



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARISSA**

**ELECTION PETITION APPEAL NO. 6 OF 2018**

**ABDIWAHAB SHEIKH OSMAN HATHE.....APPELLANT**

**VERSUS**

**MOHAMED ALI SHEIKH.....1<sup>ST</sup> RESPONDENT**

**ABDULLAHI MOHAMED OLOW.....2<sup>ND</sup> RESPONDENT**

**ISAACK MUHUMED MOHAMUD.....3<sup>RD</sup> RESPONDENT**

**INDEPENDENT ELECTORAL & BOUNDARIES**

**COMMISSION.....4<sup>TH</sup> RESPONDENT**

**JUDGEMENT**

**BACKGROUND**

1. This appeal arises from Garissa Chief Magistrate's Court Election Petition No. 1 of 2017 wherein Abdiwahab Sheikh Osman Hathe, the appellant herein was the petitioner, while Mohamed Ali Sheikh, Abdullahi Mohamed Olow, Isaack Muhumed Mohamud and Independent Electoral & Boundaries Commission (IEBC) were 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents respectively. The dispute arose from the elections held on 8<sup>th</sup> August, 2017, in respect of Member of the County Assembly for Abakaile ward, Dadaab Constituency, Garissa County in which four candidates vied for the position.

2. In the trial court's judgment delivered on 13<sup>th</sup> February, 2018 after conclusion of the hearing of the election petition, the learned magistrate concluded as follows –

**“I find that the election was free, fair and free from violence and intimidation and the results declared reflect the will of the people of Abakaile Ward. I will therefore dismiss the petition with costs. I would cap the costs at Ksh.1,000,000/=.”**

**THE APPEAL**

3. Aggrieved by the decision of the trial court, the appellant has come to this court on appeal through a Memorandum of Appeal filed on 8<sup>th</sup> March, 2018 based on the following 8 grounds;-

**1. That the trial magistrate erred in law and violated the appellant's right to a fair trial guaranteed under Article 50 of the Constitution by declining to allow the appellant to call an expert witness, to wit an information and technology expert to assist the court in evaluating the appellant's evidence.**

**2. The trial magistrate erred in law by failing to order for scrutiny and recount of votes in Kumahumato Polling Station and failed to correctly invoke the jurisdiction conferred by Section 82 (1) of the Elections Act 2011 and Rule 28 (a) and (b) and Rule 29 (1), (2) and (3) of the Elections (Parliamentary and County Elections) Petition Rules 2017.**

**3. That the trial magistrate erred and misdirected himself in law in dismissing the appellant's application for scrutiny and recount by applying wrong principles of law and in asserting that the evidence on record on tampering with the seals used to secure the ballot box for Kumahumato Polling Station 01, Abakaile ward, Dadaab Constituency, Garissa County was stray**

and that it was evidence that came by chance. The trial court's decision on scrutiny was so perverse and contrary to decisions of the High Court, Court of Appeal and Supreme Court on scrutiny and therefore wrong in law.

4. That the trial magistrate erred in law and denied the appellant the right to fair hearing by reversing the order of cross examination of respondents witnesses to the appellant's prejudice in the trial and allowing the respondents to cross examine witnesses after the appellant thereby giving the respondents an unfair advantage contrary to Article 50 of the Constitution.

5. That the trial magistrate erred in law by failing to vary the order for scrutiny and access to the data on the Kenya Integrated Elections Management System (KIEMS) kit so as to establish the voter turnout and whether the results for Kumahumato Polling Station 01 were inflated to favour the 1<sup>st</sup> respondent as pleaded in the petition.

6. That the trial magistrate erred in law by erroneously asserting at paragraph 23 of the judgment that some of the issues raised by the appellant were outside the pleadings and by failing to determine pleaded issues at the core of the appellant's petition proceeded on an erroneous foundation thereby occasioning a mistrial.

7. That the trial magistrate erred and misdirected himself in law in dismissing the petition by disregarding the evidence on record on the seals used to secure the ballot box at Kumahumato Polling Station, Abakaile Ward, Dadaab Constituency and the conclusions in the judgment were therefore not based on the evidence on record and the court made a wrong and a perverse decision in law.

