



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**ELECTION PETITION APPEAL NO.5 OF 2018**

**ODONGO VICTOR ROBERT.....APPELLANT**

**VERSUS**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT**

**THE RETURNING OFFICER KAGAN WARD EZEKIEL JUMA OTIENO...2<sup>ND</sup> RESPONDENT**

**ONYANGO PHILEMON.....3<sup>RD</sup> RESPONDENT**

**(Being an appeal from the judgment of Senior Principal Magistrate T. Obutu, made on the 23<sup>rd</sup> February 2018 in the Chief Magistrate's Court at Homa Bay in the original Homa Bay CMCC Election Petition No.1 of 2017)**

**JUDGMENT**

[1] The appellant, **ODONGO VICTOR ROBERT**, participated as a candidate for the seat of Member of County Assembly for Kagan Ward within Rangwe in the County of Homa Bay in the general elections held on the 8<sup>th</sup> day of August 2017. He was among the ten or so candidates who included the third respondent, **ONYANGO PHILEMON**.

[2] The Independent Electoral and Boundaries Commission (IEBC) (First Respondent), was responsible for the conduct of the elections as mandated under **Article 88** of the **Constitution of Kenya, 2010**. Its returning officer for Kagan Ward was the second respondent, **EZEKIEL JUMA OTIENO**, who after the elections on the 9<sup>th</sup> August 2017, declared the third respondent as the duly elected Member of the County Assembly for Kagan Ward having garnered a total of 5,081 votes out of the over Fourteen Thousand (14,000) registered voters in Kagan.

[3] The declaration prompted the appellant to file a petition at the Chief Magistrate's Court Homa Bay, being Election Petition No.1 of 2017, in which he challenged the validity of the election and the declaration of the third respondent as the duly elected Member of the County Assembly for Kagan Ward.

After the hearing of the petition, the trial court rendered its findings on all the six (6) issues framed for determination.

[4] Thus, with regard to the first issue, i.e. **whether the election of the Member of County assembly for Kagan ward was conducted in accordance with and compliance with the Constitution, written Law and legislation**, the court referred to **Articles 81 (e) and 86** of the **Constitution** and held that the voting was conducted as provided under the provisions of **Article 86** of the **Constitution** and that the voting method used was simple, accurate, verifiable, secure, accountable and transparent. That, from the scrutiny and recount exercise, the votes were recounted, tabulated and the results announced promptly by the returning officer. That, there were appropriate structures and mechanisms to eliminate electoral malpractices including the safe keeping of electoral materials.

[5] With regard to the second issue i.e. **whether the respondents' non-compliance with the constitution and/or the law in the conduct of the elections affected the results and/or the validity of the results of the election of the Member of the County assembly of Kagan**, the court held the election of the Member of County assembly of Kagan Ward was conducted with strict compliance with the Constitution. That, there was no evidence of non-compliance of the Constitution and/or the written law.

As regards the third issue i.e. **whether the third respondent was validly declared as a Member of County Assembly of Kagan Ward**, the court held that after voting, the ballots were counted after which Form 36A's were filled and later, Form 36B was generated. That, the form 36B was duly signed by the agents who were present and willing to witness. That, the certificate for Form 36C was then generated and issued to the winner who was the third respondent.

[6] Referring to Forms 32 and 32A, the court noted that there were allegations that people were being voted for and the forms being used and held that during the scrutiny and recount there was no evidence that such malpractice was committed. That, no Forms 32 and 32A were

found in the ballot thereby supporting the evidence by the first and second respondents that no Forms 32 and 32A were used. The court also noted "*inter alia*" that it was not clear how the petitioners gained access to Forms 32 and 32A and since the first respondent denied them, it was upon the petitioner to explain how he obtained them. That, it was clear from the annexed forms 32A that they did not have the full details of the people voting. That, the annexed Forms 32A were calculated to mislead the court. That, the attached forms had discrepancies and can be dismissed for want of form and be declared mere pieces of paper. That, during the scrutiny and recount and access to the SD cards, a few errors were noted e.g. above ten (10) votes were found to have strayed. These were taken back to their rightful owners. That, the errors were not grave enough to have the petition allowed.

Ultimately, the court held that after the scrutiny, recount and access to the SD cards, it was clear that it was the third respondent who emerged as the winner. That, the SD cards were clear on the number of voters identified using finger prints and the number of votes identified using document identification. That, no from 32A was ever found inside any ballot box.

[7] On the fourth issue for determination i.e. **whether, the third respondent committed election irregularities**, the trial court held that there was no evidence at all to suggest that in any way the third respondent committed an election irregularly. That, if the petitioner thought otherwise, he was under duty to demonstrate by way of evidence how the third respondent committed the alleged malpractices.

