



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
ELECTION PETITION APPEAL NO. 4 OF 2018

IBRAHIM NOOR HUSSEIN.....APPELLANT

VERSUS

HASSAN JIMAL ABDI.....1ST RESPONDENT

RETURNING OFFICER, WAJIR NORTH CONSTITUENCY.....2ND RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....3RD RESPONDENT

(Being an appeal from the entire Judgement and Order of the Principal Magistrate Court at Wajir in Election Petition No. 3 of 2018 by Hon. A. K. Mkoross (SRM) delivered on 2nd February, 2018)

JUDGEMENT

BACKGROUND:

1. This appeal was filed by Ibrahim Noor Hussein from the decision delivered on 2nd February, 2018 by the Senior Resident Magistrate at Wajir, in Election Petition No. 3 of 2017 in which the trial court allowed the petition and ordered as follows –

- a. That the election of the 1st respondent as Member of the County Assembly for the Batalu Ward was not free and fair.
- b. That the election of the 1st respondent as Member of the County Assembly for Batalu Ward is hereby declared null and void.
- c. That the 3rd respondent is hereby ordered to hold fresh election for Member of County Assembly for Batalu Ward pursuant to the Constitution and electoral laws.
- d. That the petitioner and the 1st respondent shall have the costs. The costs to be borne by the 3rd respondent.
- e. That costs payable is hereby capped at Kshs.300,000/= for the petitioner and ksh.100,000/= for the 1st respondent.
- f. That pursuant to section 86 of the Elections Act, a certificate of determination of this petition to issue to the Independent Electoral and Boundaries Commission (IEBC).

THE APPEAL:

2. The appellant herein, who was the 1st respondent in the election petition and whose election was nullified, dissatisfied with the decision of the trial court has come to this court on appeal raising the following grounds –

1. The learned magistrate erred in law and fact in failing to act as an independent, impartial and fair arbiter in determining the dispute between the parties by relying on facts not pleaded and evidence not adduced and thus arrived at a wrong finding.
2. The learned magistrate erred in law and fact in relying on extraneous matters and disregarding the parties pleadings and submissions. Effectively, the court amended the petition and determined a new petition, different from that presented by the petitioner to the detriment of the appellant.

3. The learned magistrate erred in fact and in law in relying on unpleaded and unproven irregularities to justify nullification of the election despite the fact that the said irregularities did not affect the outcome of the election.
4. The learned magistrate erred in law and fact in not appreciating sufficiently or at all that the clerical irregularities, if any, did not –
 - a. affect the outcome of the election; or
 - b. confer any numerical advantage to the appellant.
5. The learned magistrate erred in law and in fact in failing to consider or sufficiently consider the explanation provided by the 2nd and 3rd respondents in relation to the administrative errors and further disregarding the clear evidence that the said errors were not meant to and did not benefit the appellant. As a result, the learned magistrate arrived at a wrong decision.
6. That the learned magistrate erred in law by disregarding and failing to take into account the findings of the vote recount and scrutiny conducted by the court which demonstrated that the clerical errors had not altered the appellant's win. By so doing, the learned magistrate contravened the doctrine of Stare Decisis on vote recount and scrutiny as set out in the case of Richard Nchapi. Leiyagu vs Independent Electoral and Boundaries Commission and 2 Others Civil Appeal No. 299 of 2013 [2014] eKLR.
7. The learned magistrate's decision had the effect of usurping the will of the voters of Batalu Ward which was evident in the scrutiny and recount exercise conducted by the court and which results were not challenged.
8. That the learned magistrate erred in law in misapplying and misinterpreting the principles in Ahmed Abdullahi Mohamad & Another vs Mohamed Abdi Mohamed & 2 Others [2018] eKLR thus arrived at a wrong conclusion. The learned magistrate clearly disregarded the principle that each case must be decided on its own merits.
9. The learned magistrate erred in law by failing to analyse and take into consideration the respective pleadings by the parties, the witness testimonies and the evidence tendered and thus arrived at an unsupported and erroneous conclusion on the opening of the ballot boxes. The learned magistrate further erred in failing to uphold the appellant's election which was confirmed by the recount ordered by the court and which proved that the opening of the ballot boxes did not affect the results of the election.
10. The learned magistrate erred in law in assuming jurisdiction over the petition when it was clear that the same was incompetent and fatally defective as the petitioner did not set out the results of the election petition as required by law.
11. The learned magistrate erred in fact and in law by not appreciating sufficiently or at all that the 1st respondent was obligated in law to prove his accusations against the 2nd and 3rd respondent.
12. The finding by the learned magistrate goes against the evidence presented and the resulting decision is in the circumstances unfair and unjust.
13. That the learned magistrate erred in law by exercising his discretion in a capricious manner to the detriment and prejudice to the appellant.
14. The learned magistrate erred in law and in fact in holding that the appellant was not validly elected to the position of Member of County Assembly Batalu Ward.

