REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION PETITION APPEAL NO. 7 OF 2018

AZIZ KASSIM IBRAHIM ………….......……APPELLANT

VERSUS

THE INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION (IEBC).……..................…1ST RESPONDENT

THE RETURNING OFFICER EMBAKASI SOUTH

CONSTITUENCY…..…........................2ND RESPONDENT

THE DEPUTY RETURNING OFFICER EMBAKASI

SOUTH CONSTITUENCY…......……3RD RESPONDENT

ESTHER MWANGI ….……….......….. 4TH RESPONDENT

MULYUNGI JOHN KYALO…..……..5TH RESPONDENT

(Being an appeal from the judgment of the Chief Magistrate's Court at Nairobi delivered on 24th January 2017 by Hon. P. Ngare Gesora in Election Petition No. 6A of 2017)

BETWEEN

AZIZ KASSIM IBRAHIM ………………..…APPELLANT

VERSUS

THE INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION (IEBC).…..….................…1ST RESPONDENT

THE RETURNING OFFICER EMBAKASI SOUTH

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ESTHER MWANGI ……………....….. 4TH RESPONDENT

MULYUNGI JOHN KYALO………....5TH RESPONDENT

JUDGMENT

1. This is an appeal from the judgement of the Chief Magistrate (Hon. P.N. Gesora) which was delivered on 24th January 2018 dismissing the petition filed by the appellant Aziz Kassim Ibrahim to challenge the election of the 5th respondent Mulyungi John Kyalo as the Member of County Assembly (MCA) for Kwa Njenga Ward in Nairobi County. The election was part of the general election held on 8th August 2017 and conducted by the Independent Electoral and Boundaries Commission (1st respondent). The 5th respondent was a Wiper Democratic Movement Party candidate and was declared to have won by receiving 4394 votes. The appellant was an Orange Democratic Movement candidate who received 3314 votes. In all there were 15 candidates.

2. The appellant was aggrieved by the conduct of the election and the determination of the results. He filed the petition before the Chief Magistrate's Court at Milimani to challenge the same. In particular, he complained that the election was not carried out in accordance with the provisions of the Constitution, the **Elections Act** and the **Regulations**; that in some polling stations the 1st and 2nd respondents (the 2nd respondent was the Returning Officer of Embakasi South Constituency in which the Ward fell), or their agents, entered or inflated records of results in favour of the 5th respondent thereby occasioning higher and exaggerated results; there were inconsistencies in the figures recorded on the statutory forms including the total number of valid voters per polling station; Forms 36A were amended at the tallying centres to reflect fraudulent and fictitious figures in favour of the 5th respondent; the agents of the appellant were intimidated by the presiding officers and agents of the 5th respondent at various polling stations which was contrary to the fundamental constitutional and statutory requirements of accurate, verifiable, transparent and accountable electoral process; widespread use, acceptance and submission of Forms 36A and 36B that were not signed by the agents in declaration of results and in respect of which reasons for not signing were not indicated; in room 18 of 21 of Kwa Njenga Primary School polling station the votes cast were 702 when the total number of registered voters in the particular stream were 697; there were instances where Forms 36A issued were not stamped and did not bear the 1st respondent's stamp; and there was failure to display the results of the election on the doors of the polling stations.

3. The appellant further alleged that the 1st respondent engaged Esther Mumbua Mwangi (4th respondent) as the presiding officer at Embakasi Secondary School while she was an official of Wiper Democratic Movement Party, the party of the 5th respondent, which was a case of conflict of interest that went against **Articles 81(e)** and **88(2)(a)(iii)** of the Constitution. He accused the 4th respondent of working with the 2nd and 3rd respondents to doctor the results transmitted from Kwa Njenga Primary School polling station and Cheminade Training Centre polling station in favour of the 5th respondent. He claimed that despite the complaint by his main agent (Aron Asiiba Matendechere) to the 2nd respondent no action had been taken.

4. These are the reasons why the appellant alleged that the election was not validly, fairly and freely conducted, and that the result announced did not reflect the will of the people of Kwa Njenga Ward and should therefore be nullified.

5. In response to the petition, the respondents denied the allegation of malpractice, irregularity, fraud, intimidation, or conflict of interest made by the petitioner. They asserted that the election, polling, counting and tallying of votes were done in a manner that was free, fair, accurate, transparent, accountable and verifiable, and that the result declared reflected the will of the people of Kwa Njenga Ward. It was pleaded that there was compliance with the Constitution, the **Elections Act** and all laws and **Regulations** on the conduct of elections, and that any errors in the tallying process that might have occurred were minor and did not materially affect the final outcome of the Kwa Njenga Ward election.

6. Along with the petition was a motion seeking the preservation and safekeeping of all the Kenya Integrated Electoral Systems Kits (KIEMS) used for all the polling stations and tallying centres in respect of Kwa Njenga Ward, and election materials used during the election in the Ward. There was prayer that the election material used be delivered into the custody of the court, and that there be provision of access to the petitioner of all voters registers, counterfoils and diaries indicating the first and last numbers of all ballot papers issued for all the polling stations in the Ward for the MCA election, and specifically for Kwa Njenga Primary School and Cheminade Training Centre polling stations. The prayers were to issue against the 1st and 2nd respondents and the orders were to be in place pending the hearing and determination of the petition. The application was opposed. In a ruling delivered on 16th November 2017 the application was allowed.

