



**Kyalo & 2 others v Wanjohi & 7 others (Election Petition Appeal E006, E005 & E009 of 2023 (Consolidated)) [2023] KECA 948 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KECA 948 (KLR)

**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL AT NAIROBI**  
**ELECTION PETITION APPEAL E006, E005 & E009 OF 2023 (CONSOLIDATED)**  
**MA WARSAME, KI LAIBUTA & JM MATIVO, JJA**  
**JULY 28, 2023**

**BETWEEN**

**STANLEY MULI KYALO ..... APPELLANT**

**AND**

**SAMUEL NDUHIU WANJOHI ..... 1<sup>ST</sup> RESPONDENT**

**PETER WAIHENYA MACHARIA ..... 2<sup>ND</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 3<sup>RD</sup> RESPONDENT**

**MILLIAM W. GACHIHI, THE CONSTITUENCY RETURNING OFFICER, STAREHE ..... 4<sup>TH</sup> RESPONDENT**

**ALBERT GOGO, THE COUNTY RETURNING OFFICER NAIROBI CITY ..... 5<sup>TH</sup> RESPONDENT**

**AMOS MWAGO MAINA ..... 6<sup>TH</sup> RESPONDENT**

**AS CONSOLIDATED WITH**  
**ELECTION PETITION APPEAL E005 OF 2023**

**BETWEEN**

**WAIHENYA MACHARIA ..... APPELLANT**

**AND**

**SAMUEL NDUHIU WANJOHI ..... 1<sup>ST</sup> RESPONDENT**

**STANLEY KYALO MULI ..... 2<sup>ND</sup> RESPONDENT**



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CITY ..... 5<sup>TH</sup> RESPONDENT**

**AMOS MWAGO MAINA ..... 6<sup>TH</sup> RESPONDENT**

**AS CONSOLIDATED WITH  
ELECTION PETITION APPEAL E009 OF 2023**

**BETWEEN**

**SAMUEL NDUHIU WANJOHI ..... APPELLANT**

**AND**

**PETER WAIHENYA MACHARIA ..... 1<sup>ST</sup> RESPONDENT**

**STANLEY KYALO MULI ..... 2<sup>ND</sup> RESPONDENT**

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*(Appeals from the judgment (Muya, J.) dated 7th March,  
2023 in High Court Election Petition No. E001 of 2022)*

**JUDGMENT**

1. This judgment is in determination of three consolidated appeals, namely Election Petition Nos. E006 of 2023 filed by Stanley Muli Kyalo, E005 of 2023 filed by Peter Maihenya Macharia and E009 of 2023 filed by Samuel Nduhiu Wanjohi. The common denominator in the three appeals is that each appeal seeks to overturn the judgment rendered in High Court Election Petition No. E001 of 2022 on 7<sup>th</sup> March, 2023 by Muya J. The other common factor is that the appellants in the three appeals were the joint petitioners before the High Court where they unsuccessfully sought to invalidate the victory of Amos Maina Mwago, who emerged as winner in the election for member of the National Assembly for Starehe Constituency, Nairobi County, which was held on 9<sup>th</sup> August, 2022.
2. During the pre-trial stage, the three appeals were consolidated. Petition E006 of 2023 was designated as the lead file. For the sake of brevity and ease of reference, we have in this judgment designated the appellants as follows: Stanley Muli Kyalo as the 1<sup>st</sup> appellant; Peter Waihenya Macharia as the 2<sup>nd</sup>



appellant; and Samuel Nduhiu Wanjohi as the 3<sup>rd</sup> appellant. Similarly, the respondents in this judgment shall be designated as follows: the Independent Electoral and Boundaries Commission (IEBC) as the 1<sup>st</sup> respondent; Milliam W. Gachihi (The Constituency Returning Officer, Starehe) as the 2<sup>nd</sup> respondent; Albert Gogo (The County Returning Officer, Nairobi City) as the 3<sup>rd</sup> respondent; and Amos Mwago Maina as the 4<sup>th</sup> respondent.

3. On 9<sup>th</sup> August, 2022 the appellants, who are all registered voters at Starehe Constituency, Nairobi County, exercised their constitutional and democratic right, and voted for their preferred candidate(s) in the said Constituency. At the conclusion of the elections, the 4<sup>th</sup> respondent was declared by the 2<sup>nd</sup> respondent as the winner. Accordingly, he was gazetted by the 3<sup>rd</sup> respondent in Kenya Gazette Number 9950 dated 22<sup>nd</sup> August, 2022 as the duly elected member of the said Constituency.
4. In their petition dated 9<sup>th</sup> September, 2022 filed in the High Court, the appellants, queried the conduct of the elections and the ensuing declaration of results, claiming that the entire electoral process was undertaken in flagrant violation of the Constitution and the election laws. The 1<sup>st</sup> appellant's case rested on the testimony of 9 witnesses while the 2<sup>nd</sup> and 3<sup>rd</sup> appellants' case stood on the evidence of 5 witnesses. In opposition to the petition, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents called 7 witnesses. The 4<sup>th</sup> respondent opposed the Petition vide a response dated 27<sup>th</sup> September 2022, an affidavit sworn on even date, and a witness affidavit sworn by Julius Kamau Ngatia on the same date.
5. Dismissing the appellants' petition in the impugned judgment, the trial judge admitted the existence of illegalities, irregularities and errors in the conduct of the elections. However, the learned judge was categorical that such illegalities, irregularities and errors were mere procedural and administrative irregularities, which were not of such a magnitude that they could have affected the election results. The learned judge was satisfied that the elections were substantially conducted in accordance with the principles laid down in the Constitution and the law. Having so found, the learned judge found no merit in the petition and dismissed it with costs to the respondents.
6. Regarding costs, the learned judge noted that voters filed the petition. However, the learned judge quipped that the petition had a fair share of interlocutory applications filed at the behest of the appellants and proceeded to tax and allow costs in the sum of Kshs 4,000,000/= out of which Kshs 3,000,000/= are to be paid to the 4<sup>th</sup> respondent and Kshs. 1,000,000/= to the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
7. Aggrieved by the verdict, the appellants separately filed the three appeals to this Court. In his appeal, the 1<sup>st</sup> appellant cites a whopping 26 grounds, which may be abridged into 4 broad grounds as follows:
  - a) Grounds 1, 2, 3, 4,8,9,14,18, 19, 20, 21, 22, 23, 24,and 25 - whether the admitted errors, irregularities and illegalities were mere procedural administrative infractions of such magnitude so as to undermine and affect the election results.
  - b) Grounds 5, 6,7,10,11,12,15,16,17 - whether the Trial Judge erred in admitting the respondents documents which were filed out of time; whether the learned judge was biased against the appellants; and whether the decision infringed their constitutional rights to fair trial, and the right of access to justice.
  - c) Ground 26 - whether the 4<sup>th</sup> respondent was properly on record.
  - d) Ground 13 - whether the trial Judge erred in law in condemning the appellant to pay exorbitant and excessive costs in light of the alleged irregularities, illegalities and non-compliance.
8. Equally aggrieved by the dismissal of the petition, the 2<sup>nd</sup> appellant filed EPA No. E005 of 2022 citing 10 grounds, which may be reduced to 2:



- a. Grounds 1,2,3,4, 5,7,8,9 and 10 - whether the trial Judge erred in law and in fact in holding that the 6<sup>th</sup> respondent was lawfully elected as the Member of National Assembly for Starehe Constituency.
  - b. Ground 6; whether the award of costs based on the numerous applications by the appellant curtailed the appellant's access to justice.
9. Equally resolute to overturn the verdict is the 3<sup>rd</sup> appellant, who filed EPA No. E009 of 2023 citing 13 grounds of appeal, which may be abbreviated to 3 grounds:
- a) Ground 6 - whether the learned Judge erred in allowing the 3<sup>rd</sup>, 4<sup>th</sup>,5<sup>th</sup> and 6<sup>th</sup> respondents' application for extension of time while dismissing the appellant's application for amendment of the petition and filing of a further affidavit.
  - b) Grounds 1,2, 3, 4, 5, 7,8,9, 10, 11, and 12 - whether the learned Judge erred in law and in fact in holding that the 6<sup>th</sup> respondent was lawfully elected as the Member of National Assembly for Starehe Constituency.
  - c) Ground 13 - whether the trial Judge erred in law in condemning the appellant to pay exorbitant and excessive costs despite the prevailing economic constraints, and whether the award of such costs impeded his right of access to justice.
10. At the hearing, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants were represented by learned counsel, Mr. Ashioya, Mr. Shikanda and Ms. Sheunda respectively. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents were represented by Mr. Diro, Kokebe and Moriasi. The 4<sup>th</sup> respondent was represented by Mr. Ongoya. All parties filed written submissions, which they orally highlighted during the virtual hearing.
11. The gravamen of the appellants' case is that the scrutiny exercise revealed the existence of irregularities, illegalities and blatant noncompliance and violation of the principles laid down in the Constitution and the election laws, and that the results did not reflect the will of the people. To fortify their contestation, the appellants urged that the scrutiny and recount established that the result declared were not verifiable, accountable, or secure. Further, the 7 polling stations where scrutiny and recount was undertaken revealed glaring mistakes, errors, irregularities, illegalities and blatant noncompliance with the law as confirmed by the Deputy Registrar's report. They contend that it is was a clear misapprehension of the law and travesty of justice for the trial Judge to term blatant non-compliance with clear stipulations of the Constitution and the election laws as procedural or administrative irregularities that did not affect the results.
12. Further, the appellants argue that the 3<sup>rd</sup> respondent admitted relying on a wrong provision of the law which informed her decision to announce the final tally before tallying all the votes in blatant disregard of Article 86 of the Constitution. They also faulted the trial judge for not applying the provisions of section 83 disjunctively in arriving at the decision as to whether the appellants met the threshold for nullifying an election.
13. The appellants cited rule 11(1) of the Elections (Parliamentary and County) Petition Rules, 2017 (the Rules) which requires responses to a petition to be filed within 7 days from the date of service, and argued that the respondents filed their responses to the petition together with their affidavits out of time. As a result, they maintained that the trial court lacked jurisdiction to extend time. They also argued that the respondents did not seek courts' leave before filing their responses out of time contrary to the holding in Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others (2014) eKLR.



14. In support of their allegation that the learned judge was biased against them, the appellants argued that they unsuccessfully objected to the respondents' responses filed out of time. However, in a show of bias, the court insisted on hearing their application for scrutiny after the pre-trial directions. They maintained that the reason given by the respondents for filing their responses late was not tenable in law because relying on the wrong Legal Notice to decide what the law was in regards to the filing of responses to the petition is not sufficient to warrant any equitable relief from the court in exercise of its discretion.
15. Acknowledging that costs follow the event, the appellants submitted that it does not necessarily mean that the election court is obliged to make an order for costs against an unsuccessful petitioner. They argued that election courts often award costs to unsuccessful petitioners, especially where the evidence indicates that the election petition was triggered by failures on the part of the IEBC. Further, election courts have on various occasions factored in the conduct of the parties in determining who should bear the costs. They blamed the trial court for ignoring the fact that ordinary voters instituted the petition. They submitted further that the costs were exorbitant and excessive considering the nature of the case.
16. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents submitted that section 83 of the *Elections Act* bars courts from nullifying an election because of trivial errors or irregularities where such errors or irregularities have no bearing on compliance with the applicable constitutional and statutory principles, or on the correctness of results declared by the electoral management body. They cited the Supreme Court decision in *Gatirau Peter Munya v Dickson Mwenda Githinji & 2 Others* (2014) eKLR where it was held that courts will not nullify an election based on trivial errors or irregularities arising from human imperfection where such errors or irregularities have no bearing on the integrity of the election, or on the question as to which candidate the people elected.
17. Defending the courts' admission of their affidavits filed out of time, they argued that, by the time the appellants raised their objection to the affidavits, the pre-trial directions had been concluded. Further, the trial Judge reasoned that their objection ought to have been brought before the hearing as stipulated by rule 15(2).
18. In addition to the foregoing, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents dismissed the indictment that the admission of their responses out of time manifested bias on the part of the learned judge. They argued that striking out the responses amounts to summary dismissal of their cases, bearing in mind the matter is of public interest. Regarding the appellants' further affidavits; they submitted that the appellants admitted filing them more than 30 days after filing the petition, and more than 60 days from the date of declaration of the results.
19. Regarding costs, the 1<sup>st</sup> to 3<sup>rd</sup> respondents maintained that, in practice, costs are awarded at the discretion of the trial court after considering the circumstances of each case. They argued that the petition had its fair share of interlocutory applications mostly at the behest of the petitioners. In addition, they argued that the 1<sup>st</sup> respondent is not ordinarily condemned to pay costs where an election is upheld notwithstanding the existence of minor infractions. Lastly, they argued that the trial court found that the election was conducted substantially in accordance with the tenets of the *Constitution* and the electoral laws.
20. The 4<sup>th</sup> respondent submitted that, the trial Judge having concluded that the irregularities and illegalities were not of such a magnitude to have seriously undermined and affected the election results, under section 83 of the *Elections Act*, he was bound not to void the election. To buttress this submission, the 4<sup>th</sup> respondent cited *Jackton Nyanungo Ranguma v IEBC & 2 Others* (2018) eKLR, where this Court declined to vitiate the peoples will because of failure to include results of 5 polling stations in the final tally.