[8] On the fifth issue, i.e. **whether the petitioner should be declared the winner of the election of the Member of the County Assembly of Kagan Ward having majority votes**, the court held that after scrutiny and recount, it was clear that it was the third respondent who was the winner of Kagan ward Member of County Assembly election held on 8<sup>th</sup> August 2017. That, the burden remained upon the petitioner to demonstrate that he was the winner with majority votes and should be declared as the winner. That, on this issue, the petitioner was on a fishing expedition in that from the pleadings and the evidence of the petition, he seeks for an order of invalidation of the election while on the other hand, he seeks to be declared the winner of the elections. That, parties should be bound by their pleadings.

[9] The court further held that the validity of the results were not affected by any non-compliance of the law. That, there were no irregularities of grave nature that would have affected the outcome of the elections. That, during the scrutiny and recount, there were mathematical discrepancies of less than ten (10) votes in total in all the polling stations recounted but the discrepancies did not affect the outcome of the votes cast given that the respondent led by a margin of 642 votes. That, the reports on the logs for SD cards shows the number who were identified using Fingerprints and the number of voters identified using document identification.

That; there was no evidence in the SD cards showing that dead people were being voted for. That, even if dead people were voted for as alleged by the petitioner, the number was about forty seven (47) votes which again could not have affected the outcome of the results.

[10] On the sixth and final issue for determination, i.e. **costs**, the court referred to **Section 84** of the **Elections act** and **Rules 36 (1)** of the **Election Rules** and held that the issues were partly straightforward considering the pleadings and the submissions. That, guided by the "**Ranguma case**," the cost for the petition was fixed at Kshs. One million (Kshs.1 million) to be shared at Kshs.250,000/= each for the first and second respondents and Kshs.500,000/= for the third respondent.

[11] Being dissatisfied with the foregoing findings of the trial court, the appellant preferred this appeal on the basis of the fourteen (14) grounds contained in the memorandum of appeal dated 20<sup>th</sup> February 2018, and filed herein on 1<sup>st</sup> March 2018.

The hearing of the appeal proceeded by way of written submissions with brief oral highlighting of the same by **MR. ODENY**, learned counsel, appearing for the appellant assisted by learned counsels, **MR. OBACH** and **M/S IMBAYI**.

**MR. OCHIENG**, learned counsel, appeared for the first and second respondents and holding brief for **M/S GOGI**, learned counsel. The third respondent was represented by **M/S OPIYO**, learned counsel, assisted by **M/S MAUMO**, learned counsel.

[12] The appellant, in his submissions, reduced the grounds of appeal to seven and framed them as issues for determination Viz:-

**(1) Whether the judgment of the learned magistrate fell short of the expectation of the law as regards the contents of a judgment.**

**(2) Whether the learned trial magistrate erred in failing to determine the validity of the questions raised in the petition and consequently failed to grant appropriate orders.**

**(3) Whether the learned trial magistrate erred in disregarding the evidence and exhibits adduced by the appellant.**

**(4) Whether the trial court misconstrued itself in interpreting the electoral laws with regard to the standard of proof.**

**(5) Whether the trial court erred in failing to appreciate that the real purport and thrust of the appellant's case was centered on the issue of absentee and dead voters being voted for.**

**(6) Whether the trial court erred in failing to compile a report for the scrutiny exercise.**

**(7) Whether the trial court erred in failing to cap the costs it awarded the respondents.**

[13] Under **Section 75** of the **Elections act, 2011**, the High Court has appellate jurisdiction over decisions of the magistrates' courts on disputes relating to elections to county assemblies. Such jurisdiction is limited to "**matters of law only**". (See, **Section 75 (4)** of the **Elections act, 2011**.)

Therefore, grounds of appeal based on matters of fact would fall outside the ambit of this court. Simply put, this court, in the exercise of its appellate jurisdiction is precluded from interfering with findings of facts made by a trial court in an election petition.