HEARING OF THE APPEAL:

3. By consent of all counsel representing the parties, the appeal proceeded by way of filing and highlighting written submissions.

APPELLANT'S SUBMISSIONS

4. At the hearing of the appeal, Mr. Muganda appeared for the appellant, and relied on the record of appeal, their written submissions, list and the bundle of authorities. Counsel also relied on the ruling of this court dated 7th May, 2018 striking out the 1st respondent's Notice of Cross Appeal and said that it was wrong for counsel for the 1st respondent to have referred to the cross appeal in their written submissions, as same had been struck out.
5. On jurisdiction of this court, counsel submitted that this appeal was based on points of law only and relied on the case of **Zacharia Okoth Obado vs Edward Akongo Oyugi & 12 Others [2014] eKLR**.
6. Counsel submitted that contrary to what the respondents contended, this court had jurisdiction to entertain this appeal under Section 75 of the Elections Act 2011, based the authorities cited by them which clearly explained what constituted points of law and singled out the Supreme Court's sentiments in the case of **Gatirau Peter Munya vs Dickson Mwenda Githinji & 3 Others [2014] eKLR**, wherein the Supreme Court stated that where there was no evidence to support a finding of the trial court, or where the finding of the court was perverse or illegal, then such was a point of law which could be considered by this court on appeal under Section 75 of the Elections Act.

7. As an example of a perverse finding, counsel stated that though under paragraph 22 of the judgment, the magistrate found that there was no ballot stuffing, he nevertheless proceeded to find that the election was not held in accordance with the law without laying any basis for such absurd findings, which was a point of law for determination by this court. Counsel also stated that though the findings of the magistrate at paragraph 115 of the judgment were that alterations did not materially change the election results, the court went ahead to nullify the election. According to counsel, this again was a point of law to be determined by this court in terms of the reasoning in the case of **Peter Munya (Supra)**, as the magistrate after finding that the alterations did not materially change the results, should not have nullified the elections.

8. On Ground 10 of appeal, counsel argued that the learned magistrate did not have jurisdiction to entertain the petition as the results of the election was not contained in the petition, and relied on Rule 8 (1) of the Elections (Parliamentary and County Elections) Petition Rules, 2017 and Rule 12. Counsel also relied on the case of **John Mututho vs Jayne Kihara [2008] eKLR** as well as the case of **Ali Hassan Joho vs Suleiman Shabhal & 2 Others [2014] eKLR**.

9. On Ground 1, 2, 3, 6 and 8, counsel felt that the magistrate should have referred to submissions filed by the parties, but according to counsel, the magistrate did not mention a word on the submissions. In addition, counsel stated because the magistrate did not apply the principles set in the case of **Peter Munya (Supra)**, which was a decision of the Supreme Court, the court actually violated the provisions of Article 163 of the Constitution on the doctrine of precedent. Counsel also relied on the case of **Raila Odinga vs IEBC & 2 Others & Law Society of Kenya (amicus curiae) [2017] eKLR**.

10. With further regard to failure of the magistrate to apply the doctrine of precedent, counsel relied on several cases including the case of **Richard Nchapi Leiyagu vs IEBC & 2 Others [2014] eKLR**, where the Court of Appeal stated that where there was no evidence that any ballots were added, the mere irregularities of opening ballot boxes should not affect the results of the election. Counsel thus felt that the election herein should not have been nullified by the trial court as the appellant remained the winner throughout. Counsel felt that the mere removal of form 36A from the ballot boxes, though an irregularity, did not affect the election results, and the election court should thus have applied the above decision of Court of Appeal.

