REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

ELECTION PETITION APPEAL NO. 02 OF 2018

FRANCIS AMENYA NDUBI---------- APPELLANT

=VERSUS=

1. INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION----------1ST RESPONDENT

2. MARJORIE PATIENCE OWINO----------2ND RESPONDENT

3. THADDEUS NYABARO----------3RD RESPONDENT

{Being an Appeal from the Judgement and Decree delivered on 28th February 2018 by Hon. M. O. Wambani – CM arising from Election Petition No. 1 of 2017 at Nyamira Chief Magistrate's Court}

JUDGEMENT

The Appellant was one of the candidates for Member of the County Assembly of Nyamira, Ekerenyo Ward in the general election held on 8th August 2017. The said election attracted a total of twenty seven (27) candidates and ended with the 3rd Respondent being declared the winner with 1,119 votes and the Appellant second with 1,116 votes. The Appellant was not satisfied with the results or the manner in which the election had been conducted and consequently on 1st September 2017 he filed an election petition in which he sought to nullify the election of the 3rd Respondent.

In the petition he alleged that his votes were not properly captured and that as a matter of fact at KEA DEB Primary School Polling Station he obtained eight (8) votes but only four (4) were entered in the declaration Form 36B. He contended that had the four (4) votes been entered then he would have been ahead of the 3rd Respondent by one vote.

His other complaint in the petition was that the votes attributed to the 3rd Respondent in the final declaration were not what he garnered but that the votes arose from manipulation of records and serious political malpractice with an aim of rigging him (the Appellant) out.

After hearing the evidence and submissions from all the parties the election court made a finding that the election for Member of the County Assembly, Ekerenyo Ward, was conducted in accordance with the principles laid down in the Constitution and the Law, that the election was free, fair and credible and that if there were any irregularities they did not affect the result. She concluded that the petition had no merit and dismissed it and made a declaration that the 3rd Respondent was validly elected as the Member of the County Assembly of Nyamira - Ekerenyo Ward. As for the costs, she ordered each party to bear their own arguing that to order the Appellant to pay costs was onerous to the tax payers and that in any case the Appellant had an unfettered right to file the petition.

Being aggrieved by the decision of the election court the Appellant preferred this appeal. The appeal is premised on grounds that:-

1. "THAT the learned magistrate erred in law and in fact by failing to admit that there was non-conformity with electoral laws resulting to electoral irregularities.

2. THAT the learned magistrate erred in law and in fact in failing to admit that the non-conformity with the electoral laws did affect the validity of the elections and alter the outcome of the results.

3. THAT the learned magistrate erred in law and fact by failing to decide on the petitioner's evidence pointing out to alterations, manipulation and inconsistency of figures while the same was unopposed.

4. <u>THAT</u> the learned magistrate erred in law and fact by failing to hold the respondent accountable for their laxity in responding to the petitioner's evidence pointing out to alterations, manipulation and inconsistency of figures."

The Appellant sought orders that:-

1. "This appeal be allowed.

2. The judgement issued by honourable WAMBANI – CM on the 28th of February 2018 be varied to the effect that the elections results declared by the returning officer of the 1st Respondent for the Member of County Assembly, Ekerenyo Ward does not reflect the will of the people of Ekerenyo Ward.

3. A declaration that Mr. Momanyi Thadeus Nyabaro, the 3rd Respondent was not duly elected as an MCA, Ekerenyo Ward.

4. A declaration that the Petitioner, Mr. Francis Amenya Ndubi was duly elected as Member of County Assembly, Ekerenyo Ward, or in the alternative.

5. A fresh election for the position of member of County Assembly Ekerenyo Ward be done afresh by the 1st respondent."

The appeal was opposed by all the three Respondents.

The 1st, 2nd and 3rd Respondents filed cross appeals on the issue of costs based on grounds that:-

1. "The Learned Magistrate misdirected herself in exercising her judicial discretion as to the award of costs by failing to make a distinction between the Independent Electoral and Boundaries Commission (IEBC) which is funded by the public and the 3rd Respondent who directly individually incurred legal costs.

2. The Learned Magistrate erred in law and in fact in failing to take into consideration the principle of law governing award of costs that provides that the costs of any action, cause or other matter or issues shall follow the event unless the court shall for good reason otherwise order."

