IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, M'INOTI & OTIENO-ODEK JJ. A)

ELECTION PETITION APPEAL NO. 5 OF 2018

JOHN MUNUVE MATI …..…….. APPELLANT

AND

THE RETURNING OFFICER MWINGI NORTH

CONSTITUTENCY……..... 1ST RESPONDENT

INDEPENDENTELECTORAL BOUNDARIES

COMMISSION.....……..... 2ND RESPONDENT

PAUL MUSYIMI NZENGU … 3rd RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court (L.N. Mutende, J.) dated 31*st* *January 2018 in Kitui HC. EP. No. 3 of 2017)*

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JUDGMENT OF THE COURT

1. On 8th August 2017, as part of the general elections in Kenya, an election was conducted for Member of the National Assembly for ***Mwingi North Constituency.*** There were three candidates and the declared results were as follows:

a. Paul Musyimi Nzengu ……. 23,582

b. John Munuve Mati ……..……15, 702

c. Patrick Mwangangi …….7,738

2. Dissatisfied with the results of the election, ***the appellant, John Munuve Mati,*** filed a petition in the High Court at Kitui against the ***Returning Officer, Mwingi North Constituency (the 1st respondent), the Independent Electoral and Boundaries Commission (the 2nd respondent)*** and ***Paul Musyimi Nzengu (the 3rd respondent)***. The appellant alleged that the election was neither free and fair, nor conducted in accordance with constitutional principles and elections law. More specifically, he alleged that the election was marred by partiality on the part of some presiding officers; voter intimidation; improper influence, and corruption; lack of transparency, accountability, and fairness; and systematic propagation of hate speech, violence, stigmatization, and insults.

3. In their response to the petition, the respondents denied the appellant's allegations and pleaded that the election was conducted strictly in accordance with the law and was free, fair, and transparent. The appellant testified and called 14 witnesses in support of the petition. The 1st respondent testified on his behalf and that of the 2nd respondent whilst the 3rd respondent also testified and called 7 witnesses.

4. After hearing the petition, the High Court, in a judgment dated 31st January 2018, dismissed the same and upheld the election of the 3rd Respondent asthe duly elected Member of the National Assembly for Mwingi North Constituency.The final orders of the trial court as per the Decree were as follows:

"1. That the Petition be and is hereby dismissed.

2. That the Respondents be and are hereby awarded costs thus:

***a. The 1st* and 2nd Respondents shall have costs capped at Ksh. 1,000,000/=.**

b. The 3rd Respondent shall have costs capped at Ksh. 1,000,000/=.

c. That a Certificate of determination of the Petition be and is hereby issued pursuant to the provisions of Section 86 (1) of the Elections Act, 2011 to the Independent Boundaries and Electoral Commission and the Speaker of the National Assembly be and is hereby notified forthwith."(sic)

5. Aggrieved by the dismissal of the petition, the appellant filed a notice of appeal dated 13th February 2018. The notice was served upon counsel for the respondents on 14th February 2018. The validity of the notice of appeal and service thereof is contested in this appeal.

6. In his memorandum of appeal, the appellant raised the following compressed grounds of appeal:

a. THAT the learned judge erred in law in holding that the appellant had not discharged the burden of proof.

b. THAT the learned judge erred in law in not taking into account the uncontroverted evidence of the petitioner given that the 1*st* and 2*nd* respondents did not call any presiding officer to testify.

c. THAT the conclusion arrived at in the judgment is not supported by the analysis of evidence by the learned judge.

d. *THAT the learned judge erred in law in her failure to appreciate and consider the law that the manual register of voters was not applicable in conducting the elections but the KIEMS Kit. Accordingly, she erred in law in not allowing the scrutiny of the KIEMS Kit when ordering scrutiny of votes.*

7. All the parties filed interlocutory applications in the appeal. The appellant applied for extension of time for filing and serving of the notice of appeal and for an order to deem the notice of appeal on record as duly filed and served. For their part, the 1st and 2nd respondents applied to strike out the notice of appeal for having been filed out of time contrary to **rule 6 (2)** of the***Court of Appeal (Election Petition) Rules 2017, (the 2017 rules)***, whilst the 3rd respondent also applied to strike out the notice of appeal for the additional reason that it was not served upon him personally or through publication in a newspaper of national circulation as required by the rules.