[14] The Supreme Court of Kenya (SCOK) in the case of **FREDRICK OTIENO OUTA –VS- JARED OKELLO & OTHERS (2014) e KLR**, defined the phrase matters of law as follows:-

**“It is 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 the 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.”**

[15] In the same case, the court made a distinction between matters of fact and matters of law by stating that:-

**“A question of law exists when the doubt or controversy concerns the correct application of law or jurisprudence to a certain set of facts or when the issue does not call for an examination of the probative value of the evidence presented, to truth or falsehood of facts being admitted.**

**A question of fact exists when the doubt or differences arises as to the truth or falsehood of facts or when the query invites calibration of the whole evidence considering mainly the credibility of witnesses, the existence or relevancy of specific surrounding circumstances, as well as their relation to each other and to the whole and to the probability of the situation. This court cannot adjudicate which party told the truth ----- by reviewing and revising the evidence adduced at the trial court. Neither verbal sophistry, nor artful misinterpretation of supposed facts which were made by the trial court ----- absent any showing that there are significant issues involving questions of law.”**

[16] And, in the **GATIRAU PETER MUNYA CASE** i.e. **GATIRAU PETER MUNYA –VS- DICKSON MWENDE KITHINJI & OTHERS SC Petition NO.28 of 2014**, the three elements of the phrase **“matters of law”** were characterized by the Supreme Court as follows:-

(1) **The technical element** – involving the interpretation of a Constitutional or statutory provision.

(2) **The practical element** – involving the application of the constitution and the law to a set of facts or evidence on record.

(3) **The evidentiary element** – involving the evaluation of the conclusion of a trial court on the basis of the evidence on record.

[17] In both cases aforementioned, the Supreme Court was examining **Section 85A** of the **Elections Act** which limits the appellate jurisdiction of the Court of Appeal on appeals from the High Court to matters of law only. This same position would apply to **Section 75 (4)** of the **Election Act** which provides for appeals from the magistrate’s courts to the High Court.

In this case, the appellant submitted that the basic issue of contention is centered on the SD card logs which were allegedly ignored by the trial court and the forms 32A which were disregarded by the trial court yet they showed that absentee and dead voters also voted in the impugned election.

It is thus, the appellant’s contention that the respondents did not adhere to the provisions of **Articles 81 and 86** of the **Constitution**.

[18] Given the foregoing position taken by the appellant and guided by the aforementioned decisions of the Supreme Court, it would be safe for this court to infer that it is only grounds two (2), four (4), perhaps ground five (5) and ground seven (7) of the grounds of appeal set by the appellant which are relevant to this appeal.

It would therefore follow that the remaining grounds one (1), three (3) and six (6) are irrelevant and their inclusion was a misconception. Other than ground one (1), they appear to be an unnecessary off-shoots of the relevant grounds.

[19] As regards ground one, it appears to have been made in bad faith inasmuch as it tends to question the competence of the trial court in rendering a lawful judgment. It borders on attacking the person of the trial court rather than the issues arising from the election petition. It is a most unfortunate ground raised in this appeal. In any event, it is this court’s opinion that the impugned judgment of the trial court was proper both in form and context as it contained a concise statement of the case, points for determination, the decision thereon and reasons for such decision.

The judgment was not scant as it dealt with the issues arising from the pleadings and those framed for determination (see, **GALAXY PAINTS CO. LIMITED –VS- FALCON GUARDS LIMITED [2000] EA 385**).

[20] On the issue of scrutiny and access in relation to ground six (6), the exercise was ordered by the trial court under its supervision with assistance from the Court’s Executive Officer and two court assistants. The exercise was to be done in the presence of the parties and their advocates as well as their agents/representative and on completion each party was at liberty to make submissions at the end of the hearing.

There was no order that a report on the exercise be prepared by the court or the executive officer and be filed in court.

In any event, the court in its judgment alluded to the exercise and made its findings in relation thereto.

The findings made by the appellant or the respondents were not binding on the court. Clearly, ground six of the appeal was unnecessary and so was ground three (3), which was simply a diversion from ground four (4).

[21] Turning now to the grounds of appeal proper and with regard to whether the learned trial magistrate erred in failing to determine the validity of the questions raised in the petition and consequently failed to grant appropriate orders (i.e. Ground two (2)), the appellant referred to **Section 86** of the **Elections Act** and the **Supreme Court Advisory Opinion No.2 in the matter of the Gender representation in the National assembly and senate (2012) e KLR**, and submitted that an election court ought to consider the conduct of the elections in terms of the principles of the Constitution, whether the electoral laws were upheld and adhered to and the integrity of the election maintained and ultimately the will of the people was expressed and there was substantial compliance with the law by the respondents.

[22] The appellant cited the decision in **KARANJA KABAGE –VS- JOSEPH KIUNA NGANGA & OTHERS (2013) e KLR** and submitted further that numerous electoral malpractices on the part of the respondents were cited in this case by PW2, who previously knew deceased persons called **Nuro Caren Chori, Anunda Yushino Oganda, Ngichu Kaduenya** and **Nyachario Onyango** whose national identification cards were used to vote. That, the third respondent admitted that **Oganda Yushino Anunda**, was his deceased uncle. That, the details of the deceased voters were captured in the logs availed during scrutiny. That, PW4, 5 and 6 reiterated that position and added that they witnessed agents of the third respondent voting using I/d cards of deceased persons. That, PW3, 7 and 8 produced burial permits No.622845 and No.0003759 and a death certificate NO.468071.

