



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ELECTION PETITION APPEAL NO. 12 OF 2018

IN THE MATTER OF THE ELECTION OF MEMBER OF THE

COUNTY ASSEMBLY FOR NAIROBI COUNTY, MUKURU

KWA REUBEN/KWA REUBEN WARD

BETWEEN

MICHAEL MUSYOKI NWANANZIVU.....APPELLANT

VERSUS

THE INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION.....1ST RESPONDENT

EVANS OTISO.....2ND RESPONDENT

MANDE SCHOLASTICA MUTHONI.....3RD RESPONDENT

NZYUKO CHRISTOPHER TITO.....4TH RESPONDENT

RETURNING OFFICER.....5TH RESPONDENT

(Appeal from the judgment and decree of Hon. E.A Nyaloti (Chief Magistrate)

in Election Petition No. 6 of 2017 dated 23rd February, 2018)

JUDGMENT

Background:

1. In the last General Election held on 8th August 2017, the appellant, *Michael Musyoki Mwananzivu* as well as the 2nd, 3rd and 4th respondents contested for the Office of Member of the Nairobi County Assembly for Mukuru Kwa Rueben/ Kwa Reuben Ward, Embakasi South Constituency (hereinafter Kwa Reuben Ward). The election was conducted and supervised by the 1st respondent, the *Independent Electoral and Boundaries Commission (the IEBC)*.

2. At the conclusion of the election, the 5th respondent who was the Embakasi South Constituency Returning Officer announced the results and returned the 2nd respondent, *Mr. Evans Otiso* as the validly elected representative of the County Assembly for Kwa Reuben Ward.

From the court record, it is apparent that the 2nd respondent garnered the most votes in the sum of 5,342 votes while the appellant came in third with 3,031 votes.

3. The appellant was dissatisfied with the manner in which the election was conducted and with the declared results. In a petition filed on 5th September 2017 in the Nairobi Chief Magistrate's Court Milimani, the appellant then the petitioner sought among other reliefs the nullification of the election and a declaration that he was the duly elected representative of the member of the Nairobi County Assembly for Kwa Reuben Ward and in the alternative, that the court orders the holding of a fresh election for the ward.

4. The above reliefs were sought principally on grounds that the entire election process was riddled with serious irregularities, illegalities and commission of election offences. In particular, the appellant alleged that prior to the voting day, he was denied an opportunity to train his agents as he was only given 3 hours' notice of the time and venue for the training; that the 1st respondent maliciously refused to issue his agents with badges which action prevented them from witnessing the voting and counting of votes; that only 6 out of 48 agents were allowed access to the polling stations; that on the polling day, the 2nd respondent's agents engaged in ballot stuffing and stealing of the appellant's votes which they added to the 2nd respondent's votes together with stray and spoilt votes; that the 2nd, 3rd and 4th respondents together with their agents bribed and intimidated voters and circulated defamatory information regarding the petitioner; that there were deliberate errors in the tallying and announcement of results which were calculated to put the 2nd respondent ahead of all the other candidates and deny the appellant his most deserved win. In a nutshell, the appellant asserted that the election was not conducted in accordance with the constitutional and statutory principles that underpin the conduct of a free and fair election and that the impugned result did not reflect the free will of the voters of Kwa Reuben Ward.

5. In their responses to the petition, all the respondents denied all the allegations of irregularities and breaches of the law in the conduct of the elections as claimed in the petition. In their respective responses and affidavits, the respondents asserted that the election was conducted in accordance with the constitution and the law; that the election was free and fair; that the results were correctly tabulated and announced and that they reflected the will of the people of Kwa Reuben Ward. They urged the trial court (the election court) to dismiss the petition for want of merit.

6. The petition was fully heard by *Hon. E. A. Nyaloti* (Chief Magistrate) who in a judgment delivered on 23rd February 2018 found that the petitioner had failed to prove his claims that the election was marred with illegalities, malpractices and irregularities to the required standard. She consequently dismissed the petition with costs to respondents.

7. Aggrieved by the findings of the trial court, the appellant filed the current appeal in which he beseeched this court to set aside the judgment of the election court and to allow his petition dated 4th September 2017.

