REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

ELECTION PETITION APPEAL NO. 1 OF 2018

JUSTIN KITHINJI S. NDERI.....APPELLANT

VERSUS

JAMES MUTEMBEI AUGOSTINO.....1ST RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....2ND RESPONDENT

WILFRED NDUNGU WAINAINA

THE CONSTITUENCY RETURNING OFFICER

CHUKA IGAMBANG'OMBE CONSTITUENCY.....3RD RESPONDENT

(Being an appeal to the whole Judgment and decree delivered by the Chief Magistrate at Chuka Law Courts by (Hon. J.M Njoroge) on the 1st March, 2018 in Chuka Chief Magistrate Election Petition Number 1 of 2017)

BETWEEN

JAMES MUTEMBEI AUGOSTINO..... .....PETITIONER

VERSUS

JUSTIN KITHINJI S. NDERI.....1ST RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....2ND RESPONDENT

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CHUKA - IGAMBANG'OMBE CONSTITUENCY.....3RD RESPONDENT

J U D G M E N T

1. **JUSTIN KITHINJI S. NDERI**, the Appellant herein was declared the winner and the duly elected member of County Assembly for Magumoni Ward in the general elections held on 8th August 2017. The elections held on that day in respect of member of County Assembly Magumoni Ward saw the 2nd and 3rd Respondents (cross appellants) declare the appellant as the winner with **4664** votes while the 1st Respondent, **JAMES MUTEMBEI AUGOSTINO**, was the runners up with **4629** votes.

2. The 1st Respondent herein was aggrieved by the results declared by the 3rd Respondent filed a petition vide ***Election Petition No. 1 of 2017 at Chuka Chief Magistrate's Court.*** The grounds of the that petition as presented to the Chief Magistrate's Court were that the results from the polling stations in Magumoni Ward were manipulated and doctored to favour the appellant herein and besides that it was

also contended that the appellant herein and 2nd and 3rd Respondents committed election offences and malpractices which rendered the election's anullity and not reflective of the general will of voters at Magumoni Ward. There was also a contention that the impugned elections had contravened **Article 81(e)(iv), (v), Article 86** of the **Constitution** and the **Election Act** and Regulations made thereunder.

3. On the basis of the above, the 1st Respondent sought the following reliefs from the trial court.

a) An order for immediate scrutiny, recount and retallying of votes cast in all the named 57 polling stations in Magumoni Ward.

b) A declaration that the Respondent (appellant and 2nd and 3rd Respondents herein) committed election offences and engaged in electoral offences and malpractices contrary to **Sections 71, 72** and **82** of the **Elections Act**.

c) A declaration that the appellant was not validly and lawfully elected as member of the County Assembly for Magumoni Ward due to his participation and condoning of malpractices.

d) An order nullying the election of the appellant as the member of the County Assembly Magumoni Ward.

e) Upon the scrutiny, recounting and retallying of cast votes the honourable court be pleased to declare the 1st Respondent as the validly elected member of County Assembly in Magumoni Ward and the 2nd and 3rd Respondent be ordered to declare the 1st respondent as the Member of County Assembly Magumoni Ward and issue him with a certificate of election and notify the speaker County Assembly Tharaka Nithi County of the decision.

f) Costs

g) Any other relief as the court may order in the interest of justice.

4. The appellant, 2nd and 3rd Respondents denied all the allegations leveled against them and asserted that the elections in their view was conducted in accordance with the constitution and electoral law and that it was free and fair. They faulted the 1st Respondent herein for not pointing out specifies and particulars of electoral malpractices and offences done and contended that the petition was seeking for scrutiny and recount in order to fish for evidence. They further averred that the 1st Respondent's agents did not raise any query at any polling station requiring recount and that the minor discrepancies noted did not affect the final results. They maintained that the appellant was validly elected as Member of County Assembly Magumoni and lawfully declared as such after the voters at Magumoni Ward had exercised their sovereign right to vote and choose their representative at Magumoni Ward.

5. The trial court upon hearing three witnesses from the Petitioner (1st Respondent) and four witnesses from the appellant, the 2nd and 3rd Respondent herein and after evaluating evidence tendered including the outcome of scrutiny and recount ordered determined that the elections conducted in Magumoni Ward on 8th August, 2017 in respect to member of County Assembly contained errors, irregularities and discrepancies that rendered election results inaccurate, unverifiable, unsecure, unaccountable or free, fair and transparent. The election of the appellant was therefore nullified and the 2nd and 3rd Respondents further ordered to conduct a repeat election in the said ward. The 2nd and 3rd Respondents were ordered to pay costs because the appellant was absolved from blame or commission of electoral fraud, irregularities or offences.

6. Aggrieved by the above Judgment of the trial court, the appellant lodged this appeal raising the following 29 grounds namely:

1. The learned magistrate erred in law by delivering a flat judgment devoid of the necessary ingredients as he failed to state any and all the points/issues for determination, the decision thereon and the reasons for the decision and has therefore occasioned failure of justice.

2. The learned trial magistrate erred in law by making substantial alterations, changes and amendments to the judgment delivered and signed in open court on 1st March, 2018, and providing the appellant with totally different judgment upon a request for a certified copy of the judgment.

3. The learned trial magistrate erred in law by ignoring and failing to issue a determination on the raised issues of the mode of transmission of results and the admissibility as evidence of website printouts of results electronically transmitted to the 2nd Respondent's public portal.

4. The learned trial magistrate erred in law by failing to dismiss the election petition for non-compliance with Rule 8(1) (c) and (d) and Rule 12 (c) and (d) of the Election Petition (Parliamentary and County) Petitions Rules2017 despite his conclusion that there was non-compliance.

5. The learned trial magistrate erred in law by failing to observe and find that the prayer for nullification of the impugned election, the prayers for scrutiny, recount and re-tally votes in all the 57 polling stations in Magumoni Ward and the prayer for declaration of the 1st Respondent herein as duly elected were not pleaded in the alternative in the petition and as such could not be granted for lack of precision and particularly in pleadings.

6. the learned trial magistrate erred in law by ordering a recount of votes cast for the position of Member of County Assembly in all the 57 polling stations within Magumoni Ward including polling stations whose results were not challenged or disputed in the pleadings/petition.

7. The learned trial magistrate erred in law by finding the holding that sufficient basis as is required in law had been laid for grant of an order of recount of votes cast for the position of Member of County Assembly in all the 57 polling stations within Magumoni Ward.

8. The learned trial magistrate erred in law by failing to give detailed reasons for ordering a recount of votes cast for the position of Member of County Assembly in all the 57 polling stations within Magumoni Ward and in effect allowing the petitioner to go on an evidence gathering expedition.

9. The learned trial magistrate erred in law in ordering a recount of votes but proceeding to oversee and conduct a scrutiny contrary to the court orders issued on the 1st February, 2018 and therefore occasioned failure of justice.

10. The learned trial magistrate erred in law by being in direct supervision of the recount/scrutiny process and failing to appoint a court registrar by court order to oversee and supervise the process.

11. The learned trial magistrate erred in law by failing to find and hold that the declared results for the two polling stations whose polling boxes were said to be unidentified and unknown in his Judgment were part of the court record in the form of Form 36As provided by the 2nd and 3rd Respondent, which were unchallenged in the petition and in evidence.

12. The learned trial magistrate erred in law by misdirecting himself and ignoring the Court of Appeal decision in Independent Electoral and Boundaries Commission -vs- Maina Kiai & 5 Others NRB CA Civil Appeal No.105 of 2017 (2017) eKLR where it was held that results declared at the polling stations are final until they are disputed in an election petition and set aside the election court.