11. Counsel also faulted the magistrate for relying on a case of Wajir gubernatorial elections, that is **Ahmed Abdullahi Mohamed & Another vs Hon. Mohamed Abdi Mohamed & 2 Others Election Petition No. 14 of 2017** a High Court decision without analyzing it and using it to override the decision of the Court of Appeal in the case of **Richard Nchapi Leiyagu vs IEBC & 2 Others [2014] eKLR**.

12. On Ground 4, 5, 7 and 9, counsel submitted that that an election was a process and since the election petition filed was mainly on the issue of numbers, and a request for scrutiny was allowed, the magistrate should not have ignored the results of the scrutiny and found something else.

13. Specifically, on the effects of conducting a scrutiny, counsel relied on the Supreme Court decision of **Gatirau Peter Munya (Supra)** and stated that the only time an election could be annulled, was where after scrutiny, the findings on the election results affected the winner. As such in the present case, since the 1st respondent in cross examination said that he would still not be the winner, the magistrate was wrong in annulling the elections. Counsel emphasized that an election was not based on perfection but that it was an aspiration and that since perfections were an impossibility, only irregularities that altered the result could be used to annul an election, and relied on the case of **Peter Kingara vs IEBC & 2 Others [2014] eKLR**.

14. On Ground 11, 12, 13 and 14 on the burden of proof, counsel submitted that the magistrate did not say how the results of the scrutiny affected the winner and wondered how the election results could thus be altered. He relied on the case of **Nadhif Jama vs Abdikhaim Osman & 3 Others [2014] eKLR** on the rights of voters and the test to be applied in case of scrutiny, and stated that as a general rule, elections could not be free of the irregularities and the test had to be numerical in determining the winner, and should not be speculative and relied on the case of **Raila Odinga vs IEBC & Others – Petition No.s 3 & 4 of 2013** as well as the case of **Gatirau Peter Munya (Supra)**.

15. In response to the submissions of the 1st respondent, counsel submitted that the grounds of appeal herein were not a mixture of facts and law as they only raised points of pervasiveness in line with the case of **Gatirau Peter Munya (Supra)**, and added that clanism should not be considered in this appeal as no such issue was not pleaded in the trial court and emphasized that the doctrine of stare decisis in Kenya, was so central that it was anchored under Article 163 of the Constitution and not the Judicial Handbook relied upon by the 1st respondent's counsel, and faulted counsel for the 1st respondent in attempt to introduce the cross appeal which had already been struck out by this court.

1ST RESPONDENT'S SUBMISSIONS

16. Mr. Noor and Mr. Katwa Kigen made submissions on behalf of the 1st respondent.

17. Mr. Noor submitted that the appellant's counsel had resorted to sophistry and misrepresentation of facts in this appeal in the hope that the court would be misled, and maintained that factual issues were contained in the Memorandum of appeal and the appellant's counsel submission, in violation of the applicable law.

18. Counsel relied on Section 75 of the Elections Act, which provided clearly that an appeal to this court lay only on matters of law, and urged this court to be guided by the Court of Appeal reasoning in the case of **Hon. Mohamed Abdi Mohamud vs Ahmed Abdullahi Mohamed & 3 Others – Election Appeal No. 2 of 2018 [2018]**, relating to the gubernatorial election in Wajir County wherein the main grounds of appeal herein were a cut and paste copy of those grounds, and argued that all the grounds of appeal which stated that the learned magistrate erred in law and fact should not be entertained by this court.

19. According to counsel, the test for determining whether the ground of appeal was on law or fact was simple as clearly demonstrated in the case of **Gatirau Peter Munya (Supra)**, a decision of the Supreme Court, in that an appellate court in election petitions should not be called upon to evaluate the probative value of evidence. In counsel's view, determination of human errors would mean determining the truthfulness

of affidavits and explanations thereto which was a question of fact, on which this court did not have jurisdiction to entertain.

20. According to counsel therefore, only ground 8 and 10 raised points of law that is, whether the magistrate had jurisdiction, and whether the magistrate applied correctly the doctrine of stare decisis.

