REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

ELECTION PETITION APPEAL NO. 1 OF 2018

BARIDI FELIX MBEVO ..... APPELLANT

VERSUS

MUSEE MATI ..... 1ST RESPONDENT

RETURNING OFFICER,

KITUI WEST CONSTITUENCY ..... 2ND RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION ..... 3RD RESPONDENT

Consolidated with

ELECTION PETITION NO. 2 OF 2018

RETURNING OFFICER,

KITUI WEST CONSTITUENCY ..... 1ST APPELLANT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION (I.E.B.C.) ..... 2ND APPELLANT

-VERSUS-

BARIDI FELIX MBEVO ..... 1ST RESPONDENT

MUSEE MATI ..... 2ND RESPONDENT

(Being an Appeal from the Judgment and Orders of Hon. J. Munguti, Principal Magistrate, delivered on 31st January, 2018 in the Kitui CMCC Election Petition No. 1 of 2017)

J U D G M E N T

1. On the **8th** day of **August, 2017** people of Mutongoni Ward, Kitui West Constituency, as voters participated in elections conducted by Electoral and Boundaries Commission (I.E.B.C.). **Baridi Felix Mbevo,** the Appellant in **Election Petition Appeal No. 1 of 2018** was an aspirant as a Member of County Assembly for Mutonguni Ward, Kitui West Constituency. At the conclusion of the said elections, **Baridi Felix Mbevo** was on **9th August 2017** declared winner and Member of County Assembly of Mutonguni Ward having garnered 3273 votes, while **Musee Mati** (the 1st Respondent) emerged 2nd with 3071 votes and was issued with the certificate for member of County assembly elect for Mutonguni Ward. Two days later on **11th August 2017** a re-tally of votes was done where **Musee Mati** was found to have garnered 3,330 votes while **Baridi Felix Mbevo** got 3319 votes and expected the Returning Officer to nullify the result, which was not done.

2. Dissatisfied with the results of the election, the 1st Respondent **Musee Mati** filed a petition dated **18th August 2017** in Kitui Chief

Magistrates Courts against the 1st appellant, **Baridi Felix Mbevo**, the Returning Officer, Kitui West Constituency (the 2nd Respondent) and the Independent Electoral and Boundaries Commission (the 3rd Respondent). He sought orders that **Felix Baridi Mbevo** was not duly and validly elected therefore was erroneously declared winner of the elections of Member of County Assembly Mutonguni Ward, Kitui West Constituency; He sought a nullification of the certificate issued to **Baridi Felix Mbevo** and to be declared the member of County Assembly elect Mutonguni Ward.

3. **Baridi Felix Mbevo** in his response to the petition denied the allegations and pleaded that the petition was bad in law and fatally defective as it did not comply with the mandatory legal requirements of **Rule 8(1)** and **Rule 12** of the **Election (Parliamentary and County Elections) Petition Rules, 2017**; the Petitioner could not qualify for election as a Member of County Assembly as he had a receiving Order in Bankruptcy against him. He challenged the re-tally process and the figures emanating therefrom. It was his contention that the 2nd Respondent became *'functus officio'* upon declaration and issuance of the certificate, therefore, did not have power to nullify/recall or cancel the said election.

4. The Returning Officer and the I.E.B.C. denied the allegations that the results were illegal or erroneous. They averred that the unofficial re-tallying was done after **Baridi Felix Mbevo** was declared a winner and issued with a certificate and that they had no power to recall the certificate issued.

5. In the course of proceedings three formal applications were filed. **Baridi Felix Mbevo** filed an application dated **18th October, 2017** seeking dismissal of the petition on grounds that there was an insolvency order issued against the Petitioner in **Insolvency Cause No. 5/2016** pending at Milimani Law Courts from which he had been discharged, a fact that he failed to disclose at the point of nomination. The application was dismissed on grounds that documents used in support of the application were inadmissible.

6. An order was made by the Election Court directing the Returning Officer and I.E.B.C. to file results for the Mutonguni Ward Elections. An application made by the Petitioner to stay the order was dismissed. In an application dated **31st** day of **October, 2017 Baridi Felix Mbevo** sought to strike out the Petition for failure to set out the names of the Returning Officer who conducted the Elections and the results of election as declared. Similarly, the application was dismissed.