8. To facilitate timely and orderly hearing and determination of the appeal, the Court directed the parties, with their consent, to file written submissions on the appeal and the applications. The appeal and the applications were heard on 15th March 2018 and this judgment determines the applications and the appeal. At the hearing of the appeal, ***Mr. Eric Mutua***, Senior Counsel, appeared for the appellant while ***Mr. Anthony Mulekyo***, learned counsel appeared for the 1st and 2nd respondents. ***Ms. Jemimah Keli***, learned counsel appeared for the 3rd respondent.

9. Starting with the application for extension of time, Mr. Mutua urged us to extend the time for lodging and serving the notice of appeal, contending that***section 85A (1)(a)*** of the **Elections Act** requires an appeal to the Court of Appeal to be filed within 30 days of the judgment of the High Court. The section reads:

"85 A (1) 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 and shall be:

a. filed within thirty days of the decision of the High Court; and

b. heard and determined within six months of the filing of the appeal."

10. On the other hand ***rules 6 (2)*** and ***6 (3) (c)***of the 2017 rules provide as follows:

"6 (2): A notice of appeal shall be filed within seven days of the date of the decision appealed against.

6 (3) (c) A notice of appeal shall contain a request that the appeal be set down for hearing in the appropriate registry."

11. Counsel submitted that rule 6(2) of the 2017 rules is inconsistent with Section 85A (1) (a) of the Elections Act which provides a 30-day period for filing an appeal to the Court of Appeal. It was submitted thatthe 7-day period stipulated in rule 6(2) was inconsistent with the 30 days provided in the section 85A 1(a) of the Elections Act and that subsidiary legislation cannot override an express provision of the statute.

12. Learned counsel further submitted that rule 6 (2) of the 2017 rules is in conflict with **rule 35** of the **Elections (Parliamentary and County Elections) Rules 2017.** Thelatterprovides that:

"An appeal from the judgment and decree of the High Court in a petition concerning the membership of the National Assembly, Senate, or office County Governor shall be heard and determined under the Court of Appeal Rules 2010."

He added that under r***ule 75*** of the Court of Appeal Rules, 2010 (the 2010 rules), a notice of appeal is required to be filed within ***14 days*** from the date of the decision appealed from. In his view there was therefore a conflict between the Elections (Parliamentary and County Election) Petition Rules 2017 and the 2017 rules and in that case, the former must prevail because they are a"special law" governing election petitions.

13. The Appellant further submitted the object of the 2017 rules is to facilitate the just, expeditious and impartial determination of election petition appeals and that under rule 6(5) thereof, the effect of failure to comply with the 2017 rules is to be determined at the Court's discretion subject to ***Article 159(2)(d)*** of the Constitution and the need to observe the timelines set by the Constitution and any other electoral law. He accordingly urged us to exercise discretion under rule 6(5), extend time within which to file the notice of appeal, and deem the notice of appeal dated 13th February 2018 to have been filed and served on time.

14. The 1st and 2nd respondents opposed the application for extension of and submitted that the notice of appeal was lodged six days out of time and the same should be struck out. It was their view that with a notice of appeal that was filed out of time, this Court has no jurisdiction to hear and determine the main appeal. They further contended that a notice of appeal occupies a central place in the appellate system and that without it, there can be no appeal. Citing the case of **Abok James Odera T/A A.J. Odera& Associates, Nairobi Civil Appeal No. 161 of 1999,** they submitted that the notice of appeal is what gives this Court jurisdiction to hear an appeal. They also cited the Supreme Court's decision in **Nicholas Kiptoo arap Korir Salat -v- IEBC & 7 Others, [2014] eKLR** where the Courtheld that a notice of appeal is a primary document to be filed outright and was a jurisdictional pre-requisite.

15. The 1st and 2nd respondents further assailed the competence of the appeal, contending that the notice of appeal was never served upon them as required by the 2017 rules. Citing dicta from **Kibaki -v- Moi [2000] 1 EA 117**, they submitted that direct service of the notice of appeal is critical. They relied on rule 7 of the 2017 rules and urged that the appellant was obliged to serve the notice of appeal upon all affected parties within five days from the date of its filing.