7. The record of the trial court shows that on 29th November 2017 the petition was mentioned. Mr. Otieno held brief for Mr. Arende for the appellant, Mr. Tanui was for the 1st to 4th respondents and held brief for Mr. Gachie for the 5th respondent. Both counsel informed the court that they would not be calling witnesses, but they would be relying on the affidavits filed, and then would file written submissions. The court entered this as a consent order. It was further agreed that each party would be allowed 40 minutes to highlight the written submissions. Counsel signed and dated the court record to signify the consent.

8. On 22nd December 2017 the petition came up for highlighting of the filed submissions. M/s Awuor for the appellant addressed the court as follows: -

> **"This matter is coming up for highlighting of submissions. We however have an application to make. At page 36 of the petition prayer (b) we had sought for scrutiny and recount. Prayer for recount and scrutiny cannot be final prayers. We are asking the court to kindly allow us to call our witnesses to lay a basis for scrutiny."**

Mr. Tanui opposed the application, relying on the consent they had recorded. Mr. Gachie similarly opposed. Mr. Arende was present and supported what M/s Awuor had sought. The court wrote a ruling declining the request to call a witness. It stated that the appellant could not be allowed to call witnesses given the consent and the directions given on how the petition was going to be handled. The court observed that in agreeing not to call evidence in the manner indicated, the appellant had abandoned the prayer for scrutiny and recount. The court then observed as follows:-

> **"There is a comprehensive report that has been generated by the court when it moved to seal and take charge of the election material pertaining to this election petition and particularly ballot boxes for Kwa Njenga Ward and Cheminade polling stations. All parties involved in this petition appended their signature to the report and it forms part of the court record**

which will be considered by the court when making its final decision."

The court declined to re-open the matter to receive witnesses' evidence. It asked that highlighting of the written submissions begins. Counsel begun to highlight.

9. In the judgment that was delivered on 24th January 2018, the learned magistrate dismissed the petition with costs on the basis that, since the appellant had not called his witnesses to be examined-in-chief and be cross-examined, the veracity of the allegations as contained in the affidavits had not been tested; that the omission to call witness evidence to be examined-in-chief and be cross-examined made the contents of their affidavits mere allegations without any probative value. Regarding scrutiny and recount, the court observed that the appellant had abandoned his right to the same when he failed to call any witness to make a case for the same.

10. The appellant was aggrieved by these findings and filed this appeal in which he complained that:-

a. the court had declined to allow him to call witnesses to give evidence in support of the petition, and that this had violated his non-derogable right to a fair hearing under **Article 50** of the Constitution;

b. he had been denied his right under **Article 50** to pursue his application for scrutiny;

c. he had been compelled to abandon his prayers for scrutiny, and thereby his rights under **Articles 48** and **50, section 83** of the **Elections Act** and **rules 28** and **29** of the **Elections (General) Regulations, 2017** had been violated;

d. the court had failed and/or refused to consider the affidavit evidence on record to reach the decision in his judgment;

e. the court had relied on illegal consent that was entered into by a stranger who was not the appellant's advocate, and in so doing denied him the right to a fair hearing under **Article 50**;

f. the court had failed to consider the malpractices and irregularities contained in the affidavits in support of the petition; and

g. the court had ignored the Executive Officer's Report dated 6th December 2017 and 7th December 2017 which had indicated that there had been serious tampering of the ballot boxes.

11. The appellant asked the court to allow the appeal with costs; the judgment and decree of the lower court be set aside; a retrial before another recount be ordered; and, in the alternative, the election of the 5th respondent be nullified.

12. Senior Counsel Prof. Ojienda and M/s Awuor prosecuted this appeal on behalf of the appellant. Mr. Tanui represented the 1st to the 4th respondent and Mr. Gachie represented the 5th respondent. Parties filed written submissions on which they relied. Several authorities were relied upon by either side.

13. I have considered the record kept by the trial court, the learned magistrate's judgment, counsel's written submissions and authorities and the oral submissions. The questions to be determined are as follows:-

a. was there a valid consent regarding how this petition would be resolved?

b. was the petition resolved in accordance with that consent?

c. was the appellant's petition fairly determined, on the basis of affidavit evidence and the submissions rendered?

14. This appeal was opposed on several grounds, one of which was its competence. On the competence of the appeal, it was Mr. Tanui's submission, relying on **section 75(4)** of the **Elections Act**, that appeals from magistrates' courts in respect of petition to nullify the election of the MCA lie to the High Court on matters of law only and yet in this case what was appealed against were factual findings. Secondly, that under **rule 35(1)** of the **Elections (Parliamentary and County) Petition Rules, 2017** an appeal from a magistrate's court under **section 75** of the **Act** shall be in the form of a memorandum of appeal which shall concisely set out under distinct head, the grounds of appeal, without any argument or narrative from the judgment appealed from and yet paragraphs 4, 6, 7, 8 and 9 of the memorandum of appeal consists of narratives of primary facts which were outside the jurisdiction of this court. It was Prof. Ojienda's submissions that the appeal had been brought under specific points of law.