[23] It was the appellant’s contention that all the aforementioned issues were grave and needed to be examined by the trial court before coming to a conclusion, but this was not done thereby resulting in failure to give the appropriate order as per **Section 75 (3)** of the **Elections Act**.

Thus, the trial court failed to examine the entire process in order to determine the validity of the issues raised and instead drew its conclusion without considering the entire evidence adduced including the report on scrutiny and recount and the provisions of the electoral laws on what amounts to a free and fair election and whether the election was conducted in compliance with those laws.

[24] Having carefully perused the judgment of the trial court, it is the finding of this court that all the questions and issues raised in the petition and the trial court in particular in relation to the alleged non-compliance with the constitution and the electoral laws by the respondents and the validity of the declaration of the third respondent as the member of the County assembly for Kagan Ward, were carefully and in detail given due consideration by the trial court before arriving at its conclusion based on the issues raised and the oral and documentary evidence availed by all the parties. Indeed, the trial court made its findings on the issues raised based at most on the credibility of the witnesses. Such findings would not fall within the appellate jurisdiction of this court (see, **FREDRICK O. OUTA –VS- JARED O. OKELLO** (supra) and the **MUNYA CASE** (supra)).

[25] It cannot be gain said that the role of an election court in a democratic process is guided by the legal proposition that:-

**“The golden thread running through the Constitution is one of sovereignty of the people of Kenya articulated in Article 1 of the Constitution. The exercise of this sovereignty of the people as anchored by other rights and fundamental freedoms such as freedom of expression, association and freedom of access to information ----- Article 38, articulates political rights which are given effect through the electoral system set out in Chapter Seven titled “representation of the people. Under our democratic form of government, an election is the ultimate expression of sovereignty of the people and the electoral system is designed to ascertain and implement the will of the people. The bedrock principle of election dispute resolution is to ascertain the intent of the voters and to give it effect whenever possible.”** (see, **RICHARD KALEMBE NDILE & ANOTHER –VS- PATRICK MUSIMBA MWEU & OTHERS Machakos election petitions no.1 and 7 of 2013**).

This court is satisfied that the trial court discharged its role guided mainly by the principles, values, requirements and standards set out in **Article 38, 81, 86** and **159** of the **Constitution**. Consequently, the contention by the appellant in ground two of the appeal that the trial court failed to determine the validity of the question raised in the petition and failed to grant appropriate orders is vague and without merit. It is therefore unsustainable.

[26] On whether the trial court misconstrued itself in interpreting the electoral laws with regard to the standard of prove (i.e. ground four (4)), it was the appellant’s submission that under **Section 107** of the **Evidence Act**, it is trite law that he who alleges must prove. The appellant referred to the Supreme Court decision in **RAILA ODINGA –VS- IEBC (2013) e KLR**, and stated that the threshold of proof in election petitions is above the balance of probability though not as high as beyond reasonable doubt save that it would not affect the normal standards where criminal charges linked to the election are in question.

[27] The appellant also submitted that a petitioner should be under obligation to discharge the initial burden of proof before the respondents are invited to bear the evidential burden. He thus contended that his evidence proved to the required standard that the first respondent allowed national identification cards of dead voters to be used in the election in favour of the third respondent. That, the respondents’ defence

to the issue was a clear attempt to be economical with the truth. That, Forms 32A, filled when the electronic voter identification device (EVID) fails to identify a voter, were denied by the Presiding Officers at the polling stations in Luora, Pap Alera, Magwar stream 1 and Bondo streams 1 and 2. That, the said presiding officers gave contradictory evidence in relation to the forms.

[28] The appellant submitted further that most of the disputed forms 32A contained the names of the polling centres and those of the presiding officers and their signatures. That, the affected presiding officers included DW2, 4 and 5.

The appellant relied on a letter from M/s Muma & Kanjama Advocates to state that it was confirmed that about 894 forms 32A were used in Kagan Ward. He submitted that the scrutiny and recount of votes confirmed that details of several deceased voters were captured and that additional irregularities were noted.

