



Aden & 2 others v Gedi & 3 others (Election Petition Appeal E006 & E007 of 2023 (Consolidated)) [2023] KEHC 21742 (KLR) (10 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21742 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
ELECTION PETITION APPEAL E006 & E007 OF 2023 (CONSOLIDATED)**

**PM MULWA, J
AUGUST 10, 2023**

BETWEEN

KOLOSHO HASSAN ADEN APPELLANT

AND

MOHAMED FEISAL GEDI 1ST RESPONDENT

ABDULAHI IBRAHIM ISAACK 2ND RESPONDENT

**THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION 3RD
RESPONDENT**

**AS CONSOLIDATED WITH
ELECTION PETITION APPEAL E007 OF 2023**

BETWEEN

ABDULAHI IBRAHIM ISAACK 1ST APPELLANT

**THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION 2ND
APPELLANT**

AND

MOHAMED FEISAL GEDI 1ST RESPONDENT

KOLOSHO HASSAN ADEN 2ND RESPONDENT

(Being an Appeal from the Judgment dated 24th February 2023 and the resultant Decree of the Hon. Hezron Nyaberi, Chief Magistrate in Garissa Election Petition No. 1 of 2022 Mohamed Feisal Gedi vs. Kolosho Hassan Aden & 2 others)



JUDGMENT

IN THE MATTER OF THE ELECTION OF MEMBERS OF THE COUNTY ASSEMBLY REPRESENTING FAFI WARD WITHIN THE COUNTY OF GARISSA HELD ON 9TH AUGUST 2022

1. On 9th August 2022, Kenyans went to a general election where every eligible citizen had a chance to exercise their right to choose leaders of their own choice. There were six elections vide, presidential, gubernatorial, senatorial, woman representative, member of the National Assembly and Member of the County Assembly (hereinafter referred to as “MCA”). The position of MCA Fafi Ward in Garissa County attracted seven candidates including Mohamed Feisal Gedi the 1st Respondent and Kolosho Hassan Aden, the Appellant.
2. The 2nd Respondent, the Constituency Returning Officer, received and announced the election results from 18 polling stations. He declared the Appellant as the duly elected MCA for Fafi Ward having garnered 802 votes whilst the 1st Respondent had garnered 723 votes.
3. The 1st Respondent, aggrieved by the election’s outcome, filed an Election Petition No. 1 of 2022 (the Petition) in the Chief Magistrates Court at Garissa on 1st September 2022 challenging the election of the Appellant. In his petition, the 1st Respondent alleged that the 2nd Respondent unlawfully and illegally declared the Appellant the duly elected MCA for Fafi Ward as having attained 802 votes without accurately collating, tallying, and computing all the results from the 18 polling stations within Fafi Ward.
4. The 1st Respondent further contended that there was widespread incorrect, unverifiable collation of results and voter result manipulation in several polling stations within Fafi Ward. In view of the inaccurate and unverifiable collation of Form 36A by the 2nd and 3rd Respondent, the 1st Respondent sought scrutiny of votes in respect to 15 polling stations and recount of votes or examination of tallying confined to 3 polling stations.
5. The 1st Respondent during pre-trial directions made an application seeking orders for scrutiny and/or recount of votes in the following polling stations; Hagadera Community Water Pan polling station 2 of 2 (hereinafter referred to as Hagadera) and Diiso polling station 2 of 2 (hereinafter referred to as Disso). The scrutiny and/or recount was conducted on 11th January 2023. Upon scrutiny and recount of the votes in the two polling stations, the learned Magistrate held as follows:

“Following the evidence adduced by the Petitioner and his witness vis-à-vis the examination Report of Scrutiny and Recount filed in Court by the Court (administrator), it is quite apparent that the Petitioner has plainly and concisely on a balance of probability demonstrated that at Hagadera polling station 2, the Petitioner garnered 130 votes and not 30 votes as reflected in Form 36A by the 2nd and 3rd Respondent. Again, the Petitioner has also demonstrated that at Diiso polling station 2, he garnered 3 votes whereas the 1st respondent garnered 144 votes. Unfortunately, Form 36 A by the 2nd and 3rd Respondents was not found inside the ballot box. Be it as it may, it is quite apparent from the results of the recount that if they were accurately tallied and collated by the 2nd Respondent, the result thereof would have substantially affected the outcome of the election and the victory of the 1st Respondent would have been in doubt. The missing form 36A cannot affect the outcome as all other essential accountable documents such as PSD, counterfoils, ballot papers, and



un-used ballot papers were found inside the ballot box and were compared accordingly in the recount and scrutiny report.”