7. An application for leave to appeal the decision of the Court in respect of the applications dated **18th October, 2017** and **31st October, 2017** was declined by the trial Court which directed the Appeals could be pursued at the conclusion of the Petition.

8. Those aggrieved by the Rulings of the Court exercised their right of Appeal but the hearing of the Petition was expedited and the Appeals were overtaken by events.

9. The learned Magistrate considered evidence adduced at trial and in a Judgment dated **31st January, 2018** held thus:

> ***"(i) That the 1st Respondent Baridi Felix Mbevo was not duly and validly declared as the winner of Mutonguni ward-Kitui West constituency***
>
> ***(ii) That the Petitioner herein Musee Mati was the duly and validly elected winner of the Election of Mutonguni ward Kitui west Constituency.***
>
> ***(iii)The certificate of elected member of county Assembly for Mutonguni ward No. 150700346-1 issued to the 1st Respondent Baridi Felix Mbevo is hereby declared null and void/or cancelled forthwith.***
>
> ***(iv) That the Petitioner herein Musee Mati be issued with a certificate of elected member of county Assembly for Mutonguni ward in Kitui west Constituency.***
>
> ***(v) That the gazette Notice which declared the 1st Respondent as the validly elected member of the county assembly for Mutonguni ward in the general elections held on 8.8.2017 is hereby declared null and void to that extent of deleting the name of the 1st Respondent only;***
>
> ***(vi) A certificate of determination of this petition to issue and be served upon the Speaker Kitui County Assembly and IEBC as provided for under Section 86 Elections Act 2011."……***
>
> ***"……In the present case the Petitioner had to defend 3 applications and a preliminary objection on top of the main petition. For the Preliminary objection and the 3 applications, I award costs of Kshs. 125,000/= for each of the applications/P/O and a further 500,000/= for the petition making a total award of Kshs. 1000,000 (one million) These costs shall be paid by 2nd and 3rd Respondents jointly and severally.***
>
> ***The 1st Respondents costs are hereby assessed at Kshs. 500,000/= (five hundred thousand) to be paid by the 2nd and 3rd Respondents jointly and severally."***

10. Aggrieved by the said decision **Baridi Felix Mbevo** filed a memorandum of appeal dated **1st February 2018** against **Musee Mati** (1st Respondent), Returning Officer, Kitui West Constituency (2nd Respondent) I.E.B.C. (3rd Respondents) appealing against the whole judgment, raising 26 grounds, condensed thus:

i. ***The Election Petition was incurably defective.***

ii. ***The learned Magistrate determined the Petition on the basis of evidence and material that was inadmissible.***

iii. ***The decision to cancel the Appellant's Certificate of Election and to declare the 1st Respondent (Musee Mati) as the duly elected Member of County Assembly contravened Section 80 of the Election Act.***

iv. ***The I.E.B.C. (3rd Respondent) had no power to deal with disputes that arise after declaration of results.***

v. ***The trial Court unlawfully lowered the standard and shifted the burden of proof.***

11. On **20th February 2018** the Returning Officer (1st Appellant) and I.E.B.C. (2nd Appellant) filed **Election Petition No. 2** of **2018.** Against **Baridi Felix Mbevo** (1st Respondent) and **Musee Mati** (2nd Respondent) raising 27 grounds of appeal which I have condensed thus;

i. ***The Election Petition was sustained in total disregard of Rules 8(1) and 12(1) of the Election (Parliamentary and County Elections) Petition Rules 2017 (Rules).***

ii. ***The trial was not managed in accordance with Rule 15 of the Rules.***

iii. ***The standard of proof was lowered to benefit the Petitioner.***

iv. ***The trial Magistrate erred in law by holding that costs be paid to the 2nd and 3rd Respondents (Appellants).***

12. At the hearing, **Baridi Felix Mbevo** was represented by learned Counsel, **Mr. Kimuli**, The Returning Officer, Kitui West Constituency and I.E.B.C. were represented by learned counsel **Ms. Mulondu** while Musee Mati was represented by learned counsel **Mr. Kilonzi**.

13. Pursuant to directions given by this Court on the **10th April, 2018,** the two **Election Petitions No. 1** and **No. 2** were consolidated and canvassed through written submissions.