15. In the Supreme Court, in the case of **Gatirau Peter Munya –v- Dickson Mwenda Kithinji & 2 Others [2014]eKLR**, it was Prof Ojienda who was complaining, on behalf of the appellant therein, that the Court of Appeal had misdirected itself by delving into issues of fact, contrary to the provisions of **section 85A** of the **Elections Act** which limits appeals to the Court of Appeal from the High Court to matters of law only. The Supreme Court, with specific reference to **section 85A** of the **Elections Act**, defined "matters of law only" to mean a question or an issue involving –

"a. the interpretation, or construction of a provision of the Constitution, an Act of Parliament, subsidiary Legislation, or any legal doctrine, in an election in the High Court, concerning membership of the National Assembly, the Senate, or the office of the County Governor;

b. the application of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, to a

set of facts or evidence on record, by the trial judge in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of the County Governor;

c. the conclusions arrived at by the trial judge in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the Officer of the County Governor, where the appellant claims that such conclusions were based on "no evidence", or that the conclusions were not supported by the established facts or evidence on record, or that the conclusions were "so pervese", or so illegal, that no reasonable tribunal would arrive at, it is not enough for the appellant to contend that the trial judge would probably have arrived at a different conclusion on the basis of the evidence."

16. Section 75(4) of the **Elections Act** provides that –

"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. be heard and determined within six months from the date of filing of the appeal."

It follows that what the Supreme Court held in regard to **section 85A** applies to appeals under **section 75(4)** of the **Elections Act**. It is, therefore, up to this court to determine whether the petition and memorandum of appeal lodged herein by the appellant conform to the principles set out by the Supreme Court.

17. In the instant case, the court has to interpret the meaning of **rule 12(13)** of the **Elections (Parliamentary and County Elections) Petition Rules, 2017**, and apply it to the consent that the parties recorded regarding how the petition was going to be resolved. Secondly, there is the question of the validity of that consent. Lastly, the court has to determine whether or not the trial court violated the appellant's right to a fair trial under **Article 50**. To my mind, these are questions of law, and therefore the court has the jurisdiction to entertain and determine the appeal. The conciseness or otherwise of the memorandum of appeal is a matter that **Article 159** of the Constitution can deal with. The article provides for the supremacy of the principle of substantial justice over provisions on procedure, whether these appear in a statute or rules made thereunder **(Twaher Abdukarim Mohamed –v- IEBC & Others [2014]eKLR)**.

18. On the question of the consent, the appellant contended that Mr. Otieno had no authority to record the same because he had not been instructed to hold brief for Mr. Arende. However, there was no application filed before the trial court to set aside the consent (which was recorded on 29th November 2017). It was going to be through such application that evidence was going to be tendered to demonstrate that indeed Mr. Otieno had no authority or instruction to compromise the petition in the manner that he had done. Infact, the record shows that Mr. Otieno had instructions to hold Mr. Arende's brief and to enter into the consent. This is because, counsel for the appellant filed written submissions as had been agreed on 27th November 2017, and appeared in court to highlight the same as had been agreed. The only thing that concerned counsel (M/s Awuor) on 22nd December 2017 was the issue of scrutiny and recount. She wanted to call a witness to show that there was sufficient basis for scrutiny and recount. When the court declined her request to call the witness she proceeded to highlight the written submissions that had been filed on behalf of the appellant. I find that the contention that Mr. Otieno had no instructions to hold brief and enter into the consent was without basis. There was a valid consent that the parties entered into on 27th November 2017, and they were bound by it **(Flora Wasike –v- Destimo Wamboko [1988]1 KAR 625).** This appeal, as was argued by Mr. Gachie, cannot be used to challenge the consent which was not formally attacked in the trial court.

19. Was the petition resolved in accordance with the consent? This is really the crux of this appeal. This is because, the trial court, relying on **rule 12(13)** of the **Elections (Parliamentary and County) Petition Rules, 2017**, found that because the appellant had not called witnesses to be examined-in-chief and cross-examined, what was contained in their affidavits lacked probative value and could not be the basis of the nullification of the election of the 5th respondent. The court did not consider the evidence in the affidavits against the contents of the affidavits by respondents to determine whether the election was in accordance with the Constitution, **Elections Act** and **Regulations**; to determine whether any malpractices, irregularities and illegalities had been proved, and whether they were substantial enough to affect the validity of the election of the 5th respondent. This is why the judgment was attacked by the appellant on the basis that the trial court refused to consider any affidavit evidence that was on record in reaching the judgment, despite the consent wherein the parties agreed that the petition would be determined on the basis of the affidavit evidence. Further, the trial court delivered a ruling on 22nd December 2017 and promised to consider the report prepared by the Executive Officer, following court order, on the status of the ballot boxes and material. The court was to make such consideration when making the final decision. According to the appellant, that consideration was not done.

20. Rule 12(12) of the **Elections (Parliamentary and County) Petition Rules, 2012** provides that an affidavit shall form part of the record of the petition and may be deemed to be the deponent's evidence for the purposes of examination-in-chief. Once an affidavit has been filed, it becomes part of the record of the court and becomes the evidence of the witness who swore it for purposes of examination-in-chief **(Nuh Nassir Abdi –v- Ali Wario & 2 Others, Election Petition No. 6 of 2013 at Mombasa)**.

21. Rule 12(13) of the **Rules**, on the other hand, provides that every deponent shall, subject to the election court's discretion, be examined-in-chief and cross-examined:

"Provided that the parties may, by consent, accept not to cross-examine the deponents, but shall have the deponents evidence admitted as presented in the affidavits."

