



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT AT NYAMIRA

ELECTION PETITION NO.02 OF 2017

**IN THE MATTER OF ELECTION ACT NO.24 OF 2011 LAWS OF KENYA AND THE
ELECTIONS (GENERAL) REGULATIONS 2012 AND ELECTIONS (PARLIAMENTARY &
COUNTY PETITION RULES 2017**

**IN THE MATTER OF THE MEMBER OF COUNTY ASSEMBLY ELECTIONS FOR
MAGWAGWA WARD IN NYAMIRA COUNTY HELD ON 8TH AUGUST 2017**

BETWEEN

HESBORN ARAO NYAKUNDI.....PETITIONER

AND

1. FRED NYACHAE OMAYO.....1ST RESPONDENT

2. MARJORIE P. OWUO.....2ND RESPONDENT

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

J U D G M E N T

A. INTRODUCTION

This is an election petition dated the 6th day of September 2017. It is an election for the member of County Assembly of Magwagwa Ward, the petition of Mr. Hesborn Arao Nyakundi.

B. BACKGROUND

1. THE PARTIES

That the petitioner is an adult of sound mind and duly registered voter in Magwagwa Ward, of Nyamira County

That the petitioner was a candidate for the position of member of County Assembly Magwagwa Ward of Nyamira County in the General Elections held on 8th August 2017.

That he contested on an Orange Democratic Movement (ODM) party ticket.

That the 1st Respondent was one of the candidates in the said General Election for Member of County Assembly Magwagwa Ward seat and was declared to be the duly elected member of County Assembly for Magwagwa Ward and issued with a certificate by the 2nd Respondent.

The 2nd Respondent was the Returning Officer duly appointed by the third Respondent as its official to conduct the said election in Magwagwa Ward and is enjoined as a party to this petition by reasons of her conduct and the conduct of officials being subordinate Election officials appointed under the Regulations.

The 3rd Respondent is the independent Electoral and Boundaries Commission (IEBC). It is an Independent Commission established under 88 as read together with Article 248 and 249 of the constitution of Kenya and the IEBC Act No.9 of 2011. The 3rd Respondent is constitutionally charged with the mandate and responsibility to conduct and/or supervise elections to any elective body or office established by the constitution.

2. BRIEF FACTS OF THE CASE:-

The petitioner filed a petition within the provisions of the law and served upon the Respondents by law questioning the validity of the election results of member of County Assembly Magwagwa Ward, in Nyamira County held on the 8/8/2017 as captured in form 36B which was annexed to the said petition.

Initially, the 1st Respondent raised a preliminary objection, it was canvassed allegedly for lack of service in it's entirety and the court made a ruling on the same and the court ruled that the petition should proceed to full hearing.

At the commencement of the hearing, the 1st Respondent raised an objection on the petition which was later abandoned and the court ruled that the said objection if any can be canvassed in the cause of the hearing.

The said objection was founded on typographical errors as contained in the latter parts of the petition in reference to the parties and the documents which said errors do not affect at all the credibility of the petitioner.

It is worth noting that the parties are properly described in the petition from the consent as required by the rules.

The petitioner did plead that the elections were marred with irregularities and illegalities ranging from incorrect tallying of result, interference, alterations, omission of figures and/or entries in forms 36A as against form 36B. That there was declaration of dubious and/or doubtful results, that there was collusion between the 2nd and 3rd Respondents to illegally, illegitimately and unlawfully and in the bungling of the said election in favour of the 1st Respondent as well as doctoring of the said results and finally the failures, negligence and/or carelessness of the 3rd Respondent to observe its constitutional obligations of conducting a free, fair transparent and verifiable election.

That these anomalies, either singly or plurality, rendered the process of the election a sham from which the will of the people of Magwagwa Ward cannot be vouched.

3. THE PARTIES RESPECTIVE CASES

1. A PRECISE SUMMARY OF THE PETITIONER'S CASE:-

The petitioner raised six main issues.

The first ground is inaccurate vote counting and tallying. Here, the petitioner identified the

following illegalities viz:-

a. INCORRECT TABULATION OF VOTES:-

The petitioner told the court that there was incorrect tabulation of votes cast in three polling stations namely:-

1. Getare primary School polling station, with 394, 395 registered voters codes 0462721 3600501 and 04627213600501 where the clerks did not allow the petitioner's agents to check against results as marked on the ballot papers during the counting of the results. The petitioner contended that in this polling station 789 votes would therefore not be accounted for.

2. In Esamba primary school polling station codes 046272136005101 and 046272136005101 with 441, 441 registered voters, the clerks did, not allow the petitioner's agents to check against the results as marked on the ballot papers during the counting of the results. The petitioner did state that in this polling station 882 votes were affected.

3. In Riomego PAG Primary School polling station with 489 registered voters, codes 046272136005201, the clerks did not allow the petitioner's agents to check against the results as marked on ballot papers. That in this polling station 489 votes were affected.

The petition did contend that the anomalies as highlighted above affected the counting and tallying of the total votes cast which obviously materially affects the outcome of the declared winner.

b. SIMILAR AND CONCURRENT RESULTS IN POLLING STATION

The petitioner stated that there were instances of similar vote distribution, manipulating, and doctoring, as set out below:-

i. At Nyakenyomisia primary School polling station with 410, 469 registered voters codes 046272136004701 and 046272136004702

Every candidate of member of county Assembly garnered a similar number of votes. The petitioner stated that that was suspicious, distrustful and treacherous. That in this polling station 819 votes were affected.

ii. At Esamige primary School Polling Station with 546,547 registered voters codes 046272136004501 and 046272136004503, the votes cast for the 1st Respondent were unbelievable as they showed the 1st Respondent to have had a high number of identical votes cast as compared to all the other candidates in the member of County Assembly race which in the petitioner's view made the whole exercise incredible. In this polling station 882 votes were affected.

c. MAKING OF FALSE ENTRIES

The petitioner's fourth ground in the petition was the making of false entries on form 36B. He has contended that the entries in form 36A were incorrect as they were falsified. The petitioner avers that Section 6(a) of the Election Offences Act No.37 of 2016 prescribes the election offence of false entry in the statutory forms by the officers of the 3rd Respondent.

The petitioner avers that commission of this offence is so serious that it undermines the credibility of the entire election exercise for member of the county Assembly, Magwagwa Ward.

It is the petitioner's contention that the 3rd Respondent's officers/agents, engaged in fraud and greatly compromised the integrity of the election by making false entries in various polling stations.

d. VIOLENCE AND INTIMIDATION

The petitioner's fifth ground was violence and intimidation. The petitioner told the court that his agents in two polling stations, vide at Getare and Riomego Primary Schools Polling stations were ejected and/or forced out of the polling station during the counting process. The petitioner argued that this was fatal to the elections as the agents could not confirm if the counting procedure was adhered to, the accuracy of the results declared in forms 36A, and the sealing of the ballot boxes.

e. FAILURES OF TECHNOLOGY

The 6th ground in the petition was failure of technology. The petitioner states that at Nyabwororo and Gitwebe Primary schools polling stations, codes 046272136005601 and 046272136004602, 046272136004603, with a total number of 426,418,419 respectively, the Kenya integrated and Elections management (KIEMS) kits to transmit results and the petitioner's agents were not allowed to check against the entry of results in forms 36A that in this polling stations 1,2,6,3 votes were affected.

3. THE PETITIONER'S EVIDENCE

In proof thereof, the petitioner called 6 witnesses. Their evidence in a nutshell was as follows:

The petitioner, one, Hesborn Arao Nyakundi, herein after referred to as PW1, testified.

It was his evidence that he voted at Nyabwororo polling station. He said that he had agents at all the polling stations whom were given appointment letters to as ODM party agents. That they were given appointment letters by the ODM Party. He also told the court that the ODM party agents represented all candidates referring on the ODM party PW1 testified in chief that results at Getare Primary School polling station were announced by clerks but he was not sure the exact stream this happened. He did admit that there was indeed a presiding officer who announced the results while in the presence of the petitioner conceded that he had not tendered evidence of even a single name of a clerk who announced the results.

At page 93 of the typed proceedings, the petitioner admitted that he did not have any evidence to prove the complaint that his agents were chased from some polling stations.

When cross examined by the Respondents' Counsels, and when taken through a number of forms 36 A by the said counsels PW1 (the petitioner) told the court that ODM agents and by extension his agents signed in 15 out of 21 form confirming their satisfaction with the results as at the time the results in those polling stations were declared. That those agents voluntarily signed those forms without any duress or threat of a gun.

The petitioner told the court that he had not presented evidence to prove his allegations of violence as well as the qualifications of the 1st Respondent. He did withdraw those complaints.

