**Naiduya v IEBC & 2 others (Election Petition Appeal E001 of 2023)**
**[2023] KEHC 22338 (KLR) (21 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 22338 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAROK**

**ELECTION PETITION APPEAL E001 OF 2023**

**F GIKONYO, J**

**AUGUST 21, 2023**

**BETWEEN**

**LANKEMUA OLE NAIDUYA ..... APPELLANT**

**AND**

**IEBC ..... 1ST RESPONDENT**

**LILIAN VUGUTSA LILUMAH ..... 2ND RESPONDENT**

**NTOKUYUAN SANGAU OLE ..... 3RD RESPONDENT**

***(Being an appeal from the judgment and decree of Hon. M.I.G. Moranga (SPM) issued on 15.2.2023 in Kilgoris SPMC Election Petition No. E001 of 2023)***

## JUDGMENT

1. In its judgment delivered on 15th February 2023, the trial court dismissed the petition and concluded as follows;

    i. In the result the petition fails and is dismissed with costs to the 1st and 3rd respondents.

    ii. The costs are capped at Kshs. 1 million each to be agreed upon or assessed by the court upon filling of a bill of costs.

    iii. The Kshs. 100,000 deposited by the petitioner as security be withheld pending the assessment of the party's bill of costs if any.

2. Being aggrieved by the trial court judgment and orders appeals on the grounds of law as follows;

    1. The trial court erred in law by disregarding binding precedents and violating the stare decisis doctrine on:

i. Assisted voting and IEBC's obligation to account for assisted voting through the issuance of forms 32 or marked polling station register, under regulation 72 as well as the discrimination of agents in witnessing assisted voting;

ii. The disjunctive reading of section 83 of the *Elections Act* 2011 in Raila 2017;

iii. Effect of canvassing on the integrity of the election of member of county assembly Kimintet ward

iv. The treatment of uncontroverted evidence in law

v. Shifting of the evidentiary burden to the respondents,

vi. On the interpretation of Rule 12(13) of the election Rules as requiring the mandatory appearance of a primary party in the trial and;

vii. Whether answers in cross-examination and re-examination can build a party's defence without prior pleadings.

2. The trial court erred in law in misapplying and misapprehending the burden of proof and evidentiary burden and failing to shift the evidentiary burden to the respondents at any point.

3. The trial court erred in law in findings, unsupported by the record, that the election of member of county assembly Kimintet ward substantially complied with *the constitution* and electoral laws.

4. The trial court erred in law by ignoring evidence (including uncontroverted evidence) pleadings, and submissions on:

i. Irregular voter assistance by the respondents

ii. Intimidation and harassment of voter by the respondents and their affiliates.

iii. Bias and canvassing of votes by the respondents

iv. Reports of electoral malpractices by the appellant and his witnesses; and

v. Apparent contradictions in evidence by the respondent's witnesses on irregular voter assistance

vi. Turning away of supporters of Kijabe Kuya from the polling station queues.

5. The trial court erred in making conclusions unsupported by the evidence on record:

i. That 64 voters had been allowed to past 6:28 p.m. at Olgos Sopia Polling station.

ii. That PW14 Shadrack Cheruiyot had signed form 36 A at Kenyolo polling station.

iii. Agents' assistance of assisted voters and on voting by assisted voters.

iv. That the presiding officer at Kigonor polling station had denied canvassing votes for the 3rd respondent.

v. On the distance of various witnesses from the locus of various facts in question.

vi. On the absence of Shadrack Cheruiyot PW14 from Kenyolo polling station where he was an agent.

vii. That one Robert Kipkorir Langat was UDA agent and could not have committed electoral irregularities against other UDA agents or candidates.

viii. That the presiding officer at Emarti polling station had denied the entry of unauthorized persons into the polling station.

ix. That Joseph Kibyegon PW8 contradicted himself on where the presiding officer had canvassed his vote for the 3rd respondent at Kigonor polling.

6. The trial court misapprehended and misapplied the law on the jurisdiction and duty of the election court under section 87 of the *elections act* 2011, 0n claims of electoral malpractices at the petition stage.

7. The trial court ignored evidence and submissions that the affidavit of Robert Kipkorir Langat offended section 4(1) of the Oaths and Statutory Declaration Act and should have been expunged from the record.

8. The trial court erred in law in making unreasonable findings that no reasonable tribunal could make;

i. Disregarding the entire evidence of Leonard PW7 based on his literacy levels alone.

ii. Finding that canvassing and intimidation of voters by the precincts of a polling station were 'not considered to be events at the polling station'

iii. Finding that the invasion of Emarti polling station by unauthorized persons was an incident that the 1st respondent could not prevent.

iv. The 3rd respondent agents asking voters within the polling station 'if they needed assistance in voting' in breach of regulation 65(1) of the Election (General) Regulations 2012 was not meant to influence voters.

9. The trial court erred in law in making contradictory findings and orders;

i. In finding (in the main judgment) that electoral offences had not been reported while ordering (in the reliefs) the investigation of the same offences under section 87 of the *Election Offences Act*, 2011.

ii. On the presence of unauthorized persons in the polling station.

10. The trial court misapplied the law and abused her cost discretion in awarding and exorbitant Kshs. 2 million without justification.

3. In the end the appellant urged this court to allow the appeal, set aside the judgment of 15/2/2023 and order substitution by invalidating the 3rd respondent's election as a member of county assembly for Kimintet ward and that respondent's bear costs of this appeal.

**Directions of the court.**

4. On 18/4/2023, by consent of all parties, this court directed that this appeal shall be canvassed by way of written submissions. All parties have filed their written submissions. The appellant has also filed a rejoinder to respondents' submissions. The submissions are considered fully in the analysis.

## Analysis And Determination

### Court's jurisdiction

5. An appeal from the decision of a Resident Magistrate's Court as an election court as to the validity of the election of a member of a county assembly shall lie to the High Court on 'matters of law only' (s. 75(1A) (4) of the *Elections Act*)

6. According to the Supreme Court, the phrase "matters of law only" as used in section 85A [read also 75(1A) (4)] of the *Elections Act*, 2011 refers to:

    i. 'the interpretation, or construction of a provision of *the Constitution*, an Act of Parliament, subsidiary legislation, or any legal doctrine, in an election petition in the High Court; or

    ii. the application of a provision of *the Constitution*, an Act of Parliament, subsidiary legislation, or any legal doctrine, to a set of facts or evidence on record, by the trial judge in an election petition; or

    iii. the conclusions arrived at by the trial judge in an election petition where the appellant claims that such conclusions were based on "no evidence," or that the conclusions were not supported by the established facts or evidence on record, or that the conclusions were "so perverse", or so illegal, that no reasonable tribunal would arrive at the same'. (Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others)

7. The Supreme Court also stated some of the matters not forming part of 'matters of law' as envisaged in the *Elections Act* and which the election appellant court should not entertain to wit, '...a petition which requires the appellate Court to re-examine the probative value of the evidence tendered at the trial Court, or invites the Court to calibrate any such evidence, especially calling into question the credibility of witnesses,...' (see Frederick Otieno Outa v Jared Odoyo Okello & 4 Others, Supreme Court Petition No. 6 of 2014; Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others, Supreme Court Petition No. 2B of 2014)

8. This court will therefore, exercise the appellate jurisdiction set out in statutory as well as decisional law above.

### Issues for determination

9. The specific complaints in the appeal are;

    i. That the trial court misapplied or failed to apply the doctrine of stare decisis and judicial precedent.

    ii. That the trial court applied the wrong standard of proof;

    iii. That the trial court failed to shift the evidential burden to the respondents.

    iv. That the trial court failed to draw adverse inference against the 3rd respondent when he failed to offer himself to cross-examination on his affidavit.

    v. That the trial court made findings, conclusions and orders which were unsupported by evidence, contradictory and so unreasonable that no tribunal would make.

    vi. That the trial court ignored uncontroverted evidence,

    vii. The trial court misapplied its role under section 87 of the *Elections Act*.

viii. That the trial court erred in not expunging the affidavit of Robert Kipkorir Langat for offending section 4(1) of the *Oaths and Statutory Declarations Act*.

ix. That the trial court abused discretion and awarded exorbitant costs.

10. Despite use of a mix of terminologies by the parties, it is discernible from the claims made in the pleadings, the memorandum of appeal and submissions of the parties, that the broad major issues for determination are: -

i. Whether the trial election court misinterpreted, or construed applicable provision of *the Constitution*, an Act of Parliament, subsidiary legislation, or any legal doctrine (stare decisis, judicial precedent. shifting evidential burden of proof, standard of proof, drawing of adverse inference);

ii. Whether the trial election court misapplied applicable provision of *the Constitution*, an Act of Parliament, subsidiary legislation, or any legal doctrine (stare decisis, judicial precedent. Shifting evidential burden of proof, standard of proof, drawing of adverse inference), to a set of facts or evidence on record; and

iii. Whether the trial election court arrived at conclusions in the election petition which were based on "no evidence," or not supported by the established facts or evidence on record, or "so perverse", or so illegal, that no reasonable tribunal would arrive at the same'.

iv. Whether the trial court abused discretion in awarding costs.

11. There are however other issues of a preliminary nature which relate to competence of the appeal, to wit: -

i. Whether the firm of advocates, Barvelaw Advocates LLP, is properly on record.

ii. Whether the appellant has attached a certified copy of the decree.

iii. Whether the appellant has raised matters of facts.

**Issues of preliminary nature****

**I. Whether Barvelaw Advocates LLP, is properly on record?****

12. The 1st and 2nd respondents submitted that the appeal lodged before this court is completely defective as the current firm of advocates lacks locus to institute this appeal on behalf of the appellant. That during the hearing at the trial court, the law firm of Henia Anzala & associates was on record for the appellant (previously the petitioner) but this appeal was filed by the firm of Barvelaw advocates LLP. That at the time of filing this appeal no consent on change of advocates was filed and served upon the 1st and 2nd respondents therefore the appeal was irregularly filed. Further that the appellant's consent has not been adopted by this court and therefore there is no legitimate consent before this court. The 1st and 2nd respondents relied on order 9 rule 5 and order 9 rule 9 CPR, Republic V Council of Legal Education & Another Ex Parte Sabina Kassamia & Another [2018] eKLR, Judicial Review Application 703 Of 2017, John Langat V Kipkemoi Terer & 2 Others [2013] eKLR, Civil Appeal No. 21 Of 2013.