The Appeal and Submissions:

8. In his memorandum of appeal filed on 21st March 2018, the appellant faulted the decision of the learned trial magistrate on matters of both fact and law. In the eleven grounds advanced in support of his appeal, the appellant mainly complained that the learned trial magistrate erred in law and fact by misapplying the law on the standard of proof in election petitions and made erroneous findings that the allegations of bribery and ballot stuffing had not been proved to the required standard; that the trial court erred in fact and law by misconstruing or misdirecting itself on the law on scrutiny of votes; that the trial court was wrong in its interpretation of *Articles 38, 81 and 86* of the *Constitution* and *Section 83* of the

Elections Act; that the court erred in law and fact in its finding that the discrepancies noted in forms 36A and 36B were minor and did not affect the results of the impugned election; that the court disregarded the evidence, the submissions and authorities relied upon by the appellant and consequently arrived at an erroneous decision on the issues framed for determination and finally that the trial court erred in law and fact in dismissing the petition with costs to the respondents.

9. By consent of the parties, the appeal was prosecuted by way of written submissions which were highlighted before me on 27th June 2018.

Learned counsel *Mr. Wambui Shadrack* represented the appellant while *Mr. Momanyi* appeared for the 2nd, 3rd and 4th respondents. Learned counsel *Mr. Bukania* represented the 1st and 5th respondents.

10. In his written and oral submissions, *Mr. Wambui* urged this court to find that the election court failed to appreciate the import of *Section 83* of the *Elections Act* and considered only the quantitative aspects of the election and ignored the qualitative aspects which were equally important; that the court despite the available evidence failed to address the appellant's grievances that on the voting day, the 2nd, 3rd and 4th respondents together with their supporters exercised undue influence on the voters by exhibiting scandalous information or defamatory material regarding the appellant while urging them not to vote for him; that the publication of defamatory information about the appellant soiled the environment in which the election was held making it not free and fair as required by the Constitution; that there were many errors and irregularities including discrepancies in forms 36A and form 36B which were sufficient to annul the election but which the court wrongly attributed to human error; that the election was not accountable, verifiable or accurate and thus violated *Article 86* of the *Constitution*.

11. It was further contended that the trial court erred in its interpretation of *Section 83* of the *Elections Act* in holding that the irregularities and illegalities complained of must have affected the results of an election to warrant invalidation of the election.

12. It was also the appellant's case that the trial court erred in finding that on the evidence adduced by the appellant, the election offence of bribery had not been proved to the required standard of proof which according to *Mr. Wambui* was proof on a balance of probabilities.

13. Lastly, *Mr. Wambui* asserted that the trial court erred in condemning the appellant to pay costs in the sum of KShs.200,000 to each respondent; that such an award was punitive and burdensome to the appellant and impeded on his right of access to justice guaranteed under *Article 48* of the *Constitution* and if allowed to remain, it may discourage citizens from filing election petitions in the magistrates' courts in future. He urged this court to find merit in the appeal and allow it.

14. On behalf of the 1st and 5th respondents, *Mr. Bukania* started off his submissions by pointing out that the appeal as presented is on matters of facts and law and therefore offends the provisions of *Section 75* of the *Elections Act* which provides that appeals to the High Court challenging decisions of the Magistrate's Court concerning the validity of an election of a member of a county assembly shall be on matters of law only; that in exercising its jurisdiction in this appeal, this court should consider the grounds that impugn the trial court's decision on matters of law only.

15. In his further submissions, *Mr. Bukania* denied the appellant's claim that the learned trial magistrate misdirected herself on the standard of proof required in election offences and asserted that given the evidence on record, the trial court was correct in its finding that the bribery allegations had not been corroborated and had therefore not been proved to the required legal standard.

16. Counsel further submitted that the trial court properly interpreted and applied the constitutional principles in *Articles 81 and 86* of the *Constitution* as the appellant failed to adduce sufficient evidence to illustrate that the 2nd, 3rd and 4th respondents exercised undue influence on the voters by publishing defamatory material concerning the appellant; which allegedly depicted him as a thief and fraudster not worthy of their vote; that the appellant only made blanket allegations about multiplicity of errors in the

conduct of the election but failed to provide evidence to demonstrate the said errors, their nature and how they impacted the election outcome. It was also the 1st and 5th respondents' case that the election court correctly interpreted *Section 83* of the *Elections Act* and the law relating to scrutiny; that the election was conducted in accordance with the Constitution and the law and that the election court was right in dismissing the petition for want of merit.

17. On costs, *Mr. Bukania* submitted that the election court had powers and discretion to award costs and that the costs awarded in this case were reasonable and commensurate with the work done and manpower employed; that the appellant had not established any basis for this court to disturb the costs awarded to the respondents. He beseeched this court to find that the appeal lacked merit and dismiss it with costs.