22. Ordinarily, in an election petition, the petitioner's witnesses who swore supporting affidavits have to be availed to be examined-in-chief and be cross-examined. In cross-examination the veracity of their averments is tested. If they are not called to testify and despite the fact that the affidavits form part of the petitioner's case, their evidence may be treated as being inconsequential and devoid of probative value **(Noah Makhalang'anga Wekesa –v- Albert Adome & 3 Others [2013]eKLR)**. However, where parties have, by consent, agreed to admit

and rely on affidavit evidence without having to call the deponents, each evidence shall be used, and considered, to determine the issue at hand **(Ahmed Abdullahi Mohamed and Another –v- Mohamed Abdi Mohamed & 2 others [2017]e KLR).** In the instant case, the parties agreed to entirely rely on the affidavit evidence to resolve the petition. They agreed not to call the deponents of the affidavits to be examined-in-chief or cross-examined. They placed themselves under the proviso of **rule 12(13)** to admit the deponents evidence as presented in the affidavits. By the consent, the trial court was bound, in determining whether or not the appellant had proved his case as pleaded in the petition, to consider all the affidavits on record. The court did not do this. Instead, it found that because the appellant had not called his witnesses to testify and be cross-examined, his petition had not been proved because the affidavits in themselves lacked any probative value. Quite unfortunately, that was a clear misunderstanding of **rule 12(13)** and its proviso. The result was that the court failed to determine the merits of the petition. In the circumstances, the appellant's right to have the petition determined in a substantive way was not honored. The appellant was, under **Article 50**, entitled to have the petition decided on the basis of the evidence contained in the admitted affidavits, and on the basis of the principles under the Constitution, **Elections Act** and **Regulations** relating to the determination of the election petition.

23. There was the complaint that the trial court did not pronounce itself on the report that had been generated by the Executive Officer on the status of the ballot boxes. The learned magistrate had indicated that he would consider the report when making the final decision. In his own words, this was –

> **"a comprehensive report that had been generated by the court when it moved to seal and take charge of the election material pertaining to this election petition and particularly ballot boxes for Kwa Njenga and Cheminade Polling Stations. All parties involved in this petition appended their signature to the report and it forms part of the record which will be considered by the court when making the final decision."**

In the judgment, the court made reference to the report but in terms of the issue of scrutiny and recount, in respect of which he found no basis had been laid to order the same. The learned magistrate considered scrutiny and recount to be an interlocutory matter, and observed that the appellant had abandoned the opportunity to lay a basis at that stage. If the court considered the report to be part of the appellant evidence to lay a basis for scrutiny and recount, and promised to deal with it during the final decision, it could not in the same breathe state that scrutiny and recount were an interlocutory matter. Quite clearly, under **section 82** of the **Elections Act** and **rules 28** and **29** of **Elections (Parliamentary and County Elections) Petition Rules, 2017**, scrutiny and recount can be done at any stage during the hearing of the election petition. The court may look at the pleadings and determine that sufficient basis has been made and order scrutiny and recount. It may wait until some or all the witnesses of the petitioner have testified, to order scrutiny and recount. It may wait until all the witnesses, petitioner's and respondent's, have testified before making the order. It follows that, the question whether or not to order scrutiny and recount remained live in this petition. The trial court was supposed to consider the affidavit evidence that had been admitted to decide this issue. This was not done, again to the prejudice of the appellant.

24. In short, the trial court failed to determine the petition on the basis of the consent regarding the admission of the affidavit evidence without calling the deponents. Infact, the petition was not at all determined. This was owing to the misdirection that, without calling the witnesses, there was no reason to consider the affidavit evidence as it had no probative value.

25. One of the prayers in the Memorandum of appeal was that the court orders retrial before another court. That is certainly a problematic prayer to grant. This is because, an election petition regarding a member of the County Assembly is under **Article 87(1)** of the Constitution and **section 75(2)** of the **Elections Act, 2011** supposed to be determined within six months of the date of lodging the petition. Compliance with election petition timelines is not an option. It is a constitutional and statutory imperative. Voters should know with finality, and within a reasonable time, who their representatives are **(Hon. Lemanken Aramat –v- Harun Meitamei Lempaka & 2 Others, Supreme Court Petition No. 5 of 2015).** If a retrial is ordered, where will the subordinate court get the jurisdiction from now that the six months came and passed? A retrial is therefore not a constitutional or statutory option.

26. What happens to the appellant? What remedy does he have in view of the foregoing happenings? I note that this is a first appeal. What are the powers donated to the court handling a first appeal? In **Kenya National Highway Authority –v- Shalien Masood Mughal & 5 Others [2017]eKLR**, this is what Waki, JA observed:

> **"28. This being a first appeal, the court is enjoined to reconsider the evidence, evaluate it and draw its own conclusions. The usual caveat that the appellate court has neither seen nor heard the witnesses and must therefore give allowance for it, does not apply here as the matter was not orally heard. The findings of the trial court must, nevertheless, be given due deference unless they fall foul of proper evaluation in line with the evidence on record or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see Ephantus Mwangi –v- Duncan Mwangi Wamburu (1982-88) I KAR."**

27. I have found that there was evidence on record which the trial court did not consider to be able to determine whether or not the petition was proved; evidence that the court dismissed, wrongly, to be of no probative value. In the particular circumstances of this case, it falls on this court to evaluate that evidence to see if the appellant's petition had merits.

