



Omwega v Independent Electoral and Boundaries Commission & 2 others (Election Petition Appeal E005 of 2023) [2023] KEHC 21286 (KLR) (4 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21286 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
ELECTION PETITION APPEAL E005 OF 2023
LN MUTENDE, J
AUGUST 4, 2023**

BETWEEN

ERICK NTABO OMWEGA APPELLANT

AND

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST
RESPONDENT**

CONSTITUENCY RETURNING OFFICER 2ND RESPONDENT

MATUNDURA ISMAEL BOSIRE 3RD RESPONDENT

*(Appeal arising from the Judgment and Decree of the Chief Magistrate's Court,
Kisii, presided over by Hon. S. N. Abuya, delivered on 20th February, 2023)*

JUDGMENT

Introduction

1. This Election Petition Appeal arises from the Judgment and Decree of the Chief Magistrate's court, Kisii, presided over by Hon. S. N. Abuya, dated and delivered on 20th February, 2023. The 3rd Respondent, Mutundura Ismael Bosire, was declared the validly elected member of County Assembly for Bogiakumu Ward, in Bonchari Constituency Kisii County following the elections held on 9th August, 2022.
2. The 3rd Respondent garnered 3,693 votes while the Appellant Erick Ntabo Omwega got 3,418 votes. In the result the appellant filed an Election Petition seeking nullification of the election. Through the Election Petition dated 2nd September, 2022, the appellant sought a declaration that the 3rd Respondent was not duly and validly elected. He sought an order declaring the election invalid; a declaration that the Respondents committed illegalities including election offences and malpractices during elections; and



an order directing the 1st Respondent (IEBC) to organize and conduct fresh elections for Bogiakimu Ward in strict compliance and adherence with *the Constitution*.

3. The trial court considered evidence tendered and dismissed the Petition hence confirming the 3rd Respondent as the duly elected Member of County Assembly for Bogiakumu Ward.
4. Aggrieved, the appellant proffered an appeal on the following grounds:
 1. THAT the learned Magistrate erred in law in her holding that the election for Member of County Assembly (MCA) for Bogiakumu Ward was not conducted in accordance with *the Constitution*, Election Laws and Regulations governing elections. The court failed to appreciate the Constitutional, statutory and regulatory provisions governing elections.
 2. THAT the learned Magistrate erred in law in her holding that the Appellant failed to prove the following illegalities, irregularities and malpractices in spite of clear evidence proving them;
 - a) The 3rd Respondent's campaigning on election day.
 - b) Intimidation, violence and undue influence of voters.
 - c) The Petitioner's chief agent being barred from accessing the tallying Centre.
 - d) Opaque counting and tabulation of results.
 - e) The Petitioner's agents being denied an opportunity to inspect and list serial numbers on ballot boxes and ballot papers and putting their own seals.
 - f) Denial of access and/or delayed access of the petitioner's agents to various Polling Stations including Nyamokenye polling station and Kiamoiro polling station
 - g) Irregular and unlawful assisted voting.
 3. THAT the court erred in law in failing to make a finding that the 3rd Respondent blatantly breached the Electoral Code of Conduct and committed electoral offences in holding demonstrations, conducting campaigns and portraying the Appellant as a murderer, all on election day.
 4. THAT the learned Magistrate erred in law and fact in disregarding clear evidence of the 3rd Respondent portraying the Appellant as a murderer on election day and failing to appreciate its adverse effect on voters and free and fair election.
 5. THAT the learned Magistrate erred in law in disregarding clear evidence of disenfranchisement of voters who could not be identified biometrically.
 6. THAT the learned Magistrate erred in law in holding that there was no proof of commission of election offences due to the petitioner's failure to provide proof of a report of the incidents relied on to the police and not capturing them in videos relied on in evidence, despite clear evidence of their commission.
 7. THAT the court erred in in law by admitting and relying on the incompetent witnesses' affidavits including that of the 3rd Respondent and other incompetent documents.
 8. THAT the learned Magistrate erred in law in not addressing the fact that the Returning Officer (the 3rd Respondent) filled and issued a certificate of elected member of County Assembly to the 3rd Respondent on 11th August 2022, before the results were received and declared on 12th August 2022. This was despite both parties making submissions on the issue.