8. That the trial court erred in law by failing to apply the provisions of Articles 81 and 86 of the Constitution and Section 83 of the Elections Act as interpreted and applied by the Supreme Court, Court of Appeal and the High Court and as a result made a decision that no reasonable tribunal or court would have reached on the evidence on record.

4. On the above grounds, the appellant has asked this court to set aside the trial court judgment dated 13<sup>th</sup> February 2018 and decree dated 5<sup>th</sup> March 2018 and substitute therefore an order allowing the appellant's Petition. Secondly, that this court declares and certifies that the 1<sup>st</sup> respondent was not validly elected as Member of the County Assembly for Abakaile Ward, and finally, that the costs of appeal be borne by the respondents.

#### **SUBMISSIONS OF THE PARTIES**

5. By consent of counsel for the parties, the appeal proceeded by way of filing and highlighting written submissions. All parties counsel filed written submissions and made oral highlights of the same in court.

6. Mr. Issa Mansur and Mr. Nyagah Mugwe appeared for the appellant. In his oral submissions, Mr. Mansur relied on the written submissions filed on 16<sup>th</sup> May, 2018 and the grounds of appeal.

7. On ground 1, counsel submitted that the appellant's position was that the magistrate made an error on the face of the judgment in that though the agent of the appellant Mr. Daud Adan Dolal clearly stated that he was taken in by the police when he questioned the process of announcing results and was ultimately released, and later went to the counting hall and recorded the serial numbers on the ballot boxes which was controverted by Salat Noor who was the 1<sup>st</sup> respondent's agent, the magistrate said that this was an issue outside the pleadings and simply dismissed it as a non-issue. According to counsel, this was a misdirection and fundamental error in the judgment of the trial court, and asked this court to take this into account and relied on the case of **Gatirau Peter Munya vs Peter Kithinji- Supreme Court Petition 2B of 2014** – in which the Supreme Court stated that an election petition appellate court cannot shut its mind to the evidence on record, when considering matters of law in an appeal. According to counsel, the magistrate was under a duty to consider all issues in the pleadings, that is, the petition and the affidavit, and in failing to do so such became matter of law for consideration by this court.

8. Counsel added that on 14<sup>th</sup> December, 2017 when the magistrate made an order that seals were to be fixed to safeguard election materials, the court noted that one of the original seals was missing while three were intact on the ballot box, and therefore the issue of the missing seal should have been considered by the trial court, and not wished away, as the evidential burden of proof immediately shifted to the IEBC the custodians of all election materials, to explain how the seal went missing, which IEBC did not do.

9. Counsel also attacked the trial court's ruling on scrutiny delivered on 1<sup>st</sup> February 2018, and said that the ruling of the magistrate that the application for scrutiny was made after evidence had been closed was a mistake because in the grounds of the application, the reasons for seeking order for scrutiny were given as the seals had been found to be tampered and the margin of votes was only 27 votes. According to counsel, therefore, if scrutiny was allowed, the outcome would certainly have affected the results of the election because the 1<sup>st</sup> respondent got 331 votes and the appellant 21 votes in the Kumahumato polling station 01.

10. Counsel contended that though ordering for scrutiny was an exercise of discretion by the trial court, the magistrate should have ordered scrutiny before determining the petition, as though the court had earlier ordered scrutiny of the KIEMS kit before trial, no such scrutiny of the KIEMS kit was done due to excuses given by IEBC which was reason enough to have led the court to have ordered full scrutiny to have been done as requested by appellant's counsel in order to establish the integrity of the entire election.

11. Counsel also complained that the judgment of the trial court was particularly short and disregarded what IEBC had pleaded. Secondly, that the judgment did not evaluate the evidence on record and in the process ended up reaching a decision which no reasonable court would have reached, and lastly that the court descended into the dispute and became the defender of the respondents rather than a neutral arbiter.

12. Counsel finally submitted that, since there was tampering of the election material, and as IEBC being a Constitutional Commission, they were expected to have given a credible explanation why such tampering occurred which they did not do, thus the results the election could

not be said to be credible, and thus urged this court to overturn the decision of the trial court and order that fresh election to be held.