6. On whether to annul the election, the learned Magistrate held as follows: -

- “(i) The results contained in Form 36A for Hagadera polling station 2 of 2 were not properly collated into Form 36B
- (ii) The missing Form 36A for the Diiso polling station did not affect the accuracy and transparency of the results during the recount and scrutiny as all other accountable documents were found in the ballot box.
- (iii) In Hagadera polling station 2, the 100 votes irregularly added to the 1st Respondent in Form 36B if reduced from his collated tally will result to 702. And if the same votes are added to the Petitioner, the Petitioner’s collated tally will result to 823. Again, if the 30 votes irregularly added to the 1st Respondent in Diiso polling station 2 are deducted, the collated tally for the 1st Respondent will be reduced further to 672.
- (iv) The Petitioner apparently won the election with a margin of 151 votes and therefore carries the will of the people of Fafi Ward.”

7. The learned Magistrate allowed the Petition, invalidated the election of the Appellant as the MCA Fafi ward, and declared the 1st Respondent as the duly elected MCA Fafi Ward having attained the majority valid votes during the elections. Consequently, the learned Magistrate directed the 2nd and 3rd Respondent to issue a certificate of election of MCA Fafi Ward to the 1st Respondent.

8. The Appellant being aggrieved with the Judgment of the trial court filed a Memorandum of Appeal dated 24th February 2023. The grounds of Appeal are as follows: -

- a. That the trial Magistrate erred in law by misdirecting himself and thus misapplying Section 80(4)(a) and (b) of the Election Act No. 24 of 2011 by declaring the 1st Respondent as duly elected pursuant to partial scrutiny of 2 ballot boxes and subsequently ordering the 3rd Respondent to issue a Certificate of Election.
- b. That the trial court erred in law by disregarding Section 83(1)(a) and (b) of the *Elections Act* and thereby failing to find that an election will not be declared void for non-compliance with any written law if it appears that the election was conducted in accordance with the principles laid down in *the Constitution* and written law and the non-compliance did not substantially affect the result of the election.
- c. That the trial Court erred in law by disregarding a binding decision of the Court of Appeal, to wit, Abdirahman Ibrahim Mohamud vs. Mohamed Ahmed Kolosh & 2 others (2018) eKLR on declaring a Petitioner the elected leader, and in so doing arrived at a perverse decision in law.
- d. That the trial Magistrate erred in law by failing to evaluate the evidence on record and as a result made a decision that no reasonable tribunal or court applying its mind to the entire evidence could have reached.



9. The Appellant urged the Court to vacate, vary and set aside the judgment dated 13th February 2018 and substitute it with an order dismissing the 1st Respondent's Petition.
10. As a Cross-Appeal, the 2nd and 3rd Respondent filed their Memorandum of Appeal dated 30th March 2023. The grounds for their Appeal are as follows:
 - a. The learned Magistrate erred in law in his interpretation of Section 80(4) (a) &(b) of the Election Act, 2011 and in issuing a declaration that the 1st Respondent is the duly elected Member of the County Assembly for Fafi Ward and in directing the Appellants to issue a certificate of election on account of recount and scrutiny conducted in two polling stations.
 - b. The learned Magistrate erred in law in arriving at a determination that is contrary to the law and manifestly borne out the misapprehension of the intent and purport of Section 80(4)(a) & (b) of the *Elections Act*, 2011.
 - c. That the learned Magistrate erred in law in awarding costs to the Respondents as well as to their advocates.
11. The 2nd and 3rd Respondents urged the court to allow their cross-appeal; that the Judgment of the trial court be set aside; and that the costs of their appeal be awarded to them.
12. The two Appeals were consolidated, with file No. E006 of 2023 being the lead file. Parties filed written submissions as directed by the Court which were highlighted before me.