[29] The appellant referred to **Section 83** of the **Elections Act**, and submitted, that the provision lays down the standard of proof in certain election petitions but still the trial court is required to take into account the superior provisions of Article 81 and 86 of the Constitution and specifically with regard to whether the errors disclosed materially affect the results. In that regard, the **RAILA CASE 2013** (supra) was referred. It was therein stated by the Supreme Court that the gist of **Section 83** of the **Elections Act**, in relation to whether or not an election was valid, was not based upon the number of errors found but upon the effect of those errors on the results. In looking at the errors, the courts have to consider the principles set out in **Articles 81** and **86** of the **Constitution** which embody the qualitative test and the requirement of efficient, accurate, transparent, accountable and verifiable result.

[30] Referring also to the case of **PETKAY MIRITI –VS- RAGWA MBAE & OTHERS (2014) e KLR**, the appellant contended and maintained that he was questioning the entire process and not the number of votes garnered. That, the evidence showed clear illegalities and outright violation of the law by the respondents.

The appellant submitted that having proved his case to the required standard, the burden shifted to the respondents. He contended that he was subjected to a burden of proof beyond reasonable doubt due to the misconstrued interpretation of **Section 83** of the **Elections Act**.

[31] In response to the foregoing contentions by the appellant, the first and second respondent submitted that the petitioner's witnesses and the petitioner did not see any dead person who was voted for and cannot therefore allege that a lot of people who are dead were voted for. That, no voter was called to court to tender evidence in respect to the fact that he voted twice and/or that he voted for a dead person. That, the fact that the petitioner's witness kept on changing positions casts doubts at the veracity of their evidence and credibility.

On the burden and standard of proof, the first and second respondents contended that the trial court addressed itself appropriately on the same and in particular with regard to the allegations that dead people voted. That, the burden of proof is always on the petitioner and it was therefore for him to demonstrate that there were acts that amounted to a presumption that dead people voted. And, such acts being criminal in nature, the standard of proof was that of beyond reasonable doubt.

[32] In his response, the third respondent submitted that there was only one ground contained in the petition viz that deceased persons voted in the elections. However, during the hearing of the petition, the appellant stated that he did not have evidence to prove that the names of the seventeen (17) people who voted for dead persons or others are in the IEBC register and that he did not know the persons who voted for the dead people as he was not at the stations.

The third respondent submitted that the appellant admitted that the elections were conducted in strict compliance with the law and constitution and did not have any issue with the manner in which they were conducted by the respondents.

[33] It was also submitted by the third respondent that the appellant did not challenge or dispute the final results as recorded in Form 36A. That, the petition as based on one flimsy ground and was thus dismissed by the trial court after it considered the pleadings, applicable law, evidence, submissions and the results of the scrutiny.

[34] The third respondent contended that the allegation of dead voters was not proved and was based on mere hearsays. That, the appellant failed to prove that seventeen (17) dead persons voted for him (3<sup>rd</sup> respondent). That, the scrutiny revealed the true state of affairs.

On the burden of proof, the third respondent submitted that this was settled with finality by the decision of the Supreme Court in the **RAILA ODINGA CASE (2013)** (supra).

It was thus the third respondent's contention that the judgment of the trial court was based on the evidence adduced, analysis of the law, evidence and principles governing the conduct of elections.

[35] From all the foregoing arguments, it is clear to this court that the question posed in this ground four of the appeal revolves around the provisions of **Articles 81** and **86** of the **Constitution** and **Section 83** of the **Elections Act**.

The appellant contends that these provisions of the law were misinterpreted by the trial court and implied that that was the more reason his petition as dismissed.

Apparently, this appeal turns on this ground four as it has a bearing on grounds two and five and thus forms the substratum of the appeal.

[36] The courts when dealing with electoral disputes discharge their mandate on the basis of the principles, values, requirements and standard set out in **Article 81 (e) (iv)** and **86 (a) (d)** of the **Constitution** "*inter alia*".

**Articles 81 (e) (iv)** and **86 (a)**, require the electoral body (IEBC) to conduct elections in a manner that is simple, accurate, verifiable, secure,

accountable and transparent.

**Articles 81 (e) and 86 (d)** require the IEBC to establish the appropriate structures and mechanisms to eliminate fraud and malpractice.

[37] The validity of an election which is disputed would be determined on the basis of the qualitative or quantitative test or both. The application of either test or both of them would depend on the facts of each case, while some legal pundits think that the qualitative test is most suitable others think that the quantitative test is most relevant.

It is however, generally accepted that where the quality of the entire electoral process is in question, then the qualitative test would be most applicable and where numbers and figures are in question, then the quantitative test would be most applicable.

[38] In the case of **DICKSON MWENDE KITHINJI –VS- GATHIRAU PETER MUNYA & OTHERS Civil Appeal No.38 of 2013 at Nyeri**, the Court of Appeal explained the Constitutional basis for appraising an impugned election from both qualitative and quantitative perspectives in the following words.