The Respondents sought an order that the judgement of the election court be varied and the costs of the dismissed petition be awarded to them. Mr. Anyoka, the Learned Advocate for the Appellant filed notice of preliminary objection against the appeal on costs on the ground that it was time barred.

When the Advocates for the parties first appeared before me on 10th May 2018 Mr. Ndubi, Advocate for the 3rd Respondent, took issue with the manner in which the Record of Appeal was compiled. He submitted that it did not contain the Appellant's own records in the court below. Leave was then granted to counsel for the Appellant to file a Supplementary Record of Appeal with all the documents included. The said Supplementary Record of Appeal was filed on 21st May 2018. Thereafter on 23rd May 2018 the Advocates appeared before me again and Anyoka, Advocate for the Appellant, withdrew the preliminary objection against the cross appeals. Directions were then given that all the three appeals be heard together.

The appeal on the merits and the two appeals on costs were then heard together all by way of written submissions which were highlighted orally on 3rd July 2018. In his submissions, Counsel for the Appellant framed five issues:-

A. "Whether the Learned Magistrate erred in law and in fact by failing to admit that there was non-conformity with the electoral laws resulting to electoral irregularities.

B. Whether the Learned Magistrate erred in law and in fact by failing to admit that the non-conformity with the electoral laws did affect the validity of the elections and altered the outcome of the results.

C. That the Learned Magistrate failed in law and fact by failing to decide on the Petitioner's evidence pointing out to alterations manipulations and inconsistency of figures while the same was unopposed.

D Whether the Learned Magistrate erred in law and fact by failing to hold the Respondent accountable for their laxity in responding to the petitioner's evidence pointing out to alterations, manipulations and inconsistency of figures.

E. Whether the Learned Magistrate erred in law and fact in not allowing any party have costs of the appeal.

F. Whether the Appellant should be granted the prayers as sought."

Relying on the decision of **Majanja J in Jackton Nyanungo Ranguma =V= Independent Electoral and Boundaries Commission and 2 others [2018] eKLR** where he held that:-

"An election petition is not a do over of the just concluded election. It is not an opportunity to conduct another election through the court as every election conducted in accordance with the law is presumed valid unless it is set aside by the court."

Mr. Anyoka conceded that to succeed the Appellant must raise firm and credible evidence of the allegations of non-compliance with the Constitution and the law and of the electoral malpractice and misconduct which should result in the election being invalidated. He submitted that the petitioner had demonstrated and proved his allegations of malpractice and manipulation through evidence and that the 1st and 2nd Respondents had as a matter of fact admitted that there were errors in the counting, collating, tabulation and computation of votes. He contended that they had also confessed to irregularities in the transmission of the results but attributed it to human error. He submitted that the election was not conducted in an impartial, neutral efficient, accurate and accountable manner and contended that it did not meet the constitutional threshold at Articles 38 (2) and 81 of the Constitution.

On the 2nd issue Mr. Anyoka conceded that election courts must limit themselves to the allegations made in the pleadings and the evidence adduced before them. He however submitted that the Appellant provided proof that he would have been declared the winner save for the alterations of the number of votes cast at the stage of transposition, counting and declaration. He contended that the errors complained of affected the overall results as the difference between the Appellant and the 3rd Respondent was only three votes. On what amounts to results he referred this court to the case of **Paul Gitenyi Mochorwa =V= Timothy Moseti E. Bosire & 2 others Petition No. 8 of 2013**. He contended that in the court below the Appellant confined himself to only that which he had pleaded in the petition.

On issue (three) Mr. Anyoka submitted that whereas the Appellant tendered evidence that the results were manipulated the 1st and 2nd Respondents did not adduce evidence in rebuttal. He relied on the case of **Wisnienski =V= Central Manchester Health Authority 1997 PIQR 324** cited with approval in **Jacinta Wanjala Mwatela =V= Independent Electoral & Boundaries Commission & 3 others [2013] eKLR** where it was held:-

> ***"In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in any action."***

He submitted that as the Respondents did not discharge the evidential burden the election court should have held them responsible and found in favour of the Appellant. He urged this court to find therefore that she erred in law and fact.