14. Learned Counsel, **Mr. Kimuli** submitted that the Learned Magistrate sustained an Election Petition that was incurably defective for failing to set out names of the candidates and results of the election on the body of the petition, which was contrary to the mandatory terms of **Rules 8(1)** and **12(1)** of the **Election (Parliamentary and County Elections) Petition Rules (Rules).** They relied on the case of **Mbaraka Issa Kombo vs IEBC and 3 Others Election Petition No. 10 of 2017, Malindi [2017]** where the learned Judge agreed with the Supreme Court decision to the effect that **Rule 8(1)** and **12** of the **Rules** were mandatory, and not merely procedural.

15. Learned Counsel, **Ms. Mulondu** submitted that the said defect could not be cured through an amendment as provided for under **Section 76(4)** of the **Election Act, 2011** since the set timelines of 28 days from the date of declaration of results had lapsed and such amendment would require the leave of Court. In support of their argument, the appellants relied on the case of **Charles Nyaga Njeru –vs- Independent electoral Boundaries Commission and Another [2013] eKLR.**

16. Learned Counsel, **Mr. Kilonzi** opposed these allegations and submitted that though he did not state the results for all the candidates that took part in the elections for Member of County assembly for Mutonguni Ward, Kitui West Constituency. The results of the Petitioner and Respondent, which are subject matter in this Appeal were clearly stated. Further, that the names of the candidates who contested in the said election were clearly stated in paragraph 1 of the petition and with the High Court judges differing on the agreement in regards to requirements, the learned magistrate was properly guided by the decision in ***Waititu v I.E.B.C. & Others (2014) eKLR.***

17. ***Rule 8(1)*** of the ***Election Petition Rules*** set out the contents and form of an Election Petition. It provides that:

"(1) An Election Petition shall state-

(a) the name and address of the Petitioner;

(b) the date when the election in dispute was conducted;

(c) the results of the election, if any, and however declared;

(d) the date of the declaration of the results of the election;

(e) the grounds on which the petition is presented; and

(f) the name and address of the advocate, if any, for the Petitioner, which shall be the address for service."

18. Rule 12(1) of the Rules provides thus,

"12 (2) provides, "An affidavit in support of a petition under sub-rule (I) shall state-

(a) the name and address of the deponent; (b) the date when the election in dispute was conducted;

(c) the results of the election, if any, however declared;

(d) the date of the declaration of the results of the election;

(e) the grounds on which the petition is presented; and

(f) the name and address of the advocate, if any, acting for the Petitioner, which shall be the address for service."

19. The rules are couched in mandatory terms. In the case of ***Mbaraka Issa Kombe vs. Independent Electoral and Boundaries Commission (I.E.B.C.) & 2 others [2018] eKLR*** the Court of Appeal held:

"We cannot help but note that the appellant, save for naming the candidates who vied for the post in question, only set out the 3rd Respondent's results in the petition. Applying the principles discussed herein above, we, unlike the learned Judge, find that the non-compliance did not render the petition defective."

Further

"…we find that the learned Judge erred in ignoring the contents of the appellant's supporting affidavit and Form 35 annexed thereto. In as much as the results were not set out on the face of the petition, the Respondents, as well as the Election Court were not in the dark with regard to that issue. Therefore, the omission did not go to the jurisdiction of the Court or go to the root of the dispute; nor did it prejudice the Respondents."

20. A perusal of the petition confirms that the Petitioner in his petition at paragraph 1 listed the candidates that took part in the said election. Further, in paragraph 5, the Petitioner stated that **Baridi Felix Mbevo** who is alleged to have gotten 3,273 votes. In paragraph 4 he stated that,

"The Petitioner had been ranked 2nd position with 3071 votes while in fact he garnered 3330 votes against the 1st Respondent's 3319 votes."

21. The Petitioner may have omitted to state all the results the other candidates got but listed the results he got and those the appellant is said to have gotten. **Rule 5(1)** of the **Rules** provides:

"The effect of any failure to comply with these Rules shall be determined at the Court's discretion in accordance with the provisions of Article 159 (2)(d) of the Constitution."

Guided by the said Rule, I find that the omission to name the Returning Officer does not substantially affect the substance of the petition, hence is in compliance with the requirements of **Rules 8(1),** and does not substantially affect the substance of the petition. Therefore, the said petition was properly before the trial Court.

