



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ELECTION PETITION APPEAL NO. 6 OF 2018

FRANCIS MOENGA OMESSA 1ST APPELLANT

RICHARD KERIMA RATEMO 2ND APPELLANT

-VERSUS-

INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION 1ST RESPONDENT

MEJA JULIUS OKEYO (RETURNING OFFICER

NYARIBARI CHACHE CONSTITUENCY 2ND RESPONDENT

CHACHA MAINA CHARLES 3RD RESPONDENT

JUDGMENT

INTRODUCTION

This appeal arises from the judgment and orders of Hon. E. A Obina SRM Chief Magistrate court at Kisii whereupon he upheld the election of Chacha Maina Charles as Member of County Assembly Ibeno Ward in the elections held on 8th August 2017.

Being dissatisfied with the decision of the Lower Court this appeal was filed challenging the election of the 3rd Respondent.

This appeal has a plethora of grounds which are 18 in number. However, in their submissions, the appellants seem to have identified the main issues which fall for determination by this court.

- (i) Whether the learned magistrate erred in law by rejecting and disregarding the findings of the courts own scrutiny and recount.
- (ii) Whether the learned magistrate erred in law by delivering a judgment full of contradictions.
- (iii) Whether the learned magistrate erred in determining the validity, lawfulness and the legality of the election of the 3rd Respondent as a member of the County Assembly for Ibeno Ward.
- (iv) Whether the learned magistrate erred in law by admitting the Respondent's response to the petition.
- (v) Whether the learned magistrate erred in law by ordering the appellants to pay the costs of the petition to the Respondent.
- (vi) Whether the grounds of appeal raised by the appellant are matters of law.

Background

On the 8th August 2017, the 1st and 2nd Respondents conducted general elections including the elections for Member of County Assembly for Ibeno County Assembly Ward Nyaribari Chache Constituency. After counting and tallying the votes the independent Electoral and boundaries commission, the IEBC declared the 3rd Respondent who had garnered 1,759 votes the winner.

In total there were 20 candidates who contested the seat for Member of County Assembly election in Ibeno Ward and the petitioner listed the following as the top 5 candidates.

CANDIDATE	VOTES GARNERED
Chacah Maina Charles	1,759
Stephen Arika	1,672
Alfred Makori Ogutu	1,302
Christanus Obwacha	1,169
Paul Ondimu Nyamwega	1,064

The petitioner made inter alia allegations of bribery at polling stations assorted voters, and attempted improper influence, denial of voters the right to vote, denial of participation of agents including denial of the opportunity to sign statutory forms, stuffing of votes in ballot boxes and electoral offences, irregularities and malpractices.

The appellant herein was the chief co-ordinator for Mr. Stephens Arika, who was one of the candidates in the general election held on 8/8/2017 where he was contesting for the seat of Member of County assembly for Ibeno ward.

On 27th February 2018, the election court (Hon E.A Obina) dismissed the election petition and upheld the election of the 3rd Respondent as the duly elected Member of County Assembly for Ibeno Ward.

On 31st May 2018 this court gave directions that the appeal be canvassed by way of written submissions.

The appellants case

In his submissions Mr. Omwenga for the appellant did set out the issues arising for determination by the court. (These have been alluded to earlier in the judgment)

- (i) Whether the learned magistrate erred in law by rejecting and or disregarding the findings of the court's own scrutiny and recount.

On this issue counsel submits that the magistrate failed to put weight on the scrutiny report against the pleadings and evidence and material placed before the Court. That the magistrate evaluated the scrutiny report unreasonably and made a decision that was perverse in the circumstances of the case. It is further submitted that the outcome of the scrutiny recount taken together with the evidence of the appellants and their witnesses confirms that the election in dispute was not a verifiable one and that it did not meet the constitutional threshold.

Counsel relies on the decision of *Richard Nyagaka Tongi VS- Independent and Boundaries Commission & 2 others (2013)* eKLR where there were missing counterfoils and other irregularities and it was held, "*In the absence of any credible explanation, such possibilities linger and it cannot be confidently held that the result would not be affected especially in view of the small margin of difference of the votes between the winning candidate and the runner up*".