On the burden of proof he referred the court to **Raila Odinga & 5 others =V= Independent Electoral and Boundaries Commission and 3 others [2013] eKLR** where the court stated:-

> ***"While it is conceivable that the law of elections can be infringed, especially through incompetence, malpractices or fraud attributable to the responsible agency, it behooves the person who thus alleges to produce the necessary evidence in the first place – and thereafter, the evidential burden shifts and keeps shifting."***

He urged this Court not to uphold the results declared stating that the Respondents did not rebut the evidence of their alteration. He invited this Court to make a negative inference on the 1st & 2nd Respondents' failure to adduce evidence in rebuttal.

On the issue of costs he submitted that the election court was right in applying the jurisprudence of the Supreme Court in the **Raila Odinga Election Petition 2017** that the Petitioner should not be punished by an order for costs. He submitted that burdening litigants with costs in public interest litigation such as this is likely to keep people off the courts and hence hinder their right to access to justice under Article 4 of the Constitution. Mr. Anyoka concluded his submissions by stating that:- "***the narrow margin in this election is not evidence of the election having been improperly conducted but rather it is evidence of the tight contest that was between the appellant and the 3rd Respondent, in which the 3rd Respondent emerged the winner. This narrow margin, alongside the probative evidence established by the Appellant is thorough and sufficient to enable the appeal to be allowed as prayed."*** He urged this court to allow the appeal but to dismiss the cross-appeals on costs.

Counsel for the 1st and 2nd Respondents begun by decrying what he referred to as the incomplete record of appeal filed by the Respondent. He submitted that the supplementary record of appeal filed by Counsel for the Appellant was also incomplete as it did not capture the petition as filed on 1st September 2017 and did not contain a copy of the decree. On this he relied on the case of **Law Society of Kenya =V= Centre for Human Rights and Democracy & 12 others Supreme Court No. 4 of 2014** where it was held:-

> ***"The Record of Appeal is the complete bundle of documentation, including the pleadings, submissions, and judgement from the Lower Court, without which the appellate court would not be able to determine the appeal before it."***

Counsel submitted that without a record of appeal a court cannot determine the appeal before it and as such the appeal is incompetent and should be dismissed. He also invited the court to find that an incompetent appeal divests a court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues. For this proposition he relied on the **Nigerian Supreme Court Case Ocheja Emmanuel Dangana =V= Hon. Atai Aidoko Aliusman & 4 others, SC 11/2012**. Counsel also took issue with the provisions of law cited in the heading of this appeal – **Rule 40 of the Civil Procedure Rules**. He submitted that the appeal should have been brought under **Rule 34 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017** and as such there is no appeal before this court.

On the merits of the appeal counsel for the 1st and 2nd Respondents submitted that other than to throw pleadings, which had no basis or evidential value but which were answered by the 2nd Respondent in her replying affidavit at the court, the Appellant did not discharge the burden of proof and so no evidentiary burden shifted to the Respondent. He contended that the Trial Magistrate meticulously analyzed the evidence adduced by the Appellant and correctly found that the Appellant had failed to discharge the burden of proof. Counsel pointed out that during cross examination the Appellant conceded that the election was conducted properly, fairly and in accordance with the law and that he only had issue with KEA DEB Primary School Polling Station. He submitted that this is proof that the 3rd Respondent won.

On the submission that this court ought to draw a negative inference from the failure by the 1st & 2nd Respondents to call witnesses Counsel submitted that the burden of proof rested with the Appellant and the presiding officers and clerks could not be called to answer a case whose basis had not been proved to the required standard; that moreover the 2nd Respondent gave evidence and controverted the allegations made against the presiding officers. Counsel stated that the election court properly dismissed the petition as the same could not have succeeded merely because the Respondent had not offered evidence in rebuttal.

On the credibility or otherwise of the Appellant Counsel for the 1st and 2nd Respondent submitted that was an issue within the jurisdiction of the election court but not this court. On that he relied on **Gatirau Peter Munya =V= Dickson Mwenda Kithinji & 2 others [2014] eKLR** where the Court held:-

> ***"[48]" 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 between an appellate court to proceed from a position of deference to the trial Judge and the trial court, 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."***

On whether the Trial Magistrate ignored evidence showing non-conformity with the electoral laws, Counsel for the 1st and 2nd Respondents reminded this Court that it did not unlike the election court see or hear the witnesses which enabled it to weigh their credibility. Counsel argued that any incident of manipulation would not have passed without notice yet no witness was called to attest to it.

