 6 confirmed what was written there. PW7 however said she chose not to write and sign. She did not give reasons for refusal to sign. PW7 further explained that the assistant chief came thrice after he voted. The assistant chief's work was to observe law and order as mentioned. He normally reports to his bosses. As an assistant chief, he could be expected to tour many stations. One wanted to know what was happening at other station. When counting, PW7 said none of the political supporters were out. When counting there were 6 clerks. Candidates were six (6). Various clerks were assigned. Each to a candidate. P.O. was picking votes showed and gave the clerk. Then they counted. She was a jubilee agent. She did explain to his principal. He has not filed any petition. He was satisfied. Since then, PW7 had never reported to the R.O.

#### CROSS-EXAMINED BY MR. MAKOKHA:

Page 43 was a diary. She had signed.

Page 49 involves sealing of packets. PW7 said she was not there when sealing

Page 51 involves sealing of labels. She did not sign. Page 19 Form 36A she did not sign. PW7 said it was NOT true she did not sign because she was not there.

#### RE-EXAMINED

Page 49-51 claimed that she did not sign the form. PW7 explained in her affidavit why I did not sign. She was there all through even upto counting. She and others did not sign Form 36A. She could not write on the forms. The P.O. was the one with a duty to record reason why they refused to sign. PW7 said he did not write on the POD that some left walked out in protest.

The assistant chief's duty. They were trained and told that askari was to provide security not the assistant chief. PW7 explained the circumstances the assistant chief was coming. The PSD indicates the name of anybody coming in an official capacity. Nowhere was that indicated.

There were 6 clerks 6 contestants.

There were spoilt votes page 48. There were some stray ballots. She also mentioned about spoilt votes in her affidavit. PW7 said she did not sign any form after 5.17. No other forms indicate the time when people left the station. Even the polling day diary itself does not indicate the time the station was closed.

#### DEFENCE.

#### DW1 JEREMIAH KIPRUTO KERICH

DW1 said he was the RO Busia County. He resides within Busia.

He swore an affidavit on 25.9.17 He wished to rely on the same. KJ1 was Form 36As for Busibwabo Primary school 1 of 3. Running through to page 12-22. D exh 1. Form 36B KJ2 page 23 P exh2. Certificate of Elected MCA KJ3 P D exh 3 page 24. Gazette Notice No. 8240 KJ4 – Pexh 4. together with some communication page 27 KJ5. The gazette Notice 8376 page 29 KJ6 P exh 6. Dw1 said that after tallying, they issue a certificate to the winner in respect of each seat. The certificate is Form 36(c). They issued in respect of Busibwabo to George Makhayaka Busera on 10.8.17. That was after tallying. He did not issue any other form in respect of Busibwabo. Dw1 said he established votes garnered by each. They tallied the forms 36(B) and declared the winners. In this case in Busibwabo

- (1) Abote Raphael – 317
- (2) Busera G. M. 1,428
- (3) Obere Titus Okumu 28
- (4) Okuku Wycliff Wandera 232
- (5) Wanzela Fredrick Oduor 782
- (6) Zakayo Nyongesa 1,379

The winner had 1428 followed by Zakayo Nyongesa with 1379. They documented in Form 36B. The chief agents were there at the tallying centre. The C.A. for ODM was present He was Linus. DW1 confirmed the original form was the one before him. Page 16 of the response together with P 23. Page 23 –P.O. who filled was 362 votes whereas DW1 indicated 262. Dw1 said the discrepancy was that what the P.O. captured was that the 262 votes indicated by the P.O. should have been 262. DW1 said they entered details of what each and every candidate garnered. Form 36B The column for total valid votes was auto generated. It appeared on Form 36(B). It appeared to be 262. A manual calculation had to (page 16) 262 which they eventually captured in From 36 B

If it was an error by the P.O. they noticed out the P.O. cannot change the results if the actual figure was captured. The P.O. had already sent the results to Nairobi. It could have brought along issues. Dw1 said the P.O. had the responsibilities to ensure that correct information in form 36(A) other than agents are supposed to append the signature. DW1 said for one original form 36A for each station there was a carbon copy of the form 36A. There was no original page 25.

The gazettement 8240 gazetted winners in County Assembly wards for the whole Nation. It did NOT correct.....the winners. The winner was erroneously captured as Zakayo as the winner, yet he was position 2. Ideally the person who was supposed to be gazetted was Busera. Upon realising that what he saw on 23<sup>rd</sup> the gazette notice was erroneous, DW1 called his DRO to make a mail, forward it to him to indicate that there was an error (He is called ....Oduory) He made mail saying what was coming and stating the correct position. He forwarded the same to him. DW1 said he then made his.... comments and forwarded to the County Election Manager on 23<sup>rd</sup> August (page 27)

Gazette No. 8239 when he was clearing he had one document. .... under it was the gazette notice in his ...DW1 indicated the gazette notice as 8239 AND NOT 8240 as it was supposed to be. He later called him and told him that there was an error in which he had written earlier. No. 8239 related to parliamentary. Upon making that correction, they took action .... on 25.8.17 a correction was issued to the ... the earlier gazetted candidate of Busibwabo

The content of the corrigendum gazette stated that the name of Nyongesa be deleted out and substitute it with that of George Busera in respect of the ward MCA. Dw1 also said Busia was not the only County affected. Others were Bomet, KBU, Narok, Bungoma Nairobi etc. It was a noble genuine mistake.

#### CROSS-EXAMINED BY MR. OKEYO:

DW1 stated that he was trained as an RO. They equally had minimum qualification for P.O. a degree he would expect the P.O. to know this work. In their reply DW1 said he saw that (paragraph 6) he said that the petitioners agents duly approved the results in each polling station. Approved is signified by signing. Page 13 of he response Busibwabo 2 of 2 the petitioners agents did not sign. There is no petitioner's agent ODM approval. Page 15 no approval by ODM other parties have. At Page 17 (No ODM approval). Page 18 No petitioners agent. He saw..... and other parties. Going by that, all the agents (para 6) all the agents approved the results. ODM did not approve the results in all polling station.

They told on people to be clear with results 36As and form 36B. He said that the entire information in

36A is carried to 36B. If a P.O. comes with a form that is not correct, DW1 said he could not change. If his P.O. said the candidate got 1000 votes he would not change. Total votes of valid votes are included in 36A to parade 36B. Total valid votes total is generated automatically from the results of Form 36. Accurate and ..... all the results in 36A should agree with 36 B. He did not take any step to ascertain why the P.O. gave the figures. He said it was an error but, the same was not .....to our 36B. The P.O. has authority to amend if they realise a mistake before they file the response, Dw1 further said he had access to all his Pos. He did not take anything to ask the P.O. to come and explain. Form 36A for this station had an error. The difference was 100 votes. The margins of the votes between the petitioner and respondent. There was a difference of 44 votes. He noted but he did not take action. ....votes was an election offence. Since it could not affect the result, they did not take any action against the P.O. there was nothing he could do to see P.O. DW1 said he knew he would be asked to explain the difference in 36B No action on the anomaly. He did not have anywhere to record.

There was an application to be supplied with material. The election Act requires them to make a .... As the RO, they write in the diary. They did not have anywhere recorded about the 100 votes.

It was claimed that he assisted the 3<sup>rd</sup> Respondent. DW1 said all parties of candidates were entitled to a minimum of 1 agent. 1 at a time their recommendation was one agent per candidate. At Page 14 the person declared winner – Independent candidate at page 14. There are 3 agents. Those others from other parties could have signed. All agents in the polling station were allowed to sign. On page 14, 3 agents for the independent 16-3 in which page 22 MCA (14) 1 and others. 2 agents. Some agents could sign for others. DW1 also said voter importation was reported. He was not there before 21/ /17. The name of Johnstone Juma featured. That in their register Manyonyi Silvester Juma was in the respondent. Teresa Muyuya .....and Barasa .....were mentioned by the petitioner.

DW1 further stated that Form 36 As had authentication security features There was SN place for signing and a logo. It had to be signed and stamped. Stamping would verify the signature. It could be stamped around the signature. When the P.O. signed (page 17) the document within any document it would be ok. At Page 19, Nasra 2 of 2 completed and signed it was signed on 9.8.17. The last witness signed on the other on .... the other did not sign date. DW1 said the agents could have been fatigued. The role of R.O. is to pre..... and past election notes. Further indicated that IEBC cannot solve some disputes like this. IEBC cannot resolve disputes. There was a statutory time which was from gazettelement. After gazettelement it becomes an election dispute for court to resolve.

Election disputes are handled by the court. That was 26<sup>th</sup> gazette notice No. 8240 for the MCS. He gazetted erroneously the petitioner. There was error. The court on 27.8.17 is .....(27) between him DRO himself and his boss. DW1 forwarded it to his boss who is responsible for gazettelement. His DRO sent the information to him which was what he forwarded to his boss. 23<sup>rd</sup> August one at 17.10. hours and another 18.02 hours. The recipient from the end was himself. This was an extract of page. It does not indicate the recipient.

DW1 explained that he sent to the CRO what he used to gazette which was what he used to declare elections. He had recorded a demand notice demanding that he be issued with the certificate.

DW1 said that by then he had already issued 4 certificates to the winner at the tallying centre. The winner was gazetted through a corrigendum on 23<sup>rd</sup>. He did not respond the demand letter. It had been overtaken by events. The corrigenda had already been issued he did not respond to the demand. DW1 claimed that they did not have issues with identifying all voters who voted were identified electronically.

The voting was to close at 5.00 p.m. unless the voters were still on the queue. Page 44 PDO as at 5.00 p.m. his P.O. said there were no voters. Station was closed at 5.00 p.m. from IEBCs standpoint since it came after about 15 minutes to count the voting station to a counting station. Either counting, the clerks are assigned a candidate if the number of candidates are lesser.

DW1 said for Busibwabo they were 6 page 48. There were 8 ..... 6 candidates + rejected + stray balloting 8 categories. A stay ballot is captured in the diary only

The polling day diary (PDD) captures those who are assigned for that station if any other case they would not record. At Page 52 specifies for ..... this was for action taken.

On page 32 two includes are for 2 incidences. Still at Page 52 (two incidences in one column) but there was still space. For Nasra two. DW1 said he summoned the P.O. after he had seen the petitioner. If there were errors in a polling station, he was not allowed to change. Recount can only be done at the polling station or by the court.

REXXD by Mr NGAYWA:

Para 6 of the response in petition. P 1 and 2 As per his affidavit stated that his agents were present and confirmed.

DW1 said that in the event that contestant does not have an agent, an election cannot be stopped. Elections cannot be stopped in account of lack of agent. It is the responsibility of candidates to bring agents. The .... did not affect the result of the candidates garnering.

Agents who were supposed to sign page 15 of the response to petition various agents for

He stated that all the candidates were there. They were not counting who should sign. Agents who were present. The winner was an independent candidate. These others could have been for other candidates.

He said that a register has several names. He did not know whether they came from like Silvester. All he knew was that they vote in that status. Every Kenyan has a right to register anywhere. There are as follows;

- 1) They can complain to the P.O.
- 2) There was a statutory form diary the voter registration exercise (Form 2)

In this case DW1 was there doing verification. He did not see any complaint. Page 19 (by agents). This form was properly captured the date as 9.8.17. Time it was correct. The counting spilled over to 9<sup>th</sup> August. He explained that the possible circumstances were fatigue.

He said that these errors (of changing the sequence of counting and spilling over of counting to 9<sup>th</sup> August) could not affect the results. The date error does not affect the result.

Page 17 Form 36 with stamp above on signature. The form had all the security features. (1), logo, S.N. signature space, (3) stamp and all other marks.

The stamps must not have been at the signature position so long as it was in the form.

..... of the petitioners and not the respondent. This was what happened.

- (1) He
- (2) Forwarded the result to his boss
- (3)The gazette notice was erroneously done
- (4) The gazettment was erroneous. Not properly. DW1 did a letter, called and corrigenda was issued.

Dw1 said he issued to one Busera George on 10.8.17. He issued at the tallying centre. An open place. DW1 stated that a person without a certificate cannot be gazetted.

The corrigenda was on 25.8.17. He did circulate the same. They could not recount at the tallying centre. Dw1 said that only twice (and not more than twice) counting at the tallying centre on request of an agent or on the opinion of the P.O. Page 52 indicates report by the P.O.

## **DW2 WILHEN OSEMBO OBALO**

Of Matayos Luya location Busia County.

DW2 said he is a teacher by profession. On 8.8.17 he was a P.O Busia No. 3. He appeared before the advocate for the IEBC. Confirmed the affidavit. He wished to have it adopted. Affidavit on 25.9.17 be adopted. Dw2 said that while conducting his duties as the P.O, he recorded the occurrence of each and any accounting PSD page 55 all through to 78. He wished to use the material as an exhibit Pexh 7.

DW2 said on the process of sorting and counting of ballot papers

- 1) Sorting is done after polling after the voting process is .....within a counting hall. 15 minutes break agents called in on side clerks .....of .....

He said Agents confirmed in counting. Counting and sealing all the votes was on the table.

Each clerk was assigned to candidates. The P.O. sorted it by

- 1) Unfolding the votes
- 2) Looking at it
- 3) Showing face to the agents back and front to ensure it is stamped (back) in the correct and it is .....

DW2 said the process would continue until the .....marked at rejected signature instead of rejected.

That the rejected ones somebody a DPO was assigned to keep them.

After sorting out, go to poll counting.

Before Counting agree on issues on counting

- (1) ..... will the .....candidate on top
- (2) Show the agents each vote.....go back *page .239*

Page 14 (Form 36A. This is the form Dw2 prepared (page) it has. It had signatures by agents. Dw2 said she witnessed the agents sign the form. .... Bahati Oundo. He saw Bahati personally sign out from. Dw2 said the names were in similar handwriting. That was because it should be completed by the P.O. to avoid making mistakes. So her DPO wrote the names. Agents signed.

DW2 said there was no complaint from agents if they did, they were supposed to give a claim for record but it did not crop up.

On page 14, amongst the agents, they had so many independent candidates (agents. There it had more independent candidates All the agent including for....other posts signed.

CROSS-EXAMINED by Mr. Okeyo:

Dw2 said he teaches at Mabonge primary school. He has a degree. He was taken for training. According to him PDD (page 60) there were (para 6) 6 clerks.

The same page says they had a calculator to assist in tallying, additional of votes.

Dw2 said he was trained on poll accredited agents who would be allowed. No stranger could come. His contestant had three was room for 1 agent per party/contestant. The agents could witness for the contestant. If one agent signed for ODM, that would be ok.

The RO said they allowed 1 agent per contestant. One agent per contestant at a time. The agent on from 36A (page 16) witnessed from voting to counting.

Dw2 stated that not all agents witnessed from voting to counting. There was 1 independent candidate the 3<sup>rd</sup> Respondent George Busera. He had 3 agents. It was alleged that sorting was opaque (not transparent). Dw2 said he was showing/displaying votes before handing over to the clerk. He followed the counting process but did not mention it in his affidavit (para 83) There were six candidates + rejected votes + stay votes. Somebody was holding two ..... The DPO i.e. the stray + rejected. After finishing the sorting, It is said that the agents raised issues. Dw2 said In Form 36A, there was a place for comments. He said good work.

On page 14 there is no such comment.

RE-EXAMINED BY MR. MAKOKHA:

Dw2 said he talked about display of votes at paragraph 8 of his affidavit... He said that the process of sorting and scrutiny was transparent. Page 4 Form 36A that was the form he filled. It has no comments because there were no complaint.

Dw2 said at Page 14 there were 3 agents for the independent. They had six (6) election names .... had various agents. So those agents signed.

#### DW3 BEATRICE NAROCHO OTISIENO

DW3 said she comes from Nasiemo location, Nambuyu sub location. She is a teacher. She recorded her statement on 26.9.17. She wished to produce it as evidence. DW3 said on 8.8.17 he was at Busibwabo station 3 as the DPO. There were agents. Page 63 shows the ODM agents as Erick Bahati. DW3 saw him signing page 67. There was an ODM agent called Erick Bahati Oundo.

Page 70 there was an ODM agent Erick Bahati. She saw him signing. Page 73 there is an agent Erick Bahati. I

She saw him signing. Page 14 Form 36A there is an ODM agent Eric Bahati. She saw him signing. DW3 said the handwriting in form 36A was similar. They had one original 36A only. DW3 said the P.O. agreed with agent that one person should write down the names so that the agents only sign. When sorting out votes, PO took the boxes

- Agents confirmed the seal
- Seal cut and votes poured down
- Clerks were on one side
- P.O. one side
- DPO assisted the P.O.
- P.O was opening showing both back and front.
- Giving it to the assigned clerk

- That exercise was done without fraud
- Rejected and stray votes were held by Dw3.
- Clerks were holding candidates votes.

CROSS-EXAMINED BY MR. OKEYO:

DW3 holds a degree in Teaching. She teaches at Nambale Urban Sec. School. They were trained. They were told the duties of;

- Clerk
- Agents
- P.O.
- DPO

Agents duties were to take care of candidates' interests. One (1 agent per candidate. The independent candidate votes (DW3 didn't know there were 3 agents for the independent candidate. She said that the R.O. said any person who witnesses must sign. That is not true that an agent has to sign one candidate.. The witnesses said tat it was true to say George Busera had 3 agents ...to From 36A.

Sorting of votes. They had 6 clerks. The polling day shows (page 62). 1 clerk left was arranging people in the queue. While another clerk disappeared. DW3 said she was holding the rejected votes. She was there during counting. DW3 did not remember how many were rejected and stray. She also did not remember how many votes each of the candidates got (petitioner and 3<sup>rd</sup> Respondent). In the PDD (page 72 sealing of packets of the ballot (centre). Shows signed shows no rejected votes (00)

Column 6 shows of rejected (00)

DW3 said Para 68 page 14 showed there were 2 rejected votes (not indicated in the polling PDD) Further DW3 said anybody who had not signed form 36 could not be given a copy of whatthey did not sign. Agents for other party were allowed to sign.

Agent issues contestants Erick witnessed. No complaint was raised by Eric. They were ...on the..... DW3 said on Form 36A nowhere had Erick signed to say he was satisfied with the process.

After the exercise they were called to explain what happened. They were called to confirm what they did at the station. They had access to all this information when they were called to the IEBC. DW3 said she wrote the names of agents. She told the agents to sign and they signed. She had access to the PDD before she came to court.

Closure of the polling station. DW3 said Juma was amongst who signed. There was no ID etc. Not true that she altered that form 36A does not agree on the PDD.

RE-EXAMINED -

At Page 14. DW3 confirmed that that was the Form 36A. It had all the security. Securities, IEBC stamp, logo letter head, No. Of votes garnered etc. DW3 said that form was not a forgery. Rejected votes total Number of rejected 2(2) She was holding three rejected page 72. Dw3 said she completed the P.O. populated the form. She could not give a correct figure about the entries therein.

**DW4 PETER ODHIAMBO OWITI**

DW4 said he is a businessman and a teacher by profession. He lives in Busia around township estate. He recalled that on 29.9.17 Dw4 appeared before his advocate and recorded a statement dated 25.9.17 (page 80-82). He wished to use it as his evidence in chief. Dw4 stated that on 8.8.17 he was the P.O. Nasra AC (2). As a P.O. he recorded the occurrence of all the activities. Everything was recorded. This was the PDD page 31 KJ 7. going through to page 54. He wished to rely on it. P exh 8.

While at the station Dw4 incurred some incidences on the same day. These were as follows;

No power

Skirmishes during counting that delayed the MCAs counting process. A group of people came when they were just about to begin counting MCA votes.

There were noises outside and stones thrown. People were counting and along with names of MCA candidates.

Dw4 said he informed the security officers who had 2 police officers assigned by IEBC. They called for re-enforcement. Patrol were close to the station. In a few minutes the officers came in and told them that peace will be reinstated.

Soon thereafter, Dw4 said, a man identified as the assistant chief (5 minutes) also appeared and he told him to assist them pacify the place. They did not allow anybody new from outside. Only the people who were in counted. Dw4 said the process continued. One agent proposed that the MCAs be counted during the daytime. It was around 4.00 a.m. They agreed that the counting should be done till daytime. (i.e. the MCAs) calm was restored and they moved to the counting.

Dw4 said he recorded it in the PDD (page 52) . That while at the station there were various agents for various contestants. DW4 recorded what was done by all the agents. They did too on the PDD and signed. Page 39 (agent of ODM 4<sup>th</sup> agent Richard Otele). ID No. Name signed. ANC –Joyce – M. Mawenyu ID No. She signed)

Jubilee –Jane Juma ID No. 9341014 she signed page 43.

Dw4 stated there was an agent for ODM Richard Otele – signed. ANC Mawenyu signed, Jubilee Jane Juma Signed

Page 46 agent for ODM Richard Otele signed. Jubilee – Jane Juma signed

ANC Joyce Mawenyu signed.

Dw4 indicated that they were signing at the closure of the voting, before counting. The PDD opened at 6.17 a.m.

At Page 42 Dw4 indicated the time on page 42 as 6.17 a.m.

They closed before counting at 5.17 p.m. (page 44 he recorded that at 5.00p.m. there were no (zero) voters on the queue. Voters identified through printed registers. –Zero (00)

That identification was by Biometric identification with the KIEMs Kits and alphanumerical identification.

Alphanumeric – Use of details in the ID.

(1) ID No.

(2) SN of the ID

(3) Security of the codes behind the ID

That was being done against the printed register. The register was only the registered had a code

- a) On the front page on the upper corner left side
- b) The code on the right hand side was for transmission

The sorting out process

- 1) Arrange the counting table
- 2) Emptying the contents of the votes
- 3) P.O. stands on one side
- 4) DPO Opposite the P.O.
- 5) Agents on one side
- 6) Clerks opposite the agents

The clerks are each assigned candidates

- (1) Boxes are emptied
- (2) Opening up of votes (picked by the P.O. opened up agents are shown displayed. The clerks are assigned the one whose vote is given.
- (3) Collection is done until the last vote is identified.
- (4) Rejected votes the DPO holds the stray votes + rejected.

The P.O. carries each one as agents count 1,2,3 etc of each candidate till the last.

CROSS-EXAMINED BY OKEYO:

DW4 said that if you open at 6.00a.m. to 5.00 any minute that you delay in opening extend by the same time when closing even when there are no voters.

Dw4 said they took a 15 minutes break after closure.

There were many things to do. Fifteen minutes break was too short.

They began counting at 6.00p.m. The PDD indicates when they opened (page 42). There was an order (sequence for counting) presidential.

At (page 45 Valid votes – see polls diary – Form 36(As)

At Page 48 DW4 said It took them 2 hours to count the presidential votes on that day/station. Another 2 hours for the MP by 10p.m. they should have finished the Presidential and MCA. He heard of the allegation by the assistant chief.

(para (page 81) DW4 said he was counting at 4 a.m). At 4.00 a.m. DW4 confirmed the presence of the assistant chief outside the polling station. 4.00a.m. is ordinarily dark.

People were tired. There was gal lamp. He could see a figure but not be sure who it is ...after identification Dw4 said the assistant chief came in and introduced himself. He came at the door. The skirmishes/Shouting/chanting and throwing stones names of candidates noise was outside the counting place.

DW4 said security would have held them from counting. They were only chanting and throwing stones. They stopped counting for the MCA and proceeded to count the others. It was a unanimous decision. Dw4 said he stopped counting(as per his affidavit)

Despite calm having been restored. PDD shows police incharge of the security. Dw4 confirmed he was in charge of affairs in the polling stations. And that all agents did not have authority to dictate on him. It was agreed upon . DW4 however stated it was not recorded/or stated that the ODM proposed or agreed on suggested that they defer the MCA counting. That at Page 52 – not mention. It has sections for incidences. 1 – 2 – 3 etc. He s..two incidences one time.

DW4 said he had seen the petition. He did not see the documents again. They were collected on the last day. Richard, Joyce and Juma were in the room. DW4 confirmed their witnessing of the counting.

Counting votes after counting. DW4 said this was done in the morning of 9.8.17. Joyce and Jane witnessed the counting. DW4 said that one cannot say that Joyce and Juma came after we sealed the boxes (after voting).

At Para 8 page 81. Dw4 wrote that Joyce and Jane signed the diary... but thereafter left the others after confirming the sealing.

At Page 19(Form 36) they signed, Joyce and Jane did not sign. They waited for the following day (broad daylight) the Form 36A was filed on 9<sup>th</sup> August. At Page 19 – Dw4 said the last witness (Richard Keya) signed for MCA on 9<sup>th</sup> but they wrote on 8<sup>th</sup>

Same as Wiper Party agent. Jane ODM 9<sup>th</sup> Richard Keya 9<sup>th</sup>. There were FDK agents – Dw4 was not sure who it was.

On page 19 (Zacharia signed on 8<sup>th</sup> and 2 others signed on 9<sup>th</sup>)

But they never could on 8<sup>th</sup> of August as per my demand (page 19 Form 36A)

DW4 said they left at the same time with his DPO. There was a place for signing when they left.. Signing out page 51. His DPO was Onyango Samuel. He wrote that in counting there was the signature of the P.O. All their DPOs were also required to sign and date. Dw4 indicated that in that form there were features missing. That a signature means he (the DPO) agreed with what was written there. Dw4 said had been shown the petition before he was called to court.

At Page 19 the total number of registered voters was erased/or an attempt to amend the same.

At Page 31. There was an erasion of telephone numbers. Page 41 erasion of the S.N. Page 45 there was an erasion of the SN for garner.

Page 46 ballots papers issued on S.N.

Page 52 erasion on the alleged dates of the incident.

The erasion were (done of them) countersigned by himself or the PD DPO. Most votes were not countersigned.

Dw4 said that only the erasion on page 47 was countersigned.

These documents were in the custody of IEBC where he works.

Three witnesses said they protested the manner of sorting. DW4 said that was false one and one was legally allowed to refused to sign. Jane and Joyce did not sign Form 36A (page 19) but they were there.

Reasons for refusal to sign not indicated yet they could not write that form. Only IEBCs officials.

DW4 further said that it was not right to say the IEBC interfered with the election.

RE-EXAMINED by Mr .Ngaywa:

Jane and Joyce. DW4 said he did not know them physically at paragraph 8 of his response, he indicated....Thereafter left the polling station (but he did not know Jane and Joyce) After the (close, but before counting).

Dw4 said It was the dairy which helped him to sum up information that he had met them. The PDD after sealing of the packets Joyce and Jane (page 44) were not there as per the diary confirmation of sealing. At Page 51, Jane and Joyce are not there. Form 36A page 19 Joyce and Jane absent between 8.8.17 and 10.11.17 at 2 months have passed. DW4 said he only met them on the material day, 8<sup>th</sup> because of lapse of time, he would not be able to say who was there or not without the use of diary.

Page 19,DW4 said he personally prepared it on 9.8.17. His DPO signed 9.8.17 agent for ODM did indicate the sign and date on 9.8.17. He was NOT the one recording the dates and signature. They did not personally.

They (agents) are the ones who wrote the date of 9.8.17.

Erasure of documents if it was a reputation. DW4 said it did not affect the results of the votes garnered for each candidate or the total number of registered voters as per the register.

FDK had an agent. ( by name Wilfrida Olang) FDK came upon page 43 with the same details for agent and FDK. It also appeared at (page 34 and 40 . That she appeared also at page 46 Also at page 49. Save details appear. Dw4 said based on the diary, an agent for FDK party was there.

The assistant chief was identified by DW4 during the skirmishes, he appeared and identified himself as the assistant chief. He was identified by the crowd outside. He talked to him to pacify the people even after the skirmishes they postponed the counting because it was the people decision because of the skirmishes. It was captured. Page 14 of the affidavit. Unanimously agreed. It was NOT dictated upon him by an agent. DW4 did not make the decision alone. It was unanimously agreed.

They closed the entire process (on page 53 at 7.00 a.m. on 9.8.17).

Why there were alteration erasing etc in the erasion-

Dw4 said he was allowed to make the changes in the diaries (PDD) page 31, he made changes to confirm the correct position.

At page 41 correction in respect to SN I countersigned. He did not give reasons for not making a correction. DW4 further said no agent made any complaint about the same. Therefore it was not necessary to make therefore.

DW5 ONYANGO SAID SAMUEL

DW5 said he works at Aga khan Kisumu

He resides at Kisumu. DW5 recorded a statement on 26.9.17. He produced it as his evidence in chief.

Dw5 said On 8.8.17, he was working as DPO at Nara AC stream 2.

He saw a diary (PDD) being filled. At (page 39) of the PDD he saw Joyce Mawenu ANC agent – ODM – Richard Otele

S..... Jane Juma. They closed but before counting Richard Otele ODM agent was there. Jane Juma and Joyce were there too. When confirming packets of see (para 49) Dw5 said he saw Otele (ODM) agent, Jane for Jubilee was not there. ANC (Mawenu) was also not there.

