Kalinga v Independent Electoral and Boundaries Commission & 10 others (Election Petition Appeal E087 of 2023) [2023] KEHC 22171 (KLR) (14 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22171 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

ELECTION PETITION APPEAL E087 OF 2023

DKN MAGARE, J

SEPTEMBER 14, 2023

IN THE MATTER OF THE ELECTIONS (GENERAL)

REGULATIONS, 2012

AND

IN THE MATTER OF THE ELECTIONS ACT (PARTY

PRIMARIES AND PARTY LISTS) REGULATIONS, 2017

BETWEEN

MARY CHARLES KALINGA ..... APPELLANT

AND

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 1ST RESPONDENT

PARTUN MOHAMED MUSA ..... 2ND RESPONDENT

JOSEPHINE WAIRIMU KINYANJUI ..... 3RD RESPONDENT

AUGUSTINE NDEGWA ..... 4TH RESPONDENT

MULKI ABDULLAHI ADAN ..... 5TH RESPONDENT

KHADIJA NGALA ..... 6TH RESPONDENT

MELDTER I. NYAKITI ..... 7TH RESPONDENT

KENGO JUDY CHIZI ..... 8TH RESPONDENT

RUWA ELIZABETH MWANGOLA ..... 9TH RESPONDENT

TERESIA B. MUOKI ..... 10TH RESPONDENT

RACHAEL KATUMBI MUTISYA ..... 11TH RESPONDENT

JUDGMENT

Background

1. The Appeal herein arose from the Judgment and Decree dated 14th March 2023 delivered by Honourable Joe Omido, Senior Principal Magistrate in Kwale CMC Election Petition No. E 002 of 2022. In that case the court dismissed the petitioner's petition with costs of Ksh 400,000/= to the 1st Respondent.

2. As a result of the decision the Appellant, who was the petitioner in the election court, filed this appeal on 13/4/2023. By law, I have up to 12/10/2023 to make this decision. The file was left lying in limbo for some time and even given a date in November. This was because, while e-filing the case, the Appellant filed the same in the civil registry as opposed to the Election Petition registry.

3. This matter was brought to court's attention on 1/8/2023 during the vacation. We had to baby sit the Appeal during the vacation till 29/8/2023, when I gave today's date for judgment. I had to go an extra mile to ensure this ruling is ready in 2 weeks.

4. I have noted some interested parties in the Election Petition. They have no room in this matter. Their work ended when they submitted party lists under the party lists regulations. They are not necessary parties in this appeal. *The Election (parliamentary and county) Election Petition Rules* recognise only petitioners and respondents.

5. The place of interested parties in civil litigation was settled by the Supreme court in the decision of *Methodist Church in Kenya v Mohamed Fugicha & 3 others* [2019] eKLR, where the Supreme Court by majority held as doth: -

> " 53] What should we make of a cross-petition fashioned as such" Yet this Court has been categorical that the most crucial interest or stake in any case is that of the primary parties before the Court. We did remark, in *Francis Karioki Muruatetu & Another v. Republic & 5 others*, Sup. Ct. Pet. 15 & 16 of 2015 (consolidated); [2016] eKLR, as follows (paragraphs 41, 42):
>
> > "Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties' before the Court. The determination of any matter will always have a direct effect on the primary/principal
> >
> > Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us.
> >
> > Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the

> principal parties. An interested party may not frame its own fresh issues or introduce new issues for determination by the Court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court."

6. The interested parties are not proper parties in such an Election Petition and Election Petition Appeal. No orders may be obtainable by them or against them. It is a waste of precious judicial time to include them as interested parties. The case belongs to the primary parties. I will say no more.

Pleadings

7. The Petition dated 7/10/2022 was filed the same date. In a short succinct petition, the Appellant herein sought the following reliefs:

   i. The Court be pleased to declare that special issue of the Kenya Gazette Notice vol. CXXIV No. 186, Kenya Gazette Notice No. 10712 dated 9/9/2022 is null and void to the extend that it fails to nominate to the County Assembly of Kwale a representative of the persons living with disability

   ii. A declaration the nomination of the representatives of the County Assembly of Kwale contained in special issue of the Kenya Gazette Notice vol. CXXIV No. 186, Kenya Gazette Notice No. 10712 is unconstitutional in light of Article 8, 90 and 177 of the *Constitution*

   iii. The nomination of the representatives of the County Assembly of Kwale be re-gazetted in compliance with Articles 177 of the *Constitution* and Regulation 562(2) of the *Election Regulations*.

   iv. Costs of the Petition be awarded to the Petitioner.

8. The 1st Respondent is the only one who validly replied to the Petition. The other parties reportedly filed their responses. The court struck out those Responses. There was no appeal from the order of the court. The documents stand struck out to date.

9. The matter was heard by way of submissions and not viva voce evidence. The effect on relying on documents is that they are not subjected to cross examination. They are thus deemed not be contested. In the case of *Fidelity Commercial Bank Limited v Kenya Grange Vehicle Industries Limited* [2017] eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;-

> "Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it.
>
> In *Prudential Assurance Company of Kenya Limited v Sukhwender Singh Jutney and Another*, Civil Appeal No. 23 of 2005 the Court citing a passage in *Odgers Construction of*

Deeds and Statutes (5th edn.) at p.106 emphasized that in construing the terms of a written contract;

> "It is a familiar rule of law that no parol evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well to deeds as to contracts in writing. Although the rule is expressed to relate to parol evidence, it does in fact apply to all forms of extrinsic evidence."

10. The Election Court and this court will construct documents in a similar manner as there are no witnesses required to know the content of a document. The documents are usually self-explanatory. There need not be a factual decision on them.

The impugned decision

11. In its Judgement dated 14th March 2023, the election Court dismissed the Petition with costs of Ksh. 400,000/= to the 1st Respondent on the basis that the election by nomination of the Respondents conformed with the *Constitution* and electoral laws.

12. The election laws that were said to have been complied with are as doth:-

    a. the *Constitution* in particular Articles 88, 90, 177.

    b. The *Elections Act*

    c. *Elections (General) Regulations*, 2012

    d. *Elections Act (Party Primaries and Party Lists) Regulations*, 2017

13. The Election Court also struck out all responses by all except the First Respondent's response. This was due to noncompliance with Rule 11(1) as read with rule 19 of the *Election (Parliamentary and County) Election Petition Rules*, 2017. Unfortunately, the court indicated it was doing so under the Repealed Rule 14(1) of the *Election (Parliamentary and County) Election Petition Rules*, 2013).

14. There was no appeal on this particular aspect. All the petitioners supported the judgment thus inclusive of this portion striking out their responses. It is therefore conclusive that the petition was not opposed by the 2nd to 11th Respondents. This means that all factual allegations by the petitioner remain unchallenged. The 1st respondent, being a formal respondent can only answer to questions of compliance with the law.

15. The relevant rules which made the responses to be struck out are the *Election (Parliamentary and County) Election Petition Rules*, 2017, provides as doth: -

> " 11
>
> (1) Upon being served with a petition in accordance with rule 10, a respondent may oppose the petition by filing and serving a response to an Election Petition within fourteen days.
>
> (2) The response to a petition under sub-rule (1) shall be in Form 4 set out in the First Schedule.
>
> (3) There shall be as many copies of the response filed as there are persons to be served, including a copy for the election court.
>
> 19.

(1) Where any act or omission is to be done within such time as may be prescribed in these Rules or ordered by an elections 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 omission shall be done with such conditions as may be necessary even where the period prescribed or ordered by the Court may have expired.

(2) Sub-rule (1) shall not apply in relation to the period within which a petition is required to be filed, heard or determined."

16. Though the First Respondent also filed their documents late, they nevertheless sought and were granted extension of time on 3/11/2022. The court considered its power to extend time as enunciated. The court relied on decisions binding on him, that is, *Patrick Ngeta Kimanzi v Marcus Mutua Muluvi & 2 others* [2013] eKLR, where justice Majanja stated as doth; -

> " 27. It is to be noted that even where there is leeway for extension of time, such extension is not automatic and discretion must be exercised judicially and this is dependent on the circumstances of each particular case. The burden is thus upon the person seeking the extension to satisfy the court that his circumstances are such that they are deserving of the court's exercise of discretion in his favour."

17. The court also relied on the case of *Elizabeth Jebet Kibor v Isaac Suaare Oseur & 5 others* [2020] eKLR, where the court, E C Mwita stated as doth: -

> " The court may however exercise its discretion and extend time within which the petitioner may deposit security for costs if on application by the petitioner, sufficient reason or cause is shown. What is clear from section 78(3) is that the petition cannot be heard if security for costs has not been paid."

18. Aggrieved by the finding the judgment of the Election Court, the Appellant lodged this Appeal *vide* its Memorandum of Appeal dated 17th April 2023 and raised the following grounds: -

i. The Learned Trial Magistrate misrepresented, misapprehended and distorted the facts and the Application of aw in respect thereof.

ii. The Learned Trial Magistrate erred in law and fact in finding that the election of the Respondents was in conformity with the electoral laws and Article 171 of the *Constitution*.

iii. The Leaned Trial Magistrate erred in finding that the County Assembly of Kwale was properly constituted in the absence of a representative member being a person living with disability.

iv. The Learned Trial Magistrate erred in law and fact in failing to appreciate that the 2nd, 3rd and 11th Respondents were neither residents nor registered voters of Kwale County and their nomination was thus in fragrant breach of Articles 38, 81 and 90 of the *Constitution* as read with Section 36(1) of the *Constitution*.

19. As such, the Appellant prayed that the Judgement and Decree of the elections Court be set aside and substituted with an Order allowing the Petition.

The jurisdiction of the appellate election court

20. This court being a first election appeal court has its jurisdiction circumscribed under section 75 of the *Elections Act*. The court has to determine only issues of law. In so doing the court will not be blind to the facts. This is so, in a case where an issue of law is determined then the court finds that the factual matrix which the court was to determine was not decided. However, in this case, there are only two sources of facts, the Appellant and the first Respondent.

21. What consists of points of law has been fluid. In the case of *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited* [2020] eKLR, the court of appeal in determining points of law as a second court in civil matter, posited that: -

> " This is a second appeal. I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse."