18. On his part, *Mr. Momanyi* for the 2nd, 3rd and 4th respondents associated himself with the submissions made on behalf of the 1st and 5th respondents. He agreed with *Mr. Bukania's* submissions that the appellant failed to prove all the irregularities and illegalities alleged in the petition particularly the allegation of undue influence, ballot stuffing and bribery.

19. Counsel however conceded that there was an irregularity in the transposition of the results from Forms 36 A to 36 B in that the total number of rejected votes which were 187 though indicated in form 36A's were not reflected in form 36B but in his view, this was an error which did not affect the credibility or accuracy of the results. Counsel concluded his submissions by urging the court to find that the election court's decision was supported by the evidence before it; that the appeal was not merited and should be dismissed with costs to his clients.

Analysis and Determination:

20. Having considered the grounds of appeal, the huge record of appeal, the written and oral submissions made on behalf of the parties and all the authorities cited by each party, I find that the following key issues present themselves for determination in this appeal:

- i. Whether the appeal is incompetent given its presentation in the memorandum of appeal as an appeal on both facts and the law.*
- ii. If the answer to (i) above is in the negative, whether the election court misinterpreted or misapplied Articles 81 and 86 of the Constitution and Section 83 of the Elections Act.*
- iii. Whether the election court erred by ignoring or misdirecting itself on the law on scrutiny.*
- iv. Whether the election court erred in finding that the petitioner had failed to prove the offence of bribery and the other irregularities alleged in the petition to the required standard.*
- v. Whether the trial court erred in finding that the appellant should be condemned to pay costs of the petition.*

21. Turning to the first issue, the starting point is an examination of the law that confers jurisdiction on the High Court to determine appeals challenging decisions made by the Magistrate's Court in Petitions questioning the validity of election of a member of a County Assembly.

The relevant law is found in *Section 75 (1A) and (4)* of the *Elections Act* (the Act) which provides that a question as to the validity of the election of a member of a County Assembly shall be heard and determined by the Resident Magistrate's Court designated by the Chief Justice and an appeal from such a decision shall lie to the High Court on matters of law only. What constitutes matters of law as far as election petition appeals are concerned has been the subject of interpretation by our courts including the Supreme Court.

22. In *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR*, the Supreme Court when interpreting *Section 85A* of the *Elections Act* which relates to appeals to the Court of Appeal which

is similar to *Section 75 (1A)* of the Act reviewed jurisprudence from several comparative jurisdictions and defined “matters of law” in the following terms:

“... From the foregoing review of the comparative judicial experience, we would characterize the three elements of the phrase “matters of law” as follows:

- a. the technical element: involving the interpretation of a constitutional or statutory provision;**
- b. the practical element: involving the application of the Constitution and the law to a set of facts or evidence on record;**
- c. the evidentiary element: involving the evaluation of the conclusions of a trial Court on the basis of the evidence on record.”**

23. The court continued to expound on the meaning of the above definition with specific reference to *Section 85 A* of the Act and stated as follows:

“Now with specific reference to *Section 85 A* of the Elections Act, it emerges that the phrase “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 facts 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 in the High Court concerning membership of the National Assembly, the Senate, or the office of County Governor, where the appellant claims that such conclusions were based on “no evidence”, or that 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 on the basis of the evidence.”**

24. The above definition regarding what constitutes matters of law has been followed by the Court of Appeal in several authorities including the recent decisions in the cases cited by the appellant and the 2nd to 4th respondents namely, *Wavinya Ndeti & Another V IEBC & 2 Others, Election Petition Appeal No. 8 of 2018 and Philip Kyalo Kituti Kaloki V IEBC & 2 Others, Election Petition Appeal No. 25 of 2018.*

25. Like I said earlier, *Section 85 A* of the *Election Act* is similar in all respects to *Section 75 (1A)* of the Act the only difference being that *Section 85 A* applies to the Court of appeal while *Section 75 (1A)* deals with the appellate jurisdiction of the High Court in election petitions. Therefore, the above interpretation of *Section 85 A* applies with equal force to the interpretation of *Section 75 (1A)* of the Act.

26. Guided by the above wisdom of the Supreme Court and the Court of Appeal, and having closely scrutinized the grounds of appeal cited by the appellant in this appeal, it is my finding that though it is obvious that the grounds as presented in the memorandum of appeal are poorly drafted to indicate that the appeal is premised on matters of law and fact, a careful examination of most of the grounds reveal that they actually raise questions of law that fall within this court’s jurisdiction only that they are inelegantly drafted.