At Page 51 (confirming seals after counting) Dw5 said agent Otele was there. He signed. Jubilee and ANC were also not there. He was there.

Dw5 said he should have signed as a DPO but he did not sign. He forgot to sign. He explained (para 8) that Joyce and Jane signed. Certifying S.N. At closure but thereafter left the counting.

### CROSS-EXAMINED

Dw5 said they closed at 5.17 p.m. started the count at 6.00 p.m. That the presence of a person is epitomised by signature. He DID NOT sign when the station was closed. (his signature was not on that document.

They started counting the votes with

(1) presidential from 6 -Dw5 said he was not there on time. He did not know the exact time they finished the presidential.

(1) They again started the MP at a time he did not know.

(2) Dw5 did not know when they started the MCAS one. It was at 5.00 a.m. This was after finishing the others.

Dw5 said that order/sequence was not the prescribed order of counting. That when counting the MCAs one agent came up with the issue (suggestion (recount Nyongesa Otele) suggested that they postpone/defer counting of the MCA. Dw5 did not clarify that in his statement .

Further stated that there were police and P.O. at the station. Police were to maintain security. There was no time police suggested that they differ because of security. Dw5 said only the ODM suggested. Only him. There were 7 agents but none other raised the issued. The chants were outside.

Dw5 said people chanting were throwing stones. He did not mention that. Neither did he report at the police or any police station because there were police officers there. Maybe police themselves reported. Dw5 said that there was no agent who left (elections were marred violence). Those who signed the PDD left the next day 9.8.17. No agent left.

At Para 8 Joyce and Jane left at same time. Dw5 said that there was no time stated as to when they left. The previous was from 8<sup>th</sup> and 9<sup>th</sup> August. Dw5 went on to say that no agents left according to that but because they did not sign they were not there. The absence of a signature means not there.

At Page 53 declaration by P.O.) candidates affirmation no agent was included there. Dw5 stated the assistant chief never came to that station. He did not see him. At Paragraph 13 of his affidavit he said he never saw the assistant chief. It was around 4.00 a.m. when people were throwing stones.

Further stated that the assistant chief and the people chanting and throwing stones were outside. The assistant chief was identified by one of the people outside but while inside, DW5 could not identify the assistant chief outside.

## CROSS-EXAMINED

(PAGE 51) DW5 said he did not sign. He only wrote his name Onyango Samwel. That the order/sequence of counting was disrupted due to tension. Petitioner's supporters were chanting and throwing stones at the windows. Dw5 said the assistant chief their security officer, went out and came back and told them that he had met the assistant chief outside trying to clam those who were chanting. One person told the assistant chief and told him to calm down the people.

Dw5 said ODM Otele Richard Nyongesa suggested and other agents agreed with him. They all agreed that they postpone/defer.

Dw5 could not report because police were there. No need to report externally internally, they recorded the skirmish on page 52 of the response.

Dw5 affirmed that Agents present were present till the following day. Some left and did not record their names in the diary at time of counting.

That the last time they signed was on (page 46) on 8.8.17 at 5.17 p.m.

## **DW6 GEORGE MAKHAYAKA BUSERA**

The 3<sup>rd</sup> respondent herein. DW6 introduced himself as a farmer and current MCA for Busibwabo Ward. He confirmed signing his affidavit of 18.9.17. He wished to have it adopted.

In it DW6 saw exhibits BGM 002. It was a certificate of elected MCA. DW6 said he was given after he won in Busibwabo. He was given by the R.O. at Matayos tallying centre. He had witnesses.

Document GB 001. Was a Form 36B for Busibwabo ward. DW6 said the 36B was the same at page 23 of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent. Form 36B showed that at Nasra RC he got 159 votes. Form 36 on 56 of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent. Bundle. 36A shows that he got 159 votes.

In his response, dated 19.9.17 DW6 said he had answered to the petition. He denied the allegation that he imported voters as not true. The register for Busibwabo polling station 3 in his bundle (page 12 of the register dated on 7.11.17 which is document 1 page 4 thereof.

DW6 further said that Silvester Juma was said to have been imported. He said did not know him completely. The names are Mangenyi Silvester Juma. He does not know him at all. DW6 said he never imported voters.

He further denied claims that he approached members of any self-help group as alleged by Victor Mdogo. He stated that he does not know the group at all. He also does not know Alex Masinde. DW6 said he never bribed voters through his sister Beatrice Akotch.

He also never colluded with the assistant chief to get preferential treatment. DW6 confirmed knowing the assistant chief as the local area administrator . DW6 stated that it was alleged that DW6 was favoured to have more agents than allowed but he was denying that.

DW6 said he was an independent candidate. There were others vying as independent candidate e.g. the presidential and the gubernatorial candidates were independent.

DW6 said that at Busibwabo 3 of 3 his agent was Pamela Otwani and Richard Okelo. On the voting day, he left them and went to vote at Nasra AC primary school It had upto stream 1.

At about 10.00 a.m. DW6 finished voting and as a politician, he decided to go back home. He stayed there with friends and relatives awaiting the results to be brought by agents. DW6 said he went to the

tallying centre where there were other candidates. At 1.00 a.m. -2.00 a.m. DW6 said his name was called out by the R.O. he was given the certificate of victory. Showed it to the public and then went home.

At page 26 of the 1<sup>st</sup> and 2<sup>nd</sup> respondents, response No. 8240 is gazette notice. At page 26, row 12, the names appearing are Zakayo Nyongesa Harrison. DW6 said the gazette notice was erroneous. He was supposed to be the one in it as the elected MCA for Busibwabo.

He saw it and called the Busia R.O. He also got to tell the DRO. DW6 said he came to the IEBC offices and lodged a complaint that they had erroneously gazetted the wrong person. He was attended to on 25.8.17 by a corrigenda. The name was corrected P exh at page 30. DW6 said that was the gazette notice 8378 the corrigenda. That Para 7:8 row 8 (8378) before then there is a description that Zakayo Nyongesa garnered 1,369 while under raw 7 it say delete Harrison Zakayo Nyongesa raw 8 says insert Busera George Makhayaka who garnered 1423 votes.

#### CROSS-EXAMINED -

DW6 said he saw the petition and heard the witnesses give evidence. They had gazetted the petitioner first and then deleted it and then put his name .DW6 said it was his duty to show that he was the winner. There were witnesses but they did not give evidence that they saw him declared winner. He had a chief agent in the station. He said he went to the tallying centre to witness with some of them. DW6 said IEBC did not tell him that he needed agents at the tallying centre. He only had witnesses at the tallying centre. The witnesses were not called to sign at the tallying centre. DW6 said he did not have a witness to sign.

Page 23 Form 36B, DW6 saw 2 witnesses sign. None for George Busera. DW6 said it was not true that he was absent when results were being announced. He was an independent candidate earlier replaced in.

He said the petitioner was in ODM. Jubilee, Wiper, ANC and PK were represented. DW6 said that in Form 36(B) the first candidate is for NVP (national Vision party). NVP did not have a candidate. That the declaration of his victory was between 1-2 a.m. Gazette Notice No. 8240 at para 8 is for 8280 (as per his affidavit) was an error.

DW6 said it was that gazette notice, that the petitioner was the winner. He was not assisted by IEBC as alleged by the petitioner. At Para 10 of his response

DW6 said that having gazetted (para 10) he complained to the IEBC. IEBC told him to write the demand letter – annexed to his affidavit. The petitioner was not informed. At Para 11 , IEBC told DW6 that the error was rectified. Dw6 said it was the duty of IEBC to rectify he was brief/told that he needed to have at least 1 agent at a time at each polling station. Their duties were

- 1) To represent the interest of the candidate. The agent was looking into his interests NOT of any other candidate.

Page 14 there are 3 agents.

Page 14 Busibwabo 3 of 3 there were 3. Page 15, 3 agents, page 22, independent are 2 (tow)

Page 17 ANC have 4 agents. DW6 further stated that at Nasra AC (allegation of skirmishes) are not true but he was told there were and it led to assistant chief being traced at 4.00a.m. at that station.

In Form 36A at page 16 Nasra polling station 1 of 2 – a difference of 100votes. DW6 said there was a difference of 100votes. The total did not match. But he won by44 votes. He did not know whether 100 votes got lost.

Form 36A page 19 signed in different dates. DW6 still insisted that IEBC were ok. The process was alright.

DW6 confirmed Beatrice was his sister. He was with her from 2.00p.m. She spent at their home. She is a business lady at Busibwabo and she resides there at the shopping centre.

Dw6 knew the place Pexh 5(a). That was Busibwabo shopping centre. The last was Beatrice's shop. The next was a hotel. He did not know the owner. Dw6 said Beatrice spent the night at home. He was very tired with issues.

DW6 knew that the petitioner was declared winner and he wrote a demand notice dated 24.8.17.

DW6 read the petition. The petitioner does not know how his name was removed. It was just an allegation.

Dw6 said the gazette notice corrigenda came on 25.8.17. after his complaint on 23/8./17. IEBC deleted after receiving the demand notice. That there was a dispute before coming to court. Each one of them was complaining. There are two demand notices over the same election.

### RE-EXAMINED:

At paragraph 8 of the 3<sup>rd</sup> Respondents affidavit gazette notice is 8280. According to DW6 the correct gazette notice says page 4930.... He explained in his affidavit.

In his evidence in chief DW6 said he was referred to page 25 and 26 of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent.. No. 8240 Raw 13 code is 0.40. That Para 8 of the affidavit 080 was a typo. He had been referred to para 10 of the affidavit. Dw6 affirmed he wrote a demand letter. He said that he demanded from IEBC on 23.8.17. IEBC (page 27 of the 1<sup>st</sup> and 2<sup>nd</sup> Response). The email address says ....kindly and urgently.... to correct error as already the winner has lodged a complaint in our office....

Page 27 – the complaint was written on 23.8.17 at 5.10p.m.

Page 14 of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent response. DW6 said there are 3 independent witnesses Busibwabo (3). One agent was alternating. The other one were representing other candidates.

Page 22 of the 1<sup>st</sup> and 2<sup>nd</sup> Response there are (INP) agents. The last agent was IBP MCA) was my agent Mary Ogonde (1<sup>st</sup> agent to sign page 22) Page 16 of the 1<sup>st</sup> and 2<sup>nd</sup> response there is an excess of 100 votes. That in Form 36A he got 159 votes. DW6 was referred to page 36B (page 23) DW6 said according to 36B at Nasra RC he got 159 votes (row No. 5)

His agents did not sign Form 36B because he was not instructed that they should sign. Still on page 23, DW6 said he was publicly declared before the crowd that he was the winner with 1423. He was declared, given a certificate and showed it to the public. The picture 5(a). He knew the place: Beatrice's shop. She lives behind that same shop. P exh 5(a) the last house to the right. Dw6 lastly said it was true that he won by garnered 1423 votes.

### DW7 CYRUS OSEDA ALOI

DW7 said he was an assistant chief of Nasra sub location. He swore an affidavit on 18.9.17 annexed to the respondent by 3<sup>rd</sup> Respondent. He wished to adopt it as his evidence.

There were allegations that DW7 interfered with Nasra election. He denied them stating that he was at Nasra AC from 2 to 6.30 p.m on 8.8.17. He had gone to vote. DW7 said he then left and visited Nasra RC to see how the exercise was going on. That as the chairman of security at Nasra sub location his duties were

(1) To oversee the exercise so that he could report to his seniors when ....., it means first....how the outside situation was.

On 9.8.17 it is alleged that he went to Nasra AC (2) and interfered with voting.

DW7 said he never entered into room 2 but at 9.45 a.m, on 9.8.17he I heard noises and bangs on the roofs. I

He woke up and went to see what was happening. He saw two groups arguing “what will you do to us?

DW7 tried to cool them down. He then went to room 2. He knocked, identified myself as the assistant chief and demanded to see the P.O. The policeman opened, DW7 said he talked to the P.O. who requested him to call the people as they were fearing and they were then counting the gubernatorial votes. He then went out and found re-enforcement. They told me that they had been informed that there was violence. DW7 went with the officers and pacified the mob. They calmed down.

#### CROSS-EXAMINED

DW7 said when he arrived at 4.00a.m. the gubernatorial votes were being counted.

That before court was his statement and signature. At Para 4 DW7 confirmed that he visited several polling stations. He said so in his affidavit. He confirmed that he had interacted with IEBC officials. At Para 8 DW7 confirmed that the 3<sup>rd</sup> Respondent was well known to him. DW7's father is the County Commissioner.

At Para 5 circular from the security team – None assigning his assistant chief to gather information.

DW7 said he had a community policing group. None of the members came to give evidence that there was a security situation. Further said that the DPO of Nasra AC said that the interference with mob prevented them from counting. That the police came and found DW7 outside the station. The police opened by the police who after being introduced to DW7, he calmed them down, then went inside Room 2.

DW7 said Some of the people shouting were not from his area. He knew some of them . No one was arrested and charged for violence. There was no letter from the DCC or OB to say that there was violence. DW7 also said he had not even named anyone as having been involved in violence. He has an office where he records reports. DW7 said he did not write any report.

#### DW8 BEATRICE AKOTCH BUSERA

DW8 said she was a business lady at her place at Busibwabo. Presented her affidavit of 18.9.17 She signed it. She wished to have it adopted as her evidence.

Pexh 5(a) (b) and 5(d) were also there. DW8 said she could see her building. The whole of it was hers. She confirmed she does her business there. At the first shop she sells clothes.

DW8 said she did not know 5(a) (b) and (d). She was not in any of those photos.

DW8 denied claims that she was enticing voters with food for his brother.

Further said she opened her shop at 7 a.m. and closed it at 9.00, She then went to Busibwabo stream 2 at 10.00 and at 12.00 noon she voted. DW8 said she went back home, at Nasra Mundiri with her children. It could be about 2kms far.

#### CROSS-EXAMINED BY MR. OKEYO

DW8 said she lives in her building at Busibwabo. She left her house at 9.00 pm. That from the shop to Busibwabo primary is about 1 km. She arrived within 1 hour. She had walked. In the morning DW8 said she was just about there at the shopping centre. She then confirmed that the whole building was hers.

In 5(a) there is a hotel for Bonzo. DW8 said she knows Bonzo. She also knew Clement Mambo well and he also knows her shop.

DW8 said Clement could have been lying that she was buying food for voters . It was a lie. DW8 never saw him on that day herself. She said she ate at about 12.00 noon. Picked her children and went to her home. She then stayed home as a family with the other family members

At Para 6 DW8 said that she went home picked her children and went home. She then ate lunch at home with the family

DW8 further said she arrived home around 2.00p.m. and left the following day. That she spent the night there. By 9.8.17 DW8 said she had already known the results between 6.30 and 700 a.m on 9.8.17.

### **DW9 VICTOR CHARLES OMONDI**

DW9 said he is a farmer. That he can read. DW9 said that was the affidavit of Clement Mundo dated 5.9.17. At paragraph 8. It read....that DW9 was ferrying voters from Bukhayo West. DW9 said those were pure lies. He had sworn an affidavit on 18.9.17. He confirmed the document and his signature. He wished to have it adopted.

### **CROSS-EXAMINED:**

DW9 said he voted at Busibwabo that night. That in respect of Busibwabo, he knew the area . DW9 said the first one P exh 5(a) was Beatrice's shop. The next was a hotel 5(b) belonging to Bonzo. DW9 confirmed he knew Beatrice and her shop. She is his neighbour. He also said he had known Clement Washington Mambo for a short time. Say 2 years. DW9 stated that he also knew him. They knew each other. DW9 further said There was a possibility that he saw him somewhere on that day.

### **SUBMISSIONS**

#### **PETITIONER'S WRITTEN SUBMISSIONS**

Counsel for the Petitioner submitted that the petitioner has established his case to the required standard and that the petition dated 5<sup>th</sup> November 2017 should be allowed as prayed. Before the hearing of the petition, counsels agreed on the following contested issues:-

1. Whether the degazettment of the petitioner as the duly elected Member of County Assembly Busibwabo Ward, Matayos Constituency in Busia County was unlawful, illegal and contrary to law and the principles of natural justice.
2. Whether the 2<sup>nd</sup> respondent had the unilateral power to cancel and recall the gazettment of the petitioner as the duly elected Member of County Assembly Busibwabo Ward.
3. Whether the election for Member of County Assembly Busibwabo Ward was grossly undermined by instances of voter importation, voter bribery and voter inducement so as to affect the integrity and outcome of the elections.
4. Whether the election for Member of County Assembly Busibwabo Ward was conducted in a free, fair and transparent manner and to the required standards enshrined in the Constitution, the Elections Act and regulations thereto.
5. Whether the 3<sup>rd</sup> respondent was validly and lawfully elected and declared the winner for the election for Member of County Assembly Busibwabo Ward.

6 Whether the election for Member of County Assembly Busibwabo Ward held on 8<sup>th</sup> August 2017

should be declared null and void and a fresh election held.

7. Who should bear the costs of the petition.

At the close of hearing, counsel stated that they were asked by the court to submit on the following issues:-

1. The preliminary objection dated 22<sup>nd</sup> November 2017 brought by the 3<sup>rd</sup> respondent.
2. Submissions on disputed votes as per the report of the court as well as the 2 rejected votes from Busibwabo stream 3 of 3 and 1 vote attached outside the envelope containing votes for the 3<sup>rd</sup> respondent at Nasira A.C. stream 2 of 2.

Counsel stated that he would be condensing issue number 1 and 2 into one issue, issue number 3, 4, 5 and 6 into one while issue number 8 and 9 will be argued separately. He said that he would conclude the submissions by addressing issue number 7.

Counsel explained that by petition dated 5<sup>th</sup> September 2017, the petitioner petitioned the Honorable Court for orders that the declaration of the 3<sup>rd</sup> respondent by the 1<sup>st</sup> and 2<sup>nd</sup> respondent as the duly elected Member of County Assembly Busibwabo Ward was illegal, null and void for failure to comply with the mandatory provisions of the Constitution, the Elections Act and regulations. He said that the petition is based on the 8 grounds enumerated under paragraphs 7 and 8 of the petition. Counsel explained that the petitioner called a total of 7 witnesses who testified on the illegalities committed by the respondents in the conduct of the 8<sup>th</sup> August 2017 election with regard to Member of County Assembly, Busibwabo Ward.

He revisited the evidence given by PW1 who adopted his evidence affidavit and testified that he was on 22<sup>nd</sup> August 2017 declared by the 1<sup>st</sup> and 2<sup>nd</sup> respondents as the winner for the seat of Member of County Assembly Busibwabo Ward for the elections held on 8<sup>th</sup> August 2017 and his name was duly gazetted vide gazette notice no. 8240. That he testified that on 23<sup>rd</sup> August 2017, he served the 2<sup>nd</sup> respondent with a Demand Notice demanding that he be issued with a certificate as the duly elected MCA. He further testified that on 25<sup>th</sup> August 2017 vide gazette notice number 8378 the 1<sup>st</sup> respondent substituted his name with that of the 3<sup>rd</sup> respondent without his knowledge and/or participation. That PW1 also testified on instances of voter importation and treating, opaqueness in the sorting and counting of votes, interference of the counting process by the local administration at Nasira A.C. primary school which led to a change in the criteria of counting at the polling station. Counsel revisited evidence by PW2 who testified that he was the petitioner's agent at Busibwabo stream 3 of 3 and that the sorting and counting of votes proceeded in an opaque manner that tainted the credibility of the entire exercise.

Counsel stated that PW3 testified that on 8<sup>th</sup> August 2017 on his way to Busibwabo Primary School to vote, he witnessed the 3<sup>rd</sup> respondent's sister asking people to vote for the 3<sup>rd</sup> respondent and was in the process paying for their meals at Ochieno Bonzoo's Hotel situated at Busibwabo Trading Center. That he further testified that most of the people at the hotel were from Bukhayo West ward and that he met them at the line as he was cueing to vote. He also testified that they had been ferried from Bukhayo West ward by one Victor Omondi.

Counsel gave the account of PW4 who testified that he is a resident of Bukhayo West ward where he is a member of Kwasala Tusaidiane Self Help Group and that the 3<sup>rd</sup> respondent approached the group chairman one Alex Masinde to prevail upon group members to change their place of voting from Bukhayo West ward to Busibwabo Ward. He further testified that the request was attached with a promise of payment of KShs. 1,000/= to each member, a dairy cow to each member, bursaries as well as boosting table banking for the group. Counsel said that PW4 witnessed further that on the basis of the promises, some of the group members changed their polling stations from Bukhayo West ward to Busibwabo ward and he supplied names which upon inspection of the register were found to have voted at Busibwabo Primary School stream 3. Some of the names had also been supplied in PW1's testimony before the

register for Busibwabo 3 of 3 had been supplied by the 1<sup>st</sup> and 2<sup>nd</sup> respondent but were later found to be part of the register.

Counsel stated that PW5 testified that she was an ANC party agent at Nasira A.C stream 2 where the presiding officer single handedly handled the sorting of the votes and did not allow any of the agents to verify in whose favor a vote had been cast. That she also testified of unlimited access granted to the Area Assistant Chief into the polling station even after the station had been closed for counting. Further that she testified that in one instance, the said Assistant Chief came and talked to the presiding officer in low tones and in a suspicious manner after which the criteria for counting was changed and votes for MCA counted last as opposed to 3<sup>rd</sup> in the manner prescribed by the regulations. She testified of intimidation, insulting and threatening of party agents within the polling station. Counsel also gave account of PW6 who testified that she was a Jubilee Party agent at Nasira A.C. stream 2 where she witnessed the Presiding Officer allowing the Assistant Chief unlimited access into the polling station during and after polling had closed and kept on communicating with the said Assistant Chief in a suspicious manner. That at some point during the night, the Assistant Chief had a chat with the Presiding Officer after which the criteria for counting was changed. Counsel said that PW6 confirmed intimidation and harassment of party agents by the presiding officer and added that this was confirmed by PW7 who was the ODM agent at Nasira A.C stream 2 who testified on the unlimited access granted to the Assistant Chief and the frequent sessions between the said Assistant Chief and the presiding officer. He also confirmed allegations of hostility towards party agents, opaqueness in the sorting and counting process and awarding contested votes to candidates.

Counsel turned the coin and gave the account of DW1, the Returning Officer, who testified in cross-examination that there was an error with results from Nasira RC Primary School 1 of 2 whereby the total number of valid votes did not tally with what was indicated by the Presiding Officer as the total votes cast. That DW1 admitted that he made an alteration at the tallying center and reduced the total number of valid votes from 362 to 262. Counsel however maintained that this position was contradicted by the recount which showed that indeed there were 362 valid votes as opposed to the witness' position that there was an error with that station. Counsel stated that DW1 also testified that they allowed agents for candidates in other positions to sign Form 36A. The witness confirmed that he initiated the degazettement of the petitioner as the duly elected MCA Busibwabo Ward and availed to court an email whose subject was gazette notice no. 8239 as opposed to gazette notice no. 8240 which is the subject of this petition. Counsel said that there was no recipient indicated in the email. The witness also confirmed that Form 36A for Nasira A.C. polling station 2 of 2 at page 19 indicated that the document had two different dates and further that there were incidents of violence reported at Nasira A.C stream 2 as captured at page 52 of the response.

Counsel gave the account of DW3, the Presiding Officer for Nasira A.C stream 2 of 2, who testified in cross-examination that PW5 and PW6 were agents at the polling station and witnessed the sorting and counting but did not sign Form 36A and further that he did not record their reasons for refusal to sign. He also confirmed that agents on Form 36A in the said polling station signed on different dates, that is 8/8/2017 and 9/8/2017 and no explanation was given. The witness also confirmed that there were incidences of violence at the polling station and that when the police attempted to calm down the situation at 4am, they discovered the Assistant Chief was present and on whose intervention the situation calmed down. The witness also testified that they had access to the polling day diary before filing the response and went on to confirm that there were erasures at pages 19, 31, 41, 45, 47 and 52 which were never countersigned and further that Form 36A indicates an agent for an entity called F.D.K. which according to the Presiding Officer is not a party neither was there a candidate for MCA with such a party. He confirmed a change in the criteria for counting whereby votes for MCA were counted last but this fact was never indicated in the Polling Day Diary at page 52.

Counsel revisited the evidence of Beatrice N. Otsieno, the Deputy Presiding Officer for Busibwabo Primary School 3 of 3 who testified in cross-examination that they allowed into the polling station 3 agents for the 3<sup>rd</sup> respondent (see page 14 of the response) and that the Presiding Officer recorded comments on Form 36A as to why the petitioner's agent refused to sign Form 36A. She conceded that the Form 36A filled at the polling station is not the one before court as the one before court at page 14 of the

response doesn't have any comment by the Presiding Officer. He stated that Onyango Samuel, the Deputy Presiding Officer for Nasira A.C stream 2, never signed in the Polling Day diary and Form 36A and also confirmed instances of violence at the polling station and the presence of the Assistant Chief at the station at 4am when chaos had escalated.

Counsel explained that the 3<sup>rd</sup> respondent raised a Preliminary Objection dated 22<sup>nd</sup> November 2017 on ground that the petition herein is incompetent and fatally defective for failure to comply with the provisions of Rules 8(1) and 12(2) of the Elections (Parliamentary and County Election) Rules 2017. He stated that Rule 8(1) provides for the contents of an election petition which include name and address of the petitioner, date of the election, results of the election, date of declaration, grounds of the petition and the address of service. He further stated that Rule 12(2) provides for the contents of rule 8(1) to be included in the Supporting Affidavit filed in support of the Petition.

Counsel submitted that the Petition has complied with the Rules as paragraphs 1, 2 and 3 capture the address of service which include the name and address of the petitioner while paragraphs 4 and 6 capture the date of the contested election and the date of declaration of the results together with the votes that the petitioner was returned as having garnered in the disputed elections. That paragraphs 7, 8 and 9 bring out the grounds which the petition is founded and goes on to provide particulars of illegality and improprieties committed by the respondents in compromising the disputed elections. He said that the Petition ends with an address of service in compliance with the rules and this particulars and details are reproduced in the petitioner's Supporting Affidavit dated 5<sup>th</sup> September 2017 which provides further particulars.

Counsel explained that in order to fit the bill of a Preliminary Objection, the principles set out in the often-cited case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A. 696** must be met. In that case, it was decided in that a Preliminary Objection is an application raised before or during the hearing of a suit and which stops further hearing of the suit. That it must also raise pure points of law and not general grounds raised to oppose a case on its merits and the court went further to hold that such an application must have been pleaded in defense and the respondent given sufficient notice that the applicant intends to raise a Preliminary Objection. This view was captured by Law J.A. who had the following to say:-

***“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose off the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”***

Charles Newbold P. stated in the same judgment: -

***“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”***

Counsel submitted that the application before court does not meet the threshold of a Preliminary Objection as it was never pleaded in the applicant's Response to Election Petition dated 19<sup>th</sup> September 2017 and further that the hearing of the petition has already proceeded to conclusion with the applicant's full participation hence he cannot turn around and attack the very pleadings which he labored to defend against. He further submitted that the petition as drafted meets the minimum threshold envisaged in the Elections (Parliamentary and County Elections) Petitions Rules 2017 as all the requirements envisaged under the stated rules have been met and that the applicant never raised any issue with the said pleadings in the course of hearing hence his Preliminary Objection is unmerited and the same ought to be dismissed.

Counsel urged the court to find and hold that the application is ill-timed, spent and overtaken by events given that the hearing of the petition has already concluded and further that it seeks to frustrate and

embarrass the court process having already spent its resources, both material and human, to reach a point of conclusion through a judgment. He stated that in any event, Rule 15(1)(c) of the Elections (Parliamentary and County Elections) Petitions Rules 2017 limits the period within which interlocutory applications shall be brought and determined, that is during the pretrial conference and before the matter is set down for hearing. Counsel explained that the position is reaffirmed under Rule 15(2) which provides that an election court shall not allow any interlocutory application to be made on conclusion of the pretrial conference if the interlocutory application could have by its nature, been brought before the commencement of the hearing of the petition. He maintained that the applicant was served with the petition on 7<sup>th</sup> September 2017 and had all the time upto 19<sup>th</sup> October 2017 when the petition came up for the pretrial conference. He stated that the matter was then set down for hearing and the applicant participated in the hearing until its conclusion without raising any of the issues in the Preliminary Objection. Counsel urged the court to find and hold that the application, by the provisions of Rule 15 of the Elections (Parliamentary and County Elections) Petitions Rules 2017 has been overtaken by events hence the same should be dismissed.