It is important to point out that the petitioner testified about Getare, Riomego and Esamba Primary Schools polling stations as the polling stations where the clerks announced results and his agents were not allowed to cross check against the results announced at the following centers. This is found at pages 3 of the petition and 71 of the typed proceedings.

During his testimony, the petitioner (PW1) was able to demonstrate to the court that at Nyabwororo Primary School polling station he garnered 154 votes but what was falsely captured in form 36A and 36B was 54 votes being purportedly the votes he garnered.

It is worth noting that PW1, the petitioner canvassed the issue at Getare Primary School polling station to the effect that a clerk announced the results instead of the presiding officer.

On the similarities and concurrencies in results declared on form 36 A and 36B, the petitioner testified

and attached form 36B showing the same, vide pages 4 and 72 of the petition and typed proceedings respectively. Form 36B of Esanige 1 & 3 polling station have also similar votes for one **FRED NYACHAE OMayio** the 1st Respondent herein, testified that there were instances of similar vote distribution, manipulation, and doctoring at Nyakenyaminsia primary school polling station with 410, 409 registered voter codes 046272136004701 and 046272136004702.

That every candidate of member of County Assembly garnered a similar number of votes in this polling station 819 votes were affected.

That at Esanige primary School polling station with 546, 547 registered voters codes, 046272136004501 and 046272136004503, the votes cast for the 1st respondent in stream 1 and 3 were unbelievable as they showed that the 1st Respondent got 157 identical votes cast as compared to all the other candidates in the Member of County Assembly race which in the petitioner's view made the whole exercise incredible. In this polling station 882 votes were affected.

PW2, one **EVANS ISABOKE ARANI** testified it was his evidence that he was an agent of ODM Party at Esamba Primary school polling station where he represented the petitioner. He claimed, that he was not allowed to do verification as an agent. He claimed that he signed in on the polling station diary when the polling station opened. Though he said he was at stream1, but the polling station diary for this polling station does not feature his name, at all. This witness said that he does not know how to read and write. The 1st respondent's witness Shadrack Nyang'au Atei DW6 did not see PW2 at the said polling station.

PW2 could not account for how his name appeared in the list of agents who signed the polling station diary for stream 2 after polling closed. He claimed that Frank Nyanuria wrote for him his name then Arani signed but Frank Nyamwaria's name appears in the sign in and sign out record for stream 1 and his handwriting does not match that of the person who wrote Arani's name in stream 2.

Besides that counsel for the 1st Respondent submitted that the signature appended does not match that appearing in the affidavit and that appearing on Arani's National Identity card.

It is on this premises, that the 1st Respondent's learned counsel submitted that Arani (PW2) was not a credible witness and that Arani was neither in stream 1 or 2 on the election day, so his evidence should be disregarded.

It is worth noting that examination by the respondents learned counsels, PW2 the court that he was tired when signing one of his signatures testified that he did not vote because the KIEMS KIT could not identify his fingers despite several attempts by the electoral officials to help him.

He did also inform the court that claims that several voters with similar problems as him voted was indeed hearsay and/or rumors, because he did not know any such voter. He also stated that he had heard about this from unnamed people.

PW-4, one **EVANS OPIYO SIRONGA** testified that he was a registered voter at Nyakenyomusia primary School polling center in stream 2. He said that they were told to stay outside when the elections were over. He did admit that he signed on form 36A. He did not name the person who forced him to sign on the said form. He however said that he was induced to sign with a promise of payment from IEBC, though he conceded that he had no arrangement with whoever assigned him as an agent that IEBC was to pay him.

PW-5 one, **DAVID SIKWEA NYANG'AU** testified that he voted at Riomego polling station where he also acted as an ODM agent. It was his evidence that the presiding officer (PO) ordered all agents to vacate the polling station to which they complied for two hours.

He did concede that there was no confrontation at the polling station. PW-5 did confirm that he signed from 36A, though he alleged that the Returning Officer told him to sign so that he could be paid. The

returning officer denied that the IEBC was promising agents payments to sign the forms.

PW-5 denied a statement in his affidavit, which was to the effect that there was a standoff outside the polling station prior to the counting of votes.

Sikwea's (PW5) testimony was dented by the testimony of the 1st Respondent who confirmed that in 2013, David Sikwea was a key witness in an election petition in which he lied to the court about how many votes the ODM candidate garnered and that he was disproved in a recount which led to the dismissal of the petition with costs. Sikwea also lied about his role in the last election by denying that he was not an agent and also failed to account for the change of his name from **HASSAN MOTENDE** to **DAVID SIKWEA**.

PW-5's testimony that the number of votes cast exceed the ballots issued to voters is disproved by entries in the polling station diary on used and unused ballots which did not exceed ballots cast.

PW-5's signature appears on the agents who signed the polling station diary after polling to confirm that the polling exercise had been conducted successfully. Indeed, Sikwea (PW-5 herein) admitted during cross-examination that he did not have any complaints on polling.

PW-6, one **ANTONY ONGAGA OMOTI** testified that he was a voter at Getare Primary School polling station where he was also an ODM agent, representing the petitioner. It was his evidence that there was massive voter assistance by the presiding officer which exercise he was denied the chance to witness, each and every assisted voting. He further stated that the presiding officer did not allow agents to identify the particular candidates whom the assisted voters wanted to vote.

He also testified that he did not sign form 36A and that his reasons for failing to sign were not recorded. He did also confirm to the court that he was not the only ODM agent at the polling station.

He explained his understanding of voter assisting exercise to the effect that the presiding officer reads out the names of candidates to the voter with the agent witnessing. He was shown page 11 of the 2nd & 3rd respondent's initial list of documents and he confirmed that indeed 5 agents of different parties, including one **ISAIAH NYARIBO** for ODM signed form 36A as an affirmation of their satisfaction with the results.

It is important to state that PW-6 was allowed to witness voting. He acknowledged that agents were being allowed to witness in turns. He could not therefore have been allowed to witness each and every assisted voting exercise.

He did testify further that agents were not allowed to check against ballot papers at Getare Primary School stream 1, polling station.

That is a very brief outline of the petitioner's evidence. To buttress the petitioner's evidence, his learned counsel filed written submissions dated the 17th day of January 2018. He also filed the petitioner's list of authorities. The same was filed in court on the 23/1/2018.

To support the above stated premises, the petitioner's learned counsel offered his oral highlights on the 31/1/2018. He did submit that the petition was filed within the stipulated time as provided by law. That is was accompanied by the supporting affidavit of the petitioner. That form 36B was annexed thereto, which form was used to declare the results of Magwagwa Ward. That having annexed form 36B, then the upshot is that the petition contains the results of the elections that are being challenged and the details of all the participants.

The petitioner's counsel submitted further that the parties in this petition are properly described. That even though there were typing errors in the petition, in the description, of the parties, that those errors did not go to the core of the pleadings such as to render the petition defective. That no preliminary objection was raised specifically on the said errors at the interlocutory stage. The only preliminary objection was

on the issue of service and the court made a ruling which has not been appealed against. He did urge this court to be guided by the election petition rules and Article 159(2) (d) of the constitution 2010, which gives this court power to be guided by that section, which provides that the court should not be guided by the technicalities and anomalies which do not go to the root of the petition.

Counsel further submitted that the 2nd Respondent who testified as the Returning Officer who carried out the said elections admitted she did not bring evidence from the presiding officers from the various polling stations. She also stated that she did not involve the presiding officers while doing her reply or answer to the petition, counsel further submitted that the 2nd respondent vide the 2nd, DW-1 herein admitted that there were instances of wrongful posting of results. That there were situations where the results were mixed up, that there were situations where there were no correct entries made while tabulating the results.

Because the 2nd respondent did not avail the presiding officers' evidence, the petitioner's counsel submitted that she thus told the court hearsay evidence since she was not seized of the evidence she was telling the court to support thus the petitioner's learned counsel relied on the law as laid down in the case of:

AHMED ABDULLAHI MOHAMMED & ANOTHER –vs- MOHAMMED ABDI MOHAMMED & 2 OTHERS [2018] eKLR

Counsel also submitted that the 2nd & 3rd respondents did not rebut the petitioner's witnesses' evidence as required by the law.

Regarding the issue on human errors, the petitioner's counsel relied on law as decided by Judge Mutuku S.N. in the case of:

MOHAMMED ALI MURSAI

-versus-

SAADIA MOHAMED & 2 OTHERS [2013] eKLR

In this case, a similar issue of entries made in the statutory forms arose. The Respondents attributed all the anomalies to human error and the court found that argument to be kin to an insult to the voters. It stated;

It is in the view of the court that some errors cannot be excused. For instance it cannot be explained how figures from forms could not be transmitted correctly to forms 36 or why all forms do not have statutory declarations. Returning officers had the responsibility of correctly transmitting all the data from all forms 35 to the constituency form 36 without errors or with minimal errors. Kenya is coming from the history of lack of confidence by the citizens in some of the organs of the government including the 2nd respondent and especially its predecessor, the ECK. I think it was time for this institution to rise above board in order to give the electorate confidence that their political rights will be protected”.