21. With regard to the challenge on the jurisdiction of the magistrate, counsel submitted that it was not true that the petitioner had not included the election results in the petition, as the same was in paragraph 9 and 11 of the petition and in the affidavits filed as reflected on page 76 of the record of appeal. Counsel went further to say that the appellant in fact tabulated the results of the election in response to the petition which in effect provided the trial court with all the materials it needed, and relied on the case of **Martha Karua vs IEBC & 3 Others [2018] eKLR**, where the Court of Appeal gave the conditions to be satisfied by a petitioner in determining whether the petitioner had stated the election results in an election petition. This according to counsel disposed of Ground 8.

22. On Ground 10, counsel submitted that the trial court applied the doctrine of precedent and stare decisis correctly, as in the case of **Ahmed Abdullahi Mohamed & Another vs Mohamed Abdi Mohamed & 2 Others (Supra)** the court referred to the opening of the ballot boxes including those of the Member of the County Assembly herein, which meant that the magistrate hands were tied by the decision of the High Court.

23. On the argument that election petitions were proceedings of a special kind, counsel submitted that, being proceedings of a special kind did not mean that every election petition was of a special kind, as principles applicable in one situation could be applied in resolving another election dispute, if the circumstances were similar. According to counsel, these were the only two points of law raised in the memorandum of appeal.

24. In the alternative, counsel submitted that if this court was persuaded to determine points of fact, then it was obvious that the alterations noted in the scrutiny were not as a result of human error which was an unchallenged fact, and stated that, when the 1st respondent in the trial court dealt with the matter at page 96 of the record, the issue of human error was not raised. The appellant in fact denied the existence of errors and the 2nd respondent also denied that there were alterations to form 36A and that only the 3rd respondent through Mahat Bishara, filed an affidavit in which it was stated that a sleeping clerk was responsible for the alterations. Since the 3rd respondent could however not explain or give the required particulars to support the allegation of a sleeping clerk causing the errors, the magistrate rightly arrived at the conclusion he did. Counsel lastly felt that, as the sleeping clerk did not count votes, the excuse of a sleeping clerk did not hold water in terms of Regulation 79 (2) of the Elections Regulations.

25. On the allegation that the trial magistrate relied on unpleaded and extraneous issues, counsel submitted that the appellant's counsel had not explained how that was done by the magistrate.

26. Counsel lastly relied on Rule 34 (10) of the Election Petitions Rules, and urged this court to confirm or confirm but vary the decision of the trial court on appeal as appropriate, even without a cross appeal.

27. Mr. Katwa Kigen also for the 1st respondent relied on Article 81 and 83 of the Constitution, and stated that this court as the appellate court had to consider both the qualitative and the quantitative measure in determining whether to confirm or annul an election.

28. Counsel submitted that if the election did not meet the Constitutional and written law requirements, then it had to be nullified, as it would have failed the qualitative test, under Article 86 of the Constitution.

29. The second test according to counsel, was whether the election had irregularities and illegalities which affected the qualitative test, and submitted that the extensive arguments of the appellant's counsel in this appeal were that even after recount and scrutiny; the appellant had superior number of votes. Mr. Kigen conceded that after recount the number of votes of the appellant were more, he maintained that the learned magistrate was right in finding that such higher numbers only satisfied the quantitative test under Article 81 of the Constitution but not the qualitative test under Article 86.

30. On the qualitative test, counsel contended that two issues weighed on the magistrate's mind. Firstly, whether it was regular to open the ballot boxes. Secondly, whether it was regular to make alterations in form 36A. According to counsel, as the alterations were made only in favour of the appellant who was the 1st respondent in the trial court, the magistrate was correct in finding that the elections did not meet the requirements of Article 86 of the Constitution.

31. Secondly, counsel submitted that the alterations were in only 2 out of 12 voting stations which were Basineja and Batalu, where the appellant got 2/3 of the votes, while it was not in dispute that there existed animosity between the Gegodia and Ajuran communities in the area. According to counsel, the 1st respondent questioned the neutrality of the Returning Officer who was a voter, and felt that it was a fantasy to imagine that the two form 36As were left carelessly in the ballot boxes.

32. With regard to the quantitative test, counsel submitted that though the appellant initially stated that alterations did not occur, he later admitted the same and said that they were due to clerical or administrative errors, which meant that the election did not meet the quantitative test under Article 81 of the Constitution.