13. The 3rd respondents submitted that the appeal is a non-starter and fatally defective as it is drawn and filed by a firm of advocates who had not come on record formally. This court should find that the appeal and reliefs thereof by the firm of advocates, Barvelaw advocates LLP are incompetent for failure by the said firm to seek and obtain leave after the judgement was entered. The 3rd respondent relied on order 9 rule 9 CPR, John Langat Vs Kipkemoi Terere & 2 Others[2013] eKLR, Lalji Bhimji

Shangani Builders & Contractors Vs City Council Of Nairobi [2012] eKLR, Nicholas Kiptoo Arap Korir Salat Vs Independent Electoral And Boundaries Commission & 6 Others [2013] eKLR, Wavinya Ndeti & Another V Independent Electoral And Boundaries Commission & 2 Other,Teka General Merchandise Limited ( Objector) [2021] eKLR, Chelashaw V Attorney General & Another [2005] 1 EA 33, Taracisio Githaiga Ruithibo Vs Mbuthia Nyingi Civil Appeal No. 21 Of 1982[1984] KLR 505.

14. The appellant submitted that it is being represented by same advocate from trial court. That the only difference is the change in the name of the lead law firm. That in lower court Ms. Babra kwang'a (Barvelaw advocates) appeared for the appellant. That the consent on appearance confirms this position. The only difference is Barvelaw advocates is the lead law firm in the appeal. That the respondents have not demonstrated any prejudice they are likely to suffer on account of the omission. The appellant relied on Tobias M Wafubwa V Bishop Ben Butali [2016] eKLR and Kenya Women Finance Trust V Salome Waithaka Kinyua & Another [2019] eKLR

15. Order 9 rule 9 of the Civil Procedure Rules provides as follows:

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

16. In the case of Lalji Bhimji Shangani Builders & Contractors –Vs- City Council of Nairobi [2012] eKLR Odunga J . made the following observation: -

> "A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the rules of procedure the court may well be entitled to conclude that failure to comply therewith was deliberate."

17. In the case of Wavinya Ndeti & another v Independent Electoral and Boundaries Commission & 2 others; Teka General Merchandise Limited (Objector) [2021] eKLR, Odunga J, stated that

> "With due respect, acting alongside another firm of advocate is different from acting for a party. While there is completely nothing wrong with the firm of advocates on record seeking assistance from another firm or one advocate seeking assistance from another advocate, the firm that is recognized as being on record for the purposes of filing pleadings and costs remains the advocate which was acting for the party and not the assisting counsel or firm."

18. The appellants filed a consent to enter appearance dated 3/3/2023. The same was received in court on 18/7/2023.

19. The appellant's advocate after noticing the error herein have dashed to file a consent.

20. Parties and their legal counsel should observe rules of procedure which attend to or regulate the proceedings before the court. Non-observance of rules may attract penalties such as costs, reprimand, order for due observance and in notorious cases, the court may strike out the offending pleadings. Nevertheless, the court should consider any plausible explanation given for the non-observance with the rules or procedure. Other important considerations include; the nature of rule, the nature and effect

of the non-compliance with the rule on the proceedings generally, the prejudice the non-compliance causes upon the other party and the nature of the proceedings before the court. These considerations will help the court to make a determination in light of article 159(2)(d) of *the Constitution*.

21. The explanation provided by the appellant is that Ms. Babra kwang'a (Barvelaw advocates) appeared for the appellant except under the lead firm of advocates. This explanation is neither here nor there. Except, there are subsequent actions by the appellant which were aimed at curing the omission. In addition, there is no demonstrable prejudice that the respondents will suffer due to the lapse on change of advocates. This is not, however, to say that the lapse is insignificant, or should be encouraged.

22. Accordingly, as these proceedings are in the nature of public litigation with a higher objective- scrutiny of the integrity and propriety of the electoral process- the court finds no merit to strike out this appeal. The objection fails.

**II. Whether the appellant has attached a certified copy of decree.**

23. The 1st and 2nd respondents submitted that the appellant's record of appeal contains serious defect whereby the attached decree is not certified which contravenes the mandatory provisions of Rule 34(6)(e) of the Elections (Parliamentary and County Elections) Petitions Rules 2017. That there is no reason advanced by the appellant for failing to file a certified copy of the decree because the judgment, typed proceedings, and the certificate issued by the trial court pursuant to section 86(1) of the *Elections Act* are all certified by the same trial court two days after delivery of the trial court's judgment. Therefore, the 1st and 2nd respondents urged this court to uphold the preliminary objection. The 1st and 2nd respondents relied on the cases of Republic V Council of Legal Education & Another [Supra], Anyimbo Sichenga V Orange Democratic Movement & 4 Others [2018] eKLR Election Petition Appeal No. 3 Of 2018.

24. The appellant submitted that the failure to certify the decree by the court was by no fault of the appellant. That the appellant wrote three times for the signed sealed and certified copy of the decree. That the original decree is already in the trial court file before this court. That striking out the record of appeal because the decree although signed and sealed has not been certified amounts to a technicality. That the respondents have not demonstrated how they are prejudiced by the alleged omission considering that they were represented at the trial court by able counsel who know the decision of the trial court. That the preliminary objections are technical and unmerited and should be dismissed with costs to the appellant. The appellant relied on the cases of Hassan Nyanja Charo V Khatib Mwashetani & 3 Othhers [2014] eKLR, Emmanuel Ngade Nyoka V Kitheka Mutisya Ngata [2016] eKLR, Lorna Chemutai & 4 Others V Independent Electoral and Boundaries Commission [2018] eKLR and Hafid Maalim Ibrahim V Economic Freedom Party & 3 Others [2018] eKLR.

25. The Supreme Court of Kenya, in the case of Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others [2015] eKLR held as follows at paragraph 41:

> "Without a record of appeal, a Court cannot determine the appeal cause before it. Thus, if the requisite bundle of documents is omitted, the appeal is incompetent and defective, for failing the requirements of the law. A Court cannot exercise its adjudicatory powers conferred by law, or *the Constitution*, where an appeal is incompetent. An incompetent appeal divests a Court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues."

26. After considering the arguments by the parties on the absence of a certified copy of decree, the question that comes to bear upon the court is whether this is a case of '...An incompetent appeal...' which ...'

divests a Court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues' (ibid).

27. Perusal of the record reveals the following matters; i) the record of appeal was duly filed; ii) the appellant made effort to obtain a certified copy of the decree; and iii) the original trial court record with all relevant documents including a duly signed decree is before the court. This, therefore, is not a case where there is no record of appeal to justify a conclusion that the' '...Court cannot determine the appeal or cause before it' (Ibid).

28. In the circumstances therefore, this appeal is not incompetent. Accordingly, the objection on incompetence of the appeal fails and is dismissed.

**III. Whether the appellant has raised matters of law or facts.**

29. The 1st and 2nd respondents submitted that from the memorandum of appeal, the appellant is inviting this court to interrogate the facts that were presented before the trial court which contravenes section 75(4) of the *Elections Act*. According to the respondents, paragraphs 4, 5, 7, and 8 of the memorandum of appeal address factual issues raised during trial. And, in their view, the said paragraphs show that no points of law have been raised but rather a call to reexamine and reevaluate the pleadings and evidence produced at the trial court. The 1st and 2nd respondents relied on the cases of Kitavi Sammy V Independent Electoral and Boundaries Commission & 2 Others [2018] eKLR Election Petition Appeal No. 3 Of 2017, Ibrahim Noor Hussein v Hassan Jimal Abdi & 2 Others [2018] eKLR Election Petition Appeal No. 4 Of 2018, Lorna Chemutai & 4 Others v Independent Electoral and Boundaries Commission & 18 Others [2018] eKLR Election Appeal No. 1 Of 2018.

30. In a rejoinder, the appellant submitted that the respondents failed to address court on any of the grounds of law raised in the memorandum of appeal; instead, he accused the respondents of raising factual issues in their response to the appeal.

31. Further the appellant submitted that the appellant has not invited the court to examine the probative value of the evidence or calibrate the whole evidence but pointed out factual issues that the court may have ignored made perverse findings or made conclusions unsupported by the record. The appellant relied on Gatirau Peter Munya v Dickson Mwenda Kithinji SC Petition No. 2B of 2014, Cyprian Awiti & Another v Independent Electoral and Boundaries Commission & Another [2019] eKLR And Zachariah Okoth Obado v Edward Akang'o Oyugi & 2 Others [2014] eKLR.

**What constitutes 'matter of law'?**

32. It bears repeating that, under section 75(1A) (4) of the *Elections Act*, the appeal is on 'matters of law' only to wit: -

    i. 'the interpretation, or construction of a provision of *the Constitution*, an Act of Parliament, subsidiary legislation, or any legal doctrine, in an election petition in the High Court; or

    ii. the application of a provision of *the Constitution*, an Act of Parliament, subsidiary legislation, or any legal doctrine, to a set of facts or evidence on record, by the trial judge in an election petition; or

    iii. the conclusions arrived at by the trial judge in an election petition where the appellant claims that such conclusions were based on "no evidence," or that the conclusions were not supported by the established facts or evidence on record, or that the conclusions were "so perverse", or so illegal, that no reasonable tribunal would arrive at the same' (Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others).

33. This court will not therefore entertain any matter '...which requires the appellate Court to re-examine the probative value of the evidence tendered at the trial Court, or invites the Court to calibrate any such evidence, especially calling into question the credibility of witnesses,...' (see Frederick Otieno Outa v Jared Odoyo Okello & 4 Others, Supreme Court Petition No. 6 of 2014; Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others, Supreme Court Petition No. 2B of 2014)

34. This court as an appellate court on 'matters of law only' will determine this appeal within those precincts.

Of substantive issues

v. Whether the trial court violated the doctrine of stare decisis and precedent.