Counsel did submit in his written submissions at paragraphs 43, 44 that the 2nd & 3rd respondents had a statutory duty to correctly fill the forms containing the results of each six of the elections as provided by Regulations 83 (i) (e) of the Elections Regulations Rules, 2017.

The petitioner's submissions in paragraph 54 is to the effect that the petitioner canvassed the issue at Getare Primary School polling station where the clerk announced the results instead of the presiding officer, counsel submitted that, the act was contrary to Regulation 5 (1A) (b) of the Elections (General) Regulations 2012 and in breach of Regulations 5 of the Regulations that the presiding clerk wrongly delegated his duties to a stranger. That 489 votes were affected by the negligent conduct.

Counsel supported his argument with the law as laid down in the case of:

GEOFFREY KIRAGU NJOGU

-VERSUS-

PSC & 3 OTHERS [2015] eKLR, in which case the court held the proposition that a Returning Officer could not and was not allowed to delegate his duties.

In his rejoinder to the respondents' submissions, the petitioner's learned counsel, did associate himself with Mr. Malanga's submissions in response to the 1st Respondent's preliminary objection. He further stated that, the petition as filed does not leave any doubt as to what elections are being challenged by the petitioner. That there have been no other allegations that there is any other form 36B apart from the one that is annexed to the petitioner's supporting affidavit which was confirmed by the 2nd respondent vide the 2nd DW-1 herein, who was the maker of the same.

That the said forms 36B contains the results for each and every candidate for Magwagwa MCA ward. It shows who the winner was. It shows where the declaration was made and it was signed but the 2nd DW-1 vide the second respondent.

Counsel also submitted that the allegations made by the petitioner and his witnesses could only be countered by the presiding officers in respect of the happenings at the polling stations referred to by the petitioner and his witnesses.

Counsel also submitted that the 2nd respondent, thus the 2nd DW-1 cannot conclusively testify on what was entered on forms 36A which was done at the polling stations.

The petitioner's counsel did submit that the relevant forms in this petition are forms 36A and 36 B. That there was a typing error for form 36A such that it was typed as form 37A and form 36C instead of form 36B. On this issue, counsel urged the court to invoke the provisions of **Article 159(2) (d)** and overlook those errors.

The petitioner's counsel urged the court to find out that the petitioner has proved the allegations contained in the petition and that the said prayers are justified and the court should allow the prayers sought in the petition.

Counsel did submit on paragraphs 72, upto 78 about the failure by the 2nd & 3rd Respondents to call, as a witness, the presiding officers for Gitwebe, Nyakenyomisias, Getare and Esanige polling stations, election officers against whom serious allegations had been made should leave the court with only one option to draw adverse inference against the 2nd and 3rd Respondents', counsel supported this argument with the law as laid down in the case of,

1. JACINTA WANJALA MWATELA

-VS-

IEBC & 3 OTHERS [2013]eKLR, Hon. Odero J citing the case of WISNIEWSKI –VS- CENTRAL MANCHESTER HEALTH AUTHORITY 1997

PIQR 324, held that that the court will ultimately be at liberty to draw an adverse inference from the failure of witnesses to avail themselves for cross-examination.

Counsel further supported the argument of missing and non-availing of key witnesses, with the law held in the cases of;

a. Prest –V- Petrodel Resources limited & others [2013] UKSC 34,

b. Inland Revenue Commissioners, Ex PTC Coombs & co. [1991] 2AC 238.

c. British Railways Board –VS- Hemington [1972] AC 877, 930 – 931. And the seminal work of Julie Macdonald.

In his written submissions, the petitioner's learned counsel stated in paragraph 61 that the directions of Mr. Ezra Chilloba were not followed and were flouted on very many occasions during the elections for member of County Assembly Magwagwa ward. This is in respect of the polling station diary which was created pursuant to the Elections (general) Regulations, 29012. It was mandatory to fill the polling station diary and without alterations.

In paragraph 65 of the petitioner's submissions, counsel stated that an issue may arise on whether the petitioner in his pleadings made a complaint about the polling station diary. He relied on the law as held in the case of;

RAHMAN, R [on the application of] –VERSUS-

LOCAL GOVERNMENT ELECTION COURT AND OTHERS [2016] EWHC 1280 [ADMIN] at page 13, to support his position on that issue on the issue of unlawful assisted voting the petitioner's counsel, in paragraphs, 67, upto 70, submitted on this issue. He referred to Regulations 72 (5) (a) of the Elections (General) Regulations 2012.

He was emphatic that PW-6's evidence, at pages 138 -147 of the typed proceedings told the court that there were massive instances of voters being assisted to express their political will in the Magwagwa Ward County Assembly Elections of 8th August 2017. That this for example took place at Getare Primary School polling station. Counsel went ahead to submit that the 2nd & 3rd Respondents' neither rebutted the above stated assertions that they did not provide the relevant statutory materials [Forms 32A] to this court to demonstrate that such incidences were done in accordance to the laid down law and procedures.

The petitioner's learned counsel further submitted under paragraph 70, of their submissions that the 2nd & 3rd respondents' did not find it important to have the presiding officer of Getare Primary School polling station as a witness to provide the relevant information.

It is worth noting that the petitioner's learned counsel, submitted further that for there to be credibility, purity and integrity in elections, tabulation tallying, collation and declaration of results must be verifiable, transparent and at the very least accountable. Counsel submitted that the anomalies observed in the statutory documents, the forms 36A, 36B, polling station diaries and cross examination of the Respondents and their witnesses do show one thing, which is that the tabulation, tallying, collation and declaration of member of county Assembly Magwagwa Ward was tampered with such that no one can tell which candidate won the closely contested election, counsel further submitted in paragraph 87 of the petitioner's written submissions that the 2nd and 3rd respondents failed to discharge their burden of proof. They were short of explaining how there were massive omissions, blunders and errors of entries of votes on the statutory documents for various candidates in the election for member of county Assembly Magwagwa ward so as to validly declare the 1st Respondent as the winner of impugned elections.

That is a very brief outline of the petitioner's case.

3. THE BRIEF EVIDENCE OF THE 1ST RESPONDENT'S CASE

The 1st Respondent filed his answer to the petition. It was dated the 18/9/2017 and filed in court on the even date.

He also filed his Replying Affidavit dated the 18/9/2017 on the even date.

In response to the witness Affidavits dated November 05, 2017, filed on November 6th, 2017, and admitted by the court in its Ruling of November 21, 2017, the 1st Respondent filed his Replying Affidavit dated the 7/12/2017 and duly filed in court on the 8/12/2017. He did file his witnesses Affidavits. These were;

The witness Affidavits of;

- 1. DANIEL OMBOTO TURUNGI. It was dated the 7/12/2017**
- 2. ALFAYO SIGIRA GISORE. The Affidavits was dated the 7/12/23017.**
- 3. SINAGE AERA JOHNSON. His Affidavit was dated the 7/12/2017.**
- 4. SHADRACK ATEI NYANG'AU. His Affidavit was dated the 7/12/2017.**
- 5. DAVID KENGERE NYANTIKA. His Affidavit was dated the 7/12/2017**
- 6. FELISTUS NYANARO MOSE. His Affidavit was dated the 7/12/2017.**
- 7. EMENI BOCHABERI BARINI. His Affidavit was dated the 7/12/2017.**
- 8. GLADYS MONYANGI NYANG'AU. Her Affidavit was dated the 7/12/2017.**
- 9. ABRAHAM GESORE MARITIM. His Affidavit was dated the 7/12/2017**

It is key to note that all the above stated witnesses their Affidavits were sworn at Nyamira before Nyamweya Gilbert Advocate.

Secondly each witness's Affidavit was accompanied with his or her copy of the Kenyan National identity card, a letter of appointment as a polling/counting station agent issued by the Jubilee Party of Kenya, Nyamira County office, the oath of secrecy, duly commissioned by the commissioner for oaths/Magistrate except for the one of **ALFAYO SIGIRA GISORE**, whose letter of appointment was by NASA and oath of secrecy was attested by Moses A. Owuor Advocate.

To be quite brief, the first respondent one, **FRED NYACHAE OMAIYO** hereinafter referred to as DW-1, testified that he was one of the MCA candidates in the election for member of county Assembly Magwagwa ward, seat that was conducted on 8th August 2017. That he was declared the duly, elected MCA, and a certificate was issued to him to that effect by the 2nd Respondent.