33. With regard to the votes at the two polling stations, counsel referred to Regulation 83 of the Election Regulations and said that though at Basineja voting station, there were 439 valid votes and the appellant was declared winner by 464 votes which was an addition of 34 more votes than voters. In Batalu polling station also the petitioner had 487 votes and was declared the winner, which was 15 more votes than the number of voters. Counsel argued that according to Regulation 83 of the Election Regulations, such results had to be disregarded in determining the election winner which was not done. According to counsel, quantitatively therefore his client 1st respondent under Regulation 83 had more votes than the appellant.

34. Counsel thus submitted that, Article 81, 83 and 86 of the Constitution, were not complied with. To emphasize irregularities, counsel relied on the case of **Ahmed Abdullahi Mohamed vs Hon. Mohamed Abdi Mohamed (Supra)**, to demonstrate that without an order of the court, it was unlawful to open the ballot boxes.

35. Counsel submitted further that the case of **Richard Leiyagu (Supra)** was distinguishable from present case as the judges in the Court of Appeal did not apply their minds to Regulation 86 and 93 of the Elections Regulations, and the scope of that case was thus limited, and added that there was no agreement herein between parties to open the ballot boxes. Counsel felt that even if parties had agreed to open the ballot boxes, the law was that the ballot boxes could only be opened through an order of the court, and such agreement would thus be invalid. Counsel concluded by submitting that, in the case of **Leiyagu (Supra)** there was neither ballot stuffing nor an allegation of bad faith, and as the alterations herein were made with a corrupt motive, the appeal should not be allowed.

SUBMISSIONS OF 2ND AND 3RD RESPONDENTS

36. Mr. Odhiambo for the 2nd and 3rd respondents supported the appeal and relied on the submissions of the appellant's counsel.

37. With regard to the jurisdiction of this court under Section 75 (4) of the Elections Act, counsel concurred that election appeals to this court were only on points of law but added that as was stated by the Supreme Court in the case of **Gatirau Peter Munya (Supra)**, conclusions arrived at by a trial court which were not supported by the evidence, or were perverse or illegal were points of law.

38. Counsel relied on Section 83 of the Evidence Act (Cap. 80) which gave a window to the 3rd respondent (the IEBC) to acknowledge that mistakes would occur in elections, and that when such mistakes did not affect the election results, the IEBC should not take them as vitiating the election.

39. Counsel contended also that though there were many allegations before the magistrate made against the 3rd respondent, the magistrate only recognized and determined the petition on two (2) issues; that is the alteration of results, and the opening of the sealed ballot boxes, and submitted that the alterations on forms 36A were visible and attributed to human error and not designed to advantage the appellant to the prejudice of the 1st respondent.

40. On the contention by counsel for the 1st respondent that there were alterations only in two polling stations, counsel submitted that there were alterations also in the other polling stations such as Funumbua and Idhoo polling stations. These alterations according to counsel, affected candidates other than the appellant and the 1st respondent did not challenge those alterations, and instead the 1st respondent made a big issue out of only two polling stations where the appellant had many votes, but did not show that he was disadvantaged.

41. With regard to opening of ballot boxes, counsel submitted that the ballot boxes were merely opened to extract form 36A and that the 3rd respondent explained to the trial court that the forms 36A were put in the ballot boxes due to insecurity in the area not because of the ill motive.

42. On the results of the scrutiny, counsel submitted that though the trial court ordered a scrutiny, the winner was still confirmed to be the appellant, and as such the election should not have been annulled and relied on the case of **Richard Leiyagu (Supra)**.

43. With regard to the application of the doctrine of precedent and stare decisis, counsel submitted that the case authority relied upon by counsel for the 1st respondent was spent by the Supreme Court decision in the **Raila Odinga vs IEBC Case [2017] eKLR** and that the case of **Mohamed Abdi (Supra)** on clerical errors was distinguishable.

44. On the submissions by counsel for the 1st respondent that clerks did not count votes, counsel submitted that Regulation 79 (2) of the Election Regulations merely stated that the Presiding Officer would announce the results of the election but did not specify who would count the votes. On the Presiding Officer being a voter, counsel submitted that everyone in Kenya had a right to hold their political inclinations, which did not disqualify them from being election officials.