22. On whether the Learned Magistrate misdirected himself in law and lowered the standard of proof in his analysis of the discrepancies of results during declaration and the making of wrong entries, which the appellants allege required higher proof as compared to other matters. The appellants submitted that the standard of proof in Election Petition is higher than on a balance of probability as required in civil cases but lower than that required in criminal cases, which is beyond reasonable doubt. They relied on the case of **John Kiarie Waweru vs Beth Wambui Mugo & 2 Others [2018] eKLR.**

23. The appellants argued that the documents relied on by the Petitioner in his case ought not to have been admitted in evidence or relied on by a Court of law as its source was unverified and the reliance on the same by the Learned Magistrate led him to reach wrong conclusions. It was submitted that the Petitioner did not use form 36A used to declare the results at the polling station but instead relied on forms the Petitioner's advocate had allegedly downloaded from the IEBC portal which was contrary to the Elections Technology Regulation, 2017. It was their submission that the portal results were provisional. According to **Section 39(1)(a)** and **1(b)** of the **Elections Act** votes are counted and recorded in form 36A which is forwarded to the Tallying Centre which makes form 36B final with any results electronically transmitted being only provisional. He relied on ***Election Petition No.3 of 2017, Jackton Nyanungo Ranguma -vs- IEBC and 2 others.***

24. They submitted that the Learned Magistrate misdirected himself in law by determining a petition on non-existing power on the part of the 3rd Respondent. As there is no power, which vests on the Returning Officer and/or the IEBC to recall or cancel a certificate issued after the declaration of results. It was their argument that after declaration of results and issuance of certificates the Returning Officer and his Deputy became '*functus officio*' and could not re-tally, cancel and or issue or declare a parallel winner to the one already declared. That the alleged Re-tally was conducted 2 days after the declaration of the 1st Respondent as the Member of County assembly elect for Mutonguni Ward. The Petitioner and Respondents only witness who was also an aspirant confirmed by the Petitioner that not all aspirants were present.

25. That the Returning Officer on cross-examination admitted that the law did not allow him to re-tally results and/or issue a fresh certificate after having already done so as by doing so would be in contravention of Article 88(4)(e) of the Constitution which provides that:

"the settlement of electoral disputes relating or arising from the disputes relating to or arising from nomination but excluding Election Petitions and disputes subsequent to the declaration of election results."

This issue was also considered in the case of **Richard Kalembe Ndile & Another v Patrick Musimba Mweu & 2 Others [2013] eKLR**

where the Court held that:

> ***"Once the issue of recount was pleaded and allowed upon application, the consequences of such recount are to be dealt with by the Court. In this case, Section 80(4) empowers the Court to declare a winner once the conditions therein are satisfied."***

26. It was further submitted that the trial Court relied on the case of **Hassan Ali Joho vs Suleiman Shabhal in Election Petition no. 2 of 2013, George Mike Wanjohi vs Stephen Kariuki & 2 others [2014] eKLR** which was declared bad law. Further in ***Emmanuel Karisa Maitha vs John Yau & Anor Election Petition No. 1 of 1993***, where the Court held that once a Returning Officer announced the results he could not change them even if he found that he omitted to take account of some ballot.

27. The appellants alleged that the trial Court demonstrated a lot of bias when it determined that the authentic form 36B produced in evidence by the 2nd Respondent did not constitute results of the elections but admitted form 36B adduced by the Petitioner without questioning its authenticity.

28. It was submitted that the burden of proof in Election Petition does not shift from the person alleging and that the Petitioner did not discharge his duty in satisfying the trial election Court to warrant the orders it made of invalidating the election of the 1st Respondent in the elections held on **August 8th 2017**. Appellants relied on **Supreme Court Petition no. 1 of 2017, (Raila Odinga vs the Independent Electoral and Boundaries Commission and 2 others)**.

29. It was argued that the trial Court did not fulfil the requirements of **Section 80** of the **Elections Act** on scrutiny of votes before it directly declared the Petitioner a winner which was in excess of its power and in clear violation of the law. The trial Court in so doing failed to adequately deal with the issue of numbers and arithmetic error thus arriving at the wrong finding in its judgment which would have been addressed by an order for scrutiny in stations that had issues, on this they relied on the case of **Joho & 2 Others vs. Nyange & Another (2008) 3KLR (EP) 500.**

30. On the issue of costs the appellants argued that there was no justifiable reason given by the trial Court in ordering the 2nd and 3rd Respondents to pay costs to the 1st Respondents. An order they alleged was unfair and unjust as costs ought to have been awarded to the party that won the case.