## **ON DEGAZATEMENT**

Counsel stated that the petitioner was vide gazette notice no. 8240 of 22<sup>nd</sup> August 2017 declared by the 1<sup>st</sup> respondent as the duly elected MCA Busibwabo Ward having garnered 1,379 votes. However, counsel said that on 25<sup>th</sup> August 2017 vide gazette notice no. 8378 the 1<sup>st</sup> respondent caused the petitioner's name to be removed and substituted with that of the 3<sup>rd</sup> respondent without the petitioner's knowledge and or information despite his Demand Notice dated 23<sup>rd</sup> August 2017 addressed to the 1<sup>st</sup> and 2<sup>nd</sup> respondent demanding for the certificate.

Counsel submitted that the jurisdiction of IEBC ends upon declaration of election results vide a notice being published in the Kenya Gazette which is the official declaration document and that any dispute after declaration of election results is the preserve a court of law and not a discretionary authority bestowed on IEBC. That this view is anchored under Article 88 (4)(e) of the Constitution of Kenya which limits the powers and functions of IEBC to before and during the election **but excludes election disputes subsequent to the declaration of election results** (emphasize mine). Counsel submitted further that the power of IEBC to adjudicate on election disputes as provided for under Article 88(4)(e) of the Constitution of Kenya end upon declaration of election results in the Kenya gazette and as such any act of altering such declaration on its own motion amounts to an illegality and breach of a party's political rights.

Counsel relied on the wisdom of Lady Justice M. Ngugi in **Election Petition No.1 Of 2013 Nairobi Ferdinand Ndungu Waititu Vs The Independent Election & Boundaries Commission And 8 Others** where she dealt with what amounts to a declaration and held that after the declaration of results the jurisdiction is with a court of law and not the IEBC. This is so because the timeframe within which an election petition is supposed to be filed, as envisaged under Section 76(1) of the Elections Act, starts to run upon declaration of results in an instrument in the form of the Kenya gazette which declaration in effect terminates the role of IEBC in the election process. This is further so because the declaration of election results in the Kenya gazette sets in the jurisdiction of a Court of Law to determine election petitions as the declaration crystallizes a cause of action since upon gazettelement you have a Constitutionally recognized holder of office whose election can be challenged through an election petition. Counsel similarly relied on the Supreme Court decision of **Isaac Aluoch Polo Aluochier V Independent Electoral & Boundaries Commission And 19 Others [2013] EKL**R in support of this view and where the court stated:

***“the law has defined the time of declaration of presidential results as the operative moment in exercise of its jurisdiction”***

Counsel relied also on the High Court case of **Thuo Mathenge v Nderitu Gachagua & 2 Others [2013] eKLR** which also held that a declaration of the results is by IEBC through Kenya Gazette in fulfillment of the requirement of section 76(1)(a) of the Election Act and Article 87 of the Constitution. Counsel stated

that this was also the position taken by Justice Mumbi Ngugi in *Ferdinand Waititu Vs IEBC And Others* Justice Mabeya in *Josiah Taraiya Kipelien Ole Kores Vs Dr David Ole Nkedianye And Others* Majanja J in *Caroline Mwelu Mwandiki Vs Patrick Mweu Musimbi Petition No. 7 Of 2013 Machakos*. And Mwongo J in *Nairobi Election Petition No. 15 Of 2013 Hon Clement Kungu Waibara & Another Vs Francis Kigo Njenga And 3 Others*.

Counsel explained that both the petitioner and the 3<sup>rd</sup> respondent provided evidence of a complaint to IEBC in the form of demand letters demanding for the issuance of a certificate and correction of the gazette notice which declared the winner for the contested election. He submitted that this indicated to IEBC a dispute in the election for MCA Busibwabo Ward and that the appropriate procedure would be to advise the parties to seek legal redress as IEBC itself had already declared results in the Kenya gazette.

Counsel stated that before the declaration of the result by IEBC in Kenya Gazette it has jurisdiction to deal with any issue under Article 88(4) of the Constitution and that after publication the jurisdiction moves to a Court of Law and therefore any grievance after gazettement should have been referred to the court as it is the gazettement that legitimize the result. He relied on the case of *Thuo Mathenge v Nderitu Gachagua & 2 Others [2013] eKLR* in support of the submission.

He urged the court to find and hold that the action of gazetting the petitioner as the winner of the MCA election, Busibwabo Ward, constituted a declaration of election results and the Petitioner was, for that matter, duly elected to the County Assembly of Busia. That thereafter, the IEBC did not have the mandate to deal with his election by substituting his name with that of the 3<sup>rd</sup> respondent as that fell outside IEBC's mandate. In putting this submission across, counsel relied on *Rahma Issak Ibrahim v Independent Electoral & Boundaries Commission & 2 others Constitutional Petition No 456 of 2017* where Mwita J. made the following observations; -

***“The legal position emerging from the above analysis is that once a member is gazetted as duly elected, that is an election result and anyone who is unhappy with the result can only challenge it as an election dispute in an Election Court. In view of what I have said above, and after considering the facts of this case and the applicable law, I am satisfied that IEBC acted outside its mandate and violated the Constitution and the Elections Act. Its action of purporting to delete the Petitioner’s name as a duly nominated member of Mandera County Assembly and substitute it with that of the 1<sup>st</sup> interested party was ultra vires, null and void.”***

## **ON VOTER IMPORTATION AND INDUCEMENT AND ITS IMPACT ON THE ELECTION**

Counsel stated that the petitioner pleaded and supplied evidence of voter importation from the neighboring Bukhayo West Ward to register and vote in Busibwabo Ward in the contested election. He added that the witness also gave an account of how voters were being induced to vote in favor of the 3<sup>rd</sup> respondent. He gave the account of PW3 who testified that on 8<sup>th</sup> August 2017 on his way to Busibwabo Primary School to vote, he witnessed the 3<sup>rd</sup> respondent's sister asking people to vote for the 3<sup>rd</sup> respondent and was in the process paying for their meals at Ochieno Bonzoo's Hotel situated at Busibwabo Trading Center. That he further testified that most of the people at the hotel were from Bukhayo West ward and that he met them at the line as he was cueing to vote. He also testified that they had been ferried from Bukhayo West ward by one Victor Omondi.

Counsel also gave the account of PW4 who testified that he is a resident of Bukhayo West ward where he is a member of Kwasala Tusaiane Self Help Group and that the 3<sup>rd</sup> respondent approached the group chairman one Alex Masinde to prevail upon group members to change their place of voting from Bukhayo West ward to Busibwabo Ward. That PW4 further testified that the request was attached with a promise of payment of KShs. 1,000/= to each member, a dairy cow to each member, bursaries as well as boosting table banking for the group. He witnessed that on the basis of the promises, some of the group members changed their polling stations from Bukhayo West ward to Busibwabo ward and he supplied names which upon inspection of the register were found to have voted at Busibwabo Primary School stream 3. That some of the names had also been supplied in PW1's testimony before the register for

Busibwabo 3 of 3 had been supplied by the 1<sup>st</sup> and 2<sup>nd</sup> respondent but were later found to be part of the register.

Counsel submitted that this evidence was not challenged by the respondents but the respondents' witnesses adopted an evasive approach instead of traversing the evidence on record. He stated that the Returning Officer as well as the 3<sup>rd</sup> Respondent did not deny the allegations but instead stated that a voter is free to register and vote at a place of choice within the country. Counsel said that both Beatrice Akoth and Victor Charles Omondi who were accused of buying meals and ferrying voters respectively positively identified the scene/place captured in the photos in line with the description provided by PW1 and PW3. That Beatrice Akoth, in cross-examination, also admitted to being at the scene on the day of the election in the morning hours before she left for Busibwabo Primary School to go and vote. He added that both Beatrice Akoth and Victor Charles Omondi admitted to be personally known to PW3. That PW1, PW3 and PW4 also provided particulars of persons from Bukhayo West Ward who were influenced by the 3<sup>rd</sup> respondents to transfer their voting station from Bukhayo West Ward to Busibwabo Ward with a view of affecting election results. That some of the supplied names were located in the register for Busibwabo 3 of 3.

Counsel relied on Section 62(1) of the Elections Act which sets out acts which amount to treating and bribery in the following terms;-

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

***(a) before or during an election—***

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

***b) after an election, gives, provides or pays any expense wholly or in part to or for any particular voter or any other voter for having voted or refrained from voting as aforesaid, commits the offence of treating.”***

He further relied upon Section 64(1) which also sets out acts that would amount to improper influence of voters and which include promises to procure any valuable consideration to or for any voter in order to induce such a voter.

Counsel submitted that the 3<sup>rd</sup> respondent induced and imported voters with the clear objective of influencing the outcome of the election in Busibwabo Ward and that such an incident suffices to vitiate an election. He relied on the case of ***Muliro v Mubonye & Ano. (2008) eKLR (EP)*** in which it was held that one incident of voter bribery and inducement with the intention of influencing votes for a particular candidate suffices to void an election and further that it is not necessary to prove the amount of bribery for an election to be nullified on this ground. Further he relied on the Court of Appeal decision in ***Moses Masika Wetangula v Musikari Kombo & 2 Others [2014] eKLR*** in which it was held that no election can be valid if it is not free from improper influence, inducement and corruption. Counsel submitted therefore that the 3<sup>rd</sup> respondent, in violation of Article 81(e)(ii) of the Constitution got himself elected as the MCA Busibwabo Ward by improper influence. He said that this unlawfully influenced the results of the election hence the election ought to be nullified.

Counsel reiterated the position stated by the Court of Appeal in the ***Moses Wetangula case*** (supra) that the standard of proof in election petitions is generally to the satisfaction of the court, which is higher than

on a balance of probability but not beyond reasonable doubt. The court, in expounding on how bribery can be used as a ground for nullifying an election, made the following observation at page 14; -

***“Under Section 75(2) of the Elections Act, an election can be challenged on, inter alia, the ground of a corrupt practice, and specifically alleging any payment of money or other act .... We understand “other act” here to mean any other illegal act or practice. The Act does not define the phrase “corrupt practice” but it defines the phrase “illegal practice” as “an offence specified in Part VI” of the Act. Our conclusion from these provisions is that proof of commission of any election offence vitiates an election.”***

That the Court went ahead and made the following conclusion; -

***“In the case of corruption by the candidate himself, you do not require a multiplicity of acts of corruption to void an election. What is condemned in this vice is one’s mental attitude or personality. Proof of one act or incident of corruption therefore suffices to demonstrate that one is a corrupt person, or one is lacking in integrity..... it is also an established case law that corruption affects the will of the people and if the will of the people is affected, then the election cannot be said to have been free and fair and should be set aside. So if one engages in bribery, treating or commits any other election offence, his election violates the electoral law principle of “free and fair election” contained in the Constitution, the Elections Act and the Election Regulations”***

Counsel therefore urged the court to find and hold that the particulars supplied and proved by the petitioner satisfy the ingredients of the offenses of voter importation and bribery and find that having proved that limb of the petition, then the election is a candidate for nullification. **ON WHETHER THE ELECTION WAS CONDUCTED TO THE REQUIRED STANDARDS ENSHRINED IN THE CONSTITUTION, THE ELECTIONS ACT AND REGULATIONS**

Counsel stated that Article 81 of the Constitution of Kenya obligates IEBC to ensure a free and fair election which is free from violence, improper influence or corruption, transparent and administered in an impartial, neutral, efficient, accurate and accountable manner. He went on to state that Article 86 also obligates IEBC to ensure that the system is accurate, verifiable and transparent and that the results from polling stations are openly and promptly announced by the Presiding Officer at each polling station and by the Returning Officer at the tallying center. Counsel also visited Section 83 of the Elections Act which requires the validity of an election result to be gauged upon both quantitative and qualitative tests and that the result of an election is not limited to only the numerical or quantitative result. (***Moses Masika Wetangula v Musikari Kombo & 2 Others [2014] eKLR*** at page 17).

Counsel explained that the qualitative test relates to the integrity of the conduct of an election, the criterion being whether or not the process can be said to have resulted in a free, fair and transparent election. He said that this position is captured in ***Volume 14 of Halsbury’s Laws of England 3<sup>rd</sup> Edition*** where the learned writers had the following to say at paragraph 244;-

***“At common law a parliamentary election might be avoided on an election petition on the grounds of irregularities by election officials, if the irregularities were so great as to prevent the election being a true election ... [or] that the irregularities affected the result.”***

He explained that this principle has over the years been applied to the Kenyan judicial system in several cases. He gave an example of the case of ***James Omingo Magara v Manson Nyamweya & Others civil appeal no. 8 of 2010 (CA)*** where it was held that doubt will be cast on the authenticity of Form 35 by the failure of a Presiding Officer to sign it or to countersign against any erasures and that if such a Form is tabled as evidence by IEBC then it affects the results. This was also the ground for nullification in ***William Kabogo Gitau v Goerge Thuo [2010] eKLR***.

In view of the above provisions and case law, counsel urged the court to consider the following in the present petition; -

1. Onyango Samuel, the Deputy Presiding Officer for Nasira A.C stream 2, never signed Form 36A and the Polling Day Diary for the polling station.
2. Erasures at pages 19, 31, 41, 45, 47 and 52 which were never countersigned by the Presiding Officer.
3. Form 36A for Nasira A.C stream 2 of 2 indicates an agent for an entity called F.D.K. which according to the Presiding Officer is not a party neither was there a candidate for MCA with such a party.
4. Form 36A for Nasira A.C. polling station 2 of 2 at page 19 indicated that the document was signed on two different dates.
5. The Returning Officer admitted that he made an alteration at the tallying center in respect of results from Nasira RC Primary School stream 1 of 2 and reduced the total from 362 valid votes to 262 valid votes.
6. Beatrice N. Otsieno, the Deputy Presiding Officer for Busibwabo Primary School 3 of 3, conceded that the Form 36A filled at the polling station is not the one before court as the one before court at page 14 of the response doesn't have any comment by the Presiding Officer yet she witnessed the Presiding Officer indicate his comments on Form 36A at the polling station.

Counsel stated that the Constitution of Kenya at Article 86(b) and (c) provides that at every election, the Independent Electoral and Boundaries Commission shall ensure that the votes cast are counted, tabulated and the results announced promptly by the Presiding Officer at each polling station and the results from the polling stations are openly and accurately collated and promptly announced by the Returning Officer. He maintained that this provision was breached by the 2<sup>nd</sup> respondent when he made an alteration at the Tallying Center in respect of results from Nasira RC Primary School stream 1 of 2 and reduced the total from 362 valid votes to 262 valid votes.

Counsel enumerated the obligations on the part of IEBC in the conduct of elections under the Elections (Parliamentary and County Elections) Petitions Rules 2017 to include;-

1. Regulation 73(3) and (4) requires that a Presiding Officer shall seal valid votes, spoiled ballot papers, marked register and counterfoils of the used ballot papers in a tamper proof envelop for purposes of being delivered to the returning officer. Counsel stated that this was breached in the 3 polling stations where a recount was ordered as some of the votes and voting materials were not in tamper proof envelopes, one of the stations did not have counterfoils and 1 vote was found outside the tamper proof envelop at Nasira A.C 2 of 2 and which vote was never accounted for in the tally for that polling station as reflected by Form 36A.
2. Regulation 75(2) provides in mandatory terms the order for counting votes that is President, Member of Parliament, Member of County Assembly, Senator, Women Representative and County Governor. Counsel maintained that this too was breached by the Presiding Officer at Nasira A.C. stream 2 when counting for Member of County Assembly was deferred for acts which were not demonstrated to have affected the counting process inside the counting room.
3. Regulation 77(1)(a) provides for the rejection of ballot papers which don't bear the security features determined by the commission. He gave an example of such feature to be the rubber stamp of the commission. He invited the court to look at the rubberstamp at the back of the two rejected votes marked as Exhibit ii and iii and compare the same with the rubberstamp appearing on the face of it. He submitted that the rubberstamps are different from the one used by IEBC hence the reason for their rejection by the Presiding Officer. He added that if however the Court disagrees with this submission, then the 1<sup>st</sup> respondent's employees would have committed offences at the said polling station by rejecting genuine votes and this tests the very credibility of the electoral process.

4. Regulation 78(3) requires the Presiding Officer to draw up a statement in Form 41 set out in the schedule showing the number of rejected ballot papers for want of security, voting for more than one candidate, use of the wrong mark and unmarked votes. Counsel submitted that none of the 19 presiding officers complied with this provision regardless of there being rejected votes in all the polling stations across the Ward.

5. Regulation 79(5) and (6) requires the Presiding Officer to record the fact of refusal to sign a declaration form by a party agent and where the candidate or agent is absent, the Presiding Officer shall record the fact of their absence. Counsel contended that the regulation was not complied with at Nasira A.C stream 2 of 2 where PW5 and PW6 were present during counting but did not sign and this fact was never captured by the Presiding Officer in Form 36A.

6. Regulation 62(1) provides a list of persons who shall be admitted to a polling station other than the voters and this include candidates and their deputies, agents, members of the commission, police officers, vote assistants, observers and members of the press accredited by the commission. Counsel further contended that this provision was violated at Nasira A.C stream 2 when the Presiding Officer allowed the Assistant Chief unlimited access into the polling station despite him not being in the categories of persons listed under this regulation. The said Assistant Chief also testified in cross-examination that he had access to all polling stations across the ward in the name of manning the security situation.

Counsel said that at the close of hearing, the court ordered for scrutiny of votes in 3 polling stations. He explained that the purpose of scrutiny is to assist the court to understand the vital details of the electoral processes and gain impression on the integrity of the election process (see **Richard Kalembe Ndile v Patrick Musimba**).

Counsel stated that according to the court's report, 13 votes in favor of the petitioner were disputed while 15 votes cast in favor of the 3<sup>rd</sup> respondent were disputed. Three votes were also set aside for submission by the parties. Counsel submitted therefore that going by the slight margin of 44 votes between the petitioner and the 3<sup>rd</sup> respondent coupled with the high number of disputed votes from the scrutiny in only 3 out of 11 polling stations, the integrity, credibility and fairness of the election is shaken and cannot meet the qualitative test of a free, fair and accurate election as envisaged in law. He relied on the case of **Timmamy Issa Abdalla v Swaleh Salim Swaleh Imu & 3 Others 2014 eKLR** in which the court held that there comes a time depending on the circumstances of the case when a court will not look at numbers but at the integrity, credibility and fairness of an election. Counsel urged the court to find and hold that numbers become irrelevant once an election process is questionable for non-compliance with Articles 81 and 86(d) of the Constitution which spells out principles upon which elections ought to be conducted.

On the issue of violence reported at Nasira A.C. stream 2 of 2 and also the unlimited access granted to the Assistant Chief at the said polling station counsel submitted that PW5, PW6, the Presiding Officer, the Deputy Presiding Officer and the Assistant Chief confirmed incidents of violence at the polling station and which violence all the witnesses testified that it interfered with the counting process inside the counting hall. That the witnesses also placed the Assistant Chief as the person whose intervention was required to calm down the chaos. He relied on the Court of Appeal decision in the **Moses Masika Wetangula case** (supra) which held that violence, intimidation and improper influence vitiate an election. He explained that the common law principle has been that for violence to vitiate an election, the petitioner must demonstrate that such violence interfered with the election process. Counsel submitted that the petitioner demonstrated how the violence at Nasira A.C. interfered with the election process hence shaking its credibility. He stated that the petitioner also demonstrated that the election was influenced by the local administration as the chief was placed at the center of the chaos that marred Nasira A.C. stream 2 of 2.

In determining if the above listed malpractices affected the integrity of the election, counsel invited the court to consider Lord Denning's principle in **Morgan v Simpson [1974]3 All ER 722** where the learned judge made the following observation;

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

- i. If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result is affected, or not...***
- ii. If the election is so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by breach of the rules or a mistake at the polls...***
- iii. But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless, if there was a breach of the rules or a mistake at the polls and it did affect the result, then the result is vitiated.”***

Counsel urged the court to find and hold that the several malpractices and irregularities committed by the Respondents in the conduct of the election shakes its credibility and makes it a candidate for nullification. He submitted that the election was marred by numerous malpractices including the failure to sign Form 36A and the Polling Day Diary for for Nasira A.C stream 2, erasures of election documents at pages 19, 31, 41, 45, 47 and 52 which were never countersigned by the Presiding Officer, having agents signing Form 36A for a strange entity (F.D.K) in the election, having two different signing dates on Form 36A for Nasira A.C stream 2, alteration of results by the Returning Officer at the Tallying Center and having two different Forms 36A for Busibwabo Primary School stream 3 as conceded by the station’s Deputy Presiding Officer. The 1<sup>st</sup> respondent’s employees also acted in breach of Regulations 73(3) and (4), 75(2), 77(1)(a), 78(3), 79(5) and (6) and 62(1) of the Elections (Parliamentary and County Elections) Petitions Rules 2017 and the details have been provided herein above.

Counsel reiterated his submission that the election fails the qualitative test of a free, fair and credible election going by the numerous malpractices established in the petition. In the end, he submitted that the election was conducted so badly that it was not substantially in accordance with the law as to elections coupled with the fact that this was a close contest with a difference of 44 votes hence the election ought to be vitiated irrespective of the results. Counsel directed the court to the Supreme Court decision in **Raila Amolo Odinga v IEBC & 2 Others [2017] eKLR** in which it was held that elections reflect the general will of the people and that the fact of malpractices vitiates an election. The court went on to hold that the sanctity of an election is determined by the strict adherence to the Constitution which establishes the founding principles of a democratic state. Such principles are set out under article 81 and Article 86 which the respondents breached in the conduct of the 8<sup>th</sup> August 2017 elections in Busibwabo Ward.

In conclusion Counsel for the petitioner submitted that elections are matters of great public importance and the requirement that the result of elections be declared or published in the Gazette is constitutionally founded. He explained that the requirement of gazetteement is required, among other things, to give the declared results a seal of certainty, finality and legality. Thus, it is logical that the final result of elections after perhaps the most important national democratic process should be crowned by gazetteement of election results. He explained that such gazetteement takes away the jurisdiction of the commission under Article 88(4)(e) of the Constitution and places the court at the center of any dispute emanating from such declaration. He maintained that it was his view that IEBC acted outside its mandate to degazette the petitioner as the duly elected MCA Busibwabo Ward hence its actions are void *ab initio*.

Counsel maintained that he had also demonstrated that the election was marred by instances of malpractice and lack of compliance with the Constitution, the Elections Act and the rules made pursuant thereto hence placing the election for MCA Busibwabo Ward on course for nullification. He submitted that the gravity of malpractices have met the threshold in the **Morgan v Simpson case** (supra) case and has made the process to depart from the operation of the very founding statutes into an illegal and unlawful process that should not be left to stand.

Counsel prayed that the court makes the following findings; -

- a) A declaration that the improprieties by the 1<sup>st</sup> and 2<sup>nd</sup> respondent were substantial and significant and that it has grossly affected the results declared.

- b) A declaration that the 3<sup>rd</sup> respondent was not validly declared the winner for the position of Member of County Assembly, Busibwabo Ward.
- c) An order directing the 1<sup>st</sup> respondent to organize and conduct fresh elections in strict conformity with the Constitution and the Elections Act.
- a) The petitioner to have costs of this petition.

He relied on the following authorities during the submissions; -

1. *Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A. 696*
2. *Election Petition No.1 Of 2013 Nairobi Ferdinand Ndungu Waititu Vs The Independent Election & Boundaries Commission And 8 Others*
3. *Isaac Aluoch Polo Aluochier V Independent Electoral & Boundaries Commission And 19 Others [2013] ECLR*
4. *Thuo Mathenge v Nderitu Gachagua & 2 Others [2013] eKLR*
4. *Rahma Issak Ibrahim v Independent Electoral & Boundaries Commission & 2 others Constitutional Petition No 456 of 2017*
6. *Muliro v Mubonye & Ano. (2008) eKLR (EP)*
7. *Moses Masika Wetangula v Musikari Kombo & 2 Others [2014] eKLR*
8. *James Omingo Magara v Manson Nyamweya & Others civil appeal no. 8 of 2010 (CA)*
9. *William Kabogo Gitau v Goerge Thuo [2010] eKLR.*
10. *Timmamy Issa Abdalla v Swaleh Salim Swaleh Imu & 3 Others 2014 eKLR*
11. *Morgan v Simpson [1974]3 All ER 722*
12. *Raila Amolo Odinga v IEBC & 2 Others [2017] eKLR*

### 1<sup>ST</sup> & 2<sup>ND</sup> RESPONDENTS' WRITTEN SUBMISSIONS

On his part, Mr. Ngaywa, learned counsel for the **1<sup>st</sup> & 2<sup>nd</sup> Respondents** submitted as follows;

#### Brief facts of the petition

Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents stated that through the petition dated 5<sup>th</sup> September 2017, the Petitioner alleged various grounds of malpractices against the respondent herein and supported his case with affidavits from various witnesses in support of the Petition. That in particular, the Petitioner alleged that his name was deleted without due process, his name was substituted after serving the 2<sup>nd</sup> Defendant with a demand notice, declaring the 3<sup>rd</sup> Respondent the winner despite garnering 423 votes, voter importation, voter bribery, sorting and counting ballot papers in an opaque manner, counting of spoilt votes in favour of the 3<sup>rd</sup> Respondent and allowing one Silas Aloyi access into the counting hall during counting.

Counsel explained that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents opposed the Petition through the Response to petition dated and filed on 25<sup>th</sup> September, 2017 and 26<sup>th</sup> September, 2017 respectively. That the said Petitioners'

also filed various witness affidavits in opposition of the Petition. He said that in particular, the 1<sup>st</sup> & 2<sup>nd</sup> Respondents pleaded that the 3<sup>rd</sup> Respondent was declared the winner on 10<sup>th</sup> August, 2017 after garnering 1,423 votes and the certificate of the duly elected Member of County Assembly, Busibwabo ward. Further, that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents averred that the counting of votes for the member of county assembly for Nasira Primary School stream 2 of 2 was deferred till morning hours due to the chaos that had erupted prior to the counting and after consultations with the party agents who were present in the counting hall. That the said Respondents also pleaded that the sorting out, counting and announcement of results were done meticulously, transparently, in compliance with the law and in full glare of all the agents who were present in the polling stations, particularly, in Busibwabo Primary School stream 3 of 3 and Nasira AC Primary School stream 2 of 2, the only contentious polling stations as pleaded by the Petitioner. He said that it was also pleaded that the gazette notice of the Petitioner through the gazette notice 8240 on 25<sup>th</sup> August, 2017 was an inadvertent mistake which was corrected through a corrigenda in the gazette notice number 8378 through which the 3<sup>rd</sup> Respondent's name was inserted by deleting the Petitioner's name.

Counsel further explained that on his part, the 3<sup>rd</sup> Respondent filed a Response to the Election Petition dated 19<sup>th</sup> September, 2017 wherein he stated he was declared the winner and presented with the certificate of duly elected member of county assembly Busibwabo ward on 10<sup>th</sup> August, 2017 after garnering majority vote of 1,423 compared to the Petitioner who garnered 1,379 votes after tallying. He further stated that the mere appearance of the petitioner's name in the gazette notice number 8240 was an inadvertent and a genuine human error which was corrected through corrigenda in the gazette notice number 8378.

Counsel urged the court to refer to each party's pleading for comprehensive particulars as pleaded by each party.

#### Issues for Determination

He stated that parties filed joint issues for determination prior to the hearing of Petition as enumerated hereunder.

1. Whether the gazette notice of the petitioner as the duly elected Member of County Assembly Busibwabo Ward, Matayos Constituency in Busia County was unlawful, illegal and contrary to law and the principles of natural justice.
2. Whether the 2<sup>nd</sup> respondent had the unilateral power to cancel and recall the gazette notice of the petitioner as the duly elected Member of County Assembly Busibwabo Ward.
3. Whether the election for Member of County Assembly Busibwabo Ward was grossly undermined by instances of voter importation, voter bribery and voter inducement so as to affect the integrity and outcome of the elections.
4. Whether the election for Member of County Assembly Busibwabo Ward was conducted in a free, fair and transparent manner and to the required standards enshrined in the Constitution, the Elections Act and regulations thereto.
5. Whether the 3<sup>rd</sup> respondent was validly and lawfully elected and declared the winner for the election for Member of County Assembly Busibwabo Ward.
6. Whether the election for Member of County Assembly Busibwabo Ward held on 8<sup>th</sup> August 2017 should be declared null and void and a fresh election held.
7. Who should bear the costs of the petition.

That the court also directed parties to submit on the following other issues

- a. The 3<sup>rd</sup> Respondent's Notice of Preliminary Objection dated 22/11/2017
- b. The 2 rejected votes from Busibwabo stream 3 of 3 and 1 vote attached outside the envelope containing votes for the 3<sup>rd</sup> respondent at Nasira A.C. stream 2 of 2.