16. The 3rd respondent also supported the application to strike out the notice of appeal as incompetent. His learned counsel associated herself with and adopted the submissions made by the 1st and 2nd respondents in that regard. She reiterated that the notice of appeal was filed outside the 7-day mandatory period; that it was not served in accordance with rule 7(3) of the 2017 rules; and that it was defective in form and substance for failure to conform to rule 6(5) of the 2017 Rules.

17. We have anxiously considered the three applications to strike out the appeal and for extension of time. It is vividly clear to us that the appellant and his legal advisers were not aware of the promulgation of the 2017 rules, which were intended to specifically address the filing of appeals in this Court arising from election petitions. They relied on the general 2010 rules, as was the case in 2013 but when their attention was drawn to the changed legal framework, they tried to impeach the validity of 2017 rules in favour of the 2010 rules.

18. We are not persuaded that the 2017 rules are in conflict with the Elections Act, the Elections (Parliamentary and County Election) Petition Rules 2017, or the 2010 rules. First and foremost, the fact that section 85A of the Elections Act requires an election petition appeal to be filed in this Court within 30 days of the decision of the High Court does not render a notice of appeal illegal or superfluous. As this Court has consistently held, its jurisdiction as an appellate court is invoked by filing a notice of appeal, which formally notifies the other parties that the dispute has moved from the trial court to this Court. (See **Safaricom -v- Ocean View Beach Hotel Ltd & 3 Others, CA No. 325 of 2009**). Indeed in **IEBC -v- Jane Cheperenger & 2 Others, SC, CA No 36 of 2014** the Supreme Court observed that without filing a notice of appeal, there can be no expressed intention to appeal.

19. The requirement of a notice of appeal, prior to filing a record of appeal, is a reasonable and rational notification mechanism, for both the Court and the parties, without which appeals would otherwise be conducted in an environment of ambush, totally antithetical to all notions of order and fairness that is fundamental to judicial proceedings. As the Supreme Court stated in, **Frederick Otieno Outa v. Jared Odoyo & 4 Others (SC. Pet. No. 10 of 2014),** the law can regulate or confine the time within which, or the scope or nature of questions that an appeal court may accord a hearing.

20. Accordingly we do not find anything illegal in requiring an intended appellant to file a notice of appeal within 7 days of the decision intended to be appealed, before filing the record of appeal with a total of 30 days from the date of the decision that is to be appealed. We note too that even under the Supreme Court Rules and the Court of Appeal Rules 2010, a notice of appeal is a mandatory prerequisite before filing the record of appeal. If we were to take the appellant's submissions seriously, an intending appellant would only sit tight until the 29th day and file the record of appeal without any form of prior notification that such an appeal was intended.

21. The 2010 rules regulates the filing of all appeals in this Court. In general appeals, there is no serious time constraint. Parties have as many as 14 days to file a notice of appeal and 60 days thereafter to file the record of appeal. Where a party has applied for proceedings and complied with ***rule 82***, the record of appeal can be filed even three or five years later so long as there is a certificate of delay. That luxury is not available in an election petition appeal. By dint of section 85A of the Elections Act, an election petition appeal must be filed within 30 days from the date of the judgment of the High Court and heard and determined within 6 months from the date it was filed. This commitment to timely resolution of election disputes stems directly from the Constitution where ***Article 87*** specifically mandates Parliament to enact legislation to establish mechanisms for timely settlement of electoral disputes. We believe that it was that appreciation that informed the decision of the ***Rules Committee*** to promulgate dedicated Court of Appeal rules to specifically regulate the filing of election petition appeals.

22. We must also point out that the object of the 2017 rules, which the appellant emphasized, is not restricted only to just and impartial determination of election petition appeals. Expeditious determination of those appeals, which the appellant did not advert to, is equally an important object of the rules, which cannot be glossed over in the manner that the appellant invites us to do.

23. As to the appellant's the contention that in the event of a conflict between the 2010 rules and the 2017 rules, the former must prevail, we are equally unpersuaded. The 2017 rules are dedicated to election petition appeals in a bid to give meaning to an express and overriding constitutional value, whilst the 2010 rules address all other appeals. The 2017 rules are later in time. But more importantly, rule ***4(2)*** provides that in the event of a conflict between the 2017 rules and the 2010 rules, the 2017 rules shall prevail. It is only when there is no applicable provision in the 2017 rules that the 2010 rules apply in so far as they are not inconstant with the 2017 rules. In the matter at hand, the 2017 rules require a notice of appeal to be filed within 7 days whilst the 2010 rules require the notice of appeal to be filed with 14 days. We have no hesitation in holding that the 2017 rules must prevail.