31. It was their submissions that the Petitioner failed to prove that the elections conducted on **8th August 2017** did not comply with the Constitution and Electoral laws and that the same did not satisfy the two main requirements to invalidate an election. Namely;

i. That the election was not conducted within the constitution.

ii. The non-compliance must have been substantially or materially affected the results of the elections.

32. It was submitted that the Respondent, **Musee Mati** had stated that he noted that the results announced from forms 36A and the ones generated in form 36B were not tallying and raised the issue with the Returning Officer who promised to act but never did. That the Returning Officer admitted to having issued the certificate to the appellant erroneously and had taken steps to recall the same however went back on his word.

33. That sufficient documentary evidence which included document - 7 a letter dated **11th August 2017** authored by the Returning Officer and addressed to the appellant, **Baridi Felix Mbevo** purporting to recall the certificate of election issued to him was adduced. That though the Returning Officer, I.E.B.C., and **Baridi Mbevo** maintained that according to forms 36A **Baridi** had garnered 3,273 votes and **Mati** 3,071 votes they did not adduce or file results in support of their defence.

34. On the issue of imprecise and unreliable documents it was submitted that the downloads from the I.E.B.C. online portal were filed with the leave of the Court and consent of all parties with the 1st Respondent having been extensively cross examined on the same and that the 1st Respondent had complied with **Section 106B** of the **Evidence Act**.

35. That the 1st Respondent relied on document 6 (form 36B) which is an alleged document filed having been downloaded, stamped and signed by the Returning Officer after the re-tally and document 7 (a letter from Returning Officer recalling the Certificate duly signed). It was submitted that the documents, the Returning Officer, the Commission and the Appellant, **Baridi Mbevo** are complaining about now on appeal were filed, served, marked during trial and hence no one should question their admissibility or authenticity.

36. It was submitted that documents from the I.E.B.C. portal could not have been manipulated by the 1st Respondent unless proved by an ICT Expert from I.E.B.C. That the downloads were a true reflection of what I.E.B.C. had transmitted online. That under **Section 80** of the **election Act** the trial Court had discretionary powers to direct the commission to issue a certificate of election in an Election Petition to a Member of County Assembly on that basis.

37. Further that it was the duty of the Returning Officer to ensure transmitting of results from forms 36A to form 36B is accurate, correct, credible, verifiable, just, fair, honest and transparent. That the **Elections (General) Regulations 2012** provides the duty of the Returning Officer as:

> ***"a. Tallying of results from each polling station***
>
> ***b. Announcing results from the constituency***

c. Declaring results tallied"

33. Therefore, that the Returning Officer and the Commission committed the highest blunder by failing to comply with the Court order to file the results which showed they were not willing to assist the Court to reach a just determination.

34. I have considered the Memorandum of Appeal, the written and oral submissions by the parties and the authorities cited. Appeals to this Court in Election Petitions are confined to matters of law only. **Section 75(4)** of the **Elections Act** that provides:

"(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."

The Supreme Court in the case of ***Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others (2014) eKLR*** considered what matters of law entail and stated thus:

"We would categorize the elements of the phrase "matters of law" as follows;

(a) Technical element; involving the interpretation of the Constitutional or statutory provisions

(b) The practical element; involving the application of the Constitution and of 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. On whether the learned Magistrate admitted inadmissible evidence namely; the letter dated **9th August, 2019** and printout from I.E.B.C. portal, **Section 39(1)(c)** of the **Elections Act, 2011** which is in respect of determination and declaration of results provides that:

"For purposes of a presidential election the Commission shall —

(a) Electronically transmit, in the prescribed form, the tabulated results of an election for the President from a polling station to the Constituency Tallying Centre and to the national tallying centre;

(b) tally and verify the results received at the national tallying centre; and

(c) publish the polling result forms on an online public portal maintained by the Commission."

As clearly stated this is in respect of presidential elections not elections for Member of County Assembly.

36. However, looking at **Regulation 82** of the **Elections (General) Regulations, 2012** it suggests that these type of results are provisional. It provides that;

"(1) The presiding officer shall, before ferrying the actual results of the election to the Returning Officer at the tallying venue, submit to the Returning Officer the results in electronic form, in such a manner as the Commission may direct.