On the 1st and 2nd Respondents' appeal on costs, Counsel urged this Court to find that the 1st and 2nd Respondents having been wrongly sued they were entitled to the costs of the petition for the trouble undertaken by them in defending the same. He cited many authorities on the issue which I need not reproduce in this judgement.

Mr. Ndubi, the Learned Advocate for the 3rd Respondent begun by attacking the competence of the appeal. He submitted that for being brought under Order 40 Rule 1 of the Civil Procedure Rules instead of Section 75 (1) of the Elections Act and Rule 34 of the Election Petition Rules 2017 it is a civil appeal and is therefore incompetent. He also submitted that the appeal is not competent as the memorandum of appeal was not served on the parties within 7 days as provided by Rule 5 of the Petition Rules. He submitted further that it was totally unnecessary for the Appellant to frame issues for determination instead of arguing the grounds set forth in his Memorandum of Appeal only.

As for the record of appeal, Mr. Ndubi submitted that the Appellant had put the documents filed on 21st September 2017 by the 1st and 2nd Respondents in the record of appeal on the pretext that it was the documents he had filed in the petition as "FAN". Counsel stated that a record of appeal should correctly show the pleadings and documents filed by each party as accurately as possible and that it was not open for the Appellant to interchange documents.

On the merits of the appeal, Counsel submitted that this being the first appellate court it has a duty as provided under Rule 34 (10) of the Election Petition Rules 2017 to independently evaluate the evidence tendered before the trial court and reach its independent decision as if it is exercising its original jurisdiction. Counsel submitted that he agreed with the decision of **Majanja J in Jackton Nyanungo Ranguma =V= Independent Electoral and Boundaries Commission & 2 others [2018] eKLR** on the purport of Section 83 of the Elections Act. Counsel described as generalized lofty submissions from the bar the argument by Counsel for the Appellant that the Appellant had proved through evidence, that there were various manipulations of figures in various polling stations and that the Appellant was able to succinctly demonstrate malpractices, votes not accounted for and several discrepancies in filling the statutory forms bearing the results. He contended that the submissions were vague and generalized. Counsel further submitted that despite objections from Counsel for the Respondents, the Appellant adduced evidence on alleged irregularities that he had not pleaded in the petition. Counsel submitted that be that as it may those irregularities were found to be incorrect or unfounded when the 2nd Respondent clarified the issues. He submitted that the submission by Counsel for the Appellant that there was an admission of irregularities or errors on the counting, collating, tabulation or computation of votes by the 1st & 2nd Respondent was inaccurate and stated that there was no such admission. He pointed out that the only irregularity and which was conceded by all the parties was in respect of KEA DEB Primary School Polling Station where according to him while the results for all the candidates as captured in Form 36A were correct there was an error in transposition of those results in Form 36B leading to a misalignment of the results for the candidates. He submitted that as a result of that error the Appellant was given 2 votes instead of the 8 votes he had garnered while the 3rd Respondent was given 5 votes in instead of the 62 he had garnered. Counsel submitted that as a result of another error in Ikonge DEB Polling Station 6 his client lost 7 votes. He contended that the effect of the errors did not affect the results as the 3rd Respondent was still the winner.

Counsel further submitted that the Appellant did not explain what he meant by transmission stage where he alleged massive irregularities. He contended that as the Appellant did not fault the actual voting then the election was conducted substantially in compliance with the Constitution and the Electoral Laws and the minor transgressions post the voting did not affect the result. Counsel for the 3rd Respondent faulted the election court for allowing the Appellant to lead evidence on Polling Stations that he had not pleaded but submitted that be that as it may the Appellant was proved wrong by the 2nd Respondent. He reiterated however that parties are bound by their pleadings. He cited the case of **Jackton Nyanungo Ranguma =V= Independent Electoral & Boundaries Commission& 2 others [2018] eKLR** (Suppra) to support his submission. He further stated that the petition did not meet the threshold in the case of **Anarita Karimi Njeru =V= Republic [1976 – 1980] eKLR 1271** and **Mumo Matemu =V= Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** in that it did not set out with a reasonable degree of precision the right alleged to have been violated and the manner in which it was infringed.