It is submitted that the entire ward of Ibeno was not subjected to scrutiny but only half of it and therefore the discrepancies and irregularities arising from the report can only be taken to represent part of the whole.

Whether the learned magistrate erred in law by delivering on judgment full of contradictions

It is submitted that the learned magistrate failed in his duty to evaluate the evidence placed before him and arrived at a poorly reasoned decision. That though the magistrate acknowledged the outcome of the scrutiny and recount he contradicted himself by alleging that no rejected votes were found to have been marked in favour of the candidates. **Whether the learned magistrate erred in determining the validity, lawfulness and the legality of the election of the 3rd Respondent as Member of the County Assembly for Ibeno Ward.**

It is submitted that the magistrate erred in failing to properly interpret and apply the electoral principles provided for in the constitution and electoral laws. These are the principles set out in article 81 of which requires that elections be free from violence, intimidation improper influence or corruption and administered in an impartial, neutral efficient accurate and accountable manner.

Article 86 places obligations on the IEBC to ensure that the method of voting used is simple accurate verifiable secure accountable and transparent. That it has to ensure that the votes cast are properly counted, tabulated and the results openly and accurately collated and promptly announced counsel relies on the case of *Raila Odinga & Anor -VS- Independent Electoral and Boundaries Commission and 2 others – Petition No. 1 of 2017*

It is further submitted the ultimate will of the people as expressed in article 38 of the constitution is of utmost importance. He relies on the case of *Moses Wetangula -VS Musikari Kombo & 2 others 2015 eKLR* where it was held, "*the court cannot appear to condone an*

illegality in the election process and would therefore investigate any alleged breaches of the law, even where there were not in the pleadings but arose in the course of the trial”.

It is submitted that various ballot boxes were either already broken open or missing seals. It is submitted that on that account the elections should be nullified counsel has cited the case of ***Ahmed Abdullahi Mohamed & Anor –vs- Mohamed Abdi Mohamed & 2 others (2018) eKLR*** where it was held “***A reading or regulations 81, 83, 86 and 93 of the regulations would show that once the ballot boxes are sealed at the polling stations, there is no authority whatsoever to break open those ballot boxes without an order of the court.***”

It is further submitted that the scrutiny and recount also confirmed that several form 36 ‘A’ were not signed by any of the agents at all and gives the example of Chichiro Primary School.

He relies on the case of ***Ahmed Abdulahi Mohamed (Supra)*** where it was held that “***where forms are not signed by agents and the presiding officers failed to note or record that fact a question of credibility of the results arises.***”

It is submitted that the second Respondent did not tally the results as it was unlikely to miss entering the name and result of a candidate if indeed such tallying took place.

It is further submitted that under regulation 82 of the Elections (general) regulations 2012 is couched in mandatory terms and requires the electronic transmission of results.

Whether the learned magistrate erred in law by irregularly admitting the Respondents responses to the petitioner.

It is submitted that the learned magistrate erred in purporting to waive the requirements of the law fixing time lines for filing response and cites rule 11 of the Elections (Parliamentary and County elections) petitions rules 2017 which provide inter alia that a response is to be filed within 7 days. It is contended that the court lacks jurisdiction to extend the 7 days deadline. It is further submitted that the learned magistrate erred in holding that the responses and affidavits filed and served out of time be deemed to have been duly filed and served.

Whether the learned magistrate erred in law by ordering the appellants to pay costs of the petition to the Respondents.

It is submitted the appellants had proved their case and the scrutiny and recount confirmed serious irregularities with the election in question. It is submitted that there was no basis upon which such punitive costs could be imposed against the appellants whether the grounds of appeal raised by the appellant were matters of law.

Counsel cites the case of ***Dickson Mwenda Githinji VS- Gatirau Peter Munya & 2 others (2014) eKLR*** where it was held, “***If the election court erred in the interpretation of the facts as tendered in evidence this becomes a question of law***”.

It is further submitted that the election of Member of County Assembly Ibeno Ward was badly conducted and marred with irregularities and illegalities.

The conduct of the election violated the principles of laid down in the constitution the election laws and that the results did not reflect the will of the people.

