



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAROK

CIVIL APPEAL NO. 1 OF 2018

PATRICK SOSIO LEKAKENY.....APPELLANT

VERSUS

1. TOMITO ALEX TAMPUSHI.....1ST RESPONDENT

2. MACHARIA OMBOGO ELIJAH.....2ND RESPONDENT

3. GEORGE OKUMU ADERA.....3RD RESPONDENT

4. IEBC.....4TH RESPONDENT

(Being an appeal from the judgement and decree of Hon. D.K. Matutu, Senior Resident Magistrate, dated 18th January, 2018 in Kilgoris election petition No. 3 of 2017)

JUDGEMENT

INTRODUCTION

1. The Appellant has appealed against the magisterial judgement and decree, which nullified his election as the Member of the County Assembly (hereinafter referred to as MCA) for Shankoe Ward within the County of Narok. In this court, the appellant has raised ten (10) grounds of Appeal.
2. In addition to those ten grounds, Mr. Otieno for the appellant has filed written submissions, in which he has cited various authorities in support of the appeal.
3. Furthermore, the 1st Respondent who was the second runners-up opposed the appeal. Mr. Morintat counsel for the 1st Respondent has filed written submissions, in which he has cited various authorities in opposition to the appeal.
4. The 2nd and 4th Respondents through their counsel, Mr. Muriuki also filed written submissions in support of the appeal. It is important to point out that it is the 4th Respondent which conducts and runs elections. The 2nd Respondent is its agent in his capacity as the returning officer.
5. Like the 2nd Respondent, the 3rd Respondent is also the agent of the 4th Respondent in his capacity as the presiding officer of Endoinyo Nkoipit polling station, whose activities gave rise to this appeal. There are no issues arising from the remaining 23 polling stations within Shankoe Ward.

BRIEF FACTUAL BACKGROUND

6. The appellant was undisputedly declared the MCA-elect for Shankoe ward by the 2nd Respondent, having garnered 3,156 votes with the 1st Respondent being the 2nd runners-up with 3,094 votes. This gave a margin of win by 62 votes.
7. It is also not in dispute that results from Endoinyo-Nkoipit polling station were excluded by the 2nd Respondent in his final tally and declarations of results for the elective post of MCA for Shankoe Ward. Additionally, it is not in dispute that Endoinyo-Nkoipit polling station had 666 registered voters.
8. It also cannot be disputed that it is the events at Endoinyo Nkoipit polling station, which led to the nullification of the appellant as the

MCA- elect for Shankoe Ward and hence this appeal. Finally, it is also not in dispute that the 3rd Respondent who was the presiding Officer at Endoinyo Nkoipit polling station has not participated in these appellate proceedings and was not represented.

ISSUES FOR DETERMINATION

9. The Issues in contestation in this appeal are as follows:-

First, whether or not the 3rd Respondent announced and declared results for Endoinyo Nkoipit polling Station. Second, whether or not the said results were electronically transmitted to the constituency tallying centre (hereinafter referred to CTC) and simultaneously to the County Tallying Centre (hereinafter referred to as CTC) and to the National Tallying Centre (hereinafter referred to as NTC).

Third, whether or not the exclusion of results from Endoinyo Nkoipit polling station affected the sovereign will of the people of Shankoe in the election of their MCA.

THE APPLICABLE LAW

10. An appeal lies to this court from the decision of the magisterial court sitting as an election court in terms of section 75 (4) of the Elections Act 24 of 2011. And such appeals shall lie only on matters of law. Factual matters are explicitly excluded. There are further enabling provisions of the law in Regulation 34 (10) of the Elections (Parliamentary and County Elections) Petitions Rules of 2017.

11. The provisions of that regulation in part confer on this court the same powers and authorizes it to perform the same duties as are conferred and imposed on the trial court exercising original jurisdiction.

12. In addition to the statutory provisions and rules made thereunder, there is case law that indicates what constitutes a point of law. In this regard, I have sought guidance in the following authorities as cited by counsel for the 2nd and 4th respondents. This court sitting as a first appeal court over the decision of the magisterial court is required according to *Peters –V- Sunday Post Ltd (1958) EA 424*, to re-assess the entire evidence tendered at trial and make its own independent findings. If the finding of the trial court is supported by evidence and the law, then such a finding may not be interfered with.