Appellant's Submissions

13. Mr. Mugwe learned counsel for the Appellant argued that Section 80(4) of the Election Act has never been invoked in any decision in Kenya. Counsel argued that no superior court in Kenya has ever overturned a decision of an electoral body to declare a winning candidate by declaring another pursuant to partial scrutiny. Mr. Mugwe referred to the case of John Oroo Oyioka & another vs. IEBC & 2 others (2013) eKLR. He submitted that in that case the votes were recounted and on appeal, the decision was rendered per incuriam. The decision to declare Oroo Oyioka the duly elected candidate pursuant to Section 80(4) of the *Elections Act* in place of the incumbent was set aside and replaced with an order that a by-election be conducted. To further buttress his claim, counsel cited the Court of Appeal decision in the case of Abdurahman Ibrahim Mohamud vs. Mohamed Ahmed Kolosh & 2 others (2018) eKLR and submitted that the Court of Appeal held that Section 80(4) of the *Elections Act* can only be applied after counting all ballots cast.
14. Mr. Mugwe further submitted that the *Elections Act* is a normative derivative of Article 81 of *the Constitution* where the electoral system is required to abide by the principles set forth in the provisions that inter alia; Freedom of citizens to exercise their political rights and (the holding of) free and fair elections which are by secret ballot, free from violence, intimidation, improper influence, or corruption, conducted by an independent body, transparent, and administered in an impartial, neutral, efficient, accurate, and accountable manner.
15. Counsel submitted that as per Article 86 of *the Constitution*, the 3rd Respondent is mandated to ensure that whatever voting method is used, the system must be simple, accurate, verifiable, secure, accountable, and transparent. Further to this, the votes cast are counted, and tabulated, and the results are announced promptly by the presiding officer at each polling station. Also, there should be appropriate structures and mechanisms to eliminate electoral malpractice, including the safekeeping of election material.



16. Counsel referred the Court to the case of Richard Kalembe Ndile & another vs. Patrick Musimba Mweu & 2 others (2013) eKLR and submitted that in that decision the Court held that an election cannot be declared where the process on which it is founded remains in serious doubt as this would undermine the public faith in the electoral process. In this case, the Court called for a fresh election to be conducted.
17. Mr. Mugwe also cited the case of John Oroo Oyioka (Supra) and submitted that in that case, the 1st Respondent posited that the case mirrors the instant appeal. Counsel submitted that the case is distinguishable and inapplicable for the following observations: John Oyioka, the Petitioner went to the High Court complaining that he had won the impugned election by 5 votes. He said that Opre and a Returning Officer called Resa had colluded at the tallying centres to steal his victory and to have Opre declared as the winner. He prayed for scrutiny and recount of all ballots cast in Bonchari Constituency. Counsel submitted that the Court allowed the prayer and from the recount and scrutiny, it emerged that Oroo had actually won by 5 votes as claimed and as a result the Court allowed the Petition by applying Section 80(4). Counsel submitted that on appeal the court ordered for a by-election.
18. Mr. Mugwe further argued that in the case of Abdirahman Ibrahim Mohamud (Supra), the 1st Respondent and the trial court took the view that the said decision was rendered per incuriam by the Court of Appeal and thus cannot be the basis to argue that a declaration pursuant to Section 80(4) can only be made after a recount of all ballots casts. Counsel submitted that in the said case after scrutiny and recount, it was established that the votes cast exceeded the number of people who turned out to vote and the court held that the will of the people could not be ascertained hence, the court directed for a by-election to be conducted.
19. On Appeal, the Appellant was of the view that the votes recounted could be deducted from the final tally by the appellate court thereby his vote total would surpass that of the respondent, and the Court of Appeal could declare him the winner pursuant to Section 80 (4). Counsel submitted that the Court of Appeal differed with the High Court by reversing the order to conduct a fresh election with an order that the election was conducted substantially within the dictates of *the Constitution*. The matter went to the Supreme Court and they agreed with the Court of Appeal that the trial court erred in disregarding the Qara vote. Supreme Court further stated that since the votes cast exceeded voter turnout and also because the result of Qara would affect the entire result then a by-election should be conducted instead of applying Section 80(4). The Court stated that Section 80(4) can only be made pursuant to a recount of all ballots cast.
20. Counsel submitted that the learned Magistrate should not have applied Section 80(4) after partial scrutiny of the ballots casts. Further to this, he argued that the trial court failed to consider the broken seal in Hagadera and what impact this could have had when considering declaring the 1st Respondent as the winner of the election.
21. Further to this, Counsel cited the cases of Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Other (2014) eKLR and the case of Mohammed Mahamud Ali vs. IEBC (2019) eKLR and submitted that the courts have held that election matters cannot be perfect and errors, so long as they are minimal should not affect the will of the people. Therefore, the minor sins of Diiso can be excused as the 30 votes erroneously found in favour of the Appellant could not disturb the entire election. However, the recount of Hagadera cannot be relied upon as it was compromised. Hence, nothing can justify annulling the impugned election. The Appellant prayed that the appeal should be allowed, the judgment of the trial court be set aside, and his win be affirmed.