1st and 2nd Respondents Submissions

Learned Counsel Mr. Kibet on behalf of 2nd Respondent submits that on the issues raised by the appellant.

Whether the learned magistrate appreciated and correctly interpreted the findings of the court, its own scrutiny and recount.

It is submitted that the learned magistrate correctly and legally appreciated the findings of the scrutiny and recount undertaken. Counsel relies on the case of ***Hassan Abdalla –VS- Abu Mohamed Abu Chiaby & Anor 2013 eKLR*** where it was held, “***that the purposes of recount exercise is to enable the court to ascertain the accuracy of the results shown in all the forms 35 ‘As and 36B prepared in an election.***”

It is further submitted that the scrutiny and recount exercise established that the result as declared were verifiable save for the minor variations in a few stations which did not affect the result of the election in the subject election for Member of County Assembly Ibeno Ward.

Counsel submits that scrutiny and recount was carried out in the following polling stations Nyamacheo 1 and 2. Gesore 1 and 2, Nyaturago Tea Buying Centre and Nyakororo. In the remaining polling station he submitted that a recount exercise was carried out.

It is submitted that in all polling stations the results in form 36A tallied with the count in the ballot boxes except for a minor error of plus or minus 1 which fact can be taken as a minor error or arithmetical error. It is submitted that the only anomaly in the scrutiny and recount is as regards Nyamacheo 1 and 2 polling station where the unused ballot papers were not in the ballot box as required in the regulations which even if it were ignored could not affect the results.

It is further submitted that save for the anomaly based on the scrutiny and recount report it is apparent that there were no either irregularities established in the remaining 24 polling stations. On the alleged discrepancies at Kirwa Primary School, Riangabi primary Nyamaguru, Gesere Primary, Nyamocheo Primary and Nyaturango polling stations it is submitted that it was not shown how they affected the results.

Whether the learned magistrate erred in law in his findings regarding the alleged irregularities and or malpractices if any and its affect on the election results declared.

It is submitted that in determining whether a petitioner has discharged the burden of proof required to nullify an election, the court should be guided by Section 83 of the Election Act which provides, *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 written law or that the non compliance did not affect the result of the election*”.

Counsel relies on the case of *Gatirau Peter Munya –VS- Dickson Mwenda Githinji & 2 others* ‘Where it was held that it should be shown that an election was carried out substantially in accordance with the principles of the constitution and the Election Act then that election should not be invalidated on the grounds of irregularities.

Counsel relies on the case of *Owino Paul Ongili Babu –VS- Francis Wambugu Mureithi & 2 others 2018 eKLR* where it was held that “for an election to be invalidated for reason for non compliance with provisions of the constitution the Elections Act and or any other electoral law, a party must demonstrate that the election was not conducted in accordance with the constitutional principles and the relevant electoral law or that the non-compliance affected the results of the election.

It is submitted that the learned magistrate correctly applied the law and its principles in his decisions.

On the substantiality test – counsel has cited the case of *Raila Odinga & Anor –vs- IEBC & others petition No. 1 of 2017* and submits that the election conducted on 8th August 2017 for Member of County Assembly for Ibeno Ward met the constitutional threshold of a free, fair and transparent election conducted in strict conformity with the law and that the appellants have failed to demonstrate how there was a breach of the principles of the constitution, election Act and other electoral laws, further, it is submitted that the appellants have failed to demonstrate how the alleged irregularities and or malpractices affected the results and integrity of the elections for Member of County Assembly Ibeno Ward.

Whether the learned magistrate decision and findings that the 3rd Respondent was validly elected as Member of County Assembly for Ibeno Ward is merited in law.

It is submitted that the appellants failed to demonstrate how the subject elections failed to meet the constitutional threshold set under article 81 and 86 of the Constitution, further, that the recount and scrutiny confirmed the results as declared by the 1st and 2nd Respondents that they were credible and verifiable and reflected the will of the people of Ibeno Ward.

Whether the ground of appeal raised by the appellants are matters of law.

It is the contention by counsel that the grounds raised in the appeal are matters of fact and not law.