28. Consequently, I will deal with the merits of the allegations made in the petition, the affidavit evidence in support, against the responses and the replying affidavits sworn by the respondents and their witnesses.

29. In dealing with the allegations in the petition, I bear in mind that the legal burden of proof in an election petition lies with the petitioner throughout the case **(Raila Odinga –v- IEBC & 3 Others [2013]eKLR)**. The evidential burden initially lies upon the petitioner, but may shift between the parties as the weight of evidence given by either side during the trial varies. Generally, the evidential burden will shift to the respondent if the petitioner proves the incidence of electoral irregularities or malpractices and that they affected the results of the election (**Raila Odinga Case**).

30. The standard of proof is higher than the civil standard of balance of probabilities, but lower than the criminal standard of proof beyond all

reasonable doubt (**Raila Odinga case**). Under **section 83** of the **Elections Act** –

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

31. Where the petitioner alleges that the election was marred with irregularities or malpractices, and such irregularities or malpractices are proved, it has to be demonstrated that they actually interfered with the free choice of the voters **(Hassan Mohamed Hassan & Another –v- IEBC & 2 Others [2013]eKLR).**

32. Where an election offence is alleged, the same has to be proved beyond doubt **(Moses Masika Wetangula –v- Musikari Nazi Kombo, Supreme Court Petition No. 12 of 2014).**

33. It is an important principle in election petitions that, the petitioner is bound by his pleadings and therefore bound to prove the case that he has pleaded. He is not permitted to make a case outside the pleadings. His affidavits and documents must be consistent with, and support, the case he has pleaded. The Supreme Court in **Raila Odinga & Another –v- IEBC & 3 Others, Presidential Petition No.1 of 2017** cited with approval the Supreme Court of India in **Arikala Narasa Reddy –v- Ventaka Ram Neddy Reddygari & Another, Civil Appeals Nos. 5710 -5711 of 2012 [2014] 2SCR** in which the court stated as follows:

> **"In the 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 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."**

34. Lastly, the Supreme Court in **Gatirau Peter Munya –v- Dickson Mwenda Kithinji & 2 Others [2014]eKLR** acknowledged the practical reality that imperfections in the electoral process are expected; that elections are conducted by human beings under stressful circumstances, and therefore mistakes do sometimes occur. It follows that an election court should not lightly overturn the election, especially where the results substantially reflect the will of the voters, and where neither a candidate nor voters have engaged in any wrongdoing.

35. It was alleged in paragraph 80 of the petition that the appellant's agents were denied copies of Form 36A at the polling stations by the respective presiding officers, and that this contravened **regulation 79(2A)(c)** of the **Elections (General) Regulations, 2012,** and **Article 35** of the Constitution, hence the only material in the agents' possession were the notes made during the announcement of results, and the appellant was forced to source for Forms 36A and 36B and duly signed Forms 36C from friends and other sources in order to come up with an analysis of the results. The appellant got his agents Isa Issack Ibrahim, Muhammad Kassim Ibrahim, Daniel Owino, Aron Asiiba and Duncan Ochieng to each swear an affidavit to state that he was not given copies of Form 36A. The 2nd and 5th respondents each swore an affidavit to deny the allegations. The 2nd respondent swore that it was not conceivable that only the agents of the appellant were denied the Forms when all other agents got the Forms and did not raise any complaint. He further stated that the Forms were always available at the 1st respondent's constituency office and there was no time the appellant's agents, either formally or informally, requested for them and were denied. The 5th respondent's agents Francis M. Kimende, David Mwendwa, Grace Makasi, Rose Wanzila Mweu and Joel Nzuki swore affidavits stating that the process at the polling stations was smooth, and that no agent was denied a chance to get Form 36A. I consider that no single letter was written to any presiding officer or to the 2nd respondent, either complaining about Forms 36A or seeking the same. I find the allegation not materially substantiated.

36. In paragraph 81 of the petition the appellant alleged that despite numerous objections and protests, the 2nd respondent declared the 5th respondent the winner by getting 4394 votes and indicated the appellant had obtained 3314 votes. In paragraph 91 of the petition, it was claimed that despite the fact that the appellant's chief agent raised these complaints to the 2nd respondent no action was taken and, instead, the agent was thrown out of the tallying centre for what the 2nd and 3rd respondents described as causing disturbance. The agent narrated these complaints in his sworn affidavits. The 1st, 2nd, 3^{rd,} and 4th respondents denied these allegations in their respective responses. The 2nd respondent stated in his affidavit that the 5th respondent was declared to have garnered 4394 votes against the appellant's 3314 votes because these results accorded with what had been captured in Form 36B. There was no evidence of any formal complaint raised, either by the appellant or the chief agent, about the total results tallied.