### Evidence

Counsel gave the account of the petitioner, PW1 who testified by adopting his Affidavit sworn on the 5<sup>th</sup> September, 2017 as his evidence in chief. That during cross examination, he confirmed that he was neither issued with certificate of the duly elected member of the county Assembly, Busibwabo ward nor declared as the duly elected member of the county assembly, for Busibwabo ward by the 2<sup>nd</sup> Respondent. That he further stated that he was never declared the winner at the tallying centre which was in Matayos, Busia County. He confirmed that he garnered 57 votes compared to the 3<sup>rd</sup> Respondent who garnered 159 votes at Nasira RC Primary School stream 2 of 2 (*refer to page 17 of the 1<sup>st</sup> & 2<sup>nd</sup> Respondent's Response to petition*). He also pointed out the names of Masinde Alex, Teresia Nafula, Prisca Wafula, Esther Wawire, Charles Ouma, Roseline Mukoma and Martin Poxy whom he alleged were all previous registered in Sarango Primary school but transferred to Busibwabo Ward but he did not provide any evidence in support. That PW1 also admitted not having raised any objection during voter registration and any time prior to the filing of the petition on voter importation. He further admitted that he knew the fact that Beatrice Akoth runs a clothing shop in Busibwabo Ward. More importantly, he admitted that the report concerning violence or chaos in Nasira AC Primary School polling Station 2 of 2 was reported, in both cross examination and re-examination.

Counsel also revisited evidence by PW2, one Eric Bahati Oundo, who also adopted his affidavit sworn on 5<sup>th</sup> September, 2017 as his evidence in chief. That during cross examination, he confirmed that he never appeared before J. O Manwari before whom he purportedly signed the affidavit. As a matter of fact, he stated that he doesn't even know him. That he alleged that he did not sign form 36A at Busibwabwo Primary School stream 3 of 3. More interesting is that although in his affidavit he stated that he was not allowed to verify the ballot paper during counting, that PW2 admittedly demonstrated that the presiding officer would call out the name of the candidate in whose favour the ballot had been marked, show it to the agents to verify that it has all security features as well as the stamp before handing over to the designated clerk. Counsel submitted that PW2 is not a credible witness and since he did not appear before the commissioner for oath, his affidavit should be truck out.

Counsel gave the account of PW3, Clement Washington Mumbo, who after adopting his affidavit testified during cross examination that none of the photographs he produced as exhibit 5(a), (b), (c) and (d) had any person seated on the motor cycle and that he did not identify the motor cycle in question in his affidavit. That the witness also stated that because of the factory which was being constructed about 30metres from the shopping centre, many people were taking lunch at the shopping centre. Moreover, he stated that the photographs were taken at round noon, a time when people ordinarily take lunch. He confirmed that none of the people in the said photographs were in the hotel eating. Counsel maintained that there was no doubt that no scintilla of evidence existed to prove voter bribery or inducement as he therefore urged the court to treat his evidence with due circumspection.

Counsel looked at the evidence by PW4, Victor Mdogo who also adopted his witness affidavit and on cross examination, he admitted that he neither supplied a copy of the certificate of registration of Kwasala Tusaidiane Self Help Group nor gave out the list of member of the said group. That he equally did not specify the date and the minutes of the meeting when the 3<sup>rd</sup> Respondent allegedly met the chairman and the group, if at all the group existed. That he confirmed that he has never reported the allegation of voter importation to the police and 1<sup>st</sup> Respondent despite knowing that it was a criminal offence. Counsel submitted that there was no evidence, documentary or otherwise which was tabled before the court to prove the allegations of voter importation, the existence of the Kwasala Tusaidiane Self Help Group, that the meeting ever took place, the list of members of the alleged group not to forget the names of voters

who allegedly transferred their registration to Busibwabo ward. He urged the court to disregard the testimony by this witness.

Counsel also looked at the evidence by PW5, Joyce Mbinya Waweu, who adopted her affidavit as evidence in chief. Although in her affidavit at paragraph 7 she alleges that the Assistant chief visited Nasira AC polling Station stream 2 three time, in re-examination, she contradicted herself by stating he visited 4 times. That she confirmed that the assistant chief did not interfere or threaten anyone thus the allegation that the said Assistant chief interfered with voting is far-fetched.

Counsel gave the account of PW6, Richard Nyongesa Otele, who also adopted his affidavit as evidence in chief. That on cross-examination, PW6 stated that he could clearly see the presiding officer as he sorted and counted votes as nothing blocked him. He confirmed that he signed form 36A.

Counsel further looked at the evidence by PW7, Jane Aramisi Juma who stated during cross examination that from the time she did not sign the polling station diary as well as form 36A is an indication that she was not in the polling station or counting hall to be precise. He thus submitted that the court should make a finding that she was not present in the counting hall due to on admission.

Counsel turned the coin and focused on the evidence by DW1, the Returning Officer and the 2<sup>nd</sup> Respondent herein, who adopted his affidavit sworn on 25<sup>th</sup> September, 2017. He testified that although there was an error on form 36A for Nasira RC stream 1 of 2, he could not amend the said form. That it was his testimony that the total number of votes cast was automatically generated once the votes cast in favour of each contestant is keyed in. He also stated that although each contestant was only allowed one agent each, all agents who were present at the counting hall despite representing other categories in the elections like Presidential, gubernatorial, senate, national assembly, women representative were allowed to sign forms 36A and since there were several independent candidate in various categories, all agents representing independent candidates were allowed to sign. That DW1 confirmed that it is the 3<sup>rd</sup> Respondent whom he declared as having garnered majority valid votes and issued him with a certificate of duly elected member of the county assembly, Busibwabo Ward. He reiterated that gazette of the 3<sup>rd</sup> Respondent was a genuine human error which was corrected through corrigenda in gazette notice number 8378 on 25<sup>th</sup> August, 2017. He confirmed that all form 36A had security features including but not limited to serial number, logo and stamp. That DW1 confirmed that incidences that happened at Nasira AC stream 2 were all recorded and more importantly, the chaos which led to postponement of counting MCA votes.

Counsel also looked at evidence by DW2, Welhem O. Obabala who took the court through the process of counting and reiterated that none of the agents raised any concerns during sorting, counting and tallying of votes at the polling station.

Further, he looked at the evidence by DW4, Peter Odhiambo Owiti, the Presiding Officer for Nasira A.C stream 2 of 2, who testified that he transparently sorted out ballot papers in the presence of all the agents who were present during counting. That DW4 also stated that he encountered some challenges which he recorded in the polling station diary, *inter alia*, chaos which was occasioned by villagers who were supporting one of the contestants while throwing stones which forced him to change the criteria of counting and through consensus, it was unanimously agreed that the counting of MCA votes be done later. He clarified that the skirmishes were outside the counting hall.

Counsel looked also at DW6, George Makhayaka Busera, the 3<sup>rd</sup> Respondent herein, who testified that he was the one who was declared the winner and issued with the certificate of elected MCA, Busibwabo ward on 10/8/2017. That he denied voter bribery and importation allegations. He reiterated that he was not given any special treatment by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. That DW6 also stated that the gazette notice 8240 in which the petitioner's name appeared was an error as the petitioner was never declared the winner and the inadvertent mistake was corrected through corrigenda in gazette notice number 8378 where the Petitioner's name was deleted and his name inserted.

Counsel also gave the account of PW7, Silas Oseda Aloji, who stated that he did not interfere with the polling. That he voted at Nasira AC stream 2 at around 6am and left and only came back at around 3.45 am on 9/8/17 when he heard chaos at the polling station but he maintained that he never entered the counting hall as alleged. Calm was restored when reinforcement police officers went to the scene.

From the foregoing analysis of the evidence that was tendered in court, counsel stated that his further submissions on the issues and law is as follows

*a. Preliminary Objection*

Counsel explained that the 3<sup>rd</sup> respondent raised a Preliminary Objection dated 22<sup>nd</sup> November 2017 on ground that the petition herein is incompetent and fatally defective for failure to comply with the mandatory provisions of Rules 8(1) and 12(2) of the Elections (Parliamentary and County Election) Rules 2017.

That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submit in support of the said preliminary objection.

Counsel explained that Rule 8(1) of the Elections (Parliamentary and County Election) Petition Rules 2017 provides as follows: -

*An election petition shall state-*

*(c) the results of the election, if any, however declared*

*(d) the date of declaration of the results of the election.*

He submitted that the foregoing provision is couched in similar terms with Rule 12(2) of the Elections (Parliamentary and County Election) Petition Rules 2017 which mandatorily requires affidavit in support of the Petition to particularize, *inter alia*, the results of the elections, if any, however declared and the date of the declaration of the results of election.

He stated that section 2 of the Elections Act defines election results as “*election results, means the declared outcome of the casting of votes by voters at an election*”. That no tabulation of results as were declared by the 2<sup>nd</sup> Respondent has been concisely and precisely pleaded in the petition. He said that the onus placed upon the petitioner under rule 8(1)(c) of the Elections (Parliamentary and County Elections) Petition Rules to state the results of the election would only be discharged if he sets out the results as declared by the 2<sup>nd</sup> Respondent. That a similar view was taken in the case of *Mwamlole Tchappu Mbwana v. Independent Electoral and Boundaries Commission & 4 others (2017) eKLR*.

Counsel submitted that the Petition is fatally defective and incompetent for having failed to comply with the mandatory provisions of the law. That neither the Petition nor the Affidavit in support thereof have particularized the results as declared by the 2<sup>nd</sup> Respondent or the date when the said results were declared as required by law. That the petitioner failed to precisely state results garnered by each and every contestant in the elections and that this failure to comply with Rule 8(1) means there is no dispute before the court which the court, as an election petition court has jurisdiction to adjudge on. Counsel submitted that that failure to disclose results renders the petition untriable as the respondents are not able to discern the petitioner’s case to enable them respond appropriately.

He stated that the Petitioner did not even attempt to state when the election results were declared. That to help us discern the date when declaration of election result which are supposed to be pleaded in the petition, he was guided by section 39(1) of the Elections Act, which provides as follows: -

39 1(A) *The Commission shall appoint constituency returning officers to be responsible for—*

*(i) tallying, announcement and declaration, in the prescribed form, of the final results from each*

*polling station in a constituency for the election of a member of the National Assembly and members of the county assembly;*

Counsel maintained that to enable him comprehensively comply with the mandatory provisions of the law, the Petitioner ought to have specified the date when the 2<sup>nd</sup> Respondent declared the result, the place where the results were declared (emphasis ours) and the number of votes cast in favour of each of the candidates among others. He stated that failure to plead this information is fatal. He relied on the case of *John Michael Njenga Mututho vs. Jane Njoki Wanjiku Kihara & 2 others (2008) eKLR*, in which a three judge bench in the Court of Appeal stated as follows:-

*“It is clear from **rule 4(l)(b)**, above that the issue in any election petition is the result of the election. It should be noted that other than a statement on capacity to bring the petition and the date of the elections, the only other important factor to be included in an election petition is the result. The marginal note of that rule makes the position abundantly clear. It talks about the contents and Form of an election petition. The result does not go to form but to the content of the petition; and in our view **rule 4 (1)**, above is specifically concerned with content..”*

*What would happen where, as here the results as envisaged by **regulation 40**, above are not included in the petition”? In our view an essential element would be missing. The petition shall be incomplete as the basis for any complaint will be absent. Whatever complaints a petitioner may be having about an election may be regarded as having no legal basis. The law has set out what a petition should contain, and if any of the matters supposed to be included is omitted, then the petition would be incurably defective. For instance, **paragraph (a) of rule 4(1)** deals with capacity to petition. If a petitioner omits to make an averment in that regard the petition will be incurably defective. Likewise, if the date of the election omitted that omission would be fundamental in nature and would of itself without more render a petition incurably defective. We say so advisedly.... In view of the conclusions we have come to on that aspect, it follows that the term “**shall**” as used in **rule 4**, must be read as having a mandatory import. Reading it otherwise will render the provisions of that rule otiose.*

*Election petitions are special proceedings. They have a detailed procedure and by law they must be determined expeditiously. The legality of a person’s election as a people’s representative is in issue. Each minute counts. Particulars furnished count if the petition itself is competent, not otherwise. Particulars are furnished to clarify issues not to regularize an otherwise defective pleading. Consequently, if a petition does not contain all the essentials of a petition, furnishing of particulars will not validate it..”*

He also referred the court to the case of *Mukala Issa Kombo vs. IEBC, Wafula Chebukati < Ganze Sub-County Returning Officer and Teddy Mwamburire, Election Petition Case No. 10 of 2017*, by Justice P. J. Otieno. While dealing with the Article 87 (2) of the Constitution, counsel observed that failure to state the date of the declaration of the results contravened rule 8(1) (c) and (d) as well as 12(2) (c) and (d) of the Elections (Parliamentary and County Elections) Rules and the court while striking out the petition for non-compliance found that;

*”the provision of rule 8(1) (c) and (d) and 12(2) (c) and (d) are mandatory though in the petition he had given a brief overview and grounds, the full results were not disclosed anywhere as well the date of declaration of results. That the petitioner should have given a tabulation of the of results and a date of the declaration to trigger computation of time so that the court establishes when time to file petition would start to run and end.”*

He explained that the omission to state results and the date when such results were declared goes into the root of the petition and renders a petition incurable. That it goes into the substance of the petition as it establishes the course of action against the Respondents. He said that although these mandatory rules are treated as rules of procedure, they are intertwined with substantial issue. Counsel explained that the date of the dispute is a substantive issue as it signifies the commencement of an electoral dispute which aids in discerning the time of filing the petition in adherence with strict statutory timelines for filing, hearing and

determination of electoral disputes. That it helps in determining whether a petition has been filed within 28 days as a mandatory constitutional timeline. On the other hand, counsel said that omission of the results makes a petition fatally defective and incurable as it is what triggers an electoral dispute and noncompliance of which is substantive. He submitted that Article 159 (2) of the Constitution as read together with rule 5(1) of the Elections (Parliamentary and County Elections) Rules cannot cure such an anomaly. Counsel relied on the Supreme Court of Kenya decision presided over by *Mutunga; CJ & P, Ibrahim, Ojwang, Wanjala & Njoki, SCJJ* in the case of *Moses Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others* [2016] eKLR which had a similar view.

Counsel explained that while dealing with the issue as to whether failure to results and elections date, the manner of the declaration and the date of the declaration is a matter of procedure or substance in election petition, *Onyancha J* observed in the case of *Amina Hassan Ahmed V Returning Officer Mandera County & 2 Others* [2013] eKLR as follows;

*“Put differently, the provisions of Rule 10 and others aforesaid, are not mere technical requirements. If they are technical in so far as they are procedural and spell out the form and content of intended petitions, they nevertheless, at the same time, are substantive and go to the root and substance of issues and matters prescribed upon. A further reason why the provisions of the Elections Act and/or Rules must be complied with fully, is because the Act, and therefore the Rules, are a special legislation. They are a legislation for the purpose, as already stated above, of efficiently prescribing the proper, efficient, expeditious and just conduct of election petitions. Every provision in them therefore, is intended to achieve a required result and any deficient compliance is likely to lead to delay and injustice and would likely be frowned upon by the court.”*

Counsel stated that the petitioner had questioned the timing of the preliminary objection and submitted that it should be dismissed on the ground that it was filed after the hearing of the petition. He however submitted that the view taken by the Petitioner is erroneous and untenable in law. Preliminary objection can be raised any time during the trial and that it matters not that the matter has gone for trial, what matters is that the objection raises points of law capable of striking out the petition. He submitted therefore that the Preliminary objection is rightfully before the court as the court has jurisdiction to consider and strike out a petition at the instance of the Respondents or “*suo moto*.” Counsel relied on the case of *Bashir Abdulahi v. Aden Mohammed Nooru & 3 others*, 2013 eKLR, in which the High court held as follows;

*“..... If therefore an election petition is devoid of the materials required to make it one as dictated by the provisions of rule 10 (1) aforesaid, the court in my view would at any stage of the proceedings, have jurisdiction to strike the petition out whether at the instance of the respondent or “suo moto”. That is so because a petition which is not a petition for lack of substance and form is not a petition envisaged in the elections Act..*

Counsel submitted further that the Preliminary objection by the 3<sup>rd</sup> Respondent raises pure points of law and is within the ambits of the well celebrated case of *Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Limited* (1969) EA 696. That failure to state results as declared by the 2<sup>nd</sup> Respondent for each and every contestant as well the date when the declaration was made renders the petition incompetent and forms the substratum of a petition and hence the jurisdiction of the court to hear and determine the petition. Counsel explained that the jurisdiction of this Honourable court to determine election petitions is a special jurisdiction which must be confined to the law donating such jurisdiction. He stated that the Elections Act and the Elections (Parliamentary and County Elections) Petitions Rules which clothes this court with jurisdiction to entertain election petition of this nature mandatorily required that the results and the date of declaration must be stated. That in the absence of this issues in the present petition, it fails to be termed as a petition for lack of substance and form {refer to *Bashir Abdulahi (supra)*} and it is not a petition for purposes of the Elections Act and the rules thereto. As such, this Honourable court lacks the jurisdiction to hear and determine it.

In view of the foregoing, counsel beseeched the court to uphold the preliminary objection and strike out the petition with costs to the Respondents.

b. Whether the Petitioner has discharged the burden and standard of proof

Counsel explained that the burden of establishing the allegations in an election petition regarding the conduct of the said election and the results announced thereafter is on the petitioner. While determining this question, counsel referred the court to the Supreme Court decision in Raila Odinga and Others vs Independent Electoral and Boundaries Commission and 3 Others Nairobi Petition No. 5 of 2013 [2013] EKLK in which it categorically stated at paragraphs 196, 197 and 203 as follows:

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

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

*“203. The lesson to be drawn from the several authorities is, in our opinion, that this court should freely determine its standard of proof, on the basis of the principles of the constitution, and of its concern to give fulfillment to the safeguarded electoral rights. As the public body responsible for elections, like other public agencies, is subject to the “national values and principles of governance” declared in the constitution [Article 10], judicial practice must not make it burdensome to enforce the principles of properly-conducted elections which give fulfillment to the right of franchise. But at the same time, a petitioner should be under obligation to discharge the initial burden of proof, before the respondents are invited to bear the evidential burden. **The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable-doubt- save that this would not affect the normal standards where criminal charges linked to an election, are in question.** In the case of data-specific electoral requirements (such as those specified in Article 138(4) of the Constitution, for an outright win in the presidential election), the party bearing the legal burden of proof must discharge it beyond any reasonable doubt.”*

Counsel also directed the court to section 83 of the Elections Act which he said is also instructive on the question as what could invalidate an election. It provides as follows: -

*“83. No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the*

*principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election.”*

Counsel therefore submitted that the above provision dictates that an election cannot be invalidated unless it offends the Constitutional standards and the electoral laws or it fails to comply with the written law in a manner as to affect the results of the election. He further submitted that a valid election must in principle accord constitutional standards and that in case of non-compliance with the laws enacted to give life to the constitutional principles, such non-compliance must not affect the results of the election because then the will of the electorates would be defeated rather than upheld as required under Article 38 of the Constitution. He referred the court to the case of Paul Gitenyi Mochorwa v. Timothy Mosei E. Bosire & 2 others (2013) eKLR at page 10 paragraph 17.

Counsel submitted that the Petitioner did not prove the burden as well standard of proof as expected of him in this petition. That the petition is premised on the grounds of voter importation, bribery or inducement, strangers signing of forms 36A and polling station diaries, no agent or not all agents signed forms 36A or more agents signed forms 36A and alterations on form 36A and the polling station diary. He was however of the view that the Petitioner did not discharge his burden and standard of proof as discussed hereunder: -

*i. Voter bribery, inducement and importation*

He stated that the Petitioner at paragraph 8 of the petition alleged that the 2<sup>nd</sup> Respondent committed improprieties which included allowing people from Bukhayo West Ward to register and vote in Busibwabo ward and allowing the 3<sup>rd</sup> Respondent's sister, one Beatrice Akoth to buy meals for voters at Ochieno Bonzoo's hotel situated at Busibwabo market. He said that it was also alleged that the 2<sup>nd</sup> Respondent allowed one Silas Aloyi, the assistant chief, Nasira Sublocation unlimited access into the polling station.

However, counsel maintained that the petitioner, despite knowing that the above allegations amounts to an electoral offence, he admitted that he had not reported the same to any police station or to the 1<sup>st</sup> Respondent who has the mandate to manage election within the Republic of Kenya. That the Petitioner also confirmed that he has never raised any objection with the IEBC on the issue of voter importation.

He added that on his part, PW3 alleged that she saw one Beatrice Akoth at Busibwabo shopping centre talking to people to vote for the 3<sup>rd</sup> Respondent and in the process was ushering them into hotel to eat and thereafter settled their bills. That during cross examination he admitted that the photos which he produced as evidence did not show any of the 8 people being given money or ushered into the hotel by the said Beatrice Akinyi. He also stated that the photos were taken at noon which is the time that people ordinarily take lunch. That in his affidavit at paragraph 6, he deposed that a few people were being induced to vote to the 3<sup>rd</sup> Respondent by her sister. That he did not even attempt to clarify or specify the number of people that were allegedly induced.

Counsel said that PW4 on his part alleged that the 3<sup>rd</sup> Respondent approached one Alex Masinde, the chairperson of Kwasala Tusaidiane Self Help Group to prevail upon them to change their place for voting from Bukhayo West Ward to Busibwabo Ward and promised to pay them 1,000/- each and a dairy cow. That PW4 however did not provide the certificate of registration of the said group, the date when the alleged meeting took place, the minutes of the alleged meeting and the list of the alleged members of the group. Counsel wondered how the petitioner wished this Honourable court to believe the veracity of such evidence in the absence of this information. Moreover, he did not even give names of the alleged members who transferred, if at all.

Counsel stated that DW1 in his testimony said that voter registration was conducted in February and March, 2017 by which time he was not the Returning Officer for Matayos Constituency as he was transferred to Matayos in 21<sup>st</sup> June, 2017. That DW1 could therefore not help the 3<sup>rd</sup> Respondent to procure voters as alleged. He also stated that it is the responsibility of the 1<sup>st</sup> Respondent to ensure that

eligible votes are registered in Kenya and it matters not where they come from. That any eligible Kenyan can register or even transfer from one polling station to the other. Moreover, he stated that no complaint in form of objection to registration of any voter within Busibwabo ward had been formally logged to him about voter importation. That such a complaint is supposed to be made in the prescribed form being FORM 2 of the Elections (Registration of Voters) Regulations.

Counsel reiterated the evidence of DW7 who denied gaining access to the counting hall in Nasira AC stream 2 during the chaos at 4am on the 9/8/2017. That DW7 only stated that he entered in the same polling station at 6am on the 8/8/17, casted his vote and left for a security meeting with his bosses.

Counsel submitted that the allegations of this nature are criminal in nature. In particular, he relied on section 9 of the Election Offenses Act which prescribes the offence of bribery. It provides as follows:-

#### 9. Bribery

(1) A person who, during an election period—

(a) directly or indirectly offers a bribe to influence a voter to—

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

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

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

(c) directly or indirectly, in person or by any person on his behalf, in order to induce any other person to agree to be nominated as a candidate or to refrain from becoming a candidate or to withdraw if they have become candidates,

commits an offence.

(2) A person who, during an election period, accepts or agrees to accept a bribe that is offered in the circumstances described in subsection (1) commits an offence.

(3) A person who commits an offence under this section shall be liable, on conviction, to a fine not exceeding two million shillings or to imprisonment for a term not exceeding six years or to both.

Counsel explained that as was rightly stated in the case of *Raila Odinga & others vs, IEBC & Others (supra)*, the standard of proof where electoral offences have been alleged which are of criminal nature must be proved in the same standard of beyond reasonable doubt as applicable in criminal proceedings. He stated that Justice Musinga J in *Simon Nyaundi Ogari & Another versus Hon. Joel Omagwa Onyancha and 2 Others* [2008] KLR held that unequivocal proof is necessary to prove an allegation of bribery. The learned Judge said:-

*“Clear and unequivocal proof is required to prove an allegation of bribery. Mere suspicion is not sufficient. It is true that it is not easy to prove bribery, more especially where it is done in secrecy. In such cases, perhaps bribery may be inferred from some peculiar aspects of the case but when it is alleged that bribery took place publicly and in the presence of many people, the court cannot be satisfied by anything less than the best evidence which is always direct evidence given first hand”.*

Counsel also relied on *Paul Gitenyi Mochorwa vs. Timothy Moseti E Bosire & Onother (supra)*, in which the learned judge, justice Edward M. Muriithi was of the following view with respect to allegations of bribery;

“...That type of evidence is in this petition short in coming and of lower degree than the required standard of beyond a reasonable doubt. In view of the seriousness of the charge it would be expected that the petitioner and the witnesses would have reported the matter to the police and follow up with the arrest and prosecution of the 1<sup>st</sup> respondent for the election offence. One would also expect a police officer to whom such an offence is reported to take action immediately and arrest the perpetrator because the offence is by virtue of section 67 (2) of the Elections Act a cognizable offence for which he can arrest without a warrant.

.....

From the evidence, the Petitioner and his witnesses did not deal with the serious issue of alleged bribery as they could have – no formal reports to authorities and no follow-up for the prosecution of the offence including if necessary private prosecution. To date, no formal report has been made to the authorities and the 1<sup>st</sup> respondent has not been prosecuted for the bribery for which as a criminal offence there is period of limitation. Together with the fact that no proved first reports of the offence were made, this creates a doubt as to whether the alleged offence happened at all.”

Counsel therefore urged the court to uphold that the petitioner failed to discharge the burden of proof and the standard of proof of commission of the alleged offences within the standards as prescribed by law.

*i. Strangers signing forms 36A and polling day diary*

Counsel stated that the Petitioner alleged that form 36A for Nasira AC stream 2 of 2 (page 19 of the 1<sup>st</sup> & 2<sup>nd</sup> Respondents’ Response) in particular, an agent for a party called F.D.K. He said that indeed there was an agent who signed both polling station diary as well as form 36A for Nasira AC polling station stream 2 of 2.

Counsel explained that it was incumbent upon the petitioner to establish that there was no contestant at all in the said allegation in six categories across the board who was seeking to be elected on such a party. That Section 107 and 109 of the Evidence Act puts the burden of proof and proof of particular fact, which he has failed to. That other than the bare statement that an unauthorized person was allowed to sign form 36A and polling station diary, no evidence was adduced that such signing affected the results of the election. That there was no evidence tendered to prove that the person signing the said documents was not an agent for any political parties and candidates participating in the 6 elections of the general election. That the petitioner did not even confirm with the registrar of the political parties that a party known as F.D.K did not exist. As such, counsel urged the court to disregard any assertions to the contrary.

*i. No agent or not all agents signed form 36A or more agents signed form 36A*

Counsel stated that the petitioner also alleged that form 36A relating to Bisibwabo Primary stream 3 of 3 was signed by agents more than the number of contestants contesting for MCA seat. He rely on regulation 62(2) of the Elections (General) Regulations that the presiding officer was entitled to allow or admit to a polling station one agent for each candidate or political party. He further submitted that regulation 79 (2) of the said General Regulations places the duty on the candidates and or agents then present during announcement of results by the Presiding officer to sign the forms. He referred the court to the court’s decision in the *Paul Gitenyi Mochorwa (supra)* observed that it is not helpful for the presiding officer to be required to state, as it happens in the polling stations, that the agent left early or they were too tired to sign the forms. However, that an election result cannot be vitiated by reasons of failure or refusal by candidates of agents to sign the statutory form or to give reasons for refusal or default. (*refer to regulation 79(3) and (4) of the Elections (General) Regulations*).

He stated that the court further observed in *Paul Gitenyi Mochorwa (supra)* that not signing of the forms by an agent cannot vitiate elections, the signing of the forms by agents, whether in more or less than the number of the candidates in a particular election cannot invalidate the elections.

That it was specifically pleaded by 1<sup>st</sup> and 2<sup>nd</sup> Respondent's witnesses that all agents who were present during counting, in various counting halls were allowed to append their signatures notwithstanding that they were not representing candidates in that specific category of elections. He said that the petitioner has not demonstrated that such signing by those agents affected the results of the election adversely in any way.

*i. Alteration in Form 36A and diary for Nasira AC stream 2*

Counsel explained that there were some entries in the polling station diary for Nasira AC stream 2 in the polling station diary some of which were not counter-signed. That after scrutiny of votes, it was established that in this polling station where there was alteration in the number of registered voter, which can be verified using the register supplied by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the said alteration did not affect the candidate and the total number of votes that were cast in their favour.