Counsel cites the case of *Twahar Abdul Karim Mohamed –vs- Independent Electoral and boundaries Commission IEBC & 2 others (Supra)* where the court held that, on appeal the court was not concerned with the facts of the case for their own sake and therefore the court cannot re-examine the evidence to determine whether the election court made the correct finding of facts.

It is submitted that the court should therefore adopt the learned magistrate’s finding of fact which is that the petitioner’s failed to prove their allegations and that the scrutiny and recount did not further establish the said allegations.

Whether the learned magistrate erred in admitting the Respondents responses to the petition filed out of time.

Counsel submits that the learned magistrate exercised his judicial discretion in admitting the Respondents responses to the petition purportedly filed out of time. He cites rules 19 of the Elections (Parliamentary and County Elections) petitions rules 2017 which he states provide for extension and reduction of time. It is submitted that the said rules gives the court discretion of extending time where failing to do so would occasion injustice.

Whether the learned magistrate erred in law by ordering the appellants to pay the costs of the petition.

It is submitted that costs follow the event. That it was conclusive that the appellants dragged the 1st and 2nd Respondents to court for no apparent reason thus they should be condemned to pay costs of the petition and the appeal.

It is further submitted that he scrutiny and recount confirmed that the 1st and 2nd Respondents, rightfully declared the 3rd Respondent the winner in the subject election.

3rd Respondents Submissions

Counsel for the 3rd Respondent Mr. Ojwang submits that the burden of proof lies on the appellant and that all the 18 grounds of appeal are baseless, lack in merit and are an abuse of the court process. That in election disputes the standard of proof is higher than on a balance of probabilities but lower than that of beyond reasonable doubt and cites the case of *Cornel Rasanga Amoth -vs- William Odhiambo Oduol & 2 others (2014) eKLR*, and the case of *Ramadahn Seif Kajembe -vs- The Returning Officer, Jomvu Constituency and 2 others*.

It is submitted that the learned magistrate complied with the provisions of the Constitution of Kenya. On allegations that the 1st and 2nd

Respondent committed breaches of the law, it is submitted that it was incumbent upon the appellant to present these breaches and illegalities and prove how, they affected the result of the election which they did not.

On the issue and allegation that the daughter of the 3rd Respondent was appointed as a clerk at Rikendo polling station and another close relative at Inani polling station counsel submits that the appellants failed to demonstrate how this affected the outcome of the results. It is further submitted that the appointment of election officials was the preserve of the 1st Respondent and every Kenyan had the right to be appointed an election official.

On the failure to allow the candidates agents to sign the statutory forms 36'A' it is submitted that the complaint is self-defeating as most of the forms had been signed by agent. It is further submitted that failure to sign the statutory form 36'A' by an agent does not in itself negate and or invalidate the authenticity of the form without more.

Reliance is placed on the case of ***Ramadhan Seif Kajembe (Supra)***.

On the allegation of lack of stamp on the statutory forms, it is submitted that the only electoral documents required to be stamped is the ballot paper as provided for under rule 69 of the Elections (General) Regulations 2012.

It is submitted that at Rikendo polling station no voter tendered evidence in court to the effect that they were not allowed to vote and no agent confirmed that they were not allowed to witness when elderly persons went to vote. It is submitted that no agents from Rianganbi, Nyamagwa, Chirichiro, Gesere polling stations were called in court to testify that they were turned away.

Counsel cites the case of ***IEBC & Anor –vs- Stephen Mutinda Mule – 2014 eKLR*** where it was held that parties are bound by their pleadings.

It is further submitted that whereas the burden of proof lies on the appellants to establish and lay their case on illegalities and or irregularities, the appellants must go an extra mile to show that the illegalities if any, have substantially affected the results and rendered the same indeterminate. Further that it was incumbent upon the appellants to show whatever irregularities and or illegalities quantitatively or qualitatively or both obliterated the votes and or narrowed the variance between the said declared winner and the runners up.

On issue of costs it is submitted that the court takes cognizance of Section 84 of the Elections Act as well as Rule 36 of the Elections (Parliamentary & County Assembly) petition rules 2017 and award the sum of Kshs.5 million as compensatory costs to the 3rd Respondent.

Issues arising for determination

Upon a perusal of the record of appeal, responses thereto and submissions by counsels I find the following issues to spring forth for determination by this court.