37. In paragraph 82 of the petition it was claimed that whereas the vote casting process was smooth and peaceful, the counting and tallying process had irregularities, fraud, rigging and illegal maneuvering and machinations all in violation of **Article 86(a)** of the Constitution; and that the 1st, 2nd and 3rd respondents failed to ensure that the election method employed was simple, accurate, verifiable, secure, accountable and transparent. To start with, these allegations were not particularized to enable appropriate response. The appellant's chief agent Aron Asiiba swore that he received reports from his agents touching on poor lighting at specific polling stations during the counting process, that counting was too fast for the agents to possibly verify, there was intimidation and chasing away of the appellant's agents who raised questions regarding the counting process, and agents not being given Forms 36A after the counting and declaration of results. He stated that a clerk at the tallying centre informed him that the 4th respondent (who was the presiding officer at the tallying centre) was doctoring results in Form 35B to favour the 5th respondent. The 1st, 2nd, 3rd and 4th respondents denied the allegations and stated that the election was smooth, fair and transparent, and the results declared were credible. The 5th respondent's agents Francis K. Kimende, David Mwendwa, Grace Makasi, Rose Wanzila Mweu and Joel Nzuki denied the allegations by the appellant and his agents. It is notable that Aron Asiiba did not personally witness the acts he was complaining about. He stated that he received information from his agents. No affidavit of those agents who witnessed the alleged acts of fraud, rigging, doctoring or intimidation was sworn or filed in court. The allegations were therefore not proved.

38. In paragraphs 83, 84A, 85B and 84C of the petition various malpractices, irregularities and illegalities were alleged. It was stated that there was entering of inflated results in favour of the 5th respondent in particular polling streams in stations thereby occasioning higher and exaggerated results for the 5th respondent. For instance, in Room 8 of 21 at Kwa Njenga Primary School polling station and Room 13 of 21 of the same station there was a difference of 28 votes and 69 votes, respectively, noted between what the appellant's agents noted in their notebooks and what eventually appeared in Forms 36A and Form 36B. Similar differences were noted in Room 7 of 21 of the same station of 17 votes. Room 8 of 21 of the same station there was difference of 63 votes and in Room 11 of 14 at Cheminade Training Centre polling station of 8 votes. In Room 7 of 21 of Kwa Njenga Primary School polling station what was recorded in Form 36A differed with what was recorded in Form 36B by 436 votes, in Room 8 of 21 of the same school the difference in the two sets of Forms was 478 votes, in Room 13 of 21 at the school the difference was 346, and there were differences also noted at Rooms 10, 12 and 18 of the same school and Room 6 of 14 at Cheminade Training Centre polling station. Isa Isaack Ibrahim was the appellant's agent at Room 8 at Kwa Njenga Primary School and stated that according to the notebook he kept his candidate got 138 votes while the 5th respondent got 129 votes and these were not the results reflected in Forms 36A and 36B. Muhammud Kassim Ibrahim had similar story for Room 7 at the school and according to his notebook record his candidate got 95 votes and the 5th respondent got 133 votes which results were different in Forms 36A and 36B. Daniel Owino was in Room 3 at the school. According to him his candidate got 120 votes and the 5th respondent got 56 votes. Duncan Ochieng was at Cheminade Training Centre polling station Room 4. According to him the appellant got 123 votes and the 5th respondent got 83 votes. These votes, according to him, did not find reflection in Forms 36A and 36B. According to the respondents, the results reflected in Forms 35A and 36B were the true results obtained during the counting and tallying, and that if there were any inconsistencies they were owing to human clerical errors that did not affect the outcome or integrity of the election. The agents called by the 5th respondent kept the results declared in their own notebooks. They stated that their results tallied with what was contained in the Forms 36A and 36B. It was material that the appellant's agents did not annex their respective notebooks to their affidavits for the contents to be used to compare with Forms 36A and 36B. Such notebooks would have been invaluable in scrutiny. The 2nd respondent produced all the Forms 36A and 36B to confirm that the figures there were the only official results the Commission held. I find there was no material placed on record to counter these official results. Further, the respondents' case was that the results in Form 36B were signed for by the appellant's agents Patrick Otieno. The appellant got a supplementary affidavit to be sworn to state that this was not his agent. But, according to the Form 36B he was indicated as appellant's agent. Patrick Otieno did not swear any affidavit. This issue could only have been dealt with conclusively had the trial proceeded by way of examination-in-chief and cross-examination.

39. There was complaint in paragraph 84(F) of the petition of widespread use, acceptance and submission of Forms 36A and 36B that were not signed by agents in the declaration of results and where reasons were not given by the respective presiding officers at Kwa Njenga Primary School Rooms 1, 4, 6, 8, 11, 12, 13, 15 and 19 and at Cheminade Training Centre in Rooms 4, 7, 9, 10 and 14. Sample Forms were annexed to the petition. The allegations were denied, and it was deponed that the appellant had accepted the results in Form 36B when his agent Patrick Otieno had signed for them. A look at all the Forms 36A filed by the 2nd respondent shows that the results were verified by different agents who had signed. All the Forms 36A had signatures of different agents from different political parties. Under **regulation 79(6)** if the **Elections (General) Regulations, 2012** –

> **"(6) The refusal or failure to a candidate or an agent to sign a declaration form under subregulation (4) or to record the reasons for their refusal to sign as referred under this regulation shall not by itself invalidate the results announced under subregulation (2)(a)."**

Under **regulation 79(5)** of the **Regulation**, the absence of agents at the counting or declaration of results in itself cannot invalidate an election result.