45. Counsel concluded by stating that the election herein was conducted in accordance with the Constitution and Elections Act and that any irregularities noted were human errors which did not affect the election results. There was thus no reason for the annulment of the election by the trial court, which would cause more public expenditure, and urged this court to allow the appeal with costs.

RESPONSE TO RESPONDENTS' SUBMISSIONS

46. Mr. Muganda for the appellant in response said that, a decision of the Supreme Court bound all other courts, and relied on the case of **Obado (Supra)** and said that the case of **Abdullahi (Supra)** relied upon by the trial magistrate was still pending appeal. He stated also that the 1st respondent at no point, even in cross examination, did he say that ballot boxes were stuffed, and therefore there was no reason to assume that there was vote stuffing.

47. Counsel maintained that the case of **Richard Leiyagu (Supra)** a Court of Appeal decision, in which the court stated that opening of ballot boxes without a court order did not vitiate results of an election was still undisturbed and could not be overturned by the High Court.

48. On human error, counsel submitted that on the authority of the case of **Nadhif Case (Supra)**, the appellant still remained the winner of the election after scrutiny, as 1st respondent also got zero votes in other polling stations.

49. According to counsel also, the alleged bias of the Presiding Officer was unfounded as the Presiding Officer was entitled to vote, and in

any case, the trial court found that there was no votes stuffing.

50. On the exercise discretion by the trial court, counsel submitted that courts must rely on the pleadings of parties. On qualitative and quantitative consideration in elections, counsel submitted that Section 83 of the Elections Act was clear that elections would never be perfect.

51. Counsel concluded by stating that the election herein was about the will of the people which must be respected and that the decision of the trial court in nullifying the election was a mistake and that the appeal should be allowed with costs.

CONSIDERATIONS

52. I have considered the appeal and submission of all counsels on record, both written and oral. In my view, the issues for this court's determination are as follows –

I. Whether the memorandum of appeal is defective for being on law and facts.

II. Whether the petition before the trial court was fatally defective for not stating the results of the election.

III. Whether the Presiding Officer of the election was biased for being a voter.

IV. Whether the election was void as a consequence of opening the ballot boxes without a court order.

V. Whether the magistrate took into account extraneous matters and evidence and failed to take into account relevant facts, evidence and submissions and arrived at a wrong decision.

VI. What is the legal effect of the errors found in the scrutiny.

VII. Who will bear the costs of this appeal.

i. Whether the memorandum of appeal is defective for being on law and facts.

53. This issue goes to the jurisdiction of this court to hear and determine the appeal. As was stated by **Nyarangi JA in the Owners of the Motor Vessel Lilian 'S' vs Caltex Ltd [1989] eKLR 1**, without jurisdiction a court of law has to down its tools, and take no further step in the matter.

54. The guiding law on what should be contained in an appeal to this court from a decision of the Election Petition Court, is Section 75 (4) of the Elections Act of 2011 which provides as follows –

“75 (4) – An appeal under subsection (1A) shall lie to the High Court on matters of law only and shall be –

a. filed within 30 days of the decision of the magistrate's court; and

b. heard and determined within 6 months from the date of filing of the appeal.”

55. It is clear from the above statutory provisions that an appeal to the High Court from an Election Court has to be restricted to matters of law only, and cannot be based on facts. Grounds 1, 2, 3, 4, 5, 11 and 14 which I have already highlighted above in this judgement are clearly couched as being on law and fact or facts and law.

56. Counsel for the appellant has argued very strenuously that the intention of the above grounds was to raise issues of misdirection by the magistrate on obvious and proven facts. Counsel submitted that the magistrate ignored or misinterpreted facts and reached pervasive, and illegal or absurd conclusions. The counsel for the 2nd and 3rd respondents supports this position. Counsel for the 1st respondent opposes this position and says the said grounds as well as other grounds be struck out for violating the law.

57. On the main, the appellant's counsel relied on the case of **Zacharia Obado vs Edward Akongo Oyugi & 2 Others [2014] eKLR**, a decision of the Supreme Court, while counsel for the 1st respondent relied on the Court of Appeal case of **Hon. Mohamed Abdi Mohamud vs Ahmed Abdullahi Mohamed & 3 Others – Election Petition Appeal No. 2 of 2018**.