1st Respondent's Submissions

22. On behalf of the 1st Respondent, Mr. Akelo learned counsel filed written submissions dated 12th April 2023 and supplementary written submissions dated 4th May 2023.
23. Counsel submitted that the reason the scrutiny and recount was done in only two polling stations was that parties had stated that they had no dispute as to the results in the other 16 polling stations. Counsel submitted that the 1st Respondent's case at the trial court was affirmed by the scrutiny of the two disputed polling stations. Counsel submitted that Section 83 of the Election Act provides that a court shall not declare an election void for 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*.
24. Mr. Akelo submitted that from the scrutiny, the entry of the two polling stations was incorrect and manipulated as forms 36As had been altered in favor of the Appellant. Counsel added that the trial court held that the tallying and collating of votes was not conducted in compliance with *the Constitution* and the *Elections Act*. Further to this, counsel submitted that the infractions and errors of the two polling stations had substantially affected the results of the elections hence, necessitating nullification.
25. On the issue of whether the trial court correctly applied Section 80(4), Mr. Akelo submitted that the said provision is constitutional. Counsel cited the Court of Appeal and Supreme Court decision in Abdirahman Ibrahim Mohamud (Supra). He submitted that the Supreme Court overturned the decision of the Court of Appeal and agreed with the High Court where it was impossible to ascertain the winner of the elections, therefore, fresh elections were to be conducted. From this, counsel argued that there was no dispute on the results from the 16 polling stations and it would be absurd to order a recount. Counsel submitted that the Supreme Court in the case of Abdirahman Ibrahim Mohamud (Supra) was not opposed to the application of Section 80(4), but added that the election court should apply this provision judiciously.
26. Counsel further stated that in the case of Kalembe Ndile (Supra) there were numerous electoral issues that barred the application of Section 80(4). Therefore, that case is distinguishable from the circumstances of this case. He went on to submit that the trial court correctly applied Section 80(4) as the winner was devoid of doubts.
27. Counsel further submitted that after scrutiny, the proper and correct collation of forms 36A gave the 1st Respondent majority votes as the other candidates' votes were not affected. Therefore, the Appellant was not duly elected. Counsel argued that the issue in the Petition and in this Appeal is on the numbers. That the central issue was predicated on the tabulation and collation of votes and the accuracy of the declared votes entries into Form 36A. Mr. Akelo argued that the issue was never on the voting process during the election. The other results from the other candidates were not in dispute neither was the result from the 16 polling stations. It is for these reasons that counsel submitted that the Appeal should be dismissed and that the 1st Respondent is declared the winner of the election.
28. On who should bear the cost of the Appeal, counsel submitted that the court upholds the decision of the trial court and for the 1st Respondent to be awarded costs of Kshs. 2,000,000/-.

2nd and 3rd Respondent's Submissions

29. Mr. Sheikh learned counsel for the 2nd and 3rd Respondents submitted on the issue of whether the learned magistrate erred in interpreting Section 80(4). Counsel submitted that the election



court can grant other reliefs other than those set out in Section 75(3). Hence, the order declaring the 1st Respondent the duly elected MCA Fafi Ward and directing the 3rd Respondent to issue a certificate of election on account of the recount and scrutiny conducted was inappropriate relief in the circumstances of the case before the trial court. Counsel argued that the even though the 1st respondent was found not to have committed an election offence, the first condition as set out in Section 80 of finding an apparent winner was not satisfied.