40. It was alleged that in Room 18 of 21 of Kwa Njenga Primary School polling station the votes cast were 702 yet the total number of registered voters in the particular stream was 697 (paragraph 84G of the petition). This was denied by the respondents. No affidavit evidence was tendered to support the allegation. An allegation in the petition has to be supported by sworn evidence.

41. In paragraph 84 of the petition it was alleged that various Forms 36A at Kwa Njenga polling station and at Cheminade Training Centre polling station did not bear IEBC stamp as required by law. The sample Forms without stamp were annexed to the petition. No affidavit was sworn to support the claim. However, the 1st, 2nd, 3rd and 4th respondents acknowledged the lack of stamp on the Forms. The 2nd respondent's evidence was that the Forms may have lacked the stamp because the presiding officers may have stamped the first copies which were then locked up in the ballot boxes, but that the Forms which lacked the stamp still bear the signatures of the agents. Further that, the failure to stamp was not material enough to affect the integrity or outcome of the results. It is material that the appellant was not, in this complaint, questioning the results in the Forms.

42. There was the allegation in paragraph 84(I) of the petition that there was failure to display the results of the election on the doors of the named polling stations in Kwa Njenga Primary School and Cheminade Training Centre. There was no affidavit filed of evidence to prove or substantiate the claim. In any case, the claim was denied by the 1st, 2nd, 3rd and 4th respondents. I find that there was no proof of the claim.

43. It is admitted that the 4th respondent was a presiding officer based at the tallying centre of Embakasi South Constituency (in which Kwa Njenga Ward fell) at Embakasi Secondary School. It was alleged in paragraphs 87 to 90 of the petition that IEBC engaged her as presiding officer when she was an official of Wiper Democratic Movement Party, the Party of the 5th respondent; that this contravened **Article 88(2)(a)(ii**) of the Constitution. Against her, it was alleged that throughout the process of tallying and collating of results she was, together with the 2nd and 3rd respondents, engaged in the doctoring of results to favour the 5th respondent. In the affidavit of the appellant to support the petition he attached a letter from the Registrar of Political Parties dated 4th September 2017 to show that the 4th respondent was a member of the Party. In response, the 4th respondent stated that she had been engaged on temporary basis during the election period; that this followed a recruitment in which she qualified. Together with the 1st, 2nd and 3rd respondents, their case was that, like all recruited officials, she was trained and took oath to be non-partisan during the election; and that she was guided by the election law and guidelines of the IEBC. It was stated that a list of all persons proposed for recruitment as presiding officers was sent to all political parties through the Office of the Registrar of Political Parties and that no objection had been taken to her appointment. To start with, **Article 88(2)(a) (ii)** of the Constitution (as read with **sections 2**, **3(b)** and **5(2)** and **(3)** of the **Independent Electoral and Boundaries Commission (IEBC) Act No. 9 of 2011**)

clearly shows that the 4th respondent was not barred from acting as the presiding officer. She was not a "member" of the IEBC. She was neither the Chair of the Commission nor a Commissioner. Secondly, it has been sworn that she was publicly recruited, and the appellant and his Party given an opportunity to challenge her recruitment, which they did not. Thirdly, the particulars of doctoring were not given. Lastly, she sat at the tallying centre. Voting had been conducted at the polling stations where the results had been declared. There was no evidence that the entries in Form 36B did not reflect the results declared in Forms 36A. I find that the allegation was not proved.

44. It appears clear that on 22nd August 2017 the 3rd respondent and the Logistics Officer of Embakasi South Constituency tallying centre were charged in court with tampering with electoral material on 18th August 2017. The appellant claimed in paragraphs 94 to 95 of the petition that this was further proof that there was tampering with the election herein. The respondents' response was that the alleged tampering had happened on 18th August 2017 which was after the elections had been conducted and results declared; that the material in question were in respect of the presidential election; and that, in any event, the criminal case has not been concluded. I find that the respondent's response was sufficient answer to the claim.

45. In paragraph 102 of the petition, the following election offences were alleged to have been committed by the 2nd respondent and the officials under him:-

a. omitting to prepare accurate and complete election returns and statutory documents;

b. filling the results declaration Forms by the presiding officers in the absence or without agents for candidates and political parties;

c. misplacing or getting rid of the results declaration Forms from the polling stations;

d. announcing results that were unlawful, fraudulent, fictitious and false;

e. using, accepting and manufacturing fake, forged, unlawful, fictitious and false; and

f. counting and tallying that was done or undertaken using fake, incomplete, unsigned and unverified documents including Forms 36A.

These claims were denied by the respondents. It is clear from the foregoing that none of these claims has been substantiated or proved. I have considered that each alleged offence had to be proved beyond all reasonable doubt.