58. In my view, in the case of **Obado (Supra)** the Supreme Court merely said that where the point for determination on appeal is a mixed point of law and fact, and where the finding of fact by the trial court was unsupported by the evidence or was unreasonable or perverse in nature, then such constituted a point of law. It did not authorize an appellant to plead matters of fact and law in the grounds of appeal. Therefore in my view, the Court of Appeal decision in the Court of Appeal case of **Hon. Mohamed Abdi Mohamud vs Ahmed Abdullahi Mohamed & 3 Others – Election Appeal No. 2 of 2018** did not change the position determined by the Supreme Court, but applied the reasoning of the Supreme Court in a specific case. In the more recent case of **Hon. Sumra Irshadahi Mohamed –Vs- IEBC & Another**, Nairobi Court of Appeal Election Appeal No. 22 of 2018, the Court of Appeal stated that the mere appearance of the words “law and facts” in the introductory line of the ground of appeal is not fatal if in fact the issue in the ground is an issue of law.

59. In our present case, I find that all the specific paragraphs that purported to be grounds based on fact and law or vice versa are incurably defective, and I strike them out. They are Grounds 1, 2, 3, 4, 5, 11 and 14 of the memorandum of appeal. This is because the contents of all

those grounds of appeal and the submissions of counsel for the appellant on appeal are inviting this court to delve into the re-evaluation of the evidence and the conclusions of the trial court, which this court has no jurisdiction to do.

(ii) Whether the petition before the Election Court was fatally defective for not stating the results of the election.

60. On whether the petition in the trial court was null and void for not stating the results of all the candidates, in my view, that point cannot also assist the appellant. The petition gave the result of two of the contestants who are the appellant and the 1st respondent herein in the petition. The number of votes which each of the two garnered were given and the winner was indicated. In the reply to the petition, the appellant gave the complete list of candidates and the results. Regulation 8 of the Petition Regulations relied upon by the appellant's counsel does not state in what format the election result should be given in a petition. Therefore, in my view, in the circumstances of this case, the fact that the results for the other contestants who were not part of the proceedings were not contained in the petition was not a fatal defect. In this regard I rely on the Court of Appeal decision in the case of **Martha Karua vs IEBC & 3 Others [2018] eKLR** and another more recent decision of the Court of Appeal **Hon. Sumra Irshadali Mohamed vs IEBC & Another – Election Petition No. 22 of 2018** decided on 6th July 2018.

(iii) Whether the Presiding Officer was biased for being a voter.

61. Counsel for the 1st respondent have argued very strongly that the Presiding Officer was biased for being a voter and that there were clan animosities in the voting Ward. I have not been referred to any law or legal principle which says that a Presiding Officer or any other election official is disqualified from voting. Secondly, this is not a ground of appeal nor was the issue raised in the election court. On clan animosity, again even if the same existed, there is no such ground of appeal and it was not an issue in the election court. Besides, bias has to be supported by cogent evidence, and it has to be shown that the alleged biased person conducted himself in a manner that was biased. I dismiss that complaint.

(iv) Whether the election was void as a consequence of opening the ballot boxes without a court order.

62. It is admitted by all counsel for the parties that Regulation 8 of the Election Rules prohibits opening of the ballot boxes after sealing without a court order. The learned magistrate relied on the High Court decision in the case of **Ahmed Abdullahi Mohamed & Another vs Hon. Mohamed Abdi Mohamed & 2 Others – Election Petition No. 14 of 2017** in which the court said that such opening of sealed ballot boxes without a court was a fatal defect and vitiated an election. Counsel for the appellant on the other hand relied on the Court of Appeal case of **Richard Nchapi Leiyagu vs IEBC & 2 Others – Civil Appeal No. 299 of 2013 [2014] eKLR** in which the Court of Appeal stated that such opening of ballot boxes though illegal might not be fatal.