27. In my view, a court exercising appellate jurisdiction in an election petition must bear in mind the constitutional principles of access to justice and carefully scrutinize the memorandum of appeal with a

view to establishing whether the grounds relied upon by an appellant though couched as matters of fact do in fact raise issues of law or whether the grounds raise only issues of fact or whether some grounds raise issues of fact while others raise matters of law. Where the court is satisfied that the grounds of appeal raise purely matters of fact, the court should automatically reject the appeal as incompetent and refuse to admit it for hearing.

28. Where on the other hand the court is satisfied that the memorandum of appeal contains some grounds which raise questions of fact and some other grounds which raise matters of law, the court should in the interest of substantive justice isolate the grounds that fall in either category and disregard the grounds involving matters of fact and deal only with those that challenge the trial court's decision on matters of law. My view therefore is that the existence of some grounds of appeal which raises matters of fact does not by itself render an appeal incompetent if the memorandum of appeal contains other grounds which present points of law for determination by the appellate court.

29. That said and having carefully analysed the grounds of appeal as presented in the memorandum of appeal, I find that most of the grounds raise matters of law as defined in the ***Gatirau Peter Munya Case, (supra)*** and it is those grounds that have informed my formulation of the issues for determination in this appeal as shown hereinabove. It is thus my finding that the appeal is competent and is properly before the court.

30. Having found that the appeal is competent, I now turn to consider whether the trial court misinterpreted or misapplied *Articles 81 and 86* of the *Constitution*. *Articles 81 and 86* of the *Constitution* enunciate the constitutional principles that govern the conduct of elections to ensure that they are free and fair and that the election results represent the free choice and will of the voters in the election concerned.

Article 81 declares that the electoral system shall comply with the principle of free and fair elections. It defines what constitutes a free and fair election as one in which votes are cast by secret ballot; an election which is transparent and is free from violence, intimidation, improper influence or corruption and is conducted by an independent body in an impartial, neutral, efficient, accurate and accountable manner.

31. The independent body envisaged under *Article 81 (e)* is the Independent Electoral and Boundaries Commission which is the 1st respondent in this appeal. *Article 86* of the *Constitution* imposes on the 1st respondent a duty to develop voting methods and systems which ensures that the voting process is free and transparent; that there is accuracy and accountability for the election outcome. This Article provides as follows:

“At every election, the Independent Electoral and Boundaries Commission shall ensure that—

- a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;***
- b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;***
- c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and***
- d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.”***

32. The petitioner has alleged that the trial court misinterpreted and misapplied the above constitutional provisions in determining his election petition.

I have carefully studied the judgment of the trial court. I find that at paragraphs 118 to 120 of the judgment, the learned trial magistrate addressed her mind to various international law instruments which

speak to the right of the people to express their sovereign will in the choice of candidates contesting for political office by voting in periodic elections based on universal suffrage and which are held by secret ballot or by equivalent free voting procedures. She specifically referred to several articles in the Universal Declaration of Human Rights 1948; International Covenant on Civil and Political Rights 1966 and the African Charter on Human and People's Rights which protects the right of every citizen to vote and be elected in free and fair elections.

33. The learned trial magistrate correctly observed that international law is now part of the laws of Kenya by virtue of *Article 2 (6)* of the *Constitution* and that the aforesaid instruments have found expression in *Articles 38, 81 and 86* of the *Constitution* as well as in the *Elections Act and Regulations* made thereunder. From the judgment, it is clear that the learned trial magistrate was aware of the import of *Articles 81 and 86* of the *Constitution* and the requirement that IEBC being the independent body mandated with the conduct of elections should ensure that structures and mechanisms are put in place to ensure that elections are free and fair as decreed by *Article 81* and that their outcome represents the true will of the voters. Having read the entire judgement of the election court, I did not come across anything in the record that would suggest that the trial magistrate misinterpreted or misapplied any of the constitutional principles that govern the electoral system in Kenya.

34. It was alleged by the petitioner that on 6th, 7th and 8th August 2017, the 2nd, 3rd and 4th respondents together with their agents circulated defamatory publication in the form of posters bearing the petitioner's photograph depicting him as a thief or fraudster with the intention of influencing voters not to vote for him; that these actions by the 2nd, 3rd and 4th respondents created an environment which was not conducive to a free and fair election, a fact which the learned trial magistrate failed to appreciate.