On whether this Court ought to draw an adverse conclusion against the 1st & 2nd Respondents for not calling the presiding officers, Counsel submitted that the Respondents had sufficiently answered to the issues raised in regard to the only polling station that was pleaded.

On ground 4 of the appeal, he urged this Court to presume it had been abandoned as the Appellant did not submit on the same.

On the 3rd Respondent's appeal on costs, Counsel urged this Court to find that the Trial Magistrate misdirected herself in relying on the decision of the Supreme Court in **Raila Amolo Odinga & Another =V= Independent Electoral & Boundaries Commission & 2 others Election Petition No. 1 of 2017 (2017] eKLR** as that case being a Presidential Petition, was unlike the present appeal a public interest ligation case. He submitted that moreover in that case the reference to a public entity was to the Independent Electoral & Boundaries Commission. He contended that in this case there was no basis for denying the 3rd Respondent costs as he is not a Constitutional Organ funded by the State.

In conclusion, Counsel urged this Court to find the appeal not merited and dismiss it but to allow the 3rd Respondent's appeal on costs. Counsel further took issue with the word "admit" in grounds 1 & 2 of the Memorandum of Appeal and stated that this is the more reason this Court should reject this appeal and dismiss it. He contended that the petition itself should have been dismissed for being incompetent as the Appellant did not state the results and the date of the election. He faulted the election court for invoking Article 159 (d) of the Constitution to save it and stated that election petitions have their own special jurisdiction with mandatory requirements which must be strictly observed. He cited the case of **Hon. Martha Wangari Karua & Another =V= Independent Electoral & Boundaries Commission & 3 others [2017] eKLR** and the case of **Jimmy Mkala Kazungu =V= Independent Electoral & Boundaries Commission & 2 others [2017] eKLR** where the courts struck out petitions on the same grounds he had raised in his preliminary objection. He also submitted that the Appellant had admitted he had not appeared before the Advocate alleged to have commissioned his affidavit in support of the petition. Counsel submitted that in the circumstances that affidavit should have been struck out in effect rendering the petition incompetent. Counsel urged this court to allow the cross appeal and award the 3rd Respondent costs in the Court below and in this appeal.

The Advocates for the parties reiterated the above submissions at the highlighting.

By dint of Section 75 (4) of the Elections Act in this appeal this Court shall deal with matters of Law only. Section 75 (4) states that:-

> ***"(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."***

This position was also confirmed in **Gatirau Peter Munya =V= Dickson Mwenda Kithinji & 2 others [2014] eKLR** where the Court held:-

> ***"[48]" 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 between an appellate court to proceed from a position of deference to the trial Judge and the trial court, 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."***

Before I proceed to decide the appeal on the merits, I propose to first deal with the three issues raised in regard to the competency of the appeal.

The first issue was raised by Counsel for the 1st and 2nd Respondents and it touches on the completeness of the record of appeal while the second issue which was raised by Counsel for the 3rd Respondent concerns the provisions under which the appeal is expressed to be filed and an allegation that the Memorandum of Appeal was not served upon the 3rd Respondent within the prescribed seven days.

The procedure for filing election appeals to this Court is set out in **Rule 34 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017.** To begin with, the appeal is instituted by way of a memorandum of appeal which must be signed in the same manner as the petition. The memorandum of appeal must set out under distinct heads the grounds of appeal. So far that procedure was duly complied with in this appeal. **Sub-rule (6)** then provides that within twenty one days of filing of the memorandum of appeal the Appellant must file a record of appeal which must contain:-

> **(a) "The memorandum of appeal;**
>
> **(b) Pleadings of the petition;**
>
> **(c) Typed and certified copies of the proceedings;**
>
> **(d) All affidavits, evidence and documents entered in evidence before the magistrate; and**
>
> **(e) A signed and certified copy of the judgement appealed from and a certified copy of the decree."**