24. There is no dispute that the appellant did not file and serve the notice of appeal within the period prescribed by the 2017 rules. Decisions of this Court abound where it has been held that the prescribed timelines as regards electoral dispute resolution must be strictly adhered to. (See for example **Charles Kamuren -v- Grace Jelagat Kipchoim & 2 Others [2015] eKLR).**We agree with those decisions particularly given the constitutional and statutory demand for timely resolution of disputes. Nevertheless, the 2017 rules themselves now expressly confer on us discretion to determine the effect of any failure to comply with the rules, taking into account the fact that justice must be administered without undue regard to procedural technicalities, balanced against the need to observe prescribed timeliness.

25. In this case there is clear noncompliance with the rules, but we have before us the record of appeal and we perceive it is possible to determine the appeal without any further infraction on the set timelines. We have considered the effect of the appellant's failure to file the notice of appeal within 7 days and to serve the same within the prescribed period. No evidence has been adduced that any party has been prejudiced by non-compliance with the 2017 rules, which we have noted. The three objects of the 2017 rules, namely just, impartial, and expeditious determination of appeals, which we agree must be given equal consideration, do not stand to be compromised if we hear the appeal on merits. We bear in mind that in **Raila Amolo Odinga & Another -v- Independent Electoral and Boundaries Commission & 2 Others [2017] eKLR)** the Supreme Court also declined to strike out documents filed or served out of time **Supreme Court (Presidential Election Petition) Rules 2017**.

26. In the circumstances we are minded to exercise our discretion and decline to strike out the notice of appeal. In the same token, we persuaded that we should extend the time for filling and serving the Notice of Appeal. We accordingly allow the application for extension of time with no orders as to costs and dismiss the applications for striking out the notice of appeal, similarly with no orders as to costs.

THE MAIN APPEAL

27. Having determined the preliminary issues, we now proceed to consider the merits of the appeal.

28. On the first broad ground of appeal, the appellant contends that the trial court erred in finding that he did not discharge the legal burden of proof. It was his contention that he adduced sufficient evidence to show that the elections were neither free and fair, nor conducted in accordance with the law, which was enough to shift the evidential burden of proofto the respondents. He contended that the he had proved his case to the required standard because the 2nd appellant failed to call any of the presiding officers as witnesses, to rebut his evidence.

29. Next the appellant submitted that the learned judge erred by failing to evaluate the evidence on record. He contended that the learned judge evaluated the evidence of only one witness, ***Musili Mengi (PW9)*** and failed to consider the evidence of five other witnesses. Among the witnesses whose evidence was not considered, he submitted, were ***Jacob Mutua Kilonzi (PW8)*** who testified that the deputy presiding officer told assisted voters that the appellant was selling Kambas to Kikuyus; ***John Musyoki Musyimi (PW12)*** who stated that ***Hon Kalonzo Musyoka*** campaigned at Tseikuru Polling Station on polling day; ***Tavitha Kakuivu Kimwele (PW6)***, an assisted voter who said she was misled by the presiding officer; ***Grace Kisiai (PW14)*** who testified that at Masukanioni Primary School Polling Station voters appeared wearing campaign materials; and ***Kithia Mutio (PW15)*** who testified that Ngungani Primary School polling station the presiding officer was asking voters to vote for the 3rd respondent. Because of failure to evaluate the entire evidence, it was urged, the learned judge came to the wrong conclusion, which entitle us to interfere with her conclusions.

30. The appellant further submitted that the learned judge arrived at conclusions that were not supported by evidence, such as holding that ***Somin Ngwele (PW13)*** had not given reasons why, as an agent, he did not sign Form 35A, whilst in fact he had given the reasons. The trial judge was also criticized for holding that the appellant had no**t** identified the persons who were allegedly misleading the voters whilst in fact the appellant's witnesses had mentioned specific presiding officers.