21. The 4<sup>th</sup> respondent also submitted that according to the Returning Officer, the total number of registered voters in the 5 polling stations whose results were not submitted is 3,362. Therefore, the results of the 5 polling stations could not have affected the overall results since the gap between the 4<sup>th</sup> respondent and the second highest candidate was 15,229 votes. Furthermore, if elections were to be nullified because of mere unavailability of results from a few polling stations, then a malicious person could overturn the will of the people by destroying materials from a polling station.
22. The 4<sup>th</sup> respondent submitted further that it was not contested that the appellants first challenged the validity of the respondents documents on the first day of the hearing in December 2022, despite the documents having been filed in September 2022. This, the 4<sup>th</sup> respondent argued was contrary to rule 15(2). The 4<sup>th</sup> respondent submitted that the application for striking out ought to have been made before the pre-trial conference. He also stated that, by the time the issue was raised for the first time, the trial Court had already convened four times and pre-trial had been conducted and concluded. To buttress this argument, the 4<sup>th</sup> respondent cited *Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others (Presidential Election Petition 1 of 2017)* [2017] KESC 39 (KLR) (Election Petitions) (27 August 2017) (Ruling), (Raila 2017) where the Supreme Court, declining to strike out responses filed without leave, stated:
- “ 4. Mr. Awele, counsel for the applicant submitted that, in addition, the respondents have failed to seek leave to file and serve the impugned responses and affidavit out of time. [...] 10. We have considered the application, the affidavit in support thereof, and submissions of counsel. The nature of this application is such that were it to be granted, it would dispose of the entire case of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents at this preliminary stage. Such a drastic consequence in our view cannot be justified if the scales of justice are weighed in favour of all the parties to this petition.”
23. On the alleged bias, the 4<sup>th</sup> respondent submitted that no application had been made seeking admission of the petitioners’ affidavits. Further that, even as the petitioners accuse the trial court of bias, the 2<sup>nd</sup> petitioner admitted that the trial court also made some rulings in their favour despite their omissions to comply with the Rules.
24. Regarding the issue of costs, the 4<sup>th</sup> respondent submitted that, from the pleadings and evidence tendered by the appellants at the High Court, it is clear that the petitioners’ petition lacked substance, and that the 4<sup>th</sup> respondent incurred costs defending it. Consequently, the 4<sup>th</sup> respondent was entitled to the sum of Kshs.3,000,000/= awarded by the trial court, if not more.
25. We have considered the grounds cited in the three appeals, the written submissions and case law cited by the parties. We remind ourselves that section 85A of the *Elections Act* restricts the jurisdiction of this Court to matters of law. We are alive to the fact that a perfection standard should apply to questions of law. This is the typical threshold expected from courts while evaluating and determining matters of law. The primary justification for the application of this standard is that questions of law engage the appellate courts’ primary function, namely to ensure that rules are applied uniformly and consistently. A question is qualified as a question of law if it involves either the identification of the relevant legal rule or interpretive statements of the relevant law made by judges.
26. We first address the question as to whether the learned Judge erred in allowing the respondents’ application for extension of time, and in dismissing the appellants’ application for amendment of the petition, and for leave to file a further affidavit.



27. There is no dispute that an election petition is a special proceeding regulated by strict timelines as entrenched in *the Constitution*, the *Elections Act* and the Rules. It's important to bear in mind that rules of procedure are promulgated to implement the principal legislation. We must always bear in mind the objective of the Rules as stipulated under rule 4, which provides:

4

- (1) The objective of these Rules is to facilitate the just, expeditious, proportionate and affordable resolution of the elections petitions.
- (2) An election court shall, in the exercise of its powers under the *Constitution* and the *Act*, or in the interpretation of any of the provisions in these Rules, seek to give effect to the objective specified in sub-rule (1).

28. The legal precept that an election petition is a special proceeding whose initiation, filing, service of pleadings and actual hearing and determination is governed by rigid timelines as was best articulated by the Supreme Court in *Lemanken Aramat v Harun Meitamei Lempaka & 2 Others* (2014) eKLR where the court stated as follows:

“... the electoral process, and the electoral dispute- resolution mechanism in Kenya, is marked by certain special features. A condition set in respect of electoral disputes, is the strict adherence to the timelines prescribed by the *Constitution* and the electoral law. The jurisdiction of the Court to hear and determine electoral disputes is inherently tied to the issue of time, and a breach of this strict scheme of time removes the dispute from the jurisdiction of the Court. This recognition is already well recorded in this Court's decisions in the Joho case and the Mary Wambui case”.

29. Addressing the rigid timelines stipulated by the law, this Court in *Charles Kamuren v Grace Jelagat Kipchoim & 2 Others* (2013) eKLR stated:

“The time frames stipulated under Section 76(1) (a) of the *Election Act* are peremptory and an election court has no power to vary them. A petition must be filed within twenty-eight days after the date of publication of the results and should also be served within fifteen days of presentation of the petition. We agree with the learned trial Judge that Rule 20 only provides for extension of time for matters whose time is prescribed by the Rules or by the court but not those prescribed by the Act.”

30. The appellants claim that the trial judge erred in dismissing their application to amend their petition. Dismissing the said application, the trial Court cited *Timamy Issa Abdalla v Independent Electoral and Boundaries Commission & 3 Others* (2018) eKLR in which, while refusing a similar application, this Court faulted the petitioner for failing to seek leave to amend his petition or to do so within the stipulated time frame. Undeniably, time is a key aspect in determining election matters.

31. Amendment of a petition is provided for under section 76(4) of the *Elections Act*, which reads:

A petition filed in time may, for the purpose of questioning in return or an election upon an allegation of an election offence, be amended with the leave of the election court within



the time within which the petition questioning the return or the election upon that ground may be presented.

32. The decision on whether to grant or refuse an application to amend an election petition rests in the discretion of the court. This is confirmed by rule 5(1), which provides that the effect of failure to comply with the rules shall be determined at the court's discretion in accordance with the provisions of Article 159(2) (d) of the *Constitution*. However, in granting extension of time, the court will be alive to the fact that the Rules or courts' directions are not made in vain. We find no reason to fault the learned judge for dismissing the appellants' application to amend their petition or the manner in which he exercised his discretion.

33. Next, we address the petitioners' contention that the learned Judge erred in failing to strike out the respondents' pleadings for having been filed out of time. A brief examination of the Rules will assist in resolving this issue. Rule 11(1) provides:

11(1) Upon being served with a petition in accordance with Rule 10, a respondent may oppose the petition by filing and serving a response to an election petition within 7 days.

