Moi & 2 others v Libombolo (Election Petition Appeal E002 & E003 of 2023 (Consolidated)) [2023] KEHC 20471 (KLR) (20 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20471 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

ELECTION PETITION APPEAL E002 & E003 OF 2023 (CONSOLIDATED)

PJO OTIENO, J

JULY 20, 2023

BETWEEN

AMUTETE GREY MOI ..... 1ST APPELLANT

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION RETURNING OFFICER, LUGARI SUB-COUNTY ..... 2ND APPELLANT

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION .... 3RD APPELLANT

AND

WILLIAM MAKHALANYA LIBOMBOLO ..... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. Dolphina Alego (SPM) in Kakamega CM Election Petition No. E004 of 2022)

JUDGMENT

Background of the Appeals

1. There were filed two appeals herein, now consolidated and being; Election Appeals No. E002 and E003 of 2023, arise from the same decision of the Senior Principal Magistrate, in Chief Magistrates Court, Election Petition No. E004 of 2022. The petition before the election was initiated by William Makhalanya Libombolo in which he challenged the election results for Lugari ward declaring Amutete Grey Moi as the Member of the County Assembly elect. It was his contention that the election was marred with malpractices and anomalies such as campaigns by his competitors profiling him as an outsider since he was from Chekalini ward, his agents being denied access to the polling stations, his supporters and staff being assaulted on the polling day, votes casted that could not be accounted for meaning that the results were not verifiable and vote manipulation which was done through the opening of a ballot box at the constituency tallying center at Lumakanda.

2. In a Judgment delivered by the Election Court on 10th January, 2023, it was the verdict of the court that the election in Lugari ward was marred with anomalies and it was therefore declared that it was not conducted in a free and fair manner. The court thus concluded that Amutete Grey Moi was not duly elected as the Member of County Assembly for Lugari Ward.

3. The 1st appellant felt aggrieved and thus launched memorandum of appeal in election petition appeal No. 2 of 2023 is dated 12/1/2023 and premised on the following grounds: -

    a. The honourable presiding election court judicial officer erred in law by failing to frame as an issue and adjudicate whether the alleged electoral malpractices and irregularities affected the outcome of the subject election to warrant nullification thereof under section 83 of the Election Act No. 24 of 2011 (Rev.2016)

    b. The honourable presiding election court judicial officer erred in law by making a determination that the subject election was marred by violence hence not free and fair, whilst the alleged incidence of violence was not proved to the legally required evidential standard.

    c. The honourable presiding election court judicial officer erred in law by failing to establish the authenticity, admissibility and evidential value of annexure WML-3 (video clip) on the alleged profiling of the petitioner.

    d. The honourable presiding election court judicial officer erred in law by finding that the petitioner's agents were locked out of the polling stations against the weight of evidence especially by witnesses for the 1st and 2nd interested parties herein.

    e. The honourable presiding election court judicial officer made a decision on costs that was contrary to section 84 of the *Elections Act* No. 24 of 2011 (Rev. 2016) thereby ostensibly giving a carte blanche to the interested parties herein (who were blamed for the alleged electoral malpractices and irregularities) not to appeal the judgment to the appellant's detriment.

    f. The petition and the evidence adduced in support thereof does not meet the evidential threshold set out in section 83 of the *Elections Act* aforesaid and generally for the nullification of an election.

    g. The entire decision of the honourable presiding election court judicial officer is against the weight of the evidence adduced by the respondent herein.

    h. The impugned judgment is more of an academic treatise on the principle of "electoral" justice and the electoral process generally than a factual evidential analysis of the conduct of the subject election thereby rendering the said judgment legally unsound.

    i. The said judgment lacks ratio decidendi.

4. The appellant therefore prays that this appeal be allowed with costs to the Appellant and that the judgment of the trial court be set aside.

5. The memorandum of appeal in respect to Election Petition No. E003 of 2023 and dated 25th January sets out 17 grounds of appeal as follows: -

    a. The learned magistrate erred in law and fact by failing to conduct any or a proper and coherent analysis of the evidence tendered before court, and in the process, completely and without as much explanation, ignored the evidence tendered by the six witnesses who testified for the 1st and 2nd appellants.

b. The learned magistrate erred in law and in fact by alluding to facts and issues that were wholly irrelevant, and were neither pleaded nor brought out in evidence, and in particular the issue of voters' data and its relationship to profiling.

c. The learned magistrate erred in fact and law in finding that the allegation of profiling was proven by evidence of a single video taken prior to the election by an unknown person and posted on WhatsApp groups of unknown membership.