My perusal of the record of appeal indicates that the Appellant has substantially complied with Sub-rule (6) of Rule 34. The record of appeal contains a memorandum of appeal, the pleadings of the petition although some may not be the very ones the petitioner himself relied on. It also has the typed proceedings, the affidavits and evidence adduced before the trial court and the signed and certified copy of the judgement of the lower court. The only document that was omitted is the decree but a certified copy of the same was filed together with the memorandum of appeal and that cures the omission. Moreover the requirement by **Rule 34 (8)** that the election court sends its record to the

appeal court to my mind also cures the deficiency in the record of appeal. I am not therefore persuaded that that ground raised regarding the record of appeal renders the appeal fatally incompetent. Neither am I persuaded that citing the wrong provisions of the Law – **Rule 40 (1) of the Civil Procedure Rules** – renders the appeal fatally incompetent. To the contrary I find that the defect in the title of the appeal is curable under Article 159 of the Constitution which together with Rule 5 (1) of the Election Petition Rules 2017 gives this Court discretion to overlook such infractions. From the beginning the Respondents were well aware that what they were dealing with is an appeal arising from an election petition as that is clear from the pleadings and as such no prejudice has arisen from the defect in the title. As for the omission to serve within seven days as required by Rule 34 (5) Counsel for the 3rd Respondent did not state when exactly he was served and this Court is therefore not in a position to confirm the infraction. In any event this too is an infraction of the Rules which under **Rule 5 (1)** I am willing to overlook so as to consider the appeal based on merit as opposed to technicalities of procedure. In so doing I am fortified by the decision of the Court of Appeal in **Martha Wangari Karua =V= IEBC & 3 others [2018] eKLR** where the Court stated:-

> ***"……It behooves courts to undertake and place substantive considerations above those of procedure especially where the procedural infractions are curable……"***

More recently in **Walter Enock Nyambati Osebe =V= Independent Electoral & Boundaries Commission and 2 others** the Court of Appeal reiterated its position in Martha Wangari Karua (Suppra) and also relying on the decision of the Supreme Court in **Zacharia Okoth Obado =V= Edward Akong'o Oyugi & 2 others [2014] eKLR** excused a procedural infraction as no prejudice had been demonstrated. The Court stated:-

> ***"39. Being of the same persuasion, and particularly in the absence of any demonstrable prejudice suffered by the respondents on account of the notice of appeal having been filed in the High Court registry, and bearing in mind that the notice of appeal was in turn transmitted to the registry of this Court and duly served on the respondents, the order that we think is just to make is to dismiss, which we hereby do, the 3rd respondent's application dated 28th March 2018 and filed in Court on 29th March 2018. We make no order as to costs regarding that application."***

I have said enough on the competence of the appeal and I now turn to the merits.

In the petition, the Petitioner raised only two issues namely that there were irregularities in the collation and tallying of the votes cast more so at KEA DEB Primary School Polling Station leading to his 4 votes not being accounted for and secondly that the counting of votes was manipulated to give the 3rd Respondent more votes than he had received. In the Petitioner's own words**:-*"…The correct number of votes received by the Petitioner was not correctly captured and were intentionally reduced to ensure that Mr. Momanyi Thadeus Nyabaro is declared as the duly elected Member of the County Assembly of Ekerenyo Ward…..***

> **The Petitioner further says that *the 3rd Respondent did not receive the number of votes alleged to have been received but it is a total manipulation of the records on various polling stations and a scrutiny and recount would easily demonstrate the same."***

In this appeal the Petitioner contends that he proved the two allegations to the standard required and that his evidence was not rebutted yet the election court ignored his evidence and dismissed his petition.

The burden and incident of proof were settled in the Raila Odinga Presidential Petition 2017 where the Court stated:-

> ***"[132] Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and "remains constant throughout a trial with the plaintiff, however, "depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting" and "its position at any time is determined by answering the question as to who would lose if no further evidence were introduced."***

> ***"[133] It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of the irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce 'factual' evidence to prove his/her allegations of breach, then the burden shifts and it behooves the respondent to adduce evidence to prove compliance with the law."***

In the petition the burden of proof rested with the Appellant as the Petitioner and as held in the Raila Odinga case the evidential burden could only shift to the Respondent if the Petitioner had adduced sufficient prima facie evidence. As was held in **Raila Odinga & 5 others =V= Independent Electoral & Boundaries Commission & 3 others [2013] eKLR** the standard of proof in election petitions is above the balance of probability but lower than beyond reasonable doubt. As I have already stated the legal burden rested squarely with the Appellant. To succeed the Appellant was required to prove that the election was not conducted in accordance with the principles laid down in the Constitution and the electoral laws or that there were irregularities that affected the results of the election – see **Section 83 of the Elections Act**. It was therefore incumbent upon him to demonstrate that there were irregularities in the tabulation of votes and that the same affected the results.