63. I have perused both cases. While in the Court of Appeal case there was a consent between the contestants or their agents to open the ballot boxes, in the present case, such consent was lacking. The excuse by IEBC of the putting of the form 36A in the two ballot boxes for security reasons also does not in my view hold water. If indeed there was such known security reason, then in my view it should have been known by all parties concerned. In the present case this action was a secret not disclosed to other interested parties. I thus agree with the trial court that, that illegal act of opening the sealed ballot boxes without a court order and without any convincing justifiable reason rendered the election a nullity, which distinguishes this case from the Leiyagu case determined by the Court of Appeal, as there was more than one illegality here.

(v) Whether the magistrate took into account extraneous matters in determining the petition.

64. It has been argued by the counsel for the appellant that the magistrate took into account matters which were not pleaded, in that he took into account factual findings from the case of the gubernatorial case in Wajir. Indeed, the magistrate found that in the gubernatorial election petition, Ahmed Abdullahi case (supra), all the ballot boxes from the 12 polling stations in the Ward were opened and used the same to arrive at conclusions in the present case on the supposed numbers of votes achieved by the contestants herein.

65. In my view, the learned magistrate was wrong in doing so as other than the tally for the two polling stations of Basineja and Batalu, such evidence was not before the trial court. All the learned magistrate was required to acknowledge and accept based on the doctrine of precedent, was the legal reasoning and decision of the High Court case, called the *ratio decidendi*. In bringing findings of facts from the High Court case of **Ahmed Abdullahi (supra)** into this case, in my view the trial court erred. However, in my view, that error of the trial court did not materially affect the entire judgement, as the findings of the two polling stations scrutinized herein was distinct.

(vi) What is the legal effect of the errors found in the scrutiny?

66. In my view, the magistrate was perfectly entitled to consider whether the numbers disclosed from the scrutiny and recounting were supported by a valid process. The magistrate gave the reasons for arriving at the conclusion that he arrived at and I find no valid reason to disagree with him. In doing so, the magistrate did not usurp the will of Batalu Ward voters by not going by the number of votes. Once the errors were established the burden shifted to IEBC to demonstrate that such errors should not vitiate the election. They did not do so and the explanation of a sleeping clerk making the alteration was a feeble excuse.

67. In the case of **Raila Odinga vs Uhuru Kenyatta & Others [2017] eKLR** the Supreme Court stated as follows with regard to the integrity of elections –

“On our part, having considered the opposing positions, we are of the view that the contentions by the 1st and 2nd respondents ignore two important factors. One that elections are not only about numbers as many, surprisingly even prominent lawyers would like the country to believe. Even in numbers, we used to be told in school that to arrive at a mathematical solution, there is always a computational path one has to take, as proof that the process indeed gives rise to the

solution. Elections are not events but a process.”

68. In my view, the only mistake the magistrate did herein was to consider the findings of another court (the High Court) on ballot boxes which were not part of the boxes for the two polling stations that were subject to scrutiny herein. Even discounting that error of the trial court, in my view it cannot be said that in the two polling stations of Basineja and Batalu where scrutiny was done herein that the election results met the test required as explained by the Supreme Court above. Errors made by a sleeping clerk according to the explanation given were not possible. The votes for the appellant also were more than the voters cast. The result in my view would be an incredible result. I thus agree with the magistrate that the election results did not meet the required constitutional and legal standards.

(vii) Who will bear the costs of this appeal.

69. From the foregoing, it is obvious that the appeal has not succeeded. The reasons are in this judgement that firstly, the opening of the ballot boxes without a court order in the circumstances and facts surrounding this case was a fatal mistake, which could not be cured by the provisions of Article 159 of the Constitution, or the section 83 of the Election Act which recognizes that elections are not a matter of precision and gives IEBC powers to declare a winner even where there are irregularities. The second reason is that the irregularities found in the scrutiny conducted in the two polling stations of Batalu and Basineja could not be adequately explained by the IEBC and their representatives. The costs of this appeal will thus be borne by the appellant and IEBC jointly and severally and will be payable to the 1st respondent alone.

DETERMINATION

70. The upshot of the above is that this appeal is hereby dismissed. The costs of this appeal are awarded to the 1st respondent and are payable by the appellant and the 3rd respondent, IEBC jointly and severally, and are capped at Kshs.300,000/= . These are the orders of the court.

Dated, Signed and Delivered in open court at Garissa this 19th day of July, 2018.

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George Dulu

JUDGE