35. I am unable to agree with *Mr. Wambui's* submissions on this point because my reading of the trial magistrate's judgment reveals that she was alive to the allegations concerning the distribution of publication alleged to be defamatory to the petitioner since she considered the same in paragraph 135 of her judgment together with the allegations of bribery of voters and concluded that the evidence adduced in support of those allegations was not corroborated and was insufficient to prove the claims to the required standard.

36. From the record, I am unable to fault the trial court's finding on the issue of the alleged publication of defamatory material concerning the petitioner because PW3 admitted that he had not read the posters the 3rd respondent allegedly gave him to distribute to voters. Having not read them, he could not obviously have known what they contained. PW2 and *Nduku Mulota Sila* who swore a witness affidavit dated 4th September 2017 did not substantiate their allegations by exhibiting as an annexure to their respective affidavits the posters they were allegedly given by the 2nd and 4th respondents to distribute to other voters. In their evidence, PW2 and PW3 were not shown the publication annexed to the petitioner's affidavit marked "MMM4" to confirm or deny that it is the same publication that the aforesaid respondents were circulating in the Kwa Reuben Ward immediately, prior and during the voting day. It is therefore my finding that the petitioner failed to prove the existence of the alleged publication as a matter of fact and there was therefore no basis for the trial court to consider whether the publications impeded on the conduct of a free and fair election.

37. Turning to the third issue, the appellant has claimed that the election court misapplied the law relating to scrutiny of votes. The law on scrutiny is found in *Section 82 (1)* of the *Elections Act 2011* (as amended) (the Act) and *Rule 29* of the *Elections (Parliamentary and County Elections) Petition Rules 2017* (the Rules). *Section 82 (1)* of the Act provides that:

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

38. *Rule 29* of the *Rules* entitles a party to apply for scrutiny for purposes of establishing the validity of the votes cast. Under *Rule 29 (2)*, an applicant is only entitled to orders of scrutiny or recount if he

establishes sufficient reason to justify the grant of the orders. *Rule 29 (4)* makes it very clear that such orders can only be made with regard to polling stations in which the results are disputed. (emphasis added)

39. From the foregoing, it is evident that orders for scrutiny or recount can be granted by the court on its own motion or on application by a party to an election petition. However, such orders are not issued as a matter of course. The law is that a party seeking scrutiny or a recount or the party in whose favour the order is granted has the onus of establishing by way of pleadings or evidence the basis for issuance of such orders. Such an order must be confined to the polling stations in which the validity of the vote is questioned: see *Peter Gatirau Munya V Dickson Mwenda Kithinji & 2 Others, Supreme Court of Kenya Petition 2B of 2014 (2014) eKLR* where the Supreme Court emphasized that:

“the grant of an order for scrutiny or recount is not automatic; that the party seeking a recount or scrutiny has the onus of establishing the basis for such a request to the satisfaction of the court. Such a basis may be established by way of pleadings and affidavits, or by way of evidence adduced during the hearing of the petition. The court further re-iterated that an application for scrutiny or recount may be made at any stage after the filing of a petition but before its determination. If the application is successful, the order of scrutiny and recount should be made in respect of specific polling stations in which the results are disputed or the validity of the vote is questioned.”

40. Looking at the petition that was before the election court, I find that the irregularities, illegalities and malpractices complained of in the course of the election were couched in very general terms. The petitioner did not specify the particular polling stations in which the results were disputed. It is also very clear in the prayers in the petition that the appellant did not seek for an order of scrutiny. In prayer (c), the appellant sought for an order of recount of votes not scrutiny.

41. As I recently held in *Jonas Misto Vincent Kuko V Independent Electoral And Boundaries Commission of Kenya & 2 Others [2018] eKLR, Kitale Election Petition No. 3 of 2017*, scrutiny and recount though used interchangeably in the course of litigation in election petitions are two distinct legal remedies which are conceptually different. The distinction between them lies in the processes employed when executing an order for either of them and their outcomes.

42. Briefly, a recount is only concerned with the number of votes cast for the candidates in an election while scrutiny on the other hand is a tool used to audit the election process to establish the validity of the votes cast and the integrity of the election process.

43. The trial court at paragraph 139 of its judgment correctly pointed out the law on scrutiny and cited the Supreme Court’s decision in *Gatirau Peter Munya V Dickson Mwenda Kithinji, (supra)* to support its finding that orders of scrutiny or recount are not automatic; that a party seeking for the grant of such orders must establish a basis for the request to the satisfaction of the trial judge or magistrate. The court also correctly noted that the appellant had not made an application for scrutiny but expected the court to make the order *sui moto* but it is clear from the record that the court was not satisfied that the appellant had made out a *prima facie* case to enable it make such orders.