During the trial the Appellant did not raise any complaints regarding the manner in which the voting was conducted. His complaints pertain to the tabulation and tallying of the votes. It is my finding that he did not discharge the burden of proof. He did not adduce cogent and credible evidence to prove that he was robbed of 4 votes at KEA DEB Primary School Polling Station. He conceded that the votes he obtained were accurately recorded in Form 36A but stated there was an error when the votes were posted to Form 37B which was the declaration form. It is instructive however that he admitted that the error in the posting affected almost all the candidates in that election. The error was not peculiar to him as the 3rd Respondent was also affected with an even bigger margin. Clearly therefore that error which the 2nd Respondent attributed to human error did not affect the result. Moreover it is now trite that the results announced at the polling stations

are the final results. Those results were the ones contained in Form 36A and the same were not affected by the error. The error in the transposition to Form 36B clearly did not affect the outcome of the election as the 3rd Respondent was still ahead. It is also evident from the record that the Appellant was not even certain of his figures. During cross examination the number of votes not accounted for oscillated from four to six and the Appellant even introduced more polling stations in which he alleged his votes were not accounted for. In **Raila Amolo Odinga & Another =V= Independent Electoral & Boundaries Commission & 2 others Election Petition No. 1 of 2017 (2017] eKLR** the Supreme Court citing with approval the Supreme Court of India's decision in **Arikala Narasa Reddy =V= Venkata Ram Reddy Reddygari & Another – Civil Appeal Nos. 5710 – 5711 of 2012 [2014] SCR** stated inter alia:-

> ***"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."***

The election court even after allowing the Appellant to travel beyond his pleadings came to the conclusion that the errors in transposition of the results from Form 36A to Form 36B did not affect the result. She based her finding on the case of **Opits C =V= S WRZENSNEWS KYI [2012] 3 SCR 76** in which she quoted the Supreme Court of Canada as stating:-

> ***"Given the complexity of administering a federal election, the tens of thousands of election workers involved, many of whom have no on-the job experience, and the short time frame for hiring and training them, it is inevitable that administrative mistakes will be made. If elections can be easily annulled on the basis of administrative errors, public confidence in the finality and legitimacy of election results will be eroded."***

I find no reason whatsoever to depart from the findings of the election court that in respect of KEA DEB Primary School Polling Station it was not proved that the final results were affected.

In respect of the Appellant's complaint that the results in various polling stations were manipulated to favour the 3rd Respondent and to ensure that he emerged the winner the election court correctly held that the Appellant could not be allowed to travel out of his pleadings. The court found that the Appellant had not pleaded specific polling stations where the results were manipulated. Rather he had made a generalized allegation. His attempt to zero in on specific polling stations could therefore not be permitted. I am not therefore persuaded that his evidence in that regard was ignored. I have already referred to the decision of the Supreme Court in **Raila Amolo Odinga & Another =V= IEBC & 2 others [2017] eKLR** to the effect that parties are bound by their pleadings and I need not say more. The Appellant has invited this Court to draw an adverse inference from the omission of the 1st & 2nd Respondents to call presiding officers to answer to his allegation of manipulation and practice which he contends he proved. However my finding is that no cogent evidence was adduced by the Appellant to warrant a rebuttal from the Respondents and that the refusal by the election court to draw a negative inference in the failure of the Respondents to call the alleged witness was correct. In so saying I am fortified by the decision of the Court of Appeal in **John Munuve Mati =V= Returning Officer Mwingi North Constituency, Independent Electoral & Boundaries Commission and Paul Musyimi Nzengu [2018] eKLR** where it stated:-

> ***"We agreed with the Respondents that it does not invariably follow that failure by a Respondent to call a witness means that the petition must be allowed. The Petitioner must first adduce evidence of the nature that would entitle him to judgement if the Respondent did not adduce any evidence at all in rebuttal."***