d. The learned magistrate erred in law and in fact by misapprehending the meaning, nature, effect and proof of profiling in an election matter and as a result, reached the wrong conclusion on the claim of profiling by the 1st respondent herein.

e. The learned magistrate erred by failing to appreciate the legal roles and responsibilities of political party agents in an election.

f. The learned magistrate erred in law and fact by holding that agents were not all present in "quite a number" of the polling station when evidence was tendered to prove the presence of agents at all times in all the polling stations.

g. The learned magistrate erred in law and fact in finding that "in 21 out of 30 polling station (sic), there was no indication of the petitioner's agents" when this issue was not only never pleaded, but it also never arose during the testimony of all the witnesses, let alone the 1st respondent.

h. The learned magistrate erred in law and in fact by failing to appreciate the role of the presiding officer in relation to attendance of party agents and the signing if the polling station diary and form 36A.

i. The learned magistrate erred in fact and in law by attributing blame to the 1st respondents' agents' failure to attend and register on time at polling stations to the appellants herein.

j. Despite the fact that the 1st respondent complained about the alleged delay in admission of his agents in only 4 polling stations, the learned magistrate unjustifiably and without evidence extrapolated this issue to all the 30 polling stations and hence fell into error by holding that only 9 of the 1st respondent's alleged 30 agents signed form 36A.

k. The learned magistrate erred in fact and law by failing to appreciate that under regulation 79(6) and (7) of the Elections (General) Regulations 2012, the absence of an agent from the polling station, or an agent's refusal to sign a declaration of results, or failure by a presiding officer to record the fact that an agent has refused sign the declaration of results, does not in and of itself invalidate the results announced.

l. The learned magistrate erred by completely and inexplicably ignoring established jurisprudence of superior courts on burden and standard of proof in election petitions.

m. The learned magistrate fell into error by finding that the allegation of electoral violence allegedly committed against the 1st respondent's supports was proven to the required standard.

n. The learned magistrate fell into error by holding that the arrest and prosecution of an election official pointed to "an electoral injustice" sufficient to warrant the annulment of the impugned election.

o. The learned magistrate erred by failing to appreciate the implications of section 83 of the *Elections Act* regarding circumstances when an election will be invalidated, and in his regard the court wrongly applied the principles set out by the supreme court in the vase of Raila Amolo

Odinga & another v Independent Electoral and Boundaries Commission & 2 others (2017) eKLR (Raila 2017).

p. The learned magistrate erred by rendering that violates established principles governing the contents of a judgment as set out in Order 21 rules 4 and 5 of the Civil Procedure Rules and other laws.

q. The learned magistrate erred in law and fact by rendering a judgment that is a hotchpotch of divergent online articles banded together without any consideration as to relevance, lucidity and flow and that was essentially a decontextualized copy and paste of various online opinion pieces.

6. The two appeals raise an aggregate of 26 grounds of appeal and urge that the same be allowed and the decision of the election court set aside with costs.

7. With the participation of the parties, the court directed that the appeals, as consolidated, be canvassed by way of written submissions, which were duly filed by all the parties. For purposes of brevity, the Appellant in Petition No. E002 of 2023, shall be referred to as 1st Appellant, the two Appellants in No E003 of 2023 shall be referred to as 2nd and 3rd Appellants while the William Makhalanya Libombolo will be referred to as the Respondent.

1st Appellant's (Amutete Grey Moi) Submissions

8. Even though the party sets out nine grounds of appeal, the submissions identify only four issues for determination. The first issue is whether the Election Court ever framed, as an issue and adjudicate, on whether the electoral illegalities and irregularities alleged by the Respondent affected the outcome of the election and the legal consequences of such failure within the scope and meaning of section 83 of the Election Act No. 24 of 2011 (Rev.2016). It is submitted that the trial court identified issues for determination which it failed to address and instead addressed irrelevant issues such as what profiling entails, who is an agent, their roles, qualities and qualifications, their recruitment, training and accreditation without relating it to the evidence adduced by the parties. They argue that section 83 of the *Elections Act* requires that an election shall not be declared 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 written law or that the non-compliance did not affect the result of the election. In interpreting this provision, they place reliance on the decision of the Supreme Court in Raila Odinga & Another v IEBC & 2 others (2017) eKLR where the court held as follows: -

> "373. 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 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, those irregularities were of such a nature, or such a 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.
>
> 374...even where a Court has concluded that the election was not conducted in accordance with the principles laid down in *the Constitution* and the applicable electoral laws, it is good judicial practice for the Court to still inquire into the potential effect of any irregularities that may have been noted upon an election. This helps to put the agencies charged with the responsibility of conducting elections on notice."