22. In the case of *Mwathethe Adamson Kadenge v Twahir Abdulkarim Mohamed & 2 others* [2013] eKLR, it was held as Doth: -

> " 13] In interpreting the provisions for the appellate jurisdiction of the High Court under section 75 of the *Elections Act*, it is clear that the court shall have power to entertain and determine an appeal from the Election Court in the following circumstances:
>
> The appeal must arise from proceedings under section 75 (1A) of the *Elections Act* for the determination of a question as to the validity of the election of a member of a county assembly by the Resident Magistrate's Court: -
>
> i. The appeal shall lie to the High Court on matters of law only;
>
> ii. The appeal shall be filed within thirty days of the decision of the Magistrate's Court; and
>
> iii. The appeal must be heard and determined within six months from the date of filing of the appeal."

23. This was similarly decided in the case of *Victoria Cheruto Limo & another v Independent Electoral and Boundaries Commission (IEBC) & another* [2018] eKLR.

24. This court therefore has jurisdiction only in relation to matters of law. Though there is no definition of what constitutes matters of law, there have been judicial determination of this aspect.

25. My working definition of a point of law from distilling the judicial determinations it is a question of significant nature, either arising from a decision based on no evidence, or misinterpretation of a statutory, or regulatory edicts or a constitution.

26. In the case of *Twaher Abdulkarim Mohamed v Independent Electoral and Boundaries Commission (IEBC) & 2 others*, (2014) eKLR the court stated as doth: -

> " 4. Although the phrase 'a matter of law' has not been defined by the *Elections Act*, it has been held in *Timamy Issa Abdalla v Swaleh Salim Swaleh Imu & 3 Others*, Malindi Civil Appeal No. 39 of 2013 (Court of Appeal), (Okwengu, Makhandia & Sichale, JJA) of 13.01.2014 that a decision is erroneous in law if it is one to which no court could reasonably come to, citing *Bracegirdle v Oxney* (1947) 1 All ER 126. See also *Khatib Abdalla Mwashetani v Gedion Mwangangi Wambua & 3 Others*, Malindi Civil Appeal No. 39 Of 2013 (Court of Appeal), (Okwengu, M'inoti & Sichale, JJA) of 23.01.2014 following *AG v David Marakaru* (1960) EA 484.

27. Further, in the case of *Peter Gichuki King'ara v IEBC & 2 others*, Nyeri Civil Appeal No. 31 Of 2013 (Court of Appeal) (Visram, Koome & Odek, JJA) Of 13.02.2014, the Court of Appeal stated as doth: -

> " It was held that it is trite law that the exercise of judicial discretion is a point of law and that the trial court in denying a prayer of scrutiny is exercising judicial discretion. The Court concluded that it would not be feasible for the Court of Appeal to order for a recount and scrutiny as this would involve matters of fact that were within the jurisdiction of the trial court. The court further held that the question of whether the trial judge properly considered and evaluated the evidence and arrived at a correct determination that is supported by law and evidence – with the caveat that the appeal court did not see the witness demeanor – is an issue of law."

28. Whereas in this case, the court did not proceed on *viva voce* evidence, the court has latitude but cannot delve into the issue of fact, unless such fact is based on no evidence.

Issues for determination

29. The Court has reviewed and considered the pleadings, Affidavits and written submissions by counsel in support and opposition to the Appeal. The Court has also considered authorities relied on by the parties in the appeal. I have found that the only issue for determination is whether the Election Court erred in law in finding that the Appellants had failed to prove their case.

30. In determining the identified, issue there are 4 sub-issues in addition to costs: -

    a. Whether the 2nd to 11th Respondents were validly elected through nomination under *Elections Act* (Party Primaries and Party Lists) Regulations, 2017.

    b. Where the failure to nominate people living with disabilities is unconstitutional, null and void.

    c. Whether nominated members need to have either residence or voters registration in the county of nomination.

    d. What reliefs commend themselves.

    e. Who is to bear costs of the petition and the Appeal.

Burden of proof

31. The Burden of proof in election matters of this nature has been litigated over time and settled by the superior courts in this land. This court shall not belabor the same. On that I shall ride on the shoulders of giants. I shall not re-invent the wheel. Egyptians did so years ago.

32. Burden of proof in these matters was enunciated well by the supreme court in the case of *Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae)* (Presidential Election Petition 1 of 2017) [2017] KESC 42 (KLR) (Election Petitions) (20 September 2017) (Judgment) (with dissent - JB Ojwang & NS Ndungu, SCJJ), where the court stated as doth: -

> " The common law concept of burden of proof (onus probandi) is a question of law which can be described as the duty which lies on one or the other of the parties either to establish a case or to establish the facts upon a particular issue.[46] Black's Law Dictionary[47] defines the concept as [a] party's duty to prove a disputed assertion or charge....[and] includes both the burden of persuasion and the burden of production. With that definition, the next issue is: who has the burden of proof
>
> "130. The law places the common law principle of onus probandi on the person who asserts a fact to prove it. Section 107 of the *Evidence Act*, Cap 80 of the Laws of Kenya, legislates this principle in the words: Whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. In election disputes, as was stated by the Canadian Supreme Court in the case of Opitz v Wrzesnewskyj[48], an applicant who seeks to annul an election bears the legal burden of proof throughout. This Court reiterated that position in the *2013 Raila Odinga* case, thus:
>
> 195 There is, apparently, a common thread in...comparative jurisprudence on burden of proof in election cases...that an electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner....
>
> (196) This emerges from a long-standing common law approach in respect of alleged irregularity in the acts of public bodies. Omnia praesumuntur rite et solemniter esse acta: all acts are presumed to have been done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescriptions of the law.

33. On the other hand, the standard of proof has been settled by the Election Petitions over time the Supreme court in the case of *Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties)*; (*supra*) held as doth: -

> " 148. In many other jurisdictions including ours, where no allegations of a 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

[48] *Opitz v Wrzesnewskyj* (2012) SC 55.(195)

reasonable doubt', is applied. In such cases, this court stated in the 2013 *Raila Odinga case* that [t]he threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable-doubt....

149. This is the standard of proof that has been applied in literally all Election Petitions in this country. For instance, in the case of *M'nkiria Petkay Shen Miriti v Ragwa Samuel Mbae & 2 others*[70] the Court of Appeal observed that [f]rom the practice and history of this country, the standard of proof required in Election Petitions is higher than a balance of probabilities but not beyond reasonable doubt save where offences of a criminal nature are in question.

152. We maintain that, in electoral disputes, the standard of proof remains higher than the balance of probabilities but lower than beyond reasonable doubt and where allegations of criminal or quasi criminal nature are made, it is proof beyond reasonable doubt. Consequently, we dismiss the petitioners' submissions that the Court should reconsider the now established legal principle, as discussed above, and find that the standard of proof in Election Petitions is on a balance of probabilities.

153. We recognize that some have criticized this higher standard of proof as unreasonable, however, as we have stated, electoral disputes are not ordinary civil proceedings hence reference to them as sui generis. It must be ascertainable, based on the evidence on record, that the allegations made are more probable to have occurred than not."

34. Therefore, I will not use the criminal standards. In this kind of nominations, the standard of proof is real on a balance of probabilities. Even where it is indicated to be slightly more than the balance of probabilities, it is simply a higher balance. There are no malpractices involved. It is interpretation of the law. Whether the thing happened or did not happen.

Parties submissions

35. Before embarking on the issues that would fall for this Court's determination, I wish to set out in summary the parties' contentions as captured from the Record filed in the Election Court, albeit with due regard to the position that this Court is entitled to deal only with matters of the law at this stage. I will also capture the submissions of parties. Given the length of the submissions and the cross-cutting submissions, if for any reason I do not set the submissions out in full, it is not for lack of industry on part of counsel or time on part of the court but do to economy of space and avoidance of repetition. I have otherwise fully considered the well written and researched submissions.

The appellant's submissions

36. In this Appeal, the Appellant raised grounds inter alia: -

a. The nomination of the Respondents did not comply with Article 81 of the *Constitution* as the elections were not transparent, free and fair and overlooked representation of persons with disabilities.

b. The number of seats available for allocation to the political parties was 13 and the Commission flawed Article 177(1)(b) and (c) of the *Constitution*, Section 36 of the *Elections Act* and Regulation 56(2) of the *Elections (General) Regulations* by allocating the Interested Parties only 10 slots cumulatively instead of 13.

c. There was no compliance with the dictates of Articles 38, 81(1)(c) and 177(1) with respect to persons with disability as no person living with disability was nominated and in breach of Article 90 of the *Constitution* on proportional representation.

d. Further, the nominations were shambolic and a nullity because there was no the 2nd 3rd and 11th Respondents though nominated were not registered voters or residents and so lacked the ethnic diversity of Kwale County as required under Article 88 and 90 of the *Constitution*."

37. The Petitioner relied on Article 177(1) (b). and Section 36 (1) of the *Elections Act* which stipulate as follows: -

> " Section 36 (2) of the *Elections Act* stipulates: -
>
> a. party list submitted by a political party under-
>
> i. Article 177(1) (b) of the *Constitution* shall include a list of the number of candidates reflecting the number of wards in the county;
>
> ii. Article 177(1) (c) of the *Constitution* shall include eight candidates, at least two of whom shall be persons with disability, two of whom shall be the youth and two of whom shall be persons representing a marginalized group.
>
> iii. A party list submitted under sub section (1) (a), (c), (d), (e) and (f) shall contain alternatives between male and female candidates in the priority in which they are listed." (Emphasis theirs)

38. The Appellant also sought reliance inter alia, on *Lydia Nyaguthii Githendu v The Independent Electoral and Boundaries Commission (IEBC) & 17 others* [2015] eKLR where the Court of Appeal stated as follows: -

> " There is a rider that with the exception of County Assemblies the National Party lists have to reflect the regional and Ethnic diversity of the people of Kenya. Article 100 of the *Constitution* underscores the need for the promotion of marginalized "groups" especially women, persons with disability, youths, Ethnic and other minority and majority communities.