In **Jackton Nyanungo Ranguma =V= Independent Electoral & Boundaries Commission& 2 others [2018] eKLR** the same court stated:-

> ***"An inference leading to a conclusion of fact can only be drawn when there is one irresistible deduction to be made from a proven set of facts. In the instant case, if the trial court were to draw an adverse inference against the 1st & 2nd Respondents, the legal effect would be to shift the legal burden of proof from the Petitioner to the Respondent. This would be wrong in law. Further, noting that there is no legal requirement stipulating the number of witnesses a party can call to prove a fact in issue, an adverse inference ordinarily should not be drawn simply because a Respondent has chosen not to call any or some witnesses. The legal burden of proof always remains with the Petitioner and a court should be careful not to draw adverse inference when a Respondent who has no legal burden to prove any fact fails to call a witness or witnesses."***

The Appellant's evidence on alleged alterations and manipulations and inconsistency of figures was based on polling stations that had not been pleaded and the allegation was therefore not proved at all. That ground of appeal therefore also fails.

The election court while finding that there were minor infractions in the tabulation of the results found that the same did not materially affect the results and I am fully in agreement with her. Indeed in his submissions Mr. Anyoka Advocate for the Appellant seems to have conceded the appeal is not merited when he stated:-"***the narrow margin in this election is not evidence of the election having been improperly conducted but rather it is evidence of the tight contest that was between the appellant and the 3rd Respondent, in which the 3rd Respondent emerged the winner……."***

In the premises I find that the appeal has no merit.

I now turn to the appeals on costs. The decision of the Court of Appeal in **Dennis Magare & Another =V= Independent Electoral & Boundaries Commission & 3 others Election Petition Appeal No. 22 of 2018** on this issue supersedes its decision in **Rozaah Akinyi Buyu =V= Independent Electoral & Boundaries Commission & 2 others [2014] eKLR** which I cited in **(Nyamira Election Petition Appeal No. 1 of 2018 Damaris Nyarangi Mouni =V= Wafula Chebukati & 3 others)** in the **Dennis Magare & Another =V= Independent Electoral & Boundaries Commission & 3 others case (Suppra)** the court while observing that **Section 84 of the Elections Act** which gives an election court the power to award costs and **Rule 30 of the Elections Rules, 2017** which gives the election court

discretion to, inter alia, specify the amount of costs and to determine the party responsible for the payment of the same, have since their enactment been the subject of much judicial consideration stated:-

> ***"However, the jurisprudence is quite clear: the award of costs by an election court is discretionary, and the appellate court can only interfere with such an award where it is apparent that there has been a misdirection on the same and; costs are to compensate a successful litigant and should not be seen to deter litigants of modest means from accessing the courts…"***

I understand therefore that even though Section 84 of the

Elections Act is couched in mandatory terms costs in an election petition are in the discretion of the election court and I cannot interfere with the exercise of that discretion unless there has been a misdirection. The election court herein based its decision on costs on the Supreme Court's decision in the **Raila Amolo Odinga 2017 Petition** where the Court stated:-

> ***"….It is a heavily public funded constitutional organ and to burden tax payers with litigation costs would be a grave matter which we deem unnecessary in this petition."***

It is my finding that by applying that principle to this petition the election court misdirected itself because unlike in that case the culpable party in this case is not a public entity. It is my finding that in this case the Respondents who were the successful litigants were entitled to the costs of the petition which I accordingly award to them but which I shall cap at Kshs. 400,000/= for the 1st & 2nd Respondents and at Kshs. 400,000/= for the 3rd Respondent.

Final Orders

1.The Appellant's appeal is dismissed with costs to the Respondents.

2.That the costs of the Respondents in this appeal are capped at Kshs. 200,000/= for the 1st and 2nd Respondents and those of the 3rd Respondent are capped at Kshs. 200,000/=.

3.That the 1st, 2nd and the 3rd Respondents appeals on costs are allowed and the costs of the petition are awarded to them.

4.That the costs of the petition awarded to the Respondents are capped at Kshs. 200,000/= for the 1st & 2nd Respondents and Kshs. 200,000/= for the 3rd Respondent.

5.That there shall be no order for costs in respect of the appeals on costs.

It is so ordered.

Dated and delivered in Nyamira this 31st day of July, 2018.

E. N. MAINA

JUDGE