9. The second issue is whether the totality of the Petitioner's pleadings, testimony and submissions met the threshold prescribed under section 83 of the *Elections Act* No. 24 of 2011 (Rev. 2016) and more so whether the Petitioner has proved his case to the required degree or standard of proof. They contend that he who alleges must prove to the required standard as set out in the case of William Kabogo Gitau v George Thuo & Others (2012) eKLR where the Court held as follows: -

> "As regards issue (ii) on the standard of proof that should be applied by the court in considering the issues in dispute in an election petition, it is now established that the standard of proof in election petitions is higher than that which is applied in ordinary civil cases.....
>
> It is this court's view that the standard of proof that must be discharged by the petitioner is that ordinarily applied by the court in civil cases where an allegation of fraud has been made. The court must be satisfied that the allegation of fraud has been properly established. That standard of proof is not akin to that required in criminal cases i.e. that of proof beyond reasonable doubt, but is higher than that which is applied in normal civil cases i.e. proof on a balance of probabilities."

10. It is the additional submission that the alleged profiling of the petitioner was not proved since the maker of the alleged video clip that was produced in court as WML3 was not known and that it was also not established if the video was allegedly circulated to potential voters. He claims that it was not demonstrated how the said video clip affected the voting and the results of the election and that the video clip was not admissible since it was not produced by the maker and cites the case of Ndwiga Steve Mbogo v IEBC & 2 others 2017) eKLR in that regard where the court held that the person who produced the original record would be the most appropriate person to produce the record.

11. On the alleged violence, the petitioner submits that no evidence was tendered to prove that indeed there was violence and that it affected the electoral process and the results. He claims that PW8 and one Dennis Makhalanga who were alleged victims of violence did not adduce any OB report or a duly filled P3 form to prove alleged injuries.

12. On the manipulation of results at Lugari polling station and subsequent opening of a ballot box at Lumakanda tallying centre, it is submitted that there was a switching of votes belonging to him which were credited to a fellow candidate by the name of Richard Wechuli Sisa and to correct the anomaly, IEBC officers opened the ballot box to restore the votes to the rightful owner. He further contends that even if the said votes whose total was 100 were not to be accredited to him he would have still won the elections since he won by a margin of 209 against the 1st runners up and 699 votes against the petitioner.

13. On the allegation that the petitioner's agents were denied entry into the polling stations, he claims that he had nothing to do with that and his victory should not fall victim thereof.

14. On the discrepancy between the figures announced, that is 8832 and the total valid votes cast, that is 8889, he asserts that the tabulation error did not prejudice any of the candidates that the differential figure of 57 votes would not have affected his victory.

15. The third issue of whether the judgment is legally sound on which point it is argued that the same is not in line with Order 21 rule 4 of the Civil Procedure Rules which outlines one of the contents of a judgment to be reasons for the decision.

16. The fourth issue is whether a case has been made out for the appeal to be allowed to which an affirmative answer is given that a case has been made out for settling aside the judgment by the election court.

Submissions by the 2nd and 3rd Appellants

17. It is the joint submissions by the two that the trial court proceeded with the matter as if it was formal proof since not a single reference to their testimony can be discerned from the judgment. They claim that the trial court considered matters that were neither pleaded nor brought out in evidence. They argue that issues for determination by a court ought to be identified and resolved and cite the case of English v Emery Reimbold & Strick (2002) 1 WLR 2409 where the Court of Appeal (England) stated that;

> " ...if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision...the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained...it does require the judge to identify and record those matters which were critical to his decision".

18. On the issue of profiling of the respondent, the interested parties submit that it was the evidence of PW2 that the video clip was nothing but a shouting match between two individuals and did not contain a deliberate ploy to malign the respondent to cause him to lose votes. They claim that it was not proven that the said video clip was posted in WhatsApp groups and if so by whom and it is then added that none of the respondent's witnesses could tell how the video clip influenced voters.

19. On the allegation that agents of the respondent were locked out of four polling stations, they argue that for the trial court, at page 54, to address 21 stations instead of four stations was contrary to what had been raised and by the petitioner yet our court system is adversarial in nature.