31. Lastly the appellant submittedthat the trial court erred in law by excluding the KIEMS kit from the scrutiny. In his view, the KIEMS kit was a part of the register of voters because the number of voters who turned up to vote could not be established without scrutiny of the KIEMS kit.

32. The appellant cited various authorities in support including of his submissions among them **Godwat Pan Masala Products I.P. -v- Union of India, 2004 AIR SCW 4483; Peter Gichuki Kingara -v- IEBC & Others, [2013] eKLR; Gatirau Peter Munya -v-Dickson Mwenda Kithinji & 2 Others [2014] eKLR; Ferdinand Ndungu Waititu -v-IEBC & 8 Others [2014] eKLR; Raila Amolo Odinga & another -v- IEBC 7 4 Others [2017] eKLR** and **Richard Nchapi Leiyagu -v- IEBC & 2 Others [2014] eKLR.**

33. The 1st, 2nd and 3rd Respondentsopposed the appeal, submitting that the trial court did not err in finding that the appellant had not discharged the legal burden of proof and that having failed to discharge the burden of proof, no evidentiary burden shifted to them. In their view all that the appellant did was to throw in pleadings which had no basis and or evidential value and which ultimately failed as each allegation was explained and responded to. They further submitted that appellant's petition contained generic claims devoid of cogent and credible evidenceand even after scrutiny, the court found no illegalities or irregularities.

34. Regarding analysis of evidence, the respondents argued that the trial court had meticulously analyzed the evidence adduced by the witnesses and correctly found that the appellant had failed to discharge the burden of proof on him. In particular they maintained that on cross-examination, the appellant's witnesses conceded that the election was conducted properly, fairly and in accordance with the law, while

his agents confirmed that they were allowed to observe the election and that none of them was denied entry as long as they had the requisite identification documents. In addition, it was submitted; those witnesses also agreed that the presiding officers assisted voters in the presence of the agents for all the candidates.

35. On the alleged failure to call presiding officers to testify, the respondents submitted that the burden of proof rested with the appellant and that the presiding officers and polling clerks could not be called to answer a case whose basis had not been proved to the requisite standard. Further, it was submitted that the 1st respondent indeed testified and controverted the appellant's evidence on the conduct of the presiding officers for Mwingi North Parliamentary election and that in any case, a petition cannot succeed merely because a respondent has not offered evidence in rebuttal; the petitioner must prove his case to the required standard.

36. Lastly as regards the KIEMS kit, the respondents submitted that the trial court did not err in refusing to allow scrutiny of the same. They submitted that the appellant did not plead any irregularity concerning the KIEMS kit, and that in his application for scrutiny dated 20th September 2017, he only sought scrutiny and recount of all the ballots cast at the election and completely avoided any mention of the KIEMS kit. Accordingly they urged that that parties are bound by their pleadings and the appellant had no basis for faulting the trial court for failure to allow access to the KIEMS kit, which he had never applied for.

37. The Respondents cited various authorities in support of their submissions, including:

Nicholas Kiptoo arap Salat -v-IEBC & 6 Others, [2013] eKLR; Rozah Buyu Akinyi -v- IEBC & 2 Others, [2014] eKLR; Raila Odinga & others -v- IEBC & 3 Others, [2013] eKLR; and **RamadhanSeif Kajembe -v- Returning Officer Jomvu Constituency & 3 Others [2013] eKLR.**

ANALYSIS AND DETERMINATION

38. We have considered the Memorandum of Appeal, the written and oral submissions by the parties and the authorities cited to us. We remind ourselves that by dint of section 85A of the Elections Act, appeals to this Court in election petitions are confined to matters of law only, meaning the interpretation or construction of the Constitution, statute or regulations made thereunder or their application to the sets of facts established by the trial Court. A**s** far as facts are concerned, our engagement with them is limited to background and context and to satisfy ourselves, when the issue is raised, whether the conclusions of the trial judge are based on the evidence on record or whether they are so perverse that no reasonable tribunal would have arrived at them. We cannot be drawn into considerations of the credibility of witnesses or which witnesses are more believable than others; by law that is the province of the trial court. (See **Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others [2014] eKLR).**

39. In this appeal, the first issue for our consideration is whether in law the KIEMS kit is a part of the register of voters and whether the trial court erred in failing to order scrutiny thereof. The Elections Act defines what constitutes the Register of Voters. ***Section 4***of the **Act** provides that:

