



REPUBLIC OF KENYA



KENYA LAW
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**Garama v Karisa & 3 others (Election Petition Appeal
1 of 2023) [2023] KECA 974 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KECA 974 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
ELECTION PETITION APPEAL 1 OF 2023
SG KAIRU, JW LESSIT & GV ODUNGA, JJA
JULY 28, 2023**

BETWEEN

KOMBE HARRISON GARAMA APPELLANT

AND

KENGA STANLEY KARISA 1ST RESPONDENT

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 2ND
RESPONDENT**

**AMINA ABUBAKAR SENG (MAGARINI CONSTITUENCY RETURNING
OFFICER) 3RD RESPONDENT**

MICHAEL THOYAH KINGI 4TH RESPONDENT

*(Being an appeal and cross-appeal from the judgement of Hon Justice A.
Mabeya dated 3rd March 2023 in Malindi Election Petition No. E001 of 2022)*

JUDGMENT

1. Article 101(1) of the [Constitution](#) of Kenya, 2010 provides that:

'A general election of members of Parliament shall be held on the second Tuesday in August in every fifth year.'
2. Pursuant to the above Article, Kenyan voters went to general elections on August 9, 2022 and the voters in Magarini Constituency joined the other Kenyans in electing their Member of the National Assembly (herein 'MNA'). Among the candidates who contested the said elections were, the Appellant herein (the 3rd respondent in the High Court), the 1st Respondent (the Petitioner in the High Court) and the 4th Respondent (the Interested Party in the High Court). The 2nd Respondent in this appeal (the 1st Respondent in the High Court), the Independent Electoral and Boundaries Commission, was the



- Elections Management Body while the 3rd Respondent (the 2nd Respondent before the High Court) was the Constituency Returning Officer.
3. The Appellant garnered the most votes being 11,946 and was declared as the duly elected MNA. The 1st Respondent who garnered 11,925 votes lost to the Appellant with a margin of 21 votes. However, the 1st Respondent rejected those results and moved the High Court vide a petition dated September 7, 2022 which was amended on October 12, 2022 for the nullification of those elections. The grounds were that there were grave errors, flaws, fraud, illegalities and irregularities committed by the Respondents which constituted fundamental contraventions of the letter, spirit and objects of the Constitution and the electoral laws. It was the 1st Respondent's case that the 2nd and 3rd Respondents failed to ensure or secure a free, fair and credible election and the will of the people of Magarini Constituency.
 4. The petition was based on five grounds, to wit, denial of petitioners' agents to 3 polling stations; false or inaccurate Statutory Declaration Forms in 12 polling stations; differences in number of votes cast in the 6 elections in 2 polling stations; vote result padding or manipulation in 4 polling stations; and election offences due to the manner in which the 2nd Respondent through its officers conducted the elections.
 5. The 1st Respondent thus sought prayers for; a declaration invalidating the election of the Appellant as the MNA, Magarini Constituency; a declaration that the petitioner was duly elected as having attained the majority vote in that election, or in alternative, an order for fresh MNA elections in Magarini Constituency. He further sought a declaration that the non-compliance, irregularities and improprieties in the impugned election were substantial and significant and that they affected the integrity and quality of the election and the result thereof; an order for scrutiny and recount of the ballots cast in 19 polling stations; and that such election offences by the 3rd Respondent and 2nd Respondent's presiding officers be reported to the Director of Public Prosecutions for appropriate action. The 1st Respondent also sought for the costs of the petition.
 6. The 2nd and 3rd Respondents responded to the petition vide a response dated September 27, 2022 while the Appellant opposed the petition vide the amended Response to Petition dated October 28, 2022. The respondents generally denied all the allegations and contended that the election was conducted in accordance with the Constitution, specifically Articles 81 and 86, and Electoral Laws and Rules, and that there were no irregularities hence the Appellant was validly declared as the duly elected MNA.
 7. Before the High Court a total of 35 witnesses testified and after considering their testimony, in a judgment delivered on March 3, 2023 in Malindi Election Petition No E001 of 2022, the High Court at Malindi (Mabeya, J) allowed the petition by the 1st respondent, Kenga Stanley Karisa, and found that the MNA election for Magarini Constituency was not conducted in accordance with the Constitution and the law; that the massive errors, irregularities and illegalities committed by Independent Electoral and Boundaries Commission (IEBC) and Amina Abubaker Seng, the Returning Officer, the 2nd and 3rd respondents respectively, in the conduct of the election affected the validity and results of the election; and declared that election null and void; and that, Kombe Harrison Garama, the Appellant herein was not validly elected as the Member of the National Assembly for Magarini Constituency. The High Court ordered that a certificate to that effect shall issue forthwith, and that IEBC should therefore proceed to conduct a by election as required under the law.
 8. Aggrieved by that judgment, the appellant, Kombe Harrison Garama, intending to appeal against the same, filed a notice of appeal dated March 9, 2023 and lodged in Court on March 10, 2023. Subsequently, the appellant filed the record of appeal dated March 30, 2023 and a supplementary record of appeal dated April 3, 2023. The appeal was based on the following grounds:



1. The learned judge erred in law in reducing the standard of proof required in election petitions to that of mere speculation and supposition.
 2. The learned judge erred in law in his interpretation of Article 81 and 86 of the Constitution, sections 82 and 83 of the Elections Act and Part XIII of the Elections (General) Regulations, 2017.
 3. The learned judge misdirected himself in law in referring to provisions of the law that are non-existent and imposing obligations not recognized in law.
 4. The learned judge erred in law in making determinations of matters not pleaded by the 1st Respondent, going outside the ambit of the parties' pleadings.
 5. The learned judge misdirected himself in law in finding admissions where there were none.
 6. The learned judge erred in law in totally failing to consider the Appellant's evidence, testimony and submissions.
 7. The learned judge misdirected himself in law by allowing amendment of the petition outside the timelines dictated by the law.
 8. The learned judge erred in law when he allowed scrutiny and recount of votes even when no basis had been laid for ordering a scrutiny and recount of votes.
 9. The learned judge misdirected himself in law by selectively relying on the scrutiny report in order to find for the 1st Respondent.
 10. The learned judge misdirected himself in law when he failed to consider relevant matters and took into consideration irrelevant matters in his decision.
9. It was sought that the appeal be allowed and the judgement and decree of the High Court be set aside; that the Court dismisses the petition dated September 7, 2022 and amended on the October 12, 2022 in entirety; and that the costs of the appeal and the superior court be borne by the 1st Respondent.
10. There was also a Notice of Cross-Appeal dated filed on behalf of the 2nd and 3rd Respondents dated April 14, 2023. That Notice of appeal was based on the following grounds:
1. The Trial Judge erred in law by shifting the evidentiary burden of proof to the Respondents before the initial burden was discharged.
 2. The Judge gravely erred in law by ignoring the Registrar's report dated on January 20, 2023 on scrutiny and recount that confirmed that the Appellant had been duly declared as member of National Assembly Magarini rendering the entire exercise of recount and scrutiny a mockery, futile and useless.
 3. The Learned Judge misdirected himself in law by relying on evidence of the 1st Respondent without considering the evidence of 1st, 2nd and 3rd Respondents.
 4. The Learned Judge misdirected himself in law by ordering that the 3rd Respondent personally pays costs of the petition.
 5. The Learned Judge misdirected himself in law by considering extraneous issues which were not pleaded.
 6. The Learned Judge misdirected himself in law by allowing amendment of the petition which expanded the scope of the petition.



7. The Learned Judge misdirected himself in law in finding admissions where there were none.
 8. The Learned Judge erred in law in his interpretation of Article 81 and 86 of the Constitution section 82 of the Elections Act and Part XIII of the Elections (General) Regulations 2017.
 9. The Learned Judge erred in law by failing to consider the Appellant's, 2nd and 3rd Respondents evidence, testimony and submissions.
11. We have considered both the grounds of appeal and grounds of the cross appeal and since they are interconnected, we shall consider them together. Before the High Court, the following issues were identified as falling for determination:
- i. Whether the election of the MNA for Magarini Constituency was conducted in accordance with the Constitution and the law.
 - ii. Whether there was non-compliance with the Constitution and the law in the conduct of the elections of Magarini Constituency.
 - iii. Whether there were election offences committed as alleged.
 - iv. Whether the alleged irregularities affected the results of the election of the MNA for Magarini Constituency
 - v. What order as to costs.
12. The first and second issues were dealt with by the Learned Judge together. As a limb of that issue, the Learned Judge dealt with the allegations that 1st Respondent's agents were denied access to certain polling stations. However, upon considering the evidence adduced, the Learned Judge concluded that this allegation had no basis and dismissed it.
13. The second limb of the two issues was with regard to the differences in the number of votes cast in the 6 elections (Presidential, Gubernatorial, Member of the National Assembly, Member of the Senate, Women Representative and Member County Assembly). The Learned Judge found that as there was no evidence before Court of the results from the other elective seats to enable the Court make a comparative analysis and audit whether indeed there was a substantial difference in the number of votes cast in the 6 elective posts as alleged, that allegation was not proved. He dismissed that ground.
14. The Court then proceeded to deal with the allegations of false/inaccurate statutory declaration forms and vote result padding/manipulation. The Court considered the evidence of PW3, who was the 1st Respondent's agent in Mapimo Youth Polytechnic stream 1 that the Returning Officer, upon being informed that the Presiding Officer had interchanged 1st Respondent's votes with those of the Appellant, ordered a recount of the votes. This allegation was found to have been admitted by R1W2, the Returning Officer who disclosed that upon realizing the mistake, she called all the agents and the Presiding Officer of the polling station and broke the seals on the ballot boxes in their presence to retrieve the original Form 35A which had been locked in the ballot box. It was also found that the returning officer did not stop at retrieving the original Form 35A from the ballot box but went ahead and re-assembled 14 agents and the available chief agents, conducted a recount, and caused the presiding officer to alter the results in the tallying centre, contrary to the position as held in IEBC v Maina Kiai & 5 others Civil Appeal 105 of 2017 (herein Maina Kiai Case) that the votes counted at the polling station are final.