He did state that he was not duly served with a copy of the petition as required by law and that he came to learn of this petition through the Kenya Gazette dated the 15th day of September 2017, whereby the Chief Justice outlined the various Judges and Magistrates that will be handling the filed election petitions. He did annex a copy of the gazette notice as annexure FNO-2, to that effect.

He was emphatic that the Elections were free, fair credible accurate, transparent and held in accordance with the spirit and intent of Article 86 of the constitution of Kenya, 2010, the Elections Act, 2011 and Elections [general] Regulations 2012.

It was his evidence that the votes cast as captured in forms 36A were properly counted, tallied, collated and recorded into form 36 B. He also stated, his party and himself and not influence the 2nd Respondent in performance of her duties as alleged by the petitioner.

It was his evidence that he was validly elected the member of county Assembly of Magwagwa ward through an electoral system that was fair, transparent and accountable.

He did also state that his party appointed agents to act for candidates in all elective posts in every polling station and he got to be familiar with all the agents in the 21 polling stations within Magwagwa ward.

The 1st Respondent, told the court in his further evidence that PW-6 one David Sikwea is his neighbour who he has all along known as Hassan Matende Nyang'ate. That PW-6 had also testified back in 2013 in an Election Petition challenging his Election then.

It is worth noting, that the 1st Respondent testified that there were minor transposition errors when results in forms 36A were transferred to Form 36B with respect to Nyabwororo polling station and Nyakenyomisia polling station stream 2. He however stated that that even adjusting these minor errors would only increase the petitioner's total vote tally to 2208 votes while his overall vote tally would increase to 2647 votes, with the margin between them increasing to 449 votes.

He did confirm that he got 157 votes in each of stream 1 and 3 at Esanige polling station and he saw no basis for the petitioner's alleged suspicion of those results in the absence of supporting evidence.

This court will point out that the contents of the 1st Respondent's Replying Affidavit dated the 7/12/2017 denied the evidence of the petitioner's witnesses evidence as contained in their respective Affidavits and their oral evidence in court.

The 1st Respondent, testified that the petitioner's and his witnesses' evidence was false because the election was not marred by any irregularities and/or illegalities. He also stated that the provisions of the constitution, the Election Act 2011 and the Elections [General] Regulations 2012, relating to polling tallying, counting and subsequent declaration of the results, were complied with and adhered to, both at the polling stations and at the constituency's tallying centre. That the same was done on the basis of the actual votes cast at all the polling stations as evidence in the form 36B.

That is a precise outline of the 1st Respondent's evidence.

DW-2, one ABRAHAM GISORE MARTIM, testified that he was a Jubilee Party agent at Nyabwororo primary School polling station. He adopted his witness Affidavit sworn on 7/12/2017 as his evidence in chief.

The contents of the said affidavit was to the effect that voting at Nyabwororo Primary School polling station went on smoothly without any problem at the end of which the petitioner garnered 154 votes while the 1st Respondent got 91 votes. He conceded that the results as shown on form 36B indicated that the petitioner got 54 votes as opposed to 154 votes in form 36A.

DW-3 one, EMENI BOCHABERI BARINI, did also adopt her Affidavit dated the 7/12/2017 as his evidence in chief. The said Affidavit was to the effect that the voting started and ended smoothly at Riomego Primary School polling station. She testified in court that she was an agent at Riomego PAG Primary School polling station and that she was representing a candidate who was unaffiliated to deny any political party. She did represent an independent candidate to that effect.

It was her evidence that the petitioner garnered 103 votes and the 1st Respondent got 208 votes at the said polling station. She also stated that she signed form 36A to affirm her satisfaction with the entire process in that particular polling station. She also told the court that she was present at the time of vote count. She did confirm that the presiding officer, by the name, ISABELLA, would show ballot papers for MCA to the agents which were put into bundles once agents confirmed the candidates for which a ballot was meant.

DW-4 one, ALFAYO SIGIRA GISORE, testified inter alia, that he was an agent for NASA in stream 1 of Gitwebe primary School polling station. He said that he witnessed voting and counting.

It was his evidence that no voter was chased away from the polling station. He did confirm that he signed

on form 36A as a NASA agent to signify that everything went on well.

He did detail to the court the description of the polling room and further that agents would sit on the opposite side to the polling clerks with the ballot in the middle, thereby, giving the agents a good chance to witness whatever was going on inside the polling station.

DW-5, one, DAUDI KENGERE NYANTIKA, testified that he was an agent for the Jubilee party at Esamba PAG Primary School polling station number 2. He did state that the election begun and ended without any problem.

He said that he did not witness anyone being turned away from voting.

DW-6, Shadrack Nyang'au Atei testified that he was an agent of the Jubilee party at Esamba polling station it was his evidence that the entire election exercise went on well. He said that he witnessed and/or observed the entire election exercise. Other than the foregoing evidence, he told the court that he could not recall seeing Evans Isaboke Arani at Esamba polling station on the material day. This witness confirmed that he signed from 36A to signify his satisfaction of the election exercise.

DW-7, thus GLADYS MONYANGI NYANG'AU, testified that she was an agent for the Jubilee Party at Riomego Primary school polling. She said that she was in the company of Hassan Motende. It was her evidence that agents had the chance to verify the results.

She also told the court that IEBC officers never promised to give money to agents. She signed on form 36A to signify that the results were accurate

DW-8, one FESTUS NYANARO MOSE, testified that he was a Jubilee agent at stream 2 of Getare Primary School polling station. It was his evidence that the polling clerks indeed allowed party agents to check against the ballot papers contrary to what was pleaded at paragraph 7(b) of the petition.

DW-9, DANIEL OMBOTO TURUNGI, testified that he was an agent for the Jubilee Party at Gitwebe Primary School polling station stream 2. He told the court that he observed the election exercise and did not witness any eligible voter who was prevented and/or barred from voting. He further stated that he knows Mr. Aberi Aberi but he never saw him at stream 2, of the said polling station and where he was an agent.

DW-10, one SINANGE AERA JOHNSTONE, did not offer his oral evidence in court. However he filed his Affidavit dated the 7/12/2017. It was adopted in evidence by consent of all the parties subject to the court apportioning the weight to be attached to the Affidavit since that evidence was not subjected to cross examination. Other than the foregoing premise, it is important to point out that the gist of the evidence cautioned in SINANGE's Affidavit is that he was an agent for the Jubilee party at stream 1 of Gitwebe Primary School polling station. He did state in his Affidavit that he did not witness anybody being denied an opportunity to vote.

That is a very brief outline of the 1st Respondent's evidence together with his witnesses.

To buttress the 1st Respondent's evidence the 1st Respondent's learned counsel filed written submissions dated the 29/1/2018, and a list of a burden of authorities duly filed in court on the 30/1/2018. The 1st Respondent's learned counsel did also offer his oral highlights of his submissions written submissions on the 31/1/2018.

The gist of the 1st Respondent's submissions is that, one, the learned counsel began with their preliminary objection. He did state that a preliminary objection touching on a point of law can be raised at any stage of the trial not only at the pre-trial stage only.

He did submit that the petition was incurably defective because the petitioner did not provide the results

that were declared and the place where the results were declared or made and the date when they were declared. The only attempt to make a reference to the results was in reference to 6 candidates yet they were 14 (fourteen) candidates. The 1st respondent's counsel relied on the law as laid down in the following cases, to support his argument.

1. SALIM MWENI ATHMAN

-versus-

IEBC & 2 OTHER [2017] e KLR thus the court's holding at pages 4 – 6, 8 and 9 respectively.

2. Mbaraka Issa Kombo

-versus-

IEBC & 3 OTHER [2017] e KLR, thus the court's holding at page 15 – 18 respectively.

3. MARTHA WANGARI KARUA & ANOTHER

-versus-

IEBC & 3 OTHER [2017] e KLR thus the court's holding at page 26, 28 – 32 respectively

4. THEOPHILUS KALAMA FONDO

-versus-

RETURNING OFFICER MAGARINI SUB COUNTY & 2 OTHERS [2017] e KLR,

Thus the court's holding at page 44 -48 respectively.

Counsel also submitted that the petition has not stated with specificity part of the grounds and the prayers. That part of the grounds and prayers are not stated in a specific manner.

That they are stated in a general manner. That the petitioner does not specifically state the particulars of those offences pleaded. That the petitioner made a reference to forms 37A, 36C, but at the trial the petitioner focused on forms 36A and 36B, that that was different from what was pleaded in the petition.

To support the 1st respondent's written submissions at pages 2 and 3, Mr. Omoke Advocate contended orally that the court should endeavor to preserve the will of the people on the ground that the minor errors will not alter the will of the people. That the 1st Respondent was the choice of the will of the people for the Magwagwa MCA Ward.