30. Mr. Sheikh argued that an apparent winner can only be ascertained upon the recount of all the ballot casts and not partial scrutiny and recount of votes. To buttress this claim, counsel relied on the decision of Kalembe Ndile (Supra) and the Court of Appeal decision in John Oroo Oyioka (Supra). Counsel submitted that an election court is vested with powers to direct the 3rd Respondent to issue a certificate of election if, upon recount of the votes, the winner is apparent and the winner is found not to have committed an election offence. He added that an election court should exercise caution and restraint in applying Section 80(4) so that it declares a winner in the clearest of circumstances that leave no doubt as to what the will of the voters on the material polling day was. Counsel submitted that the court should decline to issue a certificate of an election to an apparent winner, where scrutiny and recount reveal that the election was not conducted in accordance with the law. Further to this, an election court in deciding whether to order a fresh election or direct issuance of a certificate of election ought to bear in mind and be guided by facts before it.
31. Counsel argued that the court having conducted a partial recount should have restrained itself from invoking Section 80(4). Therefore, the trial court misinterpreted the provision of Section 80(4) by declaring the 1st Respondent the duly elected MCA for Fafi Ward.
32. On the issue of costs, Mr. Sheikh submitted that as per Rule 30 of the Election (Parliamentary and County Elections) Petition Rules, 2017 and the Supreme Court decision in Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others (2014) eKLR, the trial court erred in awarding the cost of the Petition in favour of the Appellant and the 1st Respondent each capped at Kshs. 300,000 and to the Appellant and 1st Respondent's advocate costs capped at Kshs. 250,000/-. Counsel argued that the trial court did not only award party-to-party costs in favor of the appellant and the 1st Respondent but also ordered the 3rd Respondent to pay costs to their advocates, a concept unknown to law. Counsel submitted that there are only two types of costs, party-to-party costs and client-to-advocates costs. He cited the case of Republic vs. Lucas M. Maitha, Chairman Betting Control and Licensing Board & 4 others Ex-parte: Interactive Gaming and Lotteries Limited.
33. Mr. Sheikh submitted that the costs envisaged under Section 84 read together with Rule 30 is party-to-party costs which belong to the successful litigant. Therefore, the learned magistrate fell into grave error in law in awarding costs to the advocate on record for the appellant and 1st Respondent.

Analysis and Determination

34. Having considered the two appeals and submissions both written and oral by counsel for all the parties, I now go to the consideration of the issues raised. In doing so, I have to start by reminding myself that this being an appeal from the magistrate's election court, the jurisdiction of this court is limited to matters of law only as provided under Section 75 (4) of the [Elections Act](#) which states as follows: -

“75 (4) An appeal under subsection (1A) shall lie to the High Court on matters of law only and shall be; -

- (a) filed within thirty days of the decision of the magistrate's court; and



(b) heard and determined within six months from the date of filing of the appeal.”

35. The issues for consideration are as follows: -

- a. Whether the election court correctly applied Section 80(4) of the [Elections Act](#)
- b. Whether the election court had jurisdiction to award costs to advocates of the Appellant and 1st Respondent.

Whether the election court correctly applied Section 80(4) of the [Elections Act](#)

36. Section 80(4)(a) and (b) of the [Elections Act](#). The provision reads as follows: -

- “(4) An election court may by order direct the Commission to issue a certificate of election to a President, a member of Parliament or a member of a County Assembly if—
- (a) upon recount of the ballots cast, the winner is apparent; and
 - (b) that winner is found not to have committed an election offence.”

37. According to the Appellant, an election court should only direct the IEBC to issue a certificate of election upon recount of all ballots cast and not upon a partial recount. The 1st Respondent’s case is that neither party had an issue with the ballots cast in the 16 polling stations. The only issue was in the two polling stations. Therefore, there was no need to recount all ballots casts.

38. The result of the scrutiny and recount of ballot casts in the two polling stations were as follows: -

DIISO POLLING STATION

Aden Mohamud	Ali Hares	Dubat Odowa	Kethiye Rashid	Kolosho Aden	Maalim Ibrahim	Mohamed Feisal	Total votes casts	
Before Recount	8	0	0	8	174	7	3	200
After Recount	12	0	0	20	144	7	3	186

HAGADERA POLLING STATION



Aden Mohamud	Ali Hares	Dubat Odowa	Kethiye Rashid	Kolosh Aden	Maalim Ibrahim	Mohamed Feisal	Total votes casts	
Before Recount	13	28	0	2	113	57	30	243
After Recount	13	28	0	2	13	57	130	243