20. The other argument for the two appellants is that in terms of the stipulations of regulation 62(3), the Elections (General) Regulations, the absence of agents at a polling station shall not invalidate the proceedings at a polling station. They further rely on regulation 79(7) which provides that the absence of a candidate or an agent at the signing of a declaration of announcement of results under sub-regulation (2) shall not by itself invalidate the results announced. It is then asserted that the law does not require that all agents be present and that the attendance of agents is the responsibility of candidate. In that regard they cite the case of John Kiarie Waweru v Beth Mugo & 2 others (2008) eKLR where the court stated; -

> "The petitioner appears to take issue with the fact that most of the Form 16As that were produced in evidence by the 2nd respondent, were not duly signed by agents of the candidates. The failure by a candidate or his agent to sign the Form 16As cannot invalidate the results contained in the said Form 16As (See Regulation 35A (6) and (7) of the Presidential and Parliamentary Regulations). The fact that the said Form 16As were not signed by the agents does not render any of the results from the various polling centers invalid."

21. On the standard and burden of proof of the allegations that the respondent's staff were assaulted, his agents were ejected from Sirende Primary School polling station 3 and that certain changes were made to form 36A for Lugari Primary School, they contend that the burden of proof lay with the respondent and that the standard of proof ought to be higher than the balance of probabilities but lower than beyond reasonable doubt and that these standards were never met.

22. The 2nd and 3rd Appellants conclude their submissions by stating that change in results was a restoration of votes and the will of the voters.

Respondent's Submissions

23. On the burden and standard of proof in election petitions, it is the respondent's submission that he had the initial evidentiary burden to adduce factual evidence of the averments in the petition and since he adduced factual evidence to prove that the Member of County Assembly elections held in Lugari Ward was marred with irregularities, the burden was shifted to the appellants to adduce evidence of compliance with the law.

24. On profiling, it is submitted that there was adduced a video at the trial court wherein one Ananda Violet Tindi, the ODM candidate openly referred him to an outsider since he was born in Chekalini. He claims that the video recording was captured in a CD and produced pursuant to section 106(4)(B) of the *Evidence Act*. He further submits that there were leaflets thrown around warning "outsiders" from interfering with results and this saw PW8, the respondent's driver being attacked and they reported the matter at Pan Paper Police Post.

25. It was added that profiling a candidate subverts the will of the people and compromises the integrity of election. In putting this point forward, the Respondent cites the case of David Ouma Ochieng v Independent Electoral & Boundaries Commission, Isaiah Nabwayo, (The Returning Officer Ugenya Constituency) & Christopher Odhiambo Karani [2018] eKLR where the court held thus;

> " 66. In summary, the ODM campaign machine ran a dirty campaign during the election for Member of Parliament for Ugenya Constituency in Siaya County similar to the one that ensued during the gubernatorial campaigns for Siaya County preceding the 2013 elections. I find support in the holding from the decision in William Odhiambo Oduol v Independent Electoral and Boundaries Commission & 2 others (Supra) and hold that everything was done to depict the petitioner as a murderer and a candidate who was running against the grain. The election campaigns were repeatedly bombarded with malicious propaganda against the petitioner. The propaganda was beyond what was ordinarily expected from opponents in an election campaign. From the evidence, the County is basically an ODM and Raila zone. I find that the propaganda that the petitioner was supporting Hon. Uhuru Kenyatta was not only offensive but also a blow below the belt, as it were. Taking together all that has been outlined in the foregoing, one cannot say that a fair chance was given to the petitioner to campaign, or that the electors were given a fair chance to pick a candidate of their choice. To put it bluntly, the campaign was not free and fair. The campaign was perverted to the extent that it fundamentally subverted the will of the people and compromised the integrity of the election."

26. On agents being denied entry into the polling stations without justification, he submits that witnesses testified on the tardiness of the interested parties to admit his agents at Mahemas, Lumama, Mafutu and Sirende Primary Schools with PW6 testifying that she was at the Lumama polling station at 4:45AM, voting began at 6AM and that that she was admitted at the station at 8:45AM. PW5 was at the Mafufu polling station at 5:15AM but was only allowed into the station at 12:30PM. He claims that the 1st interested party at page 481 of the record of appeal admits that there was no formula in admitting agents and that it was the testimony of DW3 that she recorded the name of PW5 at 9:53AM to mean that he was allowed at the station after voting had commenced. He claims that the tardiness of the election can also be witnessed when a ballot box belonging to Lugari Primary School was reopened at the constituency tallying center in the presence of 3 agents only when there were 15 candidates.

27. The respondent further contends that there were two form 36 A's one dated 9/8/2023 and another dated 11/8/2022 purportedly to correct an error and he states that the opening of the ballot boxes

interfered with the integrity and credibility of the result. e HHHhHHHHHHe places reliance on the case of Ahmed Abdullahi Mohamad & another v Mohamed Abdi Mohamed & 2 others [2018] eKLR

> "139. I hold that once ballot boxes have been sealed at the polling station, no amount of consensus by electoral officers and agents/candidates can validly lead to their opening without a court order. The act of voting is an exercise of the sovereign will by the citizen which once exercised and the process finalized at the polling station, no one is allowed to tamper with the material that contains that sovereign act unless by authority of a court of law. In this regard, it does not matter that the Returning Officer only wanted to retrieve the results from the ballot boxes.... To my mind, the opening of the ballot boxes interfered with the integrity and credibility of the results from the said two polling stations."