First Respondent's Submissions

39. On its part, the 1st Respondent, Independent Electoral and Boundaries Commission respondent inter alia that:

i. The Commissions published the requirements for party and Political Parties submitted 79 lists none of which complied with electoral laws and the same was communicated to the Political Parties.

ii. The Political Parties resubmitted the lists which the Commission found compliant and the Commission published in two national wide circulation Newspapers.

iii. The lists as published were not final and the Commission gave any aggrieved persons to raise any disputes before the relevant bodies.

iv. The Appellant thus ought to have filed her complaint at the Political Parties Dispute Tribunal

v. The Commission acted in accordance with the law in publishing the impugned Gazette Notice.

vi. The available seats were ten, four of which were to be automatically allocated as special seats under Section 38(6) of the *Elections Act* and Article 177(1) of the *Constitution*.

vii. That the total number of seats could only be 24, 20 elected and 4 special seats and marginalized category.

viii. There was no legal requirement that a person nominated must be a resident of the particular county.

40. The 1st Respondent relied inter alia on the case of *Linet Kemunto Nyakeriga & another v Ben Njoroge & 2 others* [2014] eKLR where the Court of Appeal stated as follows: -

> " The IEBC issued guidelines to political parties, "The Party List Formula and Rules of Submission," to, among other things, help the parties in the compilation of the party lists. It prescribed the following requirements:-
>
> "(b) Each party list comprises of the appropriate number of qualified candidates; and alternates between male and female candidates in the priority in which they are listed. However, this criterion does not apply to Senate (Women) Party List (Article 98 (1) (b) of the *Constitution*) as all 16 nominees are women.
>
> (c) The names in the party list shall be in the order of priority.
>
> (d) The party list shall be a closed list, that is, the list may not be amended after it has been submitted to the Commission." (Emphasis ours).

41. It was further stated, in *Linet Kemunto Nyakeriga & another v Ben Njoroge & 2 others* [*supra*] that: -

> " Two new concepts have emerged in our electoral laws; party list and priority of the names in the list. Party list voting systems are widely used elsewhere in the world (particularly in Western democracies) and are designed to ensure that parties are represented proportionally in the legislature and all groups are also fairly represented. There are two broad types of party list system;

a. closed list and open list. Whatever the case, in the party list, as the name suggests, each party lists its candidates as it may be entitled."

b. In an open list system, the voters have the freedom of expressing their preference for a particular candidate in the list. The names in the list are not in any order of priority but are randomly arranged.

c. The order of the final list will depend on the number of votes received by each candidate in the list, with the most popular candidate rising to the top of the list thereby enhancing his/her chance of being elected.

42. They submitted that the list serves as a reservoir of candidates in any of the eventualities enumerated above. It is clear from what we have said up to this point that the IEBC, in a closed list system has no power to rearrange the list or pick out from the list any other candidate apart from the parties' preferred candidate listed at the top of the list if only one candidate is required.

2nd Respondent's Submissions

43. The second Respondent defended the 10 seats allocated. She states that the Appellant had not indicated how the Court misinterpreted misapprehended or distorted facts.

44. Further they state that the Appellant did not show how the nominations done by Pamoja African Alliance can lead to the nullification of the 2nd Respondents nomination by Orange democratic Movement where the appellant is not a member.

45. It is her view that the formula under Regulation 56 of the *Election (General) Regulation* 2012 is that the number of seats won by a political party are divided by the total seats multiplied by available seats a for allocation in the respective House.

46. The allocation of the 4 slots and 6 slots for marginalized was supported. To them, a party list is on priority, and thus those appearing are the only ones to receive the slots. They point out that the gender top up, reduced from 10 in 2017 to 6 in 2012 due to the matrix related to the elected members of the county assembly Only 6 women were required to fulfil the 2/3 Rule. The marginalized required 4. She argues that the Appellant has no case against her.

47. As Regards the third ground of Appeal, the Second Respondent relied on was residence in Kwale and Registration as a voter in Kenya. Though she they do not contest that she was registered in Isiolo county as a voter, she stated that she is a resident. She drills boreholes with the husband around mosques in Kwale. She stated that only requirement was to be a registered voter. She placed reliance on the case of *Esther Okenyuri Anyieni v Mokumi Edmond Anthony & 3 others* [2018] eKLR, where my elder sister Ougo J, held as follows: -

> " 32. Both Article 193 and Regulation 15 of the *Election (Party Primaries and Party Lists) Regulation* 2017 have no such requirement that one must be a registered voter in the place where they are applying to be nominated and therefore the nomination application form by Jubilee Party cannot supersede the *Constitution* and written laws since the only requirement provided for under the law is that, one must be a registered voter and the 1st Respondent has met this requirement.
>
> 33. The 3rd Respondent did not in any way rearrange the list submitted by the 2nd Respondent and it proceeded to gazette the parties in accordance with Section 36(8) of the *Elections Act*, 2011. From the application forms, the Petitioner and 1st Respondent applied for different special seat (Youth and Marginalized). There are no competing interests between them so that even if this court revokes the Gazzette Notice No. 8380, the Petitioner would not be eligible to be nominated in the slot of the 1st Respondent as she had not applied for that position."

48. She submitted that a challenge that she is not registered in Kwale is bad in law. Non-registration in Kwale is conceded, but the questions are whether she is a resident and whether there is such a requirement to be a resident.

49. They stated that the court cannot inquire into a question of fact. She states that the 2nd Respondent owns property in Kwale through her husband and sinks boreholes in Kwale county.

50. The only issue they did not address was in regard to the effect of the facts submitted on the face of the reality that the judgment they defend expunged the 2nd to 11th Respondent's responses and there is no Appeal from such expunging.

51. On the 4th ground, the 2nd Respondent stated that the Appellant is only aggrieved by the 4th Interested party allocation. The same should not be deal with ODM nominees. They contend that the Appellant was fighting for a nomination for herself.

52. On ground 5, the persons with disability, they stated that the persons on top are given priority. The 2nd respondent was nominated under youth category and: -

    a. A person living with Disability was in the second slot. The 2nd Respondent got the nomination.

    b. PAA did not nominate any person with disability. If this is correct, then, the list submitted by PAA was not correct constitutionally. It means that PAA has to forego that seat for incompleteness. Such attitude shows what powers that be, view the people living with disability.

    c. They argue that Augustine Ndegwa was listed in the 2nd slot and as such UDA nominated Augustine Ndegwa.

    d. UDM nominated Mulki Abdulahi Adan, under ethnic minority when a person with disability was third.

53. They have addressed ground of jurisdiction. I shall deal with this in the analysis.

54. The issue whether the appellant was not entitled to be nominated is said not to be meritorious as her party had only 2 slots. They have also challenged the competence of the petition. I shall not address the same as there is no cross Appeal.

55. They also filed supplementary submissions. However, she did not address one fundamental question. They did not have responses on the file as they were filed late and struck out. There was no appeal or cross appeal in that respect. This is because the facts she was submitting on were not in court.

The 3rd Respondent's submissions

56. The 3rd Respondent filed written submissions dated 28/8/2023, where she submitted inter-alia that the election Court correctly dismissed the Appellant's case. To buttress this point, it was submitted that there was no law requiring a nominated member to be from the same county and the 3rd Respondent resided in Kwale County and not Kilifi County.

57. The 3rd Respondent relied on Article 193 (1) of the *Constitution* and Section 25 of the *Elections Act*. Reliance was placed on the case of *Esther Okenyuri Anyieni v Mokumi Edmond Anthony & 3 others* (supra) eKLR. It was their further submission that the Appellant failed to discharge the burden of proof in election cases which was above a mere balance of probabilities.

4th Interested Party and the 11th Respondent

58. The 4th Interested Party and the 11th Respondent submissions dated 1/9/ 2023. They raised three issues and submitted inter alia that the Trial Court rightly dismissed the Petition. They submitted that the Appellant was not member of the 4th Interested Party and as such cannot purport to challenge the nomination of the 11th Respondent.

59. It was their considered submission that the Election Court correctly found that it had no jurisdiction to entertain disputes that arose prior to the publication if the Gazette Notice No. 10712. They relied on the decision of *Mohammed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others* (2019) eKLR. They submitted that Article 193 (1) of the *Constitution* and Section 25 of the *Elections Act* have no provision requiring a nominee to be a resident of the same county. As was usual with these submissions the case of *Esther Okenyuri Anyieni* (*supra*) became handy.

60. Further, it was the submitted that the court correctly found that the 1st Respondent used the correct formula in allocating the seats in accordance with Articles 90 and 177(1) (b) and (c) of the *Constitution* and Section 36(9) of the *Elections Act*.

61. Further, it was submitted that where the law did not provide for an allocation of the seats in case of a tie and so the 1st Respondent was correct in devising means to prevent unconstitutional ends by reasonable judgment and procedure as correctly held by the Election Court. Reliance was placed on the case of *Harold Kimunge Kipchumba v Independent Electoral & Boundaries Commission & Another* (2017) eKLR.

62. They further submitted that the Party List was a closed list and once submitted for elections could not be amended as provided for under Section 13 (2) of the *Elections Act* and as settled in the supreme court case of *Moses Mwirici & 14 others v Independent Electoral & Boundaries Commission* (2016) eKLR. It was their considered view therefore that the Appellant had not met the burden of proof and the lower court was correct in dismissing the Petition.

The 5th Respondent submissions

63. The 5th Respondent filed the written submissions dated 17th August 2023 where he submitted that in allocating seats to the political parties, the 1st Respondent correctly applied the formula in Regulation 56(2) of the *Elections (General Regulations)*, 2012, being, the number of seats won by a political party divided by the total number of seats divided by the total number of seats available for allocation and in this case, every party could not have a member as the formula locked them out.

64. They urged me to dismiss the petition as baseless. They urged that the appeal was field out of tie contrary to the constitutional timelines set out in section 76 (1) of the *elections Act*. The said section provides as doth: -

> Presentation of petitions
>
> (1) A petition—
>
> (a) to question the validity of an election shall be filed within twenty eight days after the date of declaration of the results of the election and served within fifteen days of presentation;
>
> (b) to seek a declaration that a seat in Parliament or a county assembly has not become vacant shall be presented within twenty-eight days after the date of publication of the notification of the vacancy by the relevant Speaker; or
>
> (c) to seek a declaration that a seat in Parliament or a county assembly has become vacant may be presented at any time

65. They also rely on Article 87 of the *Constitution*. The same provides as follows: -

> " 87. Electoral disputes
>
> 1. Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.
>
> 2. Petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission.
>
> 3. Service of a petition may be direct or by advertisement in a newspaper with national circulation.