- (a) Whether the learned magistrate erred in law by rejecting and or disregarding the findings of the courts own scrutiny and recount.
- (b) Whether the learned magistrate erred in determining the validity, lawfulness and legality of the election of the 3rd Respondent as a member of the County Assembly for Ibeno Ward.
- (c) Whether the learned magistrate erred in law by irregularly admitting the Respondents response to the petition.
- (d) Whether the learned magistrate erred in law by ordering the appellants to pay the costs of the petition to the Respondent.
- (e) Whether the grounds of appeal raised by the appellant are matters of law.

Analysis and conclusion

(a) Whether the trial magistrate erred in law by rejecting and or disregarding the findings of the court's own scrutiny and recount.

An order for scrutiny and recount was issued by the election court

on 6th November 2017. It is the appellants contention that the scrutiny and recount raised several discrepancies which were duly captured in the appellants final submissions before the lower court. These included un-controverted confirmation of more ballot papers in ballot boxes than the record of people who turned out to vote and missing ballot papers and counter-foils, counsels for the appellant had submitted that the court in its judgment had attempted to disregard its own scrutiny and recount outcomes.

Counsel for the appellant referred to the magistrates alleged justification of the missing ballot papers in his judgment wherein he states as follows ***“Even if the result for Nyamacheo 1 and 2 was to be ignored from the final result after the scrutiny and recount exercise would not alter the outcome of the result”*** (page 772 of the record) ***“should the above result be ignored from the final result, the 3rd Respondent would still be in the lead”*** (page 773 of the record).

Counsels gives the examples of Nyaturago Tea Buying Centre 1 where there were “nil” votes for Paul Ondimu found in the ballot box yet he had been allocated 20 votes as per form 36 A.

At Nyaturago Tea Buying Centre 2 there were 98 more ballot papers than the voters who turned out to vote. By reason of the foregoing, it is contended that the learned magistrate failed to put weight on the report as against the pleadings evidence and materials placed before him.

It is submitted that the learned magistrate evaluated the scrutiny and recount report unreasonably and thereby made a decision that was perverse in the circumstances of the case. It is submitted that the results of the scrutiny and the recount confirm that this was not a verifiable election and that it did not meet the constitutional threshold.

Mr. Kibet learned counsel for the 1st and 2nd Respondent did submit that the scrutiny and recount exercise did establish that the results as declared were verifiable save for minor variations in a few polling stations which did not affect the result of the subject election.

The learned magistrate at page 772 of the record had this to observe:- ***“Error is to human. Some errors in an election are nothing more than what is always likely in the conduct of human activity. If the errors are not fundamental they should be exercised or ignored. Even if the result of Nyamacheo 1 of 2 was to be ignored from the final results the above results be ignored from the final result, the 3rd Respondent would still be in the lead”.***

Counsel for the appellant submits that though the magistrate acknowledges the outcome of the scrutiny and recount exercise, he later contradicted himself by alleging that no rejected votes were found to have been marked in favour of the candidates.

Counsel gives the examples of Kirwa Primary School, where the count had 6 rejected ballot papers compared to IEBC’s 3. At Riangabi Primary School the court rejected 3 ballot papers compared to IEBC’s Nil. At Nyamwanga Primary School, the court rejected 1 ballot paper compared to ‘0’ by IEBC.

It is submitted that by counsel for the appellant that the learned magistrate failed in his fundamental duty of evaluating the material placed before him.

In the Supreme Court case of **Raila Amolo Odinga (Supra)**:-

It was held, “At the outset, we must re-emphasize the fact that not every irregularity, not every infraction of the law is enough to nullify an election, were it to be so, there would hardly be any election in this country, if not in the world that would withstand Judicial Scrutiny. The correct approach therefore, is for a court of law to not only determine whether the election was characterized by irregularities but whether these irregularities were of such nature, or such magnitude, as to have either affected the result of the election, or to have so negatively impacted the integrity of the election that no reasonable tribunal would uphold it”

The court of appeal in the case of **Jackton Nyanunqu Ranguma -vs- Independent Electoral Boundaries Commission & 2 others (2018) eKLR** dealt with the applicability of Section 83 of the Elections Act.