44. Quite apart from misconstruing prayer (c) in the petition and finding that the appellant had sought in that prayer an order for scrutiny instead of a recount, I am satisfied that the election court correctly interpreted the law on scrutiny and recount and properly applied it to the facts and evidence disclosed in the petition.

45. The trial court was also faulted for dismissing the petition on grounds that the petitioner had failed to prove the bribery allegations and other irregularities stated in the petition to the required standard of proof.

Before embarking on an examination of this complaint, it is important to remind ourselves of the law on the burden and standard of proof in election petitions. Although election petitions are not like other civil

disputes in the sense that they challenge the conduct of elections in which citizens exercise their political rights enshrined in *Article 38* of the *Constitution*, the legal burden of proof in election petitions lies with the petitioner. The petitioner has the burden of proving to the required standard of proof all allegations of irregularities, malpractices or breaches of the law on the basis of which the election in question is sought to be nullified. This is in line with the cardinal principle of the law of evidence that he who alleges must prove - See *Section 107 to 109* of the *Evidence Act*.

As was held by the Supreme Court in ***Raila Amolo Odinga & Another V IEBC & 3 Others, Election Petition No. 1 of 2017***, the petitioner's legal and evidential burden of proof is static and remains constant throughout the trial of the petition but depending on the effectiveness with which he discharges that burden, the evidential burden keeps shifting and ***"its position at any time is determined by answering the question as to who would lose if no further evidence were introduced."***

46. This essentially means that if the petitioner establishes a prima facie case, the evidential burden will shift to the respondents to offer evidence in rebuttal but if no such case is established, the respondents would not have any legal obligation to counter the petitioner's case.

47. With regard to the standard of proof, it is now settled law that the standard is higher than the balance of probabilities required in civil cases but lower than proof beyond reasonable doubt applicable in criminal cases. But where the petition alleges the commission of election offences, the standard to be applied is proof beyond reasonable doubt. See: ***Moses Masika Wetangula & 2 Others [2015] eKLR; Wavinya Ndeti & Another V IEBC & 2 Others, Election Petition Appeal No. 8 of 2018; Philip Kyalo Kituti Kaloki V IEBC & 2 Others, Election Petition Appeal No. 25 of 2018.***

48. With respect, I disagree with *Mr. Wambui's* submissions that *Section 87* of the *Elections Act* lowered the standard of proof in the determination of election offences from beyond reasonable doubt to proof on a balance of probabilities. *Section 87* of the *Act* requires that if an election court determines that an electoral malpractice of a criminal nature may have occurred in the election process, such determination should be transmitted to the Director of Public Prosecutions for further investigations and appropriate action.

In my opinion, *Section 87* of the *Act* did not lower the standard of proof as alleged because the election court must be satisfied that sufficient evidence had been adduced during the trial to establish that an electoral malpractice of a criminal nature had been committed in the conduct of elections before making such a determination and transmitting it to the Director of Public Prosecutions. And in any case, an election court cannot void an election on the basis of bribery allegations or allegations concerning the commission of election offences which had not been proved beyond reasonable doubt.

49. Having set out the law on the burden and standard of proof, I will now proceed to consider the appellant's grievance that the learned trial magistrate erred in concluding that the petitioner had not adduced sufficient evidence to prove the allegations of voter bribery and ballot stuffing to the required standard of proof and that the discrepancy in forms 36A and 36B were minor and could not have affected the election outcome.

50. It was the appellant's case in the lower court that the election was not free and fair since there was massive bribery by the 2nd and 3rd respondents who gave money to voters prior to and during the voting day to entice them not to vote for the appellant.

51. In their evidence, the appellant and his witnesses namely, *Mutunga Nyamai* (PW2); *Benjamin Kyalo George* (PW4 but recorded as PW3); and *Elphas Wakhisi Moli* (PW6 though recorded as PW5) testified in very vague and general terms that they saw the 2nd, 3rd and 4th respondent's agents giving money to unidentified voters on different dates and times. PW1 in his evidence in chief claimed that he saw one *Rama* distributing money to voters. He was apparently not sure whether *Rama* was the 2nd or the 4th respondent's agent but be that as it may, he did not disclose how much money *Rama* was allegedly giving to the voters casting doubt whether he actually witnessed the alleged bribery. He went further to add that even his agents had been bribed but he did not disclose the identity of the agents he claimed had been

bribed which is rather surprising considering that he is expected to know his agents.