**“to determine whether the results as declared in an election ought to be disturbed, the court, is not dealing with a mathematical puzzle and its task is not just to consider who got the highest number of votes. The court has to consider whether the grounds as raised in the petition sufficiently challenge the entire electoral process and lead to a conclusion that the process was not transparent, free and fair. It is not just a question of who got more votes than the other. It cannot be said that the end justifies the means. In a democratic election, the means by which a winner is declared plays a very important role. The votes must be verifiable by the paper trail left behind, it must be demonstrated that their existed favourable circumstances, for a fair election and that no party was prejudiced by an act or omission of an electoral official.”**

[39] Basically, an election would not be nullified by the courts on the basis of errors, irregularities arising from human imperfections or otherwise, unless they have substantial bearing on the integrity of the entire election or on the question of which candidate was actually elected by the people. It is them, the people, and not the courts who elect political leaders in this County.

**Section 83** of the **Elections Act**, cautions against nullifying an election because of errors or irregularities which have no bearing on compliance with the applicable constitutional and statutory principles or the correctness of the result declared by the electoral management body.

[40] Indeed, **Section 83** of the **Elections Act**, requires the court to as much as possible preserve the outcome of the election. It cannot therefore be a cure for all errors, irregularities or malpractices that may occur and are common in many an election. But, if an election is conducted in a manner that is inconsistent with the principles laid down by the Constitution, it would be declared null and void even if the result thereof is not affected by errors, irregularities and malpractices which may be in question.

[41] In **JAMES OMINGO MAGARA –VS- MANSON OYONGO NYAMWEYA & OTHERS Civil Appeal No.8 of 2010 at Kisumu**, the scrutiny and recount disclosed multiple errors, irregularities and serious breaches of electoral laws on the part of the presiding officers and returning officers. It also disclosed that the returned candidate had garnered most valid votes with a winning margin of several thousands. This prompted the returned candidate to plead with the court not to nullify the election because of the errors, irregularities and breaches of the electoral laws. However, the plea was rejected by the election court and upheld by the Court of Appeal.

[42] **Section 83** of the **Elections Act, 2011** provides that:-

**“No election shall be declared to be void by reason of noncompliance 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 noncompliance did not affect the result of the election”.**

The essence of the provision as may be deciphered from the English case, **MORGAN –VS- SIMPSON (1975) 1QB 151**, is that:-

**(a) If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not.**

**(b) If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by breach of the rules or a mistake at the polls provided that it did not affect the results of the election.**

**(c) But even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls and it did affect the result then the election is vitiated.”**

[43] Thus, **Section 83** of the **Elections Act, 2011**, embraces both the qualitative and quantitative tests in the determination of election disputes.

It was observed by the Supreme Court in the **MUNYA case** (supra), that the practical realities of election administration are such that imperfections in the electoral process are inevitable, and on this account, elections should not be lightly overturned, especially where neither a candidate nor the voters have engaged in any wrongdoing.

[44] In the instant case, the bone of contention was seemingly the issue of alleged dead voters or absentee voters as reflected in the electoral **Form 32A**, which is provided for under **Regulation 69 (i) (e) (ii)** of the **Elections (General) Regulations, 2012**, the form is simply a voter

identification and verification form applicable where a voter could not be identified by the electronic voter identification device contained in the KIEMS Kit.

Form 32, was also referred to in the petition. It is essentially a declaration of secrecy made by a person assisting a voter and is provided for under **Regulation 72 (5) (a)** of the **Elections Regulations**.

[45] The appellant contended that the respondents irregularly and illegally permitted dead people to vote or be voted for in favour of the third respondent. Consequently, the entire electoral process was compromised thereby calling for a nullification of the election. Apparently, it was this aspect of the process that the appellant had a quarrel with. He appeared to suggest that the first and second respondent failed in their duty in that respect in a manner which was deliberate and calculated to favour the third respondent by inflating his vote count.

[46] The appellant implied that if the number of voters reflected in the more than eight hundred (800) forms 32A were omitted from the third respondent's vote count, then the final result would have been affected in favour of his closest rival who was the appellant himself in that the number of his votes would increase and those of the third respondent would be reduced. Thus, the third respondent's winning margin would have been drastically reduced or obliterated altogether.

[47] All these factors pertaining to the forms 32A and dead voters would leave no other option for an election court to determine the petition than to invoke both the qualitative and quantitative approaches. The appellant's attack on the trial court's application of the quantitative test in determining the petition was therefore without merit considering that among his prayers in the petition was a declaration that he was validly elected as the member of the County Assembly for Kagan Ward.