It is noted that there were discrepancies unearthed in the scrutiny and recount. This fact is not denied by the 1st and 2nd Respondents. The election court itself did note these discrepancies and treated them as errors. The question which arises is whether these irregularities were of such a nature or magnitude as to have affected the result of the election or to have negatively impacted on the integrity of the election.

In his Judgment the learned magistrate was of the view that the irregularities unearthed by the scrutiny and recount exercise were not of such magnitude as to have vitiated the result of the election.

I am of the considered view that there were indeed discrepancies unearthed in the scrutiny and recount exercises but it has not been demonstrated how they would have affected the outcome of the election and its integrity.

Whether learned magistrate erred in determining the validity.

Lawfulness and legality of the election of the 3rd Respondent as a member of the County Assembly for Ibeno ward.

It is the appellants submissions that the learned magistrate erred in law in failing to properly interpret and apply the electoral principles provided for in article 81 and 86 of the constitution. It was further submitted that where elections are not conducted in accordance with the constitution, the court has no discretion to look into whether the results were affected.

He cites the case of **Raila Amolo Odinga –Vs- IEBC** where the Supreme Court interpreted the import of Section 83 of the Elections Act.

Counsel submits that it is indeed a deflection from the rights and will of the people when the constitutional principles are not applied. He relies on the case of **Moses Masika Wetangula (Supra)** where it was held that, the court would investigate any alleged breaches of the law even where these were not in the pleadings but arose in the cause of trial. It is submitted that the court is mandated to void the elections whether the results are affected or not.

Mr. Kibet submitted that the magistrate correctly applied the law and its principles in upholding the election of the 3rd Respondent. He relies on the case of **Gatirau Peter Munya (Supra)** where the Supreme Court stated and observed that procedural and administrative irregularities and other errors occasioned by human imperfections are not enough by and of themselves to vitiate an election.”

It is further submitted that that elections for the member of County Assembly for Ibeno Ward was conducted on 8/8/17 met the constitutional threshold of a fair free transparent election conducted in strict conformity with the law. It is further submitted that the appellants failed to

demonstrate how the alleged irregularities and malpractices affected the results and integrity of the elections.

In his Judgment the learned magistrate did observe “It has not been proved that the 3rd Respondent and or his agents committed Electoral offences or corrupt practices and or bribery of voters.

I find that the process of tallying and recounting was in accordance with the law. The elections were accurate, verifiable, secure, accountable and transparent. Evidence has not been led to prove that the 1st and 2nd Respondents were in breach of the electoral code of conduct. It has not been proved that the 1st and 2nd Respondents committed electoral offences the illegalities, irregularities and malpractices complained of were so minor, they could not have affected the outcome and the result of the election”

The magistrate therefore, proceeded to declare the 3rd Respondent as the validly elected member of County Assembly for Ibeno ward and dismissed the petition with costs.

The counts discretion to invalidate an election is to be found in section 83 of the Elections Act which provides:- ***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.***”

At pg 769 of the record the learned magistrate observed:- ***“When a party alleges non-conformity with electoral laws, the petitioner must not only prove that there had been non-compliance with the law but that such failure and non-compliance did affect the validity of the election.”***

I am of the considered view that the magistrate did appreciate and applied the law and principles of vitiating elections.

The issue of denial to polling stations

Regulation 62 of the Elections (General) regulations 2012 provides:- The presiding officer shall regulate the number of voters to be admitted to the polling station at the same time, and may exclude all other persons except

- (a) A candidate
- (b) A person nominated as a deputy to the candidate where applicable
- (c) Authorized agents
- (d) Members of the commission and election officers on duty
- (e) Police officers on duty
- (f) Persons necessarily assisting voters with special needs or assisted voter
- (g) Observers and representatives of the print and electronic media accredited by the commission

2. Notwithstanding sub regulations the presiding officer shall admit to the polling station not more than one agent for each candidate or political party.

3. The absence of agents at a polling station shall not invalidate proceedings at a polling station.”

From the above a presiding officer is obligated to allow at the polling station one agent for each candidate or political party.