52. The learned trial magistrate correctly pointed out that the evidence tendered by PW2, PW4 and PW5 in support of the bribery allegations made against the 2nd, 3rd and 4th respondents related to separate and distinct incidents and for it to be used as a basis for a finding that the respondents committed acts of bribery, it had to be corroborated by other independent evidence.

53. I support the learned trial magistrate's finding because PW2 and PW4 admitted to have received a bribe of KShs.300 and KShs.500 respectively from the 3rd and 2nd respondents and considering that under *Section 9 of the Election Offences Act*, a person who gives or receives a bribe during an election period to influence voters on how to cast their votes commits the election offence of bribery, the evidence of PW2 and PW4 in law amounted to accomplice evidence which requires corroboration as a matter of law before it can be acted upon by the court. Without corroboration, the evidence of PW2 and PW4 had little or no probative value. It is also important to note that none of the voters who were allegedly bribed were identified or even called to testify in support of the petitioner's case.

54. For a petitioner to vitiate an election on the basis of allegations that there was massive bribery of voters, he must adduce cogent, credible and specific evidence which sufficiently proves beyond doubt that the alleged bribery actually took place and that it was perpetrated by the respondents either directly or through their authorized agents. Given the foregoing, it is my finding that the petitioner in this case failed to meet the aforesaid legal threshold.

55. With regard to the allegation of ballot stuffing, I concur with the learned trial magistrate that the appellant failed to adduce any evidence to substantiate his claim. The appellant claimed in his evidence that he intercepted and photographed motor vehicle registration number KAC 140D which he suspected was ferrying marked ballot boxes as it was driven to Maendeleo Primary School polling station number 11. He however did not produce a photograph of the said motor vehicle as an exhibit in support of his case. He did not also say in his evidence that he actually saw marked ballot papers being offloaded from the motor vehicle and being put in the ballot boxes. The allegation of ballot stuffing was denied by the returning officer who testified as DW1. I agree with DW1's evidence that if there had been ballot stuffing as alleged, the number of votes cast would have exceeded the number of registered voters in the Kwa Reuben Ward which was not the position in this case.

56. A reading of the learned trial magistrate's judgment particularly paragraphs 123; 125 to 135, leaves no doubt that the trial court remained faithful to the law on the burden and standard of proof and applied it correctly to the evidence placed before it by the parties in the petition. It is thus my finding that the trial court did not err in its finding that the petitioner had not proved the allegations of bribery and ballot stuffing to the required standard of proof.

57. Another complaint made by the appellant was that his votes were stolen and added onto the votes obtained by the 2nd respondent. The appellant did not however substantiate this allegation with any tangible evidence. PW3 was the only witness who testified in support of this allegation and claimed in her evidence that she witnessed during the counting exercise at stream 5 of Kwa Reuben Primary School Polling Centre the theft of six votes which had been cast in favour of the petitioner being added to the 2nd respondent's votes; that when she alerted the Presiding Officer, the votes were restored to the appellant meaning that the count of the petitioner's votes was not affected. It should be remembered that stream 5 of Kwa Reuben Primary School Polling Centre was only one of the over 40 polling stations in the Ward.

58. I now wish to address the appellants' submission that the learned trial magistrate misinterpreted and misapplied *Section 83 of the Elections Act*; that the trial magistrate erred in finding that the irregularities complained of by the appellant including the discrepancies noted in form 36B when compared to form 36A's did not affect the election results and that therefore there was no basis of nullifying the election. *Mr. Wambui* argued that the learned trial magistrate concentrated on the quantitative aspects of the election and completely ignored the qualitative aspects which can equally be used as a basis of invalidating an election.

59. Section 83 of the Act is related to the law on the burden and standard of proof. It provides the test which should guide an election court in deciding whether the petitioner had met the legal threshold required to void an election. Prior to its amendment by the *Election Laws (Amendment) Act of 2017*, the provision was in the following terms:

“No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election.”

Section 83 as it existed prior to the amendment is the provision that was applicable to the proceedings in the trial court since the amendment came into force on 2nd November, 2017 and it did not have retrospective effect.

60. The Supreme Court had occasion to pronounce itself on the meaning and application of Section 83 of the Act in ***Raila Odinga V Uhuru Kenyatta & 3 Others, SCK Petition No. 1 of 2013*** (Raila Odinga case of 2013) and in ***Raila Odinga & Another V IEBC & 3 Ors, SCK Petition No. 1 of 2017*** (Raila Odinga case of 2017).