15. According to the Learned Judge, in his evidence the Presiding Officer (R1W7), contrary to his admitted duty, failed to enter any comments on the alterations made and admitted that only some of the polling agents witnessed the recount and cancellation without indicating which agents did so.
16. The Learned Judge relied on Regulations 81, 83, 86, and 93 of the Elections (General) (Amendment) Regulations 2017 (herein the Regulations) for the position that once ballot boxes are sealed at the polling station, there is no authority whatsoever to break open those ballot boxes without an order of the court. He also cited *Ahmed Abdullahi Mohamed & Anor v Hon Mohamed Abdi Mohamed & 2 Others Election Petition No 14 of 2017* eKLR, that any attempt by the returning officer to rely on internal manuals such as 'the training manual and guide for returning officers' or the guidelines in the PSD's in order to break seals and open ballot boxes was irregular and found that the transparency of the entire process was already dimmed at this juncture.
17. On the allegation of transferring of votes, the Learned Judge relied on the evidence of PW5 which the Learned Judge verified, that in Kinyaule polling station, the votes for Chad Karisa Hamadi were increased by 7 votes and Form 35A indicated a total of 81 votes while Form 35B showed 88 votes; that PW7's objection to 3 of the 16 rejected votes, that ought to have benefited the 1st Respondent, though initially met with threats of eviction from the station by police officers was later found to be valid; and that PW6's testimony that in Kayadagamra Primary School, the presiding officer had entered 224 votes in favor of the 1st Respondent instead of 244 thus denying him 20 votes, an anomaly which was only rectified after the 1st Respondent intervened.
18. The Court also considered the fact that R1W1 admitted that the tabulation of the total votes was not correct as he indicated 357 instead of 358 in Form 35A; that not all agents appearing at the PSD signed Form 35A and he did not indicate any reasons for refusal and that agents were not allowed to write anywhere in Form 35A but for their names and signatures; and that he indicated that the declared results were for Majenjeni instead of Mjanaheri but explained it as having been out of fatigue and human error and the same did not affect the results. According to the Learned Judge, it is the signature of the Presiding Officer (and not any other person) that validates and authenticates the results announced in a polling station and relied on *Manson Oyongo Nyamweya v James Omingo Magara & 2 Others [2009] eKLR*.
19. While acknowledging that failure to sign a statutory form by a candidate or his agent is excused under Regulation 79(6), the Regulations, the Learned Judge opined that such failure will only be excused if the presiding officer records that fact in the declaration form itself pursuant to Regulation 79(4) of the Regulations and that this is for the purposes of accountability, credibility and verifiability of the results in the declaration form. Upon finding that all the Form 35A's that were unsigned by the candidates or their agents without any reason being indicated by the presiding officer for the failure to sign were questionable, the Court found that the results therein could not be said to be credible and verifiable.
20. The Learned Judge also found as a fact that 2nd and 3rd Respondents made several admissions including that there were discrepancies between Forms 35A and 35B in several stations; that agents were not allowed to write objections in Form 35A despite having raised objections and no explanations by Presiding Officers were given. The Learned Judge relied on Regulation 83 of the Regulations which places the responsibility of ensuring the correctness of the entries in Form 35B on the returning officer. Also noted was that in certain cases, Form 35A were not signed by any agent yet the agents signed the polling station diaries after counting the votes; that there were various instances whereby the petitioner's votes were reduced, altered or interchanged and corrections thereon only done after the agents interjected; that there were statutory documents that had alterations that were not



countersigned and the same were admitted by the Returning Officer; that in many instances, it was the 1st Respondent's votes that were either interchanged or altered without countersigning.

21. The Court was therefore satisfied and found that the petitioner established that there were various false and/or inaccurate statutory forms that were relied upon to declare results in the MNA election and that there were also irregularities and non-compliances with the Constitution and the law. Accordingly, the Court held that under this head, the 1st Respondent met the standard of proof and proved that the MNA elections in Magarini Constituency were not conducted substantially in accordance with the Constitution and the law.
22. As regards the allegation of the commission of election offences, after considering the evidence adduced, the court found that 1st Respondent did not establish to the required standard that there was fraud on the part of the 2nd Respondent and its officials. Similarly, the Learned Judge found that the allegations of violence, bribery and campaigns at polling stations were unproved. The trial court however, while making a finding that there was evidence that the offence of failing to stamp ballot papers and counterfoils in breach of Regulation 79 was established, was unable to determine the particular official who was identified to have committed the offence in order to justify reference to Director of Public Prosecution.
23. On the issue whether the irregularities complained of affected the results of the election, the Court found that upon application for scrutiny and recount ordered by the Court, and undertaken by the Deputy Registrar, it was revealed that there were numerous unstamped counterfoils of the ballots used in 7 stations and as regards the importance of the requirement for stamping the Learned Judge referred to *IEBC and another v. Stephen Mutinda Mule and 3 others [2014] eKLR* as well as Regulation 69. According to the Learned Judge the scrutiny revealed a total of 37 unstamped counterfoils from 7 out of the 24 stations and that there were also several ballots that were unstamped. He further found that the evidence revealed that there was ballot stuffing and that despite the numerous discrepancies in the rejected votes, Form 42A's for rejected votes were missing in about 15 out of the 24 polling stations while in other instances, counterfoils for Form 35A were missing, as well as tallying sheets. It was his view that without those vital documents, the ballots in a box are unverifiable. Based on *Wabuge v Limo & Another [2008] 1 KLR (EP)*, *Gatirau Peter Munya v Dickson Mwenda Kitbinji and 3 others [2014] eKLR* (herein Munya Case), Articles 81 and 86 of the Constitution as read with the provisions of section 83 of the Election Act, it was the Learned Judge's conclusion that an election will be nullified if it is shown not to have been conducted substantially in accordance with electoral law. It will also be nullified, even though substantially conducted in accordance with the law but the errors, mistakes and irregularities committed in conducting the elections which, however trivial, are found to have affected the result of the election. See *Joho vs Nyange (2008) 3 KLR (EP)*.
24. After considering what he termed as 'glaring anomalies' and 'incidents of non-compliance with mandatory and important provisions of the law', the Learned Judge found that the election was not transparent, free and fair and that there was substantial noncompliance with the Constitution and electoral law; that the offences were committed by agents of the 1st and 2nd respondent which compromised the sanctity of the vote; that there was use of false or irregular statutory forms; that there was vote stuffing; and that there were glaring errors committed by the presiding officers and the returning officer herself which affected the verifiability of the election. He therefore found that, considering the slim margin of 21 votes, the irregularities and illegalities affected the results of the election. It was on that basis that he concluded that the MNA election for Magarini Constituency was not conducted in accordance with the Constitution and the law and that the 'massive errors, irregularities and illegalities' committed by the and 2nd and 3rd Respondents affected the validity and