(1) Upon being served with a petition under rule 12 the respondent may oppose the petition by filing and serving a response within a period of not more than fourteen days upon service of the petition.

34. Rule 19 provides as follows:

Where any act or omission is to be done within such time as may be prescribed in these Rules or ordered by an elections court, the election court may, for the purposes of ensuring that injustice is not done to any party, extend or limit the time within which the act or omission shall be done with such conditions as may be necessary even where the period prescribed or ordered by the court may have expired.

35. Rule 19 empowers the court to extend or reduce time for doing anything under the rules for purposes of ensuring that no injustice is occasioned. Even though courts emphasize the need to adhere to timelines in Election Petitions, the court has to exercise its discretion judiciously wherever the circumstances of the case so require. The Court must be guided by rule 5, which requires that the Court exercises its discretion in accordance with the provisions of Article 159(2)(d) of the *Constitution*.

36. Notably, the appellants challenged the validity of the respondents' documents for the first time during the hearing, which was long after the pre-trial conference. It is because of this late timing of the objection that the trial Court declined the objection. The converse is that, had the trial court upheld the objection at that point in time, being a time bound court proceeding, the effect would have been to completely shut the doors of justice for the respondents. This would have meant that the petition would have proceeded undefended. As was held by the House of Lords in *Henry JB Kendall & Others v Peter Hamilton* (1878) AC 504, such an approach amounts to the court strangely departing from its proper office when, in place of facilitating, it obstructs, and even extinguish, legal rights.

37. The appellants also faulted the trial Court for striking out affidavits filed by the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners. They argued that rules 12(9) and 15 (h) as read together with rule 19(1) permit filing of affidavits outside the set timelines. Further, they submitted that rule 15(h) provides for directions as to the filing and service of any further affidavits, or the giving of additional evidence. It was their submission that,



despite the said provisions, the learned Judge still chose to strike out the said affidavits in a clear show of whimsical application of the court's discretion.

38. The appellants also submitted that the learned Judge was biased in dismissing their application to amend their petition, and to file a further affidavit in support of their petition. In support of their indictment that the learned Judge was biased, they stated that the learned Judge allowed the respondents responses filed out of time contrary to rule 11(1).

39. Striking out the said affidavits, the trial Judge held as follows:

“In the instant matter, the last day for filing affidavits was on September 9, 2022, the day they filed their petition. Everything needed to aid this court in (sic) ought to have been delivered by the parties by then with room for exception within the law in place in determining election disputes. Rule 15(1)(h) of the *Elections (Parliamentary and County Elections) Petitions Rules, 2017* which enables this court to within seven days after receipt of the last response to a petition give schedule a pre-trial conference and may give directions as to filing and serving of any further affidavits which was not adhered to by the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners and thus were locked out by the 7 day period after the respondents filed their response to the petition.”

40. In principle, an appellate court will not interfere with a decision involving the exercise of judicial discretion by a trial court unless the decision is manifestly wrong. Madan JA (as he then was) had this to say in *United India Insurance Co. Ltd, Kenindia Insurance Co. Ltd & Oriental Fire & General Insurance Co. Ltd v East African Underwriters (Kenya) Ltd.* (1985) eKLR:

“The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

41. As the record shows, the respondents' application and the appellants' application stood on different grounds. More importantly, the respondents' application was allowed on the basis that the appellants would suffer no prejudice since the issue of the response was raised after the pre-trial conference. Further, the trial court considered the interests of justice in arriving at its decision, and noted that justice required hearing the respondents as opposed to locking them out of the seat of justice. Further, the trial Judge correctly held that the proposed amendments had the effect of expanding the scope of the petition. In addition, the court reasoned that the proposed amendment was filed outside the 28 days allowed by the law. Further, the court held the view that the affidavits were filed late in the day and, if allowed, they would interfere with the strict timelines prescribed for election petitions.

42. In view of the foregoing, we find and hold that the trial court did not exercise its discretion capriciously when deciding whether the appellants' application for amendment, and the application to have the affidavits admitted out of time, should be granted. The appellants have failed to demonstrate that the court failed to take into account matters that it ought to have taken into account, or that it considered matters that it ought not to have considered in arriving at its decision, or that the learned Judge was biased against the appellants. We cannot fault the trial court for refusing to exercise its discretion in the



appellants' favour. Neither did refusal to allow an application for amendment of the plaint, or refusal to admit the appellants' affidavits filed without leave, amount to bias.

43. We now turn to the gravamen of the appellants' grievance, which is whether the admitted errors, irregularities and illegalities were of such magnitude as to seriously undermine and affect the election results. The test for nullifying an election is stipulated in section 83 of the [Elections Act](#), which provides as follows:

83. Nullification of an election

1. A Court shall not declare an election void for non-compliance with any written law relating to that election if it appears that
  - a. the election was conducted in accordance with the principles laid down in the *Constitution* and in that written law; and
  - b. the non-compliance did not substantially affect the result of the election.

44. The standard of proof of irregularities and illegalities is higher than the civil standard of balance of probabilities, but lower than the criminal standard of proof of beyond reasonable doubt. The Apex Court in that decision held that mere proof or admission of electoral irregularities, without more, would not automatically vitiate an election. This is because election offences attract serious sanctions, and proof of any breach of electoral laws and procedures has to be clear and without equivocation. Consequently, the petitioner must show that the irregularities were of such a nature or magnitude as to substantially affect the results or integrity of the election.

45. In an election petition, the burden of proof generally falls on the persons challenging the outcome of the elections, or alleging misconduct on the part of another. That implies that there is a presumption of regularity on the part of the election officials and the official results. As the party asserting that some aspect of the election should be overturned, the petitioner is reasonably expected to bring forward evidence to prove the assertion.

46. The appellants bore the burden of proving their allegations of non-compliance with the [Constitution](#) and the electoral law, electoral misconduct, irregularities, and illegalities that would result in the election being nullified. In principle, this Court would refrain from intervening in the election results unless it is established to the required standard of proof that such non-compliance with the [Constitution](#) and the electoral law, as well as the irregularities and electoral malpractices complained of, render the elections invalid. This Court in [Mobamed Ali Mursal v Saadia Mobamed and 2 Others](#) (2014) eKLR emphasized that "the standard of proof in such instances is no doubt beyond reasonable doubt, the threshold cannot be any lower..."

47. In effect, the petitioner must show that the irregularities were of such a nature or magnitude as to substantially affect the results or integrity of the election. In [Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others](#) (2017) eKLR, the Supreme Court, discussing section 83 of the [Elections Act](#), observed that:

"In our respectful view, the two limbs of section 83 of the Elections Act should be applied disjunctively. In the circumstances, a petitioner who is able to satisfactorily prove either of the two limbs of the section can void an election. In other words, a petitioner who is able to prove that the conduct of the election in question substantially violated the principles



laid down in our Constitution as well as other written law on elections, will on that ground alone, void an election. He will also be able to void an election if he is able to prove that although the election was conducted substantially in accordance with the principles laid down in our Constitution as well as other written law on elections, it was fraught with irregularities or illegalities that affected the result of the election.”