13. The learned trial magistrate erred in law by failing to observe that all polling stations in Magumoni Ward are gazetted in the Kenya Gazette and there was no allegation of fictitious polling stations or results in the pleadings/petition.

14. The learned trial magistrate erred in law by finding and holding that two ballot boxes were unidentified and unknown during the recount despite the fact that he personally sanctioned a recount of votes in the two impugned ballot boxes, and recorded the result thereof, thereby recognizing that there were from Magumoni Ward and the cast votes were for candidates in the disputed election.

15. The learned trial magistrate erred in law by finding the holding that two ballot boxes were unidentified and unknown in is Judgment despite the fact that the 2nd and 3rd Respondents produced 60 ballot boxes to the satisfaction of the trial magistrate before the recount exercise and have not been held in contempt of court for non-compliance with the orders issued on the 1st February, 2018 directing that all ballot boxes relating to the disputed elections be availed for a recount.

16. The learned trial magistrate erred in law by finding and holding that two ballot boxes were unidentified and unknown and did not contain results as per his judgment despite the fact that the boxes had distinct ballot box codes, unbroken seals that are the standard manner of identifying ballot boxes, which evidence he ignored.

17. The learned trial magistrate erred in law observing and holding by implication that ballot boxes can only be identified through statutory forms used to declare results that are left inside the ballot boxes after counting in the polling stations and not by way of ballot box after codes/numbers and distinct seal numbers.

18. The learned trial magistrate erred in law by failing to observe in his judgment that there was no question as to the integrity of two boxes marked as unknown as the ballot box seals were intact at the time of the recount and further that tamperproof packets of ballot papers for each candidate were also intact and untampered with at the commencement of the recount.

19. The learned trial magistrate erred in law by failing to give the respondent's an opportunity to respond to the adverse findings of the recount process that was done before close of proceedings therefore occasioning a failure of justice

20. The learned trial magistrate erred in law by misdirecting himself on the effect of margins of loss in election petitions and proceeding to nullify on account of a 'narrow margin' despite the fact that after an arithmetical calculation is made by applying the results after a recount the appellant not only maintains a lead over the 1st Respondent herein but also increases it.

21. The learned trial magistrate erred in law by misdirecting himself on the effect of a random and unpremeditated human error by a presiding officer on the integrity of an entire election particularly in his holding on the effect of failure to leave a copy of Form 36As in ballot boxes after counting of votes in the polling station and therefore proceeding to nullify the election on a mere technicality.

22. The learned trial magistrate erred in law by making no reliance and/or reference on the entirety of the evidence, summations and authorities provided by the appellant and giving no reasons for disallowing them in his judgment.

23. The learned trial magistrate erred in law by holding that the 1st respondent herein had not proven any instances of malpractices or irregularities pleaded in the petition and then proceeding to nullify the election against the weight of evidence.

24. The learned trial magistrate erred in law by failing to find and hold that the 1st Respondent herein had admitted in his pleadings and evidence at the hearing to having committed electoral malpractices and offences.

25. The learned trial magistrate erred in law by ignoring the time tested principle that parties are bound by their pleadings and evidence in support of petition, and allowing the 1st Respondent herein to travel outside his pleadings and then determining the entire election petition on the basis of issues not originally pleaded.

26. The learned trial magistrate erred in law by misdirecting himself on the burden, standard of proof in election petitions and misapplied the binding interpretations of Section 83 of the Election Act, 2011.

27. The learned trial magistrate erred in law by finding and holding that the appellant was not validly elected and election process was not free, fair credible and verifiable.

28. The learned trial magistrate erred in law by ignoring the doctrine of stare decisis in his determination and judgment.

29. The learned trial magistrate erred in law in predisposing himself to a position favourable to the 1st Respondent herein and failed to accord the Respondent the right to a fair hearing with the effect of arriving at a decision that was unreasonable, wrong in law and unjust in effect.

7. The 2nd and 3rd Respondent were equally dissatisfied with the decision of the trial court and filed a cross appeal raising the following 11 grounds namely:-

1. That the magistrate erred in law and in fact in allowing recount/scrutiny all the polling stations in the ward without any legal and factual basis.

2. That the magistrate erred in law and in fact in failing to dismiss the application for scrutiny/recount dated 4th September, 2017 for lack of merit.

3. That the magistrate erred in law and in fact failing to find out that the two polling stations lacking Form 36As were easy to identify and belonged to specific areas.

4. That the magistrate erred in law and in fact by failing to add the result of the two "unidentified polling stations" where the will of the people could clearly be discerned.

5. That the magistrate erred in law and in fact by failing to find that the result of the recount favored the 1st Respondent (in Chuka CMCC Election Petition No. 1 of 2017).

6. That the magistrate erred in law and in fact by finding that the petition had proved yet none of the grounds set out in the petition had been proved.

7. That the magistrate erred in law and in fact by failing to find that none of the grounds set out in the petition had been proved and there by failing to dismiss the petition.

8. That the magistrate erred in law and in fact by failing to find that the appellant and the 2nd Respondent had provided sufficient answer to the petition in terms of the responses, affidavit and oral audience in court.

9. That the magistrate erred in law and in fact by introducing a new ground in the petition and using the new ground to allow the petition.

10. That the magistrate erred in law and in fact by failing to stick to the pleadings, testimony and issues arising from the petition in the judgment.

11. That the magistrate erred in law and in fact by failing to dismiss the petition with costs to the appellant.

8. All the parties in this appeal chose to proceed through both written and oral submissions which I will summarize herebelow before consideration and final determination of this appeal.

Appellant's submissions:

9. In his written submissions done through Ms Yunis Osman and Mwiti Advocate the appellant has submitted that the trial court did not find the appellant or 2nd and 3rd Respondent guilty of any electoral malpractices as was pleaded in the election petition. The appellant further contends that the trial court found no electoral offences had been proven by the 1st Respondent herein. The appellant further contended that in this appeal they are not challenging the findings of facts made by the trial magistrate and reiterated that this appeal has been brought pursuant to the provisions of **Section 75(4)** of the **Elections Act No.24** of **2011**.

10. The appellant has submitted that it was the trial court's findings that the errors, omissions that were found out did not impute all ill motive on the part of the 2nd and 3rd Respondent and has pointed out an instance where a Presiding Officer at Nthambo Polling Station inadvertently placed the original Form 36A in the ballot box and sealed it.

11. The appellant argued grounds 1 to 3 together and contended that the learned trial magistrate erred by not addressing all issues that had been framed for determination. It is the appellant's contention that that the 1st Respondent in his petition at the trial relied on electronic evidence whose admissibility was challenged by the appellant but the trial court in his view erred by not rendering a decision on it. The appellant has submitted that the 1st Respondent failed to tender electronic evidence certificate and that the trial court should have ruled that the said evidence was inadmissible by dint of **Section 106 B** of the **Evidence Act.**

12. The appellant has also faulted the learned trial magistrate for not punishing the 1st Respondent despite what he considers an admission on his part about committing an electoral offence which was preventing the Returning Officer from announcing the official results at the tallying centre. The appellant contends that the Judgment delivered by the trial court was incomplete without this aspect being covered.

13. On grounds 5-10 of his appeal, the appellant's main contention is that the trial court erred on two respects;

(i) Ordering a recount at the tail end of trial when the prayer by the 1st Respondent was for immediate scrutiny, recounting and retalling of votes cast in 57 polling stations in Magumoni Ward. The appellant opines that he suffered prejudice because the learned trial magistrate did not exercise his discretion judiciously.