To support part (c) – pages 3 to 8 of their submissions, the 1st Respondent's learned counsel was emphatic that the petitioner failed to adduce evidence to support his petition.

That the only evidence he proved was that there were minor errors in the transmission of results from forms 36A to 36B. However the petitioner pleaded form 36C not 36B, so the petitioner did not prove all the other allegations counsel further submitted that the petitioner's witness by the name David Sikwea, retracted or recanted his evidence. That he said that there was a standoff at Riomego Primary School but in cross examination he recanted that part of evidence.

Counsel further submitted that some of the petitioner's witnesses were not present at the polling stations, for EVANS ISABOKE ARANI was not at the polling station, so his evidence should be disregarded counsel also stated that Opiyo Sironga and David Sikwea's evidence should be disregarded since they

said that they signed forms 36A because they were promised to be paid by the IEBC officials.

Counsel also stated, that there was a lot of hearsay evidence from the petitioner's witness, John Aberi Aberi, who said that he heard from other people. He also submitted that ANTONY OMOTI, who was one of the petitioner's witnesses did not understand the election process and the counting process.

Mr. Omoke Advocate for the 1st Respondent, did submit that the respondent' explained the posting errors. That they controverted the petitioner's evidence to support part (d) of their written submissions, Mr. Omoke Advocate stated that the petitioner did not discharge his burden of proof, which is above a balance of probability but it is below reasonable doubt. That the petitioner must show that any form of irregularities alleged must have affected the outcome of the results. That if he makes a criminal allegation, he must prove it beyond reasonable doubt. That the petitioner has not the criminal conduct if any of any of the Respondents to the required legal standard to support their written submissions at part (e) of the 1st Respondent's written submissions, the 1st respondent's learned counsel submitted that, in Nyakenyomisia polling station the petitioner lost 8 votes and the 1st Respondent lost 12 votes. That if you correct these errors, the 1st Respondent gets 2,647 votes and the petitioner gets 2208 votes sharing a margin of victory as 439 votes. He further submitted that the results at Nyabwororo polling station were correctly entered on form 36A for the petitioner, though there was a posting error in form 36B, whereof the petitioner lost 100 votes.

At streams 1 and 2 of Getare Primary School polling station, the results were interchanged but there was no numerical effect on the results. The 1st respondent's counsel was emphatic these errors were explained to have been innocent human error because the election officials were under pressure and had worked for four (4) days and they were tired. That they had no chance to get food or water.

Counsel also submitted that the petitioner did not prove the *mens rea* and the *actus reus* so he did not prove the alleged criminal offences beyond reasonable doubt.

To support paragraph (g) of the 1st Respondent's submissions, counsel for the 1st Respondent submitted that transmission of results was for the presidential elections.

As regards paragraph (h) of their submissions, counsel for the 1st Respondent submitted that, **Mr. ANTONY OMOTI** did not tell the court that he was denied the opportunity to sign form 36A. That the same cannot form a basis to invalidate the election.

To support paragraph (i) of their written submissions, Mr. Omoke Advocate for the 1st Respondent submitted that the petitioner adduced evidence that was not in support of his pleadings.

That he adduced new allegations and grounds, that the evidence he offered did not support his grounds and allegations to wit that the petitioner pleaded forms 37A and 36C but he offered evidence in respect to forms 36A and 36B.

Counsel also submitted that comparisons between entries in the polling station diaries relating to used and unused ballot at the closure of polling and entries in forms 36A because those two sets of evidence are not comparable.

To support his argument in paragraph (J) of the 1st Respondent's written submissions as regards the prayer of scrutiny, Mr. Omoke, Advocate for the 1st Respondent stated that the petitioner has not laid a basis for the prayer for scrutiny, to wit that he has not specifically identified the polling station in which scrutiny, can be granted. He also stated that the prayer of scrutiny is not practicable at this stage, for example at Getare Primary School polling station it emerged that there were 2 stray ballots in the MCA ballot box and 2 stray ballots in the women representative ballot box. However this court cannot order for the opening of the women representative ballot box.

To support his argument on the prayer for scrutiny Mr. Omoke Advocate for the 1st Respondent cited the decision in the case of;

RAILA ODINGA & 2 OTHERS

-versus-

IEBC & 3 OTHER [2013]e KLR in which case the Supreme Court made a ruling on scrutiny to the effect that a person asking for scrutiny should lay a basis and specifically identify the polling station in which scrutiny can be granted.

As regards the costs of this petition, vide part (K) of the 1st Respondents' written submissions, the 1st Respondent urged the court to award Ksh.4,000,000/= upon the dismissal of this petition. He also submitted that the scrutiny for costs of Ksh.100,000/= be shared by the Respondents pending the payment of the costs, and the other costs to be taxed by the court's Executive Officer.

In a rejoinder to the 1st Respondent's preliminary objection, Mr. Omoke Advocate urged the court to read very critically the 1st Respondent's authorities numbers 1, 2, 3 and 4 and arrive at a conclusion that failure to state the results that were declared, the place and the date when the results were declared or the stating of only a few candidates and leaving many others renders a petition incurably defective.

That **Article 159(2) (d)** of the constitution 2010 does not aid a party who has not complied with the mandatory provisions of the law.

That the petitioner failed to provide full particulars of the alleged election offences posed a serious challenge to the Respondents in preparing their answer to the petition. That that jeopardizes their right to a fair trial as provided by Article 50 of the constitution 2010.

4. THE BRIEF EVIDENCE OF THE 2ND AND 3RD RESPONDENTS' CASE

In their response to this petition, they filed their Response dated the 19/9/2017 in support thereof, an Affidavit in support of Response to this Election Petition was filed by the 2nd Respondent, one, MARJORIE PATIENCE OWINO. The same is duly sworn and dated the 19/9/2017 and filed in court on the 20th day of September 2017. The 2nd & 3rd Respondents filed a list of documents in support thereof. The same was marked MPO and was dated 19/9/2017. She also relied on the contents of her further affidavit dated 7/11/2017.

The said list of documents included the following documents

	DOCUMENT	PAGE WHERE FOUND
1.	Esanige Pr. School polling Station Form 36A	Which is at page 1 – 3 of the list of the documents
2.	Gitwebe Pri.School polling Station Form 36A	Found at Pages 4 – 5
3.	Nyakemyomisia Pri.School Polling Station Form 36A	Found at pages 6 - 7
4.	Musambi Pri. School Polling Station form 36A	Found at page 8 – 9
5.	Magongo Pri. School polling station form 36A	Found at page 10

6.	Getare Pri. School Polling Station form 36A	Found at page 11- 12
7.	Esamba PAG Pri. School polling Station form 36A	Found at page 13 – 14
8.	Riomego PAG Pri. School Polling station form 36A	Found at page 15
9.	Rianyamegi Pri. School polling station form 36A	Found at page 16
10.	Geturi Pri.School station form 36A	Found at page 17
11.	Nyamatuta Pri. School Polling Station form 36A	Found at page 18
12.	Nyabwororo Pri. School polling station form 36A	Found at page 19
13.	Kenyerere Pri. School polling station form36A	Found at page 20
14.	Mesobwa Pri. School polling station form 36A	Found at page 21
15.	Form 36B for Magwagwa Ward	Found at page 22.

To support the contents of all the aforesaid premises, thus in proof thereof, the 2nd Respondent one **MARJORIE PATIENCE OWINO**, hereafter referred to as the 2nd DW1-, testified.

It was her evidence in chief, under cross-examination, by both the petitioner’s counsel and the 1st Respondent’s counsel, and also under Re-examination by her learned counsel that, out of the 21 forms 36A for the entire ward, at least 16 had signatures of ODM agents signifying their satisfaction with the results at those polling stations that there was a further 1 form 36A that was signed by a NASA agent signifying his or her satisfaction with the results declared at that polling station.

It was her testimony that agents had first to be present for them to sign on form 36A.

She did state that entries in form 36B as transferred from forms 36A matched word for word in 17 out of the 21 polling stations.

She conceded that there was a mistake with respect to Getare polling station 1 and 2 in which form 36B entries meant for station 1 seemed to have been entered for station 2 while those meant for station 2 seemed to have been entered for station 1 but none of the candidates can complain because the overall results for the entire centre remained unaffected by the that mistake.

She also confirmed that in 19 out of 21 polling stations, none of the candidates can complain that the entries made were wrong both in form 36A and form 36 B.

2nd DW-1, testified further that she never personally interacted with any of the party agents to be in a position to promise payment of money given the fact that she was at the tallying centre.

It is worth noting that the 2nd Respondent took the court though the mechanics of entries in selected parts of the polling station diary as contained in the further list of documents by the 2nd and 3rd Respondents and the entries on form 36 A ultimately concluding that those entries were incomparable.