48. In the above case, the Supreme Court considered the application of section 83 of the *Elections Act* and the circumstances under which an election may be nullified for failure to adhere to the provisions of the *Constitution* and the law, or because of irregularities. It stated:

“ [209] therefore, while we agree with the two Lord Justices in the *Morgan v Simpson* case that the two limbs should be applied disjunctively, we would, on our part, not take Lord Stephenson’ route that even trivial breaches of the law should void an election. That is not realistic. It is a global truism that no conduct of any election can be perfect. We will also go a step further and add that even though the word “substantially” is not in our section, we would infer it in the words “if it appears” in that section. That expression in our view requires that, before vitiating it, the court should, looking at the conduct of the whole election, be satisfied that it substantially breached the principles in the *Constitution*, the *Elections Act* and other electoral law. To be voided under the first limb, the election should be what Lord Stephenson called “a sham or travesty of an election” or what Prof. Ekirikubinza refers to as “a spurious imitation of what elections should be.”

49. The Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* (2014) eKLR also observed as follows:

“216. It is clear to us that an election should be conducted substantially with the principles of the *Constitution*, as set out in Article 81(e). Voting is to be conducted in accordance with the principles set out in Article 86. The *Elections Act*, and the Regulations thereunder, constitute the substantive and procedural law for the conduct of elections.

217. If it should be shown that an election was conducted in accordance with the principles of the *Constitution* and the *Elections Act*, then such election is not to be invalidated only on grounds of irregularities.

218. Where, however, it is shown that the irregularities were of such magnitude that they affected the election results, then such an election stands to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection are not enough, by and of themselves, to vitiate an election. In this regard, we stand on the same plane as the learned Judges in *Morgan, Opitz and Nana*.

219. By way of example, if there would be counting or tallying errors which after scrutiny and recount do not change the result of an election, then a trial Court would not be justified, merely on account of such shortfalls, to nullify such an election. However, a scrutiny and recount that reverses an election result against the candidate who had been declared a winner, would occasion the



annulment of an election. Examples of irregularities of a magnitude such as to affect the result of an election, are not however, closed.”

50. When faced with the question as to whether the non-compliance, irregularities and improprieties in the second presidential election of 2017 were substantial and significant, and affected the result thereof, the Supreme Court in *John Harun Mwau & 2 Others v Independent Electoral and Boundaries Commission & 2 Others* (2017) eKLR stated:

“[407] Was the election credible? From the controlling factor of legitimacy, the election would be perceived as credible, in the absence of clear evidence that the bulk of it simply failed; that due procedure was not followed in the conduct of election; that someone other than IEBC conducted the election; that the procedures of vote counting were not followed; that false results were announced, in place of the true outcome; that the voters were turned away from polling stations by IEBC, or by State agencies of power; that the motions of verification and announcement of vote-outcome were not complied with. We have stated elsewhere in this judgment that none of these factors were at play or at play in any significant manner.

[408] If it emerges that, in accordance with Article 81(e) of the *Constitution* of Kenya, the repeat election was conducted by secret ballot; that it was free from violence (more particularly, such violence being initiated and prosecuted by the electoral body, or by State agencies); that the voters were not influenced by intimidation or corruption; that the management process was in the hand of IEBC; that voting was transparently done; that such voting proceeded transparently, efficiently, accountably, with precision and clear expression of voter-preference – then such election has to be judged to have been credible for the purposes of *the Constitution*, the law, and the national expectation.

[409] It is our considered view, therefore, that the burden falls on the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners, not just to allege, but to show by objective evidence the legal foundations of their claim; and thereafter to lay before this Court weighty evidence to sustain each and all of their claims. As already demonstrated, some of their claims are of such a generic order as to lend only feeble grounds for the Court to depart from prima facie perceptions of legitimacy and credibility...”

51. It is the appellants’ case that the scrutiny undertaken on 31<sup>st</sup> January 2023 established glaring mistakes, irregularities, illegalities and blatant non-conformity with the law that manifested in all the seven polling stations scrutinized, which was confirmed by the learned Judge at paragraph 121 of the impugned judgment. The appellants relied on their evidence before the trial court which, in a nutshell, was: that an imposter signed Form 35B with the authority and knowledge of the 3<sup>rd</sup> respondent, and on behalf of the United Democratic Alliance Party candidate; that it was admitted by two Presiding Officers, Vivian Awino Okoth and Wilson Njogu, that agents of candidates not of the Member of National Assembly elections signed Form 35As in numerous polling stations across Starehe Constituency; that there were threats, harassment and intimidation of the agents of other candidates other than the 4<sup>th</sup> respondent herein; that one John Mathenge was appointed as a presiding officer while he was still a Chief agent for the 4<sup>th</sup> respondent; that the 4<sup>th</sup> respondent admitted that votes from certain polling stations were never included in the final tally that was used in the announcement and declaration of the results; that the 3<sup>rd</sup> respondents admitted during cross-examination that she did not follow the law and chose to declare results without tallying the votes in all the Polling Stations in Starehe



Constituency; that some ballot boxes were missing while others were brought to the Constituency tallying Centre as late as the night of 10<sup>th</sup> August 2022, well over 24 hours after voting ended; that, as at the time the results were announced, police were still undertaking investigations into missing ballot boxes and the existence of marked ballot papers at the Tallying Centre; that the 3<sup>rd</sup> respondent admitted the existence of mistakes and errors on Forms 35A's and 35B's in the total number of votes cast, number of registered voters, irregular stamping (as testified by Milliam Gachihi), and discrepancies between the results captured in Form 35A and 35B; that the 3<sup>rd</sup> respondent admitted mistakes and errors on Forms 35As and 35Bs, specifically, the total number of votes cast, the number of registered voters, irregular stamping (as testified by Milliam Gachihi), and discrepancies between the results captured in Form 35A and 35B; that rejected votes were tabulated into the total number of valid votes cast, thereby giving rise to inaccurate results; that there was strategic and targeted removal of UDA party agents from polling stations, for instance, Pangani Girls High School Polling Stations 6, 7 and 8, Mariakani Primary School Polling Station 4 and Kariokor Social Hall Polling Centre; that there were numerous baseless, illegal and unwarranted arrests of UDA party agents, for instance in Pangani Girls High School Polling Stations 6, 7 and 8; Kariokor Social Hall Polling Centre, Mwariro Market Polling Centre, Pumwani Polling Centre, and Mariakani Primary School; that there were instances of ballot marking and ballot stuffing, for instance, in Our Lady of Mercy Girls Secondary School Polling Station 2 of 10, and Kenyatta International Convention Centre Grounds Polling Station 2 of 11; and that there were reports of violence against two presiding officers under the supervision of the 4<sup>th</sup> respondent.