(ii) Secondly the appellant contended that an order for recount as per **Rule 28** of the Elections (Parliamentary and County Elections) Petition Rules, is only available as a relief in a petition if the only issue for determination in the petition is the count or retallying of votes garnered by candidates in an election petition. The appellant expressed his displeasure at how the trial court applied this rule during trial although he conceded that there have been different positions taken by different courts.

His contention is the decision in ***Gitarau Peter Munya -vs- Dickson Mwenda Kithinji & 2 Others [2014] (b***) and the ***Raila Amolo Ondinga & Another -vs- IEBC & 2 Others [2017] eKLR (Raila II)*** shows that the literal meaning of an order of recount is retallying of votes and a party should ask for this relief as a sole prayer to get it. The appellant has also cited the decision in ***Benjamin Onguyo Adama -vs- Benjamin Andola & others (Kakamega Election Petition No. 8 of 2013)*** to back up this position.

14. The appellant has faulted the learned trial magistrate for ordering for a recount when no sufficient basis had been laid. Citing ***Raila Amolo Odinga & Another -vs- IEBC & 2 others (Raila II),*** the appellant advance the following factors to be established before a trial court can order for a recount namely;-

a) That the court must be satisfied that a prima facie case is established

b) The material facts and full particulars have been pleaded stating the irregularities in counting of votes.

c) A roving and fishing inquiry should not be directed by way of an order to recount votes.

d) An opportunity should be given to file objection and

e) Secrecy of the ballot should be guarded.

The appellant drew the attention of this court on what the 1st Respondent told the trial court under cross examination, the sum of it being that he had no problem with counting and tallying of votes at polling stations as reflected in Form 36 A. His problem was posting of results from Form 36A to Form 36 B. The appellant has further contended that no recount was requested at any polling station. The appellant has in the premises faulted the learned trial magistrate for ordering for recount and retallying of votes in all polling stations in Magumoni Ward when not all results were contested and when the 1st Respondent had questioned only the retallying process which could according to the appellant could be done without going through recounting process.

15. The appellant's other grounds revolves around the trail court's finding that there were two an unidentified ballot boxes discovered during the process of scrutiny and recount. The trial court found that the origins of 2 ballot boxes could not be ascertained and this affected the credibility of the elections held because the ballot boxes were not marked, no serial numbers and had no Form 36 As. The appellant has contended that these findings were not supported by any factual basis and has drawn the attention of this court to results of recounting/scrutiny process contained in the 2 forms in respect to the two contestious polling stations. He further contends that the ballot boxes had codes and unbroken seals duly captured during the recount exercise by the trial court.

16. The appellant contends that the trial magistrate erred by framing an issue that was outside the pleadings and evidence tendered. It is the appellant's contention that the issue of the 2 boxes should not have been considered and cited **RAILA II** as an authority to back up the contention. In his view, the Supreme Court in **RAILA II** observed that;

> ***"In absence of pleadings, evidence if any, produced by 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..... therefore, it is not desirable or permissible for a court to frame an issue not arising on the pleadings."***

17. The appellant has further submitted that the learned magistrate erred in law by ordering for recount and proceeded to oversee scrutiny thus expanding the nature of the orders issued without giving the parties a chance to make objections. To him this occasioned miscarriage of justice. It is submitted that scrutiny as per **Rule 29** is done to establish validity of the votes and that while **Regulations 77 of Elections** (General) Regulations 2017 dictates what constitutes a valid vote to be counted, interrogating the validity of rejected and spoilt vote like was done by the trial case was no longer recount but scrutiny.

18. The appellant further submits that the trial court went ahead to reject two ballot boxes contrary to **Regulation 67** of Election (General) Regulations 2012 when in his view the ballot boxes were identifiable through seal numbers and ballot box codes which provided unique distinction of every ballot box used. In his view the only legal way of verifying a ballot box is through seal numbers and ballot box codes. It is further submitted that the learned magistrate erred by coming to the conclusions he made in his judgment because there was no allegations of fictitious results or ballot boxes in the 1st Respondent's petition, affidavits or oral evidence during trial. The appellant has faulted the learned trial magistrate for sanctioning the counting of votes in the impugned boxes which were in his view valid as per **Rule 68(1) (f)** and **(4)** and rejecting the results when it was clear what each candidate in Magumoni Ward had garnered in those 2 stations. He further argues that Magumoni Ward had 57 polling stations with 60 streams or polling centres and hence the 60 ballot boxes which were stored in a guarded warehouse and produced to the trial court for recount as ordered. It is submitted that when the ballot boxes were opened it was found to contain ballot papers for candidates vying in the seat of Member of County Assembly Magumoni Ward and this, in his view, showed that the ***"unknown"*** ballot boxes were not alien but identifiable and known. He has further argued that there was no question raised on the integrity of the said 2 boxes since the seals were intact and ballot papers therein intact and tamperproof. The appellant has submitted that the 2nd and 3rd Respondents did provide Form 36A for all polling centres and because 58 ballot boxes could easily be identified using Form 36As inside that ballot boxes. In his opinion only the remaining stations were Magumoni Primary School I and Nyaga Primary School whose results were as per the form 36A supplied by 2nd and 3rd Respondent which marched those recorded by trial magistrate during recount exercise.

19. The appellant has contended that he was denied a chance to respond to any of the findings of the recount and that the trial court completely ignored his written submissions on the subject. This in view was erroneous because the court of appeal in ***RAILA AMOLO ONDINGA II*** determined that the results of a polling station was final and polling station was a true locus to determine voters free will. The appellant contends that by shutting out the 2 ballot boxes the learned trial magistrate erred by not preserving the will of the people in those stations.

20. On grounds 20-23 of his approval, the appellant has submitted there was no evidence of premeditation to leave no mark on the impugned ballot boxes and that failure to leave Form 36A in the boxes did not prejudice any candidate and it was down to human error which in his view was excusable. He has cited the decision in ***Gitarau Peter Munya -vs- Dickson Mwenda Kithinji & 2 others [2014] eKLR*** where the Court of Appeal held that if the mistakes are premeditated persistent, multiple and substantial and reveal a pattern or cause prejudice to any individual candidate, or affect the will of the people, then integrity and credibility of an election can come into question. The appellant has further submitted that small human errors should not be used to vitiate an election done in accordance with the law and cited the decision of ***Lenny Maxwell Kivuti -vs- IEBC & 3 Others [2018] eKLR.*** The appellant has submitted that the trial court should have found that failure to leave Form 36As in the 2 ballot boxes was just a human error just like he had found that a Presiding Officer at Ntambo Primary School I had also committed an excusable error of inserting and locking the original form 36A in the ballot box instead of a carbon copy. The two errors in the appellant's view were random, minimal and not premeditated to prejudice any candidate. The appellant has faulted the trial magistrate for deciding the petition on a technicality against the weight of evidence. In his view the evidential burden was not discharged by the 1st Respondent to justify the finding of the trial court and that in ***Joho - vs- Nyange (2008) 3 eKLR*** **Maraga J.** (as he then was) held that election petitions should be proved by cogent, credible and consistent evidence.

21. Finally the appellant has joined issue with the 1st Respondent in regard to the requirements of **Regulation 81(4)** of **Court** of **Appeal Election Rules** and submitted that the said rules only apply in the Court of Appeal and not a requirement in this court. In his view the Deputy Registrar of this court forwarded the lower court file and entire proceedings and nothing was omitted to warrant the 1st Respondent to complain that he has suffered prejudice because certificate of correctness of the lower court record is missing.