She took the court through page 20 of the 2nd and 3rd Respondents’ further list of documents, thereby confirming that indeed there was a proper counting for every vote issued to the presiding officer.

She also took the court through a detailed explanation of how vote counting takes place. She confirmed

the impracticability of preventing any agent from witnessing the counting exercise.

The 2nd Respondent conceded that the results entered for Nyakenyomisia polling station 1 was correct both in form 36A and form 36B, but the same results were similar for station 2.

However, the 2nd respondent refuted claims that this amounted to doctoring as pleaded by the petitioner. It was her further testimony that she never received any report of a voter who was denied a chance of voting. She also stated that merely being on the voter register was not a guarantee that one had to vote since there were other requirements that one had to meet before they could be allowed to vote.

She did admit the fact that the entries in form 36B for Nyabwororo polling station was 54 votes for the petitioner, though he got 154 votes which were indicated correctly in form 36A.

It was the 2nd Respondent's evidence that polling clerks at Getare Primary School polling station, Esamba Primary school polling station and Riomego PAG Primary School polling station conducted the entire election exercise in the presence of all the agents present and without any unreasonable restrictions on counterchecking by candidates, and/or their agents. She thus denied the petitioner's allegations that polling clerks at the above stated polling stations did not allow the petitioner's agents to check against the ballot papers.

It was also her evidence that the petitioner's allegation does not particularize the manner in which the entire 789,882 and 489 votes respectively for those particular entries were affected.

She categorically denied the petitioner's allegations in paragraph 7(f) and (g) of the petitioner, by stating that all the results were correctly and accurately tabulated and the results declared were the true results.

She did deny the petitioner's allegation in paragraph 8 of the petition by stating that the anomalies that may have occurred were due to an innocent human error and that the same were not significant and did not negatively affect the outcome of the election.

She further stated that the petitioner's allegations in paragraph 9 of the petition are general and do not lay any basis for faulting the results declared in respective polling stations at Nyakenyomisia Primary School polling station.

It is worth noting that this court had an opportunity to look at pages 1, 3, 5, 6, 7, 10, 12, 13, 14, 15, 16, 17, 19 and 20 of the 2nd and 3rd Respondent's initial list of documents and the court found out that the petitioner's agents signed those forms 36A.

The NASA coalition to which the ODM party is an affiliate party and on whose ticket the petitioner contested the MCA seat, had its agents that signed on forms 36A as evidenced at pages 4 and 9 of the said list of documents. The upshot of the aforesaid premise is that the total number of forms 36A signed by the petitioner's agents to 17 out of the total 21.

It is the 2nd and 3rd Respondent's evidence that the petitioner's agents failed to sign on forms 36A for Esanige primary School polling station 2 of 3 as evidenced at page 2 of the 2nd & 3rd respondent's initial list of documents. The petitioner's agents did not sign on forms 36A of Musambi Primary School polling station 1 of 2 as evidenced in page 8 of the 2nd & 3rd respondents' initial list of documents.

The petitioner's agents did not sign on form 36A of Getare Primary School polling station 1 of 2 as evidence at page 11 of the 2nd & 3rd respondents initial list of documents.

The petitioner's agents did not sign on form 36A of Nyamatuta polling station 1 of 1 as evidenced at page 18 of the 2nd and 3rd respondents' initial list of documents.

The petitioner's agents did not sign on form 36A of Mesobwa Primary School polling station as

evidenced at page 21 of the 2nd & 3rd respondents' initial list of documents.

It is key to point out that the 2nd Respondent testified that the presence of an agent at the time of results declaration is a prerequisite for appending their signatures on form 36A.

It is clear at pages 95, 96 and 97 of the further list of documents filed by the 2nd and 3rd respondents that no agent was present for the petitioner at Esanige polling station 2 of 3 at the time of results declaration.

Page 202 of the court's typed proceedings shows the 2nd DW-1's evidence to the effect that she narrated to the court in detail how vote counting takes place. She did confirm the impracticability of preventing any agent from witnessing the counting exercise as alleged by the petitioner in his evidence.

The 2nd DW-1 did sincerely regret for the mistake that occurred at Nyakenyomisia polling station 2 of 2 whereby the results as entered in form 36B was different from what was in form 36A. The 2nd respondent told the court that that was a genuine mistake and she was very sorry for it. She however said that even adjusting that mistake would not have changed the determination of what the will of the people of Magwagwa was at the time of the declaration of the results.

The 2nd Respondent, that is the 2nd DW-1 did concede an error with respect to Nyabwororo polling station in which the results for the petitioner was erroneously entered on form 36B as 54 votes while the correct results should have been 154 votes, which were correctly indicated in from 36A the 2nd Respondent also stated in evidence that the 1st Respondent does not have any electoral code of conduct and even if he had, the 2nd Respondent could not abide with the same.

It is worth noting that the contents, of the 2nd Respondent's further Affidavit in support of Response to the Election petition dated the 7/12/2017 responded to the Affidavits of John Aberi Aberi, David Sikwea Nyang'au, Antony Ongaga Omati, Marcella Kwamboka Ongeru. She did file a further list of documents dated the 7/11/2017 and duly filed in court. It contained the following documents were as follows:-

	DOCUMENT	PAGE WHERE FOUND
1.	Getare Primary School polling Station Diaries	1 – 22
2.	Esamba PAG Primary School polling Station Diaries	23 - 44
3.	Riomego PAG Primary School Polling Station Diaries	45 - 55
4.	Nyakenyamisia Primary School Polling Station Diaries	56 - 77
5.	Esanige Primary School Polling Station Diaries	78 -110
6.	Nyabwororo Primary School Polling Station Diaries	111-121
7.	Gitwebe Primary School Polling Station Diaries	122 - 132

The 2nd Respondent did adopt all the evidence contained in all her pleadings and the contents of all her documents as filed as evidence in this case.

That is a very brief outline of the 2nd Respondent's evidence. To buttress the evidence of both the 2nd and 3rd Respondents, since the 2nd respondent testified on her own behalf and on behalf of the 3rd Respondent; the said parties learned counsel filed written submissions dated the 30/1/2018. He also filed a list of a bundle of authorities dated the 30/1/2018. He also tendered forth his oral highlights on the

31/1/2018. Counsel did rely on all their submissions and the authorities.

Mr. Malanga Advocate for the 2nd & 3rd Respondents was emphatic that the petitioners witnesses PW-1, PW4, PW5, PW6 were not credible. He said it is only PW-3 one John Aberi Aberi who was an honest and credible witness. He said that PW2 was untrustworthy witness. Same to PW-4. That PW-4 said that he signed form 36A but he claimed that he was forced and that he was induced by IEBC official to sign the said form.

PW-5, one David Sikwea Nyang'au said that he signed form 36A, though he said that he was induced by money.

That PW-6's testimony showed that he misunderstood the election process. Mr. Malanga Advocate for both the 2nd and 3rd respondents did submit in his written and oral submissions that the petitioner did not discharge his burden to prove his petition to the standard of proof laid down in the Supreme Court's decision in **Nathis Jama Adam –versus- Abdikhaim Osman Mohammed and 3 Others [2014] eKLR** plus the standard of proof held in the RAILA AMOLO ODINGA & 5 OTHER –VERSUS

IEBC AND 3 OTHERS [2013] e KLR Election Petition No.5 of 2013 and also the law held in the case of;

PHILIP OSORE OGUTU

-versus-

MICHAEL ONYURA ARINGO & OTHERS [2014] e KLR

Counsel went on to submit that the petitioner must establish that he errors and irregularities complained of in the petition affected the overall results.

On the issue of incorrect counting and tallying vide, issue No.(9) in his submissions, Mr. Malanga, Advocate for both the 2nd & 3rd Respondents did submit inter alia that the totality of the 2nd respondent's evidence shows that the petitioner's agents only failed to sign in forms 36A for Esanige Primary School polling station 2 of 3, Musambi primary School polling station 1 of 2, Getare primary School 1 of 2, Nyamatuta polling station 1 of 1 and Mesobwa primary school polling station. Be as it may the 2nd respondent testified that this is not sufficient proof that she did the correct counting and tallying Mr. Malanga submitted in paragraph 51 of his written submissions that failure to sign by the agents in forms 36A would have been excusable under Regulation 79 (6) of the Elections (General) Regulations 2012 as was confirmed by Judge Mabeya in the case of;

Ahmed Abdullahi Mohammed & Another

-versus-

Mohammed Abdi Mohammed and 2 others [2018] eKLR

On issue No.(b) vide making of false entries the 2nd and 3rd respondents' learned counsel submitted that the petitioner did not offer sufficient evidence to show that the alleged criminal offence of making false entries was indeed committed in respect of all the 21 polling station for the Magwagwa Ward. He further stated that the petitioner did not prove this allegation beyond reasonable doubt as per law required, counsel also submitted that the petitioner did not produce some alternative results to compare with the ones that were entered on the forms 36A.