In addition, counsel submitted that although it is good practice, there is no legal requirement that in case of alteration of entries in the polling station diary, the same must be counter signed. Moreover, that the presiding officer of this station attributed the confusion in dates as indicated form 36A by the agents to them being tired after staying awake the whole night and also the fact that the election started on 8/8/2017 and overlapped to 9/8/2017. In any case, he submitted that the confusion in dates did not in any way affect the results as declared.

*b Whether the election was conducted within the constitutional framework as well as in line with the provisions of the elections laws and regulations thereunder*

Counsel explained that the Constitution places the obligation on the 1<sup>st</sup> Respondent to ensure that elections are conducted in a free, fair and transparent manner. (*Refer to Article 81 of the Constitution*). That the law through the Constitution under *Article 86* to ensure that the voting method is simple, accurate, verifiable, secure, accountable and secure; the votes cast are counted, tabulated and results announced promptly at the polling station; the results at the polling station are openly and accurately collated and promptly announced by the Returning Officer; and to put in place structures and measures to eliminate electoral malpractices.

Counsel submitted that the 1<sup>st</sup> Respondent with the stewardship of the 2<sup>nd</sup> Respondent strictly adhered to the above Constitutional threshold and the petitioner has not in any way attributed any abrogation of the same to them. That the Respondents reiterated that the elections were conducted in accordance with the law, it is incumbent upon the petitioner to adduce cogent, credible and consistent evidence which show that the elections were not conducted in accordance with the law and that the non-compliance affected the results thereof. Counsel stated that where the witnesses allege that they were present at the polling stations and participated as either voters or agents facts which would be peculiarly within their knowledge, it behooves them to bring forth sufficient material that would show that indeed they were present at the Polling Stations on the material day. For example, counsel said that the PW6 and PW7 allege that they were present at Nasira AC polling station stream 2 of 2 but there is nothing to demonstrate that indeed they were there during the counting. The presence was disputed since the two did not even append their signatures on the polling station diary during the sealing of packets but only signed the diary at the close of the polling station before the start of counting. That in the absence of their signatures in the diary and form 36A, the Court may well be entitled to find that indeed they were not present at the places they alleged they were on the material day.

Counsel submitted that section 83 of the election Act is explicit as to when an election court can invalidate elections on the grounds of non-compliance with the law. That invalidation of election can only be occasioned by substantial non compliance with the law.

Counsel stated that it was not in dispute that the order of counting of the ballots cast for member of county assembly was delayed in one of the polling station at Nasira AC polling station stream 2. He said that this was explained by DW1, DW4 and DW5 to have been occasioned by the villager who were calling out the name of one of the contestant while throwing stones when the exercise of counting MCA's

ballot was about to commence. That the postponement of counting of the votes was done after consultation with the agents who were present and duly recorded in the occurrence book (*Refer to page 52 of the 1<sup>st</sup> & 2<sup>nd</sup> Respondent's Response to Petition*). Counsel said that regulation 75 (4) of the Elections (General) Regulations in mandatory terms, obligates the presiding officer not to commence the counting or recount of votes unless he is of the opinion that such count or recount can be conveniently completed without a break. That in view of the chaos by the supporters of one of the contestants as an MCA, it was not prudent for the presiding officer to commence the counting as the prevailing circumstances might not have allowed to him conveniently complete the counting. That it was otherwise not prudent on his part to wait and withhold the counting in other categories of election in the general election which fell below the MCA in terms of counting as it would have delayed the elections further.

Counsel submitted that the strict non-compliance with regulation 75(2) of the Elections (General) Regulations did not in any way affect the results in that polling station. That the elections were still verifiable, accurate and transparent, as was established during scrutiny and recount. He said that the results of scrutiny and recount showed that none of the contestant was given undue advantage over the other by being assigned a vote other than that cast in his favour.

He maintained therefore that irregularities in the conduct of an election will not vitiate the result unless the irregularities either were so serious that the election was not in accordance with principles laid down in the law or the irregularities affected the result. Again, that the overriding objective of the Act, it has been held, is to promote the right to vote and this requires that the Act should be interpreted in such a manner as to provide citizens with every opportunity to vote and that the primary duty of the court is to give effect to the will of the electorate. Therefore reasonable compliance as opposed to strict or absolute compliance with the procedures set out in the legislation is the modern jurisprudence when considering procedural matters. He said that much of the law points out that the obligations imposed by election statutes on election officials such as a returning officer, are directory as opposed to mandatory. He elaborated the difference to be that, if mandatory provisions are not complied with then the thing done is invalid or void, while it is sufficient, if a directory enactment is obeyed or fulfilled substantially, courts will strive to uphold an election as being substantially in accordance with the law, even where there has been serious breaches of the Rules or of the duties of the election official providing that the result of the election was unaffected by those breaches. He stated that the availability of proportionate judicial remedy for rectifying the result and declaring the true result of the election following scrutiny and a recount prevents the necessity to choose between vitiating the entire election and allowing an erroneous result to stand. Thus counsel maintained that it is inappropriate for the court to declare that an election should be avoided where breaches of the Rules at the counting stage have not, in fact affected the result. See *Ramadhan Seif Kajembe v Returning Officer, Jomvu Constituency & 3 others [2013] eKLR*

*b Degazettement of the petitioner*

Counsel stated that he was guided by section 39 of the elections Act which provides as follows:-

39. "Determination and declaration of results

(1) The Commission shall determine, declare and publish the results of an election immediately after close of polling.

(1A) The Commission shall appoint constituency returning officers to be responsible for—

(i) tallying, announcement and declaration, in the prescribed form, of the final results from each polling station in a constituency for the election of a member of the National Assembly and members of the county assembly;

(ii) collating and announcing the results from each polling station in the constituency for the election of the President, county Governor, Senator and county women representative to the National Assembly; and

(iii) submitting, in the prescribed form, the collated results for the election of the President to the national tallying centre and the collated results for the election of the county Governor, Senator and county women representative to the National Assembly to the respective county returning officer."

Counsel explained that it is clear from the foregoing provisions that the power to determine, declare and publish election results for MCA is bestowed on the 1<sup>st</sup> & 2<sup>nd</sup> Respondents. He added that the law also sets a clear distinction between declaration and publishing.

Counsel relied on Black's Law Dictionary which defines the word 'publish' to mean "a way to communicate a document or [information](#) by way of media such as print, radio and television." On the other hand, to declare means to "solemnly assert a fact before witnesses"

Counsel said that based on the above distinction, it was his submission that the 2<sup>nd</sup> Respondent after tallying all the results as received in all the 11-polling stations, he filled form 36B as required of him under the law and declared them before the witnesses who were present on the 10<sup>th</sup> August 2017. He stated that subsequently, the 3<sup>rd</sup> Respondent was issued with Certificate of Elected member of the County Assembly, Busibwabo Ward on the said 10<sup>th</sup> August 2017.

However, counsel said that an inadvertent mistake happened on the 22<sup>nd</sup> August 2017 when vide gazette notice number 8240, the petitioner, who had not been declared the winner, was published in the Kenya Gazette. On noticing the mistake, the 2<sup>nd</sup> Respondent urgently wrote an email to the County Returning Officer seeking to correct the inadvertent and excusable mistake and the 3<sup>rd</sup> Respondent's name was published through a corrigenda gazette notice number 8378 which specifically directing that the petitioner's name in gazette notice number 8240 be deleted.

That although the declaration of results by the 2<sup>nd</sup> Respondent was done on 10<sup>th</sup> August, 2017, the petitioner did not demand to be issued with the certificate of elected MCA, Busibwabo ward until his name was erroneously gazetted. As a matter of fact, his letter to 1<sup>st</sup> and 2<sup>nd</sup> Respondents was received on 24<sup>th</sup> August, 2017. Counsel terms this delay as a clear indication that he had genuinely believed to have lost the election prior to publication of results.

Counsel was further guided by Regulation 98 of the Elections (General) Regulations which gives the 1<sup>st</sup> Respondent powers to provide measures to ensure efficient and fair elections which powers are exercised through gazette notice. Further, he stated that directives as envisaged under this regulation must be published in such a manner as to reach the person who may be affected or whose compliance or action may be required.

Counsel submitted that the inclusion of the petitioner's name was done inadvertently and is a genuine excusable mistake which can be done by a human being. That the error did not in any way interfere with the will of the people as per the declared results. Further, that the deletion of the Petitioner's name and insertion of the 3<sup>rd</sup> Respondent name was done in compliance with the powers as are conferred to the 1<sup>st</sup> Respondent through the foregoing regulation.

Counsel relied on and referred the court to the case of Richard N. Kalembe Ndile & Another vs. Patrick Musimba Mweu & 2 Others [2013] eKLR where the court excused inadvertent human error by stating as follows;

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

*even in the face of such errors, whether advertent or otherwise is that the ultimate will of the electorate is ascertained and upheld at all costs.”*

*b. Whether the Petitioner is allowed to amend his pleadings*

Counsel explained that Election petitions are “*sue generis*” with special sets of substantive and procedural laws. He said that it is trite law that parties are bound by their pleadings which pleadings he said have the purpose of aiding a fair trial. He said that Rules of procedure are not mere formulae to be observed as rituals and elevated to a fetish. That beneath the words of a provision of law, lies a juristic principle. In this case the principle is that the rule is intended to enable the court to fairly adjudicate the dispute between the parties. He said that the guiding principle in consideration of this matter is the overriding objective of *the Rules* which is stipulated under rule 4(1) of *the Rules* as “*to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the Constitution and the Act.*” This objective he said, is best realised by the Election court having regard to the purpose and mischief that the rule seeks to cure and the prejudice that would be occasioned by insistence on the strict compliance with form. That Rule 5 further obliges the court and the parties to conduct proceedings before it to achieve the following aims, “*(a) the just determination of the election petition; and (b) the efficient and expeditious disposal of an election petition within the timelines provided in the Constitution and the Act.*”

Counsel maintained that the petitioner ought to have confined himself to the matters that he had specifically pleaded in the petition. He said that the petitioner however adduced evidence and has even submitted on issues that were not specifically pleaded. He urged the court to find that such action was done outside the rules of procedure and disregard issues which were not specifically pleaded including but not limited to allegations of Nasira RC Polling station stream 1 of 2, the three ballot papers which were not in sealed envelopes as established during scrutiny, among other. He relied on the wisdom of Justice Kimaru who stated in *Mahamud Muhumed Sirat .V. Ali Hassan Abdirahman And 2 Others [2010] eKLR 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 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 (on) which he adduced evidence but which were not based on the pleadings that he had filed in court, and in particular, the petition.”*

In Conclusion Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted therefore based on the analysis, that the preliminary objection is merited, and this petition should be dismissed with costs based on it alone.

He submitted further that in the unlikely event that this Honourable court finds the preliminary objection is not merited, he invited the court to look at the evidence before it and make a finding that the petitioner has not proved his case to the required standards as there is no evidence that the 3<sup>rd</sup> Respondent obtained highly inflated, fictional and outright non-existent votes in the two polling station where the petitioner challenged results (Nasira AC 2 and Busibwabo 3 polling stations). He said that the scrutiny conducted by the court established that the results declared were verifiable, accurate and transparent. That all the allegation by the petitioner were proved otherwise by the scrutiny of votes.

He submitted further that the court should not interfere with the democratic choice of voters who elected the 3<sup>rd</sup> Respondent as their leader since it was not established to the required standards of proof that there were substantial irregularities to render the said election null and void. That it is not enough for the Petitioner to merely allege that the irregularities and electoral malpractice occurred, he is duty bound to establish that such malpractice were of such a magnitude that it would substantially and materially affect the results. This fact counsel said the petitioner had failed to establish.

Counsel thus beseeched the court to find that the petition is not merited and dismiss it with costs to the 1<sup>st</sup> & 2<sup>nd</sup> Respondents.

### **3<sup>RD</sup> RESPONDENT'S WRITTEN SUBMISSIONS**

On his part, Mr. Makokha, learned Counsel for the 3<sup>rd</sup> Respondent submitted that the election of the 3<sup>rd</sup> Respondent as Member of the County Assembly, Busibwabo ward was free fair and done in accordance with law. Counsel submitted that it has already been established through evidence in court that the 3<sup>rd</sup> Respondent was duly elected and for that reason the court ought to dismiss the Petition against him.

Counsel explained that the submissions are further to the response filed in court and dated 19<sup>th</sup> September 2017, the 3<sup>rd</sup> Respondents Affidavit sworn on 18<sup>th</sup> September 2017 and all the documents annexed thereto and witness affidavits. Counsel stated that he relies on the said pleadings entirely.

#### **Contested issues**

This submission cover the seven issues as agreed by counsels as contested issues namely; -

Whether the degazettement of the petitioner as the duly elected Member of County Assembly Busibwabo Ward, Matayos Constituency in Busia County was unlawful, illegal and contrary to law and the principles of natural justice.

1. Whether the 2<sup>nd</sup> respondent had the unilateral power to cancel and recall the gazettement of the petitioner as the duly elected Member of County Assembly Busibwabo Ward.
2. Whether the election for Member of County Assembly Busibwabo Ward was grossly undermined by instances of voter importation, voter bribery and voter inducement so as to affect the integrity and outcome of the elections.
3. Whether the election for Member of County Assembly Busibwabo Ward was conducted in a free, fair and transparent manner and to the required standards enshrined in the Constitution, the Elections Act and regulations thereto.
4. Whether the 3<sup>rd</sup> respondent was validly and lawfully elected and declared the winner for the election for Member of County Assembly Busibwabo Ward.
5. Whether the election for Member of County Assembly Busibwabo Ward held on 8<sup>th</sup> August 2017 should be declared null and void and a fresh election held.
6. Who should bear the costs of the petition?

There is also the preliminary objection dated 22<sup>nd</sup> November 2017 raised by the 3<sup>rd</sup> respondent, and the issue of 3 votes.

#### **Layout of these submissions**

Counsel elaborated the design and layout of the submissions to be as follows:

- A. An analysis of the Petition, the complaints and allegations therein and flaws in terms of the nature of Orders/prayers being sought
- B. The Preliminary Objection
- C. Whether the Petitioner adduced sufficient evidence to proof the allegations raised

D. 3<sup>rd</sup> Respondent answer to the contested issues as agreed among the Advocates representing various parties

E. 3<sup>rd</sup> Respondents response to the 3 votes in issue

F. Conclusion

### **ON ANALYSIS OF THE PETITION AND THE PRAYERS BEING SOUGHT THEREIN.**

Counsel enumerated the allegations raised by the petition in its entirety against the Respondents as hereunder: -

1. That the Petitioner was duly elected but the 1<sup>st</sup> & 2<sup>nd</sup> Respondents substituted him for the 3<sup>rd</sup> Respondent
2. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in cohort with the 3<sup>rd</sup> Respondent allowed people from neighboring Bukhayo West Ward to register and then to vote in Busibwabo Ward.
3. That the 3<sup>rd</sup> Respondent's agents committed acts of voter bribery and unduly influenced voters into voting for the 3<sup>rd</sup> Respondent in a Hotel.
4. That the Assistant chief of the Nasira sub-location was allowed unlimited access to the counting hall.
5. That the Counting and sorting out of votes was done in an opaque manner.
6. That the spoilt votes were counted in favour of the 3<sup>rd</sup> Respondent.

Counsel explained that other than the issue of Gazettement, the Petitioner's complaints/allegations in the entire Petition are specific only two polling centers namely Busibwabo Primary School and Nasira A.C Primary School Polling Centers (**Refer to Paragraphs 7 and 8 of the Petition and Paragraphs 8 – 20 of the Petitioners Affidavit in support of the Petition, Paragraph 4 – 9 of the Affidavit of Clement Washington Mumbo, Paragraphs 3 – 7 of the Affidavit of Erick Bahati Oundo, Paragraphs 3- 12 of the Affidavit of Richard Nyongesa and the other witnesses).**

Counsel stated that Busibwabo Primary School Polling centre has 3 Polling stations while Nasira A.C Polling Centre has 2 Polling stations. He stated further that the Petitioner in his Petition, supporting Affidavit and the witness Affidavits is not specific as to which polling station in the two polling centre he has problems with.

He said that throughout the Petition, the Petitioners supporting Affidavit and all the Petitioners witnesses, there is no complaint about NASIRA R.C Primary school polling centre.

Counsel however pointed out that during hearing and based on documents filed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent, there was an anomaly discovered with regards to entries in form 36A and 36B such that the court acting *suo moto* ordered for a recount and scrutiny in respect of **Nasira R. C Primary** school Polling station 1 of 2.

Counsel said that all issues pertaining to Nasira R. C Primary school Polling station are not pleaded. He therefore implored the court in that regard to be guided by the famous principle that parties are bound by their pleadings. He stated that it is a trite principle of the law and any evidence led by any party which does not support the averments in the pleadings or which is at variance with the averments in the pleadings goes to no issue and must be disregarded. Counsel referred the court to the Court of Appeal case of **Civil Appeal No. 219 of 2013- IEBC and Another –vs- Stephen Mutinda Musau and 3 others).Also refer to the Jones vs- National Coal Board(1957)2QB 55. Also refer to the Ugandan Case**

## **I. The Petitioners Prayers.**

He said that the Petition espouses the following prayers: -

- 1) An order for scrutiny of all ballot booklets issued and ballot papers cast in respect of the position of Member of County Assembly, Busibwabo Ward and recount of the ballot papers cast in favour of each candidate.
- 2) A declaration that the improprieties by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent were substantial and significant and that it has grossly affected the results declared.
- 3) A declaration that the 3<sup>rd</sup> Respondent was not validly declared a winner for the position of Member of County Assembly Busibwabo Ward.
- 4) An Order directing the 1<sup>st</sup> Respondent to organize and conduct fresh election in strict compliance with the Constitution and the Election Act as in the alternative, if the recount of votes reveals the Petitioner to have won the election, a declaration that the Petitioner is validly elected member of County Assembly for Busibwabo Ward.
- 5) Costs of this Petition.
- 6) Any other relief the Court may deem just and fit to grant.

He reiterated his submission that parties are bound by their pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made and that the court itself is bound by the pleadings of the parties as they are themselves. Counsel explained that it is not part of the duty of the court to enter upon any inquiry into the case before it other than adjudicate upon the specific matters in dispute which the parties themselves have raised by pleadings and referred the court to the **Supreme Court of Malawi Appeal in Malawi Railways Ltd –vs- Nyasulu(1998) MWSC, 3(Supra)**

Having relied on the principle entirely counsel invited the court to take a keener look at the prayers as pleaded by the Petitioner. Counsel also invited the court to consider paragraphs 6, 7 and 8 of the 3<sup>rd</sup> Respondents Response to the Petition dated 19<sup>th</sup> September, 2017. He explained that the responses specifically attack the form of the Petition dismissing it as vague and frivolous. He submitted further that the 3<sup>rd</sup> Respondent's attack of the Petition is premised on the following faults in the nature of prayers the Petitioner is seeking. For example

**a. Prayer a-** where he said that the court was being asked to order for scrutiny of all ballot booklets issued and ballot papers cast in respect of the MCA position and recount of ballot papers cast in favour of each candidate in the entire of Busibwabo ward.

Counsel submitted that this prayer is superfluous in the sense that in the entire Petition; the Petitioner's complaint is in respect of 2 Polling Centres- Busibwabo Primary School and Nasira A. C. Primary school. He maintained that the Petitioners have not complained about any other polling centre other than the two. He relied on **Rule 28 (2) (4) of the Elections(Parliamentary and County)Petition Rules, 2017** which require that if the recount and scrutiny prayer is granted, then it should be confined to polling stations in which the results are disputed.

Further, Counsel stated that the Petitioner's other prayer is for the Order of Recount and Scrutiny to be extended to each candidate. He stated that this prayer is also superfluous in the sense that the Petitioner in the entire Petition does not plead the number of the candidates that he was competing with nor their names and how many votes they garnered. He said that there is therefore no basis in law for the Petitioner

to have sought such an Order. On the contrary counsel explained that there is a statutory obligation Under **Rule 8 (1) and 12(2) of the Elections (Parliamentary and County) Petition Rules, 2017** on the Petitioner to have disclosed the names of all the candidates and the votes each one of them garnered. He stated that by not disclosing the particulars of the candidates and the votes garnered, the Petitioner failed in his statutory duty and cannot seek to correct that anomaly of pleadings through a prayer.

b. Prayers **(b)** and **(d)** – in Prayer **(a)**, counsel said that the Petitioner’s complaint is that the entire election for MCA Busibwabo was marred by improprieties and therefore not free and fair. He however wonders why the same Petitioner in **prayer (d)** is asking the court declare him the winner. Counsel maintained that the two prayers counteract one another. Counsel concluded that by asking the court to declare him the winner, the Petitioner is admitting that the entire election was free and fair and his only complaint is with regard to tallying the votes such that if the votes are in his favour, he won. He stated that the Prayer makes the Petitioner’s allegations that the elections were tainted with improprieties a mirage and a malicious lie.

Counsel posed the question that if indeed it is true as the Petitioner alleges that the Election of the 3<sup>rd</sup> Respondent is tainted improprieties, why would he want to be declared the winner of the same tainted election. He wondered why the Petitioner wanted to be a beneficiary of an election he complains was tainted with improprieties?

Counsel submitted that by his prayer to be declared the winner of the Election, the Petitioner has disowned his allegation as to improprieties and has instead affirmed the entire election to have been free and fair.

## **B). THE PRELIMINARY OBJECTION**

### **1. VALIDITY OF THE PRELIMINARY OBJECTION**

Counsel explained that the 3<sup>rd</sup> Respondent raised a Preliminary Objection dated 22<sup>nd</sup> November 2017 citing non compliance with provisions of Rules 8(1) and 12(2) of the Elections (Parliamentary and County Election) Rules 2017 which Rules are mandatory in nature.

Counsel explained that when it comes to Preliminary Objections, the test /principles for consideration are set out in the case of ***Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A. 696*** . He said that the Petitioners too cite the same case. The established test is that :-

- a) A Preliminary Objection must be of a point of law
- b) The preliminary objection must be pleaded or it arises by clear implication out of pleadings,
- c) If argued as a preliminary point may dispose off the suit.

Counsel stated that the Petitioner in their submissions on the Preliminary Objection have challenged the 3<sup>rd</sup> Respondents preliminary objection arguing that;-

- a) The Preliminary Objection does not raise pure issues of the law,
- b) The Preliminary Objection was not pleaded in Defence/ Response
- c) The Preliminary Objection was filed way too late after the conclusion of the hearing of the Petition.

In response to the Petitioner’s arguments in opposing the Preliminary Objection; Counsel invited the court to have a look at the body and contents of the Preliminary Objection as filed.

i. Counsel submitted that the Preliminary Objection cites specific provisions of law the 3<sup>rd</sup> Respondent contents the Petition dated 5<sup>th</sup> September 2017 and the Petitioner's Supporting Affidavit sworn on 5<sup>th</sup> of September 2017 does not comply with. The cited provisions of law are Rules 8(1) and 12(2) of the Elections (Parliamentary and County Election) Rules 2017.

ii. As to the issue of the Preliminary Objection not having been pleaded, counsel again invited the court to have a look at Paragraphs 6 and 8 of the 3<sup>rd</sup> Respondent's Response which in effect give notice as to the faulty nature of the Petition. He added that the two paragraphs espouse a warning to have the Petition struck out.

He submitted therefore that the Preliminary Objection was properly pleaded in the 3<sup>rd</sup> Respondents Response at Paragraphs 6 and 8. Further and in the alternative, he submitted that the Preliminary Objection arises by clear implication of the 3<sup>rd</sup> Respondents Response as filed.

iii. Counsel maintained that the Preliminary Objection as raised does not require the adduction of evidence in order to establish it. He explained that it only requires of the court to look at the law as and cross check whether the particulars required by the cited Rule/statute are set out in the Petitioner's Petition and Petitioner's Supporting Affidavit. If the particulars are not set out, then it follows that the Petition and the Affidavit would not have complied with the statute.

He further submitted that the Preliminary objection if upheld, will dispose of the entire Petition herein.

With regard to the Petitioners contention that the hearing of the petition has already proceeded to conclusion and for that reason the Preliminary objection has been raised way too late, Counsel submitted that such is not among the principles established in the cited case of *Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A. 696.*

Counsel pointed out that the Petitioner also contended that by provisions of Rule 15 of the Elections (Parliamentary and County Election) Petition Rules, 2017, the Preliminary Objection has been overtaken by events.

Counsel explained in this regard that Rule 15 of the Elections (Parliamentary and County Election) Petition Rules, 2017 pertains to Pretrial so that the court ought not to allow an interlocutory application on conclusion of the pretrial.

He explained however, that what was before the court is not an interlocutory application but an application based on points of the law. He added that points of law can be raised at any state. He relied on the case of *Martha Wangari Karua & another –vs- IEBC and 2 Others ( Election Petition Number 2 of 2017- Kerugoya High Court)*, in which Justice L. W. Gitari faced with the same argument as to the timing of an application states as much at paragraph 22 that points of law cannot be raised at any stage. He further stated while interpreting Rule 15(2) of the of the Elections (Parliamentary and County) Petition Rules 2017 that an interlocutory application may not be brought after the conclusion of the pretrial.

## **II). Does the Petition Comply With the Mandatory Statutory Requirements under Rules 8(1) of the Elections (Parliamentary and County) Petition Rules 2017**

Counsel submitted that the Petition does not comply with Rule 8(1) of the Elections (Parliamentary and County) Petition, Rules 2017.

He maintained that the Petitioner has not in his submissions demonstrated compliance to Rule 8(1). He demonstrated for example:-

a) **Under Rule 8(1) (c), the Petition shall state the results of the Election if any and however declared.**

Counsel pointed out that the Election Petition does not state the results of the Election if any and however declared. He said that it is not true what the Petitioner argued in his submissions that what is contained in paragraph 4 and 6 of the Petition are the results as returned.

He explained that the Election being challenged had more than one candidate and that all of them garnered votes. He wondered therefore what the votes were for each candidate as tabulated announced and declared.

Further, counsel submitted that declaration of the results is not by Gazette notice as the Petitioners tent to believe. He therefore maintained that it is factually wrong for the Petitioner to refer to the Gazette Notice Number 8240 of 22<sup>nd</sup> August 2017 as the results which were declared. He said that the results he alleges are not the results as envisaged under Regulation 83(1)(a)(e)(f) &(g). he relied on the case of **Mwamlole Tchappu Mbwana –vs- IEBC and 4 others (Election Petition Number 5 of 2017 Mombasa High Court)** in which Justice M Thande held at paragraph 34 of his ruling that :-

*“The onus upon the Petitioner under Rule 8(1)(c) of the Election Petition Rules would only be discharged if he sets out the results as declared by the returning Officer”.*

Counsel explained that Election results are the results announced and declared by a Returning Officer Pursuant to Section 39 (1), and (1A) of the Elections Act, 2011, Regulation 79(1),(2)(b), (3), (7), (8), and Regulation 83(1), (a), (e), (f) and (g) of the Elections (General) Regulations, 2012 as Amended which announcement/declaration is done publicly and immediately after close of polling.

He stated that gazettement of the results is done pursuant to Regulation 87(h) and that sch persons gazetted pursuant to this Regulation and in respect of the position of Member of County assembly are persons who would have been declared as elected pursuant to Regulation 83(1)(a), (e), and (f) **AND** would have been issued with Certificate of Elected Member of County Assembly Pursuant to Regulation 83(1)(g).

**a) Under Rule 8(1)( d), the Petition shall state the date of declaration of results of the Election.**

Counsel stated that the date of the declaration of results was not stated anywhere in the petition. He said that the Petitioner in his answer to the Preliminary Objection was wrong to refer the court to Paragraphs 4 and 6 of Petition and that their contention that results are declared by **Gazette Notice number 8240 of 22nd August 2017**, is factually wrong.

Counsel submitted in conclusion that the Petition failed to meet the mandatory statutory threshold as to form and content of an Election Petition as set out under Rule 8(1) Elections (Parliamentary and County) Petition, Rules 2017.

**I. Does the Petition Comply With the Mandatory Statutory Requirements under Rules 12(2) of the Elections (Parliamentary and County) Petition Rules 2017**

Counsel submitted that the Petition does not comply with Rule 12(2) of the Elections (Parliamentary and County) Petition, Rules 2017 which rules pertain to the form and content of affidavit sworn by the Petitioner in support of the Petition.

He explained that the Rule does not require of partial compliance but total compliance and that the Petitioner has not in his submissions demonstrated full compliance to Rule 12(2). For example :-

**Under Rule 12(2)( b)(c)(d) of the Election Rules, the Petition shall state the date when the Election in dispute was conducted, the results of the Election, if any, declared, and the date the results were declared.**

Counsel faulted the Affidavit of the Petitioner for failing to state the date when the Election in dispute was conducted, the results of the Election, if any, declared, and the date the results were declared. He also

faulted the Petitioner for failing to address the issue of none compliance to the statutory law in his submissions.