2nd and 3rd Respondents' submissions

22. The 2nd and 3rd Respondent herein were also aggrieved by the decision of the trial court and filed a cross-appeal and written submissions in support of the appeal vide Kinyanjui Njuguna & Co. Advocates. It is their contention that the 1st Respondent did not discharge his burden at trial court and that the petition should not have seen the light of the day. Mr. Laisagor, the learned counsel for the 2nd and 3rd Respondent submitted that the 1st Respondent had the burden to prove the allegations contained in the petition at the trial and that the law places that burden on him and that the burden only shifts to the Respondents once it is proved. In their view that never happened. The 2nd and 3rd Respondents has pointed out that during trial the 1st Respondent and his witness stated that they had no problem with voting and tallying and that none of their agents in Magumoni Ward reported any irregularities during the voting exercise on 8th August, 2017.

23. The 2nd and 3rd Respondents in their written submissions have reiterated most of the grounds and submissions made by the appellant and for the interest of time, I will not repeat them here suffice to say that the 2nd and 3rd Respondents contend that none of grounds set out in the petition was proved at the trial court. The 2nd and 3rd Respondent have therefore faulted the finding of the trial court and its conclusion to allow the petition.

24. The 2nd and 3rd Respondent further contend that the 1st Respondent should have laid a proper basis in his pleadings or evidence for recount and scrutiny and that the 1st Respondent totally failed to do so to justify the trial court's finding and decision to order for a recount. They have also cited the decision in ***Gitarau Peter Munya -vs- Dickson Mwenda Kithinji*** [supra] where the Supreme Court set out guidelines or principles on when recount or scrutiny can be ordered observing that the same does not lie as a matter of course. The 2nd & 3rd Respondents contend that the trial court failed to stick to those established principles when ordering for a recount of all 57 polling stations at the trial. In their view there were no specific allegations or challenges to found a sufficient basis by the trial court to order for recount and scrutiny. The trial magistrate is faulted for making a finding that irregularities were not proved and yet again found basis to order for recount and proceed to nullify the elections when the 1st Respondent in their view had failed to prove the allegations of malpractices and electoral offences.

26. The 2nd and 3rd Respondent have also faulted the learned trial magistrate for making a determination over an unpleaded issue. They

contend that parties are bound by their pleadings and that the trial court could not go beyond the pleading because doing so infringed on their right to be heard. They have cited Court of Appeal decision in ***IEBC & ANOTHER -VS- STEPHEN MUTINDA MULE & 3 OTHERS [2014] eKLR*** to butress their submissions.

27. The 2nd and 3rd Respondent have submitted that the trial magistrate erred in deciding on the effect of random and unpremeditated human error by a Returning Officer who in their view failed to leave a copy of Form 36A on the ballot boxes after the counting process. In their view the said errors were innocent human errors that were not systematic or geard towards assisting any particular candidate. It was not, in their view, tenable for the trial court to nullify the elections on such a ground and slap the 2nd and 3rd Respondents with costs. In their view the two polling stations found by the trial court to be unidentifiable were identifiable as they were Magumoni School I and Nyaga Kairu Primary School polling stations for the reasons that they were the only ones out of the 60 boxes identified through Form 36A and that is was erroneous for the trial court to exclude the votes from the two stations in the tallying process when the will of the voters were clearly discernible in their view.

1st Respondent's submissions

28. The 1st Respondent herein has opposed this appeal through both oral and written submissions by Mr. Ayuka and Nyamu Nyaga Advocates. Mr. Ayuka has contended that an appeal to this court under **Section 75(4)** is limited to only matters of law and that grounds 3, 13, 14, 15, 16, 17 and 19 of the Memorandum of Appeal is an invitation of this court to go to areas that the law does not permit and have argued that the cited grounds requires this court to render a decision in matters of fact.

29. The 1st Respondent has also submitted that the record of appeal filed has no schedule nor a certificate of the manner of production and as such in his view the record of appeal cannot be relied upon to make a conclusive determination of the matters in contention in respect to the evidence tendered and the determination thereof.

30. It is the 1st Respondent's contention that the trial court exercised its discretionary powers properly and judiciously in ordering for a recount. In his view the court correctly invoked the provisions of **Rule 28 of the Elections** (Parliamentary and County Elections) **Petitions Rules 2017** and followed the principles set out in the decision of ***Gitarau Peter Munya - vs- Dickson Mwenda & 2 Others [supra]***. In his view the margin of victory of the appellant was low and were separated by only 25 votes and that was in order for the trial to carry out investigations by way of recount. In this regard the 1st Respondent has relied on the decision of ***Charles Ongondo Were -vs- Joseph Oyugi Magwanga & 2 Others (Election Petition No. 1*** of ***2013 at Homabay High Court)*** and ***Richard Kalembe Ndile& Another -vs- Patrick Musimba Mweu & 2 Others (Machakos Election Petition No.7*** *of* ***2013).***

31. The 1st Respondent has contended that upon recount the learned trial magistrate was entitled to use results obtained there on to draw and make inference as whether the results declared were accurate and reflective on who had won the elections in Magumoni Ward.

32. On unpleaded matters in an election petition, the 1st Respondent has cited the decision in ***Zachariah Okoth Obado-vs- Edward Okongo Oyugi & 2 Others [2014] eKLR*** where the court reportedly held that the court may make findings on unearthed irregularities even if not pleaded in the petition. The 1st Respondent has further cited decisions in;

Musikari Nazi Kombo-vs- Moses Masika Wetangula [2015] eKLR & ***Lenny Maxwel Kivuti -vs- IEBC & & 3 Others*** where the courts noted that a court cannot condone an illegality in election process or shut its eyes even if these were not on the pleadings but arose in the course of trial. He has submitted that the learned trial magistrate conducted the recount in accordance with the law and came to the resolution of all the evidence that arose and in particular the unidentified ballot boxes that did not have corresponding results in them from the Returning Officers. He has cited the decision in ***Justus Mong'umbu Omiti - vs- Walter Enoch Nyabati (Election Petition No. 1 of 2008*** where the court observed that all issues pleaded and those that crop up in the course of trial whether pleaded or not but which have the potential to adversely affect the final results and the will of the people must come into the spotlight through scrutiny and interrogation and that it would be a sad day if such evidence were to be disregarded on the ground that the same was not the subject of any pleading. The 1st Respondent has argued that the appellant is trying to evade the question as to whether it was possible for a Presiding Officer to legally declare results in the absence of Form 36A duly signed by the Returning officer. The 1st Respondent has supported the learned trial magistrate's finding that the boxes were not identified and had no statutory forms to authenticate them.

33. On the question of not being given a chance to be heard on the recount, the 1st Respondent has contended that all parties had a chance to make submissions on the issue of unidentified boxes and that because the appellant's views were not upheld it does not in law amount to denial of right of hearing.

34. According to the first Respondent there were no legal results in two polling stations to compare with what had been filed in court and that any court could not overlook that fact.

35. The 1st Respondent has supported the trial Court in its decision to order for a recount submitting that on the basis of evidence tendered including the evidence of the Returning Officer conceding that there were errors, the trial court was according to him in order to invoke the provisions of **Section 82** to order for a recount on 1st December 2018 given that the margin of victory was also small.

36. The 1st Respondent has also submitted that the trial court could do both recount and scrutiny as in his view the rules do not provide for practical differences between the two exercises. The 1st Respondent contends that the appellant become uncomfortable because the trial court carried out recount exercise in a manner that appeared to suggest that scrutiny was being done at the same time. He has relied on the authority in ***James Omingo Magara -vs- Manson Onyongo Nyamweya [2010] eKLR***.