13. Mr. Nyagah also for the appellant, on his part submitted that the court violated the principles of fair trial, and in reference to ground 1 and 4 of appeal complained that the magistrate wrongly refused to allow the appellant to call an expert witness even though it had been stated in the petition that the Presiding Officer ran a Facebook account to campaign for the 1<sup>st</sup> respondent, and relied on paragraph 18 (g) of the petitioner's supporting affidavit and the Notice of Motion of the petitioner dated 13<sup>th</sup> of October 2017, requesting leave to call an expert Information Technology witnesses. According to counsel, though the petitioner only required seven days to do so, the request was disallowed, and the court thus denied itself the chance to determine the impartiality of the 4<sup>th</sup> respondent IEBC through its agent the Presiding Officer. Counsel emphasized that Rule 15 (1) (h) of the Election Petition Rules expressly allowed the filing and serving of additional affidavits and giving further evidence.

14. Counsel contended thus, that the decision of the trial magistrate in declining the request to admit the expert evidence was not consistent with the requirements on fair trial under Article 50 of the Constitution.

15. Additionally on fair trial, counsel complained that the appellant's counsel was allowed to cross examine the respondent's witnesses before the respondents counsel were allowed to do so, which meant that the appellant's counsel asked the respondents witnesses leading questions contrary to the law. According to counsel, such procedure adopted by the trial court resulted in prejudice the appellant, resulting to unfair trial.

16. Counsel concluded by submitting that the above contraventions of Article 50 of the Constitution were adequate to demonstrate that the judgment of the trial court was not sustainable.

17. Mr. Owuor for the 1<sup>st</sup> respondent appeared with Mr. Manyange.

18. Mr. Owuor submitted that the 1<sup>st</sup> respondent was validly elected as Member of the Garissa County Assembly leading with 27 votes which was an expression of the will of the people of Abakaile ward, and relied on Article 39 (3) (c) of the Constitution, which provides that a candidate could be elected by a single winning vote.

19. Counsel argued that any person challenging the results of an election through an election petition had the burden under the Constitution and written law to establish that the irregularities alleged affected the election results, and that such an election petition had to be drafted with particularity and clarity leaving no doubt to the respondent about the allegation for challenging the results of the election, and relied on the case of **Mumo Matemo vs Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** in which the Court of Appeal emphasized the necessity of precise pleadings in claims of such a nature.

20. According to counsel the request by the appellant's counsel to introduce further affidavits after the lapse of 28 days from the date of filing the election petition was correctly rejected by the trial court as its effect would enlarge the petition and would require that the respondents to be given additional time to respond. In addition the appellant also asked for 7 days to file the affidavits, which would put the trial court in a position where it would not be able to comply with the strict time lines set in law for disposing of election petitions.

21. Counsel emphasized that since parties were bound by their pleadings, and since there were no specific complaints in the petition on broken or changed seals, the trial court was correct in declining to order scrutiny and that in any case the ruling on provision of KIEMS kits related to scrutiny, and there was thus no need for further scrutiny. With regard to verification of differing seal numbers noted by the trial court, counsel argued that the inter changing of seals was accidental and was correctly found by the trial court not to have been pleaded and thus not for determination. According to counsel, as the respondents were not given time to respond to the allegation of the changed seals, and litigants were not allowed to benefit from fished evidence, the magistrate was correct in not making a determination on the same.

22. In further submissions in scrutiny, counsel argued that scrutiny was not ordered by the court as a matter of course but only when a basis had been laid to justify such scrutiny. According to counsel, the appellant did not lay such adequate basis to justify an order for the alleged scrutiny as the alleged favourism was not particularized, nor was the petitioner at the polling station, but only his agent.

23. With regard to the allegation of denial of fair hearing by shifting the order of cross examination of witnesses, counsel submitted that there was no prejudice caused to any party as all advocates were allowed to ask questions in the limited time granted by the court. Counsel concluded by stating that the magistrate properly applied the principles laid down under Article 81 to 86 of the Constitution and Section 83 of the Elections Act, and added that since the appellant did not challenge Form 36A, the challenges now brought regarding the election process were speculative, and the appeal should thus be dismissed with costs to the 1<sup>st</sup> respondent.