- results of the election. He declared the election null and void and that the Appellant was not validly elected as the MNA for Magarini Constituency. It was this determination that provoked this appeal.
25. At the hearing of this appeal, on 12th June, 2023, which was conducted physically in open court, Learned Counsel Mr Wakwaya appeared with Mr Gikandi and Mr Ometo for the Appellant. Learned Counsel Mr Bwire appeared with Mr Gichaba for the 1st Respondent and Mr Bwire also held brief for Mr Busiega for the 4th Respondent. Learned Counsel Mr Momanyi appeared for the 2nd and 3rd Respondents. Learned Counsel relied on the submissions filed in support of their respective clients' cases which submissions they highlighted before us.
 26. On behalf of the Appellant, it was submitted that the trial court erroneously placed a burden on the Appellant and the 2nd and 3rd respondents to disprove the 1st respondent's allegations, and yet the 1st respondent's allegations had no basis. An issue was taken with respect to the Learned Judge's findings of fact which according to the Appellant were not supported by evidence. Before us it was argued that the finding on vote stuffing/padding and the finding on the used ballot booklets, touching on the scrutiny report was arrived at without evidence of vote stuffing; that after the scrutiny exercise, the parties ought to have been given a chance to make comments on the scrutiny report which was not done; and that whereas the trial court found that no offences were committed, at the end of the judgement the court concluded, without any basis that offences were committed.
 27. It was contended that the amendment of the petition that introduced new allegations touching on Kadzuhoni Primary Polling station 1 of 2 and Mapimo Youth Polytechnic Polling station as well as allegations of denial of access for agents to Kaembeni Primary School Polling station were made outside the 28 days contrary to Article 87(2) of the Constitution and Section 76(4) of the Elections Act; that the joinder of the 4th respondent expanded the scope of the petition as the 4th Respondent raised new issues that were beyond the constitutional set timelines; that though the court determined the issues of opening of the ballot box by the presiding officer, the interchanging of Mjanaheri Primary School with Majenjeji, denial of agents to write objections on forms 35A and non-countersigned alterations on forms 35A for Kimyaule Nursery, Mapimo Primary & Mapimo Youth Polytechnic 1 of 6, the petition did not plead these issues; that the court was biased in ignoring the Appellant's testimonies that rebutted the 1st Respondent's allegations of loss of votes by the 1st Respondent when there was no loss of votes and in instances where there was the loss affected all the parties and in certain instances never affected the 1st Respondent; that the results were impugned based on repealed law since regulation 69 of the Election (General) Regulations requiring counterfoils to be stamped by presiding officers was amended and or repealed by Legal notice 72 of 2017; that the legal requirement to place form 42A for rejected votes in the ballot box containing the cast ballots is contrary to Regulation 81 of the Elections (General) Regulations that requires that they be placed in separate ballot boxes; and that the declaration forms for Mjanaheri Primary School and Majenjeji were signed by the agents and the presiding officer and the excusable error in writing Majenjeji instead of Mjanaheri did not affect the results for Mjanaheri.
 28. According to the Appellant, the court erred in its interpretation of Article 81 and 86 of the Constitution and Section 82 and 83 of the Elections Act and Part XIII of the Elections (General) Regulations 2017; that allegations of irregularities were not substantiated; that the pointed out infractions did not warrant a finding of breach of constitutional dictates since they did not affect the result as is required under Section 83 of the Elections Act and as was posited in Clement Kungu Waibara v Anne Wanjiku Kibe & Another (2019) eKLR.
 29. The appellant defended the recount of the ballot boxes on the basis that it was meant to retrieve the original form 35A that was locked in the box, and not to recount the votes and that the recount was



incidental to the opening of the box and was done in the presence of agents; that the allegations of vote interchange were not proved in a manner as to give votes to the appellant; and that the alterations on form 35A were countersigned.

30. It was further submitted that improper dealing with rejected votes is not an automatic guarantee to nullification of results based on the case of *Raila Odinga & 16 Others v Ruto & 10 Others (2022) eKLR*; that the mistake in writing the incorrect names of a polling station on the forms of another station does not invalidate the results of that station and in any case this was not an issue that was pleaded but was based on the findings of scrutiny which findings were used to expand the scope of a petition. In this regard, reliance was placed on the case of *Walter Enock Nyambati Osebe v Independent Electoral and Boundaries Commission & 2 others (2019) eKLR*.
31. To the Appellant, the unproved allegations against a paltry 19 polling stations out of the 191 polling stations could not be used to nullify the elections. It was argued that the court ought to interpret Section 83 of the *Elections Act* as being conjunctive as opposed to disjunctive; that in interpretation of the mentioned Section 83, a petitioner must show substantial irregularities and substantial non-compliance with the law and *Morgan v Simpson* case was cited.
32. It was the Appellant's position that substantial effect referred to in the section means something that is powerful; that no elections is ever perfect; that to err is human hence the mere fact that irregularities were detected and the margin was 21 votes is not enough to affect the results. In their submission, Counsel for the Appellant urged that because the court noted that there was no bribery, no violence; that in terms of substantial compliance with the law and the few irregularities that have been well explained, the court ought to conclude that there were no substantial irregularities that affected the result.
33. We were urged to take judicial notice that the conduct of a by election will be a costly affair and ponder whether it will be prudent use of limited finances to engage the people of Magarini in a costly by election. To counsel, unless there is strong evidence that the election was shambolic and badly conducted, there is no reason for the by election.