37. The 1st Respondent contends that there is no legal requirement that a recount exercise must have a report summarizing the exercise. He has pointed out that the recount at the trial court in this instance of all polling stations were captured in a form signed by officers and agents who carried out the recount exercise.

38. The 1st Respondent has further contended that the errors pointed out in their petition was sufficient for the trial court to order for a recount and have submitted that it was not necessary that the errors pointed out amounted to the provisions of **Section 83** of **Elections Act** for an order of recount to be made. He has relied on the case of ***Lenny Maxwel Kivuti -vs- IEBC & 3 Others [2018] eKLR*** to support this contention in that case the court held that a court can look at the material that emerges from scrutiny or recount and that a court is not precluded from studying the material merely because the same was not pleaded.

39. On costs the 1st Respondent contended that it is fair that costs be capped at Kshs.2 million.

Issues for determination

40. This court has considered this appeal, the cross appeal and submissions made by all the parties. In my view the issues arising from this appeal for determination are as follows namely:-

(i) Whether this court has jurisdiction to determine the appeal.

(ii) Whether the judgment delivered in the trial court delved with on all the issues raised by the parties in the trial.

(iii) Whether the learned trial magistrate erred in law and fact in the exercise of his discretion to order recount of all 57 polling stations in Magumoni Ward.

(iv) Whether the learned trial magistrate erred by relying on an unpleaded issue.

(v) Whether failure to insert Form 36A in respect to two ballot boxes in respect to two polling stations amounted to human errors that did not affect credibility of the polls by dint of **Section 83 of** the **Election Act**.

41. To begin with the first issue, is that this court is clothed with appellate jurisdiction to entertain appeals emanating from gazetted election subordinates courts. **Section 75(4)** of the **Election Act** however caps jurisdictional limits of this court to only matters of law under **Article 165(1)(e),** the constitution confers this court with appellate jurisdiction over matters emanating from the lower court including election matters and as observed above the statute (read **Section 75(4)** of the **Election Act**) limits the jurisdiction of this court on appeal to only matters of law on election matters. There has been a big debate as to what constitutes matters of law and matters of fact and that debate was settled in the Supreme Court case of ***Gitarau Peter Munya -vs- Dickson Mwenda Kithinji & 2 Others [2014] eKLR*** where the Supreme Court weighed in and gave the following guiding principles in determining what constitutes matters of law;

" Matters of law only means a question or an issue involving:-

a) the interpretation, or construction of a provision of the constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine in an election petition in the High Court, concerning membership of the National Assembly, the Senate or the office of County Governor;

b) the application of a provision of the constitution, an Act of Parliament, Subsidiary Legislation or any legal doctrine to a set of fact or evidence on record, by the trial judge in an election petition in the High Court concerning membership of the National Assembly the Senate or the office of County Governor.

c) the conclusions arrived at by the trial Judge in an election petition..... where the appellant claims that such conclusions were based on "no evidence" or the conclusions were not supported by the established facts or evidence on record or that the conclusions were so "perverse" or so illegal that no reasonable tribunal would arrive at the same it is not enough for the appellant to contend that the trial Judge would probably have arrived at a different conclusion ....."

42. Going by the above guiding principles, this court finds that this court is seized with the jurisdiction to determine the issues raised in this appeal and I will go into the finer details of the same as I delve into the issues arising.

43. (ii) **Whether the Judgment delivered by the trial court covered all issues raised**.

A court of law is at liberty to choose whatever style it deems in Judgment writing. The guiding principle on what a judgment should contain is provided under **Order 21 Rule 4** of the **Civil Procedure Rules** which provide as follows:-

"Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision."

44. This court has perused through the 21 page Judgment delivered by the trial court and in so far as the above guidelines are concerned I do find that the judgment contains the statement of the petitioner as well as the responses made by all the Respondents. The trial magistrate has also included in the body of the judgment the issues for determination. Issues for determination are usually drawn from the issues framed by parties in a given case and I have perused through the issues drawn by the parties and none of the parties herein really raised the

issue of admissibility of the electronic evidence tendered by the 1st Respondent herein. Of courts a trial court is not precluded from framing up an important issue if it feels that the issue is an important issue that effects the direction of a judgment. The trial magistrate in my view framed up what it considered important issues and rendered his decision on the issues including whether or not any party was guilty of electoral offences.

45. It is ofcourse true that the issue of electronic evidence featured during trial when the 1st Respondent filed what he considered the electronically transmitted results supplied to him. The first record of proceedings indicate that the evidence tendered did not comply with the provisions of **Section 106 B(2)** of the **Evidence Act** in that there was no certificate authenticating the source of the electronic results print outs. In the absence of a certificate issued in accordance with the above cited provisions the evidence supplied by the 1st Respondent to prove the allegations of irregularities were not admissible in law but the aspect of the decision was not a factor in the judgment from the trial court because the trial court's mind was directed at whether the elections conducted in Magumoni Ward met the threshold stipulated under **Article 86** of the **Constitution**. A court properly directing itself can at times determine only one issue in a case and the determination renders the other issues either mundane or academic and the fact that the court clearly states that there is no need to determine the other issues does not in itself render a judgment bad in law. In the premises the appellant's attack on the judgment from the trial court on its contents is not merited because he has not shown how the omission by the learned trial magistrate of the issue (which were not even framed by any of the parties) affected the directions of the judgment.

46. (iii) **Whether the learned trial magistrate erred in ordering a recount of all 57 polling stations at Magumoni Ward.**

This is one of the major issues in this appeal and all the parties are in agreement that an order of recount is discretionary issued by a trial court pursuant to the provisions of **Rule 28** of the Elections (Parliamentary and County Elections) Petitions Rules 2017 which provide as follows:-

" a petitioner may apply to an election court for an order to;

a) recount the votes, or

b) examine the tallying, if the only issue for determination in the petition is the count or tallying of votes received by the candidates."

The above provision in my view can only mean one thing which is the fact that a party can go to court and apply for recount if he/she has issues on how the valid votes were counted or collated from various polling stations and tallied. This covers a situation where a party in all election has issues with the electoral agency in the manner in which the valid votes cast were counted and tallied. The party must be specific with particulars that show that counting and tallying was riddled with irregularities that can be interrogated and determined by an order of recount. In my view that is how a discretion of a trial court to order for a recount can be invoked.

47. The word ***"recount"*** at times is used interchangeably with the word ***"scrutiny"*** because it is tricky to separate the two exercises in an election process. The law distinguishes the two exercises because while a scrutiny exercise done under **Rule 29** of **Election Rules** is anchored by the provisions of **Section 82(1)** of the **Elections Act**, recount is only provided under **Rule 28** of the Election (Parliamentary and County Election) Petition Rules. An order for scrutiny is given to inspect the validity of the votes cast and can only be ordered on sufficient reasons or grounds. **Rule 29(2**) also provides that for any recount or scrutiny to be ordered sufficient reasons must be shown. It is therefore not hard to see why the two exercises are at times used interchangeably.

48. It is my view that a scrutiny exercise will involve some element of recount at the tail end of the exercise because after separating the valid votes from the rejected votes or spoilt votes, a scrutiny exercise will only be meaningful if the valid votes cast are recounted and retallied after scrutiny. On the other hand recount exercise also involves to some extent some level of inspection or scrutiny because a court cannot be expected to act like a counting machine during a recount exercise. It has to first separate the wheat from the chaff before embarking on a recount exercise. So if one is the pose and ask what is the process of separating the wheat from the chaff called? Is it not thoroughly examining or inspecting the valid votes from the rejected or spoilt votes to enable the appointed officials embark on a recount exercise? Now let us revisit the meaning of recount again and in this context it means to count something again to establish if what is stated in a statutory form (Form 35A) is reflective of what each candidate garnered in a given polling station. So an order for recount is to establish the number of VALID VOTES each candidate garnered in a disputed polling station. The two words scrutiny and recount are therefore though distinct are difficult to separate when it comes to the actual exercise in either case. As I have observed above even if a court orders for recount of votes, the exercise cannot be done blindly. A trial court must verify what is recounting to ensure that what is obtained reflects valid votes and hence the true will of the voter.