## **I. Why is the foregoing information important**

Counsel reiterated his earlier submissions that Rules 8(1) and 12(2) of the Elections (Parliamentary and County) Petition Rules 2017 are mandatory statutory requirements.

Counsel explained that in the instant Petition, the Petitioner prayed for recount in respect of each candidate but without pleading who the candidates were, what votes each one of them garnered, and what the dispute was as to the declared results so as to lay basis for such an order.

Further, he said that when it comes to **Rules 12(2) of the Elections (Parliamentary and County Election) Petition Rules 2017**, which as submitted pertains to Affidavits, inclusion of the information enables the deponent who is on oath to be cross- examined on contents of his affidavit and thereby test the truthfulness of his allegation or perjury.

Counsel stated that during cross-examination of the Petitioner by the Advocate of the 3<sup>rd</sup> Respondent, a question was posed to the Petitioner as to how many votes the 3<sup>rd</sup> Respondent garnered and his answer was that he didn't know.

Counsel then wondered;-

- a) How a petitioner could not know the results of the election of the candidate whose election he is challenging?
- b) What is such a petitioner challenging or put differently, what would be the basis for such a petitioner's Complaint?

He submitted therefore that non compliance with the said two Rules presents serious challenges in that it affects the respondent's adduction of Evidence against the Petition. He relied on the **case of Martha Wangari Karua & another -vs- IEBC and 2 Others ( Election Petition Number 2 of 2017- Kerugoya High Court), in which** Justice L. W. Gitari grappled with this issue and held at Paragraph 44 of the ruling that:-

*".....where there is such an omission, a petitioner will seek to bring in what is omitted in the course of trial. This would be prejudicial as it will amount to allowing amendments outside the time allowed because it will be difficult to make the declarations the Petitioner in the Petition as the particulars requires in Rule 8(1) of the Rules are not in the Petition".*

## **V) How courts have dealt with the issue**

### **a. Election Petition Number 2 of 2017 Kerugoya High Court**

#### **Hon Martha Wangari Karua and another -vs- IEBC and 3 others**

Counsel relied on this case in which the court made several observations and held that the Requirements under Rule 8(1) of the Rules are not mere technical requirements; that they are substantive as they go to the root of the issue before the court. That a petition which fails to state the date declaration of results, the results of the election and how declared is fatally defective and beyond salvage. The consequence is to strike it out.

He stated that the case makes an interested reading and he invited the court to look at it particularly paragraphs 30, 31, 33, 35, 36, 37, 38, 39, 40, 41, 44, 45, and 48.

### **a. Election Petition Number 5 of 2017 Mombasa High Court**

## **Mwamlole Tchappu Mbwana –vs- IEBC and 4 others**

Counsel relied further on this case in which a preliminary point of law was raised as to failure by the Petitioner to plead the date of declaration of the results. The Court having found that indeed there was omission on the part of the petitioner to state the date of declaration of the results to the election proceeded at paragraphs 27 – 43 to analyze the issue and held;-

*“by proceeding with a petition in which the date of the declaration of results and the results have not been pleaded, this court will run the risk of abandoning its role as an independent and impartial arbiter and descent into the arena of conflict”*

The court then proceeded to find the petition incompetent.

He similarly invited the court to read through paragraphs 27 through to 43 of the said ruling and also consider the other cases the court had analyzed in the process.

### **a. Election Petition Number 9 of 2017 Mombasa High Court Jimmy Mkala Kazungu –vs- the IEBC and 2 others**

Counsel relied on this case in which the court was confronted with an issue of non compliance with Rule 8(1) of the Election Rules. The court cited several cases including the **Court of Appeal case of John Michael Njenga Mututho –vs- Jayne Njeri Wanjiku Kihara and 2 others 92008)eKLR** and held at **paragraph 29 of the Ruling:-**

*“that the import of omission of results in the Petition is that the Petition is incomplete as the basis of any complaint is absent”.*

The Election Petition was struck out.

## **C. WHETHER THE PETITIONER TENDERED SUFFICIENT EVIDENCE TO PROVE ALLEGATIONS RAISED**

Counsel elaborated the following allegations as having been raised in the Petition and the Petitioner’s witness affidavits:-

- a) That the Petitioner was duly elected but the Respondents substituted him for the 3<sup>rd</sup> Respondent
- b) That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in cohort with the 3<sup>rd</sup> Respondent allowed people from neighboring Bukhayo West Ward to register and then to vote in Busibwabo Ward.
- c) That the 3<sup>rd</sup> Respondent’s agents committed acts of voter bribery and unduly influenced voters into voting for the 3<sup>rd</sup> Respondent.
- d) That the Assistant chief of the Nasira sub-location was allowed unlimited access to the counting hall.
- e) That the Counting and sorting out of votes was done in an opaque manner.
- f) That the spoilt votes were counted in favour of the 3<sup>rd</sup> Respondent.

### **i. That the Petitioner was duly elected but the Respondents substituted him for the 3<sup>rd</sup> Respondent**

Counsel reiterated the petitioners averment at Paragraph 6 of the Petition and also paragraphs 4 of the Petitioner’s supporting Affidavit that vide Gazette Notice Number 8240 of 22<sup>nd</sup> August 2017, he was declared the winner of the seat of Member of County Assembly, Busibwabo ward.

He stated that the averment is factually and legally wrong. He explained that Gazette notices do not declare persons winners of Elections but that Election winners are declared so by a Returning Officer Pursuant to Section 39 (1), and (1A) of the Elections Act, 2011, Regulation 79(1),(2)(b), (3), (7), (8), and Regulation 83(1), (a), (e), (f) and (g) of the Elections (General) Regulations, 2012 as Amended.

And the announcement/declaration is done publicly and immediately after close of polling in a gazetted place also known as a tallying centre and the winner is then issued with a certificate of elected member of County Assembly. The certificate is in form 36C and is issued as provided for under Regulation 83(1)(g).

Counsel maintained that it is only those who are issued with the certificate of elected member of County Assembly that are pursuant to Regulation 87(h) gazetted as a confirmation that such a person was the declared winner by the Returning officer pursuant to Regulation 83(1)(a), (e), and (f)

Counsel explained that under Section 76 (1), (2), (3) of the Elections, 2011 Act, the law in its body makes a clear distinction between declaration of the results and the publication of the results in the Gazette.

In the instant case, counsel stated that the Petitioner has not produced such a certificate of Elected Member of County Assembly. On the contrary, he said at Paragraph 5 and 6 of the 3<sup>rd</sup> Respondent's supporting Affidavit are the collated results of the Elections for the Member of holder of County Assembly, Busibwabo ward in decalred at the tallying centre in form 36B and at the **Certificate of Elected Member of County Assembly Busibwabo ward for George Mukhayaka Busera ID No. 0834851.**

Counsel explained that without having been issued with a certificate of Elected member of County Assembly like the 3<sup>rd</sup> Respondent was issued with, the Gazettement of the Petitioner was erroneous. He maintained that it was erroneous because the Petitioner would not have complied with the provisions of the Elections Act and the Constitutions, which constitute mandatory requirements for one to be gazetted.

He reproduced the wording of the Gazatte Notice number 8240 of 22<sup>nd</sup> August 2017 in itself in the opening paragraphs which read:-

***“In the Exercise of powers conferred by Article 88(4) and 177(1) (a) of the Constitution, Section 4 of the Independent Electoral and Boundaries Commission Act, 2011, Sections 39(1) and (1A) (i) of the Elections Act, 2011 and Regulation 83(1)(a)(e)(f)(i) and (g) of the Elections (General) Regulations, 2012, the IEBC declares the persons whose names are listed in the schedule herein were elected as members of the various county assemblies having received the majority of the votes cast in the election of 8<sup>th</sup> August, 2017 and complied with the provisions of the Elections Act and the Constitution”.***

He justified his act of reciting the opening paragraph because in the wording of the Gazette notice itself, there is a requirement for one to have complied with certain provisions of the law.

He stated that the Petitioner had not complied with those provisions of the law. He added that the 3<sup>rd</sup> Respondent had however complied with the cited provision of the law. He said that on that basis, he submitted that the gazettement of the Petitioner was erroneous.

**The error having been discovered, was the 1<sup>st</sup> and 2<sup>nd</sup> respondents under a statutory obligation to afford the Petitioner a hearing before degazattment?**

He maintained that in the circumstances of an error, there is no any legal requirement that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were to hear the parties before degazetting the Petitioner. He said that the issue was clearly an a mistake/an act of human error and that therefore there was nothing to investigate as to who was the winner.

He explained that based on the error the Gazette Notice 8378 is a *corrigenda*. It is meant to correct an

error apparent.

He explained that all that the IEBC is required to do is to issue the directive and have the directive published in such manner as to reach the persons who may be affected or whose compliance or action may be required. This is provided for under Regulation 98 of the Elections (General) Regulations, 2012.

He further stated that IEBC acting transparently and in good faith and in a justifiable manner is vested with residual powers and the exercise of such residual powers extends to publication of results and or correction whatever errors may occur in the process **(Steven Kariuki –vs- George Wanjohi and 2 Others (2013) eKLR)**

**i. Allegations as described under items b& c above**

Counsel stated that at Paragraphs 8(a) and (b) of the Petition and Paragraphs 9 and 10 of the Petitioners Supporting Affidavit and also the Affidavits of Clement Washington Mumbo (PW3), and Victor Mudogo(PW4) makes allegations of voter importation and voter Bribery and undue influence.

He however said that pursuant to Article 38(3) of the Constitution of Kenya 2010, Sections 3, 4, 5, 6, 7, 8, and 11 of the Elections Act, 2011, there is nothing like voter importation. He added that voter importation is an extinct phrase and if anything, this allegation by the Petitioner in as much as is superfluous is not substantiated to say the least.

Counsel explained that the allegations of Voter Bribery are a very serious allegation that border on criminality. **Voter Bribery and undue influence are described as offences under Sections 9 and 10 of the Election Offences Act, 2016** and that allegations of voter bribery made against the 3<sup>rd</sup> Respondent must be proved to the required standard. He stated that the 3<sup>rd</sup> Respondent relied on the evidence of Beatrice Akoth Busera and Victor Omondi to rebut the Petitioner's case that the 3<sup>rd</sup> Respondent committed the offence through his proxies Beatrice Akoth Busera and Victor Omondi.

Counsel stated that the obligation on the Petitioner is to prove the offence of bribery of voters under Section 9 and 10 of the Election Offences Act. This act is criminal in nature and the burden of proof lies with the Petitioner. That standard he said is high. Besides proving the offence, counsel said that it was incumbent upon the Petitioner to show that this bribery substantially affected the outcome of the elections.

Counsel maintained that the Petitioner in his testimony confirmed that he himself did not witness any of those incidents directly but learnt of them from his agents and other persons. He said that the Petitioner then presented two witnesses Washington Mumbo (PW3), and Victor Mudogo (PW4). He reiterated the evidence given by Washington Mumbo (PW3) who alleged that on the voting day he witnessed people gathered at bonzoo hotel and on moving closer he saw one Beatrice Akoth who is the 3<sup>RD</sup> Respondents sister openly asking people to vote for his brother. That he took photographs and left the place and proceeded to vote and while lining up, the same people who had been at the hotel came to vote.

He (PW3) further alleged that the majority of the people were from Bukhayo West ward which neighbours Busibwabo ward and therefore not residents of Busibwabo. And that they were being ferried by one Victor Omondi.

Counsel faulted the evidence as no particulars were given as to the identities of these people, what time they were at the hotel and whether a report was filed with relevant authorities.

PW4, Victor Mdogo testified alleging that he was a member of an alleged group by the name Kwasala Tusaidiane self help and he had been informed by the Chairman of the said group one **Alex Masinde** that the 3<sup>rd</sup> Respondent had requested him to prevail upon the members of the group to change their place of voting from bukhayo west ward to busibwabo ward in exchange for a sum of kshs. 1,000/= and a diary cow, bursaries and other goodies.

Counsel also stated that no particulars are provided as to proof of the existence of the alleged Kwasala Tusaidiane self help group, nor minutes to demonstrate that indeed the issue was discussed in the Group, membership of the group etc.

He wonders why the one Alex Masinde was also never called as a witness. However, counsel stated that most importantly, despite the alleged inducement, PW4 still voted at Siwongo Primary school Polling station which is a polling station not within the 3<sup>rd</sup> Respondents Electoral area which in itself is evidence that the persons who allegedly received the bribes voted differently than they had intended to vote.

Counsel submitted that the Petitioner has not met the standard required in proving an allegation of an electoral malpractice. He explained that this standard, where a criminal conduct is alleged, is high and must meet the twin aspects of proving the commission of the offence by the person complained of in the election either directly or indirectly, and further that the irregularities complained of must have affected the outcome of the results of the election substantially to his disadvantage.

Counsel submitted further that the Petitioner has not in that regard, met his obligation satisfactorily to demonstrate that the voter bribery as alleged was committed by the 3<sup>rd</sup> Respondent or by persons acting on his behalf.

He relied on the **The Halsbury's Laws of England 4th Edition Volume 15 in Paragraph 695** which provides on proving of voter bribery as follows:

***“.... clear and unequivocal proof is required before a case of bribery will be held to have been established. Suspicion is not sufficient, and the confession of the person alleged to have been bribed is not conclusive”***

He maintained that an allegation of voter bribery should be specifically proved. That an alleged electoral malpractice cannot be established through inference; it must be specifically proved to its full elements. He reiterated that the Petitioner must prove voter bribery by cogent, reliable evidence and establish the twin limbs – that the malpractice took place on the one hand and the criminal act was done by the Petitioner, directly or indirectly on the other hand.

He explained that where the alleged act is said to have been done by agents of the person complained of, that connection must be comprehensibly established. Counsel insisted that it was not enough to show that the alleged proxies were the kinsmen of the 3<sup>rd</sup> Respondent; the Petitioner had the duty to show that they indeed engaged in voter bribery and they did so agents of the 3<sup>rd</sup> Respondent or with his consent. This standard counsel maintained that it was a high standard, which the Petitioner has not met.

Counsel went further to submit that had the Petitioner been serious about the allegations of voter bribery and voter importation alleged which may have affected his performance in the impugned election, he would have been vigilant in taking appropriate action. He maintained that Neither the Petitioner nor his witnesses made any complaint regarding the alleged massive bribery before, during or after the polling. Counsel said that the Petitioner did not honour his duty to report any conduct that was done in contravention of the **Electoral Code of Conduct** provided in the **Second Schedule** of the **Elections Act** to which he had subscribed as a contestant in the elections. That he did not demonstrate any action on his part to follow up on the allegations of voter bribery.

**He invited the court to look at the case of Kondavet Gurunath Reddy –vs- Sessaiah & others AIR APN 331**

#### **i. Allegations as described under item d above**

Counsel said that the Petitioner's witness number PW6 and PW7 testified how the Assistant Chief of the Area was allowed unlimited access to the Polling station. This he said was in respect of the two polling stations for Nasira A.C Primary school polling centre. He added that the two witnesses also testified how

agents were allegedly harassed and that vote counting and tallying was allegedly done in a manner that was not transparent.

He explained that the same allegations are also made in the Petition and by the Petitioner. That the Petitioner however confirmed in his evidence in chief that he never witnessed the alleged incidences but was relying on reports from his agents and other persons including PW6 and PW7.

Counsel explained that during cross examination, it turned out that the Petitioners agents had actually signed the forms 36 A in respect of Nasira A.C primary school polling station. He described PW6 and PW7 as agents for the ANC and Jubilee parties respectively and stated that they confirmed that their problem was not with the voting processes but with the vote counting and tallying.

He explained that the Assistant chief of the area, Mr. Silas Oseda Alooi swore an affidavit and also testified in court rebutting the Petitioner's Allegations as to interference with the Vote Counting and tallying process. Counsel therefore relied on the testimony and the explanation given and termed them as sufficient and enough.

#### **i. Allegations as described under items e & f above**

With regard to the allegations that vote counting at Nasira A.C primary school polling station was done in a manner that was not transparent, counsel invited the court to consider the evidence of PW6 and PW7 against the Evidence of the Election Officials particularly the Presiding Officers and the 2<sup>nd</sup> Respondent. He maintained that PW6 and PW7 gave a completely wrong description of the set up of the vote counting hall. Whereas the Election officials description of the set up was such that the agents and the clerks holding votes for each candidates were facing each other and the Presiding Officer and the Deputy Presiding officer seating a far apart also facing each other with the votes being sorted out poured on a flat surface in the middle open area in full view and proximity of all parties; counsel said that PW6 and PW7 had led the court to believe that the agents were seated at the back in an obscure place not able to closely and clearly see the sorting out and tallying.

Counsel submitted that the misinformation was fundamental since it demonstrates that the Petitioner's Agents were either absent or they deliberately misled the court and thereby lay unfounded basis that vote counting was done in a manner other than as provided in the Rules and Regulations.

Counsel submitted that the votes sorting, counting and tallying was done above board, opening and in strict compliance with **Regulations 74, 75, 76, 77, 79, 81 and 84 of the Elections (General) Regulations 2012**. He submitted further that from the evidence on record, the slight deviations that were occasioned as to the sequence of the count in respect of the vote counting for the Position of Member of County Assembly were well and properly explained. Finally counsel stated that the deviation in sequence of counting votes for the Position of Member of County Assembly did not at all affect the integrity of the results as announced at Nasira A.C primary school polling station at all or substantially. He maintained that no such evidence was submitted to the Court.

Counsel explained that an election will not be vitiated merely because of minor procedural irregularities which have been explained and which do not go to the root of or substantially affect the outcome of the election.

#### **Were spoilt votes counted in favour of the 3<sup>rd</sup> Respondent?**

Counsel submitted that the Court Ordered for a recount and scrutiny in three polling stations, Busibwabo, Nasira A.C and Nasira R.C. However, he said that the exercise did not reveal any incidence where spoilt votes had been counted in favour of the 3<sup>rd</sup> Respondent. He therefore dismissed the allegation as a flat lie.

#### **D. 3<sup>RD</sup> RESPONDENTS ANSWER TO THE CONTESTED ISSUES AS AGREED AMONG ADVOCATES ON RECORD FOR THE PARTIES.**

**a. Whether the degazettment of the petitioner as the duly elected Member of County Assembly Busibwabo Ward, Matayos Constituency in Busia County was unlawful, illegal and contrary to law and the principles of natural justice.**

He submitted that the issue had been answered in the body of the submissions

**b. Whether the 2<sup>nd</sup> respondent had the unilateral power to cancel and recall the gazettment of the petitioner as the duly elected Member of County Assembly Busibwabo Ward.**

He also stated that it had been answered in the submissions

**c Whether the election for Member of County Assembly Busibwabo Ward was grossly undermined by instances of voter importation, voter bribery and voter inducement so as to affect the integrity and outcome of the elections.**

He maintained that the allegations of voter bribery, voter importation and voter inducement were never proved at all. He stated that the Petitioner had the obligation of proving the allegations and going a step further to demonstrate how he was substantially prejudiced as a result of the cited infractions.

**d. Whether the election for Member of County Assembly Busibwabo Ward was conducted in a free, fair and transparent manner and to the required standards enshrined in the Constitution, the Elections Act and regulations thereto.**

Counsel explained that the yardstick for determining whether the impugned elections were held in a free, fair and credible manner is provided for by **Article 81(e)** of the Constitution. He submitted that the Petitioner had not shown that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents failed to comply with **Article 86** of the **Constitution** and all other relevant provisions of the law in the conduct of the elections and that was to the benefit of the 3<sup>rd</sup> Respondent.

Counsel reproduced Section 83 of the Elections Act, 2011 which provides;-

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

Counsel explained that the law is alive to the fact that the holding of elections may not be picture perfect and errors may occur. He stated that the mere presence of irregularities does not vitiate an election. He stated further that the burden remains on the person alleging to prove his allegations, and only then will the burden shift. He reiterated that this threshold was not reached by the Petitioner.

Counsel submitted that the objective of **Section 83** is to insulate the electoral process from abuse and frivolous claims and that it is the duty of the Court to preserve the will of the electorate where it is shown that the elections were conducted in accordance with the law.

Counsel relied on the case of **Morgan & Others v. Simpson & Another (1974) 3 All ER** in which the Court, in summing up the standard to be considered in determining whether or not an election should be declared invalid reasoned that;-

*“...an election court was required to declare an election invalid (a) if irregularities in the conduct of elections had been such that it could not be said that the election had been conducted as to be substantially in accordance with the law as to election, or (b) if the irregularities had affected the results. Accordingly, where breaches of the election rules, although trivial, had affected the results, that by itself was enough to compel the Court to declare the election void even though it had been conducted substantially in accordance with the law as to elections.*”

***Conversely, if the election had been conducted so badly that it was not substantially in accordance with the law, it was vitiated irrespective of whether or not the result of the election had been affected...”***

Counsel stated that the Petitioner did not go a step further to prove that any irregularities pointed out materially affected the outcome of the results that were declared by the 1<sup>ST</sup> AND 2<sup>ND</sup> Respondents. In spite of the complaints, counsel said that the Petitioner did not make a case on how those allegations affected the integrity of the results in any way. If there was non-compliance with the provisions and principles of the law, counsel explained that it must be established that such non-compliance affected the results in a substantial manner. He submitted that this has not been established in the case.

Counsel relied on the words of Justice Musinga in the case of ***Manson Oyongo Nyamweya v James Omingo Magara & 2 others*** (supra) where the learned Judge in considering whether an election was free and fair, stated that:

***“The court has to consider whether the grounds as raised in the petition sufficiently challenge the entire electoral process and lead to a conclusion that the process was not transparent, free and fair. It is not just a question of who got more votes than the other. It cannot be said that the end justifies the means. In a democratic election the means by which a winner is declared plays a very important role. The votes must be verifiable by the paper trail left behind, it must be demonstrated that there existed favourable circumstances for a fair election and that no party was prejudiced by an act or omission of an election official.”***

**e. Whether the 3<sup>rd</sup> respondent was validly and lawfully elected and declared the winner for the election for Member of County Assembly Busibwabo Ward.**

Counsel reiterated his earlier submissions that the 3<sup>rd</sup> Respondent was announced and declared the winner for Member of County Assembly, Busibwabo ward having garnered 1, 423 votes to the Petitioners 1,379 votes. He agreed that the margin was indeed narrow of 44 votes but it suffices for our first-past the post electoral system.

He explained that the 3<sup>rd</sup> Respondent was then issued with a Certificate of Nominated member of the County Assembly which he still holds to date. He maintained that the certificate is a valid certificate, and that it was issued validly and by the proper authority and to the winner. He added that there was no evidence adduced questioning the regularity of otherwise of this certificate.

He submitted that the Petitioner has failed to impeach the certificate of results and elected member of County Assembly issued to the 3<sup>rd</sup> Respondent.

On the flipside, counsel stated that the Petitioner was never issued with such a certificate and for that reason he remains unelected as at all times. Counsel noted that the only complaint the Petitioner has is that he was gazatted as the winner, which has been explained as to the error that resulted in the Petitioner being gazatted.

Counsel submitted that the 3<sup>rd</sup> Respondent was validly and lawfully elected and declared the winner for the election for Member of County Assembly Busibwabo Ward. He invited the court to consider the following two cases- **Steven Kariuki –vs- George Mike Wanjohi & 2 other (2013) Eklr, Hosea Kiplagat –vs- Sammy Komen Mwaita and 2 others (2013) eKLR).**

**a. Whether the election for Member of County Assembly Busibwabo Ward held on 8<sup>th</sup> August 2017 should be declared null and void and a fresh election held.**

Counsel submitted that the Petitioner had not adduced any evidence forceful enough to enable the court to mind annulling the poll on grounds as pleaded. He therefore urged the court to dismiss the Petition.

## **a. Who should bear the costs of the petition?**

Counsel submitted that costs ordinarily follow events. He therefore requested that the costs of the petition be awarded to the 3<sup>rd</sup> Respondent.

### **COURT'S ANALYSIS OF THE CASE**

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

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

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

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

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

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

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

- a. ....
- b. ....
- c. ....
- d. Universal and equal suffrage based on the aspiration for fair representation and equality of votes,
- e. free and fair elections, which are;
  1. By secret ballot
    - a) free from violence, intimidation, improper influence or corruption;
    - b) conducted independently
    - c) transparent and
    - d) administered in an impartial, neutral, efficient, accurate and accountable manner.

In addition to these constitutional, statutory and regulatory provisions, there is a plethora of case law which guide this court on how to navigate around this case. Of major importance is **Raila Odinga V Independent Electoral and Boundaries Commission & 3 Others (2013) Sc Ep No.5 Of 2013** (the so called **Raila 1**) and Raila 2. Because this court is bound by both judicial authorities this court will use each of the case wherever it is appropriate in the particular circumstances.

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

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

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

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

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

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

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

In this court’s opinion, the Supreme Court in Raila 2 did not open a Pandora’s box such that IEBC becomes duty bound to prove that such malpractices or misdeeds, commission or omission by other persons did not occur. In such cases, the burden of prove remains with the person who alleges them and hence **Raila 1** becomes the applicable law.

Where the malpractices are committed by IEBC or its employees or worker, Rail2 is the applicable law where the burden shifts from the person alleging existence of the malpractices to IEBC to prove that the malpractices did not exist

## **1. THE PRELIMINARY OBJECTION**

This matter was heard. Petitioner and his witnesses gave evidence. The respondents and their witnesses gave evidence. This matter came up for directions as to the issues of submission sand but counsel for the 3<sup>rd</sup> Respondent intimated that they had a Preliminary Objection in the file. Considering the presence of the P.O, this court gave directions that submissions on the Preliminary Objection be made alongside the submissions on the main case as the court.

A Preliminary Objection was defined as follows in **Mukisa Biscuits Manufacturing Company Ltd V West End Distributors Ltd (1969) EA 696**. “a preliminary objection consists of point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a Preliminary Objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Sir Charles Newbold President in the same judgment stated:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

In his submissions, counsel for the 3<sup>rd</sup> Respondent raised certain grounds upon which the P.O was based. Counsel submitted that what was before the court is not an interlocutory application, but an application based on points of the law. He added that points of law can be raised at any state.

**Does the Petition Comply With the Mandatory Statutory Requirements under Rules 8(1) of the Elections (Parliamentary and County) Petition Rules 2017**

Counsel submitted that the Petition does not comply with Rule 8(1) of the Elections (Parliamentary and County) Petition, Rules 2017.

He maintained that the Petitioner has not in his submissions demonstrated compliance to Rule 8(1). He demonstrated for example:-

**a) Under Rule 8(1) (c), the Petition shall state the results of the Election if any and however declared.**

Counsel pointed out that the Election Petition does not state the results of the Election if any and however declared. He said that it is not true what the Petitioner argued in his submissions that what is contained in paragraph 4 and 6 of the Petition are the results as returned.

He explained that the Election being challenged had more than one candidate and that all of them garnered votes. He wondered therefore what the votes were for each candidate as tabulated announced and declared.

Further, counsel submitted that declaration of the results is not by Gazette notice as the Petitioners tent to believe. He therefore maintained that it is factually wrong for the Petitioner to refer to the Gazette Notice Number 8240 of 22<sup>nd</sup> August 2017 as the results which were declared. He said that the results he alleges are not the results as envisaged under Regulation 83(1)(a)(e)(f) &(g). he relied on the case of **Mwamlole Tchappu Mbwana –vs- IEBC and 4 others (Election Petition Number 5 of 2017 Mombasa High Court)** in which Justice M Thande held at paragraph 34 of his ruling that :-

*“The onus upon the Petitioner under Rule 8(1)(c) of the Election Petition Rules would only be discharged if he sets out the results as declared by the returning Officer”.*

Counsel explained that Election results are the results announced and declared by a Returning Officer Pursuant to Section 39 (1), and (1A) of the Elections Act, 2011, Regulation 79(1),(2)(b), (3), (7), (8), and Regulation 83(1), (a), (e), (f) and (g) of the Elections (General) Regulations, 2012 as Amended which announcement/declaration is done publicly and immediately after close of polling.

He stated that gazettelement of the results is done pursuant to Regulation 87(h) and that sch persons gazetted pursuant to this Regulation and in respect of the position of Member of County assembly are persons who would have been declared as elected pursuant to Regulation 83(1)(a), (e), and (f) **AND** would have been issued with Certificate of Elected Member of County Assembly Pursuant to Regulation 83(1)(g).