39. Upon scrutiny of Diiso, the only discrepancy was the missing form 36A and the 194 plucked ballot papers from the counterfoil whilst the total votes cast were 186. There were no rejected ballot papers. As for Hagadera, the ballot boxes and seals were found to be intact. The only discrepancy was that there were 246 plucked ballot papers from the counterfoil whilst the total votes cast were 243. Upon scrutiny of Form 36A, it indicated 1 rejected vote. The rejected vote was not found in the ballot box and the Polling Station Diary (PSD) indicated that there were no rejected votes.
40. From the reading of Section 80 (4) an election court can direct IEBC to issue a certificate of election to a candidate if three conditions are met. Firstly, there should be a recount of the ballots cast; secondly, as a result of a recount, the winner becomes apparent; and thirdly, where the winner has not been found to have committed an election offence. In this case, there was no evidence of either the Appellant or the 1st Respondent having committed an election offence. And therefore, the remaining issues for consideration are (a) whether a recount should be done on all ballots cast or on the disputed ballots cast, and (b) whether the discrepancies after scrutiny and recount have caused reasonable doubt as to the apparent winner of the election.
41. The case of *Abdirahman Ibrahim Mohamud v Mohamed Ahmed Kolosh & 2 others* [2018] eKLR and (2019) eKLR can be said to be the locus classicus on the interpretation of Section 80 (4) of the *Elections Act*. I will summarize the case from when it was first filed in the High Court till the last appeal in the Supreme Court.
42. The case arose from the election race for Member of Parliament for Wajir West Constituency. Mohamud and Kolosh were candidates in the elections. Kolosh was declared the winner with 6701 votes while Mohamud came in second with a total vote of 6224. Mohamud approached the High Court claiming inter alia that Kolosh and the respondents had committed election offences. During the trial, the court ordered for ballot boxes in four polling stations to undergo scrutiny and recount. Upon scrutiny, there were several malpractices and upon recount, specifically for the Qara polling station, the votes significantly altered the results in favour of Mohamud. The trial court nullified the election and ordered a by-election. The reason for this was that after scrutiny, the votes declared and found to have been cast at the Qara polling station exceeded the voter turnout and the ballot box was contaminated with votes unlawfully inserted therein.
43. Aggrieved with the decision, Mohamud approached the Court of Appeal on several grounds. Kolosh also filed a cross-appeal. The Court of Appeal summarized the issues for determination as follows:
- whether the learned Judge acted without jurisdiction and considered matters not pleaded in the petition; whether the learned Judge erred in disregarding the result of the vote count for Qara Constituency; and whether the learned Judge erred in law in not directing the Commission to issue Mohamud a certificate of election as a member of Parliament for Wajir Constituency.



44. On the first issue, the Court of Appeal held that election courts, should only determine cases before them on the basis of what was pleaded, and not on what may turn up somewhere along the way. On the issue of disregarding the Qara votes, the trial court had disregarded Qara votes for not being credible even though the trial court's reasons for the votes not being credible did not fall within the ambit of Section 82(2). The Court of Appeal held that the learned Judge fell into plain error in purporting to exercise a power he did not have and his disregard, discounting or nullification of the Qara votes was a nullity that had no legal force or effect. On the last issue of the issuance of a certificate of election to Mohamud, the Court of Appeal agreed with the trial court for not declaring Mahmoud the winner since a recount should be done on all ballots cast.
45. The upshot was that the Court of Appeal found that Mohamud did not make a case sufficient to void Kolosh's election. Mohamud did not have insubstantial or frivolous complaints, but they were of an emergent kind excluded by his own pleading in the petition which did not contain them. The Court of Appeal stated that the burden of proving allegations in a petition sufficient to upset an election is upon the petitioner and the same is not discharged when the case is presented, as it was herein. Therefore, the Court found that no proper basis had been laid in law for the nullification of the election and the ordering of a by-election.
46. Aggrieved with the decision of the Court of Appeal, Mohamud approached the Supreme Court. The Apex court agreed with the Court of Appeal, that the trial court lacked the jurisdiction to disregard the votes recorded at Qara Polling Station since the alleged electoral malpractice did not meet the conditions of Section 82(2). On the issue of declaring Mohamud as the winner of the election, the court stated that the issue of declaring a winner is an issue of credibility, as it is clear that the process of scrutiny of the ballots has not pointed to any contestant as the winner because the position is blurred and distinctly uncertain since the number of votes cast exceeded the number of voter turnout. It was, therefore, the court's holding that the election was not conducted substantially in accordance with the terms of *the Constitution*. The Court directed that a fresh election be conducted.
47. In this case, the Supreme Court did not disagree with the Court of Appeal's interpretation of Section 80(4). In answering the question of whether the "recount of ballots cast" refers to all the votes in the particular election or it can apply to a recount of only some of the votes as represented by a selection of polling stations, the Court of Appeal held as follows: -
- "Our thinking is that the power invested in the election court to literally declare a person elected other than the one who had previously been so declared on election day, is so great that it must be exercised with circumspection and with a taking of great care that there should be no error or omission in the reckoning of votes.
- It is a power to be exercised to give the correct position as to who won the election on the basis of the recount of the votes cast in that election. Such recount provides a conclusive answer to the question of who won the election and, logically, it must be on the basis of all the votes cast in that election. Any piecemeal or select counting of votes cannot possibly provide a winner to the election, as a winner is one who gains the most votes in the election. Any other construction seems to us to be unrealistic and even absurd for the reason that the winner of one or two polling stations contended could be declared victor of the elections, yet he may have gained less votes in totality, were the votes from all polling stations to be counted."
48. Elections more often than not is a numbers game. I fully associate myself with the decision of the Court of Appeal. For an election court to exercise the power conferred to it by Section 80(4) it has