(2) The results submitted under sub-regulation (1) shall be provisional and subject to confirmation after the procedure described in regulation 76."

In the case of **Jackton Nyanungo Ranguma v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR,** it was stated that:

"The legal position remains that the votes as recorded in Form 34A are final. Unless Forms 34A are disputed, any errors in electronic transmission of results or publication in the 1st Respondent's public portal cannot, of themselves and without more, invalidate Forms 34A. Where the results from the polling station are electronically transmitted from the polling station to any other portal as the 1st Respondent may direct, such results can only be termed as provisional thus underlining the primacy and finality of Form 34A.Regulation 82 of the Elections (General) Regulations, 2012 suggests that these results are provisional."

37. This is a case where the 1st Respondent in support of his Petition relied on forms allegedly printed from the I.E.B.C. Portal by his advocate and not the forms 36A that were used to declare the results. The trial Court in its analysis and conclusion used the said information. Noting that the results from the I.E.B.C. portal are provisional, the resultant analysis using the same would definitely lead to wrong conclusions. In the premises I find that the learned magistrate erred in admitting the alleged documents printouts from the I.E.B.C. portal as they lacked exactness or accuracy. Such documents could not be verified.

38. The learned Magistrate was faulted for relying on the case of **Stephen Kariuki vs. George Wanjohi and 2 Others** where the Magistrate was of the view that the commission had some power to undertake a re-tallying exercise and even cancel a Certificate of Election after results

had been declared. This, it was argued that was bad law because the case was overturned by the Supreme Court in the decision of **George Mike Wanjohi vs. Steven Kariuki & 2 Others (2014) eKLR.**

39. From the decision of the Superior Court, it is apparent that once a declaration of results has been made any alteration of the results would be done after being considered by the Election Court. The commission had no authority whatsoever to address the issue as it was *'functus officio'* and the Court misdirected itself in coming up with a decision based on a case that had been overturned.

40. On whether the learned Trial magistrate erred by direct declaration of the Petitioner as duly elected Member of County Assembly without verification of results. **Section 82(1)** of the **Election Act** gives the Court wide jurisdiction in this respect and it states that,

> ***"An Election Court, may on its own motion or on application by any party to the petition, during the hearing of an Election Petition, order scrutiny of votes to be carried out in such a manner as the election Court may determine."***

In the case of ***Gatirau Peter Munya v Dickson Mwende Kithinji & 2 others, Supreme Court Petition No. 2b of 2014 [2014] eKLR*** as follows:

> ***"(a) The right to scrutiny and recount of votes in an Election Petition is anchored in Section 82(1) of the Elections Act and Rule 33 of the Elections (Parliamentary and County Elections) Petition Rules 2013. Consequently, any party to an Election Petition is entitled to make a request for a recount and /or scrutiny of votes, at any stage after the filing of petition, and before the determination of the petition.***
>
> ***(b) The trial Court is vested with discretion under Section 82(1) of the Elections Act to make an order on its own motion for a recount or scrutiny of votes as it may specify, if it considers that such scrutiny or recount is necessary to enable it to arrive at a just and fair determination of the petition. In exercising this discretion, the Court is to have sufficient reasons in the context of the pleadings or the evidence or both. It is appropriate that the Court should record the reasons for the order for scrutiny or recount.***
>
> ***(c) The right to scrutiny and recount does not lie as a matter of course. The party seeking a recount or scrutiny of votes in an Election Petition is to establish the basis for such a requests to the satisfaction of the trial judge or magistrate. Such a basis may be established by way of pleadings and affidavits, or by way of evidence adduced during the hearing of the petition.***
>
> ***(d)Where a party makes a request for scrutiny or recount of votes, such scrutiny or recount if granted, is to be conducted in specific polling stations in respect of which the results are disputed, or where the validity of the vote is called into question in the terms of Rule 33(4) of the Election (Parliamentary and County Election) Petition Rules."***

41. The Petitioner did not query the election process but the results from the tally. The margins between the parties going as per the declared results 3273 *vis a vis* 3071 were narrow. In my view, this would have made a good case for scrutiny. The trial Court would have invoked the power vested on it under Section **82(1)(b)** of the **Elections Act**. I believe the scrutiny of the forms 36A would have shed light and even verified the total tally of votes garnered by each candidate.