9. THAT the learned Magistrate erred in law in not addressing the Petitioner's request to file a reply to the Respondents' submissions and not considering what was filed thus denying him the right of reply given that parties were not given an opportunity for oral highlights of their submissions.
 10. THAT the learned Magistrate erred in law in relying on conjecture, speculation, extraneous factors and hearsay instead of evaluating and analyzing all the evidence placed before her.
 11. THAT the learned Magistrate erred in law for taking an inaccurate record of proceedings some portions of which are incomprehensible and incomplete which compromised the Appellant's right to fair hearing and his right of appeal.
 12. THAT the learned magistrate erred in law in making an order that a certificate under Section 86 (1) of the Elections Act, 2011 do issue to the 1.E.B.C and the Speaker of the County Assembly of Kisii, conveying the trial court's determination of 20th February, 2022.
5. The appeal was disposed through written submissions that were highlighted orally.

Submissions –

a. Appellant

6. It was urged by the Appellant that the elections were not free and fair as the 3rd Respondent instigated chaos, unrest and demonstrations in six (6) polling centers. That the 3rd Respondent linked the Appellant to alleged murder of his bodyguard who was alive; false statements that influenced and tainted the integrity of voting. That the trial court did not apply the law in light of facts and evidence presented. In this regard it was submitted that the respondent breached the Electoral Code of Conduct and also committed election offences.
7. On the question of an election being voided following making false statements the appellant relied on the case of William Odhiambo Odour vs. IEBC and 2 others (2012) eKLR.
8. That there was evidence of some voters in Biogiakumu Ward who were denied their right to vote when they could not be identified biometrically which was evidence of having been disenfranchised. And, that in stations where alternative voting was facilitated, these was illegal and irregular identification and verification which made it null and void.
9. That elections were not free and fair as the 3rd Respondent instigated chaos, unrest and demonstrations in six(6) centers which created an environment that could not be said to be free or fair. That the 3rd Respondent linked the Appellant to the killing of his bodyguard knowing that he was alive, malpractices, irregularities that tainted the integrity of the qualitative aspect of elections. This,it was urged that impeded the integrity of numbers.
10. On the question of the court having allegedly admitted and relied on incompetent witnesses, affidavits and documents including that of the 3rd Respondent, it is submitted that the 3rd Respondent did not sign his replying affidavit and agents appointment letters which were relied on in evidence having denied knowing the commissioner of oaths who commissioned them, which called upon the court to disregard his evidence for lack of credibility.
11. That the court failed to address the issue of the Returning Officer having issued a certificate of elected MCA to the 3rd Respondent on the 11th August, 2022, before results were announced on 12th August 2022, an issue that was dismissed by the Respondent as having arose during submissions but not pleaded yet it had been pleaded. This according to the Appellant was an illegality and irregularity



committed by the 2nd Respondent. In this regard the appellant cited the case of *Odd Jobs Vs. Mubia* (1970)EA 476 where the court held that:

“ a Court may base its decision on an issue, where it appears from the course followed at the trial that the issue has been left to the Court for decision...”

12. That issuance of a certificate to the winner is so vital in an election so that even if it was not pleaded but featured in the evidence and was submitted on, the court could still be obligated to consider it.
13. Further, that the appellant was denied the right to reply to the Respondents' submissions following directions by the court, and, though the Appellant filed submissions in reply, they were disregarded by the court.