13. Furthermore, according to *Timamy Issa Abdalla V. Swalleh Salim Imu & 3 others (2014) eKLR* this court's jurisdiction to re-assess the evidence and draw its own conclusions must be exercised with caution since its jurisdiction to draw its own conclusions can only apply to conclusions of law. If such conclusions are erroneous, that is to say, they are not supported by the evidence and the law, the matter becomes a point of law. The court of Appeal in *Mercy Kirito Mugeti V. Beatrice Nkatha Nyaga & 2 Others (2013) eKLR*, citing *Selle and Another V. Associated Motor Boat Co. Ltd & Others (1968) EA 123*, stated that:

“An Appeal from the High Court is by way of retrial and the Court of Appeal is not bound to follow the trial Judge findings of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanour of a witness is inhabited with the evidence generally.”

14. Furthermore, in *Attorney General V. David Marakaru (1960) EA 486*, the court held that a decision is erroneous if it is one to which no court could reasonably come to, citing with approval *Bracegirde V. Oxley (1947) I ALL ER 126*.

15. In *Bracegirde V. Oxley, supra*, Lord Denning gave the following guidance:-

“The question whether determination by a tribunal on point of fact or in point of law frequently occurs. On such a question there is one distinction that must always be kept in mind, namely, the distinction between primary facts and conclusions from those facts. Primary facts are facts which are observed by the witnesses and proved by testimony; conclusions from those facts are references deduced on a process of reasoning from them. The determination of primary facts is always a question fact. It is essentially a matter for tribunal who sees the witnesses to assess their credibility and to decide the primary facts which depends on them. The conclusions from those facts are sometimes conclusions of fact and sometimes of law.....the court will only interfere if the conclusions cannot reasonably be drawn from the primary facts.....”

16. There is further guidance in the Court of Appeal in *Mwangi V. Wambugu (1984) KLR 453*, in which that court pronounced itself as follows:-

“A court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding and an appellate court is not bound to accept the trial Judge's finding of fact if it appears either that he has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

ANALYSIS OF THE GROUNDS OF APPEAL IN THE LIGHT OF THE MAGISTERIAL FINDINGS, THE APPLICABLE LAW AND THE EVIDENCE

17. It is clear from the foregoing matters that the jurisdiction of this court is limited to issues of law only. As was rightly pointed by Lord Denning in *Bracegirde V. Oxley, supra*, the conclusions which are drawn from the facts are sometimes conclusions of fact and sometimes of law. This dichotomy will always be there. It therefore follows that as to whether a conclusion drawn is one of fact or law depends on the

particular circumstances of each case. In other words, the distinction between fact and law will have to be decided on a case by case basis.

18. I now proceed to consider the grounds of appeal with the foregoing principles in mind. The appellant has raised ten grounds of appeal in his memorandum of appeal to this court. In ground one, the appellant has faulted the trial court in law for substantially relying on extraneous matters, conjectures, suppositions and theories to make determinations rather than relying on the evidence adduced before it. And as a result the court arrived at an erroneous determination contrary to the law and evidence.

19. In this regard, counsel for the appellant has faulted the trial court in finding that all the party agents did a shoddy job at the polling station. He has also faulted that court in finding that in future, if the polling station is to be a true locus as held in *IEBC v. Maina & 5 others*, (2017) eKLR, parties and candidates have to invest in capacity building and training.

20. Counsel further submitted that the 1st Respondent did call any of his agents to give evidence in court on his behalf. The only agent who gave evidence was Moses Ledama Kiligat (DW1), who was the appellant's agent, and was called by the appellant as his witness. DW1 testified that one Dominic Ledama was the agent of the 1st Respondent (Tomito Alex Tampushi). DW1 also testified that Dominic Ledama like himself signed all the forms at the polling station. DW1 further testified that there was no complaint after the results were announced and declared at Endoinyo Nkoipit. DW1 was then given a copy of 36A, which was signed by all agents. This is clear from the evidence in chief (that is, the affidavit evidence) of the 1st respondent, who has annexed the said form 36A as annex TAT 6, to his affidavit.