35. The appellant submitted that the trial court violated the doctrine of stare decisis by ignoring binding precedent from the High court, Court of Appeal, and the Supreme Court on issues raised in the petition. He relied on the cases of Mohammed Abushiri Mukullu v Minister for Lands & Settlement Civil Appeal 158 of 2007, Evans Kidero v Ferdinand Waititu & 4 Others [2014] eKLR, Geoffrey M Asanyo & 3 Others v Attorney General [2020] eKLR, and Jasbir Singh Rai & 3 Others v Tarcholan Singh Rai & 4 Others SC Pet. No. 4 of 2012[2013] eKLR

36. The 3rd respondent submitted that the circumstances in this appeal were distinct from the cited authorities in the trial court. The 3rd respondent took the view that, the appellant in his submission cited a number of cases without marrying them to any malpractice witnessed at any polling stations. The 3rd respondent relied on the supreme court case in the case of George Mike Wanjohi V Steven Kariuki & 2 Others, Ahmed Ali Muktar (Interested Party) [2019]eKLR.

37. In a rejoinder, the appellant submitted that the stare decisis doctrine strictly obliges lower courts to follow the decisions of the higher courts unless distinguished or overruled. See the Supreme Court in Geoffrey M. Asanyo & 3 Others v the Attorney General [2020] eKLR, Canada v Craig [2012] SCC 43 Of 2012.

38. This court notes that, on precedent fact, the Supreme Court stated that;

'Indubitably, the differing fact-situations make every given case peculiar, and quite apart from the other. Bearing in mind that ascertained legal principles of binding precedent are applied to ascertained factual situations, regard should be had, in the course of identifying an applicable rule, to the principle that similar fact-situations should be treated in a similar fashion' (George Mike Wanjohi v Steven Kariuki & 2 others [2014] eKLR)

39. The appellant should therefore, identify and ascertain the factual situations or areas he alleges the trial court ignored to apply precedent. Such should be a factual situation to which the precedent applies having 'regard..., to the principle that similar fact-situations should be treated in a similar fashion' (ibid). The court will, within this test, deal with each of the complaints by the appellant under this time.

**a. Assisted voting.**

40. The appellant submitted that the trial court ignored the precedent forbidding the rotation of agents in witnessing voting by assisted voters. He relied on the case of David Ouma Ochieng [supra].

41. The appellant submitted that the trial court disregarded binding precedent obliging IEBC to account for assisted voting through the issuance of forms 32 or marked polling station register. He argued further that assisted voting was obscure and not verifiable or accountable contrary to regulation 72 and

articles 81 and 86 of *the constitution*. He gave examples of the Kigonor polling station, that, although it was admitted that there were about 100 assisted voters, the voting process by these voters was not accounted for.

42. The presiding officers concerned claimed that, he did not assist any voter on that day because all of them were accompanied.

43. The 3rd respondent's agents claimed that they witnessed the voting of these assisted voters.

44. The appellant called two witnesses on this issue. One of the witnesses (PW6) claimed she was an assisted voter and alleged that the presiding officer marked the ballot disregarding her choice of candidate. The other claimed that despite having assisted his elderly mother to vote, he was not issued with any form 32. They relied on the cases of Ahmed Abdullahi Mohammed & Another V Mohammed Abdi & 2 Others [2018] eKLR (High Court), David Ouma Ochieng V IEBC Isaiah Nabweyo (The Returning Officer, Ugenya Constituency) Christopher Odhiambo Karan [2018] eKLR , Mohammed Abdi Mohammed V Ahmed Abdullahi Mohammed & 3 Others, Ahmed Ali Muktar (Interested Party) [2019] eKLR (Supreme Court) and Christopher Odhiambo Karan V David Ouma Ochieng & 2 Others [2018] eKLR (Supreme Court)

45. The 1st and 2nd respondents submitted that the appellant's own witnesses admitted during cross-examination all assisted voters voted for their preferred candidates. According to them, other witnesses contradicted themselves during cross-examination thus not credible and unreliable evidence and witnesses.

46. The 1st and 2nd respondents made the following submissions.

47. That PW4(Thomas Kiprotich Tonet) and Shadrack Cheruiyot confirmed as party agents that there was no wrongdoing by the 1st and 2nd respondents in how voters were assisted to vote. Forms 36A for all the polling stations did not indicate any discrepancy regarding assisted voters and no police report was filed by any of the appellant's witnesses including the appellant regarding violations of any assisted voters.

48. PW6 Elizabeth Lelei incident was rebutted by R2W3 Paul Kiprotich Langat who authoritatively confirmed that he was present at the time PW6 was voting and he was one of the agents who were called by the presiding officer to witness the exercise.

49. R2W3 testified that PW6 was granted her wish and she indeed voted for her preferred candidate in all the 6 ballots that included but were not limited to the MCA.

50. R2W3 in any event showed to the court that he was not an agent of the 3rd respondent and therefore his testimony is impartial and cogent.

51. PW4, Thomas Towett testified that he was seated next to R2W3 Joseph Kipyegon Sigei and told the court that he voted in accordance with the wish and the desire of his mother. Thus, the allegation that he was asked to vote for someone else is not cogently established.

52. R1W3 Isaiah Parsayo testified that he never compelled anyone on who to vote for that all those who went to Kigonor polling station exercised their democratic right freely.

53. PW14 (Shadrack Cheruiyot) was an agent of Tonai ole Kijabe on a UDA ticket and claimed that some assisted voters were disenfranchised when seeking help during voting, some of whom are known to him but did not mention them in his witness affidavit. His allegation of an election that was not free and fair was because the other agents who witnessed the assisting of voters witnessed more times than him

and therefore he felt disadvantaged as an agent. PW14 however, did not demonstrate the disadvantage he claimed to have suffered and the negative effect in had on the voting and the outcome of the election.

54. PW15 (Lemorio Dalton Oloonkishu) an agent at Emarti Polling Station mentions that he saw an agent tick wrongly for an assisted voter despite his back facing him on account of how he was holding the pen. Nevertheless, he was sure of this fact and could not even remember the arrangement of the candidates on the ballot paper to ascertain whether the marking was done correctly or not. No complaint was lodged by any of the assisted voters and he equally did not witness the marking of the ballot papers.

55. PW14 Shadrack Cheruiyot who was at Kenyolo polling station randomly mentioned a figure of 50 assisted voters without any further information on whether there is any voter that was denied the right to vote and / or not assisted in accordance with their wishes.

56. That the allegation by PW14 that he was never accorded an opportunity to witness the assisted voters casting their ballots was not substantiated.

57. R2W2 Benjamin Langat Kipkorir testified that all the agents at Kenyolo polling station were given an opportunity to witness the voters being assisted. That the trial court rightly found that PW14 was not denied a chance to be part of the polling process and all the activities that were undertaken by the polling agent. He was accorded a chance unless he otherwise opted to abscond on his own accord.

58. That in a polling station where there are more than 20 polling agents representing different parties it was not practical to have all of them witness a voter casting his/her vote without occasioning an interference. That the trial court did not contradict the set precedent in Raila 2017 on section 83 of the elections but instead upheld it and confirmed that a party has to satisfactorily prove that either the conduct of the election in question substantially violated the principles laid down in *the constitution* as well as other written law on elections or it was fraught with irregularities or illegalities that affect the result of the election.

59. That allegation of lack of impartially, transparency, fairness and or improper influence were not proved at the trial court. Therefore, the court did not fell into error in its application of section 83 of the act.

60. The appellant stated that at Kigonor, there was a group of 100 illiterate voters. The names of the said illiterate voters were not given to the court or called to testify.

61. At Kenyolo Polling Station, Shadrack Cheruiyot, PW14, randomly mentioned a figure of 50 assisted voters, without any further information on whether there is any voter that was denied the right to vote and/or not assisted as they wished while casting their ballot.

62. The allegation by PW14 that he was never accorded an opportunity to witness the assisted voters casting their ballots was not substantiated. Benjamin Langat Kipkorir, R2W2, testified that all the agents at Kenyolo Polling Station were at a given point given an opportunity to witness the voters being assisted.

63. R2W2 added that no one complained of the verifiability and the credibility of the process, a position that was corroborated by the Presiding Officer, at that station, Sylvia Silei, R1W6.

64. At Esoit Polling Station, the appellant alleged to have seen two individuals being assisted to vote. He, however, failed to substantiate this by not adducing cogent evidence to prove his allegation. None of the claimed assisted voters was mentioned by name, and therefore this is not proven. Further, that alleged incident was not reported anywhere and there is no evidentiary proof that has been tabled before the court to prove this allegation.

65. The Petitioner alleged that he saw Ben Nausiet marking ballot papers of the assisted voters at Esoit Naibor Polling Station. He alluded that the said Ben Nausiet was an agent of 3rd Respondent without adducing any evidentiary proof to substantiate this averment. On cross-examination, he confirmed that he did not know the names of the random individuals he imagined and he never reported the incident to the police, to the Returning Officer, or to any other relevant authority.

66. The Petitioner also mentioned a random number of voters that he alleged were assisted and form 32 was not filled.

67. Upon consideration of the submissions by the parties, the findings and conclusions by the trial court on assisted voters and the allegations by the appellant that the trial court failed to apply precedent on assisted voters, it bears repeating that; '...legal principles of binding precedent are applied to ascertained factual situations, regard should be had, in the course of identifying an applicable rule, to the principle that similar fact-situations should be treated in a similar fashion' (supra George Mike Wanjohi case).

68. Therefore, the petitioner should first establish and ascertain a factual situation to which a binding precedent applies of which the trial court failed to apply the precedent.

69. The appellant called witnesses who claimed that there were about 100 or so assisted voters who, despite stating their candidate of choice, the presiding officer marked another candidate. According to him, this violated those voters' right to choose candidate of own choice, and thus, a violation of the right to vote.

70. The trial court analyzed the evidence by the witnesses. In particular, that PW4 did not make any formal complaint about the incident he alleged concerning an assisted voter namely Elizabeth Lelei. The trial court was categorical that PW4 did not make any remark or complaint about the issue of Elizabeth. He did not also object to the results in Form 36A or make any formal complaint on the manner Elizabeth was assisted contrary to the law.

71. The court further notes that the report of this incident seem to have been made on 14.8.2022 vide OB NO. 5/14/08/2022.

72. From the evidence it appears PW4 wanted to assist Elizabeth and was not happy when the presiding officer did not allow him. During cross-examination by Kingori advocate, he stated that many assisted voters were asking for him so that he could assist them. It is not clear how he knew this. PW4 stated that he was an UDA agent and so his insistence on assisting voters is contrary to the law, the role of agents, and quite suspect. Regulation 72 of the Elections General Regulation disqualifies a candidate or an agent from assisting any voter. And this was the basis for the statement by the trial court that: -

    'At some point PW4 appears not to understand his role as an agent. The fact that PW6 called him did not mean he would then mark the ballot paper for her or assist her in the voting'.