to be cautious. There should be a conclusive answer to who won the election and with how many votes. There should never be room for doubt. Questions such as What about the other polling stations? Were there discrepancies in the collating, tallying, and computing of the votes? should never arise. The 1st Respondent argued that there was no contention among the parties on the results of the other 16 polling stations. An election court should never allow reasonable doubt to enter the minds of the citizens during an election more so, with the history of this country on election matters. Any doubt as little as a mustard seed can cause an uproar among the electorates.

49. The Court of Appeal in *Zebedeo John Opore v John Oroo Oyioka & 3 others* (supra) stated that recount should be for all the polling stations, but scrutiny can be on selected polling stations.
50. On the issue of whether to call for a fresh election, the Supreme Court held that that was a question of the credibility of the elections. It must be noted and appreciated that this was a closely contested seat since initially, the Appellant won the elections by 802 votes whilst the 1st Respondent came in second with 723 votes. This was a difference of 79 votes. There were no electoral offences and in polling stations such as Diiso, there were errors such as the missing form 36A and 194 plucked ballot papers from the counterfoil whilst the total votes cast were 186. According to the 1st Respondent, these errors were not significant enough to affect the result of the election. However, upon recount, there was a significant change of 30 votes. Despite the argument that there was no contention in the other 16 polling stations, it cannot be clearly ascertained that as long as parties had no issue with the other polling stations, then the results as recorded are the correct results. A minor change in the result even as little as 5 votes in each of the 16 polling stations could alter the entire result of the election.
51. In Hagadera, the results seem to have been either manipulated or an error in the recording. Initially, the Appellant's results were 113 and after recounting the Appellant is said to have garnered 13 votes. On the other hand, the 1st Respondent initially had 30 votes and after the recount, it was found that he had 130 votes. I uphold the view that even though the election was credible within the ambit of Articles 81, 82 and 86 of *the Constitution*, this election was closely contested and an apparent winner could not be declared from select counting of votes. A winner is one who gains the most votes in the election.
52. So, should the election be nullified? Section 83 of the *Elections Act* provides as follows:
 - “(1) A Court shall not declare an election void for non-compliance with any written law relating to that election if it appears that —
 - (a) the election was conducted in accordance with the principles laid down in *the Constitution* and in that written law; and
 - (b) the non-compliance did not substantially affect the result of the election.”
53. Elections are conducted by humans who none are infallible. As such, errors will always occur in the course of the election and the question that an election court must ask itself is not whether these errors and mistakes would occur but whether the same would affect the outcome in a substantial, material and decisive manner.
54. Since this election was closely contested with the difference between the Appellant and the 1st Respondent being 79 votes, any error in the tallying and computing of the votes should not be taken lightly. The recount of two polling stations out of the 18 polling stations caused significant changes in



the outcome of the elections. It is thus unclear what the will of the electorates in Fafi Ward was. For this to happen, a by-election should be conducted.

Whether the election court had jurisdiction to award costs to advocate of the Appellant and 1st Respondent.

55. On the issue of costs, the trial court held as follows:

“I award the Petitioner full costs capped at Kshs. 300,000/=. The 1st Respondent to get full costs capped at Kshs. 300,000/=. The costs for Mr. Akello and Mr Nyaga each capped at Kshs. 250,000/=”

56. Section 84 of the *Elections Act* stipulates that costs in election disputes follow the event. An election court may either award the total costs payable or cap the maximum sum payable and leave the assessment to the Taxing Officer. The election court may also determine which litigant will shoulder the costs, regarding being had to, inter alia, their conduct in the proceedings. (see Rules 30 and 31 of Elections (Parliamentary and County Elections) Petitions Rules.