28. It is his contention that article 86(c) of *the Constitution* limits the duty of the returning officer to collating and announcing results and not to instruct alteration of form 36A, then adds that import of section 83 of the *elections Act* was reiterated by the court of appeal in Dickson Mwenda Githinji v Gatirau Peter Munya & 2 others [2014] eKLR where it was held as follows: -

> "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. It is 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 there existed favourable circumstances for a fair election and that no party was prejudiced by an act or omission of an election official."

29. On the structure of the judgment, the respondent submits that the trial magistrate stated the concise statement of the case at pages 501-533 of the record appeal where she analyses the evidence tendered by each witness and outlines the issues for determination at page 533 of the record of appeal and proceeds to explain the court's finding in the rest of the judgment.

Issues for Determination

30. I have looked at the record of appeal and the submissions by the parties. The petition impugns the election results on three issues; profiling of the respondent, denial of his agent's entry into polling stations and malpractices, violence and electoral offences on the polling day. The judgment does not make specific determinations on any of the grounds. The two memoranda of appeal however set forth 26 grounds of appeal which I consider capable of being collapsible into a single substantive issue to be whether the pleaded incidents said to have amounted to electoral malpractices invalidated the Lugari Ward elections.

Analysis

31. The mandate and power of the High Court in election appeals is derived from Rule 34 (10) of the Elections (Parliamentary and County Elections) Petition Rules, 2017 and decreed to entail the mandate to confirm, vary or reverse in whole or in part, the decision of the Court from which the Appeal is preferred and shall have the same powers and perform the same duties as are conferred and imposed on the Court exercising original Jurisdiction. That stipulation regurgitates the now well

established duty of the court as a first appellate court to reappraise and reexamine the entire evidence afresh with a view to coming to own conclusions. The court in that setup, proceeds by way of a retrial but must always appreciate that it lacks the benefit enjoyed by the trial court which recorded the evidence, heard the witnesses talk and observed their demeanour.

32. At the trial court, the Respondent alleged that the elections at the Lugari ward were marred with electoral malpractices which included profiling, assault of his driver, agents being denied entry into the polling stations, discrepancy between the votes announced and the total votes cast and existence of two form 36As.

33. It is trite learning that the burden of proof lays with the person alleging and the standard of proof required in election petition is higher than that in ordinary civil litigation but below that in criminal cases. In addressing the standard of proof, the Court in Bernard Shinali Masaka vs Boni Khalwale & 2 Others [2011] eKLR held as follows: -

> " Further, I agree with the proposition grounded on the decision in Mbowe vs Eliufoo [1967] E.A. 240 that any allegations made in an election petition have to be proved to the "satisfaction of the court". Like Rawal J. in Onalo, I am certain that the standard of proof, save in matters where electoral offences are alleged, cannot be generally beyond reasonable doubt, but because of the quasi – criminal nature of some election petitions, it is almost certainly on a higher degree than merely on a balance of probabilities, the latter being the standard in civil cases."

34. That position was reaffirmed by the apex court in Raila Odinga and Another -vs- The Independent Electoral and Boundaries Commission and others [2017] eKLR when the Court said:

> " In many other jurisdictions including ours, where no allegations of Criminal or quasi – Criminal nature are made in an election petition, an "intermediate standard of proof", one beyond the ordinary Civil litigation standard of proof on a "balance of probabilities", but below the Criminal standard of beyond reasonable doubt" is applied.
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> In such cases, this court stated in 2013 Raila Odinga case that the threshold of proof should in principle be above the balance of probability, though not as high as beyond reasonable doubt ..."

35. It was the testimony of PW1, the Respondent herein, at page 456 of the record of appeal in No. E003 of 2023, that he read in a WhatsApp wall that it was alleged by one Amanda a candidate in the elections who emerged 3rd, that he was not from the said ward. PW2, the Respondent's chief agent, during cross examination said that in the said video one B.N Amanda was exchanging words with someone else. He further stated that the video clips were profiling PW1 saying he was from Chekalini.