52. On their part, the respondents maintained that the learned Judge correctly applied the law and concluded that the election was conducted substantially in accordance with the principles laid down in *the Constitution* and written laws, and that the irregularities and illegalities were not of such a magnitude as to seriously undermine and affect the election results. Accordingly, they argued that the learned Judge was bound by section 83 of the *Elections Act* not to declare the election a nullity.
53. On the alleged failure to tally results of 5 polling stations, the 1<sup>st</sup> to 3<sup>rd</sup> respondents' counsel maintained that, even quantitatively, the appellants did not prove how failure to tally the results in issue affected the final results. Further, there was no evidence of the actual number of voters who voted and their votes were not tallied. They relied on *Jackton Nyanungo Ranguma v Independent Electoral and Boundaries Commission & 2 Others* (2018) eKLR. The 4<sup>th</sup> respondent submitted that the Returning Officer was satisfied that the results of the 5 polling stations would not affect the overall results; and that the Returning Officer recorded the same information in form 35B, stating that "the total number of registered voters in the 5 polling stations whose results were not submitted is 3,362 and this would not affect the final tally if added to the second highest candidate." In addition to the foregoing, it was submitted that the gap between the 4<sup>th</sup> respondent and the second highest candidate was 15,229 votes and that, therefore, the learned Judge cannot be faulted for failing to void the election on the alleged failure to tally 5 polling stations.
54. Arriving at its finding on the alleged failure by the 4<sup>th</sup> respondent to tally results from 5 polling stations, the trial court noted that the case before it was in all fours with the holding in *Jackton Nyanungo Ranguma v IEBC & 2 Others* (*supra*) and proceeded to hold as follows:

"... Applying the provision of Section 83 of the Act, I find that these irregularities would not have affected the ultimate result given the margin of votes and the fact that the irregularity occurred in only 5 Polling Stations out of over 1000 polling stations in the County...



In the present petition the 2<sup>nd</sup> Respondent did make an attempt to explain the reasons behind non- inclusion of the results of the five Polling Stations before the announcement and declaration of the 4<sup>th</sup> Respondent as the Winner. Those reasons I find are Plausible.”

55. We find no difficulty in accepting the fact that results from 5 polling stations were left out when the final tally was announced. However, the record shows that the 4<sup>th</sup> respondent explained to the appellants that 3 presiding officers had locked their forms 34As in the ballot boxes, while the other two had misplaced their original forms 34As. Furthermore, an attempt by the 4<sup>th</sup> respondent to have the 3 ballot boxes opened for the purposes of retrieving the Form 34As came to a cropper because the candidates rejected the proposal. It means no fault can be attributed to the 4<sup>th</sup> respondent for arriving at his decision. In any event, the said decision affected all the parties and there is no evidence that the winner got undue advantage or benefit from the failure to include or exclude the said results.
56. From the foregoing, we are satisfied that the appellants successfully proved the irregularities in the conduct of the election for Member of National Assembly for Starehe Constituency. However, as observed by the Supreme Court in *Mohammed Mahamud Ali v Independent Electoral and Boundaries Commission* (supra), elections as a matter of course cannot be perfect and errors, so long as they are explainable should not affect the will of people. We are satisfied that the learned Judge correctly analyzed the effect of the illegalities and irregularities on the elections and cannot fault his finding that the proven infractions were not of such magnitude as to justify nullification of the election of the member of Parliament for Starehe Constituency.
57. On the alleged anomalies in Forms 35As and 35B, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents’ counsel cited this Court’s decision in *IEBC v Stephen Mutinda Mule* [2014] eKLR that:
- “ There is no stamping requirement in case of Form
35. All that is required with regard to Form 35 as provided for in Regulation 79 is the signature of the presiding officer and the agents of the candidates. We agree with the submission on behalf of the appellant that it is the signature of the presiding officers and the agents that authenticate the Form
35. If any such Forms were stamped, it was gratuitous and superfluous discretionary or administrative act incapable of creating a statutory obligation, less still the invalidation of Forms 35 that did not contain the stamp ....”
58. The 4<sup>th</sup> respondent’s case is that the appellants have continued to raise the issues of irregular stamps and innocent arithmetic errors, which do not affect the results when there is a litany of precedents indicating that such cannot be a basis of nullification of an election. He cited this Court’s decision in *Cyprian Awiti & Another v Independent Electoral and Boundaries Commission & 3 Others* (2018) eKLR, which held that stamping is not mandatory in law. Furthermore, there was no allegation in the pleadings or during the hearing to suggest that there were any errors regarding counting of the votes, or in the entering of the figures in Form 35As, and neither did the appellants demonstrate how those errors affected the final results or otherwise.
59. On the issue of the alleged faint stamps and non-stamping of forms 35As, the learned Judge held as follows: “This issue is a non-starter as this Court loudly pronounced itself in its Scrutiny ruling dated 26 January, 2023.” We are in total agreement with the learned judge that the issue was a non- starter, which could not in any way affect or tilt the outcome of the election. Nothing turns on the said allegation. We therefore find that the respondents gave a correct and clear explanation. We decline the invitation by the appellants to find otherwise.