(b) 1st and 2nd Respondents

14. It is submitted that the appeal is incompetent as it offends Section 75(4) of the [Elections Act](#), 2011. That although the memorandum of appeal states that the court erred in law, the substance discloses matters of facts hence the appeal is based on facts and evidence.
15. That as captured under Section 107 of the [Evidence Act](#), the appellant bore the burden to prove the alleged irregularities and illegalities in the elections for Bogiakumu Ward which was not done. That the appellant availed evidence that did not meet the threshold as stated in the case of *Raila Amolo Odinga & Another Vs. IEBC & Others*, SCK Presidential Petition No. 1 of 2017.
16. That the appellant failed to discharge the burden of proof of the alleged chaos, exaggerated voter turnout, padding of votes, denial of entry/ access of agents to polling centers, intimidation of voters, transmission of false results, favoritism, false publications and unlawful assisted voters. That the Petition contains general accusation that cannot be the basis of overturning an election and the will of people.
17. That demonstrations were held to protest the shooting of the 3rd Respondent's bodyguard the previous night, but, the Appellant did not demonstrate how the peaceful demonstration affected voting in Bogiakumu Ward. That there was no record of any violence or chaos and voting and counting continued from opening to closing. That had the voting environment been hostile the Appellant's agents would not have remained in the polling stations.
18. That the speculations of alleged voting by unregistered voters, bribery, cheating undue influence, impersonation, double voting by disqualified voters remained unsubstantiated as there was no evidence to that effect.
19. On the question of failure of Kiems Kit, it is urged that there were minor challenges during the voting exercise which included failure of Kiems Kit in one of the polling stations, challenges that were resolved almost immediately and in a seamless manner therefore not calling for cancellation of the elections.
20. That the trial court did not rely on speculation or extraneous factors and the conclusion reached was informed by evidence as evident from the record of the trial court which is accurate.
21. It hence urged that the Bogiakimu Ward MCA election was conducted in a fair and transparent manner; and, the declaration of the results was done in the presence of candidates and/or their agents.

(c) 3rd Respondent.

22. It is contended that the appeal is incompetent as it contravenes the mandatory provisions of Section 75(4) of the [Elections Act](#). That though the framing of the grounds of appeal mention matters of the



law, the analysis of evidence presented clearly show that grounds 2,3,4,5,6,7 and 8 dispute the trial court's findings on lack of proof to the required standard, concerning the alleged electoral irregularities and malpractices. In this regard reliance was placed on the case of Mwathethe Adamson Kadenge Vs. Twaher Abdulkarim Mohamed & 2 others (2018) eKLR where the High Court stated that:

“ 42. It is clear from the foregoing that a contest of a decision in a Magistrate's Court to this Court in an election petition can only be on matters of law and not fact. The Supreme Court in the Gatirau Peter Munya case had this to say in respect of what constitutes “matters of law” ...

43. An election petition appeal from the lower Court to this Court must relate to the interpretation, or construction of a provision of *the Constitution*, an Act of Parliament, statutes or rules and regulations made thereunder or any legal doctrine, or the application thereof to a set of facts or evidence on record. Matters of law could also relate to determination of whether the conclusions of the trial Court are not based on the evidence on record or are so perverse or illegal that no reasonable tribunal would have arrived at them.”

23. On the question of admissibility of defective affidavits and documents as captured in ground 7 that were argued to have not been specified, it is urged that it is not a matter of law. To reinforce the arguments, the 3rd respondent depended on the case of Gatirau Peter Munga Vs. Dickson Mwenda Kithinji & 4 others (2014) e KLR where the Supreme Court held that;

“(82) [82] Flowing from these guiding principles, it follows that 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, ought not to be admitted. We believe that these principles strike a balance between the need for an appellate Court to proceed from a position of deference to the trial Judge and the trial record, on the one hand, and the trial Judge's commitment to the highest standards of knowledge, technical competence, and probity in electoral-dispute adjudication, on the other hand.”

24. And, that matters not pleaded before the trial court must be disregarded.

25. Grounds 9,10,11, and 12 were also dismissed as not being matters of the law but facts. In this respect reliance was placed on the case of Kitavi Sammy Vs. IEBC & 2 others (2018) eKLR.

26. In opposition of grounds 1,2,3,4,5,6,8, and 12, it is urged that the appellant failed to demonstrate to the required standard proof of existence of illegalities, irregularities, malpractices and/or offences hence the elections were conducted in accordance with *the constitution*, election laws and regulations governing elections.

27. That grounds No. 4,5,7 and 8 were never pleaded before the trial court which should be disregarded. That allegations of the appellant hereby portrayed as a murderer on the election date; disenfranchisement of voters not biometrically identified, a defective certificate issued to the 3rd respondent as well as admissibility of defective affidavits and unspecified documents were not pleaded. In this respect reliance was placed on the case of Raila Amolo Odinga & Another vs IEBC & 2 Others (2017) eKLR where the court held that:

”In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are



bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings”