73. It is also important to note that PW4 stated during cross-examination that he heard PW6 complaining and so he approached her and he examined the ballot paper and told her that she had marked Sangau. Contrast this with what PW6 stated that she is the one who called PW4 after the ballot paper had been marked contrary to her will and instructions.

74. Accordingly, insistence by PW4 to assist PW6 leaves a lot to be desired.

75. The trial court noted all these serious allegations and wondered- and so does this court- why the complaint was not made to the IEBC officers at the polling station or to the returning officer or to the police officers present at the polling station. From the evidence, the reports of malpractices seem

to have been reported to the village elder. There was no recording of the incident in the documents signed by agents including PW4.

76. PW6 stated that when the presiding officer for Kigonor polling station was assisting her there were 10 or so people there including PW4. She also stated that the presiding officer marked all the other candidates in accordance with her will except the seat for the MCA. She did not however report such grave matter to the police immediately. She said she made a report to the village elder.

77. Other witnesses for instance PW15 made similar allegations of unlawful interference or misleading of assisted voters in marking the ballot paper. The trial court found the claim by this witness that he saw one Robert Tiyo marking ballots for assisted voters to be thoroughly vitiated by several factors. One, the said Robert turned out to be an UDA agent. And two, it was doubtful that, from where he was seaaated, he could see the marking of ballots in the voting booth.

78. PW8 assisted her mother to vote in accordance with her mother's wishes. She stated that although the presiding officer whispered to her to vote 'pastor', she was not influenced to change her mother's choice. There is nothing in her evidence which established that the presiding officer whispered to her as alleged.

79. Upon analysis of the evidence provided by the appellant in support of these allegations, the trial court came to the conclusion that the allegation on unlawful assisting of voters was not proved to the required standard.

80. And, this court also does not find any succinct proof of the allegation. Other than merely stating that about 100 illiterate voters who were assisted did not vote the candidate of their choice, the specific details of the names- apart from Elizabeth Lelei- and their first-hand account thereto was not proved before the court. See the case of Esoit polling station where Lady Narinknkera Sipune was not called to give evidence. Notably also is that at Esoit, PW10 assisted her mother to vote and according to him voting was peaceful and went on well.

81. PW14 claimed that, at Kenyolo polling station, assisted voters were more than 50 and that he knew some of them. He however confirmed that he did not state their names in his affidavit. He only made a sweeping statement in cross examination that the assisted voters were not given an opportunity without any actionable substantiation thereof. None of the alleged assisted voters in that station gave testimony in the manner they were assisted. His evidence was bare and left at very high level of generalization.

82. No specific details of the alleged assisted voters and the particular incidents were provided or first-hand account thereof.

83. Therefore, the appellant did not substantiate his claims of assisted voter malpractice in the manner done in the case of Mohammed Abdi Mohammed v Ahmed Abdullahi Mohammed & 3 Others, Ahmed Ali Muktar(interested party)(2019)eKLR,

84. From the evidence, the petitioner did not establish a factual basis to which precedent cited on assisted voter could have been applied.

85. In the circumstances, as the claim was not proved, it is naïve to expect application of precedent on assisted voters where 'no factual situation' has been ascertained out of evidence adduced as required by the law.

86. Accordingly, the trial court did not therefore ignore or refuse to apply precedent on the subject of assisted voters.

**b. Disjunctive reading of section 83 of the *elections act* 2011.**

87. The appellant submitted that the trial court adopted a conjunctive test in interpretation of section 83 of the *Elections Act* 2011 rather than the disjunctive test affirmed by the Supreme Court. According to the petitioner, the conjunctive reading led the trial court into error because it insisted on applying the wrong test to a purely qualitative petition and where the margin was meagre, despite finding and ordering investigation of electoral malpractices during the conduct of the election. The appellant relied on the case of Raila Amollo Odinga & Another v IEBC & 2 Others [2017] eKLR

88. The 1st and 2nd respondents submitted that the election subject of this appeal does not fall under the threshold given by the disjunctive interpretation of section 83. Further that the appellant did not discharge his burden of proof.

**Of section 83 of the Elections Act**

89. This issue has been repeated under several grounds including application of precedent, burden and standard of proof as well as unreasonable conclusions not founded on evidence.

90. But, the argument here is on interpretation and application of Section 83 of the *Elections Act* to ascertained facts of the case- which is a question of law.

91. According to the section 83 of the *Elections Act*:

'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 noncompliance did not affect the result of the election.'

92. The section has been touted to be the ultimate yardstick in the determination of an election petition. Nonetheless, the court takes the view that, it is one of the applicable law (largely procedural) in the determination of election petitions.

93. Some pundits view section 83 of the *Elections Act* as merely procedural provision in an implementing legislation enacted under *the Constitution*. Other commentators argue that the threshold for free and fair election is provided in *the Constitution*, such that, section 83 of the *Elections Act* does not provide any new element thereof.

94. Be that as it may, interpretation and application of section 83 of the *Elections Act* in the determination of the validity or otherwise of an election was dealt with by the Supreme court of Kenya as follows;

> "It is clear to us that an election should be conducted substantially in accordance with the principles of *the constitution* as set out in article 81(e). Voting should be conducted in accordance with the principles set out in Article 86. The *Elections Act* and the Regulations therefore, constitute the substantive and procedural law for the conduct of elections. If it should be shown that an election was conducted substantially in accordance with the principles of *the constitution* and the *Elections Act*, then such an election is not to be invalidated only on grounds of irregularities. Where however, it is shown that the irregularities were of such magnitude that they affected the election result, then such an election stands to be invalidated. Otherwise procedural or administrative errors occasioned by human imperfection are not enough, by and themselves to vitiate an election.....where an election is conducted in such a manner as demonstrably violates the principles of *the constitution* and the law, such an election stands to be invalidated."

95. See also Raila Amolo Odinga & Stephen Kalonzo Musyoka –Vs- IEBC & Others, Presidential Election Petition No.1 of 2017.

96. The question before the court is whether the trial court misinterpreted or misapplied section 83 of the *Elections Act*, and as a consequence reached attained an absurd or unreasonable decision.

97. From the outset, the trial court set out the burden and standard of proof, and application of section 83 of the *Elections Act* in election petitions. And, a careful reading of the judgment by the trial court reveals that, it did not seek a conjunctive proof of the disjunctive elements in section 83 of the *Elections Act* as a basis for invalidation of the election.

98. Be that as it may, it is no sacrilege or prohibition, for a court to find minor infractions which do not affect the election or result, yet, declare the election to have been conducted substantially in accordance with the law. There is no contradiction in such finding.

99. This court therefore, finds that the trial court did not misinterpret or misapply section 83 of the *Elections Act*.

**c. Canvassing for votes during polling**

100. The appellant submitted that the trial court analyzed the individual witness testimonies of various witnesses but failed to determine the effect of canvassing as pleaded in the petition and submissions. That various witnesses established a nexus between the name 'pastor' and the 3rd respondent by testifying that the 3rd respondent is famously known as 'pastor' because he is a pastor of full gospel church. He stated that canvassing of votes by presiding officers happened at Kigonor polling station, which corrupted the electoral environment through undue influence.

101. The appellant's case before the trial court was that the IEBC officials and agents and affiliates of the 3rd respondents campaigned for the 3rd respondents on election day by asking voters to 'vote for pastor who is Sangau'. At the same time, they would de-campaign one of the candidates by the name Kijabe Ole Tunai by uttering the words 'Museveni' while saying 'chunga watu wa Museveni wako hapa wasiibe kura' in the polling stations. According to the appellant, various witnesses established a nexus between the name 'pastor' and the 3rd respondent testifying that the 3rd respondent is famously known as 'pastor' because he is a pastor of full gospel church. Many people within the ward would easily identify him as a pastor rather than his official names 'Ntokuyuan Sangau ole'. Additionally, the appellant submitted that, as per the testimony of PW8, Joseph Kibyegon Sigei, the 3rd respondent campaigned using the name 'Pastor' and instructed people that his name is 'Sangau' for purposes of voting on election day. According to the appellant, the court ought to have acknowledged that the effect of canvassing by polling officials is unquantifiable because of the influence and authority electoral officials have over voters. And, it was the appellant's opinion that the court ought to have found that canvassing by presiding officers that happened at Kigonor polling station corrupted the electoral environment through undue influence. The appellant relied on David Ouma Case [supra] and Milliah Nanyokia Masungo v Robert Mwembe & 2 Others [2014] eKLR.

102. The appellant submitted further that the question of canvassing as pleaded in the petition remained completely unconverted by the respondents who called no witnesses to testify to this allegation or swear affidavits rebutting the claims.

103. The 3rd respondent submitted that the petitioner branded the 3rd respondent a name that was not in the ballot papers or campaign poster. There was no evidence to support the alleged alias name. The 3rd respondent relied on the case of Raila Odinga & Another vs IEBC & 2 Others [2017] eKLR, John Harun Mwau & 2 Others vs. IEBC & 2 Others, Justus Mongumbu Omiti vs. Walter Enock Nyambati

Osebe & 2 Others [2011] eKLR., Sheikh Ali Senyonga & 7 Others vs. Shaikh Hussein Rajab Kakooza and 6 Others SCCA No 9 Of 1990 [1992] V KALR 30.

104. The 3rd respondent submitted also that trial court established allegation of branding individuals as Kijabe supporter was hogwash- and therefore the same could not be established and / or proved. That the courts duty is to determine if the said harassment, intimidation, violence and threats of violence and turning away supporters affected the voting turn out and counting in such manner as to lead to conclusion that the election were not free and fair.

105. This court has considered the evidence adduced and the conclusions by the trial court of the allegation of canvassing for votes for the 3rd respondent on the polling day. These allegations relate to a conduct of a criminal nature which must be proved beyond reasonable doubt. See Raila Odinga case.

106. The appellant claims the evidence by PW8 was uncontroverted and so the allegations were proved as required.

107. The appellant submitted that PW8, Joseph Kibyegon Sigei testified that at Kigonor polling station that while he had gone to assist his illiterate mother to vote, the presiding officer asked him to tell his mother to vote for 'pastor' saying 'tuangushe huyu mzee ametawala huku miaka mingi sana'. According to the appellant, the presiding officer never denied these allegations.