On issue no, (c) vide, failure of technology,

The 2nd & 3rd respondent's counsel submitted in his written and oral submissions that the petitioner failed to prove this allegation which he pleaded in paragraph 24 of the petition counsel stated that PW-3,

tendered evidence that he did not vote because the KIEMS kit could not identify his fingers despite several attempts by the electoral officials to help him. This witness one John Aberi Aberi, thus PW3, told the court that his claim that several voters with similar problems as him voted was indeed rumors and/or hearsay, PW3 admitted that he tried to vote in two streams, thereby, demonstrating he tried to vote but the KIEMs kit machine rejected his fingers. To counter this evidence the 2ⁿ respondent detailed to the court in her evidence, the circumstances under which a Kiems kit machine can reject a voters fingers.

On issue no. (d) Vide; on the issue of violence and intimidation, the 2nd & 3rd Respondents' learned counsel submitted, inter alia that that the petitioner admitted in his testimony that he did not have any evidence to prove this ground. Resultantly, the petitioner did not prove this allegation contrary to the submissions at paragraph 21 of the petitioner's submissions.

On the issue no.(e) vide; anomalies in polling stations diaries and unlawful assisted voters. On this Mr. Malanga Advocate for the 2nd and 3rd respondents' submitted inter alia that the petitioner did not plead these matters in his petition, even though he gave evidence on those matter,

That the issue of massive voter assistance was offered by **PW-6, one ANTONY ONGAGA OMOTI.**

However, Mr. Malanga submitted that the said witness's evidence and the petitioner's evidence put together did not prove the alleged unlawful assisted voters.

On the issue no. (f), vide the issued on polling clerks declaring results. On this issue, Mr. Malanga Advocate, submitted, inter alia that; the petitioner' conceded that he was not sure of the exact stream of Getare primary School Polling Station where clerks announced results. He also explained that his reference to polling clerks announcing results to mean that the presiding was the one announcing but in the presence of the polling clerks. The petitioner did admit that he had not given even a single name of a polling clerk who declared or was found announcing the results. The 2nd and 3rd respondents counsel submitted that even if the petitioner would have pleaded the issue of clerks announcing the results and even went on to adduce cogent proof thereof, that would not of itself have any impact as observed by Judge Mabeya at page 131 of the Judgement in the case of;

AHMED ABDULLAHI MOHAMMED and ANOTHER

-versus-

MOHAMMED ABDI MOHAMMED and 2 OTHER [2018] eKLR

On the issue as to whether the 1st Respondent was validly elected and whether the petitioner is entitled to the reliefs sought, the 2nd and 3rd Respondents' learned counsel, Mr. Malanga was emphatic that this election was conducted substantially in accordance to the principles set out in the constitution. Counsel did submit therefore that the 1st Respondent was validly elected and that the petitioner is not entitled to the reliefs sought.

On the issue of the costs of the petition, Mr. Malanga for the 2nd and 3rd Respondents' submitted that the 2nd and 3rd Respondents are entitled to costs, as this is in accordance with the concept that a successful party in litigation should get his/her costs of the litigation./ He prayed for costs of Ksh.1,500,000/=.

That is a precise outline of the parties evidence. This court has all the submissions and has keenly read and has considered each party's evidence, documentary evidence each in its entirety as it should, and this court is of the considered view that to determine this petition this court had a duty to determine on the following issue, which have emanated from the parties issues, the parties evidence herein and the law:-

- 1. Whether the electoral process duly complied with the constitution and election laws.**
- 2. Whether the election was marred with illegalities, irregularities, fraud or any other**

anomaly?

And if there were any illegalities, irregularities fraud or any other anomaly, did they vitiate the validity of the election, or did they alter the outcome of the election.

3. Whether the 1st Respondent was validity elected as member of County Assembly of Nyamira County representing Magwagwa ward.

4. Whether the petitioner is entitled to the reliefs sought in the petition?

5. Who should bear the costs of the petition?

In determining issues 1 and 2 respectively, this court has considered the evidence available in this case as a whole, and having considered it keenly, this court is duly satisfied that the petitioner has not proved that the election was not conducted in accordance with the principles laid down in the constitution and all the relevant written laws, or that the non-compliance affected the result of the election.

This is consistent with the decision of the Supreme Court in the case;

NATHIF JAMA ADAM

-VERSUS-

ABDI KHAIM OSMAM MOHAMMED AND 3 OTHERS [2014] eKLR

PETITION No.13 OF 2014

In this case the 2nd Respondent testified that the election was conducted substantially in accordance with the principles of the constitution and the election Act, and the relevant laws, so this election cannot be invalidated only on grounds of irregularities.

The 2nd respondent explained the procedural or administrative irregularities and other errors occasioned by human errors. She regretted for the said errors.

It is the considered view by this court that the alleged procedural or administrative mistakes irregularities and other errors occasioned by human imperfections, are not enough by and themselves, to vitiate this election. This court is fortified by the decision in the case of;

1. OPTZ C

-versus-

WRZESNEWSKY1 [2012]

3 S.C.R. 76 [OPITZ]

Wherein, the Supreme Court of Canada held that such errors are to be expected in elections due to human error limited training of election officials and fatigue as a result of working long hours before and during the elections. It held that to annul elections based on such errors would erode public confidence in the electoral process it held;

“Given the complexity of administering a federal election the terms of themselves of election workers involved, many of whom have no on the Job experience and the time frame for hiring and training them, it is inevitable that administrative mistakes will be made. If elections can be easily annulled on the basis of administrative errors, public confidence in the

finality and legitimacy of election result will be eroded [emphasis added”.

In this case the petitioner did not prove that any non-compliance with the law, as alleged by him in the petition had affected the validity of the elections. Even though the petitioner alleged that there was non-conformity with the electoral law, he did not offer any cogent evidence to prove that the alleged non-compliance had fundamentally affected the validity of the elections for Magwagwa Ward. In arriving at this conclusion this court has been fortified by the law as laid down in the case of;

RAILA ODINGA & 2 OTHER

-versus-

IEBC & 3 OTHER [2013] eKLR in which case, the Supreme Court held that,

“.....where a party had alleged non-conformity with the electoral law, the petitioner ought to not only prove that there had been non-compliance with the law, but that such failure of compliance had affected the validity of the elections.

In this case, it is important to note that both the petitioner and the 2nd respondent offered tangible regarding the fact that there were errors in transferring entries contained on form 36A to form 36B in some polling stations vide the parties evidence as herein before stated for instance the 2nd Respondent admitted that there was a mistake with respect to Getare polling station 1 and 2 in which from 36B entries meant for station 1 seemed to have been entered for station 2, while those meant for station 2 seemed to have been entered for station 1. Be that as it may, the 2nd respondent told the court that none of the candidates’ can complain because the overall results for the entire centre remained unaffected by that mistake.

It is in the light of the above stated premises, that this court is of the considered finding from the totality of the evidence on record, that the petitioner failed to prove that the errors in forms 36A and 36B of the affected polling stations led to a result different from the actual time result that were declared by the 2nd Respondent herein complied with the aforesaid premises, this court has found out that the errors complained of by the petitioner did not negatively impact on the integrity of the election, that no reasonable tribunal would unhold it. To support this finding, this court will invoke the law as held in the case of;

JACKTON NYANUNGO RANGUMA

-VERSUS-

IEBC & 2 OTHER, ELECTION PETITION NPO. 3 OF 2017 KISUMU

In which case Justice Majanja was faced with a more serious challenge than abound in this election. There was an omission far greater than in this case and/or in our situation in this petition, in Ranguma case, the result of 5 polling stations were not transposed at all into forms 37B and 37C.

The court applied the numerical test provided in section 83 of the Election Act and established that the omission would not in any way affect the ultimate result.

As regards the petitioner’s averments that his agents did not sign on form 36A. The answer to this allegation is that the petitioner did not give cogent evidence that his agents were denied an opportunity to sign form 36A at any polling station. Be it as it may, this court is of the considered view that the failure of a candidate or agent to sign the declaration or record reasons for their refusal to sign the form cannot invalidate the results announced. In arriving at this finding, this court is fortified by the decision held in the case of;

JOHN MURUMBA CHIKATI

-Versus-

REUTRNING OFFICER TONGAREN CONSTITUENCY & 2 OTHERS

Election Petition No.4 of 2013 the High Court at Bungoma, held inter alia that, **“The refusal or failure of a candidate or agents to sign the declaration or record reasons for their refusal to sign the form could not invalidate the result announced”**.