42. In Election Petitions the standards of proof expected is higher than that required in civil cases which is on a balance of probability but lower than what is required in criminal matters which is beyond reasonable doubt. In ***John Kiarie Waweru vs Beth Wambui Mugo & 2 others [2008] eKLR*** as follows: -

> ***"As regards the standard of proof which ought to be discharged by the Petitioner in establishing allegations of electoral malpractices, there is consensus by electoral Courts that generally the standard of proof in electoral petition cases is higher than what is applicable in ordinary civil cases i.e. that proof on a balance of probabilities. The standard is higher than proof on a balance of probabilities but lower than the standard of proof beyond reasonable doubt required in establishing criminal cases. Allegations of electoral practices, like for instance bribery, require higher proof."***

43. The burden of proof lay with the party that brought the claim in dispute. To discharge this burden, the 1st Respondent, with the aid of sufficient evidence was obligated to persuade the Court to hold that he had proved the allegations raised in his petition. In **Supreme Court Election Petition No.1 of 2017,** ***Raila Odinga vs the Independent Electoral and Boundaries Commission the Supreme Court of Kenya*** *stated: -*

> ***"But at the same time, a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden. The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond reasonable doubt-save that this would not affect the normal standards where criminal charges linked to an election, are in question."***

Further at page 43 paragraphs 211 the Court observed thus;

> ***"…a Petitioner who is able to satisfactorily prove either of the two limbs of the Section can void an election. In other words, a Petitioner who is able to prove that the conduct of the election in question substantially violated the principles laid down in our Constitution as well as other written law on elections, will on that ground alone, void an election. He will also be able to void an election if he is able to prove that although the election was conducted substantially in accordance with the principles laid down in our Constitution as well as other written law on elections, it was fraught with irregularities or illegalities that affected the result of the election…"***

44. The Respondent main piece of evidence was the re-tally analysis of results and votes tally coupled with the documents allegedly downloaded from the I.E.B.C. portal and the letter dated **11th August, 2017** made by the deputy Returning Officer. These documents did not in view discharge the burden of proof vested on the Respondent/Petitioner. The documents generated from the I.E.B.C. Portal gave provisional tally and as such could not be held to give accurate tally of votes.

45. The Returning Officer and I.E.B.C. took issue with the order of the Learned Magistrate that directed them to pay costs to the Petitioner (**Musee Mati**) and the 1st Respondent (**Baridi Felix Mbevo**). **Section 84** of the **Elections Act** states;

"An election Court shall award the costs of and incidental to a petition and such costs shall follow the cause. Such costs are to follow the event and the Court has a broad jurisdiction to determine the costs."

It is important to note that the award of costs is discretionary as seen in **Rule 30(2)** of the **Election (Parliamentary and County Election) Petition Rules 2017**. The same provides that,

> ***"(1) The Court shall, at the conclusion of an Election Petition, make an order specifying –***
>
> ***a) the total amount of costs payable; and***
>
> ***b) the person by and to whom the costs shall be paid."***
>
> Further
>
> ***"30(1)….***
>
> ***(2) when making an order under sub rule (1) the Court may --- disallow any costs which may in the opinion of the Court have been caused by vexatious conduct, unfounded allegations or unfounded objections on the part of either the Petitioner or the Respondent and impose the burden of payment on the party who has caused an unnecessary expense, whether such party is successful or not in order to discourage such expense."***
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> In **Martha Karua vs Independent Electoral & Boundaries Commission & 3 Others (2018) eKLR, Election Petition Appeal No. 1 of 2017** the Court set out the rationale behind an award of costs as follows:
>
> ***"It is up to the election Court to determine whether a party would be awarded costs or not and in doing so the Court must be guided by the principles of fairness, justice and access to justice."***

46. In recent times Courts cap costs to ensure the same are not too prohibitive to discourage parties from seeking legal redress in Election Petitions. In **Esposito Franco v Amason Kingi Jeffah & 2 Others [2014] eKLR** the Court held that:

> ***"Although this observation is obiter, the new electoral dispute regime has introduced a mechanism for capping of costs in Election Petitions. This was certainly intended to keep costs at a manageable level so as not to limit access to justice by litigants of moderate incomes. In many petitions filed after the 2013 General Elections that went into full hearing, costs were capped by Courts at between shs.1.5 to shs.2m."***

47. An award of costs will obviously flow with the result of litigation. The successful party would ordinarily be entitled to costs. In awarding costs the Court recognizes the parties' participation, in terms of time, research, preparation of pleadings and the time spent in Court during the actual hearing of the case and submissions.