66. Sincerely speaking, I did not understand what they were saying with this kind of submissions. The articles and sections referred to are totally irrelevant. We are not dealing with a petition under section 76 or article 87 but an Appeal under section 75 of the *elections act* which provides for:

> " (4) An appeal under subsection (1A) shall lie to the High Court on matters of law only and shall be—
>
> (a) filed within thirty days of the decision of the Magistrate's Court; and
>
> (b) heard and determined within six months from the date of filing of the appeal."

67. She raised issue with the Appeal being field as a civil Appeal and not an election Appeal. This is also much ado about nothing. I am enjoined to have regard to determination of disputes without undue regard to technicalities. This is circumscribed under Article 159 of the *Constitution*.

The 6th and 7th Respondents

68. The 6th and 7th Respondents filed their joint written submissions dated 28th August 2023 through which they submitted inter alia that the total number of the slots available for allocation was 10 and not 14 as contented by the Appellant and the final list was to be picked on priority basis.

69. It was further submitted that the 1st Respondent complied with Article 177 1) (c) of the *Constitution*. Further, that there was no requirement that the nominee be a resident of the County and so it would not matter that the 6th and 7th Respondents were residents of Kwale County. Reliance was placed on Articles 90 and 177 of the *Constitution* and Section 26 (8) of the *Elections Act* as well as Regulations 54, 55 and 56 of the *Elections (General Regulations)*, 2012.

70. It was their submissions that in the absence of legislation to guide scenarios of a tie, the 1st Respondent was correct in its decision to prevent unconstitutional ends as correctly held by the trial court. Reliance was placed on the case of *Harold Kimunge Kipchumba v Independent Electoral & Boundaries Commission & Another* (2017) eKLR (*supra*).

71. It was also submitted that on jurisdiction, the trial court correctly exercised its jurisdiction as an election court under Article 87(1) of the *Constitution* and Section 74 of the *Elections Act*.

4th,8th and 9 Respondents submissions

72. I have not had sight of the submissions by the 4th, 8th and 9th Respondents Represented by Rashid Mbwiza.

The 10th Respondent's submissions.

73. The 10th Respondent filed its written submissions dated 29th August 2023, where she submitted that the 10th Respondent was duly nominated and satisfied the conditions under Article 193 (1) of the *Constitution*.

74. Counsel submitted that Section 34(5) of the *Elections Act* was followed because more slots than 10 could not be provided because the list was filled and closed and the 10th Respondent was among the top in the list.

75. She submitted that as required under Regulations 54, 55 and 56 of the *Elections (General Regulations)*, 2012, the party lists were in accordance with the Parties' Rules and the formula of the allocation of Rues which the trial court correctly established.

76. Lastly, it was the submission of Counsel that there was no requirement that one be a registered voter in the place they apply to be nominated and relied on the case of the *Violation by Non-Inclusion of the Persons Living with Disabilities in Kisii County Assembly* (2018) eKLR.

Analysis

77. The appeal and petition before the court reminds me of the scenario in the late 1990s where a Chief Justice of this country struck out a constitutional petition for being incompetent, since he, had failed to gazette rules, which were to provide how the court was to be approached.

78. The court' duty is circumscribed. It will rely on findings of fact unless the findings are such that no reasonable tribunal properly looking at the same facts could come to the same conclusion.

79. The parties are also under duty to have proper pleadings. Any evidence that is tendered, without supporting pleadings does not help any party. The evidence on record and submission by parties is that virtually all the nominees who were elected are not registered voters in Kwale county. It is a big indictment of the people of Kwale on their inability to produce leaders. However, pleadings are against a few of them.

80. The court cannot act on evidence, even where it is established, in the absence of pleadings. In the recent presidential Election Petition, the court of Appeal of Nigeria sitting as the election court, in *Peter Gregory Obi & another v Senator Bola Ahmed Tinubu &INEC & 3 others* consolidated with Petitions No. 4 and 5 both of 2023, the Election Court stated as doth: -

> " In *Belgore v Ahmed* (2013) 8 NWLR (Pt.1355) 60 the complaint against averments in the petition that were unspecific, generic, speculative, vague, unreferable (sic), omnibus and general in terms. The Apex court specifically held as follows: -
>
> > Pleadings in an action are written statements of the parties wherein they set forth the summary of material facts on which they rely on in proof of this claim or his defence as the case may be, and by means of which real matters [in] controversy between the parties are to be adjudicated are pleaded in a summary form. They

must nevertheless be sufficiently specific and comprehensive to elicit the necessary answers from the opponent.

81. The facts that are conceded and not contentious are: -

a. The 2nd ,3rd and 11th respondents are neither residents nor registered voters of Kwale county.

b. The 4th Respondent, Augustine Ndegwa is a man though nominated as a woman and listed in the Kenya gazette notice as a man.

c. The 5th respondent is a female nominated as female and listed in the Kenya gazette notice as a man.

d. There was no person with disability nominated to the County Assembly of Kwale.

e. Only the 2nd Respondent was nominated as a youth

f. In both 2017 and 2022 election cycles there has been no persons with disability nominated to the county assembly of Kwale.

82. There are constitutional imperatives that govern elections. The elections, whether through proportional representation under Articles 90 and 177 or through universal suffrage must be free, fair and credible. They must reflect the will of the people and not the whims of the ruling elite who decide who gets elected where and in which county. This is in protection of the people's political rights under Article 38 of the *Constitution*.

83. The composition of the county assembly is a factor of the constitutional structure as set out Article 1 of the *Constitution* under Sovereignty of the people, which provides as hereunder: -

> " 1. All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.
>
> 2. The people may exercise their sovereign power either directly or through their democratically elected representatives.
>
> 3. Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution
>
> a. Parliament and the legislative assemblies in the county governments;
>
> b. the national executive and the executive structures in the county governments; and c. the Judiciary and independent tribunals.
>
> 4. The sovereign power of the people is exercised at:
>
> a. the national level; and
>
> b. the county level."

84. Everyone is enjoined by article 3 of the *Constitution* to protect and defend the *Constitution*. The article provides as doth: -

> " Defence of this Constitution

1. Every person has an obligation to respect, uphold and defend this Constitution.

2. Any attempt to establish a government otherwise than in compliance with this Constitution is unlawful."

85. Devolution of power is now a reality. It allows people to exercise power at the grass root level. Under article 10 devolution is not just a concept one of the national values and principles of governance. The said article provides as doth: -

> " 10. National values and principles of governance
>
> The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them-
>
> 1. applies or interprets this Constitution; b. enacts, applies or interprets any law; or c. makes or implements public policy decisions.
>
> 2. The national values and principles of governance include
>
> a. patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
>
> b. human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
>
> c. good governance, integrity, transparency and accountability; and...
>
> d. Sustainable development

86. Under Article 4(2)- Kenya is said to be a free democratic and multiparty state founded on national values of governance referred in article 10. To be able to understand the elections, one must have a wholistic approach to constitutional interpretation. It cannot be mechanistic and textualist.

87. I am grateful for the 2nd Respondent's succinct submissions. They bring out the problem with people with disability. Only ODM party had the youth and person with disability with a realistic chance of appointment. The rest of the parties picked the amorphous ethnic minorities, minority group over the youth and persons with disability.

88. This is the basis of institutional discrimination on the youth and person with disability. The 2nd Respondents made submissions, without basis that the challenge on person with disability has no legal basis. The question I will address later, is why from 2017 to 2022, the County Assembly has not found itself with people living with disability. The parties conveniently place them in No. 2 or 3, where there is a snow ball chance in hell to be nominated.

89. It is surprising that 60 years from independence, the people of Kwale have had a significant population of its marginalized put in the back banner while able bodied businessmen and women and political willy dealers are said to be marginalized. They are not only not registered in Kwale, but the leaders found it convenient to import non-residents to be nominated.

90. There must be registered voters and residents who are on the qualified lists submitted. The reason the list is long enough is for eventualities like the ones contemplated in this matter.

91. It follows though regional balance as known in the National Assembly and Senate may not be blindly applied, our constitutional architecture provides for balances within the county. There may be counties that are homogenously having one ethnic or religious groups. No-one can begrudge them. However, diversities must be taken care of in line with article 90, 177 and 27(4) of the *Constitution*.

92. In the case of *Rose Wairimu Kamau & 3 others v Independent Electoral & Boundaries Commission* Civil Appeal No. 169 of 2013 [2013] eKLR, the Court of Appeal stated that: -

> " Although Article 90(2) (c) of the *Constitution* excludes the criteria of regional and Ethnic diversity of the peoples' of Kenya from consideration in the nomination at the county level, nonetheless it does not obviate any balance in the community of the county concerned, that is to say that nomination for women, the youth and the people with disability should be done fairly and equitably with a view to ensuring that (a) community and cultural diversity of the county is reflected in the County Assembly."

93. The court of appeal was looking at the criteria for nomination and how to balance within communities. These groups can be obtained through intersectionality where, in appointing people with disability, minorities are looked at. The same with the youth and women or gender balance. It never elevated ethnicity to a pedestal for nomination.

94. Under Section 34(6) of the *Elections Act* the party lists submitted to the Commission under this section shall be in accordance with the *Constitution* or nomination rules of the political party concerned.

95. I am aware of the position held in the case of *Community Advocacy and Awareness Trust & 8 others v Attorney General & 6 others* [2012] eKLR, where Majanja J stated that: -

> " the process of compliance with the various provisions set out in the *Constitution* that seek to ensure there is regional and ethnic diversity and that disadvantaged groups are represented is not intended to be an exact science carried out with Pythagorean precision. The court in evaluating the facts and evidence before it is not expected to substitute itself as the appointing authority"

96. That case turned on its own facts. The court was not dealing with a scenario we have in Kwale county assembly where most seats were given to people who have no residence or registration connection to the county. Though nomination may not be an exact science like physics and chemistry, it is equally not magic, mysticism and sorcery. It is a social science where circumstances of the people are taken care of. It is not a ground to raise mysticism and other forms of -isms and obfuscate them through refined, rhetoric, king's English and sophistry.

97. Consideration of ethnic marginalization is to be considered secondary to the three major established grounds of marginalization. That is gender, youth and people living with disability. For the county assembly, the constitutional imperative of not more than two thirds being of one gender cannot be gainsaid. It is a pure mathematical equation with no magic or mysticism.

98. On people with disability, there is no provision for progressive attainment in the county assembly. The requirement of having people with disability is attainable pronto. The only requirement is that in choosing the 5% people with disability, ethnic diversity and ethnic minorities must be considered.