49. The appellant in my view cannot fault the learned trial magistrate in the exercise of recount *per se*. What this court is minded about is not whether the court went ahead to conduct a scrutiny instead of first minding about recount but rather whether the provisions of the law was applied properly. The provisions of **Rule 29(4)** of the **Election Petitions Rules 2017** provides as follows:-

"The scrutiny or recount of votes in accordance with sub-rule (2) shall be confined to the polling stations in which the results are disputed and may include;

a) written statement made by the returning officers under the Act

b) the printed copy of the Register of votes used during the elections sealed in a tamper proof envelope,

c) the copies of the results of each polling station in which the results of the elections are in dispute.

d) the written complaints of the candidates and their representatives

e) the packets of spoilt ballots

f) the marked copy register

g) the packets of counterfoils of used ballot papers.

h) the packets of counted ballot papers

i) the packets of rejected ballot papers

j) the polling day diary and

k) statement showing the number of rejected ballot papers".

50. The above provision of the law show that the reliefs of recount or scrutiny is not automatic. A party asking for the reliefs must really show good reasons for either of the reliefs to be granted. In the case of ***Gitarau Peter Munya - vs- Dickson Mwenda Kithinji*** the Supreme Count referred the Court of Appeal case of ***Nicholas Salat - vs- Wilfred Rotich Lesan & Others (Nairobi Court of Appeal No.228/13)*** where the court made the following observations:-

> ***"Rule 33(2) (in our case its now Rule 29(2)) requires the court to be satisfied that there is sufficient reason and manner in which the scrutiny is to be carried out is set out in detail. An order for scrutiny is therefore not automatic; sufficient reason has to be shown before the court orders scrutiny and recount.....the first part of the appellant prayer sought an order for recount throughout the entire Bomet County. The appellant laid no basis whatsoever to justify that request..... it seemed that the appellant was on a fishing expedition. The alternative prayer for recount was restricted to some polling stations in three constituencies, namely Chepalungu, Bomet East Constituency and Sotik Constituency. Each of those constituencies had numerous polling stations with respect to which the appellant made no complaints."***

51. This court has looked at the petition presented to the trial court together with the Supporting Affidavit and though the 1st Respondent sought for scrutiny and recount of all 57 polling stations in Magumoni Ward, the orders sought were blanket orders because save for the 11 polling stations pleaded under paragraph 14 of the petition, the Petitioner in my view did not establish with sufficient particulars basis for recount of all 57 polling stations because he only pleaded particulars of irregularities in the 11 polling stations and even then the basis of his complaint was that there were marked differences between the electronically transmitted results and what was on Form 35B yet he failed to tender admissible evidence pursuant to **Section 106B** of the **Evidence Act**. In his evidence before the trial court he told the trial court thus;

"none of my agents in 57 polling stations reported any irregularities.....none of my agents asked for a recount."

The evidence tendered by the Petitioner in totality indicated that he had no problem with the primary results as captured in Form 36As . His major complaint was in respect to Form 36B.

52. A trial court in Election matters should always be on guard because politicians more often than not do not lose an election contest so when elections results are announced sometimes they file election petitions as an endeavour to fish for evidence or something that can alter the announced results. So courts should be careful not to be used in such endeavours. A party aggrieved by election results declared should come to court with specifics on how he/she thinks he/she was robbed of victory despite being voted by majority of voters.

53. In this appeal, the record of appeal shows at the trial, the 1st Respondent pleaded that the appellant ***" committed numerous election offences and malpractices "***which in his view vitiated the will of the voters of Magumoni Ward but during cross examination when put to task to explain what he meant by election offences and malpractices he stated that the appellant agreed to be declared a winner when he knew that he had not won and proceed to name the following polling stations which he claimed the 2nd and 3rd Respondents transmitted wrong results;

1) Magumoni Nursery

2) Kathiru polling station

3) Kagaari Primary School

4) Gachuri Primary School

5) Kangoro Primary School

6) Maabe Primary School

7) Rubate Primary School

8) Thambo Primary School 1

9) Thambo Primary School &

10) Magumoni Polling Station

Again when asked during cross-examination matter he had evidence to prove that the results were tampered with he said;

"I rely on downloaded results and IEBC portal. I have no certificate of electronic evidence."

54. With the above pleadings and evidence highlighted above, the big question is, did the trial court exercise its discretion properly/judiciously in ordering for a recount? It is true that the power to order for count or scrutiny is a discretionary one to be exercised judiciously at a stage in the pleadings a trial court may deem fit. In this regard I disagree with the appellant's view that because the 1st Respondent asked for ***"immediate scrutiny and recount"*** the court hands were tied to only granting or not granting the relief immediately. An election court has wide latitude to decide at what stage and it is desirable that the determination of whether or not to grant such a relief is done after all the parties have tendered their evidence to enable the court determine with the benefit of evidence tendered whether there is sufficient basis to warrant recount or scrutiny or both in order to determine the petition filed.

55. Back to whether the trial court exercised its discretion properly in ordering for a recount of all 57 polling stations is that the answer to the question posed is clearly given in the cited case of ***Gitarau Peter Munya (supra)*** where the Supreme Court made the following observations;

"Indeed the rule (referring to then Rule 33(4) now Rule 29(2) of Election Petitions Rules) should be seen as providing the necessary guidelines for the exercise of discretion by the court under Section 82 of the Act. By providing that scrutiny shall be confined to the polling stations in which the results are disputed, the rule is by no means limiting the court's discretion. If election results are seriously disputed, in all polling stations in a constituency then Rule 33(4) (read Rule 29 (4)) would not erect any barrier to an order for scrutiny in those polling stations. Otherwise why should a court order for scrutiny in a polling station in which there is no dispute whatsoever. What would the court be scrutinizing?" And so I ask why did the trial court order for a recount in all 57 or 60 polling stations? What was the rationale? In my considered view the 1st Respondent did not establish sufficient basis to warrant the trial court undertake a laborious task of recounting of votes in all 60 polling stations in Magumoni Ward- given that the overriding objective of **Rule 29(4)** is to facilitate the timely resolution of election petitions as held in ***Gitarau Peter Munya*** where the Supreme Court held that an order of scrutiny should not be abused and ***"turned into a fishing expedition"*** where a petitioner comes without a basis for challenging an election but instead elects to seek scrutiny as a device to generate election dispute material.

56. This court finds, on the basis of the above, that the trial court misdirected itself when it ordered for a recount of all the 57 polling stations in Magumoni Ward for the following reasons:-

(i) The petition did not indicate with sufficient particulars the malpractices or irregularities to warrant a recount or scrutiny of votes in all the 57 polling stations.

(ii) The 1st Respondent and his witness during trial stated that had no problem with Form 36As and that the only complaint they had was that the results on the IEBC portal was reflective of the results contained in Form 36A. As I have observed above no legal basis was tendered as the evidence tendered in this regard contravened the provisions of **Section 106B** of the **Evidence Act.**

(iii) The Petitioner told the trial court that none of his agents raised a complaint at any polling station or requested for a recount.