2nd and 3rd Respondents' Case

34. On behalf of the 2nd and 3rd Respondents who filed the notice of cross-appeal, it was submitted that the allegations of denial of access of Petitioners agents in Polling Station, False/ inaccurate statutory declaration forms, difference in number of votes cast in 6 elections, false results padding and manipulation and election offences were not proven. It was submitted that even after the scrutiny, it was clear that the appellant was ahead, regardless of minor mistakes.
35. Just like the stand taken by the Appellant, the 2nd and 3rd Respondents urged us to consider the massive exercise of conducting an election in a constituency that had more than 290 polling stations in 6 different elections within 12 hours, an experience that requires financial and human sacrifice in terms of stamina, strength. It was pointed out that the minor mistake at Majenje polling station was attributed to fatigue.
36. To counsel the qualitative test ought to be applied in the sense that the general perception of the conduct of elections in Magarini Constituency should be the determining factor. If so applied, it was submitted that it ought to be concluded that the elections were free and fair; that the irregularities, if any, did not occasion prejudice. According to Learned Counsel for the 2nd and 3rd Respondents, internal regulations permitted that as a method of dispute resolution, materials could be retrieved as long as the results were not changed.



1st Respondent's Case

37. In opposition to the appeal, it was submitted on behalf of the 1st Respondent that once the Petitioner established evidence to warrant impugning of the result, the burden shifted to the 2nd and 3rd Respondents and in support of this submission the 1st Respondent cited *Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae) (Presidential Election Petition 1 of 2017) [2017] KESC 42 (KLR)*. It was therefore urged that there was an admission of interchange of the 1st respondent's votes at Mapimo Youth Polytechnic Stream 1, reopening of Ballot box and recount at Tallying Centre. To counsel, Regulations 81, 83, 86 and 93 prohibit reopening of ballot boxes once sealed at the Polling Station, without an order of the Court. Cited was the case of Ahmed Abdullahi Mohamed & Anor v Hon. Mohamed Abdi Mohamed & 2 Others, Election Petition No 14 of 2017 eKLR, for the proposition that it is an irregularity on the part of Returning Officer to break seals and open the ballot box. It was contended on behalf of the 1st Respondent that subsidiary legislation could not override the primary statute.
38. On the interchange of results, it was urged that there was evidence that in two polling stations (Kayadagamra Primary School Polling Station and Mapimo Youth Polytechnic Station) there was unexplained reduction of the 1st respondent's votes by 20. Since there was non- countersigning of alterations resulting from the interchange of results, it was urged that the credibility and integrity of the declarations was called to question based on the cases of *William Kabogo Gitau v George Thuo and 2 others (2010) eKLR*, *Simon Nyaundi Ogari & Another v Joel Omagwa Onyancha & 2 others (2008) eKLR* and Maina Kiai case.
39. This Court was urged not to interfere with the Learned Judge's findings of fact without basis. To the 1st Respondent, the superior court correctly identified the law; considered the oral evidence of witnesses, witness affidavits and the totality of the evidence thereby leading to proper shifting of the burden of proof.
40. On the issue of the amendment of the petition it was urged that there is no valid appeal against the decision permitting amendment of the petition and therefore this court lacks jurisdiction to entertain an appeal on the same. On reliance of the scrutiny, it was urged that the court was well within its powers to investigate illegalities or issues that cropped up during the hearing. Cited was *Justus Mungumbu Omiti v Walter Enock Nyambati Osebe & 2 Others EP No 1 of 2008*.
41. On departure from pleadings, it was submitted that there were matters that arose in the trial, whether pleaded or not; that parties argued them and that it was lawful for the court to deal with such issues.
42. It was urged that the scrutiny report established that there were missing form 42As for rejected votes in some polling stations, which was a violation of Regulation 81(1) of the Election Regulations. It was concluded that in light of the pointed out irregularities, it was not possible for the court not to find that there was non-compliance with the law and the *constitution*.
43. Counsel urged that the proper application of the threshold of section 83(1) of the *Elections Act* was defined in *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 4 others & Attorney General & another [2017] eKLR*. It was urged that there are 2 options, for a party in an election petition, either to demonstrate that an election was not conducted in accordance with principles laid down in the *Constitution* and written law, or to demonstrate that non-compliance did substantially affect the result of the election and that in this case both limbs were proved.



44. According to counsel for the 1st Respondent, the slim margin of vote difference of 21 votes as against the evidence in the scrutiny as well as non-compliance with the law was enough to show that non-compliance substantially affected the results.
45. Counsel for the 1st Respondent reminded the Court that since Article 38 of the Constitution guarantees the sanctity of votes, there was a breach of the said Article when rejected votes were improperly handled. He reminded the Court of the admissions by the authenticating party on alteration of results, improper handling of rejected votes, and the admission that there was declaration of results properly belonging to Mjanaheri polling station as those of Majenjani. To counsel this admission by the authenticating party created doubts in authenticity of the results.
46. Counsel while placing reliance on the case of *James Omingo Magara v Manson Onyongo Nyamweya & 2 others [2010] eKLR* for the proposition that there was non-compliance with the law, pointed out the infraction in Mjanaheri Polling station was a contravention of Regulation 69; that the failure of agents to sign form 35A at Vuga Polling station with no explanation from the presiding officer was a contravention of Regulations 71 and 79; and that the inter-transposition of results at Malindi GK prison was a violation of the law.
47. On costs, counsel for the 1st respondent cited the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR*, Section 84 of the Election Act and Rule 30 of the Election Petition Rules, 2017, for the proposition that there was a proper exercise of discretion to award costs that does not warrant interference in line with the case of *Mbogo v Shah [1968] EA 95*. It was pointed out that the 1st respondent's traversing the country to appear in Malindi is a cost that ought to be met by the appellant on indemnity basis.