21. In response to the submissions of counsel for the appellant Mr. Morintat supported the disputed magisterial findings. He submitted that the trial court exercised its mind on the issue of form 36A. He further submitted that the 2nd Respondent, who was the returning officer, did not include the tallied results in his final tally, which he declared and announced by excluding the tallied results from Endoinyo Nkoipit polling station.

22. Furthermore, Mr. Morintat submitted that the 3rd Respondent who was the presiding officer at Endoinyo Nkoipit was arrested under circumstances which involved results from the said polling station.

Counsel for the 2nd and 4th respondents supported the position taken by the appellant.

23. I have considered the rival submissions of all participating counsel. I have also re-assessed the evidence of Moses Ledama Kiligat (DW1) as required of a 1st appeal court in the light of the totality of the evidence tendered at trial. As a result I find that the evidence of DW1 has a ring of truth and he did what he was required to do as an accredited party agent for the appellant. It therefore follows that the magisterial conclusion that all the party agents did a shoddy job is not supported by evidence adduced at trial. *Oketch Okale and others v. R. (1965) EA 555* requires courts to base their findings on the evidence and matters canvassed before them. Although that pronouncement was made in a criminal case, the principle is the same in civil matters.

24. In the circumstances, I find that the conclusion reached by the trial court was not based on evidence. And according to *Mwangi V. Wambugu, supra*, I am entitled to interfere with such finding. It is also important to point out that a trial court's conclusion such as this one, that is not based on evidence, is a point of law that falls within the jurisdiction of this court as a 1st appeal court.

25. Furthermore, I find that the trial court fell in error in law in basing its conclusion on extraneous matters. The submissions of counsel for the 1st Respondent are hereby dismissed for lacking in merit. I therefore find merit in ground 1 of the Appellant's appeal and I hereby uphold it.

26. Counsel for the 1st respondent has submitted that the 2nd respondent considered the results from Endoinyo Nkoipit yet he proceeded to declare the winner without the results from that polling station. It is common ground those results were not included in the final tally by the 2nd respondent, upon which he proceeded to declare the winner. Those results according to the 1st respondent's annex TAT 6 to his supporting affidavit were as follows:

INVENTORY OF CONTENTS IN THE BALLOT BOXES ON 11TH AUGUST, 2017

MEMBER OF COUNTY ASSEMBLY

PARTY/ CANDIDATE SYMBOL	CANDIDATE NAME	VOTES IN THE BOX	REJECTED	STRAY	SPOILT	REGISTERED VOTERS	VOTES DECLARED
CCM	KAIPEI MOSOIKO JACKSON	3					3
JUBILEE	SOSIO LEKAKENY PATRICK	272					272
ODM	TOMITO ALEX TAMPUSHI	247					247

INDEPENDENT	MOSES YIAMBOI OLAIMERRI	29					29
TOTAL		551	30	2	3	666	551

27. It is clear peradventure that Appellant garnered 272 votes, while the 1st respondent garnered 247 votes.

In the circumstances, it is clear peradventure that the exclusion of the votes from Endoinyo Nkoipit could not affect the final outcome that the Appellant won. In other words, the exclusion of those votes was an error that did not affect the sovereign will of the voters in Shankoe ward in voting for their MCA.

28. Counsel has further submitted that the 2nd respondent should have carried out his duties without being directed on what to do. He further submitted that it was wrong for the 2nd respondent “to state that parties agreed not to include results from the said station.”

In this regard the evidence of the 2nd respondent while under cross examination by O. M. Otieno Advocates of the 2nd respondent was that:

“...The decision not to include results from Ndonyokopit was not unilateral. I consulted the candidates and their agents.”...

29. Furthermore, the 2nd respondent in his evidence in chief testified that:

“...There was no physical results from Presiding Officer. I consulted the candidates who agreed we announce results without those recorded. I made a declaration. I considered the transmitted results in the declaration.”