This court finds that the trial's court conclusion that a basis for a recount had been established was erroneous and unsupported by evidence and as held in ***Zachariah Okoth Obado-vs- Edward Akango Oyugi & 2 Others [2014] eKLR*** the appellant had a right to appeal against such finding under **Section 75(4)** of the **Elections Act** because as I have observed above on the evidence and pleadings presented before the trial court, ***"no reasonable tribunal could have reached that conclusion***" basically because there was lack of ***"sufficient reasons"*** within the context of **Rule 29(2)** of **Election Petitions Rules** and the decision in ***Raila Amolo Odinga & Another -vs- Indepedent Electoral & Boundaries Commission & 2 Others [2017] eKLR*** to engage in a recount exercise in the face of the following set guidelines by the Supreme Court;

" Before the trial court permits recounting the following conditions must be satisfied;

(i) The court must be satisfied that a prima facie case is established.

(ii) The material facts and full particulars have been pleaded stating the irregularities in counting of votes

(iii) A roving and fishing inquiry should not be directed by way of an order to recount the votes.

(iv) An opportunity should be given to file objection and

(v) Secrecy of the ballot should be guarded."

In ***Peter Gichuki Kingara -vs- IEBC & 2 Others [2013] eKLR*** Justice Ngaah made the following remarks which I find relevant on this issue;

> ***"..... the law on scrutiny and recount that I have addressed hereinbefore suggests that scrutiny and recount in a petition..... is not a gambling exercise that sets the court rummaging through ballot boxes to see whether any scintilla of evidence of electoral malpractice or irregularity can be found. If the petition is based on any particular malpractice or irregularity that would warrant scrutiny or recount of votes, the malpractice must be pleaded and the evidence of such malpractice must be laid out or established prior to an order for scrutiny or recount; the court must be satisfied that on the basis of evidence before it, it is necessary to call for scrutiny and recount, if not for anything else, to confirm the truth of particular evidence. Asking for scrutiny or recount where there is no evidence or basis for such exercise would be more or less engaging the court on a mission searching for evidence where non exists, a practice that would not only be prejudicial to the Respondents but would also be deprecatory in a legal system that believes in fair and impartial administration of justice."***

The trial court therefore clearly made an error to order for recount of all 57 polling stations.

57. (iv) **whether the learned trial magistrate erred by relying on unpleaded issues**.

The appellant has faulted the learned trial magistrate for framing up an issue outside the pleadings filed and the evidence adduced. This is in regard to the trial's court finding that in the process of recounting he found ***"two ballot boxes that were not identifiable"*** as the boxes lacked Form 36As. The appellant has stated that the issue of the 2 ballot boxes did not crop up during trial neither was it pleaded and the 1st Respondent's response is that the trial court was not expected and could not shut its eyes to an irregularity.

58. This issue no doubt is major in this appeal and I have taken time to ponder over it. I will give this issue a multifaceted approach with a view to addressing it adequately.

Firstly, can a trial court make a finding or render a decision on an issue not pleaded? It is quite clear from the pleadings the question of ***"two ballot boxes"*** was not specifically pleaded. The issue of some two boxes also did not crop up during the hearing as per the proceedings of the trial. The two boxes came up during the recount exercise.

59. From the onset it is important to note that our legal system is an adversarial one where each party is required in law to lay open his case for adversary to have a fair chance to respond to it. It is prejudicial to a party in litigation to be presented with a case and on adequately responding to it, he/she gets confronted with new set of facts for which he/she was not prepared for. That is why parties are precluded from departing from their pleadings unless they seek leave and are allowed to amend their pleadings in which event the opposing party also has chance to respond. The underpinning of this is the right to be heard and right to access justice which are embedded in Kenya's Constitution 2010 (Article 25(e), 48 and 50). It is true therefore that parties should be bound by their pleadings and should not be given latitude to build up their cases in the course of trial because that would amount to changing of goal posts when the parties have prepared their respective positions in a case. In the case of ***Benjamin Ogunyo Andoma -vs- Benjamin Andola Andayi & 2 Others [2013]*** the court had this to say,

> " ***The affidavit evidence relied upon by the Petitioner however sought to expand the scope of the petition by adding complaints which were not pleaded in the petition. It is trite, in my view that parties are bound by their pleadings. A party cannot be allowed to come to court and attempt to prove complaints which are not pleaded unless a request for amendment of pleading is considered and granted by court. In my view the evidence whether by affidavit or otherwise is meant to support what is contained in a party's pleadings and not to expand the cause of action....."***

In ***Ferdinard Ndung'u Waititu -vs- IEBC & Others [2013] eKLR*** the court made similar observations as follows:-

> ***"..... the 3rd principle is that as in all litigations, a petitioner is bound by his pleadings. It is common that a Petitioner will file a petition and will in the course of the proceedings veer away the initial track. This puts the opponent into a difficult position in knowing what the real case is and what the court must determine....."***

60. Now turning on to the question posed by the 1st Respondent regarding whether a court should turn a blind eye to an illegality even if the same was not pleaded, is that there is another school of thought that elections courts enjoy special jurisdiction which is inquisitorial in nature. The reasoning behind this school is that an election court is at the end of the day a fact finding court whose mandate is to check whether an election carried out meet the constitutional requirements as stipulated under **Article 81** and **86** of the **Constitution of Kenya 2010.** So in the exercise of this inquisitorial jurisdiction can an election court render a decision on an unpleaded issue? Let me start first by turning to older case law in the case of ***ODD JOBS-vs- MUBIA [1970] EA 476*** where the Court of Appeal held as follows:-

> ***".....a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision .....pleadings should contain concise statement of the material facts on which the party pleading facts on which the party pleading relies..... Generally speaking pleadings are intended to give the other side fair notice of the case that it has to meet and also arrive at the issues to be determined by the court. In this respect a trial court may frame issues on a point that is not covered by the pleadings but arises from the facts stated by the parties or their advocates and on which a decision is necessary in order to determine the dispute between the parties."***

In the case of ***Clement Kungu Wambora -vs- Benard Chege Mburu & 2 others [201]*** the Court of Appeal emphasized this position in the following observations;

> ***" In our view, the issue was pleaded though not expressly. Even assuming it was not, on the authority of Odd Jobs -vs- Mubia, (Supra) the issue was canvassed at the hearing of the petition and a decision therein was necessary."***

The two decisions above shows that a venture outside pleadings can be allowed so long as the issue can be deduced from the facts presented and the issue was canvassed at the hearing . In the case of ***Hassan Abdalla Albeity - vs-Abu Mohammed Chiaba & Another***

[2013] eKLR, on the court made the following observations.

> ***" ..... though ordinarily parties in civil suits are bound by their pleadings and the court ought not to entertain or make a determination on matters not covered by the parties pleadings, I am of the view that an election court enjoys special jurisdiction which is inquisitorial in nature. An election court and indeed this court has clear mandate to inquire into and determine whether a disputed election was conducted in accordance with the law, whether it was free, fair and transparent and lastly whether the winning candidate was validly elected. It therefore follows that any ground which is relevant to a determination concerning the validity of results whether pleaded or not in the petition ought to be considered by the court of course after ensuring that no prejudice would be occasioned to the opposing parties. It is my considered view that an election court should be flexible in its approach in the conduct of its inquiry as this is the only way that it can make a fair and substantive determination of all issues raised in an election dispute. Such an approach would be in tandem with Article 159(2) of the Constitution and Section 80(1) of the Election Act which enjoins court to administer substantive justice."***

I believe the Judge in the above decision when expressing the need to first ensure that no prejudice should be occasioned to any party when deciding on unpleaded ground or issue was minded about fair trial that entails that parties get a chance to be heard before a decision is rendered.