24. Mr. Manyange also for the 1<sup>st</sup> respondent on his part submitted that the appellant's advocate had made a big issue about the seals but did not say where they had got the seal numbers. According to counsel, the seal numbers in the petition were foreign, and since the aperture seal was not pleaded, the ruling of the trial court declining the request for scrutiny closed the matter and could not be dealt with by the magistrate in the judgement.

25. Counsel submitted further that though the appellant's counsel contended that the winning margin was narrow, that was not the true position as the 1<sup>st</sup> respondent in the Kumahumato polling station led with 310 votes while the appellant merely got 34 votes. According to counsel, therefore, even if scrutiny was conducted, the appellant would not have been the winner.

26. With regard to the complaint of the appellant that the trial court erred in not allowing filing an additional affidavit of an expert witness, counsel said that the time lines for disposal of election petitions were not in favour of the petitioner, who is the appellant. The magistrate was thus correct in disallowing the request.

27. With regard to the complaint that the appellant was not accorded a fair hearing, counsel submitted that the allegation of violation of Article 50 of the Constitution had not been substantiated.

28. Mr. Farouk Kyalo for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents opposed the appeal, and submitted that both the application for amendment of the petition and the application for scrutiny came too late in the day and were both rightly rejected by the trial court.

29. With regard to the complaints of the appellant regarding the seals, counsel submitted that it was merely the court which made an observation in the variance of the seal numbers but there was no complaint from the appellant, as such it was not an issue for the court's consideration. It was also not clear where the agent of the appellant got the seal numbers listed in the petition, thus there was no justification for the court ordering scrutiny.

30. On the allegation of the appellant that he was denied fair hearing under Article 50 of the Constitution, counsel submitted that of the nine sub-articles of Article 50, the appellant did not state which one was violated, to enable the respondents and the court to address the same. In any event, the appellant's counsel did not raise any such issues of unfair trial at the hearing and should thus not raise same on appeal.

31. To conclude, counsel submitted that the trial court adhered to the provisions of Article 81 and 86 of the Constitution and properly interpreted Section 82 of the Elections Act and Rule 29 of the Elections Petition Rules 2017, and emphasized that the fact of the election winner in the ward winning with a small margin did not create a basis for ordering scrutiny and emphasized that there were more than 300 people who voted at Kumahumato polling station alone with several candidates who contested in that election in Abakaile ward. Counsel thus urged this court to dismiss the appeal.

32. Mr. Issa Mansur for the appellant in response stated that the case of **Mumo Matemu –Vs- Trusted Society (Supra)** was a Constitutional Petition not an Election Petition even though similar principles would apply, and emphasized that in that case the Court of Appeal said that precision was not the same as exactitude. On the issue of pleadings, counsel submitted that it was pleaded in the election petition that the Presiding Officer and the IEBC had engaged in questionable conduct, and also expressly challenged the results of the election, and emphasized that pleadings were not confined to the election petition alone but also covered other documents filed with the petition.

33. With regard to the court's decision on the interlocutory applications, counsel submitted that there were mis-directions both in the ruling for scrutiny and the judgment, and asked this court to review the decisions.

34. With regard to tampering of electoral materials, counsel submitted that under Article 86 of the Constitution it was the obligation of the IEBC to keep the election materials safe and therefore they were obligated to give an explanation of any irregularity noted which they failed to do.

35. Counsel concluded by stating that though the trial court had ordered IEBC to provide the KIEMS kit, the same were not provided, and emphasized that though it was true that one (1) winning vote was adequate to determine an election, if the process was marred with irregularities then such results could not be taken to be genuine and determining the winner.

## **CONSIDERATIONS**

36. I have considered the appeal, submissions both written and oral of all the counsel for the parties and the authorities cited to me. The first issue relates to fair hearing.