4th Respondent's Case

48. On behalf of the 4th Respondent it was submitted that the 1st respondent proved his allegations in the petition hence the court came up with the correct finding. Cited was the Gatirau Peter Munya case (supra) for the proposition that scrutiny was properly ordered and the results of the scrutiny brought to light issues in the election that assisted the court to arrive at a fair and just determination of the petition, resulting in nullification of the impugned election. Cited was the case of *Lenny Maxwell Kivuti v IEBC & 3 Others (2018) eKLR*.
49. Also cited was the Judiciary Benchbook on Electoral Disputes Resolution and the case of *Musa Cherutich Sirma v IEBC & 2 Others (2017) eKLR* for the proposition that amendment of the petition was with leave and the amendment merely corrected a misnomer in the 4th respondent's name.
50. Counsel maintained that the 4th respondent had a stake in the petition as he was a witness to the election exercise; that no new issues were introduced by the 4th respondent's joinder. It was revealed that the paragraphs that the court saw as introducing new issues were expunged and the hearing proceeded with the issues as framed and without objections by any party.

Analysis and Determination

51. We have considered the appeal, the submissions of Learned Counsel and the authorities relied upon.



52. Before embarking on a consideration of the matters raised, it is important to set out from the outset the jurisdiction of this Court when dealing with appeals from the High Court sitting as an election court. Section 85A of the [Elections Act](#) provides that:

' An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of county governor shall lie to the Court of Appeal on matters of law only'

53. The Supreme Court clarified what constitutes 'matters of law' in *Gatirau Peter Munya v Dickson Mwenda Kithinji and 3 others* [2014] eKLR where the three elements of the phrase 'matters of law' were identified thus:

- ' (a) The technical element: involving the interpretation of a constitutional or statutory provision;
- b. The practical element: involving the application of the [Constitution](#) and the law to a set of facts or evidence on record; and
- c. The evidentiary element: involving the evaluation of the conclusions of a trial Court on the basis of the evidence on record.'

54. Our determination of this appeal must therefore be based on the above principles and we shall, where necessary, revisit the facts of the case purely as regards the evidentiary element in order to satisfy us whether or not the conclusions of the High Court were based on the evidence on record.

55. We wish to dispose of the grounds in the appeal and in the cross-appeal touching on the amendment to the petition first. From the record, it is clear that the application seeking the amendment was fully heard and a ruling thereon delivered on October 25, 2022. Rule 6(2) of the Court of Appeal (Election petition) Rules provides that:

'A person who desires to appeal to the Court against a decision of the High Court in an election petition shall, within seven days of the date of the decision appealed against, lodge a notice of appeal.'

56. Though an appeal arising from an interlocutory order must be subject to the deferred or consequential jurisdiction of this Court, that does not bar such a party from filing a Notice of Appeal against that decision in the meanwhile. Failure, however, to give notice of intention to appeal against an interlocutory order means that the party is thereby locked out from taking up the issue at the hearing of an appeal against the final decision.

57. In order to determine this appeal, it is important to revisit the grounds upon which the petition in the High Court was allowed. In his judgement, the Learned Judge's ground for nullifying the election results of Magarini Constituency was that there were irregularities which affected the results.

58. It is not in doubt that from the evidence of R1W2, that upon realizing the mistake that arose from Mapimo Youth Polytechnic stream 1, she directed that the seals on the ballot boxes be broken in order to retrieve the original Form 35A which had been locked in the ballot box. Thereafter, a recount was conducted, thereby resulting in the alteration of the results at the tallying centre. In our view the act of not only opening the ballot box but also proceeding to conduct a recount at the tallying centre was clearly against the decision in *Maina Kiai Case* that the votes counted at the polling station are final. The finality of vote counting at the polling station would make no sense if a window for recounting is left open under some circumstances at the tallying centre. The issue was compounded by the evidence of



Presiding Officer (R1W7), who admittedly failed in his duty to enter any comments on the alterations made. He further admitted that only some of the polling agents witnessed the recount and cancellation without indicating which agents did so. We agree that the 2nd Respondent cannot resort to internal manuals such as “the training manual and guide for returning officers’ or the guidelines in the PSD’s in order to bypass the said decision. Though the Appellant submitted that this issue was not pleaded, the same was clearly pleaded in paragraph 33 of the petition. By opening the ballot box and carrying out a recount at the polling centre before ensuring that all the agents of the candidates were present, the election officials failed to meet the test of transparency.

59. On the allegation of transferring of votes, the Learned Judge relied on the evidence of PW5 which the Learned Judge factually verified, that in Kinyaule polling station, the votes for Chad Karisa Hamadi were increased by 7 votes and Form 35A indicated a total of 81 votes while Form 35B showed 88 votes. This was a finding of fact that was not challenged as being incorrect. While the Appellant admitted that there were irregularities, it was his position that these irregularities such as the improper rejection 3 votes that ought to have benefited the 1st Respondent; the entry of 224 votes instead of 244 votes for in Kayadagamba Primary School; the wrong tabulation of the total votes; and the omission to indicate the reasons in the PSD why not all agents signed Form 35A were rectified and that they did not affect the result of the elections. We have considered the evidence on the record and we agree that considered singularly, the said irregularities and omissions may not have affected the outcome of the election. We shall however consider their cumulative effect later in this judgement.
60. As regards the declaration of the results for Majenjani instead of Mjanaheri that was explained as having been out of fatigue and human error and did not affect the results, we agree with the Appellant that this issue was not pleaded and the fact that it might have come from the scrutiny was not a valid reason to rely on it as a basis for the nullification of the election results. That the report of scrutiny cannot be the basis for impugning election results when the revelations of the report did not form part of the pleadings in the petition was appreciated by this Court in Walter Enock Nyambati Osebe v Independent Electoral & Boundaries Commission & 2 others [2018] eKLR where it was held that:
- ‘ In this appeal, the appellant has shifted his focus from the allegations in his petition to the discrepancies and irregularities which he says have been revealed by the Deputy Registrar’s report on scrutiny and recount that were not pleaded in his petition. Therefore, the foundation on which the appellant’s appeal is built is that the scrutiny and recount exercise that was undertaken pursuant to orders of the election court brought out or unearthed malpractices and irregularities, quite apart from those on which the appellant had based his petition, on the basis of which the election court should have annulled the election. That foundation is weak in that the appellant is in effect seeking nullification of the election on grounds that were not pleaded.’
61. In arriving at the said decision, the Court relied on the decision of the Supreme Court in Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR in which the views expressed in Gideon Mwangangi Wambua & Another v IEBC & 2 Others, Mombasa Election Petition No 4 of 2013 were adopted to the effect that:
- ‘ The aim of conducting scrutiny and recount is not to enable the Court [to] unearth new evidence on the basis of which the petition could be sustained. Its aim is to assist the court to verify the allegations made by the parties to the petition which allegations themselves must be hinged on pleadings.’