48. **Mr. Kilonzi** counsel for the Respondent in his oral submissions argued that the appellant did not comply with **Rules 35(4)** of the **Election Rules**. He argued that the said provision prescribed the filing fee of the memorandum of appeal and the requirement of deposit of **Kshs. 100,000/-** as security of costs failure of depositing the same he argues would result to the collapse of the appeal. I note that this argument had not been raised during the reply to the appeal or in the Respondent's written submissions. However, I have interrogated the same and made the following findings. **Rule 35(4)** of the **Elections (Parliamentary and County Elections) Petitions Rules, 2017** on appeals from Magistrates Courts provides;

> ***"The appellant shall, upon filing the memorandum of appeal in accordance with sub-rule (3), pay the fees prescribed in the Second Schedule."***

The said schedule provides for fees of lodging a Memorandum of Appeal at 15,000 the same does not in any way refer to the deposit of security of costs. This Rule in my view is irrelevant to these proceedings.

49. Deposit of costs is provided for under Rule 13 (l) of the **Elections (Parliamentary and County Elections) Petitions Rules, 2017** which provides that,

> ***"Within ten days of the filing of a petition, a Petitioner shall deposit security for the payment of costs in compliance with Section 78 (2) (b) and (c) of the Act". [emphasis mine].***

The Election Act at **Section 78** dwells on the security of costs on a person seeking to file a petition to challenge an election the same provides.

> ***"(1) A Petitioner shall deposit security for the payment of costs that may become payable by the Petitioner not more than ten days after the presentation of a petition under this Part. (2) A person who presents a petition to challenge an election shall deposit — (b) five hundred thousand shillings, in the case of a petition against a Member of Parliament or a county governor; or (c) one hundred thousand shillings, in the case of a petition against a member of a county assembly."***

50. *In* ***Joel Nyabuto Omwenga & 2 others v Independent Electoral & Boundaries Commission & another [2014] eKLR***, the Respondent in this case sought security of costs upon filing an appeal by the appellant. In dismissing the application the Court held,

> ***"The Court finds that the use of the word "Petition" and Appeal" is not a matter of semantics as the process of presenting a Petition and lodging an appeal are different as night and day. There is no mention of a deposit of security of costs in the appellate Court or enhancement of security for costs deposited in the Court which heard the Petition. It would thus be presumptuous for this Court to hold that a deposit would be required in the appellate Court. As has been above, a deposit is not one of the requirements at the time of lodging an appeal."***

From the plain reading of the said provision, it is clear that the payment of security is a mandatory requirement when one is filing a petition. There is no mention of payment of security of costs when one is lodging an appeal. I find that the 1st Respondent's argument is not anchored on any law and as such, his argument on the same fails.

51. From the foregoing, I proceed to make final orders as follows:

i. The Appellants' Appeal is allowed and the judgment and order of the trial Court dated **31st January 2018** is hereby set aside.

ii. Without the forms 36A it is impossible to tell who won the elections for Member of County Assembly for Mutonguni Ward, Kitui West Constituency and as such it is only fair that the said elections be annulled to pave way for fresh elections which I hereby do.

iii. The I.E.B.C. is hereby directed to conduct fresh elections for the position of Member of County Assembly for Mutonguni Ward, Kitui West Constituency in line with the Constitution, Election Laws and regulations.

iv. The certificate that the trial Court had directed to be issued to the 1st Respondent **(Musee Mati)** is hereby set aside.

v. The1st Respondent **(Musee Mati)** shall pay **Baridi Felix Mbevo** costs incurred in the lower Court, to be taxed but not to exceed **Kshs. 300,000/=.**

vi. The 1st Respondent **(Musee Mati)** shall pay **Baridi Felix Mbevo** costs of this Appeal, to be taxed but not to exceed **Kshs. 600,000/=.**

vii. The1st Respondent **(Musee Mati)** shall pay the I.E.B.C. costs incurred in the Appellate Court, to be taxed but not to exceed **Kshs. 300,000/=.**

52. It is so ordered

Dated, Signed and **Delivered** at **Kitui** this **20th** day of **June,** 20**18.**

L. N. MUTENDE

JUDGE