**a) Under Rule 8(1)( d), the Petition shall state the date of declaration of results of the Election.**

Counsel stated that the date of the declaration of results was not stated anywhere in the petition. He said that the Petitioner in his answer to the Preliminary Objection was wrong to refer the court to Paragraphs 4 and 6 of Petition and that their contention that results are declared by **Gazette Notice number 8240 of**

**22nd August 2017**, is factually wrong.

Counsel submitted in conclusion that the Petition failed to meet the mandatory statutory threshold as to form and content of an Election Petition as set out under Rule 8(1) Elections (Parliamentary and County) Petition, Rules 2017.

**Does the Petition Comply With the Mandatory Statutory Requirements under Rules 12(2) of the Elections (Parliamentary and County) Petition Rules 2017**

Counsel submitted that the Petition does not comply with Rule 12(2) of the Elections (Parliamentary and County) Petition, Rules 2017 which rules pertain to the form and content of affidavit sworn by the Petitioner in support of the Petition.

He explained that the Rule does not require of partial compliance but total compliance and that the Petitioner has not in his submissions demonstrated full compliance to Rule 12(2). For example :-

**Under Rule 12(2)( b)(c)(d) of the Election Rules, the Petition shall state the date when the Election in dispute was conducted, the results of the Election, if any, declared, and the date the results were declared.**

Further, he said that when it comes to **Rules 12(2) of the Elections (Parliamentary and County Election) Petition Rules 2017**, which as submitted pertains to Affidavits, inclusion of the information enables the deponent who is on oath to be cross- examined on contents of his affidavit and thereby test the truthfulness of his allegation or perjury.

Counsel relied on the case of **Martha Wangari Karua & another –vs- IEBC and 2 Others ( Election Petition Number 2 of 2017- Kerugoya High Court)**, in which Justice L. W. Gitari faced with the same argument as to the timing of an application states as much at paragraph 22 that points of law cannot be raised at any stage.

He submitted therefore that non-compliance with the said two Rules presents serious challenges in that it affects the respondent’s adduction of Evidence against the Petition. He relied on the **case of Martha Wangari Karua & another –vs- IEBC and 2 Others (Election Petition Number 2 of 2017- Kerugoya High Court), in which** Justice L. W. Gitari grappled with this issue and held at Paragraph 44 of the ruling that: -

*“.....where there is such an omission, a petitioner will seek to bring in what is omitted in the course of trial. This would be prejudicial as it will amount to allowing amendments outside the time allowed because it will be difficult to make the declarations the Petitioner in the Petition as the particulars requires in Rule 8(1) of the Rules are not in the Petition”.*

There is a plethora of authorities which have dealt with the issue of the consequences of non-compliance with the rules. Counsel examined how the courts have dealt with the issue in the following cases.

**a. Election Petition Number 2 of 2017 Kerugoya High Court**

**Hon Martha Wangari Karua and another –vs- IEBC and 3 others**

**b. Election Petition Number 5 of 2017 Mombasa High Court**

**Mwamlole Tchappu Mbwana –vs- IEBC and 4 others**

**c. Election Petition Number 9 of 2017 Mombasa High Court**

**Jimmy Mkala Kazungu –vs- the IEBC and 2 others**

For the position that “*by proceeding with a petition in which the date of the declaration of results and the results have not been pleaded, this court will run the risk of abandoning its role as an independent and impartial arbiter and descent into the arena of conflict*”

Counsel relied on this case in which the court was confronted with an issue of non-compliance with Rule 8(1) of the Election Rules. The court cited several cases including the **Court of Appeal case of John Michael Njenga Mututho –vs- Jayne Njeri Wanjiku Kihara and 2 others 92008)eKLR** and held at **paragraph 29 of the Ruling:-**

*“that the import of omission of results in the Petition is that the Petition is incomplete as the basis of any complaint is absent”.*

On the other hand, counsel for the Petitioner responded to the P.O as follows;

Counsel explained that when it comes to Preliminary Objections, the test /principles for consideration are set out in the case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A. 696** . He said that the Petitioners too cite the same case. The established test is that :-

- a) A Preliminary Objection must be of a point of law
- b) The preliminary objection must be pleaded or it arises by clear implication out of pleadings,
- c) If argued as a preliminary point may dispose off the suit.

Counsel stated that the Petitioner in their submissions on the Preliminary Objection have challenged the 3<sup>rd</sup> Respondents preliminary objection arguing that;-

- a) The Preliminary Objection does not raise pure issues of the law,
- b) The Preliminary Objection was not pleaded in Defence/ Response
- c) The Preliminary Objection was filed way too late after the conclusion of the hearing of the Petition.

Counsel pointed out that the Petitioner also contended that by provisions of Rule 15 of the Elections (Parliamentary and County Election) Petition Rules, 2017, the Preliminary Objection has been overtaken by events. Counsel explained in this regard that Rule 15 of the Elections (Parliamentary and County Election) Petition Rules, 2017 pertains to Pretrial so that the court ought not to allow an interlocutory application on conclusion of the pretrial.

I have looked at the rival arguments of counsel. The locus classicus case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A. 696** is instructive.

A preliminary Objection should in itself be capable of disposing a suit without further ado.

In this case, the 3<sup>rd</sup> Respondent’s basis of the P.O is that the Petitioner has not complained with the mandatory provisions of Rules 8 and 12

I have weighed the rival arguments of the parties herein. I agree with counsel for the 3<sup>rd</sup> Respondent in respect of the P.O. that there is an avalanche of judicial authority to state that. I also agree that the P.O as raised has indicated issues of law and has cited the specific law that has not been complied with However, in as much as I agree with the 3<sup>rd</sup> respondent to that extent, I also agree with counsel for the petitioner that the P. O. was raised rather too late in the proceedings. The P.O. in my opinion should have been argued at the pretrial stage. More so because the counsel for the 3<sup>rd</sup> respondent had given prior notice that they would raise a P.O. If that was the case, why then did they have to wait until the parties have given

evidence in chief, had been cross examined and re-examined, and the parties had closed their case? Was it by default or by design?

In this case, the court observes that directions on all pending applications were given at the pretrial stage. It follows therefore that no other applications could be filed without leave being sought to file them. A preliminary objection is not an application, but this court still wonders why the parties never sought directions on the P.O. (if any), at the pretrial stage

I agree with counsel for the petitioner on the provisions of the Rule 15 that the 3<sup>rd</sup> respondents P.O. has rather come in too late in the day. Specifically, Rule 15 (2) which states that;

**“An election court shall not allow any interlocutory application to be made on conclusion of the pretrial conference if the interlocutory application could have been, by its nature, been brought before the commencement of the hearing of the petition”**

I bear in mind that from Rules 4 and 5 of the (EP 2017) it is quite clear that the petition should be heard expeditiously fairly and without technicalities.

In the courts opinion, the P. O filed herein does not pass the test set out in **Mukisa Biscuits Manufacturing Company Ltd V West End Distributors Ltd (1969) EA 696** and the same is hereby dismissed

## **1. ROLE OF THE RETURNING OFFICER**

**Section 2** of the Elections Act defines a ‘returning officer’ as a person appointed by the commission for the purpose of conducting an election or referenda under the Act. He/she is thus an election official. The petitioner herein questioned the role of a returning officer with specific reference to cancelling and recalling his gazettement as the duly elected MCA.

**Regulation 3(3) (c)** of the Election (General) Regulation Provides for the role of a constituency returning officer as follows:

"tallying, announcing and declaring, in the prescribed form, the final results from each polling station in a constituency for the election of a member of the National Assembly and Member of the County Assembly,....."(emphasizing on underlined words)

The role of a returning officer is therefore to declare the results.

DW1 in his evidence in court said that he understood his duties as an R.O that he could not alter the results as presented in Form 36A or alter the gazette notice 8240. Thus he asked his deputy to put to him in an email the corrections to be made in the now contested corrigenda gazette notice 8378 which he sent to his boss.

In the case of **Moses Mucigi & 14 others V IEBC & 5 others [2016]eKLR** the Supreme Court considered the issue and stated thus on the legal position after gazetting:

"that an 'election by registered voters' is in principle, completed by the **issuance of Form 36 which terminates the Returning Officers mandate** and shifts any issue as to the validity of results from the IEBC to the Election Court." **Regulation 83(3).**

Furthermore, the Supreme court expressed itself in **George Mike Wanjohi V Stephen Kariuki and 2others S.c petition No. 217 of 2014** where the results were erroneously declared and a certificate issued to the first respondent then later cancelled and the correct form 38 done and a certificate issued to the appellant. The question before court was whether the returning officer had such powers. The court held that the returning officer having declared the 1<sup>st</sup> respondent as the winning candidate and duly issued the Form 38, became *functus officio*. There is neither scope for a returning officer to withdraw a declaration

of the election result once made, and to cancel the certificate issued in favour of the winning candidate, nor is there a mandate to rectify the Form 38.

The role of the returning officer has thus been limited up-to the issuance of a certificate to the candidate declared as Winner having garnered more votes and not to settling issues coming up after and including matters after gazette as is the case before us. I therefore find that the returning officer had no unilateral powers whatsoever to cancel and degazette the petitioner as informed by corrigenda gazette notice 8378.

## **1. ISSUE OF GAZETTE NOTICE**

Article 88(1) of the Constitution of Kenya 2010 establishes the Independent Electoral and Boundaries Commission.

Article 88(4) provides that the Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this constitution, and any other elections as prescribed by an Act of Parliament and, in particular;

Several other Acts including the Independent Electoral and Boundaries Commission Act, Elections Act 2012, Elections (General) Regulations 2017 were passed by Parliament to ensure that the Commission exercises its duties in accordance to the Constitution and other national legislation.

Article 88(4) (e) gives the Commission the mandate to manage queries in relation to the

"settlement of electoral disputes, including disputes relating to or arising from nominations but **excluding petitions and disputes subsequent to the declaration of election results.**"

Rules of Natural Justice provide that administrative bodies ensure a right to fair hearing (*audi alteram partem*) and that these bodies are not judges in their own case (*nemo iudex in causa sua*). The Constitution of Kenya 2010 establishes the IEBC as an Independent body governed by the principles of natural justice as implied in **Article 47** on Fair Administrative Action. Article 88 (4) (e) further confirms the extent of its powers to ensure fairness.

DW1 who was the RO out rightly testified that in making the corrections to the earlier Gazette Notice 8240, he did the emails between the DRO and himself. They did not at any point inform the petitioner. The makers of the Constitution and parliament in their own right wished to cure such by creating an election court upon gazette. As such, the court in **Rahma Issak Ibrahim V IEBC & 2 OTHERS** said that it should have been the duty of the person questioning the gazette to seek refuge in an election court (in this case the 3<sup>rd</sup> Respondent) because the powers of IEBC had been exhausted. IEBC herein acted *ultra vires* and even as a judge in their own case. It is now settled law that IEBC can only settle disputes prior to the final declaration and gazette of a candidate in the disposal of their duties. Any queries arising after are a concern of the Election courts.

The Kenya Gazette is an official publication of the government of Kenya.

**Regulation 87(4) (b)** gives the chair of the Commission power to publish the name or names of persons elected in the Kenya Gazette. This as discussed by the Supreme Court in **Hassan Ali Joho 2014** is the kind of gazette notice done in conformity to Regulation 87(4) is **Nota bene** for the purposes of adherence to **Article 35** of the Constitution of Kenya 2010: Right of access to information. To put across to the public such information as regards the election or referenda.

There is however no tangible Constitutional provision or Act of Parliament that gives directions on degazette or what 'corrigenda gazette notice'. As far as **Article 88(4) (e)** provides the Commission is mandated to settle any issues prior to a declaration and any other issues after that are to be settled in an election court. Questions as to whether the person declared and gazetted was the rightful person touches on the fairness and validity of the election. That an election court having six months to determine such a

petition would be able to declare itself as per the will of the electorate.

Further emphasis was made on the issue of degazettement in **Rose Wairimu Kamau and 3others V IEBC C. A no. 169 of 2013** denying IEBC such powers deeming it to have acted *ultra vires*.

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I therefore answer the first issue in the affirmative. That in so far as IEBC purports to delete the name of the petitioner and put that of the 3<sup>rd</sup> Respondent, it is irregular, unlawful and a nullity. The court finds that IEBC acted *ultra vires* the law.

Be that as it may this court observes that Gazettement of election results is for the purposes of adherence to **Article 35** of the Constitution of Kenya 2010 (Right of access to information) and hence gazettement itself has no quantitative or qualitative relationship with the election it publishes. Simply put, the fact that one finds himself gazetted for an activity or for a post does not necessarily mean that the person so gazetted qualifies for that act or post. In this court's opinion, all it means is that there is a rebuttable presumption that the person is so qualified for the act or for the post. The presumption can be rebutted. That means that if the court upon herein the parties on merits finds that the qualities and quantities in an election were different from what was gazetted, the court may go ahead and rebut the presumption thereby substituting the gazetted results with those of its own findings.

This court notes that there is however no tangible Constitutional provision or Statute which gives directions on de-gazettement once a person is gazetted. The court further notes that there is only a practice code named 'corrigenda gazette notice' which is normally used for the purposes of rectification of an error in a Kenya Gazette issue. IEBC does the rebuttal by causing what they call a gazettement by way for a corrigendum.

This court is guided by the doctrine of reasonable expectation

In ordinary life, human is to error. In this case, the court finds that the quantities (figures posted as the final tally results) by the IEBC were erroneous. IEBC noticed this error belatedly and attempted to rectify the situation by causing a corrigendum to be published as it is the usual practice.

This court however confirmed after analysing the evidence and examining the documents produced in court and upon scrutiny and recounting and retallying that the quantities (by IEBC were indeed erroneous. The net conclusion in this petitioner after hearing the case on merit is that the 3<sup>rd</sup> respondent was validly elected as the MCA for Busibwabo Ward of Matayos Constituency, Busia County and his and it is so declared

The principles and doctrine of legitimate expectation supports the courts contention that both the petitioner and the 3<sup>rd</sup> respondent had a legitimate expectation that each would be declared the winner.

However, such expectations were ruined by IEBC's negligence in posting the results and attempting to rectify the situation thereby committing a second error.

The court observes that the confusion in gazettelement of the Petitioner as the winner and then degazetting him and gazetting the 3<sup>rd</sup> respondent as the winner was caused by IEBC's errors in posting results and thereby announcing the wrong candidate as the winner. The doctrine of reasonable expectation works in favour of both the Petitioner and the Respondent each of whom expected to be the winner. The mistakes by IEBC should not be visited on any of the two parties. In the circumstances costs should be borne by IEBC

## **1. DECLARATION OF RESULTS**

**Regulation 3(3)** provides for a returning officer to declare results: "... **in the prescribed form...**"

Declaration as defined by the Black's Law Dictionary, 9th Edition is ' a formal statement, a proclamation, or announcement, especially one embodied in an instrument '

The Supreme Court in **Hassan Ali Joho & Another V Suleiman Said Shahbal & 2 others (2014) eKLR** went on to define an instrument as in the Black's Law Dictionary :

"a written legal document that defines rights, duties, entitlements or liabilities such as a contract, will or share certificate. "

It was therefore found that the Gazette could not be termed as the instrument of declaration. That the process of election culminates in the issuance of a certificate which squarely falls within the said definition of the instrument. The court in **George Mike Wanjohi** (supra) held that the returning officer having declared the results and issued a certificate had finalized his duty and an election court takes over from there. This is to inform us that a certificate is the ultimate declaration of an election winner by the returning officer.

In this case, DW1 issued the 3<sup>rd</sup> respondent with a certificate upon declaring him as the winner on the 10/8/2017. That was not disputed by the petitioner, PW1 who clearly testified in re-examination that he had not been issued with any certificate prior to the gazettelement. He claimed to have heard of instances where certificates were denied eg the **Joho case**. He however did a demand for a certificate.

## **1. ROLE OF AN ASSISTANT CHIEF**

In this court's opinion, these irregularities cannot be levered against IEBC. They range from the allegations that the 3<sup>rd</sup> respondent imported voters from another ward, that there was voter influence to allegations of voter bribery. This is one situation where **Raila 1** would apply as the malpractices are directed at IEBC and not the candidates or agents. the burden therefore remains with the Petitioner to prove that such irregularities did not exist.

The Petitioner PW1 said that his agent officially captured against saw the assistant chief intimidating at Nasra AC stream 1 of 2. PW5 further stated that she saw the assistant chief around trying to keep law and order. PW6 agent for the petitioner also said that he saw the assistant chief coming into the station 4 times. His evidence showed that he was there until the end of the counting process. He however did not raise any issue with the chief as he understood his duty to be to maintain law and order.

The **Election Regulations 62** provides that the presiding officer shall regulate the number of voters admitted to the polling station at the same time and may exclude all other persons except- **(e)** police officers on duty. It is presumed that it is the police officers that shall provide security and enforce law and order in a polling station during an election and not the sub chief.

An assistant chief is a government official with his duties separate from that of a police officer. It was therefore unlawful for the sub chief to have been allowed entry into the station. However, the petitioner

did not provide any tangible evidence to show that the sub chief interfered with the election results. **Regulation 63** further gives provision on keeping order at polling station. That it is the duty of a presiding officer to provide law and order and report any matter with the police. Nowhere do the provisions on conducting of elections in Kenya give such duties to an assistant chief.

In this court's opinion, it was incumbent upon the Petitioner to prove that the presence of the Assistant chief was mischievous, that the Assistant Chief was not acting within the scope of his duties and that his presence was detrimental to the result of the elections. In the courts opinion, the Petitioner did not prove all these. The petitioner did not prove that the Assistant Chief influenced the IEBC officials or voters or candidates in any way. The court therefore finds that the presence of the Assistant chief at the polling station was in the ordinary course of his duties and his presence was non-consequential to the results of the election.

## **1.VOTER IMPORTATION**

In this court's opinion, these irregularities cannot be levered against IEBC. They range from the allegations that the 3<sup>rd</sup> respondent imported voters from another ward, that there was voter influence to allegations of voter bribery. This is one situation where **Raila 1** would apply as the malpractices are directed at IEBC and not the candidates or agents. the burden therefore remains with the Petitioner to prove that such irregularities did not exist.

It was stated by Mr. Nyongesa that the DW1 was the Returning officer for Matayos when voter registration was conducted in February and March 2017. He based on this to state that the DW1 could therefore not have helped the 3<sup>rd</sup> Respondent procure votes. The question of voter importation takes us back to the processes involved in an election. How viable is it that voters can be transferred from a particular station to vote in a totally different station altogether on the day of the election?

The **Election Act, 2011** stipulates under section 5 thus;

5. (1) Registration of voters and revision of the register of voters under this Act shall be carried out at all times except—

(a) in the case of a general election or an election under Article 138(5) of the Constitution, between the date of commencement of the sixty day period immediately before the election and the date of such election: Provided that this applies to the first general election under this Act;

(2) Notwithstanding subsection (1), where an election petition is filed in respect of an electoral area, between the date of the filing of the petition and the date of the by-election, where a court determines that a by-election is to be held, a voter shall not be allowed to transfer his or her vote to the affected electoral area.

(3) Any citizen of Kenya who has attained the age of eighteen years as evidenced by either a national identity card or a Kenyan passport and whose name is not in the register of voters shall be registered as a voter upon application, in the prescribed manner, to the Commission.

(4) All applicants for registration under this section shall be registered in the appropriate register by the registration officer or any other officer authorised by the Commission.

(5) The registration officer or any other authorised officer referred to in subsection (3) shall, at such times as the Commission may direct, transmit the information relating to the registration of the voter to the Commission for inclusion in the Register of Voters.

It suffices from section 5 that voters are free to transfer their registration from different polling stations. There only exists two scenarios through which a voter is barred from transferring his vote. These scenarios are as under section 5(1)(a) which provides that registration does not happen within the period of 60 days immediately before an election or on the day of such an election. The second scenario is under

section 5(1)(b) which exempts registration in the case of a by-election, between the date of the declaration of the vacancy of the seat concerned and the date of such by-election; or in the case of a referendum, between the date of the publication and the date of the referendum.

The election laws require any citizen of Kenya, regardless of where they come from to register as a voter, and that the Independent Electoral and Boundaries Commission is mandated to register the persons provided they have either their national identity cards or the passports. Mr. Makokha for the 3<sup>rd</sup> Respondent reiterated this fact in his submissions that it is the responsibility of the 1<sup>st</sup> Respondent, (IEBC) to ensure that eligible voters are registered in Kenya regardless of where they come from. Mr. Makokha on his side argued that Article 38(3) of the Constitution and sections 3, 4, 5, 6, 7, 8 and 11 of the Elections Act 2011 did away with any possibilities of voter importation.

Indeed, on this issue of voter importation, I note with certainty that one among the many criteria to ensure there has been a free and fair election is the registration of all persons eligible to be registered as voters. It is only through this exercise that the electorate gets an opportunity to choose their preferred representative. It is disastrous both if ‘foreigners’ are allowed to come and take part in a vote for a person who shall not be their representative and similarly if eligible persons who are mandated to choose a representative are locked out due to technicalities. It is therefore mandatory that such claims of voter importation be accompanied by congruent evidence to prove importation. Mr. Ongoya Elisha explained in “IMPORTATION” OF VOTERS IN KENYA’S ELECTORAL PROCESS: A CASE OF LAWS THAT CAN DEFY AN ANGEL’S ATTEMPT TO ENFORCE IN THE ABSENCE OF A VIGILANT ELECTORATE, that ‘In the country Kenya, there is no mechanism of regulating movement of people from one constituency to another; it follows that a domestic servant who works in Westlands, Nairobi but ordinarily resides in Kawangware area of Nairobi will lawfully register as a voter either in Westlands constituency or Dagoreti constituency. Assuming that such a citizen has a rural home in Esirabe village where (s)he was born and bred and where he/she possesses a grass thatched house to which (s)he resorts for the Christmas festivities every year, how does the Commission deal with such a voter when (s)he is making the option on where to register as a voter?’

It is my considered view that the petitioner has not tendered this court with evidence enough to prove the offence of voter importation. It is a duty of the petitioner and indeed the electorate at large to exercise due diligence and flush out any purported foreigners if at all imported to their constituency. The IEBC does not have any other talisman for their mandate is to register Kenyans who are eligible to vote as voters. This eligibility relies on procedural matters like whether the voter is in possession of an ID or a passport that identifies him as a Kenyan citizen. Given the nature of the Kenyan situation where people freely traverse the constituencies it is upon the IEBC to undertake the registration of the voters regardless of where they permanently reside. Therefore, it is reasonable to wonder why the petitioner together with his agents refrained from executing their mandate to report any such election offence if indeed it happened under their watch and to their detriment.

Having said this, I conclude therefore that the claim of voter importation has not been properly proved to the satisfaction of this court. The claim must therefore fail.

## **1. VOTER BRIBERY AND INFLUENCE**

PW3 stated that he saw people in a hotel at the shopping centre. That he saw Beatrice Akoth enticing the people from Bukhaya West. He referred to photograph number 5(d) in which he said there was a person coming from eating with a toothpick in the mouth. That when he went to vote, he saw the people who had been enticed at the hotel voting. He gave an example of Silvester Juma who he said was from Bukhaya West but who voted in stream 3 of 3 at Busibwabo primary school. PW3 however, stated that people normally visit the shopping centre. He said that it was around noon and that people normally eat at the place over lunch hours.

PW4 said that he was a member of Kwasala self-help group which the 3<sup>rd</sup> Respondent bribed and unduly influenced to vote for him. He stated that he received a call from the chairman of the group who informed him that the 3<sup>rd</sup> Respondent wanted them to transfer their votes. However, PW4 did not have any

evidence to prove to the court that indeed such a group existed and that he was a member of such a group. PW4 stated that he knew that such an arrangement was an offence but that he did not take any step to report such an occurrence.

Mr. Makokha submitted as regards this claim that no particulars whatsoever were provided as to prove the existence of the group, that no minutes were there to demonstrate that indeed the issue was discussed in the group. Counsel referred the court to **Halsbury's Laws of England, 4<sup>th</sup> Ed, Vol. 15** as regards bribery which records thus;

**“...clear and unequivocal proof is required before a case of bribery will be held to have been established. Suspicion is not sufficient, and the confession of the person alleged to have been bribed is not conclusive”**

Mr. Makokha submitted that the photographs being relied upon by the Petitioner were taken at around noon which according to him it's the ordinary time for taking lunch. He questioned why PW4 failed to produce the registration certificate or minutes of the group to prove its existence.

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

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

***(a) before or during an election—***

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

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

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

***commits the offence of treating.***

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

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

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

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

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

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

***commits the offence of undue influence.***

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

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

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

***(b) in any manner influences the result of an election,***

***commits an offence.***

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

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

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

***commits an offence.***

***64. (1) A candidate who—***

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

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

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

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

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

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

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

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

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

—

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

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

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

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

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

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

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

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

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

I have handled all of the aforementioned issues comprising the issue of voter importation, voter bribery and undue influence concurrently. The Election Act has classified these issues as electoral offences thus drawing a line in the mode of their determination. I set out in the preliminary to handle the issue of the standard of proof and burden of proof since as the court stated in **MUSIKARI NAZI KOMBO V MOSES MASIKA WETANGULA & 2 OTHERS [2013] EKLR** that it is vital to first dispense with matters of who bears the burden of prove and to what extent. Particularly the court relied on the case of **MOSES WANJALA LUKOYE V BENARD ALFRED WEKESA SAMBU & 3 OTHERS (2013) BGM HC EP NO. 2 OF 2013** which stated that;

*{34} The two terminologies; the burden of proof and the standard of proof are closely related subjects albeit distinct, (...). The legal burden of proof in an election petition rests with the*

***petitioner; for he is the party desiring the court to take action on the allegations in the petition. Therefore, where the petitioner has laid prima facie evidence against the Respondent including the electoral body which as a matter of law must be a Respondent in an Election Petition, the law says that the evidential burden has been created on the shoulders of the Respondent who would fail if he does not adduce evidence in rebuttal.***

I quote further from the case of **RAILA ODINGA V INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 3 OTHERS (2013) SC EP NO.5 OF 2013** in which the court stated thus;

***(...)a Petitioner should be under obligation to discharge the initial burden of proof, before the Respondents are invited to bear the evidential burden***

The question that must arise from the allegations levelled by the Petitioner against the 3<sup>rd</sup> Respondent as regards voter importation, bribery and undue influence is whether the Petitioner has provided this court with evidence enough to establish the occurrence of these acts after which the Respondent shall be invited to rebut. The burden in such allegations is not ordinarily as it is in other electoral disputes. These acts have been described by the Elections Act, 2011 as electoral offences whose standard of proof is much higher. Unlike in other electoral disputes where the standard of proof is slightly above that of balance of probabilities albeit lower than beyond reasonable doubt, in electoral offences as the ones alleged herein, the Petitioner has the burden of proving to this court that indeed the Respondent, either in person or through his agents committed the offences.

This position was reiterated in **BENARD SHINALI MASAKA V BONNY KHALWALE & 2 OTHERS (2011) eKLR** as was similarly stated in **RAILA ODINGA CASE (supra)** and also in **JOHO V NYANGE & ANOTHER (2008) EP NO.4 OF 2008** that;

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

The allegations on voter importation, voter bribery and undue influence are serious criminal offences directed at the 3<sup>rd</sup> Respondent. This thus raises the standard with which such allegations are to be proved. The ordinarily set standard is that of beyond reasonable doubt which normally is applicable in criminal matters. The list of members who are said to have been imported is not given exclusively to show that such members were actually not registered at the polling station claimed. PW3 fronted a loose argument that Silvester Juma was an imported voter because his home was in Bukhayo West and yet he voted in Busibwabo primary school.

On the other issue to do with voter bribery, the petitioner claimed that he did not witness Beatrice buying food at the hotel but that he was told by his agents. PW3 stated only that he saw people in a hotel at the shopping centre and said that he saw Beatrice enticing them especially those from Bukhayo west. He claimed that only because he saw someone coming from the hotel with a toothpick in the mouth, then the person must have been among those enticed by Beatrice. PW4 stated that he was a member of Kwasala self-help group, and that the 3<sup>rd</sup> Respondent bribed and unduly influenced the group to vote for him. The witness however, did not back his allegations with any sought of proof. He could not produce the registration certificate to show that indeed such a group existed. He could not also provide the minutes of the group discussing the matter of voting for the 3<sup>rd</sup> Respondent. Also, the witness did not provide the list of the members of the said group but gave an example of one person, Mr. Silvester Juma whom he said was a member of the group.

This court notes that bribery is an act that require the one alleging it to prove the existence of a certain state of mind akin to what in criminal law may be called ***Mensrea***. The fact that people were seen

entering into a hotel with Beatrice Akoth cannot amount to bribery or voter influence *per se*. One needs to go further and prove that by enticing people into that hotel and by people eating in that hotel, **Beatrice had the intention** of having the voters cast their votes in a particular way for a particular candidate. In this case, the burden of proof rested with the petitioner and in this court's opinion, the petitioner did not discharge that burden.