62. In *Raila Amolo Odinga & another vs IEBC & 2 others* [2017] eKLR (Raila 1, 2017), the Supreme Court emphasised that:

' A petitioner who seeks the nullification of an election on account of non- conformity with the law or on the basis of irregularities must adduce cogent and credible evidence to prove those grounds 'to the satisfaction of the court' That is fixed at the onset of the trial and unless circumstances change, it remains unchanged.'

63. It is therefore our view and we hold that the Learned Judge ought not to have taken into account the allegation that the results for Majenjeni were relied on instead of the results of Mjanaheri. This position also applies to the findings of the Learned Trial Judge as regards the allegation of numerous unstamped counterfoils of the ballots which was relied upon as evidence of ballot stuffing.

64. According to the Learned Judge, these irregularities even where explained, coupled with the conduct of the returning officer of opening the ballot boxes and undertaking a recount as well as the small margin between the Appellant and the 1st Respondent affected the results of the election.

65. That brings us to the interpretation of Section 83 of the Election Act. That Section provides that:

'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.'

66. According to the Appellant, the court ought to interpret the said section as being conjunctive as opposed to disjunctive; that in interpretation of the mentioned Section 83, a petitioner must show substantial irregularities and substantial non-compliance with the law. The 1st Respondent, on the other hand was of the view that the said section ought to have a conjunctive interpretation. This section was the subject of the Supreme Court decision in *Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae)* (Presidential Election Petition 1 of 2017) [2017] KESC 42 (KLR) (Raila 2017) and at paragraph 374 of the majority judgement, it was held that:

' In view of the interpretation of Section 83 of the Elections Act that we have rendered, this inquiry about the effect of electoral irregularities and other malpractices, becomes only necessary where an election court has concluded that the non- compliance with the law relating to that election, did not offend the principles laid down in the Constitution or in that law. But even where a Court has concluded that the election was not conducted in accordance with the principles laid down in the Constitution and the applicable electoral laws, it is good judicial practice for the Court to still inquire into the potential effect of any irregularities that may have been noted upon an election. This helps to put the agencies charged with the responsibility of conducting elections on notice.'

67. What we understand the Supreme Court to have been saying is that section 83 of the Election Act envisages two scenarios. The first scenario is where the Court finds that the election was not conducted in accordance with the principles laid down in the Constitution and in the written law. The Constitution in Article 81 provides for these principles and states that:

'The electoral system shall comply with the following principles--

a. Freedom of citizens to exercise their political rights under Article 38;



- b. Not more than two-thirds of the members of elective public bodies shall be of the same gender;
- c. Fair representation of persons with disabilities;
- d. Universal suffrage based on the aspiration for fair representation and equality of vote; and
- e. Free and fair elections, which are—
 - i. By secret ballot;
 - ii. Free from violence, intimidation, improper influence or corruption;
 - iii. Conducted by an independent body;
 - iv. Transparent; and
 - v. Administered in an impartial, neutral, efficient, accurate and accountable manner.'

68. The second scenario is where it finds that the non-compliance affected the result of the election. In this case the Learned Judge found that there were 'glaring anomalies' and 'incidents of non-compliance with mandatory and important provisions of the law', hence the election was not transparent, free and fair and that there was substantial noncompliance with the Constitution and electoral law. He further found that the offences were committed by agents of the 1st and 2nd respondent which compromised the sanctity of the vote. Dealing with the said offences, it is clear that the only offence that the Learned Judge found to have been committed was that of failing to stamp ballot papers and counterfoils. However, as submitted by the 2nd and 3rd Respondents, regulation 69 of the Election (General) Regulations requiring counterfoils to be stamped by presiding officers was amended and or repealed by Legal notice 72 of 2017. It follows that the findings of the Learned Judge as regards this issue was erroneous.

69. The Learned Judge however proceeded to hold that there was use of false or irregular statutory forms; that there was vote stuffing. Pausing here, briefly, this finding was based on the allegation that the results for Majenjeni were relied on instead of the results of Mjanaheri. We have already found that since this allegation was not pleaded it ought not to have been relied upon.

70. Moving forward, the Learned Judge found that there were glaring errors committed by the presiding officers and the returning officer herself which affected the verifiability of the election. He therefore found that considering the slim margin of 21 votes, the irregularities and illegalities affected the results of the election. In other words, the Learned Judge found that there was substantial noncompliance with the Constitution and electoral law and further that there were irregularities and illegalities which affected the results of the election.

71. It is important that we reiterate the position of the Supreme Court in *Raila 2017* at paragraph 371 that election is a process and that it comprises not only the numbers but also the manner in which it is conducted comprising factors such as numbers and the process and stated that none of the factors:

' can be viewed in isolation. For by doing so, we run the risk of cannibalizing a sovereign process. Elections are the surest way through which the people express their sovereignty. Our Constitution is founded upon the immutable principle of the sovereign will of the people.