30. Again as regards the transmitted results from the said polling station, the 2nd respondent testified that: “...There was no physical results from Ndonyokopit. Voters voted. There (sic) will was electronically transmitted. That is the most secure.” As an agent of the IEBC, The 2nd respondent, He is required to carry out his mandate independently as mandatorily directed on the Constitution of Kenya in terms of article 249(2)(d), which provisions state that commissions and the holders of independent offices –

“(b) Are independent and not subject to direction or control by any person or authority”

31. In the light of totality of the foregoing evidence I find that the 2nd respondent declared the results by excluding those from the said station after consultation. There is no evidence that he was directed by candidates to declare the results without those from Ndonyokopit.

32. I therefore find no merit in the submission of Mr. Morintat the 2nd respondent was directed by the candidates. However, the 2nd respondent having received the results from the 3rd respondent at Endonyo Nkopit, he should have announced and declared them as required by *IEBC v. Marina Kiai & others (2017) eKLR*. But the said breach did not affect the sovereign will of the people of Shankoe ward.

33. Furthermore, Mr. Morintat submitted that the electronically transmitted results on Kiems kits twice, did not indicate acknowledge delivery of the results. The 3rd respondent in this regard testified that he did not know whether the transmission had succeeded.

In this regard there is ample evidence of the 3rd respondent while under cross examination by counsel for the 2nd and 4th respondents that he electronically transmitted the results and upon his arrest by the police, those results had already been received by the 2nd respondent.

Additionally, In this regard also the 2nd respondent testified while under cross examination by Mr. Morintat testified that: “...we received results for Ndonyokopit. I cannot say the time at night. I did not receive (sic) the physical form...”

34. In view of this evidence I find no merit in Mr. Morintat’s submission, in which he seems to suggest that the transmitted results were not received by the 2nd respondent. I therefore dismiss his submissions for lacking in merit.

35. Mr. Morintat also submitted that the failure of the 4th respondent to provide legal representation for the 3rd respondent should be interpreted to their disadvantage. Additionally, he submitted that...”The 4th respondent should take full responsibility. It is only exempted on issues of criminal liability.”

36. There is no evidence on record as to why the 3rd respondent was not accorded legal representation. I am therefore unable to rule on the issue of lack of legal representation.

37. However, it is important to point out that whatever orders the court is going to make at the end of the trial those orders could affect the 4th respondent. And for that reason, amongst others, it would have been advisable accord legal representation to the 3rd respondent. According to *Muwonge v. Attorney General (1967) EA 17*, the government is vicariously liable for the actions of its employees who are sued for matters arising within the course of their employment. This is so, even if the employees are acting criminally or otherwise. Similarly, IEBC would be liable vicariously for the civil actions of its agents. However, this liability does not extend to criminal liability, which only affects those agents who are involved. In this regard, I agree that Mr. Morintat that IEBC is only exempted on issues of criminal liability.

38. In view of lack of evidence in support of counsel’s submission, I find it difficult to “interpret” the lack of legal representation to the

disadvantage of the 4th respondent. I therefore dismiss the submissions for lacking in merit.

39. Mr. Morintat for the 1st respondent submitted that the trial court correctly found that there were no electronically transmitted results from Ndonyo Nkoipit, since the 3rd respondent did not receive any acknowledgement of the same.

He has further submitted that there is no legal or statutory requirement for electronic transmission of the results for Member of County Assembly. In support thereof, counsel cited the decision in *Jackton Nyanungo Ranguma v. IEBC & 2 Others, Petition NO. 3 of 2017 (Kisumu)*, in which it was held “*that electronic transmission and publication of polling in a public portal is only a statutory requirement for the presidential election...*” That court in turn cited the provisions of section 39 (1) (C) of the Elections Act, 2011 as the basis for its holding.

40. In this regard I have shown in the foregoing paragraphs that there is the evidence of the 3rd respondent that he electronically sent the results of Ndonyo Nkoipit to the 2nd respondent. There is also evidence from the 2nd respondent that he received and considered them, but he excluded them in his final tally, declaration and announcement in respect of Shankoe Ward.

41. It therefore follows that the trial court either misapprehended or ignored that evidence. Consequently, this court is entitled in accordance with *Mwangi v. Wambugu, supra*, to interfere with that conclusion by setting it aside. As a result I find no merit in the submission of counsel and I hereby dismiss it.