108. The record shows that PW8 told the court that he voted in accordance with his mother's wishes, and that the IEBC person did not influence him at all. But, earlier during cross-examination, he stated that he voted for 'pastor' after the presiding officer had whispered to him in a very low tone that even his mother did not hear the whisper, to vote for 'pastor'. In addition, other than claiming that the 3rd respondent was commonly known as 'pastor' for he preaches in a church, his contradictory evidence does not prove there was canvassing of votes or connect the perpetrators to, and that it was committed with the knowledge- actual or constructive- or instruction of the 3rd respondent.

109. PW15 talked of several issues. He spoke of a mzee called Boit Tare who appeared drunk and who made remarks about 'chungeni watu wa Museveni...wasiibe kura' in the polling station. According to him Museveni referred to Kijabe-one of the candidates in the election in issue herein. To him, these remarks were akin to campaigning for 'pastor' and de-campaigning Kijabe. He said that the mzee then left. There was not really any substantiation of these remarks and their effects on the electoral process. He also talked of a commotion involving Moses and Sampwekwe in which Moses (PW11) was attacked. He however, during cross-examination stated that after the two were separated, voting went on peacefully and no one was stopped from voting until 5pm when the station closed.

110. Moses testified as PW11 and confirmed there was an incident between him and Sampwekwe in which he claimed to have been injured. Of importance is that he confirmed that the commotion was calmed by the police who disarmed the attacker. There was no evidence to show the commotion affected the election. All indication is that the voting went on well.

111. At Olgos Sopia polling station, the appellant submitted that PW5, Irene Chelangat Ngetich testified that just as she got into the polling station to vote R2W4 Robert Kipkorir Langat an affiliate of the 3rd respondent told her to vote for 'pastor' saying 'huyu mzee ametuangusha sana' – allegations he claims were not denied by Robert in his affidavit and therefore remained uncontroverted.

112. It is worth noting that this witness casually stated that she saw Robert chasing away Kelvin. It emerged during cross-examination that the said Kelvin was an agent for Sangau- and according to her Kelvin told Robert not to chase him away as he was also an agent for Sangau. Kelvin was not called as a witness. One wonders how Robert would chase away the agent for the person he is said to be canvassing votes

for. The trial court also made this inference from the stated facts. Therefore, it is not true that the conclusion or inference by the trial court on the facts emerging from the evidence of PW5 was based on no evidence or unfounded.

113. PW5 also stated in cross-examination that after chasing Kelvin away, Robert asked her to vote for 'pastor'. She did not provide much detail on the matter to establish the alleged acts by, and connect them to Robert, and as an affiliate of the 3rd respondent.

114. The appellant, in the submissions claimed that; at Esoit Naibor polling station, both the appellant and PW9 Narasha Korinko testified that while getting into the polling station compound, they saw two of the 3 respondent's agents and affiliates Daniel Kinanta and Ben Neusiet soliciting for votes for Pastor who is 'Sangau' PW9 explained that the said Ben who was an agent of the 3rd respondent was equally canvassing for the 3rd respondent within the polling station. According to the appellant, neither Ben nor Daniel swore affidavits or gave evidence refuting these claims.

115. Most of the allegations the petitioner has staked in the petition were told to him by persons he called 'my supporters'. He called them as witnesses and their evidence has been duly analyzed. As for PW9 he stated that a Mr. Daniel Kinanda was loudly soliciting votes for 'pastor' and all in the queue heard him well. However, it is astonishing that he did not make any report of such serious election offences. His evidence fell short of the material required to establish the elements of the offence of campaigning or soliciting votes during voting. It was also necessary that such conduct of a criminal nature committed by the said person is connected to the 3rd respondent for purposes of determining an election petition founded on such acts of a criminal nature by agents or servants or employees of the candidate. Similarly, the petitioner needed to establish the effect these acts of a criminal nature had on the voting or the specified election in issue or the results for purposes of invalidation of an election. Proof thereof is beyond reasonable doubt. It should be noted that an election will only be void if the canvassing of votes is proved to have occurred, and in such manner and scale as to have affected the results. The appellant did not offer any such evidence.

116. These pieces of evidence were only consistent in one thing; they made bare claims of canvassing of votes for 'pastor' without providing the vital evidentiary details to prove that an electoral malpractice of a criminal nature or a criminal conduct ocurred, the perpetrators, their relationship with the 3rd respondent and that were committed with his knowledge or instruction and for his benefit. And, of course, they fell short of proof that these illegalities affected the voting or results or the integrity and propriety of the election.

117. The burden of proof of the allegations in the petition lay with the petitioner the onus of which is not absolved or diminished merely because there was no rebuttal evidence. See the discussion on shifting the evidential burden.

118. Nevertheless, upon perusal of the record and judgment of the trial court, it is notable that; of Kigonor Polling Station, Paul Kiprotich Langat, R2W3, an agent who represented an Independent Candidate for the Member of National Assembly, Kilgoris Constituency testified that there was no-one who was campaigning during the polling day. This testimony is contrary to the testimonies of Thomas Towett, PW4, and Joseph Kipyegon Sigei, PW8 who alleged that there was canvassing on the voting day. These witnesses signed the polling diary which did not contain any such occurrences of canvassing for votes for the 3rd respondent during voting. It is therefore, completely indefensible the submission by the appellant that the evidence on alleged canvassing for votes for the 3rd respondent during polling was completely uncontroverted.

119. The trial court observed these facts and doubted how such serious events were not put forward as formal complaints or objection to the results; only to come to the fore in the petition. The trial court considered the testimonies by PW4 and PW8 to be afterthoughts. Without dwelling on the credit worth of these witnesses as that falls within the power of the trial court, there are difficulties arising from the evidence by the two especially given that it related to very serious matters but of which they neither made a formal complaint to IEBC through the statutory accountability election documents, nor object to the results.

120. R2W3 testimony was corroborated by the Presiding Officer, R1W3, Isaiah Parsayo, who sufficiently informed the court that he did not know any of the aspirants for the seat of the Member of County Assembly, Kimintet Ward and therefore he could not be in a position to campaign for anyone. He added that there was no-one by the name Pastor that was on the ballot paper for the seat of Member of County Assembly, Kimintet Ward.

121. At Olgos Sopia Polling Station, Irene Chelangat Ngetich, PW5, misled the court that there was a 3rd Respondent's agent by the name of Robert Langat R2W4, who was campaigning for the 3rd Respondent on Election Day. R2W3 swore an affidavit and adopted it in court as his testimony where he stated that he was the agent for Mr. Shadrack Sabaya, an aspirant for the Member of National Assembly, Kilgoris Constituency and annexed thereof a letter of appointment. R2W3 Confirmed that he never campaigned for the 3rd Respondent and that he was under clear instructions to exclusively represent Mr. Sabaya.

122. In conclusion on this issue, the allegation of canvassing for votes during voting is criminal act and requires proof beyond reasonable doubt (Raila Odinga case). There was need for supporting evidence establishing the elements of the criminal acts, actual occurrence of the said criminal acts and direct link among the alleged perpetrators and the 3rd respondent. There was no such evidence by the witnesses herein who merely made generalized allegations which are also riddled in inaccuracies. The ground therefore fails.

**d.Treatment of uncontroverted evidence**

123. The court has observed that the appellant has repeated this ground- perhaps for emphasis- in his claim that the trial court violated the stare decisis doctrine by disregarding the principles set out on the treatment of uncontroverted evidence in law. He claims that despite serious allegations having been made against the respondents, they failed to call witnesses on the various allegations. Yet- he claims- at no point did the court shift the evidentiary burden to them as required in Raila 2017 case. Further, despite the absence of these witnesses without any valid reason the court drew no adverse inference on them. To him, instead the trial court engaged in what seemed like a selective treatment of uncontroverted facts where she readily drew adverse inferences against the appellant's witnesses who failed to appear in court (even though their evidence was not relied on) but failed to do so to the respondents' witnesses. That this did not only breach stare decisis doctrine but equally violated the appellant's rights to equal treatment of the law as well as the legitimate expectations that he would be afforded the same treatment as the respondents in the analysis of his case.

124. The court makes out of the foregoing submissions three issues; stare decisis, shifting of evidential burden, and adverse inference on failure to call witnesses. The court has already dealt with stare decisis and application of precedent.

**Of Shifting Evidential Burden**

125. Of shifting of evidential burden, in Moses Wanjala Lukoye v Bernard Alfred Wekesa Sambu & 3 Others [2013] eKLR, this court stated,

> " The petitioner will not, however, succeed because the respondent has not offered evidence in rebuttal but because the petitioner has proved his case to the required standard of proof, and the absence of evidence in rebuttal by the respondent only sanctifies the confidence of the court to enter judgment in favour or the petitioner. Of the essence is that the evidential burden is the obligation of the respondent once it has been properly created by the evidence tendered, and failure to discharge the evidential burden disadvantages the respondent with the result that he fails and the petitioner succeeds."

126. A good beginning point. The trial court was aware of the intricacies in the concept of burden of proof, and clearly set out that the burden of proof entails; legal burden of proof and evidential burden; and explained the incidence of evidential burden and when it shifts.

127. Within that bound, the trial court appreciated the evidence as presented before it by the witnesses, whose credibility it alone was in a position to weigh and gauge, and analyzed the documents placed before it, and made a finding that the petitioner had NOT made out a strong prima facie as to shift the evidential burden to the Respondents. In such case, there is no evidential burden that is created upon the shoulders of the respondent, and so there is no burden to discharge- in other words, evidential burden does not shift in such circumstances.

128. See Bernard Kibor Kitur v Alfred Kiptoo Keter & another [2018] eKLR Petition 27 of 2018 at paragraph 85:

> " In this matter, having found that the evidence relied upon by the trial court to come to a determination that the evidentiary burden was duly met and shifted amounted to hearsay, we are in agreement with the appellate justices in their finding that the Petitioner's evidentiary burden of proof did not shift to the 1st and 2nd Respondents."

129. Nevertheless, a better understanding; the evidential burden initially rests with the petitioner who bore the legal burden of proof of the allegations in the petition. It does not however, automatically arise upon or shift to the respondent or merely because the petitioner has closed his case. It arises where the petitioner has established such prima facie case that the respondent would fail without further evidence.