In the *Raila Odinga* case of 2017, the Supreme Court departed from the conjunctive approach it had adopted to the interpretation of the provision which led to its holding that for a petitioner to annul results of an election, he must not only prove that there was non-compliance with the law but must go further to prove that the failure of compliance affected the validity of the results. The court in the *Raila Odinga* case of 2017 held that Section 83 created two limbs of circumstances and any of them if proved would justify nullification of an election; that the two limbs should be read disjunctively and not conjunctively.

The court reiterated what it had stated in the ***Gatirau Peter Munya Case (supra)*** and emphasized that where it is demonstrated that the conduct of an election violated the principles laid down in the constitution or other written law on elections, a petitioner should succeed in having the election annulled but where an election had been conducted substantially in accordance with the constitution and the law, it should not be invalidated only on grounds of irregularities unless it is proved that the irregularities were of such a magnitude that they affected the election result. This means that not any irregularity if proved would be sufficient to nullify an election. The irregularities in question must be material and of such a nature that they may have affected the election outcome.

61. As noted earlier, the appellant did not prove to the required standard that there were instances of violation of the principles laid down in the Constitution and the law in the conduct of the election for Kwa Reuben Ward or that the 2nd, 3rd and 4th respondents committed election offences. The only irregularity that was supported by evidence in the course of the trial was the issuance of two ballot papers to two voters in stream 5 and stream 15 of Kwa Reuben Primary School Polling Center which the petitioner through the evidence of PW3 and PW7 conceded was remedied immediately by stamping the extra ballot as a rejected vote.

62. The petitioner also claimed that there were many errors or discrepancies in form 36 A and form 36 B but he did not specify the said errors or discrepancies other than noting that some rejected votes in some polling stations though reflected in form 36 A's had not been captured in form 36 B. DW1 in his evidence admitted that there was an error when transposing the results from form 36 A to form 36 B as a total of 187 rejected votes captured in the various form 36 A's were not reflected in form 36B. This in his view was the only error or discrepancy that existed in the two forms. This evidence by DW1 was not controverted by the petitioner.

63. It is worth noting that the results in form 36 A's which were the primary documents were not challenged. These are the documents which were compiled at the polling stations where voters in the Kwa Reuben ward casted their votes expressing their choice of the candidate they wanted to represent them in the Nairobi County Assembly. As was held by the Court of Appeal in ***Independent Electoral and Boundaries Commission V Maina Kiai & 5 others (2017) eKLR***, the polling station is the true locus

for the free exercise of the voters will and where results in the statutory results declaration forms compiled at the polling station are not disputed or are otherwise ascertained, they should carry the day. Though this holding was made with respect to presidential elections, it holds true to all other elections including elections for Members of the County Assembly.

In any event, given the difference between the votes garnered by the 2nd respondent and the appellant, I am unable to fault the election court's finding that even if the rejected votes were added to the votes obtained by the appellant, they would not have changed the election outcome. In the premises, I am satisfied that the learned trial magistrate properly interpreted *Section 83* of the *Act* and nothing turns on the claim that she erred in not invalidating the election. I find that the judgment of the election court was properly grounded on the evidence placed before it.

64. On costs, the appellant complained that the trial court erred in awarding costs to the respondents. The amount of costs awarded was not challenged in the memorandum of appeal and I will therefore disregard *Mr. Wambui's* submissions on the costs capped by the lower court.

65. *Section 84* of the *Elections Act* empowers an election court to award costs to the winner of an election petition by providing that costs in an election petition shall follow the cause. *Rule 30 (1)* of the *Election Rules* gives an election court discretion to determine the amount of costs to be paid and the manner in which they would be paid. Since the petitioner was unsuccessful in his petition and costs follow the event, it cannot be said that the election court wrongly exercised its discretion by awarding the respondents costs of the petition. I consequently do not have any basis of interfering with the court's decision on costs.

66. In view of the foregoing, I have come to the conclusion that this appeal is devoid of merit and it is hereby dismissed with costs to the respondents. The costs on appeal are capped at KShs.300,000 for each respondent. The 1st and 5th respondents shall be treated as one party.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 16th day of August, 2018.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Machibo holding brief for Mr. Wambui: for the Appellant

Mr. Kisaka holding brief for Mr. Bukania: for the 1st and 5th Respondents

Mr. Momanyi: for the 2nd, 3rd and 4th Respondents

Mr. Fidel Salach: Court Assistant