57. Mr. Sheikh learned counsel for the 2nd and 3rd Respondent submitted that the trial court can only award party-to-party costs and not client to advocate costs. The Rules do not make provision for the timelines for taxation of costs and whether the election court has jurisdiction after the timeline has lapsed to deal with the issue of costs. The assumption is that save for disbursements, all other costs are capped. In *George Gilbert and Mombo Advocates vs. Lesirma Simeon Saimanga*, Misc Application No. 20 of 2022 (unreported), the taxing Master held as follows: -

“Rule 34 of the Elections (Parliamentary and County Elections) Petitions Rules 2013 empowers the election court, at the conclusion of the petition to make an order specifying the total amount of costs payable. Pursuant to this the Election Court rendered itself as follows: -

- a. The 1st and 2nd Respondent are awarded costs of Kshs. 4,000,000/=
- b. The 3rd Respondent is awarded costs of Kshs. 2,000,000/=

The election court did not itemize the costs to the respondents awarded. As such, the instruction fees are unknown and cannot therefore be Kshs. 6,000,000/= as submitted and proposed by the applicant. The costs awarded were not capping but rather the precise costs consisting of everything. The respective costs were therefore inclusive of instruction fees, getting up fee, attendance, drawing, perusal, making copies, service and disbursements. This is confirmed by the certificate of costs dated 6.08/2018. There was no party and party bill of costs for the court to go through as the costs was awarded and set by the election court.

What appears from the orders of cost by the election court is that each respondent was awarded Kshs. 2,000,000/= as costs. In other words, the party and party costs for each respondent was assessed at Kshs. 2,000,000/=”

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The Election Court did not itemize the costs to the Respondents awarded. As such the instruction fees is unknown and cannot therefore be Kshs. 6,000,000/= as submitted and proposed by the Applicant. The costs awarded were not capping but rather the precise costs consisting of everything. The respective costs were therefore inclusive of instruction fees, getting up fee, attendance, drawings, perusals, making copies service, and disbursements. This is confirmed by the certificate of costs dated 6/08/2018. There was no party and party bill of costs for the court to go through as the costs was awarded and set by the Election Court.

What appears from the orders of cost by the Election Court is that each Respondent was awarded Kshs. 2,000,000/= as cost. In other word the party and party cost for each Respondent was assessed at Kshs. 2,000,000/=

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What appears from the orders of cost by the Election Court is that each Respondent was awarded Kshs. 2,000,000/= as cost. In other word the party and party cost for each Respondent was assessed at Kshs. 2,000,000/=

58. I associate myself with the said decision. In awarding costs, the trial court was right to award costs to the parties and advocates as their instruction fees. Costs follow the event.

Since this was a closely contested election, the 2nd and 3rd Respondents had a duty to ensure that collating, tallying, and computing of the votes was as accurate as possible.

Disposition

- a. The appeal dated 24th February 2023 is hereby allowed.
- b. The Judgment and the decree of the trial Court dated 24th February 2023 is hereby set aside.
- c. The cross-appeal dated 30th March 2023 is partially allowed save for ground (c) in the Memorandum of Appeal.
- d. The Certificate of Election of the Member of County Assembly for Fafi Ward issued to Mohamed Feisal Gedi is declared invalid.
- e. The 2nd and 3rd respondents are hereby directed to conduct a fresh election for the seat of Member of County Assembly for Fafi Ward in Garissa County while ensuring due compliance with the governing terms of *the Constitution*.



- f. The costs of the Petition in the trial court and the costs of the appeal be borne by the 2nd and 3rd Respondent. Both capped at Kshs. 600,000/=each
- g. The 2nd and 3rd respondents to bear their own costs at the trial court and the High Court.
- h. Instruction fees for the counsel of the Appellant and the 1st Respondent in the trial court and High court be borne by the 2nd and 3rd Respondent and capped at Kshs. 500,000/= each.

Orders accordingly.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU

THIS 10TH DAY OF AUGUST 2023.

P. MULWA

JUDGE

In the presence of:

Mr. Paul Mugwe - for the Appellant

Mr. Wilberforce Akelo - for the 1st Respondent

Mr. Sheikh Mohamud - for the 2nd and 3rd Respondent

Court Assistant - Mr. Musyimi