99. Even within the youth, within the limited space, there should always be a man and woman as they represent different typologies of marginalization. The girl child empowerment and the boychild emancipation should be reflected in the nomination. Otherwise that class of people will remain unrepresented. This should be true youth and not people outside the youth bracket.

100. It is therefore my finding that in designing the marginalized list, ethnicity and youth on one hand and ethnicity and people with disability are to be taken not as separate fields but intersectionality between youth and ethnicity and disability and ethnicity. However, their slots cannot be limited through intersectionality between youth and people living with disability and reduce representation. Though plausible, it should be taken as one or the other.

101. I take judicial notice that the court of Appeal of the republic of Kenya has attained the constitutional imperative regarding the people with disability forming not less than 5% of its members. The county assembly are required to have attained the percentage way back in 2013. We cannot be arguing, 13 year after promulgation of the *Constitution* on the place of the people living with disability in the leadership structure.

102. The argument that IEBC was bound by politicians that design the list is untenable. IEBC has in the past used its constitutional powers to balance regional, ethnic and gender issues in the list. They cannot state that when in the national assembly, they pick a second youth from the second largest party, in lieu of the fist placed youth to balance gender, they have more powers than when they pick a 2nd or 6th placed person living with disability to fulfill a constitutional imperative.

103. In the case of *Lydia Mathia v Naisula Lesuuda & another* [2013] eKLR, the court of appeal held as follows: -

> "I find as follows; IEBC as an administrative body should act fairly reasonably and comply with the requirements imposed on them by law have the right to seek redress before a court or tribunal. The elections by way of party lists commenced when different political parties presented their party lists and concluded upon gazettement of the nominees who had met the requirements of Article 90 (2) (c). Section 36(4) of the *Election Act* states that,
>
> > "Within thirty days after the declaration of the election results, the Commission shall designate, from each qualifying list, the party representatives on the basis of proportional representation".
>
> What this court deduces from section 36(4) of the *Elections Act* is that the lists that had been presented to the 2nd Respondent were valid and that it was incumbent upon the 2nd Respondent to designate the representatives on the basis of proportional representation.
>
> It is not the Petitioner's contention that the list was not valid. This section does not state that it had to be in order of priority in the party list rather the words used were qualifying lists. Article 90 (2) (b) of the *Constitution* states that except Article 98 (1) (b) (which refers to women members nominated to the Senate) the party list shall comprise the appropriate number of qualified candidates and alternates between male and female candidates in the priority in which they are listed. The plain meaning of this sub article is that with the women nominated to the Senate IEBC had the mandate to designate, bearing in mind regional and ethnic diversity of the nominees and not necessarily looking at the order of priority in which nominees were listed."

104. The next question then is this, if we are looking for ethnic minorities and marginalised without portfolio, where are the youths, men and women? Where are people with disability. I agree with the petitioner that the list contained persons whom the elections for special seats were not meant for.

105. How does having three out of 4 marginalised people from outside the county cure marginalisation within the county. Who represents people living with disability?

106. The *Elections Act* cannot provide for everything. However, when it comes to marginalisation, it must be marginalization within the county. There is already an injunction under article 177 that there is to be national or regional balance within the county. Where then does the power to collect Kenyans from other counties to fill positions in Kwale county come from. A Kenyan has a right to work and live and even own land anywhere in the country. Where he does so is home. Before he exercises that duty, we cannot impose him on the people of a county where they have no connection either by registration or residence.

107. The 1st Respondent was under duty to comply strictly with Article 90 and 177 and ensure that persons with disability were nominated together with the youth. These are youth from the county or registered in the county. Section 13 c of the *Elections Act* as introduced by Legal Notice No. 73 of 2022, provides that: -

> " 13C "Transfer of registration A voter is not qualified to transfer his or her registration unless at the date of his or her application to be transferred he or she was ordinarily resident in that constituency six months immediately preceding the date of his or her application for transfer."

108. What is the rationale of requiring 6 months residence. This is to avoid voter transportation and gerrymandering. If an ordinary voter cannot be transfer his vote, can that same unqualified voter, be made a leader in the same county? I digress.

109. In a scheme of things, the first two categories that have constitutional imperatives are persons living with disability and the youth. In county assembly, there is nothing called progressive realisation. The gender equity, youth empowerment and having a proper representation of people with disability has to be met. The people with disability are not a switch on where the parties place them somewhere down the list and ensure that they are just decorations.

110. It is instructive to note that other than IEBC, none of the other respondents responded to the petition. The factual basis of the petition is unopposed. The legal basis is addressed by IEBC. I do not subscribe to the mantra by IEBC that it must defend even the indefensible.

111. In the case of *Lydia Mathia v Naisula Lesuuda & another* [*supra*], the court of Appeal had directed IEBC that it is not doing clerical duties in selecting persons to be nominated but supervising elections. It is on the same light that when selecting a person with disabilities, it does not matter which position they are in the list. The first person with disability has to be prioritised over able bodied persons who may be in higher slots.

112. The same applies to the youth. The other marginalised are taken into consideration after filling the slots for people with disability and the two youth. The nomination is not a chance to fill the county assembly with friends, charlatans, political rejects, cronies, girlfriends, boyfriends and political henchmen at the expense of the youth and persons living with disabilities.

113. The county assembly of Kwale consists of 30 members, 20 of whom are elected on first past the post basis from wards and 4 marginalized who are to be nominated on the basis of the strength of parties. In

this 4, there must be effort to ensure that 1.5% of the Assembly are persons living with disability. In the current assembly, the 1st Respondent determined that 6 women will make the county to be complaint with article 27. This makes a total of 30 and out of whom is 1.5 members have to be persons with disability. This can be 1or 2 persons with disabilities are to be nominated in the 4 slots provided. There must also be two youth, a man and woman duly nominated.

114. If there is a slot or so, is then and only the other true minorities are nominated. This is the last slot. The first three are cast in stone. They are for people living with disability and youth.

115. I agree that there is no requirement for the person to be registered in the county to be nominated. However, in practical terms it is not possible to be a minority if you are from outside the county. There must be a connection to the county where the person is marginalised. If the person does not come from or is not a voter in Kwale county and is not a resident in that county, they cannot be a minority in Kwale county.

116. The golden rule is that the nominations are supposed to empower the marginalised in the county. How does nominating someone from Machakos, Kilifi, Wajir, Mombasa or Isiolo counties, who is neither a resident nor a voter in Kwale empower the people and give effect to the sovereignty of the people of Kwale. One cannot miss both residence and registration and claim to represent the people of Kwale County. These are mercenaries who have no loyalty to the People of Kwale.

117. In the circumstances, I hold that the 2nd, 3rd and 11 respondents failed to respond to the facts set out in the petition that that they are neither registered voters in Kwale county nor residents of Kwale county. This is information within their knowledge. The evidence produced and unchallenged was that the 2nd Respondent is a resident of Isiolo county and is a registered voter in that county, where she is registered and votes at Olla Bulle Nursery school, Polling station 1 in Isiolo County.

118. The 3rd Respondent is a resident of Mombasa county, Nyali Constituency, Mkomnani Ward, ASK Ground Gate A Polling Station, Polling Station Number 4. These were conceded facts. The only defence she gave was that there is no requirement for residence.

119. The 11th Respondent is a resident of Machakos County, Mavoko Constituency, Kinanie Ward, Kyumbi Trading Polling Station, Polling Station number 7. These were conceded fact. The only defence was that there is no requirement for residence.

120. The court struck out their responses and they never appealed. The case remained that the averments by the Appellant remained unchallenged. I am aware that the burden of proof is on whoever alleges by dint of section 107 and 108 of the *evidence act*. These sections provide as follows: -

> " 107. Burden of proof
>
> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
>
> 108. Incidence of burden
>
> The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
>
> 109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

121. Section 112 of the *Evidence Act* places the burden of proving special knowledge on the party with such special knowledge. The registration and residence is within the special knowledge of the Respondent. Under Section 112, the Appellant had the burden of proof in respect to matters within their special knowledge. The said Section provides as doth: -

> " 112. Proof of special knowledge in civil proceedings In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

122. This was buttressed by the Supreme Court in the case of *Dickson Mwenda Githinji v Gatirau Peter Munya & 2 others* [2014] eKLR where it stated thus: -

> " Guided by the provisions of Section 112 of the *Evidence Act*, it is our considered opinion that failure by the 2nd and 3rd respondents to produce a certified and confirmed figure as to the total number of registered voters at Yururu Primary Polling Station Streams 1 and 2 means that they did not discharged the evidential burden of proof cast upon them. The total number of registered voters is a fact and matter that was well within the personal knowledge of the 2nd and 3rd respondents. The 2nd and 3rd respondents cannot hide behind the concept of legal burden of proof and fail in its duty to provide a statutory figure that is well within its knowledge and custody. It is not sufficient to state that the origin and authenticity of the figure given by the appellant has not been established. Whereas we agree with the trial Judge's finding that the number given by the appellant as representing the total registered voters cannot and could not be used, this is because the appellant is not the custodian of the register of voters and the appellant by any stretch of imagination cannot authoritatively provide the total number of registered voters.
>
> We find that the evidential burden to prove the total number of registered voters is on the IEBC and not on the petitioner. The Constitutional and statutory duty to register voters and prepare the voters register is on the IEBC and this duty entails generating the total number of registered voters in the country in general and in each polling station in particular. This duty should not be confused with the legal burden to prove the allegations raised in the Petition. The legal burden to prove allegations in an Election Petition rests with the petitioner but the evidential burden to provide the total number of registered voters is a Constitutional and statutory obligation on the IEBC. This Constitutional and statutory duty is constant and cannot shift. The 2nd respondent is the statutory custodian of the voter's register and it cannot be gainsaid that the evidential burden to prove the total number of registered voters can never shift to the appellant. We find that the learned Judge erred in placing the burden to prove the total number of registered voters on the appellant/ petitioner. The 2nd and 3rd respondents are the official statutory custodians of the figure representing the total number of registered voters and they should have produced the same to counter the allegations by the appellant."

123. The Appellant cannot be expected to documents of residence. She cannot have such documents as they are in the special knowledge of the respondents. She averred that from her personal knowledge she knows the residence of the parties. She annexed documents of registration for the three.