[48] As reflected in its impugned judgment, the trial court considered with care and detail all the issues it framed for determination without losing sight of the evidence adduced by all the parties and the applicable provisions of the Constitution and statutory Law. In the end, the trial court was not persuaded on both questions of law and fact to rule in favour of the petitioner and nullify the election of the third respondent as member of the County assembly for Kagan Ward.

[49] In dismissing the petition, the trial court held that the impugned election was conducted on the basis of the principles set out in **Articles 81 and 86** of the **Constitution**. The court thus stated:-

**“The voting method used was simple, accurate, verifiable, secure, accountable and transparent. This court and the parties was (sic) able to scrutinize and recount the ballots which had been casted and the votes were able to be recounted, tabulated and the results announced promptly by the Returning Officer. It was also clear that there were appropriate structures and mechanisms to estimate electoral malpractices including the safe keeping of electoral material -----**

**I have already observed that from the record the elections of the Member of County assembly of Kagan ward were conducted with strict conformity with the constitution. There was no evidence of non-compliance of the constitution and or the written law.”**

[50] On the validity of the declaration of the third respondent as the duly elected member of the County assembly for Kagan ward, the trial court observed that the result Form 36B was generated from duly Filled Forms 36A which were duly signed by the candidates' agents who were present and willing to sign. That, the certificates Form 36C was ultimately generated and issued to the winner who was the third respondent. It is instructive to note that these result forms were never disputed by the appellant in the petition and in this appeal.

[51] With regard to the disputed Forms 32 and 32A, the trial court expressed itself as follows:-

**“An issue of Forms 32 and 32As arose in the petition and during the hearing of the witnesses. The petitioner alleged that people were being voted for and the forms being used. During the scrutiny and recount, there was no evidence that such malpractice was committed. The 1<sup>st</sup> and 2<sup>nd</sup> respondents denied the allegations of people being voted for and indeed no form 32 and 32A were found in the ballots. This support the evidence by the 1<sup>st</sup> and 2<sup>nd</sup> respondents that during the exercise, no form 32 and 32As were used.**

**I also wish to mention that it was not clear how the petitioners gained access to the forms 32 and 32As. The 1<sup>st</sup> respondent denied the forms and it was upon the petitioner to explain how he obtained the forms. He did not demonstrate that he wrote a letter to the 1<sup>st</sup> respondent seeking for the forms and how he was supplied with the forms. It was also clear from the annexed forms 32A that they did not have the full details of the people voting. My position is that the annexed Form 32As were calculated to mislead this court. The forms which had been attached had discrepancies and can be dismissed for want of form and be declared mere process of paper. During the scrutiny and recount and access to the SD cards, the court noted a few errors. For instance about 10 votes were found to have strayed; they were taken back to their rightful owners. I do not think the errors were grave enough to have this petition allowed.”**

[52] In effect, the trial court dismissed the disputed forms 32 and 32A for want of probative value and being worthless in demonstrating with credibility that dead voters voted or were voted for in specified polling stations. The court observed that the forms came from unknown source and could not therefore be relied upon. All these were factual findings by the trial court which this court cannot interfere with.

[53] The allegation by the appellant that over eight hundred (800) forms 32 and/or 32A were used in Kagan ward was not supported by any credible evidence as the letter from Muma & Kanjama Advocates was not an authorized document to confirm the number of voters who could not be identified through the KIEMS Kit or the people who assisted voters and made declarations of secrecy.

In any event, it could not be presumed that all the alleged over eight hundred forms 32 and/or 32A favoured only the appellant and not any

other candidate.

[54] Most importantly, the trial court observed that the scrutiny and recount of the votes in specified polling stations did not reveal the presence of Forms 32 and/or 32A thereby confirming the evidence by the 1<sup>st</sup> and 2<sup>nd</sup> respondents that such forms were never used.

The appellant was clearly unable to establish the validity of the forms 32A which he exhibited in court or the presence of over eight hundred (800) of such forms in Kagan ward. In the circumstances, the evidential burden of proof never shifted to the respondents as herein alleged.

[55] Although there existed believable evidence from some of the respondents witnesses that some Forms 32A were used in some polling stations but contrary to the requirements of the electoral laws, it was evident that the irregularity was not widespread as to hold that the entire electoral process was compromised or that the irregularity was substantial enough to interfere with the integrity of the entire process and indeed, the final result of the election.

[56] On the SD cards, the trial court had the following to say:-

**“I find in totality that after the scrutiny, recount and access to SD cards, it was clear that it was the 3<sup>rd</sup> respondent who emerged as the winner.**

**The SD cards were clear on the number of voters identified using fingerprints and the number of voters identified using document identification.”**

This holding was a confirmation that nothing significant germinated from the access to the SD cards which was conducted under the supervision of the trial court itself. There was no obligation on the part of the trial court to be bound by the observations of the appellant and the respondents made and/or filed in court after the access to the cards or logs.