36. However, that incident was not alleged to have been attributable to the 1st Appellant and no attempt was made to show how that incident affected the outcome of the elections. This court has had the privilege of watching the video and appreciate its contents. In the video there is an assertion by a candidate other than the 1st Appellant that the Respondent was not born in the ward. The stage as set appears to be a school compound and the engagement is more of a quarrel between one Ananda Violet Tindi and unidentified person. No undoing is alleged not demonstrated against the 1st appellant yet it was his win which was at stake.

37. Election campaigns are known to be largely characterized by use and exchange of words in a bid to woo voters. At times, the information put forward could be truthful and other times false and this is

meant to put a candidate a foot forward from the rest of his competitors. Was the video clip a malicious propaganda meant to sway and subvert the will of the electorate of Lugari Ward. It was the testimony of PW1 that he was born in Chekalini but had lived and settled in Lugari ward. It thus follows that no lies were told about PW1s place of origin. Upon my perusal of the record of appeal, I am unable to tell the members of the alleged WhatsApp group, how many they were, whether they were registered voters of Lugari Ward, if their intent was to vote for the respondent and how the video clip affected their voting. I thus find that the allegation of profiling the respondent by persons other than the 1st appellant was not proved to the required standard to have affected the outcome of the elections.

Denial of entry to the respondent's agents in four polling stations

38. It is the submission of the respondent that his agents at Mahemas, Lumama, Mafutu and Sirende Primary Schools were denied entry into the polling stations. PW6 stated that she was at the Lumama polling station on 4:45AM, voting began at 6AM and that that she was admitted at the station at 8:45AM. PW5 stated that he was at the Mafufu polling station at 5:15AM but was only allowed into the station at 12:30PM.

39. Regulation 62(1) (c) of the Elections (General) Regulations 2012 lists an authorized agent as one of the people a presiding officer ought to admit into the polling station at the start of the voting exercise.

40. DW3, Kadenyi Nancy Mugambi was the presiding officer at Mafutu Primary school testified, at page 487 of the same record of appeal, that she recorded names of all agents once they got into the room and that she recorded the name of PW5 at 9:53 AM. To the contrary, PW5 at page 475 of the record of appeal stated he was an agent at stream two and the presiding officer for the stream was one Vincent who denied him entry. It is difficult to know why PW5 would not properly identify the presiding officer manning the polling station he was to serve. It gives the impression that PW5 could have been denied entry by a person other than the presiding officer whose identity is not known. It was also the evidence of DW3 that no complaints were raised by any of the agents and in fact none was captured in the Pole day diary.

41. However, the law is clear that the absence of an agent during the voting process is by section 62(3) and 79(7) of the Elections (General)Regulations 2012 incapable of invalidating the proceedings at the station. Based on that stipulation, even if there had been sufficient proof that the agents were excluded, that alone would not be a reason to invalidate the elections and nullify the election results.

Assault of the Respondent's agents

42. At page 467 of the record of appeal, PW2 alleges that some agents were assaulted without giving the identity of the agents assaulted or who assaulted them. At page 478 of the record of appeal, PW8, the driver to the respondent, testified that while together with his colleagues, they were attacked by a group of eight people who were unknown to him. He did not associate the attack to any of the parties including the 1st appellant. In fact, on cross examination, he denied knowing the 1st appellant. In effect the evidence of attacks did not demonstrate who was the attacker, the relationship between the alleged attacks and the elections and how they affected the voting and the subsequent results. Without such demonstration, the onus upon the respondent to demonstrate failure to comply with the law was not discharged and it was thus not a basis to disturb the results.

Discrepancy between the votes announced and the total votes cast and existence of two form 36As

43. The total votes declared by the 2nd and 3rd Appellants was 8,832 whereas the total valid votes cast was 8,889. PW1 in his testimony at page 456 questioned the validity of form 36B for this reason. The

appellant on the other hand contends that the vote gap of 57 votes was indeed manifested but could not make a difference in declaring the winner.

44. The respondent further questions the credibility and integrity of the results since there were two form 36A's one dated 9/8/2022 and another dated 11/8/2022 purportedly to correct an error.

45. The interested parties have explained this alleged malpractice at pages 55 and 56 of the record of appeal by stating as follows: -

> 23. the 1st and 2nd petitioner aver that when the results were being announced at the tallying center, the 3rd respondent herein raised a complainant arguing that the votes stated to have been garnered by him at Lugari Primary School Polling Station 1 were at variance with what was announced at the polling station. The 1st respondent, together with deputy returning officer investigated the complaint and found Form 36 appeared to have been altered. This necessitated further investigation that required the unsealing and opening up the ballot box for the said polling station and a recount of the votes, a process that was undertaken in full public and media presence and through the concurrence of all agents.
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> 24. The 1st and 2nd respondents affirm that upon a recount being done, it was found that the 3rd respondent's votes had been reduced by 100 and the votes for another candidate, Sisa Richard Wechuli had been increased by the same margin. This error was rectified and proper entries were made on a new form 36 which was attested to by agents of the affected candidates and both Forms 36 were made available for all the parties. In the circumstances, the error such as was discovered did not affect the petitioner in any way whatsoever, and the results used to declare the winner were based on the actual votes cast for each of the candidates."