Counsel for the appellant cited *Julius Lekakeny Ole Sunkuli v. Gideon Sitelu Konchella & 2 Others, Election Petition NO. 1 of 2017, (Kericho)*, wherein the court refused to nullify an election on account of irregularities at Ndoinyo Nkoipit polling station amongst other irregularities. I find that the decision in that case in respect of Ndonyo Nkoipit is a finding of fact in relation to that polling station.

42. It should be borne in mind that findings of fact by one court cannot bind another court, because they are based on both factual matters and the demeanour of witnesses. It therefore follows that factual findings by their very nature are neither persuasive nor binding. It is the ratio *decidendi* and the *obiter dicta* in those decisions that are of value. It therefore follows that that case is of no help.

GROUND 3, 5, 9 AND REST OF THE GROUNDS

43. In grounds 3, 5 and 9 the appellant has faulted the trial court in law in concluding that there were no votes counted, and tallied announced and declared from Endonyo-Nkoipit polling station. The appellant has further faulted the trial court in law in concluding that the 2nd respondent, who was the returning officer, did not consider the results from Endoinyo-Nkoipit polling station, before the final declaration of the result in respect of Shankoe Ward.

44. In this regard, counsel for the appellant submitted that the issues raised in these three grounds are governed by regulations 73-79 of the Elections (General) Regulations of 2012. He contends that those regulations make provisions in respect of polling, counting, transposition, tabulation and declaration of the results which are done at the polling station. A breach of those regulations raised issues of law.

45. The finding of the trial court in this regard was that the exclusion of the results from Endoinyo-Nkoipit polling station, affected, the free will of the people of Shankoe Ward. The trial court went further and found that it could not be said the elections were credible, free and fair and added that it could not be said that the appellant was lawfully and validly elected. It further found that there was a breach of Articles 38, 81 and 86 of the Constitution of Kenya.

46. The trial court did not stop there. It went further and found that the presiding officer, who is the 3rd respondent, adopted a system that was far from accountable, secure and verifiable, which system by virtue of the doctrine of vicarious liability, made the 2nd and 4th respondents, vicariously liable.

47. The evidence in this regard is that of two eye witnesses, namely Moses Ledama Kiligat (DW1), who was the agent of the appellant and George Akumu Adera (DW4), who was the presiding officer at Endoinyo Nkoipit polling station. The evidence of DW1 is that at the end of voting, the results were counted and tallied. As a result presiding officer declared the results and announced the appellant as the winner with 272 votes with the respondent as the second runners up with 247 votes.

48. The foregoing was done after all the agents signed all the forms including form 36A, which declared the results. The agent of the 1st respondent, Dominic Ledama also signed form 36A.

49. DW1 continued to testify that after announcing the results, the presiding officer fixed the results outside the polling station on class room walls.

DW1 as the agent of the appellant and Dominic Ledama as agent of the 1st Respondent were each given copies of the results form 36A.

50. The evidence of DW1 is supported by the presiding officer. Additionally, the presiding officer testified that he scanned and sent copies of the results to Elijah Ombogo (DW3), who was the returning officer. He also added that after completing the exercise, he proceeded to the C.T.C. It was on 9/8/17 while on the way to the CTC that he was arrested by the police and later charged in court.

51. DW3 further testified that the 4th respondent did not physically take the results to him. It was also his evidence that after consulting the agents of the parties and all candidates, it was agreed that by consensus that the results for Shankoe ward be announced. He then proceeded to announce the results by excluding the results from Endoinyo Nkoipit.

52. Furthermore, it was also the evidence of the returning officer (DW3) that results from Endoinyo Nkoipit had been transmitted and had been announced by the 3rd respondent, the presiding officer. In this regard, DW3 in his evidence under cross examination testified that:-

“There was a problem with Ndonyokopit after the results had been transmitted. Results were announced at station and transmitted no one could change them. Agents sign the announced results. The results were announced at Ndonyo Nkoipit. No one has challenged the results. The decision not to include results from Ndonyo koipit was not unilateral. I consulted the candidates and their agents.”

53. Furthermore, DW3 testified that the 1st respondent was part of that consensus before the returning officer declared the winner for Shankoe ward. He also testified that there are no complaints on form 36As in their possession.