28. That the election for Member of County Assembly (MCA) for Bogiakumu Ward satisfied relevant constitutional and statutory requirements hence the trial court reached the correct conclusion and gave a correct order pursuant to Section 86(1) of the *Elections Act*, 2011.
29. That the appellant made generalized allegations that had no basis. That the appellant had the responsibility to show that illegalities, malpractice and non-compliance with the law if any, affected the results as required, and, that results as required by Section 83 of the *Elections Act* could not be voided following non-compliance of the written law unless it affected results of the elections. Reliance was placed on the case of Bernard Kibor Kitur Vs. Alfred Kiptoo Keter & Another (2008) eKLR where the Supreme Court declined to nullify elections where there was sufficient evidence of unlawful campaigns; the court delivered itself thus:
 - “ 91. The point however is that the main beneficiary of the irregularity at Ng’ame Nursery School was the petitioner. In the end, the anomalies in Forms 35A and 35B in the three polling stations of Ng’ame Nursery School, Lelwak Primary School and Nduruto Primary School did not materially affect the final results. There remained a wide gulf of votes between the petitioner and the 1st respondent. See generally James Omingo Magara v Manson Nyamweya and others Kisumu, Court of Appeal, Civil Appeal 8 of 2010 [2010] eKLR; Kakuta Maimai Hamisi v Peris Pesi Tobiko and others Nairobi High Court, E.P. 5 of 2013 [2013] eKLR.
 92. I will now turn to the alleged election offences of bribery and treating of voters. The petitioner alleged that at Labuiywo, the 1st respondent bribed voters. The members of the public were clustered into tens; and, given Kshs. 1,000 each. The petitioner also testified that the 1st respondent and his agents visited tea estates and treated voters with bar soaps, sugar and other household goods. The 1st respondent and his witnesses denied the accusations.
 93. I find there was no cogent or credible evidence at the trial to back up the allegations. It was also not lost on me that they were based largely on hearsay. Furthermore, the allegations were of a criminal nature. The standard of proof required was beyond reasonable doubt. See Moses Masika Wetangula v Musikali Nazi Kombo & 2 others, Supreme Court Petition 12 of 2014 [2015] eKLR, Raila Odinga and others v Independent Electoral and Boundaries Commission and 3 others, Nairobi, Supreme Court, election petition 5 of 2013 [2013] eKLR, Halsbury’s Laws of England 4th Ed. Vol. 15 para 695, Simon Nyaundi Ogari and another v Onyancha and others [2008] KLR.
 94. My partial answer to issue number ii) framed earlier is that there is scantiness of evidence to show that the 1st respondent bribed or treated voters as pleaded in the petition.”
30. In a rejoinder, the Appellant urged that matters of the law are constituted by the technical element (interpretation of *the Constitution*) Practical element (application of *the Constitution* and law to a given



set of facts) and, evidential element (evaluation of *the Constitution* on the basis of the evidence on record). He called upon the court to consider how the Supreme Court dealt with the issue in the case of Kitur Vs. Keter (supra) where it was stated that:

“

“(61) [61] While the Petitioner argues that in remarking that the affidavit of the original petitioner is of no probative value, the Learned Justices of Appeal delved into matters fact, we are of a different opinion. The statement by the Appellate Judges does not delve into the veracity or otherwise of the averments in the affidavit of the Petitioner but only makes a pronouncement on the place in law of the said affidavit given the substitution of the parties. We are therefore not convinced that the Appellate Judges delved into matters of fact in coming to their determination.

(62) We consequently hold that the Learned Judges of appeal did not delve into matters of fact as claimed.”

On this basis the Appellant dismissed the allegation that grounds of appeal were based on matters of fact and evidence.

31. On the question of unpleaded issues, it is argued that though unpleaded, if the issue arises in evidence and both parties submit on it, failure to determine it by the court is erroneous.

Issues for Determination

- i. Whether the elections were conducted in accordance with *the Constitution*, Statute (Election laws) and regulations.
- ii. Whether the conclusion of the trial court was in accordance with the law.

Analysis and Determination.

32. The appellate jurisdiction over decisions emanating from electoral disputes before the magistrate’s court is provided for by the provisions of Section 75 (4) of the *Elections Act* that provides thus:

4) An appeal under subsection (1A) shall lie to the High Court on matters of law only... (Emphasis added.)

33. This means that the appellate jurisdiction of the High Court is limited to matters of the law. The question arising is what constitutes matters of the law? The Encydopedia.com defines matters of law as:

“That which is determined or ascertained through the use of statutes, rules, court decisions, and interpretation of legal principles.”