46. The significance and finality of the results declared at the polling stations was addressed by the court of appeal in the case of Independent Electoral and Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR wherein it held as follows: -

> "Accuracy of the count is fundamental in any election. Voter turnout determines the outcome of any electoral contest. Numbers are therefore not only unimpeachable, but they are everything in an election. The lowest voting unit and the first level of declaration of presidential election results is the polling station. The declaration form containing those results is a primary document and all other forms subsequent to it are only tallies of the original and final results recorded at the polling station."

47. The 2nd and 3rd appellants have testified and conceded that there were indeed 2 forms 36A and that the second Form 36A was executed at the tallying center to rectify an error in the allocation of votes and signed by the chief agents at the tallying as opposed to the first form which was signed by only two agents at the polling station. To this court, once the ballot box is sealed, it would take a court order to open it. It matters not that that the election officials discover an error capable of rectification by them. It matters not that the parties agree. It matters that the mandate of a presiding officer ends once he counts the vote have the results captured in the statutory forms and the ballot secured in the box in accordance with the regulations. Every error after the ballot box is sealed and declaration made may only be subjected to correction following the due process of the law for conduct of elections. The only process the court discerns to be available is an election petition. That is the only way the sovereign verdict may be protected so that that will is not subverted between the polling station and the tallying center.

48. In this appeal, it surprised at the assertion by the 2nd and 3rd Respondents witness admission to having opened the ballot box without a court order while citing legal provisions he could not identify to the court. Such are the officers the 2nd and 3rd Appellants, and in deed the Kenyan people, should never see again engaging in the management of elections.

49. For this appeal however, the question the Court must pose and resolve is if these errors were so substantial as to demonstrate that the conduct of the elections was so bad and way off the legal requirements that leaves the court with no option but to vitiate the outcome. Related to that question is whether the error and impropriety of opening the ballot box after the declaration was to an extent that it affected the outcome of the election. The Respondent had to the onus to prove to the satisfaction of the court at least one of the two requirements of the law. That is the interpretation given by the Supreme Court in Raila Amollo Odinga v Independent Electoral and Boundaries Commission and 4 others (2017) eKLR where the Court held that: -

> " In our respectful view, the two limbs of section 83 of the *Elections Act* should be applied disjunctively. In the circumstances, a petitioner who is able to satisfactorily prove either of the two limbs of the section can void an election. In other words, a petitioner who is able to prove that the conduct of the election in question substantially violated the principles laid down in our Constitution as well as other written law on elections, will on that ground alone, void an election. He will also be able to void an election if he is able to prove that although the election was conducted substantially in accordance with the principles laid down in our Constitution as well as other written law on elections, it was fraught with irregularities or illegalities that affected the result of the election."

50. Much earlier in Peter Munya's case (supra), the Supreme Court explained this provision as follows: -

> " Where, however, it is shown that the irregularities were of such magnitude that they affected the election results, then such an election stands to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection, are not enough by and of themselves, to vitiate an election."

51. In this instance, the irregularity alleged and admitted by the conductors of elections concerned one polling station out of thirty (30) polling stations. When cross-examined, the Respondent, told the Court that at Lugari Primary School he garnered 54 votes and that is what was recorded in the forms and were never changed by the admitted correction by the 2nd and 3rd Appellant. In aggregate, the Respondent garnered 1065 votes against the 1st Appellant's 1764. Whether or not the irregularity affected the outcome must entail and invite an objective evaluation of the election outcome. It is admitted that the erroneous rectification yielded to the 1st Appellant a benefit of 100 votes which however reduced the votes of a candidate other than the Respondent. Employing an objective test whether that irregularity affected the outcome is to juxtapose that number of votes against the declared results and assess what the outcome would be without that otherwise unlawful act. That would have to invite literal reduction, in this appeal, of the 100 votes allocated to the 1st Appellant. However, the more truth-finding path would have been to ask and conduct scrutiny. Employing deduction as a way of correcting the infraction would reduce the 1st Appellants votes to stand at 1664. When the Court further discounts the differential figure of the votes announced and votes cast being 57, his total votes would still stand at 1607. The 1st runners up in the election was one Sisa Richard Wechuli who garnered a total of 1545 votes. Mathematically speaking, despite all the errors, Amutete Grey Moi would still be declared the winner of the election for the Member of County Assembly, representing Lugari ward. It is therefore the finding by the Court that the proved infraction of the law, thought grievous and may

amount to criminality, did not amount to the conduct of the elections being substantially way off the requirements of the law and that the same did not affect the outcome as to vitiate the elections.