The fact that, it is the people, and they alone, in whom all power resides; be it moral, political, or legal. And so they exercise such power, either directly, or through the representatives whom they democratically elect in free, fair, transparent, and credible elections. Therefore, whether it be about numbers, whether it be about laws, whether it be about processes, an election must at the end of the day, be a true reflection of the will of the people, as decreed by the Constitution, through its hallowed principles of transparency, credibility, verifiability, accountability, accuracy and efficiency.'

72. The Supreme Court, however, appreciated at paragraph 373 that:

' Not every irregularity, not every infraction of the law is enough to nullify an election. Were it to be so, there would hardly be any election in this Country, if not the world, that would withstand judicial scrutiny. The correct approach therefore, is for a court of law, to not only determine whether, the election was characterized by irregularities, but whether, those irregularities were of such a nature, or such a magnitude, as to have either affected the result of the election, or to have so negatively impacted the integrity of the election, that no reasonable tribunal would uphold it.'

73. In arriving at its decision, the Supreme Court posed several questions to be considered and expressed itself at paragraph 378 thus:

' Where do all these inexplicable irregularities, that go to the very heart of electoral integrity, leave this election? It is true that where the quantitative difference in numbers is negligible, the Court, as we were urged, should not disturb an election. But what if the numbers are themselves a product, not of the expression of the free and sovereign will of the people, but of the many unanswered questions with which we are faced? In such a critical process as the election of the President, isn't quality just as important as quantity? In the face of all these troubling questions, would this Court, even in the absence of a finding of violations of the Constitution and the law, have confidence to lend legitimacy to this election? Would an election observer, having given a clean bill of health to this election on the basis of what he or she saw on the voting day, stand by his or her verdict when confronted with these imponderables? It is to the Kenyan voter, that man or woman who wakes up at 3 am on voting day, carrying with him or her the promise of the Constitution, to brave the vicissitudes of nature in order to cast his/her vote, that we must now leave Judgment.'

74. In *Odinga & 16 others vs Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae) (Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated) [2022] KESC (Election Petitions) (September 26, 2022)*, the Supreme Court in addressing the question whether there were irregularities and illegalities in the presidential election of such magnitude as to affect the final result expressed at paragraph 284 and 285 that in order for the petitioners to succeed in overturning the results declared, they had the burden to satisfy the court that there were irregularities and illegalities and secondly that the proven irregularities and illegalities were of such overwhelming nature that it was likely to affect the actual result or the integrity of the election.

75. In this case, we have found that the opening of the ballot boxes at the tallying centre and the conduct of the recount without ensuring that all the agents were present was an irregularity. By undertaking a recount at that stage and in the absence of all the agents of the parties, the process failed to meet the constitutional tests of transparency and accountability. We have also found, and it was admitted by the 2nd and 3rd Respondents there some irregularities did occur save that they did not affect the result of the elections. It was for example admitted that there was an interchange of results at Mapimo



Youth Polytechnic Polling Station No. 1; that there were alterations of votes or wrong entries for Kayadagamra, Adimaye, Kinyaule Nursery School, Kibaoni Primary School Polling Station, Meekatili Poling Station, St Peters Nursery School Polling Station and Chakama Poling Station. We reiterate that we agree that taken singularly, the said irregularities may not have affected the outcome of the elections. However, in determining whether the irregularities committed did or did not affect the result, the court ought to adopt a holistic approach since it is not merely the numbers that count. As the Supreme Court appreciated, the perception of the electorates also matters.

76. To our mind, in a case where several irregularities, though minor on their own, are committed coupled with a major one such as the unlawful reopening of ballot boxes and conducting a recount in the absence of all the agents and without countersigning the alterations arising therefrom, that may, where the margin is negligible, be, in our respectful view, a basis for nullifying the results. As posed by the Supreme Court in Raila 2017 Case at paragraph 377:

' Why would a returning officer, or for that matter a presiding officer, fail or neglect to append his signature to a document whose contents, he/she has generated? Isn't the appending of a signature to a form bearing the tabulated results, the last solemn act of assurance to the voter by such officer, that he stands by the 'numbers' on that form?'

77. We must be quick to point out that it is not in every case that the margin is small that the results of an otherwise properly conducted election must be nullified. A win is a win even if by only one ballot and absence any irregularities and illegalities in the conduct of the election, a court will not nullify the results of an election simply because the petitioner lost by a small margin. The conduct of the elections must be considered in its totality and all factors taken into account.

78. In this case, taking into account all the factors, we agree with the Learned Judge that the elections for Magarini Constituency were not conducted in accordance with the Constitution and the law and that the irregularities affected the result. We cannot sanitize such a process simply because the conduct of the by election will be a costly affair. The right to representation being a process by which the electorate delegate their sovereign right to govern to their elected representatives cannot be sacrificed at the altar of costs. Those to whom the sovereign power is delegated must be those who the electorates have decided by a majority exercising their free will, at a fair, transparent and accountable process. Just like the Learned Trial Judge, we are not satisfied that the process of the conduct of the election of the Member of the National Assembly for Magarini Constituency met this test.

79. As regards the award of costs by the High Court, as correctly submitted on behalf of the 1st Respondent, costs are in the discretion of the Court. Based on the decision in the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR, together with Section 84 of the Election Act as read Rule 30 of the Election Petition Rules, 2017, we have not been satisfied that the Learned Judge wrongly exercised his discretion in the award of costs. We therefore have no basis for interfering therewith. See Mbogo v Shah [1968] EA 95.

80. In the premises, we find no merit in both the appeal as well as the cross appeal which we hereby dismiss with costs to the 1st Respondent to be borne by the Appellant. We cap the same at Kshs 1,500,000.00.

81. Judgement accordingly.

DATED AND DELIVERED AT MOMBASA THIS 28TH DAY OF JULY, 2023.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G.V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