This court noted from the evidence given by the petitioner's witnesses that despite having allegedly witnessed the occurrence of these heinous acts of electoral compromises, they abstained from taking any step to report to the relevant authorities. There is an implied duty on the petitioner, his agents and indeed members of the public to report to the IEBC or alternatively the police where such acts are being done. In the absence of sufficient evidence, this court finds that the allegations for voter importation, voter bribery and undue influence have not been proved and they therefore must fail.

In a nutshell, I am convinced that the evidence of the Petitioner and his witnesses does not meet the threshold of above balance of probabilities as set out in **Raila 1**. There is a multiplicity of loopholes in the evidence and questions abound as to why the agents having well understood their mandate could not follow the laid down procedures in communicating their grievances.

### **“WHETHER THE ELECTION WAS FREE, FAIR AND TRANSPARENT”**

The issues discussed herein below are targeted at answering the issue which was framed in a rather generalized manner.

Following a keen study of the broad issues which were raised and submitted on separately by the Counsels, I nonetheless have decided to join them and handle them together. The broad issues are informative of each other and they touch substantively on similar facts. The issues that I hereby embark on are;

#### **1. IRREGULARITIES**

There were irregularities generally levered against IEBC. They range from the allegations that the agents were denied access, heavy handedness, intimidation to allegations that the vote counting was opaque. This is one situation where **Raila 2** would apply as the malpractices are directed at IEBC and not the candidates or agents. the burden therefore shifts to IEBC to prove that such irregularities did not exist.

**PW1** stated in his evidence in chief that at Nasira AC primary school, the Returning Officer was intimidating, and he threatened his agents. He stated that there were instances when the IEBC officials proceeded with the activities without the presence of the agents. He complained of massive irregularities during counting and said that there was a variation on Form 36B adding that a figure of 100 votes disappeared. He stated further that there was an altercation on Busibwabo which was neither signed nor explained. PW1 said that he did not report these shortcomings anywhere.

PW2 complained that the Presiding Officer did not allow him or any agent to verify what signature would go to which contestant. He gave a description of the scene during counting time. That the clerks were lined up on one side, that the Presiding officer was calling out the names and giving the ballots to the clerks without showing to the clerks. He said that he refused to sign the forms he is required to sign as a protest to the improper sorting and tallying of votes.

PW5 stated that the presiding officer did not show them which vote was for who during the sorting and that the returning officer was hostile to them and told them that he could do without them. PW5 explained that just like PW2 she also refused to sign as a protest against the irregularities. She went further to state that she saw many rejected votes being given to other candidates. That she reported all of these happenings to her principal whom she was representing at the station, but the principal seemed satisfied since he did not lodge any complaint. She stated further that she saw the Assistant Chief at the station four times on the material day and that he was talking to the presiding officer inside the counting room.

PW6 also faulted the counting process saying that the IEBC officials were counting and sorting for themselves without showing the agents and the people around. He stated that the whole tallying process was not transparent. He added that the presiding officer did not announce the votes that were garnered by the candidates and that PW6 only knew about them when he went to sign. However, he said that he did not raise any complaints whatsoever with the presiding officer and he also did not write down any remarks when he went to sign.

Just like all the other agents, PW7 stated that proper procedure was not followed when sorting the votes. She stated that the agents were not allowed to see which ballot for whom was. She said that she refused to sign the form because of the conditions. That she was not satisfied with the process. That she reported to her principal who was a Jubilee aspirant in the election, but the principal seemed not to be moved since he was contended. He did not report or complain to any authority and did not show any signs whatsoever of reporting.

DW1 who was the returning officer stated that results were approved by agents in each polling station and explained that approval is done through signing. He said that he issued Form 36(c) which is the certificate to George Makhayaka Busera on 10<sup>th</sup> August 2017 after tallying and finding him to have been the winner. According to the tally, he outlined the results to have been as follows;

1. ABOTE RAPHAEL 317
2. BUSERA GEORGE MAKHAYAKA 1428
3. OBERE TITUS OKUMU 28
4. OKUKU WYCLIFF WANDERA 232
5. WANZALA FREDRICK ODUOR 782
6. ZAKAYO NYONGESA 1379

**THE** returning officer stated that if there was any error with the results delivered to him by the presiding officers, he could not change such results because normally they are sent to Nairobi by the presiding officers. However, he said such errors are brought to him as issues from the agents. He explained that Gazette notice number 8240 erroneously captured Zakayo Nyongesa as the winner, yet he was in position 2. That upon realizing the error, he contacted the DEPUTY Returning Officer to give guidance as to what should be done about the error. On 23<sup>rd</sup> August 2017 he made his comments and forwarded to the County Election Manager. He stated that on 25<sup>th</sup> August 2017 a correction was issued to the earlier gazetted candidate of Busibwabo to include George Busera. As regards issues to do with absentia of agents, he said that elections cannot be stopped due to lack of agents, that it is the responsibility of candidates to bring the agents to the station.

**DW2** he maintained that he was displaying the ballots to the agents and the people around both on the top and the back side. He said that the tallying process was done in line with the law and that any person who might have had a genuine complaint as regards the process would have followed the right procedure of recording down the claim.

DW3 on his hand gave a description of what transpired during the tallying time. He stated that;

1. The presiding officer took the boxes
2. The agents confirmed the seals
3. The seals were cut and votes poured down
4. Clerks were on the one side

5. Presiding officer was on the other side assisted by the deputy presiding officer
6. The presiding officer was opening the ballots showing both sides
7. He then gave the ballots to the assigned clerks
8. That the exercise was done without any fraud or mischief. He went further to state that the rejected and stray ballots were held by DW3 and that the clerks were holding the candidates votes, each clerk with a specific candidate.

DW4 said that there was no power that night. He said that there were skirmishes during counting that delayed MCAs counting process. He stated that a group of people went at the station when they were just about to begin counting MCA votes. He said that he informed the police who had 2 police officers assigned by IEBC. They called for re-enforcement which they received from their fellows on patrol that night. He said that one of the agents proposed that the MCA votes be counted during daytime. It was around 4 am and so the other agents agreed to the proposal given the circumstances. He reiterated the layout of the tallying process as has been elaborated herein by DW3.

DW7 the assistant chief stated that he visited Nasra to see how the exercise was progressing. That he was to oversee the exercise so that he could report to his seniors of the situation. He explained that on 9<sup>th</sup> August 2017 at 0945hours he heard bangs on the roof. He went at the station and found two groups arguing. That he went to the counting room, he knocked and introduced himself after which he asked to speak to the presiding officer. That with the help of the enforcement team, he was able to calm the crowds since that was the only thing he went there to do.

Mr. Makokha representing the 3<sup>rd</sup> Respondent made extensive submissions regarding the validity of the election and the question whether the election ought to be nullified. He said that the declaration of results is not by Gazette Notice and that it was factually wrong for the petitioner to refer to the gazette notice number 8240 of 22<sup>nd</sup> August 2017 as the results which were declared. He referred the court to the case of **MWAMLOLE TCHAPPU MBWANA V INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 4 OTHERS (2017) E.P NO. 5 OF 2017** in which the court stated at paragraph 34 thus;

***The onus upon the petitioner under Rule 8(1) of the Election Petition Rules would only be discharged if he sets out the results as declared by the returning officer.***

Counsel said that election results are the ones announced and declared by the returning officer pursuant to section 39(1) and 1(A) of the Elections Act, 2011, Regulations 79(1), (2)(b), (3), (7), (8) and Regulation 83 (1) (a) (e) (f) and (g) of the Elections (General) Regulations, 2012 as amended, which is done publicly and immediately after close of polling.

Counsel submitted that the yardstick for determining whether the impugned elections were held in a free, fair and credible manner is provided for by Article 81(e) of the Constitution. He submitted that the petitioner had not shown that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents failed to comply with Article 86 and other provisions of the law.

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

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

He reiterated that the mere presence of irregularities does not vitiate an election. That the objective of section 83 is to insulate the electoral process from abuse and frivolous claims and that it is the duty of the court to preserve the will of the people where it is shown that the election was done in accordance with

the law. Counsel further referred the court to the words of the court in **MORGAN OTHERS V SIMPSON & ANOTHER (1974) 3 ALL ER** which enshrined the factors to be met for an election court to invalidate an election. Counsel stated that the Petitioner did not make a case on how the allegations he raised affected the integrity of the results. He explained that after the 3<sup>rd</sup> Respondent was successfully elected with 1423 votes he was then issued with a certificate of nominated member of county assembly which he still holds. That no evidence was adduced questioning the regularity or validity of the certificate.

Mr. Okeyo for the Petitioner defended the petition claiming that the election was marred by irregularities which make the election a candidate for nullification. He reproduced **Halsbury's Laws of England, 3<sup>rd</sup> Ed Vol. 14** in which it was documented thus;

***At common law a parliamentary election might be avoided on an election petition on the grounds of irregularities by election officials, if the irregularities were so great as to prevent the election being a true election –(or) that the irregularities affected the results.***

Counsel stated that there was violence at Nasira stream 2 of 2 and that unlimited access was granted to the Assistant Chief which materially interfered with the election.

Mr. Makokha on his end explained that an election cannot be invalidated unless it offends the constitutional standards and the electoral laws, or it fails to comply with the written law in a manner as to affect the results. He referred to section 75 (4) of the Elections (General) Regulations obligates the presiding officer not to commence the counting or recount of votes unless he is of the opinion that such count or recount can be conveniently completed without a break. He referred also to the result of the scrutiny and recount which he said showed that none of the contestants was given undue advantage over the other by being assigned a vote other than that cast in their favour.

I have considered all the evidence and the submissions by the counsels.

Section 83 is informative in this regard. The section provides that;

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

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

I am guided by the locus classicus case of **MORGAN & OTHERS V SIMPSON & ANOTHER (1974) 3 ALL ER** where the learned judge had the following to say;

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

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

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

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

## **1. VOTE COUNTING PROCEDURE.**

This was raised by the petitioner through PW6 one of his agents. He said that they were trained to follow the following sequence when counting the votes after the elections;

1. President
2. MP
3. MCA
4. Senator
5. Woman Representative
6. Governor

PW2 also said that the sorting was supposed to be open the ballot and then votes shown to assert whose it was.

Regulation 75 (1) provides the Commencement and sequence of the count. That the presiding officer shall in the presence of the candidates or agents, proceed to arrange the counting venue, assign duties to the clerks and begin to count the votes for that polling station. This is exactly what the P.O did with respect to this case as was elaborated by the witnesses during cross examination. It is Regulation 75 (2) that creates a bone of contention.

“the presiding officer shall carry out the counting of votes for the respective elective posts in the following order-

- a) president
- b) member of national assembly
- c) member of the county assembly
- d) senator
- e) county woman representative in the national assembly
- f) county governor.

This is the same alleged not to have been followed by the petitioner. In this case, the burden

Of proof shifted to IEBC to justify why they changed of the vote counting sequence such that the votes of the MCA were counted last instead of third

However, to what extent can the irregularities be said to amount to a nullification of an election? Are there trivial irregularities which a court can overlook in an election petition or should the court annul an election based on any irregularity proved regardless of the magnitude? As earlier, observed, the changing of the counting sequence did NOT affect the final result and such anomaly amounts to a non-consequential irregularity which cannot warrant the nullification of an election.

## **1. WHERE AGENTS DID NOT SIGN FORM 36 A**

Regulation 79 provides as follows;

“1) the presiding officer, the candidates or agents shall sign the declaration in respect of the elections.

Regulation 79 (3) provides that where any candidate or agent refuses or otherwise fails to sign the declaration form, the candidates or agents shall be required to record the reasons for the refusal or failure to sign. This provision imposes an obligation on the candidates or agents and not the election officials as was discussed by the court in **John Lokitare Lodinyo V Mark Lomunokoi & 2others [2013] eKLR**. It is Regulation 79(4) and 79(5) that impose such on an election official. However, the refusal by a candidate or agent to sign would not invalidate an election as established by Regulation 79 (6).

In this regard, the court finds that generally, the respondents’ witnesses indicated that the election was free, fair and transparent except for the counting procedure; the sequence. The Petitioner’s main complaint is that some of his agents DID NOT sign form 36 As. Does this really invalidate an election? I will answer in the negative. The courts findings on this aspect is that the petitioner has not proved any substantial irregularity even for the form 36 As which were allegedly not signed by the petitioner’s agents to warrant invalidation.

I am aware from the witnesses who testified in court that indeed there were a number of anomalies during the election process in issue herein. Such anomaly includes the changing of the vote counting sequence such that the votes of the MCA were counted last instead of third. However, to what extent can the irregularities be said to amount to a nullification of an election? Are there trivial irregularities which a court can overlook in an election petition or should the court annul an election based on any irregularity proved regardless of the magnitude? As earlier, observed, the changing of the counting sequence did NOT affect the final result and such anomaly amounts to a non-consequential irregularity which cannot warrant the nullification of an election.

I have evaluated the evidence of the witnesses from both sides. I also observed their demeanour. In this regard, the court finds that generally, the respondents’ witnesses indicated that the election was free, fair and transparent except for the counting procedure; the sequence. The Petitioner’s main complaint is that some of his agents DID NOT sign form 36 As. Does this really invalidate an election? I will answer in the negative. The courts findings on this aspect is that the petitioner has not proved any substantial irregularity even for the form 36 As which were allegedly not signed by the petitioner’s agents to warrant invalidation.

In my opinion, the allegations levelled against IEBC were not proved. I said earlier, the burden of proof shifted to the IEBC to prove that the alleged malpractices did not exist. From the evidence of the 2<sup>nd</sup> respondent and other witnesses on the defence side, I am convinced that IEBC discharged the burden of proof that such malpractices did not exist at the alleged polling stations. I do NOT find that IEBC officials did something they were not supposed to do or did anything they were not supposed to do in any of the polling stations in Busibwabo Ward.

## **1. WAS THE ELECTION CONDUCTED IN ACCORDANCE WITH THE LAW?**

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

***‘free and fair elections, which are***

***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 then proceeds to provide as follows;

***‘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’***

The petitioner decried voter importation, bribery and inducement. This claim has been already dispensed with herein and this court found that the petitioner had not provided sufficient proof for the same. Most of the irregularities cited by the petitioner relate to the tallying exercise and the aftermath of the poll. All of the agents who testified for the petitioner faulted the tallying process. They stated that they did not sign the forms which they were required to sign as protest against the improper tally.

It was alleged that the presiding officer did the tally in a secretive way and that he did not display the ballots to the agents as is required by law. This is a grave allegation that directly contravenes the constitutional requirements of a free and fair election. However, neither of the agents who protested through not signing made any complaint either to the presiding officer or the returning officer. The law requires that if there is any irregularity at the station which was observed by the agents at the station, then they should at the end of the session, write down the remarks of whatever the irregularity was before signing the form. What the agents did is reminiscent to a creation of their own law and then following it to the total disregard of what the procedure should be. They claim that they reported the irregularities to their principals who were candidates in the election. These principals did not take any step towards reporting the matter or launching a complaint.

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

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

The court could have benefitted immeasurably from the formal claims and/or complaints from the agents at the station when they witnessed the occurrence of irregularities. They all testified to the act that they were well trained and therefore that they understood what their role was before, during and after elections. Refusing to jot down the remarks they purportedly had as concerns the election and thereafter refusing to append their signatures could have been joyously done as a protest. However, it is an injustice to this court because it cannot enjoy the privilege which has been rightfully bestowed upon it to scrutinize and interrogate such forms containing any complaints and/or remarks for irregularities committed.

There were no substantive complaints by the petitioner as regards the process of voting. I will therefore not belabour on what happened during the voting since I take it that it was done within the precincts of the law. The petitioner did not prove to the required level the allegations he raises in the petition. In this regard I rely to the case of **MUSIKARI KOMBO V MOSES WETANGULA** in which the court stated;

***“...it is now settled that in election petitions, the standard of proof in allegations other than those of commission of electoral offences is higher than that of balance of probabilities required in civil cases although it does not assume the standard of beyond reasonable doubt”***

In handling the question of what it means for a particular election to have failed to comply with the law, the court in a Ugandan case, **BISIGYE V MUSEVENI (2001) EP NO.1 OF 2001** stated as follows;

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

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

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

Having had the opportunity to go through and reproduce herein the wise words of my colleagues, and further having scrutinised the evidence given herein, I am convinced that the evidence does not meet the threshold of above balance of probabilities. There is a multiplicity of loopholes in the evidence and questions abound as to why the agents having well understood their mandate could not follow the laid down procedures in communicating their grievances. In this court’s opinion, failure by the Petitioners, or any party’s agents to be keen on what was happening at the polling station, or to sign the required documents or to exercise their rights of protest and demands for retallying at the polling station cannot be blamed on anyone else other than themselves. No-one else can be blamed for them having slept on their job.

### **1.DID THE IRREGULARITIES (IF ANY) AFFECT THE RESULT?**

The irregularities complained of herein, even though not proved by cogent evidence, touches substantively on the conduct of the tallying which is congruent to the result obtained. It was alleged that the presiding officer did not display the ballots to the agents or the people around for confirmation of the mark on the ballot. This secretiveness was reason enough for the agents to believe that there was some mischief in the process. However, any such aspersions casted have one panacea: the order for scrutiny and recount.

This court ordered for scrutiny and recount of the votes. This exercise was carried out in accordance with the law and the results made available to this court.

### **1. RESULTS OF THE SCRUTINY AND RECOUNT**

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

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

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

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

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

**ELECTION PETITION NO. 4 OF 2017**

**TABULATION FOR BUSIBWABO WARD**

**VALID VOTES AS PER I.E.B.C.**

<b>POLLING STATION CODE</b>	<b>POLLING STATION NAME</b>	<b>TOTAL REGISTERED VOTERS</b>	<b>ABWOTO RAPHAEL</b>	<b>BUSERA GEORGE</b>	<b>OBARA OKUDYI</b>	<b>WYCLIFFE WANDERA</b>	<b>FREDRICK OWINO</b>
040228114400501	BUSIBWABO PRI. SCH.	524	9	126	0	10	107
0402281144004502	BUSIBWABO PRI. SCH.	525	11	128	1	4	116
0402281144004503	BUSIBWABO PRI. SCH.	525	16	141	0	10	113
0402281144004601	BUSABAKWA PRI.	441	14	64	1	48	223
0402281144004701	NASRA R.C. PRI. SCH.	445	1	159	4	11	30
0402281144004702	NASRA R.C. PRI. SCH.	445	2	174	5	88	33
0402281144004801	NASRA A.C. PRI. SCH.	504	5	248	6	21	35
0402281144004802	NASRA A.C. PRI. SCH.	504	6	272	7	15	33
0402281144004901	ALUNGORI	665	46	51	4	5	26



040228114400501	BUSIBWABO PRI. SCH.	524	9	126	0	10	107
0402281144004502	BUSIBWABO PRI. SCH.	525	11	128	1	4	116
0402281144004503	BUSIBWABO PRI. SCH.	525	14	136	0	10	110
0402281144004601	BUSABAKWA PRI.	441	14	64	1	48	223
0402281144004701	NASRA R.C. PRI. SCH.	445	2	157	4	110	30
0402281144004702	NASRA R.C. PRI. SCH.	445	2	174	5	88	33
0402281144004801	NASRA A.C. PRI. SCH.	504	5	248	6	21	35
0402281144004802	NASRA A.C. PRI. SCH.	504	6	264	7	15	33
0402281144004901	ALUNGORI PRI. SCH.	665	46	51	4	5	26
0402281144005001	BUSIDIRU PRI. SCH.	361	103	34	0	13	30
0402281144005002	BUSIDIRU PRI. SCH.	362	104	26	0	7	36
	<b>TOTALS</b>	<b>5301</b>	<b>316</b>	<b>1408</b>	<b>28</b>	<b>331</b>	<b>779</b>

There was an envelope that contained 2 rejected votes which had been cast in favor of **GEORGE BUSERA** but there was no reason for the rejection though they bore the **I.E.B.C** stamp for rejected votes and also there are no submissions in respect to the same, and the same are to be redistributed to George Makhayaka Busera since it is clear that the intention of the voters for the two votes was clearly in favour of the said Makhayaka Busera

#### **VALID VOTES UPON SCRUTINY**

<b>POLLING STATION CODE</b>	<b>POLLING STATION NAME</b>	<b>TOTAL REGIST ERED VOTERS</b>	<b>ABWOTO RAPHAEL</b>	<b>BUSERA GEORGE</b>	<b>OBARA OKUDOYE</b>	<b>WYCLIFFE WANDERA</b>	<b>FREDR OWINO</b>
040228114400501	BUSIBWABO	524	9	126	0	10	107

	PRI. SCH.						
0402281144004502	BUSIBWABO PRI. SCH.	525	11	128	1	4	116
0402281144004503	BUSIBWABO PRI. SCH.	525	14	136	0	10	110
0402281144004601	BUSABAKWA PRI.	441	14	64	1	48	223
0402281144004701	NASRA R.C. PRI. SCH.	445	2	157	4	110	30
0402281144004702	NASRA R.C. PRI. SCH.	445	2	174	5	88	33
0402281144004801	NASRA A.C. PRI. SCH.	504	5	248	6	21	35
0402281144004802	NASRA A.C. PRI. SCH.	504	6	264	7	15	33
0402281144004901	ALUNGORI PRI. SCH.	665	46	51	4	5	26
0402281144005001	BUSIDIRU PRI. SCH.	361	103	34	0	13	30
0402281144005002	BUSIDIRU PRI. SCH.	362	104	26	0	7	36
	<b>TOTALS</b>	<b>5301</b>	<b>316</b>	<b>1410</b>	<b>28</b>	<b>331</b>	<b>779</b>

RANK	CANDIDATE'S NAME	VOTES ON 8/8/17 (PAR IEBC)
1	BUSERA GEORGE MAKHAYAKA	1410
2	ZAKAYO NYONGESA	1367
3	WANZALA FREDRICK ODUOR	779
4	ABOTE RAPHAEL	316
5	OKUKU WYCLIFF WANDERA	331

6	OBERA TITUS EKODOYE	28
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The final results of the scrutiny and recount / retally in the order of rank were as follows;

RANK	CANDIDATE'S NAME	VOTES (PAR IEBC)	VOTES (SCRUTINY)	MARGIN
1	BUSERAGEORGE MAKHAYAKA	1428	1410	
2	ZAKAYO NYONGESA	1379	1367	
3	WANZELA FREDRICK ODUOR	782	779	
4	ABOTE RAPHAEL	317	316	
5	OKUKU WYCLIFF WANDERA	232	331	
6	OBERE TITUS OKUMU	28	28	

The court finds that there was no undue favour on any of the candidates by the IEBC officials. It was ascertained that each candidate got the rightful votes as they deserved.

From the result of the scrutiny, not much difference was discovered save for a few changes which have no significant change on the results basically because the changes affected candidates other than the petitioner or the respondent and secondly because even where the changes involved the two, the difference was inconsequential for purposes of the final tally.

## 1. CONCLUSION

I think that the last issue should be dealt with in the conclusive part of this judgement the issue was framed as;

### **“WHETHER THE 3<sup>RD</sup> RESPONDENT WAS VALIDLY AND LAWFULLY ELECTED AND DECLARED WINNER”**

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

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

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

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

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

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

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

“...the courts will strive to preserve an election as being in accordance with the law, even where there have been significant breaches of official duties and election rules, providing the results of the election was unaffected by those breaches ...”

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

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

The court has expressed itself in **NICHOLAS SALAT VS IEBC & OTHERS in Election Petition no.1 of 2013** that legal sufficiency in the election to mean that an election was conducted in a free, fair and credible manner and that it accurately represented the will of the electorate. It would not necessarily mean that the election was devoid of any errors, mistakes or irregularities. It means that if there were any such errors, mistakes or irregularities they were not of such magnitude that they substantially affected the results.

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

As such, I find that the petitioner has brought before this court mere allegations that actually touched on the authenticity of the election process. He **DID NOT** provide sufficient evidence to support his claims. It appears to this court that some of the issues raised like voter importation and voter bribery were just an after-thought to try and buff up petition to impress the court to imagine that there were crime-based malpractices of a high magnitude which the. Scrutiny done showed that the figures actually were almost similar to those of the IEBC. Even when the rejected votes were added to the petitioner, it did not make any difference in the final result in the order of ranking. The 3<sup>rd</sup> respondent still ranked first after scrutiny while the petitioner ranked second.

I therefore find the 3<sup>rd</sup> Respondent as having been validly elected as Member of County Assembly for Busibwabo Ward, declared by the returning officer and a certificate issued to him.

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

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

**THE UPSHOT**

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

1. I find no merit in the preliminary objection and I hereby dismiss the same.
2. The petitioner did not prove that the Assistant Chief influenced the IEBC officials or voters or candidates in any way. The court therefore finds that the presence of the Assistant chief at the polling station was in the ordinary course of his duties and was inconsequential to the results of the election.
3. Failure by the Petitioners, or any party's agents to be keen on what was happening at the polling station, or to sign the required documents or to exercise their rights of protest and demands for retallying at the polling station cannot be blamed on anyone else other than themselves. No-one else can be blamed for them having slept on their job. None of the agents called as witnesses in this case proved any malpractice or irregularity or illegality which is capable of forming the basis upon which this court would nullify the elections in question
4. In the courts opinion, the petitioner was duty bound to prove on a standard higher than that of a balance of probabilities but not as high as beyond reasonable doubt that there was voter importation, voter bribery and undue influence by the 3<sup>rd</sup> respondent. The court having listened to the witnesses, observed their demeanour and analysed their evidence finds that the petitioner did not discharge that duty to the required standard. In the absence of sufficient evidence, this court finds that the allegations for voter importation, voter bribery and undue influence have not been proved and they therefore must fail.
5. The allegations on voter importation, voter bribery and undue influence are serious criminal offences directed at the 3<sup>rd</sup> Respondent. This thus raises the standard with which such allegations are to be proved. The ordinarily set standard is that of beyond reasonable doubt which normally is applicable in criminal matters.
6. The list of members who are said to have been imported is not given exclusively to show that such members were actually not registered at the polling station claimed. It is my considered view that the petitioner has not tendered this court with evidence enough to prove the offence of voter importation.
7. There is a multiplicity of loopholes in the evidence and questions abound as to why the agents having well understood their mandate could not follow the laid down procedures in communicating their grievances.
8. The sequence of counting votes to have started counting votes for the president then MP and MCA last instead of third was not a fatal irregularity upon which this court could issue an order for nullification of elections or to justify a repeat of the elections.
9. From the result of the scrutiny, not much difference was discovered save for a few changes which have no significant change on the results basically because the changes affected candidates other than the petitioner or the respondent and secondly because even where the changes involved the two, the difference was inconsequential for purposes of the final tally
10. Gazette or deazztemenet cannot be termed as the instrument of declaration. That the process of election culminates in the issuance of a certificate
11. This court finds that the gazettelement of the petitioner as the Busiabwabo MCA and the subsequent gazettelement of the 3<sup>rd</sup> respondent t/. were both in error in the gazettelement of the petitioner was factually erroneous as he was not the winner since he was number two in the order of

ranks and the gazettelement of the 3<sup>rd</sup> respondent was legally erroneous since by the time IEBC gazetted him the IEBC had become *fanctus offio*.

12. The RO's mandate ended at announcing the results. and only an election court could change has change. The R.O should have waited for one of the parties to go to court for rectification. In the circumstances of this case, the R.O acted ultra vires the law.

13. This court being an election court can issue a declaration which is capable of superseding all certificates and corrigenda issued by IEBC.

14. Having heard this case on merits, this court hereby issues a **DECLARATION** that the 3<sup>rd</sup> respondent was validly elected as the Member of County Assembly, Busibwabo Ward of Matayos Constituency, Busia County

15. The confusion in gazettelement of the Petitioner as the winner and then degazetting him and gazetting the 3<sup>rd</sup> respondent as the winner was caused by IEBC's errors in posting results and thereby announcing the wrong candidate as the winner. The doctrine of reasonable expectation works in favour of both the Petitioner and the Respondent each of whom expected to be the winner. The mistakes by IEBC should not be visited on any of the two parties. In the circumstances costs should be borne by IEBC.

16. For the reasons set out in (15 above), I order that the petitioners costs and those of the 3<sup>rd</sup> respondent shall be paid by the 1<sup>st</sup> Respondent (IEBC) which I cap at Kshs. 300,000 /= (Three Hundred Thousand shillings) in respect of each.

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

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

Dated, signed and delivered at Busia this 5<sup>th</sup> day of February 2018

**A. N. WAKAHU C. M. BUSIA**