130. The court has made findings that the evidence tendered by witness does not show to the required standard of proof that assisted voters' rights were violated or that there was canvassing of votes for the 3rd respondent during polling, or that a certain group of voters were prevented from voting in certain areas. These are the major areas about which the appellant says were uncontroverted and therefore, the respondents ought to have borne evidential burden. In the absence of a prima facie evidence before the court, the evidential burden does not shift; it remains with the petitioner as the person bearing the legal burden of proof.

131. The court therefore, finds that the appellant failed to adduce such prima facies case as to shift the evidential burden to the respondents.

e. Interpretation of rule 12(13) of the election rules; drawing adverse inference

132. The appellant submitted that the trial court was entitled to draw adverse inferences upon the absence of the 3rd respondent for cross-examination on his filed replying affidavit. According to the appellant, instead, the trial court excused his absenteeism. He took the view that the trial court disregarded the binding precedent holding that it was obligatory for a primary party to appear and participate in the proceedings as per rule 12(13) of the Election Rules, 2017. To the appellant, a court is entitled to draw adverse inferences against such a party and any unchallenged evidence against them may well be accepted if it is credible.

133. According to the appellant, the trial court's conclusion that the absence of the 3rd respondent could be compensated for by other witnesses was fallacious in many respects. To him, the 3rd respondent was adversely mentioned in several irregularities raised in the petition. Therefore, the 3rd respondent should have come to court and exonerated himself. Further, the 5 witnesses did not rebut any allegations made against the 3rd respondent. The appellant relied on the case of Mohammed Abdi Mohammed V Ahmed Abdullahi Mohammed & 3 Others [2018] eKLR (Court of Appeal)

134. The 3rd respondent submitted that the trial court was perfectly justified in its appreciation of the evidence as presented before it by the witnesses, whose credibility it alone was in a position to weigh and gauge and analyze the documents placed before it to make the factual finding that the petitioner before it had not made out a strong prima facie as to shift the evidentiary burden to the respondents. According to him, in any event, all the materials and evidence that were presented before the trial court was controverted. That the legal burden of proof is constant; never shifting but the evidentiary one keeps shifting though it shifts to the respondent only after the petitioner first adduces necessary evidence. Therefore, he took the view that, the appellant failed to discharge the burden of proof to the requisite threshold. The 3rd respondent relied on the case of Moses Wanjala Lukoye Vs Benard Alfred Wekesa Sambu & 3 Others [2013] eKLR.

135. The 3rd respondent appreciated the court's decision that there was no adverse inference that was directly drawn against the 3rd respondent. To him, the witnesses who testified on behalf of the 3rd respondent gave substantive response that challenged the evidence presented by the appellant at the trial court.

136. The court takes the view that, the Trial Court did not draw adverse inference against the 3rd respondent on the basis that; i) the witnesses who testified on behalf of the 3rd Respondent gave a substantive response which challenged the evidence presented by the Appellant at the Trial Court; and ii) that the appellant did not proof their case on the required standard.

137. It profits jurisprudence that, it is not axiomatic that an adverse inference must be drawn against the 3rd respondent who has filed a response and called witnesses to support his claims and or defenses in the response simply because he did not testify in court. This proposition draws upon the fact that the petitioner bears the burden of proof.

138. In light of the analysis of the facts and issues herein, there is no basis for drawing an adverse inference against the 3rd respondent merely because he did not testify in court.

139. The court may also add, but without making any definite determination, that, although the word used in rule 12(13) of the Election Rules is 'shall', it conveys a directory rather than mandatory command on the basis of two observations. First; the requirement '...subject to the election court's direction...' in the rule embodies judicial discretion. And second; the fact that '...parties may, by consent, accept not to cross-examine the deponents but shall have the deponent's evidence admitted as presented in the affidavits' removes any sense of compulsory command.

**f. Whether answers in cross-examination and re-examination can gap-fill a party's defence without prior pleadings**

140. The appellant submitted that the trial court ignored the Supreme Court binding precedent that affirmed that answers in cross-examination could not sustain a party's case or build a defence. That they must tender evidence supporting the allegation. According to the appellant the uncontroverted evidence by PW8, Joseph Kibyegon Sigei that the presiding officer Kigonor polling station had canvassed for votes by asking voters to 'vote for Pastor' was uncontroverted in the presiding officer's witness affidavit. Instead, he blatantly tried to deny the allegation in his re-examination. He urged that the court should have found that the uncontroverted claim was proved because the answers in the reexamination were bare and not backed by evidence. Instead, he claimed that, the court held that the witness had 'denied the allegations' in reexamination. The appellant relied on Christopher Odhiambo Karan V David Ouma Ochieng & 2 Others [2018] eKLR (Supreme Court)

141. This argument seems to be an extension of the one on purported uncontroverted evidence, adverse inference and or shifting of the evidential burden. Nevertheless, the important point here is that the appellant bears the burden of proof of the allegations made in the petition. He will succeed because he has proved his case to the required standard and not otherwise. At least, there was no claim of any admission on the part of the presiding officer concerned of the allegation by the appellant that he canvassed for votes for the 3rd respondent. The appellant did not prove the said allegation through evidence.

**vi. Whether the trial court misapplied the standard of proof.**

142. The appellant submitted that the trial court in analyzing the appellant's evidence elevated the standards of proof to beyond reasonable doubt and in other instances to a standard higher than beyond reasonable doubt thus misapplying the law on the intermediate standard of proof.

143. The appellant urged further that the trial court disregarded evidence from the appellant's witnesses because they had not availed P3 forms and treatment notes despite proof that the OB reports were availed in court. These witnesses include PW10, PW12, PW13 and PW11.

144. It was the view of the appellant that the trial court disregarded the evidence of PW4 on account that no arrests or charges had been made.

145. According to the appellant, the trial court misapplied the principle of burden of proof by failing to shift the evidentiary burden at any point to the respondents. That the trial court misapplied the burden of proof in two ways; i) Failing to shift the evidential burden of proof to the respondents at any point despite the petitioner having discharged its burden. And ii) Failing to apply the intermediate standard of proof and elevating the standard to a standard beyond reasonable doubt.

146. The appellant has repeated the arguments on shifting burden of proof which the court has already dealt with. Nonetheless, there is a new issue; alleged misapplication of the standard of proof.

147. According to the appellant, the trial court elevated the intermediate standard of proof to beyond reasonable doubt and in some cases beyond the standard of beyond reasonable doubt. The appellant relied on Raila Amollo Odinga case [supra] and Milliah Nanyokia Masungo case[supra].

148. It is worth noting that, intermediate standard of proof is higher than balance of probabilities but not as high as beyond reasonable doubt. Some commentators argue that this is a mongrel-kind of standard whose measure may not be easy to demarcate.

149. The critique notwithstanding, it is a standard which has been applied in Kenya and many other jurisdictions in civil cases where matters of a criminal nature have been pleaded, for instance, fraud. And, terms such as 'cogent evidence', 'preponderant evidence', 'compelling evidence', 'outer or upper limits of balance of probabilities' et al have been used to describe and demarcate the measure of the intermediate standard of proof.

150. Did the trial court misapply this standard?

151. Once again this court notes that the trial election court was acutely aware that the standard of '...proof in matters of election disputes...must be higher than the civil standard of balance of probabilities but lower than the criminal standard of proof of beyond [all] reasonable doubt' (page 37 of the judgment of the trial election court).

152. Although the appellant submitted that the evidence by all 13 witnesses he called was not controverted, the reality of the record was that it was controverted.

153. The trial election court analyzed the evidence by each witness for the appellant and the respondents and concluded that the appellant did not prove their case to the required intermediate standard of proof. There is no element in the analysis and evaluation of the evidence of misapplication of the standard of proof. The trial election court properly understood the scope of and properly applied the intermediate standard of proof on matters which are not of a criminal nature, and of beyond reasonable doubt on matters of criminal nature.

154. The appellant seems to lay too much premium on the fact that the 3rd respondent did not testify- to mean two things; i) that the evidence by the appellant's witnesses was not controverted; and ii) the court should draw an adverse inference against the 3rd respondent. But, the court has already dealt with the two issues extensively and conclusively elsewhere above.

155. In the end, I find that the trial court applied the proper standard of proof; intermediate standard of proof on allegations other than of criminal nature whose standard is beyond reasonable doubt.

**a. Intimidation, harassment of and violence on voters**

156. The appellant submitted that there was intimidation, harassment, violence and threat to violence.

157. The 3rd respondent submitted that the incidence of violence was an isolated one or a right preceding the election day. They were controverted or uncorroborated but could not be substantiated no evidence was tabled to demonstrate a resultant low voter turnout, destruction of election materials or injuries sustained by voters due to the violence harassment, intimidation, violence and threats of violence and turning away supporters.

158. At Olgos Sopia polling station PW7 Leonard Kibet Rotich testified that he was attacked intimidated and ejected from the queues by an IEBC polling clerk, Leshao Kibet Reuben as well as an affiliate of 3rd respondent named Wesley Kiplangat on account of being perceived a 'Kijabe supporter'. He testified that he could be easily identified as Kijabe supporter because he used to campaign for him. According to the appellant, Leshao Kibet Reuben did not rebut the claims.

159. The trial election court analyzed the evidence of this witness and observed his demeanor and concluded that '...the witness was not believable and was not an honest witness' (page 48 of the judgment). The question of demeanor is best observed and noted by the trial court. even looking at his evidence, he states at one point that he was at the polling station of Olgos Sapia at 330pm but was pulled out of the queue by Wesley Kiplangat. He again joined another queue but he decided not to vote and left out of

his own will. He did not report the matter to the police. His reason was that it was at night. Note the time he went to and left the polling station. His testimony has no or little value if any.

160. At Sosiana polling station PW3 Robert Kipngetich Tonui testified that he witnessed one Tonai Kijabe Kuya's campaigners Sharon Kitur get harassed while on the queue by one Wesley Koech Kurgat an affiliate of the 3rd respondent who incited other people against her for being a supporter of Kijabe. He stated that the crowd criticized Sharon for supporting Kijabe and she was forced to go back to the line and queue a fresh after being ejected by Wesley.