124. They were conceded by the 1st Respondent who argued that residence is not important. Without proof of registration and residence within Kwale, there were no facts upon which to make the court could make a finding that the 2nd 3rd and 11 were properly elected by nomination. In the circumstances the court made a finding without any evidence at all.

125. It must be clear that the court is not setting a new requirement. It is the constitutional imperative. The parties could be registered elsewhere, but must have some connection with Kwale county by way of residence. When both requirements lack, they are ineligible to be marginalized or top up.

126. The Respondents knew where their residence were. The same with registration. The Appellant has no burden of proving a negative. This is made worse by their failure to respond to the petition in time. They also failed to rebut all the evidence tendered. When the court struck out their responses, they did not cross appeal. The failure to rebut by way of responses makes all the subsequent submissions otiose.

127. I agree with nothing useful to add to the postulations by G V Odunga J, as then he was in the case of *Robert Ngande Kathathi v Francis Kivuva Kitonde* [2020] eKLR, when he stated as doth: -

> " 18. In this case no witness was called and no document was referred to. It was not indicated that the parties were consenting to the production of certain documents filed with the pleadings. In fact, no reference at all was made to any such document. The Court was not addressed on what documents to rely on. However, the court relied on the copies of documents filed with the plaint as if there was a consent by the parties that the same were agreed documents.
>
> It also relied on submissions of the parties to which no agreed documents were annexed. Submissions, with due respect, do not amount to evidence unless expressly adopted as such. Consequently, in legal proceedings, evidence ought not to be introduced by way of submissions. As was held by Mwera, J (as he then was) in *Erastus Wade Opande v. Kenya Revenue Authority & Another Kisumu* HCCA No. 46 of 2007:
>
> > "Submissions simply concretise and focus on each side's case with a view to win the court's decision that way. Submissions are not evidence on which a case is decided."
>
> 19. The same Judge in *Nancy Wambui Gatheru v. Peter W Wanjere Ngugi* Nairobi HCCC No. 36 of 1993 expressed himself as follows:
>
> > "Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case."

128. I find and hold that the court erred in dismissing the Appellant's contention that the 2nd, 3rd and 11 respondents are neither registered voters in Kwale nor residents of Kwale county and therefore not legible to have been elected as nominated members for the special seats in the county assembly of Kwale.

129. I find that the appellant petitioner proved that allegation to the standard required in law. I hold and find the nominations of persons from Kilifi, Isiolo, Mombasa, Machakos and Wajir counties does not enhance democracy in Kwale county. It is the source of perpetual marginalisation felt by the people of Kwale.

130. The evidence on the 4th respondent are fairly serious. The requirement is for a zebra list for the nominees. The 4th respondent was nominated as a woman despite being a biological man. In the list he was indicated as a man but finally gazetted as a woman. This means that in the zebra list, a man was inserted as a woman to be able to be in a slot meant for a woman. This evidence was not challenged. This was used to calculate the entitlement under gender top up. Whither did the 1st Respondent get evidence that the 4th Respondent was a man to be so gazetted. Any such difference is meant to rig the zebra list and steal march on the other contestants.

131. The 5th Respondent was is said to be biologically a woman. She was nominated as a woman and gazetted as a man. This means that she took a as a seat woman. The gazettement was incorrect. This was tinkering with the zebra list by assigning incorrect gender. He is also said to be from Wajir county without residence in Kwale county. This is conceded as there is no responses to the Appellant's positive averments. He did not oppose that particular aspect. There is a duty to traverse every averment that is made.

132. Consequently, I hold and find that the 2nd, 3rd, 4th ,5th and 11th Respondents were invalidly elected by nomination to the county assembly of Kwale. This is in addition to the fact that by failing to nominate a person living with disability and 2 youth, the entire list of the marginalized became poisoned and cannot be salvaged. As regards to the 11th Respondent, her registration is in Machakos county together with her residence. She was not able to prove residence in Kwale within the meaning of section 112 of the *evidence Act*.

133. Regarding the formula as set out in regulation 56(2), of the *Elections (General) Regulations*, 2012 I note that the 1st Respondent is required to allocate seats and set a formula. The regulation indicates as doth: -

> " 56. Commission to publish formula for allocation of seats
>
> (1) The Commission shall before the election to which a party list applies, publish in the Gazette and publicise through electronic and print media of national circulation and other easily accessible medium, the formula for allocating the seats to the respective political parties.
>
> (2) The formula for allocation of seats to the respective political parties from the party lists shall be the number of seats won by a political party divided by the total number of seats multiplied by available seats for allocation in the respective House."

134. There were 20 elected members on the first past the post elections under Article 177(1) a of the *Constitution*. adding the 4 marginalized this makes a total of 24. The number of women elected, is a paltry 1. If the formula is maintained then only 10 nominees need to be made, with 4 under marginalized category. They were indicated that three of them were women, making a total of 10. 6 had to be added to gender top up. There is no rational formula for reaching 14.

135. I therefore dismiss the allegations that the seats for nomination were to be 14. The 1st Respondent correctly found and allocated 10 seats. It is important also to note that for good governance it is not

proper for the county assembly to be dominated by nominated members. In an assembly with only 20 elected members. Having more than 10 nominated members is neither wise nor advisable as they dilute the power of the universal suffrage.

136. The 10 seats allocated are proper in the circumstances. There were no seats to allocate to other parties that did not garner more than 1 seat. The availability of the 10 seats were not to blame for the failure to allocate persons with disability. It was the fettering of discretion by the IEBC, the first Respondent that led to this imbroglio. The 1st Respondent cannot have its hands tied without a basis whatsoever.

137. For example, nominating unqualified persons as marginalised, not only marginalised the county but also wastes the capacity of these people to be nurtured to be leaders in Kwale County. The affirmative Action will not be with us forever. When that happens, the counties need to have nurtured leaders to take over.

138. To then let the party machinery to fill seats with cronies, relatives, political rejects from other counties does not offer purposive interpretation of the *Constitution*. We have for long hidden behind lack of express provisions to marginalise marginalised counties. This is different from nomination of persons seen as settlers at the expense to the locals. the *Constitution* does not differentiate between the two. Even for first past the post, it does not discriminate even for clearance of candidates. If the voters decide to be led by a person who is not a voter in that county it is their business.

139. In this case the nominees were neither residents nor voters in the county. This reminds me when Europeans used to be members of legislative council of Kenya representing Africans. This changed when a first African, Eliud Mathu was nominated in 1944 followed by Benaiah Ohanga who followed in 1946 to represent the majority Africans. That moment for the people of Kwale living with disability is yet to occur.

140. Article 90 of the *Constitution* provides as doth: -

> " 90. Allocation of party list seats
>
> 2. Elections for the seats in Parliament provided for under Articles 97(1) (c) and 98 (1) (b), (c) and (d), and for the members of county assemblies under 177 (1) (b) and (c), shall be on the basis of proportional representation by use of party lists.
>
> 3. The Independent Electoral and Boundaries Commission shall be responsible for the conduct and supervision of elections for seats provided for under clause (1) and shall ensure that
>
> a. each political party participating in a general election nominates and submits a list of all the persons who would stand elected if the party were to be entitled to all the seats provided for under clause (1), within the time prescribed by national legislation;
>
> b. except in the case of the seats provided for under Article 98 (1) (b), each party list comprises the appropriate number of qualified candidates and alternates between male and female candidates in the priority in which they are listed; and
>
> c. except in the case of county assembly seats, each party list reflects the regional and ethnic diversity of the people of Kenya.

3. The seats mentioned in clause (1) shall be allocated to political parties in proportion to the total number of seats won by candidates of the political party at the general elections.

141. Article 177 of the *Constitution* provides as follows: -

> " 177. Membership of county assembly: -
>
> A county assembly consists of
>
> a. members elected by the registered voters of the wards, each ward constituting a single member constituency, on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year;
>
> b. the number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender;
>
> c. the number of members of marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament; and
>
> d. the Speaker, who is an ex officio member.
>
> 4. The members contemplated in clause (1) (b) and (c) shall, in each case, be nominated by political parties in proportion to the seats received in that election in that county by each political party under paragraph (a) in accordance with Article 90.
>
> 5. The filling of special seats under clause (1) (b) shall be determined after declaration of elected members from each ward. 4. A county assembly is elected for a term of five years.

142. Article 177 2(c) provides the priority in the nominations. It creates seats for the marginalised. However, they prioritize, within the marginalized groups, persons with disabilities and the youth. There is no other category created by the *Constitution* under the said Article.

143. Article 260 defines marginalized group means a group of people who, because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27 (4).

144. The article referred to above, that is, Article 27(4) provides as follows:-

> " The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth."

145. In the case of the *Commissioner for the Implementation of the Constitution v Attorney General & 2 others* (2013) eKLR the Court of appeal stated:

> " Article 90 of the *Constitution* decrees that the party lists must comply with two discernible principles namely;

2. The requirement for the lists to reflect regional and ethnic diversity of the people of Kenya. This is meant to ensure that no ethnic group or region of the country dominates the lists provided by the parties. The exception to this, naturally, is the county assembly which from the nature of things may be from an ethnic majority or from the one region which the county is located. We would venture that on proper reading of article 90 (2) (c), the requirement for the regional and ethnic diversity should apply so as to reflect the face or diversity not of the people of Kenya necessarily, but definitely of the county in question.'

146. Further, the case of *Millicent Cherotich v Omari Esha Wanjiku & 2 others* [2018] eKLR, the High Court stated as follows: -

> " The minorities in the county could be any group of people in the county showing, "if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language". For obvious reasons, ethnicity was not a consideration, instead, pointing to the factors of community and cultural diversity of the people within the County. The PPDT ruling in Margaret Nyathiogora pointed out that the list nominees from the Kikuyu ethnic community only. It directed the 3rd respondent to ensure that the party list reflected the ethnic diversity of the County and special interests as expected by the law. I think the question it was posing was whether it was possible that there are no members of any other community living within Nyeri County who could represent some of special interests without necessarily representing the interests of their ethnic communities."

147. In the case of *Communications Commission of Kenya & 5 others v Royal Media Services Ltd. & 5 others* (2014) eKLR

> "the *Constitution* of Kenya has to be interpreted holistically within its context and in its spirit".

In

148. The court in the above stated the foregoing after Article 90(2) (c) of the *Constitution* provides:

(c) except in the case of county assembly seats, each party list reflects the regional and ethnic diversity of the people of Kenya.