60. With regard to the allegations by the appellants that imposter/unauthorized agents signed Forms 34As and 35Bs, it was the 4<sup>th</sup> respondents case that it was the 2<sup>nd</sup> respondent's testimony that one George Karanja was introduced to her by Simon Mbugua, the UDA Candidate. He collected the nomination papers for the UDA candidate. He attended the chief agents meeting and the UDA Candidate informed her that George Karanja was the liaison person between her and himself. Nevertheless, no evidence was tendered that Simon Mbugua complained anywhere that it is not his Chief Agent who signed the form.
61. On the allegations of imposters signing Forms 34As and 35A, the learned Judge held:
- “...The allegation of an Imposter was made by one Michael Mbanya. It is instructive to note that the UDA Candidate himself did not present any evidence on the alleged Imposter ...
- afind that the Appellant has failed to point out and prove that an irregularity of Law occurred as to the Signature appended on form 355 and 365 and that this irregularity materially affected the results.”
62. Having gone through the record, on the issue of stamping of Form 34As, and the allegations of imposters signing Forms 34As and 34B, we find and hold that this Court has severally held that stamping of Forms 34As is not mandatory, and we need not reinvent the wheel. (See *Owino Paul Ongili Babu v Francis Wambugu Mureithi & 2 Others* (2018) eKLR and *IEBC & another v Stephen Mutinda Mule & 3 Others* (2014) eKLR).
63. On the alleged signing of the Forms 34As and 35B by imposter agents, we have considered the record and find that the appellants failed to discharge the standard of proof placed upon them, since it was the 4<sup>th</sup> respondent's evidence that Simon Mbugua, the UDA Candidate, introduced one George Karanja, the alleged imposter to her. It is noteworthy that there is no evidence on record of Simon Mbugua disowning one George Karanja as his agent. Consequently, we find that the appellants have failed to demonstrate how the non- stamping of Form 34As affected the final tally of the results announced.
64. Regarding the alleged bribery of voters, it was the respondents' case that no reasonable judge presented with such unsubstantiated claims could have concluded that the appellants had proved beyond reasonable doubt the allegations of voter bribery. The learned Judge, dismissing the allegations of bribery, stated:
- “The allegation of voter bribing is a Criminal Offence. The burden of proof is on the Petitioner to prove it beyond reasonable doubt. The evidence adduced falls for short of the degree required. There was no proper identification of those allegedly giving the bribes and the recipients. No photographs were produced in court of the same. There was not a single exhibit produced in court to corroborate the allegations of bribery. The allegations of bribery remain just that.”
65. Bribery is one of the election offences provided for in the *Election Offences Act* No. 37 of 2016. Section 9 of the Act creates the offence as follows:
1. A person who during an election period-
    - a. Directly or indirectly offers a bribe to influence a voter to-
      - i. Vote or refrain from voting for a particular candidate or political party.



- ii. Attend or participate in or refrain from attending or participating in any political meeting, march, demonstration or other event of a political nature or in some other manner lending support to or for a political party or candidate.
    - b. In any manner unlawfully influences the result of an election.
    - c. Directly or indirectly, in person or by any person on his behalf, in order to induce any other person to agree to be nominated as a candidate or to refrain from becoming a candidate or to withdraw if they have become candidates.
  - 2. A person who, during an election period, accepts or agrees to accept a bribe that is offered in the circumstances described in subsection (1) commits an offence.
  - 3. A person who commits an offence under this section shall be liable, on conviction to a fine not exceeding two million shillings or to imprisonment for a term not exceeding six years or to both.
66. Bribery constitutes both a criminal and an electoral offence. Consequently, the standard of proof required is beyond reasonable doubt. Did the appellants discharge the standard of proof placed upon them on the allegations of bribery? We do not think so. The appellants' witnesses never adduced evidence in support of the bribery allegations against the 4<sup>th</sup> respondent. There was no attempt to identify the alleged givers or recipients of the alleged bribe. There was no evidence to prove whether the alleged bribe was in the form of money, or whether it was given on behalf of the 4<sup>th</sup> respondent. No attempt was made to identify the administration police officer or the local chief who allegedly engaged in bribery. No photos were adduced in evidence. On this time and age of technology, it is very easy to capture bribery of voters on camera.
67. We are persuaded that the allegations of bribery were not substantiated. In the end, we find no evidence of bribery was presented. The inevitable conclusion is that the said allegations remained just mere allegations.
68. Regarding the allegations of violence, it is the appellants' case through the testimony of Michael Mbanya Wathigo that he was attacked on 5<sup>th</sup> August, 2022, near Moi Avenue Primary School by youth wearing the 4<sup>th</sup> respondent's regalia in the presence of the 4<sup>th</sup> respondent. Therefore, the appellants believe that the said attack was orchestrated to deny them the chance to carry out their duties during the elections, and to intimidate their supporters. Additionally, one James Kuria Mburu Mwaniki testified that, on the night of 8<sup>th</sup> August, 2022 at Pangani Girls High School, alongside the 1<sup>st</sup> respondents officials, they were attacked by a mob of youth carrying weapons and that the 3<sup>rd</sup> respondent's posters and the police did nothing to remedy the situation as they proceed to affix the posters at the polling center. The appellants faulted the learned Judge for dismissing the violence complained of as having occurred prior to the Election and, therefore, falling under the ambit of pre-election disputes.
69. In *Owino Paul Ongili Babu v Francis Wambugu Mureithi & 2 Others* (2018) eKLR, this Court held as follows:
- “...it is not enough to find that there was some form of violence in a given station and then proceed to nullify the result of an election. There has to be a demonstration that the violence



affected not only the voting but the final result of the election; for example, that the violence disfranchised some voters and/or gave an undue advantage to one of the parties.”

70. Under Article 81 of the *Constitution*, elections must comply with the principle of universal suffrage based on the aspiration for fair representation and equality of vote. The casting of votes must be by secret ballot, free from violence, intimidation, improper influence or corruption, and must be conducted in a transparent, and administered in an impartial, neutral, efficient, accurate and accountable manner by the 1<sup>st</sup> respondent.
71. We have appraised the entire record. We are of the considered view that the learned Judge erred in concluding that the reported incidences of violence reported on 5<sup>th</sup> August 2022 and 8<sup>th</sup> August 2022 were pre-election disputes and that, therefore, the appellants were barred from raising the same as a ground in the petition. In our view, an election is a process that transcends the election date. Pre-election processes, such as voter registration, integrity of voter registers and polling materials, the conduct of the actual elections and post-election processes, such as handling and preservation of election materials, form an integral part of the entire election process. We therefore find and hold that the appellants properly raised the said ground. However, the appellants were required to prove that the alleged violence affected the conduct of free and fair elections as required by Article 81 of *the Constitution*. In the end, we find that, other than the appellants mentioning the incidents of violence, there was no attempt to demonstrate that the alleged violence substantially affected the voting exercise, or that the said violence affected the conduct of free and fair elections, or that it affected the ultimate choice of the voters or that a voter(s) was turned away as a result of the said violence.
72. In any event, the appellants did not tender evidence in the form of affidavit of a voter or voters who were allegedly discouraged or restrained from exercising their democratic right to vote as a result of the cited incidences of violence. Even more important is the fact that no evidence was tendered to show that, on the election day, there were incidences of violence which prevented voters from participating in the voting exercise. There is nothing to show that the alleged violence disadvantaged any of the candidates, leave alone the petitioners. Neither is there evidence that the 4<sup>th</sup> respondent stood to gain any advantage from the alleged violence or threats of insecurity in Starehe Constituency.
73. The upshot of the foregoing is that the appellants failed to establish to the required standard that there was violence and general insecurity on 5<sup>th</sup> August 2022, or on the eve of the elections in Starehe Constituency which affected the conduct of free and fair elections.
74. We now address the scrutiny of the results. The appellants’ case is that it was confirmed that there were two missing ballot boxes out of the seven that the Court ordered to be scrutinized. Further, out of the 5 ballot boxes availed for scrutiny, only one contained a sealed tamper proof envelope containing unused ballot papers. The appellant’s case was that the foregoing violated regulation 81 of the Elections (General) Regulations, 2012. Further, the appellants argued that, in all the other polling stations where scrutiny was undertaken, the unused ballot papers were unaccounted for. It was argued that this was affirmed and verified by video evidence played in Court and the statement made by the 4<sup>th</sup> respondent that, indeed, ballot boxes were missing, and that it was the 3<sup>rd</sup> respondent who gave them guidance on how to break the law and announce the results before completing the process of tallying.
75. On the other hand, counsel for the respondents submitted that the unavailability of the two ballot boxes from Pangani and Pumwani Polling Stations did not in any way show that the impugned election was flawed. Counsel also urged the Court to consider the minutes signed by all the parties who were present at the warehouse, and which was filed in the Court’s portal by counsel for the 1<sup>st</sup> to