34. This indicates that matters of fact are not a basis of an appeal. In the case of Gatirau Peter Munya Vs. Dickson Mwenda Kithinji & 2 others S.C. Petition 2B of 2014, the court set out the three (3) elements that constitute matters of the law thus:

“a. the technical element: involving the interpretation of a constitutional or statutory provision;

b. the practical element: involving the application of *the Constitution* and the law to a set of facts or evidence on record;



- c. the evidentiary element: involving the evaluation of the conclusions of a trial Court on the basis of the evidence on record.”

35. The Respondents’ interpretation of the law is that the court is prevented from interrogating the evidence. But, determination of the law may not be done in a vacuum. In order to reach a finding whether the decision was in accordance with the law the appellate court must act within the scope of interrogation of what resulted into the resolution.
36. It is urged that Grounds 4,5,7 and 8 were not pleaded at trial therefore should be disregarded. It is trite that parties are bound by their pleadings (See Waititu vs. IEBC & Others (2013)e klr). The court is not expected to step out of the line drawn by the pleadings. The court cannot be expected to base its decision on unpleaded matters. However, it has been stated that the alluded to rule does not prevent the election court from inquiring whether the election was conducted in accordance with *the Constitution* and Statute. According to the holding of Hassan Abdalla Alberty Vs. Abu Chiaba & Another (2013) eKLR in that regard, if the holding does not prejudice a party, a court may consider an unpleaded matter. In the Odd Jobs case (supra), it is only where it seems that parties left the issue to be determined by the court, having been heard on it, that it can determine unpleaded issues. But, as pointed out, it is imperative that the issue to be determined be pleaded.
37. The unpleaded matter alluded to the assertion that the appellant was portrayed as a murderer on the election day, disenfranchisement of voters not biometrically identified, issuance of a defective certificate to the 3rd Respondent and admissibility of defective affidavits.
38. With regard to ground 4 of the appeal, the Appellant did not refer to the term murderer in his pleadings. What was stated was the allegation that the 3rd Respondent published false information that the Petitioner was the perpetrator of chaos. It was in the supporting affidavit that he claimed to have been alleged to have killed someone.
39. On ground, 5 of the appeal, it is alleged that evidence of disenfranchisement of voters who could not be identified by biometrics was disregarded by the trial court. The argument raised was that the law provides for mechanisms to be resorted to so as to avoid disenfranchisement.
40. The issue of incomplete affidavits raised in ground 7 of the appeal was not pleaded. It arose at the appellate stage. The issue having not been raised at trial, it is accordingly disregarded.
41. Ground 8 of the appeal regarding filling and issuance of certificates of an elected Member of County Assembly was not pleaded and did not come up in evidence. The issue emerged during submissions. In the case of Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007,the court stated as follows:
- “Submissions simply concretise and focus on each side’s case with a view to win the court’s decision that way. Submissions are not evidence on which a case is decided.”
- This ground was not pleaded and is treated as such.
42. On ground 9, failure or not to address the request to file a reply to the Respondents’ submissions and allegedly not considering what was filed; and, further, not giving a party a right of highlighting submissions prior to delivering judgment; It was stated in the case of Ngang’a & Another vs. Owiti & Another [2008] 1 KLR (EP) 749, that:
- “As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which



may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."

Plainly, this is not a matter of law.

43. Grounds 10 and 11 are not matters of the law.
44. The main issue to be considered in this appeal is therefore: Whether the election for Bogiakumu Ward for Member of the County Assembly (MCA) was conducted in accordance with the Constitution, electoral laws and regulations governing elections.
45. The standard of proof in an election case was stated in the case of Raila Amolo Odinga & Anor. Vs IEBC (2017) eKLR thus:

“We maintain that, in electoral disputes, the standard of proof remains higher than the balance of probabilities but lower than beyond reasonable doubt and where allegations of criminal or quasi criminal nature are made, it is proof beyond reasonable doubt.”
46. In the case of Raila Amolo Odinga (2013)eklr, it was stated that:

“Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondent bears the burden of proving the contrary”
47. On the issue of alleged irregularities and illegalities that may have affected the outcome of elections; Article 81 of the Constitution lists principles to be complied with by the electoral system. According to paragraph (e) elections must be free and fair which include being free from violence intimidation, and improper influence.
48. In the case of Raila Amolo Odinga (2017) eKLR it was held that:

“(204) Even in the English Court of Appeal decision in Morgan v Simpson⁹⁹, which has extensively been cited and applied in many cases in this country, both Lords Denning and Stephenson were of the clear view that notwithstanding the use of the word and instead of the word or in their provision, the two limbs of the section should be applied disjunctively. In his words, Lord Denning asserted:⁹⁹Morgan v Simpson [1974] All ER 722.1.If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected.2.If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or mistake at the polls-provided that the breach or mistake did not affect the result of the election.”
49. In this case the illegalities alluded to were:Counting and tallying of results.Voter identificationAgents denied access to the polling stationOpaque counting and tallying.

* Irregular and assisted voting.



50. Section 83 of the *Elections Act*, 2011 that is in respect of noncompliance with the law provides that:

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

i. Counting and tallying of results. It was argued by the appellant that agents in six (6) of the stations did not sign form 36. The Election/trial Court found that the two (2) agents signed the forms despite the allegation of being denied a chance to see the details on the ballot paper. The appellant admitted signing the forms and alleged that some of the agents left early while others fled. Rule 79(4) (6) (7) of the Elections (General) Regulations 2012 state that:

(4) Where a candidate or an agent refuses or fails to record the reasons for refusal or failure to sign the declaration form, the presiding officer shall record the fact of their refusal or failure to sign the declaration form.

(6) The refusal or failure of a candidate or an agent to sign a declaration form under subregulation (4) or to record the reasons for their refusal to sign as required under this regulation shall not by itself invalidate the results announced under subregulation (2)(a).

(7) The absence of a candidate or an agent at the signing of a declaration form or the announcement of results under subregulation (2) shall not by itself invalidate the results announced.

51. In the case of Thomas Malinda Musau & 2 Others vs. IEBC & 2 others (2013) eKLR, the court stated that:

“though it was crucial for the agents or candidates to sign the Form 35, failure to do so does not necessarily nullify elections.”

52. The record of the activities of the day would be concisely captured in the diary which was not sought to be availed to establish legal backing. That notwithstanding, as clearly provided by the regulations and case law, failure to sign the forms does not vitiate an election.

53. On the question of agents being denied access to Polling and Tallying stations, evidence adduced by the appellant’s Chief Agent was that he was at the Tallying center during certain hours as results were being collated. He stated during cross examination that he was at the Tallying Centre on 9th and 10th of August 2022 and waited as he received results from agents through whatsapp as they streamed in. It is on record that only accredited agents were being let in as numbers of the agents had to be limited by the Presiding Officer. Regulation 62 of the Elections (General) Regulations, 2012 provides that;

62.

(1) The presiding officer shall regulate the number of voters to be admitted to the polling station at the same time, and may exclude all other persons except— (a) a candidate; (b) a person



nominated as a deputy to the candidate, where applicable; (c) authorised agents; (d) members of the Commission and election officers on duty; (e) police officers on duty; (f) persons necessarily assisting or supporting voters with special needs or assisted voter; and (g) observers and representatives of the print and electronic media accredited by the Commission. (2) Notwithstanding sub regulation (1), the presiding officer shall admit to the polling station not more than one agent for each candidate or political party. (3) The absence of agents shall not invalidate the proceedings at a polling station.

54. RW15, the Returning Officers, per her uncontroverted evidence was not aware of any complaint, according to the record of activities at the polling station. To this end there was neither an irregularity nor illegality in the action of the Polling Officers.
55. On the question of irregularities in voter identification, Section 44(1) of the *Elections Act* Provides that:
- (1) Subject to this section, there is established an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results.
56. Section 44(3) in particular provides that:
- (3) The Commission shall ensure that the technology in use under subsection (1) is simple, accurate, verifiable, secure, accountable and transparent.
57. Section 44A of the *Elections Act* that is in respect of complementary mechanism for identification of voters provides:
- Notwithstanding the provisions of section 39 and section 44, the Commission shall put in place a complementary mechanism for identification of voters and transmission of election results that is simple, accurate, verifiable, secure, accountable and transparent to ensure that the Commission complies with the provisions of Article 38 of *the Constitution*.
58. The allegation was that some people were not identified biometrically and they were turned away. The 1st Respondent's witness, the 2nd Respondent herein, alluded to the steps taken by the Presiding Officer following failure of biometric system/kiems kit that was resolved and voting continued without a complaint being raised.
60. The Appellant/Petitioner was duty bound to adduce evidence so as to prove that contravention of the law. From the part of the Appellant, it was a mere allegation as no witness was called to buttress the fact. But, the 1st Respondent by virtue of the evidentiary burden of proof and by virtue of being the one manning the electoral process explained that some people who were not identified were released. What was not established was that there were alleged voters who could have cast the votes in the appellant's favour and that it could have altered the election result. It is not alleged that a voter complained to the Appellant for having been prevented to vote. In this regard there having been no failure in the biometric system the accuracy and integrity of the election cannot be put to question.
61. On the question of irregularities concerning assisted voting process; Regulation 72 (1) of the General Regulations enact thus:

72.



- (1) On the application of a voter who is, by reason of a disability or being unable to read or write, and therefore unable to vote in the manner prescribed in these Regulations, the presiding officer shall permit the voter to be assisted or supported by a person of the voter's own free choice, and who shall not be a candidate or an agent.
62. No evidence was led by the Appellant of how the process was violated. Evidence was tendered of ten (10) people having been assisted by the Presiding Officer at Musando Polling Station in the presence of 3-4 agents while RW 11 assisted two (2) voters in the presence of two (2) agents. No omissions in the process were pointed out that may have contravened the law by the appellant that would have been considerable enough to affect the results of the elections.
63. The 3rd Respondent is faulted for contravening the law by committing illegal acts that included making false statements and publishing information regarding perpetration of an offence. Section 11 of the [Election Offences Act](#) provides thus:
- A person who, directly or indirectly in person or by any other person on his behalf, inflicts or threatens to inflict injury, damage, harm or loss on or against a person—
- (a) so as to induce or compel that person to support a particular candidate or political party;
- (b) on account of such person having voted or refrained from voting; or
- (c) in order to induce or compel that person to vote in a particular way or refrain from voting, commits an offence and is liable on conviction to a fine not exceeding two million shillings or to imprisonment for a term not exceeding six years or to both.
64. In the case of *Khatib Abdalla Mwashetani vs. Gideon Mwangangi Wambua* (2014) eKLR, the Court of Appeal held that:
- “Purely from the consequences that flow from the finding that a person is guilty of improper influence, we must conclude that improper influence is serious conduct that has attributes akin to those of an election offence. It is now settled beyond peradventure that the standard of proof where an election offence or such kind of conduct is alleged, is proof beyond balance of probabilities.”
65. Evidence tendered before the trial court confirm demonstrations having taken place where the 3rd Respondent was a participant following shooting of his bodyguard. The events happened on the elections date; the question to be posed is whether the occurrence amounted to campaigning? Section 2 of the Elections (General) Regulations defines the act of campaigning as the promotion of a candidate or political party for purposes of an election during the campaign period. What happened was an act showing that there had been some shooting of an individual which differed from campaigning.
66. Claims of false allegation that may be defamatory, propaganda and undue influence claimed had to be proved. The Appellant was required to prove that as a result of the occurrence voters who were to cast the vote at his instance were manipulated, threatened such that they refrained from voting.
67. The attention of voters was attracted due to curiosity but they stayed on to exercise their mandate of voting. The participants in the public protest did not carry weapons per the evidence of PW 5.



Thereafter voting continued. The trial court alluded to no voter having been called to testify to change of mind following the published information without statistics to prove loss of votes, no election offence was proved to lead to nullification of the elections.

68. From the foregoing, it is apparent that allegations put forth on appeal were not proved to the required standard so as to dislodge the will of the people of Bokiakumu Ward. Therefore, I have no reason to unsettle the decision of the trial court.
69. Accordingly, the appeal is dismissed with costs to the respondents in the sum of Ksh. 60,000/- which shall be capped at Ksh. 20,000/- for each Respondent.
70. It is so ordered.

DATED, SIGNED AND DELIVERED AT KISII, THIS 4TH DAY OF AUGUST, 2023.

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

MR. MITUGA FOR APPELLANT

MR. KAREI H/B FOR MR. MWANGI FOR 1ST & 2ND RESPONDENTS

MESSRS. OCKOKI FOR 3RD RESPONDENT

COURT ASSISTANT – DANIEL ORUASA