37. The Article 50 of the Constitution specifically provides for the protection of right to fair hearing. Fair hearing is also a right under the Constitution which cannot be limited, as provided under Article 25 (c) of the Constitution. It is thus imperative that in all judicial proceedings, the principles of fair hearing be applied without fail. The elements of fair trial are many, and include each party having adequate time to file pleadings, be served with pleadings of the other side, have adequate time to prepare for trial, be allowed to act in person or through advocate, be allowed to prosecute his/her case, allowed to cross examine witnesses of the other side, that proceedings be conducted in a language each party understands. The list is long.

38. The first complaint of the appellant about failure of the magistrate to comply with the requirements of fair hearing relate to a claim that the trial magistrate allowed counsel for the appellant to cross examine the respondents witnesses before they were cross examined by counsel for the respondents. According to the appellant this procedure adopted by the trial court amounted to a violation of the law and was unfair and prejudicial to the appellant.

39. Regulation 12 of the Election (Parliamentary and County Elections) Petition Rules 2017, provides that a party in an election petition and every intended witness shall file affidavits with the petition. With regard to the conduct of the trial, Regulation 12 (12) and (13) provides as follows:-

**“12 (12) An affidavit shall form part of the record of the hearing and may be deemed to be the deponent's evidence for the purposes of examination in chief.**

**(13) Every deponent, shall subject to the election court's direction, be examined in chief and cross-examined.**

**Provided that the parties may, by consent accept and not cross examine the deponents but shall have the deponent's evidence admitted and presented in the affidavits”.**

40. It is clear to me from the above provisions of Regulation 12, that examination in chief should start for each witness. However both the

trial court and the parties can vary the order of examination in chief and cross examination of witnesses. The parties may even choose not to examine in chief or cross examine witnesses, as the rules were not mandatory or cast in stone so to speak.

41. It is noteworthy also that all parties were represented at the hearing of the petition by very able advocates. There is nothing on record to show that any of the advocates raised an issue on the process adopted by the trial court, with regard to the examination in chief and cross-examination of any witness. In my view, if there was such an issue, it should have been raised at the trial, not on appeal. I thus find no basis for the contention that the procedure of cross-examination of witnesses adopted by the trial court prejudiced the appellant or to any of the parties involved. I find no prejudice or unfair trial occasioned on the appellant.

42. The second limb of the appellant's allegation of unfair trial is the refusal by the trial court to allow an IT expert to file an affidavit as additional evidence and come to testify at the trial. Rule 12 of the Elections (Parliamentary and County Elections) Petition Rules 2017, provides that a petitioner shall at the time of filing the petition, file an affidavit sworn by self and each witness whom the petitioner intends to call.

43. Rule 12 (8) and (9) provides as follows:-

**“12 (8) Except with the leave of the election court and for sufficient cause, a witness shall not give evidence unless an affidavit is filed as required under these Rules.**

**(9) The election court may, on its own motion or on the application by any party to the petition, direct a party or witnesses to file a supplementary affidavit”.**

44. Rule 15 covers pretrial conferencing and interlocutory applications. It provides with respect to affidavits as follows:-

**“ 15 (1) Within seven days after receipt of the last response to a petition, an election court shall schedule a pretrial conference with the parties in which the election court shall-**

**(h) give directions as to the filing and serving of any further affidavits or the giving of additional evidence”.**

45. By the time of election petition directions, there were four application pending before the court dated 25<sup>th</sup> September, 2017, 26<sup>th</sup> September, 2017, 13<sup>th</sup> October, 2017 and 30<sup>th</sup> October, 2017. The application dated 13<sup>th</sup> October, 2017 was the appellant's application for leave to amend the petition, and for leave to be granted to the petitioner to file a further affidavit sworn by an officer of East African Data Handlers in support of the amended petition; that the ballot box containing votes cast for Member of County Assembly, Abakaile ward at Kumahumato polling station 01 be availed in court for purposes of fixing additional seals; that the court orders 4<sup>th</sup> respondent to give access to the petitioner to the KIEMS kit used at Kumahumato polling station on 8<sup>th</sup> August, 2017 for purposes of obtaining the register of voters for the polling station; and an order be issued that Safaricom Ltd produce text messages sent from cell phone number 0725220626 to 0729022777 between 8<sup>th</sup> to 9<sup>th</sup> August, 2017.