- 3<sup>rd</sup> respondents. Therefore, there cannot be a sound presumption that the non-retrieval of the boxes proved that the election was not conducted according to law, or that there were errors.
76. The 1<sup>st</sup> to 3<sup>rd</sup> respondents also submitted that there is nothing in the scrutiny report to show that the election was not conducted in accordance with the principles set out in *the Constitution* and in the electoral laws, and that the errors observed did not affect the outcome or integrity of the results.
77. Regarding the scrutiny exercise, the learned Judge found that there were illegalities and irregularities in the conduct of the election of the member of parliament for Starehe Constituency. However, the said irregularities and illegalities could be termed as procedural or administrative irregularities, illegalities and errors, and that they were not of such a magnitude as to seriously undermine and affect the election results.
78. We have considered the record, the arguments by the appellants and the explanation offered by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondent. The Supreme Court in *Evans Odhiambo Kidero & 4 Others v Ferdinand Ndungu Waititu & 4 Others* (2014) eKLR stressed the importance of the scrutiny report. It asserted that scrutiny is a necessary tool in assessing the credibility of an election, and that the court must take the scrutiny report into consideration in arriving at its determination; that, if there are questions regarding the report, parties must be allowed to interrogate it; that, if there are newly discovered irregularities, the petitioner must identify them and show how those irregularities affected the results; and that it is only then that the court will determine the petition.
79. The Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Gitinji and 2 Others* (*supra*) explained that:
- “...If it should be shown that an election was conducted substantially in accordance with the principles of *the Constitution* and the Election Act, then such election is not to be invalidated only on ground of irregularities. Where however, it is shown that the irregularities were of such magnitude that they affected the election result, then such an election stands to be invalidated. ...Where an election is conducted in such a manner as demonstrably violates the principles of *the Constitution* and the law, such an election stands to be invalidated.”
80. In that case, the Court underscored the fact that:
- “... . procedural or administrative irregularities and other errors occasioned by human imperfection, are not enough, by and of themselves, to vitiate an election.”
81. In the same vein, the Canadian Court in *Opitz C v Wrzesnewskyj* (2012) 3 S.C.R. 76 stated thus:
- “...If elections can easily be annulled on the basis of administrative errors, public confidence in the finality and legitimacy of election results will be eroded. Only irregularities that affect the result of the election and thereby undermine the integrity of the electoral process are grounds for overturning an election.”
82. In conclusion, and to our mind, these irregularities were explained, and of the nature that would not invalidate an election. That said, we also note that the cited judicial authorities and statute law are in agreement that elections, as a matter of course, cannot be perfect, and that errors, so long as they are minimal, should not affect the will of the people as expressed in the ballot. We are satisfied that the 3<sup>rd</sup> respondent satisfactorily explained why the two ballot boxes were not availed during the scrutiny exercise. Further, parties placed the additional seal on the ballot boxes at Moi Primary school during retrieval, and that the missing 100 votes in favour of the 4<sup>th</sup> respondent could be retrieved from sealed



envelopes that were never opened. From the foregoing, we are persuaded that, indeed, the irregularities and errors complained of by the appellants are of such a nature that they had no effect on the outcome of the election.

83. Lastly, we turn to the issue of costs. The appellant contended that the costs of Kshs. 4 million awarded by the trial Judge are excessive, and that the same ought to be set aside. Section 84 of the Act provides that “An Election court shall award the costs of and incidental to a petition and such costs shall follow the cause.”
84. The above provision is augmented by rule 30, which confers discretion to the election court to determine the amount of costs a party is liable to pay, and the maximum amount payable. These two pieces of legislation have been the subject of judicial interpretation. It is settled position that that an award of costs is the discretion of the court, and an appellate court will only interfere with the award if there has been a misdirection in exercise of the discretion. It is also an accepted position that costs are meant to reimburse a successful litigant, and should not be interpreted to discourage litigants of modest means from accessing the courts.
85. In *Hon. Dickson Daniel Karaba v Hon. Kibiru Charles Reubenson Election* (2018) eKLR, it was stated thus:

“Section 84 of the *Elections Act* requires the election court to award costs to the winner of an election petition which accords with the general principle that costs follow the event which is the same as saying that the party who succeeds in court will normally get the costs of the litigation. This Court in the case of *Philip Kyalo Kituti Kaloki v Independent Electoral and Boundaries Commission and 2 Others* [2018] eKLR citing its decision in *Martha Wangari Karua (supra)* stated on the issue of costs:

“It is up to the election court to determine whether a party would be awarded costs or not and in doing so the court must be guided by the principles of fairness, justice and access to justice”

86. Capping the costs at Kshs. 4 million, the learned judge held that the election petition had its share of interlocutory applications at the behest of the appellants. Considering that the petition, and the interlocutory applications, including an application for scrutiny, were fully heard, we are not persuaded that the costs awarded are manifestly excessive to warrant our interference. Accordingly, we find no reason to interfere with the award made by the election court. There is no evidence or material to show that the trial judge injudiciously or arbitrarily exercised his decision such that it occasioned injustice. Having failed the said test, we find that the sum awarded is justified in the circumstances of this case.
87. Flowing from our analysis of the facts and the law, it is our conclusion that these consolidated appeals have no merit. Accordingly, we hereby dismiss the three appeals as consolidated with costs to the respondents. The appellants shall jointly and severally pay the costs of these appeals to the respondents. The costs are hereby capped at Kshs.1,000,000/= to each respondent. As stated above, we find no reason to interfere with the costs imposed by the High Court for the proceedings in the High Court. Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF JULY, 2023.**

**M. WARSAME**

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**JUDGE OF APPEAL**



**DR. K. I. LAIBUTA**

.....

**JUDGE OF APPEAL**

**J. MATIVO**

.....

**JUDGE OF APPEAL**

*certify that this is a true copy of the Original*

*Signed*

**DEPUTY REGISTRAR**