It was also his evidence that the agents signed the forms. He further testified that the unannounced results for Endoinyo Nkoipit were not part of the final result for Shankoe ward.

54. There is also the additional evidence of the appellant (DW 2), which also supports the evidence of the returning officer (DW 3) and the presiding officer (DW 4) in respect of the events at Endoinyo-Nkoipit. It was his (DW 2) evidence that results were declared at mid-night in respect of Endoinyo Nkoipit with him garnering 272 votes, and was declared the winner. DW 2 looked at a copy of form 36A, which he obtained from his agent (DW1), which still confirmed him as the winner.

DW2 (the appellant) further testified that upon being declared the winner, PW1 (the 1st Respondent) congratulated him, when the two met in that morning of 9/8/17.

55. It was also the evidence of appellant that the CID police report, which was marked as annexed TAT 6 to the supporting affidavit of PW1 (Tomito Alex Tampushi), also shows that the appellant as a winner with 272 votes as against 247 votes for the 1st Respondent (Tomito Alex Tampushi).

56. In the light of the foregoing evidence it is clear beyond doubt that the returning officer into account the declared and announced results from Endoinyo-Nkoipit, before declaring the appellant as the MCA elect for Shankoe Ward. He testified that the results from Endoinyo-Nkoipit could not affect the outcome of the final declaration that the appellant won.

57. It is to be borne in mind that according to the CID police report, which in essence is an inventory of what the police recovered from the presiding officer, indicated that the appellant garnered 272 votes as against 247 for the 1st respondent (Tomito Alex Tampushi).

58. Furthermore, it is also clear that annex TAT 6 to the supporting affidavit of Tomito Alex Tampushi (PW 1) was not tailored for the appellant and 1st respondent. It covers the votes garnered for all the six elective posts namely presidential, senatorial, member of national assembly, women representative, gubernatorial and MCA.

59. In the light of the foregoing evidence and having considered the rival submissions, I find that trial court erred in law in disbelieving the evidence of the appellant and his witness namely Moses Ledama Kiligat (DW 1). The court further erred in law in disbelieving the evidence of the returning officer (DW3) and the presiding officer (DW4), which was cogent and credible.

60. Furthermore, the court erred in law in believing the evidence of Tomito Alex Tampushi (PW 1). A number of instances point to him as an incredible witness. For instance, while under cross examined, he admitted that he had not asked his agent namely Dominic Ledama, the declaration and announced results in respect of Endoinyo Nkoipit. He had not done so up to the time he was testifying on 7/11/17, that is, over three months after the results were declared and announced.

Additionally Tomito Alex Tampushi (PW1) admitted under cross examination that his agent participated in the exercise at Endoinyo Nkoipit and signed form 36A, in addition to representing his interests.

61. Furthermore, PW1 did call his agents as witnesses in the trial court. In law according to *Bukenya V. Uganda (1972) EA 549* the court is entitled to draw an adverse inference, where a party fails to call a material witness, such as in the instant case. I have accordingly drawn an adverse inference that had Tomito Alex Tampushi (PW1) called his agent as a witness, he would have given unfavourable evidence. Stated differently, he would have told him that he lost to the appellant as per form 36A, which he had signed.

62. Tomito Alex Tampushi (PW 1) also did not agree with the contents of annex TAT 6 to his supporting affidavit, which is an inventory of the CID police report in respect of votes garnered by each of the candidates in the six elective posts in regard to results as declared and announced by the presiding officer. The 1st Respondent cannot in law be allowed to approbate and reprobate his own exhibit at the same time, just because he lost to the appellant. The evidence of the witness of Tomito Alex Tampushi namely Felix Radama Kiook (PW2) was rightly found an incredible witness by the trial court.

63. The upshot of the foregoing is that I find that there is merit in grounds 3, 5 and 9 of the appeal. I therefore uphold them for being meritorious.

64. In ground 4, the appellant has faulted the trial court in law for failing to appreciate that the police are mandated by law to investigate election offences and had the right to take possession of election materials and compile the inventory as they did, which was not a usurpation of the jurisdiction of the election court.

65. In this regard, counsel submitted that the conduct of the police in compiling an inventory of what they recovered from the presiding

officer did not constitute a scrutiny and audit of votes.