46. Pursuant to the court order dated 29th November 2017, the parties, together with court officials, visited the IEBC warehouse for resealing of ballot boxes. For Kwa Njenga Primary School polling stations 21 ballot boxes were identified, sealed and serialized. For Cheminade Training Centre polling stations 12 out of 14 boxes were identified, sealed and serialized. 2 boxes were initially missing, but were later availed. From the report availed to the court, some ballot boxes had broken seals. In some the seals were missing. In some the tallying sheet was missing while in some the lid was broken on one side. In the written submissions, the appellant's case was that the security of the election material was compromised; that out of 35 polling stations only 11 ballot boxes had intact seals; that even out of the 11 some had just 4 out of the required 5 seals. The respondents submitted that apart from the status of the ballot boxes at resealing, there was no evidence that the boxes had been tampered with; it was not demonstrated that the seals used after the results declaration were not the ones on the boxes during the visit to the warehouse and that the status of the ballot boxes did not advance or prove any claim in the petition. They pointed out that the seals used on the ballot boxes were plastic and therefore easy to break, which could have happened during transportation and storage. It is important to note that the purpose of the resealing exercise was, from the application in respect of which the order was made, to be used by the court and the parties in the event that there was a successful request for scrutiny and recount. Otherwise, the state of the ballot boxes, the broken seals or the broken lids were not issues that were specifically pleaded in the petition in respect of which evidence was to be called to prove. I find that nothing turned on the status of ballot boxes at the warehouse. It is material that these ballot boxes were being viewed several months following the election, and after they had been transported here from the respective polling stations. They had been subjected to wear and tear.

47. When the counsel consented to have the petition heard and determined on the basis of the affidavit evidence and written submissions, it was known by the appellant that he had filed an application for scrutiny and recount which had not been prosecuted. He did not care to indicate that the consent was subject to the prosecution of the application. The trial court observed that, in the circumstances, it was considered that the application had been abandoned. The better way that the trial court should have looked at the matter was that, it was going to consider the petition and supporting affidavits (and indeed the responses) to see whether a case had been made for scrutiny and recount. That was not done, hence the complaint that the appellant was denied the opportunity to canvass the issue.

48. The law on scrutiny or recount of votes is now settled. The right to scrutiny or recount does not lie as a matter of course. The party seeking scrutiny or recount of votes has to establish sufficient basis for invoking the right. Such basis must be pleaded in the petition and evidence tendered, either through affidavit or orally on oath, to show that it is necessary to order for scrutiny or recount. The scrutiny or recount is called to confirm the truth of that particular evidence. It is also now clear that scrutiny or recount must relate to a specific polling station whose results are in dispute, and the evidence called has to be specific in that regard.

49. It was observed by the Supreme Court in **Nicholas Kiptoo Arap Korir Salat –v- IEBC & 7 Others [2015]eKLR** that the petitioner must specify the polling stations in respect of which he seeks scrutiny and the materials and documents that he wishes the court to scrutinize. Similarly, reasons should be given why the materials and documents in question should be scrutinized. Scrutiny and recount allow the court to determine the contested facts, otherwise the court should not be turned into another tallying centre. The process is intended to deal with disputed results and/or the impugned electoral process.

50. In the petition and the affidavit sworn in support, the appellant sought scrutiny and recount of the ballot papers cast at the said election in

all polling streams in Kwa Njenga Primary School and Cheminade Training Centre polling stations within Kwa Njenga Ward. He further sought for scrutiny and audit of the data downloaded from the KIEMS Kits used during the election of Member of County Assembly of Kwa Njenga Ward.

51. There was no sufficient evidence in the affidavits in support of the petition to show that the results were disputed in any of the streams in question. No reasons were given why the ballot papers needed to be scrutinized. No evidence was given to show why the KIEMS kits data needed to be scrutinized or audited. The affidavits of the appellant's agents indicated that the results in Forms 36A and 36B were different from what they held in their notebooks. They did not avail those notebooks for scrutiny and verification. In any case, scrutiny was sought in respect of ballot papers cast, and not for Forms 36A and 36B.

52. In **Ledama Ole Kina v- Samwel Kuntai Tunai & 10 Others [2013]eKLR,** it was observed as follows:-

> **"An application for scrutiny of all of Narok South Constituency lacks specificity, is a blanket prayer that in my view, cannot be granted. The applicant needed to be specific on which polling stations he wanted a scrutiny done in. If he wanted scrutiny in all the polling stations, then a basis should have been laid for each polling station………"**

I find that there was no basis laid in the petition and the supporting affidavits to enable an order for either scrutiny or recount to be made.

53. In conclusion, I find that the appeal cannot succeed. For the reasons given, I will not disturb the judgment of the trial magistrate delivered on 2nd January 2018 dismissing the petition with costs. The appeal is dismissed with costs.

54. Regarding costs, I consider that the complaint that the petition had not been heard and determined on merits was with a basis. On consideration of the petition, however, it has been found that the petition did not have merits. Costs in an election petition should not be such that would be petitioners will find it impossible or prohibitive to challenge an election that has aggrieved them. On the other hand, the successful party has to be reasonably and effectively compensated. Costs usually follow the event. Bearing all these in mind, I order that the appellant shall pay Three Hundred Thousand Shillings (Kshs.300,000/=). One Hundred and Fifty Thousand Shillings (Kshs.150,000/=) of that shall be paid to the 1st, 2nd, 3rd and 4th respondents, and One Hundred and Fifty Thousand Shillings (Kshs.150,000/=) shall be paid to the 5th respondent.

55. Finally, I determine and confirm that the 5th respondent was at the election held on 8th August 2017 validly elected as the Member of the County Assembly of Kwa Njenga Ward in Embakasi South Constituency in Nairobi County. Accordingly, the certificate of court as to the validity of the election shall issue to the Independent Electoral and Boundaries Commission and the Speaker of the Nairobi County Assembly.

DATED and DELIVERED at NAIROBI this 7th day of MAY 2018.

A.O. MUCHELULE

JUDGE