46. The application for leave to amend the petition was dismissed on the ground that request for amendment was made more than 28 days from the date of the declaration of the election results. The request for leave to file a further affidavit from the IT expert was also rejected because the report of the expert was, at the time of the application not ready, and in any case allowing same would delay the petition hearing as the respondents could require time to respond.

47. In my view, it cannot be said that there was any violation of the principles of fair trial by the trial magistrate against the appellant. Firstly, the additional affidavit was to be in support of the proposed amended petition which was declined by the court, so the additional affidavit would not serve any purpose anyway. Secondly, in my view the trial court exercised its discretion judiciously in its ruling by considering the timelines to be complied with in the disposal of election petitions as well as the impact the filing of the additional affidavit would have on the other parties, considering that the actual contents of the affidavit had not been filed with the application for leave, and the appellant's counsel sought for 7 days to file the said affidavit. I thus see no violation of the principles of fair trial committed by the trial court.

48. I now turn to the issue of scrutiny. The appellant has contended that the trial court's refusal to order scrutiny for Kumahumato polling station 01 occasioned a miscarriage of justice as it cannot be said that the election results declared were accurate and verifiable. The application for scrutiny was made on 15<sup>th</sup> January, 2018 after the closure of the evidence of the parties, and the court's ruling delivered on 1<sup>st</sup> February 2018, declining the request.

49. From the record, it is worth to note that in the Election Petition filed on the 17<sup>th</sup> August 2017, the appellant asked for scrutiny under prayer (a) as follows; –

**(a) Scrutiny and recounting of all ballots cast at Kumahumato Polling Station 01 for the position of Member of County Assembly of Abakaile Ward, Dadaab Constituency, Garissa County.**

50. In addition to the above, the appellant under prayer (b) in the petition asked for an order from the court that the 4<sup>th</sup> respondent IEBC do avail a report of the number of people positively identified during the Election Day by the Kenya Integrated Election Management System (KIEMS) device used at Kumahumato Polling Station 01, and in an earlier ruling delivered on 14<sup>th</sup> December, 2017 before commencement of trial, the learned trial magistrate allowed the request for provision by the IEBC of the KIEMS device. However, the learned magistrate refused to allow the request for scrutiny, which was made after the closure of the evidence of the parties.

51. The law provides that scrutiny can be ordered by the court on its own motion or on application by the parties at any time during the trial. In this regard Section 82 (1) of the Elections Act 2011 provides as follows:-

**“82 (1) An election court may, on its own motion or on application by any party to the petition, during the hearing of the petition, order for a scrutiny of votes to be carried out in such a manner as the election court may determine”.**

Rule 29 of the Elections (Parliamentary and County Elections) Petition Rules 2017, fortifies the above statutory position and provides as follows;

**“29 (1). The parties to the proceedings may apply for scrutiny of the votes for purposes of establishing the validity of the votes cast.**

**(2) On an application under sub-rule (1) an election court may, if it is satisfied that there is sufficient reason, order for scrutiny or recount of the votes.**

**(3).....**

**(4).....**

52. The Supreme Court listed the governing principles for consideration in an application for scrutiny in the case of **Garitau Peter Munya vs Dickson Mwenda Kithinji & 2 Others (2014)eKLR**, and stated that the trial court has discretionary power to order scrutiny under Section 82 (1) of the Elections Act if it considers that such scrutiny is necessary to enable it arrive at a just and fair determination of the petition. In exercising such discretion, the court should seek to find sufficient reasons in the context of the pleadings or the evidence or both, and should record the reasons for the order for scrutiny or recount.