[57] In any event, being adversaries, it was not expected that the petitioner/appellant and the respondent would come up with any report; finding or observation unfavourable to themselves. Undoubtedly, each would display the tendency of being more subjective than objective in their own observations. The trial court was therefore correct in putting absolute reliance on its own observations rather than those of the parties.

[58] Generally, it was clear that the trial court appreciated that there were some irregularities in the conduct of the election in some aspect but it remained firmly convinced that the irregularities were not substantial as to interfere with the will of the people of Kagan ward expressed by their voting in the majority for the third respondent. In that regard, the trial court rendered itself as follows:-

**“The upshot is that the validity of the results were not affected by any non-compliance of the law. There were no irregularities of grave nature that would have affected the outcome of the elections. During the scrutiny and recount there were mathematical discrepancies of less than 10 votes in total in all the polling stations recounted but the discrepancies did not affect the outcome of the votes cast given that the 3<sup>rd</sup> respondent led by a margin of 642 votes.”**

[59] In sum, the question as to whether the trial court misconstrued itself in interpreting the electoral laws with regard to the standard of proof (i.e. ground four (4) of the appeal) must and is hereby answered in the negative. Therefore, this ground four of the appeal must fail and is hereby dismissed along with its sister ground Five (5) i.e. whether the trial court erred in failing to appreciate that the real purport and thrust of the appellant's case was centred on the issue of absentee and dead voters being voted for.

The trial court's order for scrutiny, recount and access to the SD card was a clear indication that it appreciated the real purport and thrust of the appellant's case.

[60] On whether the trial court erred in failing to cap the costs it awarded the respondents (i.e. ground seven (7) of the appeal), the court in its final orders awarded costs of Kshs.250,000/= to each of the first and second respondents and Kshs.500,000/= to the third respondent.

The award of costs is a matter of judicial discretion and like in any civil case, the costs of and incidental to an election petition follow the event. However, an election court is not obliged to make an order for costs against an unsuccessful petitioner as the real purpose of awarding costs is to compensate the successful party for the trouble taken in prosecuting or defending legal proceedings rather than to penalize the losing party (see, **JASBIR SINGH RAI & OTHERS –VS- TARLOCHA/ENSINGH RAI ESTATE & OTHERS, SUPREME COURT PETITION NO.4 OF 2012**).

[61] The award of costs is clearly not meant to unjustly enrich any party and/or discourage a litigant from pursuing what he considers to be a just cause.

This is the more reason why in election petitions, an election court is obliged to award and cap costs by dint of **Section 84** of the **Elections act 2011** and **Rule 30** of the **Elections (Parliamentary & County Elections) Petitions Rules, 2017**.

As indicated by the Supreme Court in the dissenting opinion in the case of **EVANS O. KIDERO & OTHERS –VS- FERDINARD N. WAITITU & OTHERS SUPREME COURT PETITION NO.18 OF 2014**, the rationale for the power to cap costs is to encourage genuine petitioners to challenge flawed elections without being widely hindered by the fear of incurring huge costs.

[62] In **KARANJA KABAGE –VS- JOSEPH KIUNA & OTHERS NAIROBI Civil appeal nO.301 of 2013**, the Court of Appeal held that the capping of costs presents the mischief of runaway costs previously demanded by successful parties in electoral disputes.

Thus, the capping of costs (i.e. to put a maximum limit or sealing of costs) is a valuable tool for promoting the right of access to justice provided under **Article 48** of the **Constitution**.

So, the answer to ground seven of the appeal is in the affirmative. Indeed, the trial court failed to cap the costs as it should have. It's order as to costs must and is hereby set aside and substituted for an award of costs to the three respondents capped at Kshs.500,000/= to be shared by the three respondents in the following manner:-

(a) 1<sup>st</sup> and 2<sup>nd</sup> respondents ..... **Kshs.250,000/=**

(b) 3<sup>rd</sup> respondent ..... **Kshs.250,000/=**

(c) Total ..... **Kshs.500,000/=**

[63] The first and second respondents, being employer and employee were in the petition joined together on the hip like **“Siamese twins.”** There was no justification to award them separate costs. Ultimately, other than the alteration in the costs awarded by the trial court, this appeal is dismissed for want of merit with costs to the respondent both in the lower court and this court.

**J.R. KARANJAH**

**JUDGE**

[Dated and signed this 7<sup>th</sup> day of August, 2018]