It is incumbent upon the petitioner adduce evidence to prove this accredited agents were not allowed access to the polling stations.

Under regulation 79 (6) the refusal to sign form 35 A by a candidate or his agent does not invalidate an election however, it would be dereliction of duty by a presiding officer to refuse to request an agent who is present to sign the form or to record the said refusal if any.

The agents refusal to sign cannot by and of itself vitiate an election. The petitioner has to show how the allegations impugning form 35 affected the results of the election.

The issue as to whether the results were required to be electronically transmitted under regulation 82 of the elections Act.

Section 39 (1) (c) of the Elections Act provides for electronic transmission of results for presidential elections.

Whether the magistrate erred in law for admitting irregularly the Respondents response to the petition.

Counsel for the appellants cites rule 11 of the Elections (Parliamentary and County Elections) petitions 2017 which provides inter alia that a response is to be filed within 7 days. It is submitted that the learned magistrate had no jurisdiction to extend the 7 days deadline and further

that the magistrate erred in holding that the responses and affidavits filed and served out of time be deemed to have been duly filed and served.

It is the contention by the counsel for the Respondents that the learned magistrate exercised his discretion in admitting the Respondents responses to the petition purportedly out of time. It is submitted that the said rule gives the court the discretion of extending time where failing to do so would occasion an injustice.

Rule 19 (1) of the Election rules 2017 provides:- ***“Where any act or omission to be done within such time as may be prescribed in the rules or ordered by an election court, the election court may for the purposes of ensuring that injustice is not done to any party extend or limit the time within which the act or commission shall be done with such conditions as may be necessary even where the period prescribed or ordered by the court may have expired.”***

Section sub rule (1) shall not apply in relation to the period within which a petition is required to be filed, heard or determined.”

From the above, it is quite clear that the court was clothed with the requisite jurisdiction to extend or reduce time prescribed by the rules. The question of extension of time was a discretionary one and the learned magistrate judiciously exercised his discretion in that regard.

Whether the learned magistrate erred in law by ordering the appellants to pay costs of the petition to the Respondent.

It is trite law that costs follow the event. The learned magistrate dismissed the petition with costs.

In the case of **Mercy Kirito Mutegi –V- Beatrice Nkatha Nyaga & 2 others.**

It was held, “The trial court was correct in holding that costs follow the events. None the less we are unable to decipher the reasoning for awarding a higher sum of Ksh.2.3m to the 1st Respondent and 2nd and 3rd Respondents a sum of Ksh.1.3 million. We cannot get a possible explanation from the records why the two parties were given different orders. Rule 36 gives the election court power to cap the costs payable by a party which is merely the ceiling and not the floor.....

In the circumstances of this case the magistrate capped the costs of Ksh.500,000/= to the 3rd Respondent and Ksh.300,000/= to the 1st and 2nd Respondents. I find there was no good reason for the differentials.

It was the same petition and all counsels expended their time and energy equally.

I will allow capping of the instruction fees costs at Ksh.300,000/=

As to whether the grounds of appeal are matters of law

Section 75 (4) of the Elections Act provides:- ***An appeal under subsection (1A) shall lie to the High Court on matters of LAW only.”***

In the Supreme court case of **Gatirau Peter Munya (Supra)** it was held ***“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 conclusion of a trial court on the basis of the evidence on record”

Based on the above binding authority, this court has the jurisdiction to evaluate the conclusion of the election court.

Conclusion

The election of member of County Assembly Ibeno ward was conducted substantially in accordance with the constitution and the electoral laws and the 3rd Respondent was validly elected as the member of County Assembly for Ibeno ward.

This appeal has no merit and its dismissed with costs capped at Ksh.500,000/= for each Respondent

M. MU YA

JUDGE

1/8/2018

Judgment delivered dated and signed this 1st August 2018 to open court and in the presence of learned counsel for the appellant. Learned counsel for Respondent, learned counsel for Ochwangi for 3rd Respondent. Court assistant Mr. Rotich.

Nyamwage holding brief for Rigoro for 1st and 2nd Respondent.

M. MUYA

JUDGE

1/8/2018

Certified copies of the Judgment to be furnished to the parties.

M. MUYA

JUDGE

1/8/2018