52. Still on infractions/malpractices by the 2nd and 3rd Appellants and narrowed down to the admission of agents into the polling stations, the Respondents claim as pleaded, and the evidence led, amounted to a complaint against four stations. It is the law that all, the Court and parties, are bound by the pleadings filed. In the Judgment at pages 554-555 of the record, the Court sought to analyse all the 30 stations for the presence or absence of the polling agents. The Court then determined that out of the 30, the Respondent had only 9 agents filling the forms and posed the question whether that was a coincidence. While the Court must be commended for the detailed scrutiny, that scrutiny went beyond the scope of the dispute the parties presented for determination. In Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR the Court quoted and cited with approval, a legal treatise on the binding nature of pleadings on the parties and the court in the following words: -

> " As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....
>
> In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice." (emphasis provided)

53. Here I see the Appellants to complain and challenge the decision by the court partly on the grounds that the trial court went outside the pleaded dispute. That is a complain the Court cannot ignore but demands correction. The Court finds that it was erroneous for the Court to delve outside the pleading.

54. In addition to the foregoing, it is not clear from the record and the judgment if indeed the court identified for itself the issues for determination. It is also not very clear from which findings the rendition by the court was arrived at from the very succinct analysis of the fact in the case and the general election practice demands. That civil Procedure Rules prescribe the structure of a judgment is not in vain. It is not to muzzle the hands of the court. It is to make the decision user friendly so that whoever interacts with it is able to understand, with ease, the facts of the dispute, the issues parties want determined and the reasons for determination reached. In that understanding the court is persuaded by the decision in South Nyanza Sugar Co. Ltd v. Omwando Omwando (2011) eKLR where the judge held: -

> " I do not think that, the judgment as crafted by the learned Magistrate really qualifies for a valid judgment. Ordinarily and in law a judgment should deal with issues raised and should

not be scanty. A judgment must comply with the mandatory provisions of order 21 rule 4 of the Civil Procedure Rules which provide that a judgment in a defended suit shall contain a concise statement of the case, points for determination, the decision thereon and reasons for such decision. In the circumstances of this case, it cannot be said from the extract of the judgment I have set out above the trial magistrate complied with this mandatory provisions of the law. The trial magistrate by not setting out points for determination and reasons for his decision contrary to the aforesaid provisions of the law abdicated his judicial responsibility. As a judicial officer he was under a duty to state in writing the reasons which made him arrive at a particular decision on liability and the apportionment thereof. It could not have been done in vacuo. Any judgment that does not contain the aforesaid essential ingredients is not a judgment and an appellate court will frown at such a judgment and indeed impugn it as I hereby do. This ground alone would have been sufficient to dispose of the appeal. "

55. That infraction of the law, on its own, would however not be the reason to allow the appeal because as a first appellate court, there is a duty to proceed by way of rehearing. But, for fidelity to the law, a court of law has no otherwise but to comply with the law it seeks to enforce and apply.

56. In conclusion, having re-examines and re-appraised the record of appeal and submissions by parties, the court determines and finds that the trial court not only misapprehended the standard of proof but also failed to observe the duty to assess how the irregularities proved affected the outcome of the elections before nullifying the results.

57. The appeal is therefore allowed on terms that the decision of the Election Court nullifying the election of the 1st Appellant is set aside and in its place substituted an order dismissing the Petition dated 8th September 2022 with costs.

58. For the trial court, the costs are payable to the 1st Appellant, as the 3rd Respondent before that court. Because the petition was largely on the proven malpractices by the 2nd and 3rd Appellants, they shall not be entitled to any costs. The costs payable to the 1st Appellant is capped at 200,000, subject to taxation.

59. For this appeal however, the costs go to the three Appellants and the same is capped at Kshs. 400,000, subject to taxation, to be shared equally between the 1st Appellant on one hand and the 2nd and 3rd Appellants on the other.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 20TH DAY OF JULY, 2023

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Polycarp Mukabwa: Court Assistant

Mr Mbogo for 1st Appellant

N/A for Mr Oduor for 2nd and 3rd Appellants

Mr Malenya for the 4th Respondent