149. This is to be read holistically. The holistic reading of Article 177 (1) (c) provides for giving an illumination on what needs to be understood in constitution interpretation and application. *In the Matter of Kenya National Commission on Human Rights* [2014] eKLR, the supreme court stated as doth: -

> " But what is meant by a 'holistic interpretation of the *Constitution*'? It must mean interpreting the *Constitution* in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the *Constitution* must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result."

150. In *Ndii & others v Attorney General & others* (Petition E282, 397, E400, E401, E416 & E426 of 2020 & 2 of 2021 (Consolidated)) [2021] KEHC 9746 (KLR) (Constitutional and Human Rights) (13 May 2021) (Judgment), the supreme court, stated as doth: -

> " 492 .... This court, in interpreting the *Constitution*, must do so holistically as we have explained above. As was held in *Tinyefuza v Attorney* General Const Petition No 1 of 1996 (1997 UGCC3):The entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and rule of paramountcy of the written Constitution."

151. They stated in the said case, *Ndii & others v Attorney General & others* [*supra*] as hereunder: -

> " Third, the *Constitution* has provided its own theory of interpretation to protect and preserve is values, objects and purposes. As the retired CJ Mutunga expressed in his concurring opinion *in Re the Speaker of the Senate & another v Attorney General & 4 others*, Supreme Court Advisory Opinion No 2 of 2013; [2013] eKLR. (paragraphs 155-157):155.In both my respective dissenting and concurring opinions, *In the Matter of the Principle of Gender Representation in the National Assembly and Senate*, Sup Ct Appl No 2 of 2012; and *Jasbir Singh Rai& 3 others v Tarlochan Singh Rai and 4 others* Sup Ct Petition No 4 of 2012, I argued that both the *Constitution*, 2010 and the *Supreme Court Act*, 2011 provide comprehensive interpretative frameworks upon which fundamental hooks, pillars, and solid foundations for the interpreting our Constitution should be based. In both opinions, I provided the interpretative coordinates that should guide our jurisprudential journey, as we identify the core provisions of our Constitution, understand its content, and determine its intended effect.156.The Supreme Court of Kenya, in the exercise of the powers vested in it by the *Constitution*, has a solemn duty and a clear obligation to provide firm and recognizable reference-points that the lower courts and other institutions can rely on, when they are called upon to interpret the *Constitution*. Each matter that comes before the court must be seized upon as an opportunity to provide high-yielding interpretative guidance on the *Constitution*; and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents. The court must also remain conscious of the fact that constitution-making requires compromise, which can occasionally lead to contradictions; and that the political and social demands of compromise that mark constitutional moments, fertilize vagueness in phraseology and draftsmanship. It is to the courts that the country turns, in order to resolve these contradictions; clarify draftsmanship gaps; and settle constitutional disputes. In other words, constitution making does not end with its promulgation; it continues with its interpretation. It is the duty of the court to illuminate legal penumbras that Constitution borne out of long drawn compromises, such as ours, tend to create. The constitutional text and letter may not properly express the minds of the framers, and the minds and hands of the framers may also fail to properly mine the aspirations of the people. It is in this context that the spirit of the *Constitution* has to be invoked by the court as the searchlight for the illumination and elimination of these legal penumbras."

152. The Constitution of County Assemblies as follows: in article 177 (2) (c) had a number of members of marginalized groups, including persons with disabilities and the youth, prescribed by an Act of Parliament.

153. In this case the Act of Parliament is the *County Governments Act* no. 17 of 2012, Section 7(2) which provides:

> " The political party nominating persons under subsection (1) shall ensure that-
>
> (a) community and cultural diversity of the county is reflected in the county assembly; and
>
> (b) there is adequate representation to protect minorities within the county in accordance with Article 197 of the *Constitution*.

154. Article 197 requires that the County assembly to ensure gender balance and diversity in the following terms:

> 1. Not more than two-thirds of the members of any county assembly or county executive committee shall be of the same gender.
>
> 2. Parliament shall enact legislation to—
>
> (a) ensure that the community and cultural diversity of a county is reflected in its county assembly and county executive committee; and
>
> (b) prescribe mechanisms to protect minorities within counties.

155. Reference was made Article 100 which provides for the promotion of representation of marginalized groups. It states: -

> Parliament shall enact legislation to promote the representation in Parliament of—
>
> (a) women;
>
> (b) persons with disabilities;
>
> (c) youth;
>
> (d) ethnic and other minorities; and
>
> (e) marginalized communities.

156. I note that the common line between the meaning of marginalized groups and minority groups is there fraction of the entire population. The meaning of population per the Black's Law Dictionary is: All of the individuals of, units or samples that make up a constitution.

157. That rule of law and interpretation and application of the *Constitution* should be in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights and that contributes to good governance.

158. In *Institute of Social Accountability & Another v National Assembly & 4 others* High Court, (2015) eKLR the principles in Article 259 were summed as follows: -

> " [T]his Court is enjoined under Article 259 of the *Constitution* to interpret the *Constitution* in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights and that contributes to good governance. In exercising its judicial authority, this Court is obliged under Article 159(2)(e) of the *Constitution* to protect and promote the purpose and principles of the *Constitution*. In determining whether a statute is constitutional, the court must determine

the object and purpose of the impugned statute for it is important to discern the intention expressed in the Act itself (see *Murang'a Bar Operators and Another v Minister of State for Provincial Administration and Internal Security and Others Nairobi* Petition No. 3 of 2011 [2011] eKLR, *Samuel G. Momanyi v Attorney General and Another* (supra)). Further, in examining whether a particular statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect... [59] Fourth, the *Constitution* should be given a purposive, liberal interpretation...Lastly and fundamentally, it is the principle that the provisions of the *Constitution* must be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other (see *Tinyefuza v Attorney General of Uganda* Constitutional Petition No. 1 of 1997 (1997 UGCC 3)). We are duly guided by the principles we have outlined and we accept that while interpreting the impugned legislation alongside the *Constitution*, we must bear in mind our peculiar circumstances. Ours must be a liberal approach that promotes the rule of law and has jurisprudential value that must take into account the spirit of the *Constitution*.

159. In order for me to be able to meet the requirements of the *Constitution*, it is not enough to nullify the seats. I must craft an appropriate relief that gives effect to the decision and enhance the rights of the people with disability. In the case of *the matter Salaries and Remuneration Commission & another v Parliamentary Service Commission & 15, others; Parliament & 4 others (Interested Parties)* [2020] eKLR, the court stated as doth: -

> " the definition of "appropriate relief" was given by the south African constitutional court in *Minister of Health & others v Treatment Action Campaign & others* 142 thus:-
>
> "322. ...appropriate relief will in essence be relief that is required to protect and enforce the *Constitution*. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus, or such other relief as may be required to ensure that the rights enshrined in the *Constitution* are protected and enforced. If it is necessary to do so, the court may even have to fashion new remedies to secure the protection and enforcement of these all-important rights...the courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if need be to achieve this goal."

160. It is fallacious to argue that issues that ought herein ought to have been raised after exhausting internal remedies. This is an oft quoted mantra that has no place in the Election Petition matrix. The arena for dispute resolutions moves to courts after elections. This is not a party dispute. The Appellant may have an axe to grind with her party. However, she is not challenging the validity of the nomination list. She is raising a question, that all parties, not just her party submitted qualifying lists.

161. In supervising the elections, the county ended without people living with disability. The list also ended with persons across the parties who are neither residents nor registered voters in the county.

162. She is also raising an issue that they have been allocated 10 seats instead of 14. All these are post-election disputes. If she ends up benefitting at the end, it is a bonus. The case was properly filed. The parties misunderstood the holding in the case of *Sammy Ndung'u Waity v Independent Electoral & Boundaries Commission & 3 others* [2019] eKLR, where the supreme court held as doth; -

> " (69) So what is the interface between Articles 88 (4) (e) and Article 105 (1) of the *Constitution* as read with Section 75 (1) of the *Elections Act*? How should we approach these provisions so as, instead of rendering any of them inoperable,

> we strengthen the scheme of electoral dispute resolution? The starting point in our view is to recognize the mandate of the IEBC or any other Organ such as the PPDT, of resolving pre-election disputes, including those relating to or arising from nominations, whether such disputes revolve around the qualification of a candidate or otherwise. The next logical step is to ensure that an election court or the judicial process for that matter is not helpless when faced with a critical factor to determine the validity of an election. This twin approach ensures that Article 88 (4) (e) of the *Constitution* is not rendered inoperable while at the same time preserving the efficacy and functionality of an election court under article 105 of the *Constitution*. To achieve this noble objective, we think that now is the time to issue certain guiding principles."

(i) All pre-election disputes, including those relating to or arising from nominations, should be brought for resolution to the IEBC or PPDT as the case may be in the first instance.

(ii) Where a pre-election dispute has been conclusively resolved by the IEBC, PPDT, or the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of the *Constitution*, such dispute shall not be a ground in a petition to the election Court.

(iii) Where the IEBC or PPDT has resolved a pre-election dispute, any aggrieved party may appeal the decision to the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of the *Constitution*. The High Court shall hear and determine the dispute before the elections and in accordance with the Constitutional timelines.

(iv) Where a person knew or ought to have known of the facts forming the basis of a pre-election dispute and chooses through any action or omission, not to present the same for resolution to the IEBC or PPDT, such dispute shall not be a ground in a petition to the election Court.

(v) The action or inaction in (4) above shall not prevent a person from presenting the dispute for resolution to the High Court, sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of the *Constitution*, even after the determination of an Election Petition.

(vi) In determining the validity of an election under Article 105 of the *Constitution* or Section 75 (1) of the *Elections Act*, an election court may look into a pre-election dispute if it determines that such dispute goes to the root of the election and that the petitioner was not aware or could not have been aware of the facts forming the basis of that dispute before the election.

163. There is no mechanism in the *Constitution* for challenging cross-party disputes. Further, the cumulative effective of the parties' unconstitutionality is seen after IEBC exercises its mandate. There could have been no pre-election dispute on people with disability before the election. No one, in their widest dream could have known that the IEBC will omit youth and persons with disability. The IEBC is expected to check qualifications of the different nominees. It is no practice to do so for thousands of nominees, a few days to the elections.

164. If we continue hiding on legislation or lack thereof, we will end replaying a section of the *Constitution* implicitly.