53. In the present case, the request for scrutiny was pleaded in the petition and on 11<sup>th</sup> January, 2018 at the close of the respondent's evidence, Mr. Nyaga, counsel for the appellant asked the court to supply him with copy of proceedings to enable him file an application for scrutiny and recount. He then filed an application dated 15<sup>th</sup> January, 2018 to which a ruling was delivered on 1<sup>st</sup> February, 2018 by the trial court dismissing the same by concluding as follows;

***“ The general principle is that a scrutiny may be ordered without establishing a basis where the margin of victory or loss is narrow on the ground that a recount may lead to expeditious disposal of the petition. Recount would have led to the expeditious disposal of the petition if it was made before the commencement of the hearing. Allowing scrutiny at this stage without laying a foundation would amount to granting the petitioner an opportunity to go for a fishing expedition in an attempt to discover new or fresh evidence.***

***In view of the foregoing reasons, I am not convinced that an order for scrutiny and recount should be made since no sufficient basis has been laid. I therefore decline to grant the orders sought. Consequently this application is dismissed with costs”.***

54. In my view, the above ruling of the court occasioned prejudice on the appellant and denied the court the opportunity to make a just and fair decision in the election petition.

55. Though the court noted tampering/changing of one seal of the ballot box at Kumahumato polling station, no explanation was given by IEBC on why there was such discrepancy. Secondly, though there was a contention which was not challenged, that the polling station agent of the appellant (Daud Adan Dolal) was arrested by the police for merely questioning the mode of reading the results, a report made at the police station, no explanation was given by IEBC on the same. In addition, though the trial court ordered that the KIEMS kit be provided to the appellant, by IEBC, the same was not provided. Lastly, though in Kumahumato polling station the petitioner garnered 21 votes, 1<sup>st</sup> respondent 331, Siyat Abdikarim Salah 13, and Hussein Dekow Maalim 3, in the entire ward election the appellant garnered 1799 votes and 1<sup>st</sup> respondent 1826 while Siyat got 693 votes and Hussein 26. The margin between the appellant and 1<sup>st</sup> respondent was thus merely 27 votes.

56. In view of the circumstances above especially the small winning margin, and considering that elections are an expression of the will of the voters, I am of the view that the trial magistrate should have ordered scrutiny of the votes in Kumahumato polling station 01, failure to which in my view, the results of the elections cannot be said to be accurate, verifiable and accountable as required under Article 86 of the Constitution. With this finding, in my view the appeal will succeed.

57. The third issue is with regard to the contents of the judgment. The trial court wrote its judgment which was said by appellant to be brief, and in contravention of Articles 81 and 86 of the Constitution and Section 83 of the Election Act. It is indeed a brief judgment but issues arise from the pleadings as well as the evidence tendered in court. From what is on record, it is apparent that the parties counsel spent a lot of time on preliminary applications rather than addressing the main election petition. That might be the reason why the magistrate wrote a short judgment. I will not speculate whether if scrutiny was ordered, the judgment would have been longer. However, in my view, the judgment of the trial court covered the issues raised other than those issues which had been determined in the preliminary applications. This appeal will however succeed because of the failure of the magistrate to allow scrutiny for Kumahumato polling station 01.

58. The fourth issue relates to the application to review the order on the KIEMS kit. In my view, the magistrate correctly rejected the request of the appellant's counsel. The appellant's counsel made that request too late in the day. The trial court was functus officio after making a ruling on the same. If counsel wanted the magistrate to consider making an order that could be executed, or was executable, he should have done so during trial, not after trial.

59. With regard to costs, as I have decided that the appeal will succeed due to the trial court not allowing scrutiny, the costs of the appeal and the costs of the trial court proceedings will be borne by the respondents.

**DETERMINATION**

60. Consequently, I allow the appeal and set aside the judgement and decree of the trial court. I also certify that the 1<sup>st</sup> respondent was not validly elected as Member of County Assembly for Abakaile ward, Garissa County. I order that the IEBC should hold fresh elections in accordance with the law. The respondents will jointly and severally pay the costs of the appeal and the trial court proceedings. The costs of the appeal will be taxed and are capped at Kshs.600,000/=.

**Dated, Signed and Delivered in open court at Garissa this 29<sup>th</sup> day of August, 2018.**

.....

**George Dulu**

**JUDGE**

**In the presence of;**

Court Assistant- Martin Musau

Counsel for Appellant- Mr. Nyaga

Counsel for 1<sup>st</sup> Respondent- Mr. Manange

Counsel for 2<sup>nd</sup> Respondent

Counsel for 3<sup>rd</sup> Respondent Mr. Farouk Kyalo

Counsel for 4<sup>th</sup> Respondent