As regards the Respondents’ submission that this court should not admit any evidence on the ground and allegations not pleaded, the court’s answer to this issue is that the Respondents were quite right that parties are bound by their pleadings, as clearly held in the case;

RAILA AMOLO ODINGA AND ANOTHER -V E R S U S- IEBC & 2 OTHERS (2017) eKLR, The Supreme Court of Kenya aligned itself with the holding in **ARIKALA NARASA REDDY –V E R S U S- VENKATA REM REDDYGARI & ANOTHER** Civil appeal has 5710 – 5711 of 2012 (2014) SCR, in which case, the supreme court in India held that:

“In absence of pleadings, evidence if any, produced by the parties cannot be considered. It is also settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration.”

Relying on the above stated law, this court is of the consideration finding that the petitioner’s prayer for scrutiny and recount cannot be granted since the petitioner pleaded that prayer in such general terms. Essentially seeking the scrutiny of various polling stations. There is no specificity in what exactly the petitioner seeks to be scrutinized.

Secondly, the petitioner has not laid the basis for his prayer for scrutinizing and recount because posting errors in forms 36B cannot form the basis for scrutiny and recount. Neither can allegations that agents were not allowed to sign on form 36A be a basis for this court to grant a prayer for scrutiny and recount. Although scrutiny is within the court’s discretion, the applicant/petitioner must establish sufficient basis for the court to order scrutiny. Further, the petitioner must not be permitted to launch a fishing expedition under the guise of a prayer for scrutiny in order to discover new evidence upon which to foist his or her case to invalidate the election this court shall rely on the holding in the case of **RASHID HAMID AMANA –VERSUS. IEBC & OTHERS**, Malindi Election petition No. 6 of 2013 to support the aforestated finding.

The respondents’ submitted in detail on what the petition should contain they relied on the law as laid down in the case of **JOHN MICHAEL NJENGA MUTUTHO –VERSUS- JANE NJERI & 2 OTHERS NKR Civil appeal No. 102 of 2006** in which case, the court held that: and/or the court set the law on what a petition has to contain and that would if any matter supposed to be minded was omitted then that render the petition incurably defective. In this case the omission was set out in the petition the results of the election.

Now the 1st respondent’s learned counsel raised a preliminary objection which was touching a question of law, which can be raised at any time by parties or the court **EX DEBISTO JUSTATIAE**. In this apparent petition the 1st respondent learned counsel pointed out to the court that the petition is incurably defective. He gave various reasons which are already on record. One being that the petitioner did not plead and/or indicate the date where the results were declared as contemplated by Rule 8 (1) of the elections (parliamentary and country elections) petition rules 2017; the courts answer to the 1st respondent’s preliminary objection as whole is that this election court was guided by the provisions of Article 159 (2) (d) of the constitution of Kenya 2010 in allowing this petition to be heard on its own merits.

Secondly, I do concur with the petitioner's learned counsel's averment on the issue of legal technicalities that what is contested in this case is clear to the parties herein and that the alleged typing errors and the omissions in the petition do not go to the root of the petition herein. Because this court has heard all the parties' evidence, this court will make a holding that the 1st respondent's preliminary objection is untenable at this stage on the sole ground that this case shall determine this petition from the parties evidence, documents, submissions and the law. The upshot of all the foregoing premises is that this court has found out that the election was conducted on a free, fair and credible manner and that it accurately represented the will of the electorate of Magwagwa ward. 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 result.

It is worth noting that there is no scintilla and/or ample evidence to prove that the 2nd and 3rd respondents committed any fraud, whilst conducting the elections of Magwagwa ward. Infact it is clear from the evidence on record that the 2nd and 3rd respondents carried out the elections for Magwagwa ward substantially in accordance with the law. As regards issue No. 3 herein, which is to the effect as to whether the 1st respondent was validly elected as an MCA for Magwagwa ward. The answer to this issue is that given the totality of the evidence on record, it can be said that the 1st respondent was validly elected as the MCA for Magwagwa ward, Black's Law Dictionary 9th edition at page 1690 defines VALID to mean: Legally, sufficient or binding, meritorious: I understand legal sufficiency in the election to mean that an election was conducted on a free, fair and credible manner and that it accurately represented the will of the Magwagwa ward electorate.

It is explicitly clear from the 2nd respondent's evidence that the 2nd and 3rd respondent's conducted the election process in compliance with Article 81 of the constitution of Kenya 2010 and the elections were free, and fair interalia.

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.

In fact the 2nd respondent discharged the 2nd and 3rd respondent's burden of proof in this case. Consequently, this court is of the considered finding that the totality of the evidence on record has proved that the mistakes, errors and irregularities which were claimed by the petitioner and not materially tamper with the election and that they did not fundamentally affect the result of the election. The interest of the situation in this matter demands that the election be upheld.

This court has thus evaluated and/or considered the totality of the evidence in this matter, and this court is of the considered finding that the petition has no merit and the court will accordingly dismiss it. As regards, the issue on who should bear the costs of the petition this court is cognizant of the fact that costs do follow the event. However, the court will invoke the supreme court's decision in respect to the issue on costs in **RAILA CASE 2017 VIDES RAILA ODINGA & ANOTHER (2017) –VERSUS- IEBC and 2 OTHERS (2017) eKLR**; in which case, at page 387, the supreme court held, ".....it is a heavily public funded constitutional organ and to burden tax payers with litigation costs would be a grave matter which we deem unnecessary in this petition.

So let each party therefore bear its own costs. This court will align itself with that Supreme Court's decision and the fact that the petitioner had unfettered right to file this petition. The parties herein have unconditional right to be heard in a fair, even, just and full manner. It is in the light of the foregoing premises that this court will proceed to make an order that let each party herein bear its own costs. This

court will make a declaration that the 1st respondent herein, one **FRED NYACHAE OMAIYO** is the validly elected member of the county assembly Nyamira, Magwagwa ward. This court will also issue a certificate the 1st respondent herein one **FRED NYACHAE OMAIYO** as the validly elected member of county assembly Nyamira for Magwagwa ward. Those shall be the orders of this court.

Orders accordingly.

Judgment dated at Nyamira at Nyamira this 28th day of February, 2018.

M. O. WAMBANI

C.M

28/02/2018

28/02/2018

CORAM BEFORE - MRS. M. O. WAMBANI (CM)

The petitioner present

The 1st Respondent present

The 2nd Respondent Absent

The 3rd Respondent Absent

Court Clerk –Nyabonyi

Court interpretation: English/Kiswahili/Ekegusii - English by court clerk Nyabonyi

Mr. Bosire for the petitioner

Mr. Omoke for the 1st Respondent

Mr. Malanga for 2nd and 3rd Respondents

COURT: The judgement signed, dated, read and delivered in open court in the presence of the court assistant: Nyabonyi, the petitioner, and his advocate – Mr. Bosire.

The 1st Respondent, his advocate Mr. Omoke.

The 2nd and 3rd Respondents – absent their Advocates Mr. Malanga is present.

COURT: The judgment be and is hereby delivered accordingly.

Court: The parties have a right of appeal.

M. O. WAMBANI

C.M

28/02/2018

MR. BOSIRE FOR THE PETITIONER:

We may not agree with your judgment. We commend the court for the reasoned judgment. The petitioner has the right of appeal. We congratulate the 1st respondent. I commend my colleagues. I apply for certified copies of the judgment. We will consider the issue of costs after the time for appeal expires.

MR. MALANGA FOR THE 2ND& 3RD RESPONDENTS:

The respondents earned some costs during the application stages. The judgment does not change that position. We thank the court for the judgment. My clients may decide to appeal on the issue of costs but I have not sought for their instructions.

MR. OMOKE FOR 1ST RESPONDENT:

We thank the court for hearing the parties and the judgment. The costs we were given during the interlocutory applications be covered by the security for costs. The costs be kept pending the filling of the appeals by the petitioner and the 2nd& 3rd respondents.

MR. BOSIRE:

In the Raila case, which guided the court on the issue of costs, was that each party do bear its own costs. In Raila case, costs were awarded at interlocutory stage but in the final decision, the court having heard all the parties, the Supreme Court ordered that each party do bear its own costs.

M. O. WAMBANI

C. M.

28/02/2018

ORDER:

Proceedings be typed. The parties be given the certified copies of the proceedings and the judgment.

M. O. WAMBANI

C. M.

28/02/2018

ORDER:

The issue of the costs for the interlocutory applications and the release of the security costs will be handled after the expiry of the appeal period.

M. O. WAMBANI

C. M.

28/02/2018

The parties to file their necessary applications and the court to consider the same on merit.

M. O. WAMBANI

C. M.

28//02/2018