165. Reading the two holistically, it is not enough to be from an ethnic, cultural sexual language or other groups. The group must be discriminated on the basis of laws, practices or were disadvantaged by discrimination. The women were clearly and historically marginalised despite being a majority.

166. This discrimination was engrained in the formers section 84(4) of the retired *constitution*. It provided as doth: -

(1) Subject to subsections (4), (5) and (8), no law shall make any provision that is discriminatory either of itself or in its effect.

(4) Subsection (1) shall not apply to any law so far as that law makes provision -

(a) with respect to persons who are not citizens of Kenya;

(b) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law

c) for the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons; or

(d) whereby persons of a description mentioned in subsection

(3) may be subjected to a disability or restriction or may be accorded a privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society.

167. The youth are universally recognised as a marginalised group. They were even barred from running for presidency before 2010.

168. People with disability were discriminated against till the *Constitution* had to recognise them in article 54 of the *Constitution* as doth. The said Article provides as follows: -

" 54. Persons with disabilities

1. A person with any disability is entitled

a. to be treated with dignity and respect and to be addressed and referred to in a manner that is not demeaning;

b. to access educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interests of the person;

c. to reasonable access to all places, public transport and information;

d. to use Sign language, Braille or other appropriate means of communication; and e. to access materials and devices to overcome constraints arising from the person's disability.

2. The State shall ensure the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities."

169. It was not till 2003 that the *Persons with Disabilities Act*, 2003 was enacted in an attempt correct an historical injustice. The Act, in the long title provides that it is: -

> " An Act of Parliament to provide for the rights and rehabilitation of persons with disabilities; to achieve equalisation of opportunities for persons with disabilities; to establish the National Council for Persons with Disabilities; and for connected purposes."

170. Parties must therefore realize that the courts will and must not hesitate to act, when the so-called ethnic minorities are not the marginalised communities. However, before other marginalized communities are recognised, there has to be a recognition that the youth form a bedrock of marginalised community.

171. They are not a homogeneous group. This is why in all nomination for the youth, there ought to be a male and female youth nominated before everything else. Secondly there has to be a nomination such that the county assembly shall not have less that 5% of its members as persons with disability.

172. In case of Kwale county, it is either 1 or two since the calculation lead to 1.5 persons which can go either way. This is sacrosanct and cannot be breached. A county assembly without a person or persons with disability consisting 5% of its members is improperly constituted.

173. I find and hold that the court erred in disregarding the question of persons with disability. They were treated so perfunctorily as if they are children of a lesser god. Unless, we learn as a country in particular and the county assembly of Kwale that we must treat people with disabilities not as invited guests who are quietly sent to the catering committee and forgotten, but a full-blooded members towering over the assemblies like the colossus that they are.

174. Consequently, the first Respondent failed to strictly adhere to the tenets of the Kenyan constitution by failing to gazette persons living with disability to the extent of 5% of the county assembly.

175. I declare that part of the Special issue of the Kenya gazette -notice volume CXXIV – NO 186 is null and void to the extent that it failed to nominate persons living with disability.

176. Regarding the 6th, 7th, 8th, 9th and 10 Respondent, I hold the view that there were no allegations against them on the petition. There is no amount of arguments that could find them liable. They ought to have filed responses in time to enable the court adjudicate and give them costs. Without allegations in the plaint, the petition against the five fails.

177. This is because parties are bound by their pleadings. They cannot travel outside the same. The evidence follows pleadings and not vice vice versa.

178. In the case of *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd* [2018] eKLR, Justice A C Mrima stated as doth; -

> " 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position

was re-affirmed by the Court of Appeal in the case of *Independent Electoral and Boundaries Commission & Ano. v. Stephen Mutinda Mule & 3 others* (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) v. Nigeria Breweries PLC* SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

> ".....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....
>
> ...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

179. In the case of *Malawi Railways Ltd v Nyasulu [*1998] MWSC 3, Malawi Supreme Court of Appeal stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled "*The Present Importance of Pleadings*" published in [1960] Current Legal Problems at p 174 whereof the learned author posited that: -

> " 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 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 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."

180. On the other hand, the Supreme Court of Kenya in its ruling on *inter alia* scrutiny in the case of *Raila Amolo Odinga & Another v. IEBC & 2 others* (2017) eKLR found and held as follows in respect to the essence of pleadings in an election petition: -

> " In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the

court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....'"

181. I therefore find that the case against the 6th, 7th, 8th 9th and 10 Respondents were correctly dismissed with no order as to costs. I have no need to change that order.

182. The List was one undivided list and as such the Appellant did not bring an idle case all together. The 6th, 7th, 8th 9th and 10th Respondents are the sitting leaders of the county who must raise their voice in defence of the marginalized. I dismiss the Appeal against the 6th, 7th, 8th 9th and 10th Respondents with no order as to costs. The appellant has been substantially successful and is not to blame for the imbroglio that she finds herself in.

183. In summary therefore, from the foregoing it is clear by now the direction this appeal takes. I find and hold that the nomination of the 2nd ,3rd and 11 Respondents as members of the county assembly of Kwale is invalid as they are not qualified to be nominated by virtue of not being registered voters and or residents of Kwale county.

184. I hold and find that the court erred in failing to set aside the nomination of the 4th Respondent. I hold and declare that the Nomination of the 4th Respondent as member of the County Assembly of Kwale is invalid as was nominated as a woman while he is biologically male. The 1st respondent erred in substituting his gender in the Kenya gazette separate from the nomination as a man in the pleadings.

185. I had already held that the 5th Respondent was not validly nominated and as such the seat is declared vacant.

186. The orders that recommend themselves are declare to: -

a. the positions held by the Appellant did not prove the case against the Khadija Ngala, Meldter I. Nyakiti, Kengo Judy Chizi, Ruwa Elizabeth Mwangola and Teresia B. Muoki and as such declare I declare the 6th, 7, 8th, 9th and 10th Respondents as validly nominated as members of the county assembly of Kwale.

b. declare that Fartun Mohamed Musa, Josephine Wairimu Kinyanjui, Augustine Ndegwa, Mulki Abdullahi Adan and Rachael Katumbi Mutisya were not validly elected by nomination to the special seats they were elected to And as such the position they hold are declared as vacant.

187. I direct the first Respondent to choose from the lists provided by the qualifying parties in the proportions of the votes garnered by prioritising under the marginalized: -

a. one or two persons living with disability, then,

b. two youth, a man and woman resident or voter in the county of Kwale,

c. if one slot is available, a person in the list of marginalised qualifying as a foresaid as resident or voter in the county of Kwale county.

188. I direct and order that none of the candidates found to have been invalidly elected are legible for re-election.

189. As per the *Constitution*, the youth and people with disability must have that marginalization till the end of the term.

190. I dismiss the Appeal on the number of seats as 14 instead of 10 and find that as the formula applied by the 1st Respondent was correct.

191. The Appellant shall have costs of 200,000/= in the court below payable by the 1st Respondent and 300,000/= in this court payable by the 1st Respondent.

192. The court is under duty under section 86 of the *elections act* to issue a certificate on the validity of the elections. The section provides as follows: -

> " 86. Certificate of court as to validity of election
>
> SU(1) An election court shall, at the conclusion of the hearing of an Election Petition, determine the validity of any question raised in the petition, and shall certify its determination to the Commission and notify the relevant Speaker."

193. A certificate under section 86 of the *elections act* do issue forthwith.

Determination

194. In the end I allow the appeal partly by making the following orders: -

a. The failure to nominate persons with disability is unconstitutional, null and void.

b. Nomination of persons who are neither resident nor registered voters of Kwale county is invalid.

c. I therefore declare that Fartun Mohamed Musa, Josephine Wairimu Kinyanjui, Augustine Ndegwa, Mulki Abdullahi Adan and Rachael Katumbi Mutisya were not validly elected by nomination to the special seats they were elected to and as such declare that the said seats as vacant.

d. I Declare that the 6th, 7th, 8th 9th and 10 respondents, that is, Khadija Ngala, Melder J. Nyakiti, Kengo Judy Chizi, Ruwa Elizabeth Mwangola, Teresia B. Muoki were validly elected as nominated members of the county assembly of Kwale and continue to serve.

e. I direct the First Respondent to choose from the qualifying lists provided by the parties in the proportions of the votes garnered by prioritizing under the marginalized as provided in section 36 of the *elections act* as doth: -

i. one or two persons living with disability, then,

ii. two youth, a man and woman resident or voter in the county of Kwale,

iii. if one slot is available, a person in the list of marginalised qualifying as a foresaid as resident or voter in the county of Kwale county.

f. I further direct that in filling the gender top up and in appointing people with disability, and the youth the determination already made as to party entitlements is be maintained, save that shall a party entitled to have a person with disability, does not have in its list a person with disability, then such a party shall forgo that seat and it be given to the next qualifying party with one elected member as per the formula already adopted by IEBC.

g. In filling the positions, priorities in the list must be respected safe only where the commission has to comply with the order on residence and registration, and prioritising persons to be

nominated, persons lining with disability are deemed to be on top of the lists with the youth as number 2.

h. None of the candidates found to have been invalidly elected are legible for re-election.

i. As per the *Constitution*, the youth and people with disability must have that marginalization till the end of the term.

j. I dismiss the part of the Appeal on the number of seats allocated as 14 instead of 10 and find that as the formula applied by the 1st Respondent was the right one.

k. The Appellant shall have costs of 200,000/= in the court below payable and 300,000/= in this court, both payable by the 1st Respondent.

l. The other Respondents to bear their own costs.

m. The clerk to the county assembly to ensure the newly nominated persons are sworn on the nearest Tuesday within or 7 days of appointment

n. The 1st Respondent to conclude nominations to fill the vacant seats within 14 days.

o. Certificates under section 86 of the *Elections Act* do issue accordingly.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 14TH DAY OF SEPTEMBER, 2023.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Miss Kagori for the Appellant

Mr Ian Amino for the 1st Respondent

Willis Oluga for the 2nd Respondent

Mr Oduor for the 3rd Respondent

Rashid Mbwiza for the 4th, 8th and 9th Respondent

Mola Ahenda for the 5th Respondent

Mr Oduor/ Mr. Michael Gitonga for the 6th and 7th Respondent

Mr. Gakaria for the 10th Respondent

Samuel Mbatai for Mr. Issa for the 11th Respondent