61. As I have observed above, one of the cardinal principles of a fair trial is giving parties a chance to be heard. In my view rendering a decision on an issue not pleaded or not canvassed fully at the trial compromises that cardinal principle. So while I agree that at the times in rare special circumstances, it may be necessary to entertain an issue which, though pleaded, crops up in the course of trial like a glaring illegality, it is necessary and an imperative to invite parties to make their representations/responses on it before a decision is rendered. That way no party will feel prejudiced or hard done but courts should be careful so as to avoid descending into the arena of conflict because doing so would be dangerous to the overall administration of justice which must be done with fairness and impartiality.

62. In the case cited by the 1st Respondent, of ***Zacharia Okoth Obado -vs- Edward Akongo Oyugi & 2 Others [2014] eKLR*** the Supreme Court rendered itself on this question of upleaded facts and its place in the right to a fair hearing and held as follows:

> ***"..... In our opinion the trial Judge rightly refused to consider any issues that had not been canvassed fairly such as the introduction of new matters which had not been disputed by the Petitioner....."***

In that case the 1st Respondent wanted to introduce a new issue at the stage of submissions and the trial court declined on the ground that the rest of the parties would not have an opportunity to respond.

63. In the light of the above decision the question posed is whether the trial magistrate accorded the parties a fair chance to be heard on the discovery of two unidentified ballot boxes? The answer to this question brings me to the second facet of approach to this issue. It is clear from the proceedings in the court below that the parties were not given an opportunity to interrogate or canvass about the missing Form 36A in the 2 boxes. That in my view is where the learned trial magistrate fell into error the result of which the election of the appellant was nullified hence prejudice suffered.

64. The appellant also complained that the trial magistrate should not have taken part in recount exercise and that a written report should have been availed to the parties with a view to giving them a chance to interrogate them. While there is no rule barring a trial court from conducting either scrutiny or recount, itself, it is in my view desirable that another judicial officer, in this respect, an Executive Officer should carry out that exercise to enable the trial court maintain its impartiality and address any issue arising from scrutiny or recount exercise. But be that as it may that is not a major problem in this appeal.

65. The main issue is the results of an exercise brought up new evidence on the basis of which the petition was allowed. Where a petitioner in an election petition does not sufficiently plead his facts with necessary particulars to give the other a chance to respond and hope that a scrutiny or recount exercise would unearth evidence to support him, the court would be justified to reject such a move as the same amounts to a fishing expedition.

In ***Zacharia Okoth Obado***, the Supreme Court held as follows:-

"We hold it to be improper that, when re-tally is conducted, a party should take this as an opportunity to introduce new spheres of dispute which had not been signaled in his or her original pleadings. It is vital in election disputes, that the Respondent should know the case that faces him or her. Hence the Petitioner ought to have indicated in his or her pleadings that the disputed matters, with clarity and specificity, as a basis for being allowed to urge that there were irregularities in those spheres, after re-tally has been conducted. However, where a trial court exercises its discretion and, ***suo moto,*** orders a scrutiny, recount or retally, revealing irregularities other than those that were pleaded, then there is a proper basis for any party to pose question upon such ***"new" findings and the court then will make findings on the effect of those irregularities on the declared results."***

66. In the present case, the 1st Respondent never pleaded that he had any issue with the two ballot boxes or the polling stations in respect to which the two ballot boxes relates. So it is quite clear that the recount exercise conducted by the trial court upon application or motion by the 1st Respondent introduced a new sphere of dispute which was outside the four corners of his petition. The appellant and 2nd and 3rd Respondent did not know about this when they turned up in court to defend themselves and were clearly got off guard when they were confronted with the same at the tail end of the proceedings that is at submissions stage. They were clearly and unfairly exposed because they did not get a chance to interrogate why the Form36As were missing and who was responsible.

67. Thirdly, the appellant posed a question which I found legitimate that the learned magistrate found, on one hand that in Nthambo Primary School polling station, the Returning Officer made a human error by inadvertently inserting original Form 36A in the ballot box of that station and sealing it. The trial court in its Judgment found that error to be a human error and excusable in the circumstances but on the

other hand, he found out that two Presiding Officers had inadvertently forgot to insert the carbon copy of Form 36As in their respective polling station and found that the same was an irregularity sufficient enough to nullify an election. This court finds that two findings even on their own are inconsistent and incapable of any other inference other than either one or both are an erroneous findings but given the evidence tendered the latter conclusion was erroneous and unfair to the appellant and 2nd and 3rd Respondent because they did not get a chance to interrogate and canvass about the missing Form 36A in the two ballot boxes. The process of that finding in my considered view was wrong and so to the trials court's conclusion that it was sufficient to show that the ***"errors/discrepancies were of such magnitude"*** that it affected the final result or outcome of election.

68. This court finds that on the evidence tendered before the trial court, failure of two Returning Officers to insert copies Form 36A in two ballot boxes discovered during recount exercise may have been due to human error that did not affect the credibility of the polls in Magumoni Ward by dint of **Section 83** of the **Election Act**. Had the learned trial magistrate invited parties to interrogate the missing copies of Form 36As in the two ballot boxes perhaps he could have gotten answers which could have exonerated the 2nd and 3rd Respondents. The bottom line however is that sight should not be lost on who bears the burden of proof in an election petition. The Petitioner always carries the burden and where there is failure to discharge that burden as it was clear from the evidence presented before the trial court, then the sovereign will of voters should always be sustained.

The 1st Respondent did not make any specific complaint on the two ballot boxes in his pleadings or during trial and the trial court in my view erred because in effect it introduced a new ground in the petition, and introducing it failed to invite the parties to ventilate upon it and used same the new ground to determine the petition. As held ***ZACHARIO OKOTH OBADO*** he ought to have given a chance to the parties to canvass about the issue in a trial and not through submissions because submissions were not sufficient. Parties should be given a chance to call evidence if necessary to rebut or defend themselves against any allegation made against them. That is the essence of a fair, trial as contemplated under **Article 25 (2) 48, and 50(1**) of the Constitution of Kenya 2010.

69. On costs, it is now settled that costs awarded should not be so punitive as to impede litigants rights to access justice as provided under **Article 48** of the Constitution. In the premises and having heard all the parties on this score, I will cap costs of this appeal to **Kshs.1.5 million** (**one million five hundred thousand)**

70. In the light of the considerations on the submissions made by the appellant and the 2nd and 3rd Respondents who were also cross appealing and the 1st Respondent, this court finds merit in this appeal. The same is allowed. The decision made by the learned trial magistrate on 1st March, 2018 nullifying the election of the appellant is set aside and in it's place an order is made sustaining his election as **Member of County Assembly Magumoni Ward** as declared by the 2nd and 3rd Respondent on **10th August, 2017** and gazetted on **22nd August, 2017**. The 1st Respondent shall pay costs to both the Appellant and 2nd and 3rd Respondents capped at **Ksh.1.5 Million (One Million Five Hundred Thousand)** in this appeal and also pay the costs of the petition in the lower court to the Appellant and Respondents also capped at **Kshs.1.5 Million.**

Dated, signed and delivered at Chuka this 31st day of July, 2018.

R.K. LIMO

JUDGE

31/7/2018

The Judgment is signed dated and delivered in the open court in the presence of Leisagor for 2nd and 3rd Respondent (also cross Appellants) and Nyamu for the 1st Respondent.

R. K. LIMO

JUDGE

31/7/2018