161. It is not clear whether this Wesley is the same Wesley PW7 was talking about. PW10, Dickson Kipkorir Ngeno gave testimony about Sosiana polling station. Other than claiming that Wesley told him not to vote, threatened to beat him up and was harassing voters in the queue, there was no succinct evidence of such act of criminal nature which showed intimidation by Wesley. He did not even report the matter to the police or IEBC. He stated that he preferred reporting such matter to the village elder. From the lens of the witnesses on Wesley's alleged harassment of voters, it would appear he did it consistently and for a long time in the polling station. Clear evidence of the matter and the action taken was necessary but it appears the witnesses kept mum over such grave incidents for reasons known to them- this kind of evidence does not give any grace to the allegation.

162. His claim that earlier his brother PW12 Richard Kipkemoi Ngeno had been attacked at the polling station so when Wesley threatened him he felt intimidated and left is intended to provide some sense of truth in his claims.

163. PW12, Richard Kipkemoi Ngeno about Sosiana polling station. He stated that he voted and that the voting was peaceful. He also testified to being attacked when he was leaving the polling station by the 3rd respondent affiliates Jackson Sinei and Dickson Chepkwony on the basis of having been campaigners for Kijabe. Jackson and Dickson. He gave evidence which show that he was even robbed by the two. He also chose to report to the chief first. He went to the police on 11.8.22. The chain of events and action on the part of the witness leaves a lot to be desired.

164. At Emarti polling station, PW11 Moses Kipei Kulale testified that he was attacked at the polling station by one Julius Sampwekwe.

165. PW13, Rober Kipkoech Jumbe testified that he was attacked on the eve of the election by close to 50 people affiliated to the 3rd respondent and managed to identify a few of them. That he was attacked because of being perceived as a Kijabe supporter 'it was people like him who were making him (Kijabe) stay in power for too long'. He testified that because of the attack he left intimidated and feared voting the next day. He mentioned many of his attackers in his affidavit including one Jackson Sinei.

166. These incidents were not reported to IEBC or made a basis for objection to the results. These are serious matters of criminal nature which require proof beyond reasonable doubt. Other than stating that the attackers were affiliates of the 3rd respondent, there was no pointed evidence to establish actionable or causal link between perpetrators of the violent attacks and intimidation of voters, and the 3rd respondent. For purposes of invalidating an election on a claim of violence and intimidation of voters by agents or affiliates of a candidate are made, it is necessary to establish they were done with the knowledge or instructions- express or ostensible- of the candidate.

167. Accordingly, the trial election court did not err in finding that the appellant did not prove beyond reasonable doubt intimidation and harassment of voters by the 3rd respondent or his agents or affiliates.

168. In addition, for purposes of invalidating an election, it is necessary to establish through cogent evidence that the alleged harassment, threats to, and violence, and harassment to violence of voters affected the

election; say, voting (turnout) or election materials, and or the counting of votes in such a manner as to lead to the conclusion that the elections were not free and fair. The trial election court correctly found that there was no substantiated claim proved as to justify the nullification of the election.

**vii. Whether the trial court erred in findings unsupported that the election of MCA substantially complied with *the constitution* and electoral laws.**

169. The appellant submitted that the trial court findings are unsupported by the evidence on record that the election of MCA, Kimintet ward substantially complied with *the constitution* and electoral laws. That the appellant pleaded and proved violation of electoral laws. That despite all the above breaches of constitutional principles and electoral laws, and against the evidence on record, the court found that the election of MCA, Kimintet ward was held in the substantial compliance with the law. The appellant relied on the case of Christopher Odhiambo Karan V David Ouma Ochieng & 2 Others [2018] eKLR (Supreme Court)

170. The 1st and 2nd respondents submitted that the supreme court in Raila 2017 applied the test given in the case of Morgan v Simpson whereby the use of the word 'substantially' was implied to be consistent with paragraph 209 of the judgment in order no. 2. That order no. 2 states that the irregularities and illegalities were substantial and significant that they affected the integrity of the election the results notwithstanding. The 1st and 2nd respondents relied on Raila Odinga & Another v Independent Electoral And Boundaries Commission & 2 Others , Aukot & Another ( Interested Parties), Attorney General & Another ( Amicus Curiae) ( Presidential Election Petition 1 Of 2017) [2017] KESC 42(KLR) (20 September 2017) Presidential Election Petition 1 Of 2017, Raila Odinga & 16 Others v William Ruto & 10 Others, Law Society Of Kenya Petition E005,E001<E002,E003,E007 & E008 Of 2022( Consolidated) [2022] KESC 56 (KLR) ( Election Petitions ) (26 September 2022) Judgement.

171. The 3rd respondent submitted that there was no issue that bordered irregularity and/ or malpractice that was reported to any relevant authority both on and prior to the voting day. Thus, election conducted on 9/3/2022 for Kimintet ward MCA was in compliance with *the constitution* and other relevant laws. The 3rd respondent relied on the case of Idris Abdi Abdullahi V Ahmed Bashane & 2 Others [2018] eKLR.

172. The 3rd respondent submitted that this ground is in bad faith. It is impugning the legitimacy of the Court's finding and questioning the competence of the court. He beseeched this court to condemn the appellant for this misplaced attack on the trial court having failed in the first place to present evidence that was based on facts that could be corroborated.

173. The court has analyzed the claims by the appellant against the evidence and the law.

174. Most appellant's witnesses were not convincing and / or tendered evidence that could not be substantiated.

175. For instance, PW8 Joseph Kibyegon Sigei and PW6 Elizabeth Chepkemoi Lelei gave testimonies that were not substantiated or capable of belief. PW4 who appeared to support the evidence of PW4 turned out not credible and seemed not to understand his role as an agent when he insisted on assisting voters himself yet he was an agent for particular party and candidates.

176. R2W3 Paul Kiprotich Langat threw a random figure of 100 voters who were assisted without any proof or evidentiary material to establish his claims.

177. PW5 Irene Chelangat Ngetich's testimony was controverted by Robert Kipkorir Langat who was present at the polling station as the polling agent of Mr. Shadrack Sabaya.

178. On the basis of the analysis herein, the court's overall impression of the facts of the case is that;

i. The appellant did not prove the allegations pleaded in the petition. More specifically, claims of subversion of assisted voters' right to elect a person of own choice; canvassing of votes for 3rd respondent during polling; chasing away of voters; closure of polling station before the permitted time; intimidation of voters and violence;

ii. The election was conducted substantially in accordance with *the Constitution* and election laws, except minor infraction occurred which did not affect the result of the election.

viii. Whether the trial court misapplied its role under section 87 of the Election Act.

180. The appellant submitted that the trial court misapprehended its role as an election court under section 87 of the *elections act* by requiring an investigation report as a proof that electoral irregularities may have occurred. That the trial court dismissed evidence on grounds that either investigation had not been done or investigation report not availed or that arrests had not been made. The appellant relied on Moses Wanjala Lukoye v Benard Alfred Wekesa Sambu & 3 Others [2014] eKLR.

181. The 1st and 2nd respondents submitted that there was no misapprehension of application of section 87 of the *elections act*. That allegations of electoral malpractices raised by the appellant with various police reports only show that reports were made but no investigations conducted. Therefore, according to the 1st and 2nd respondents, nothing stops the trial election court from invoking its powers under section 87 of the *elections act* to order that stalled investigations be conducted. If there was any malpractice, then the ODPP will take it up as a criminal matter. That none of the witnesses showed any steps taken to follow up their complaints.

182. The 1st and 2nd respondents submitted that the complaints in OB produced by PW1 did not touch on the 1st and 2nd respondents. Nonetheless the people proceeded to peacefully carry out their democratic right to vote. That only PW13 opted not to vote out of his own free will. That the entire voting process was peaceful and no wrong doing was demonstrated on the part of the 1st and 2nd respondents. The alleged criminal offences do not in any way implicate any of the respondent and does not negatively affect the outcome of the election.

183. The 3rd respondent submitted that Appellant misconstrued the provision of Section 87 of the *Elections Act*, 2011, which empowers the election court to make a determination that an electoral malpractice of a criminal nature occurred, it however is not seized with jurisdiction to determine an election offence.

184. This court takes the following view of Section 87 of the *Elections Act*, 2011. The section provides for two function that the election court must perform;

i) 'may, at the conclusion of the hearing of a petition, in addition to any other orders, make a determination on whether an electoral malpractice of a criminal nature may have occurred;

ii) upon such determination, ''shall direct that the order be transmitted to the Director of Public Prosecutions.

185. There is, however, a current debate of section 87 of the *Elections Act* on three nuances. One; what exactly the phraseology 'an electoral malpractice of a criminal nature' means or entails? Two; whether it is mandatory for the court to make a determination on whether an electoral malpractice of a criminal nature has occurred. And, three; whether the standard of proof has been lowered in light of the subject; 'an electoral malpractice of a criminal nature may have occurred' in the section.

186. The court finds quite illuminating of the debate, a passage in the case of Idris Abdi Abdullahi v Ahmed Bashane & 2 others [2018] eKLR, that: -

'...This Court is of the view that to determine if a criminal offence may have occurred in order to recommend to the Director of Public Prosecution (DPP) to investigate, the evidence on record should be able to disclose the alleged offence not on a balance of probabilities but the standard of proof to be proved by Petitioner ought to be higher than on a balance of probabilities."

187. Of importance however is that, unlike in the repealed section 87 of the Election Act, the new section does not use the words 'election offence' or 'found guilty of election offence' or 'criminal offence'. Nevertheless, some courts still use terms as 'criminal offence' or 'election offence'. It would be relieving more decisions by the High Court, and from the Court of Appeal or Supreme Court specifically addressing section 87 of the *Elections Act* especially on the issues of the debate raised above.

188. The foregoing notwithstanding, it bears repeating that, under the section: -

An election court may, at the conclusion of the hearing of a petition, in addition to any other orders, make a determination on whether an electoral malpractice of a criminal nature may have occurred.

And upon such determination: -

'...the court shall direct that the order be transmitted to the Director of Public Prosecutions'.

189. Therefore, the section empowers the election court to make a determination that an electoral malpractice of a criminal nature may have occurred, and upon such determination, 'the court shall direct that the order be transmitted to the Director of Public Prosecutions.

190. The DPP acts on the order to direct an investigation by the relevant investigation agency, and depending on the outcome of the investigations, the DPP may commence criminal proceedings or close the file.