The evidence in this regard is that of Moses Ledama Kiligat (DW 1), who testified in his evidence in chief that the presiding officer (DW4) was arrested after tallying, declaration and announcement of results of Endoinyo Nkoipit polling station. In this regard also the evidence of DW1 is supported by the returning officer (DW 3). DW3 testified under re-examination that the 3rd Respondent had transmitted results when he was arrested.

66. I therefore agree with the submissions of Mr. Otieno that the arrest of the presiding officer, his deputy and the administration police officer was an event after the fact. I therefore find that the results that were declared and announced at Endoinyo Nkoipit polling station were credible, verifiable and transparent. It therefore follows the arrest of those three officers did not affect the final election results that were announced and declared by the returning officer. The omission of the results from Endoinyo Nkoipit from the final tally as announced and declared by the returning officer did not affect the sovereign will of the people of Shankoe Ward.

67. Furthermore, I agree with the submissions of counsel for IEBC that the holding in *IEBC V. Maina Kiai & 5 Others (2017) eKLR* applies to the instant appeal. The holding in that case was that once the presiding officer has announced the results after tallying those results are final. The decision in *IEBC V. Maina Kiai & 5 Others, supra*, was binding on the returning officer.

68. Additionally, the police could not in law scrutinize and audit the votes. Any attempt to do so would amount to interfering with the constitutional mandate of IEBC, which in terms of Article 249 of the 2010 constitution is not subject to control by any authority or person. The presiding and returning officers in the instant appeal were exercising a delegated power from IEBC and as such they were sovereign in the discharge of their mandate. They were not subject to control by any authority or person.

69. There are two matters of public importance that need to be addressed. First, the order of the returning officer directing the police to investigate the circumstances arising out of the arrest of the presiding officer, his deputy and the administration police officer which led to their being charged in court. The returning officer in this regard testified that:

“..... I directed police to investigate the incident. The presiding officer had transmitted the results when he was arrested. The results were posted in our IEBC portal...”

The direction of the returning officer to the police to investigate is contrary to article 245 (4) (a) (b) of the 2010 Constitution, which provisions prohibit any person from giving directions to the police to investigate any particular offence or offences.

70. Secondly, the language of the High Court and of the Court of Appeal shall be English, and the language of subordinate courts shall be English or Swahili as required by section 86(1) of the Civil Procedure Act [Cap.21] Laws of Kenya. It was therefore not proper for the trial court in its conclusion and final orders to state that:

“..... in the genre of Kenyan Political tunes and currency you are, used to: let the drums roll please... Tibim! Tialala.... Tuko pamoja!. Those non-English and non-Swahili words should have been translated into English or Swahili. However, those errors have not singly or collectively affected the outcome of the results in respect of the election of the MCA for Shankoe Ward.

FINAL DISPOSAL ORDERS

71. I hereby register my deep felt appreciation for the well-researched and presented submissions of all counsel.

The upshot of the foregoing is that this appeal succeeds. It is hereby allowed with the result that the magisterial judgement and decree and the consequential orders dated 18th January, 2018 are hereby set aside.

72. The Appellant (Patrick Sosio Lekakeny) is hereby declared to have been validly elected as a Member of the County Assembly for Shankoe Ward.

73. The 1st Respondent is hereby ordered to bear the costs of this appeal.

The costs payable are hereby capped at Kshs. 120,000/- to be shared equally between the appellant on the one hand and the 2nd and 4th Respondents on the other hand. The security for costs deposited in this court to be released to the appellant/depositor.

74. Pursuant to section 86 of the Election Act, 24 of 2011, a certificate of the determination of this Appeal is hereby ordered to issue to the Independent Electoral and Boundaries Commission (IEBC).

In terms of Section 86 (1) of the Elections Act 24 of 2011 notice of this determination is hereby ordered to be served upon the Speaker of the County Assembly of the county of Narok.

JUDGEMENT DELIVERED in **OPEN COURT** this 31ST day of **MAY, 2018** in the presence of Mr. O.M. Otieno for the appellant and also holding brief for Mr. Muriuki for the 2nd and 4th respondents and Mr. Morintat for the 1st respondent.

J.M. BWONWONGA

JUDGE