191. The manner the section has apportioned the function of the election court on one part; and prosecution function to DPP on the other part completely removes any obscurity that the determination of the election court 'that an electoral malpractice of a criminal nature may have occurred' is not a determination of guilt or otherwise of an election offence. The latter jurisdiction is exercised in a criminal trial in accordance with the *Election Offences Act* and other relevant criminal law statutes.

192. One misconception that should be avoided, however, is that, a determination 'that an electoral malpractice of a criminal nature may have occurred' should per se void an election. Mutatis mutandis, making or transmission of the order thereof to the DPP does not make the determination any more potent. In order to void an election on the basis of 'an electoral malpractice of a criminal nature' the election court must consider the entire circumstances of the 'electoral malpractice of a criminal nature' including; i) the nature of the malpractice; ii) the scale or extent as to have affected the result or election; iii) the essence of the malpractice; iv) the relationship between the perpetrators and the candidate; v) the role of the candidate as principal offender; vi) the possibility of the candidate claiming exoneration from acts of his agents which constitute the malpractice. This reality may be an important argument in the flysheet for the debate the court has already alluded to especially on the use of the words 'may have occurred' as a pointer towards the applicable threshold or standard.

193. The trial election court was clear that there was no election offence proved to have been committed by 1st, 2nd and 3rd respondents. However, she noted that incidents which had been reported to the police vide OB NO. 24/5/9/2022 at Ntulele Police Station, OB NO. 5/11/8/2022 at Junction Police Patrol

Base, OB NO. 3/10/8/2022. At Junction Police Patrol Base, and OB NO. 3/5/9/2022 at Junction Police Patrol Base be investigated by the DCI, Transmara East, and a copy of the order be transmitted to the DPP.

194. By these findings, the trial election court did not violate section 87 of the *Elections Act* especially given the fact that the reports had been made and considerable period of time had lapsed without any investigation being carried out on the complaints. There is also no contradiction in the finding by the trial election court that there was no election offence that was proved to have been committed by the 1st, 2nd and 3rd respondents for which the election could be voided, and the order for investigations of the incidents that had been reported to the police.

195. These were peculiar circumstances of the case which warranted the order for investigations.

196. Ordinarily, however, the practice and role of the election court under section 87 of the *Elections Act* is to make a determination that 'an electoral malpractice of a criminal nature may have occurred', and upon such determination, 'direct that the order be transmitted to the Director of Public Prosecutions'. It is the view of the court, that, once the determination under section 87(1) of the *Elections Act* has been made, the order thereof shall be transmitted to the DPP under section 87(2); it matters not whether the election is or is not voided on the basis of the electoral malpractice of criminal nature that may have occurred.

**Of costs**

197. The appellant submitted that the trial court abused her discretion in awarding an exorbitant cost of Kshs. 2 million against the appellant without justification. That the court failed to indicate the basis of such an excessive amount. That comparative awards range from Kshs. 100,000 to 300,000/=. That there was no bias for the court to inflate the figure to Kshs. 2 million considering the election petition was straightforward and heard in 3 days. That because of the electoral malpractices proven against the respondents the court ought not to have awarded costs the appellant. Milliah Nanyokia Masungo v Robert Mwembe & 2 Others [2014] eKLR, Wilfred Kikaet Kuyo v Letulal Ole Masikonde & 2 Others [2018] eKLR, Timooh Emmanuel Sanaet v Muguya Wilson Matenya & Others Narok Election Petition No. E001 Of 2022 and George Mike Wanjohi v Steven Kariuki & Others [2014] eKLR.

198. The 1st and 2nd respondents submitted that the costs of 2 million awarded by the trial court the same was done at the courts discretion pursuant to section 84 of the *Elections Act* and rule 30(1) of the Elections (parliamentary and county elections) petitions Rules, 2017 (herein after referred to as Elections Rules). That the amount is not exorbitant. That preparing to cross examine 14 witnesses and to present 6 witnesses for examination in chief and reexamination and incurring traveling and office expenses for example printing costs, drafting and researching written submissions is no mean feat. That the judgement indicates that Kshs. 1,000,000 awarded to each of the respondents is to be agreed upon or assessed following the filling of bill of costs. Therefore, the appellant's claim to challenge the award on costs is premature because the ceiling was capped and parties are yet to file their bill of costs or agree on how each is to take. Relied on Mwathethe Adamson Kadenge V Twaher Abdullkarim Mohamed & 2 Others [2018] Eklr Election Petition Appeal 3 Of 2018.

199. The 3rd respondent submitted that costs follow the event. That noting that the petition and subsequently the appeal has complex and the issues have generally consumed loads of time, and submitted that the court should cap the instruction fee at Kshs. 2.5 million. He relied on Section Section 84 of the *Elections Act* and Kalembe Ndile and Another vs Patrick Musimba and Others [2013] e KLR .

200. Upon consideration of the foregoing arguments, the following is important.

201. The trial court capped costs at Kshs. 1 million each to be agreed upon or assessed by the court upon filling of a bill of costs.

202. The trial court also ordered that Kshs. 100,000 deposited by the petitioner as security be withheld pending the assessment of the party's bill of costs if any.

203. Under section 84 of the *Elections Act*: -

An election court shall award the costs of and incidental to a petition and such costs shall follow the cause.

204. In addition, under rule 30 of the Elections Rules, the election court may specify, among other things; i) the total amount of costs payable; or ii) the maximum amount of costs payable. The latter is what is now commonly known as 'capping of costs'.

205. The general rule is that awarding of costs is at the discretion of the court (Karanja Kabage v Joseph Kiuna Kariambegu Ng'ang'a & 2 Others, Civil Appeal (Nairobi) No. 301 of 2013). Nevertheless, the discretion is to be exercised judicially and in accordance with the election law and rules. Therefore, an election court- or any other court- cannot decline to award costs solely on the basis that the award of costs is a matter of judicial discretion (Joseph Amisi Omukanda v Independent Electoral & Boundaries Commission (IEBC) & 2 Others, Civil Appeal (Kisumu) No. 45 of 2013; George Mike Wanjohi v Steven Kariuki, Supreme Court Petition No. 2A of 2014).

206. From the argument presented, the appellant is not saying that the trial court ought not to have awarded costs on the petition. He has fastened a quarrel on the amount of costs payable which he says is exorbitant. He sees abuse of discretion in the quantum of maximum costs payable.

207. As a general rule, the costs of and incidental to an election petition follow the cause. (Godfrey Mwaki Kimathi & 2 Others v Jubilee Alliance Party & 3 Others, High Court (Nairobi) Petitions Nos. 102 and 145 of 2015; Joseph Amisi Omukanda v Independent Electoral & Boundaries Commission (IEBC) & 2 Others, Civil Appeal (Kisumu) No. 45 of 2013).

208. Costs in each cause is dependent on the circumstances of the cause. In this cause, the respondents are the successful parties. A total of 26 witnesses testified. Considerable time and research was employed in the preparation of the pleadings, the applications and the submissions as well as preparation of the witnesses and the hearing. The matters raised were also complex. The costs awardable should be adequate to compensate the work done.

209. Therefore, the trial court did not abuse discretion in capping costs at a sum of Kshs. 1,000,000.

210. In any event, upon the capping of costs by the election court, the 'Registrar shall tax the costs of a petition...in the same manner as costs are taxed in civil proceedings in accordance with the *Advocates Act*' (rule 31(1) of the Elections Rules) to determine the actual costs payable.

211. The ground fails.

212. The security deposited by the petitioner shall be utilized towards satisfaction of costs once taxed or agreed by the parties.

DIVISION - Conclusions and orders

213. The Trial Court analyzed the materials placed before it and made a determination. At the hearing, it was established that most if not all of the witnesses who testified were not credible, they only appeared in court out of necessity, for instance PW7. The Trial Court, on the basis of interpretation of section 87 of the *Elections Act* and the circumstances of the case, ordered for investigation to the alleged attack

on PW13 and PW12 since there was no substantial evidence that was tabled to ascertain these claims to a level of being determined as acts of a criminal nature for which the election may be voided.

214. The trial Court's decision that some infractions may have occurred but did not affect the election or result was proper and is on the basis that election, like all events or processes managed by humans, will not lack some shortcomings which are of minor nature and do not affect the results or the election in any substantial manner.

215. This court has also considered the evidence, the interpretation of the applicable law, application of the said law to the facts of the petition, and the conclusion reached by the trial court thereto, and does not find any misinterpretation or misapplication of the applicable law or legal principle on the facts of the case or any conclusion or conclusions which are based on 'no evidence' or are extraneous or absurd or illegal to justify upsetting of the judgment of the trial court.

216. The court's overall impression of the facts of the case is:

    i. That the appellant did not prove the allegations pleaded in the petition. More specifically, claims of subversion of assisted voters' right to elect a person of own choice; canvassing of votes for 3rd respondent during polling; chasing away of voters; closure of polling station before the permitted time; permitting unauthorized persons in the polling station; intimidation of voters and violence;

    ii. That the election was conducted substantially in accordance with *the Constitution* and election laws, except minor infractions occurred which did not affect the result of the election.

    iii. The 3rd respondent was validly elected.

217. In the upshot, this court finds the appeal to be without merit and is dismissed with costs. But so as not to be punitive in such public litigation, costs capped by the trial court shall now be the maximum costs payable for both the lower court case and this appeal to be taxed by the Registrar or agreed by the parties.

218. For the avoidance of doubt, the court upholds the Trial Court's decision that; i) the election was conducted substantially according to law and that infractions identified did not affect the result; ii) the order for investigations of identified reports made to the police be transmitted to DPP; iii) the 3rd Respondent was validly elected as the Member of County Assembly representing Kimintet ward; and iv) a certificate of the determination of the petition issue upon the IEBC and the speaker of the County Assembly of Narok under section 86(1) of the *Elections Act*.

**Appreciation**

219. The court appreciates the legal counsel for the parties for duly serving the court and the overriding objective of the law by observing their statutory duty thereto, and most importantly, bravely putting forward arguments on quite nascent areas of the law especially on section 87 of the *Elections Act*, and rule 12(13) of the Elections Rules.

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 21ST DAY OF AUGUST, 2023**

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**F.M. GIKONYO**

**JUDGE**

**In the presence of; -**

**Muraguri C/A**

**Ms. Kwanga for appellant**

**Ms. Kitur for 1st and 2nd respondents**

**Kiprotich for 3rd respondent**