> **"There shall be a register to be known as the Register of Voters which shall comprise of−**
>
> **a. a poll register in respect of every polling station;**
>
> **b. a ward register in respect of every ward;**
>
> **c. a constituency register in respect of every constituency;**
>
> **d. a county register in respect of every county; and**
>
> **e. a register of voters residing in Kenya. "**

40. As for the KIEMS kit, it is plain to us that the appellant does not appear to fully appreciate what it is, and that is why he submits it is part of the register. ***Section 44*** of the **Elections Act** establishes an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results. This is what is referred to as the Kenya Integrated Election Management System (KIMES). On the other hand section 44A requires the IEBC to establish a complementary mechanism for identification of voters and transmission of election results as a fall back in the event of failure of the electronic system.

41. The KIEMS kit is a gadget that is used to biometrically identify persons for purposes of registration as voters, voting during the elections, and transmission of the election results. For purposes of voting, the kit is in the form of a laptop tablet with a fingerprint reader, which biometrically identifies the voter to confirm that he is in the register and to avoid impersonation. (See ***Thomas Mwatwetwe Nyamache v IEBC & Others, Kisii EP No. 8 of 2017*** and ***Elizabeth Ongoro Amollo v Francis Kajwang Tom Joseph & 2 Others [2017] eKLR)***.

42. From a plain reading of ***Section 4*** of the **Elections Act**, it is manifest that the KIEMS kit itself is not the register of voters. It is also not one of the items listed to comprise the Register of Voters. Accordingly, we cannot fault the trial court for not treating the KIEMS kit as part of the Register of Voters as defined in the Elections Act.

45. We have carefully perused the record of appeal and it is evidently clear to us that neither in the petition, nor in the application for scrutiny did the appellant apply for access or scrutiny of the information contained in any aspect of the KIEMS kit. It was his duty to apply and lay the basis to justify an order of access to or scrutiny of that information. Having failed to so plead and lay the basis, the appellant cannot turn round at this stage and blame the trial court for failing to make an order for scrutiny of the KIEMS kit. Parties are bound by their pleadings

and the learned judge would have been justifiably accused of committing errors if she had granted orders that none of the parties had applied for. This ground of appeal has no merit and must fail.

44. The next ground of appeal for our consideration is that the trial court erred in evaluating the evidence on record thereby arriving at the wrong conclusion. We have already set out the limited scope that we have in engagement with the facts. We are satisfied that at the heart of contestation is the issue of credibility of witnesses. The appellant has urged us, for example, to find that the trial judge erred by holding that she could not believe the testimony of PW 13. Believability of a witnesses is an issue of credibility of the witness.In **Gatirau Peter Munya - v-Dickson Mwenda Kithinji & 2 others** (supra) on the issue of credibility of witnesses, the Supreme Court expressed itself as follows:

> **"[48] Flowing from these guiding principles, it follows that a petition which requires the appellate Court to re-examine the probative value of the evidencetendered at the trial Court, or invites the Court to calibrate any such evidence, especially calling into question the *credibility of witnesses,* ought *not* to be admitted. We believe that these principles strike a balance between the need for an appellate Court to proceed from a position of deference to the trial Judge and the trial record, on the one hand, and the trial Judge's commitment to the highest standards of knowledge, technical competence, and probity in electoral-dispute adjudication, on the other hand."**

45. Accordingly, the issues whether PW13 was credible or believable are matters within the competence and jurisdiction of the trial court. We have seen nothing on record to suggest that the determination by the learned judge that PW13 was not a witness of truth is so perverse that no reasonable tribunal would have come to that decision.

46. Turning to the question whether the learned judge correctly evaluated the evidence on record, the appellant contends that the learned judge ignored evidence showing that the presiding officers were partial and in favour of the 3rd respondent. We cannot easily gross over the advantage that the trial court had of seeing and hearing the witnesses who testified, which enabled it to weigh the credibility of each witness. We note too that there is no evidence on record of any reported incident of partiality captured in the Polling Station Diary or any report made to the police and captured in the Occurrence Book. Ordinarily, in any given polling station, there are witnesses in the form of agents of various candidates, representatives of the media, security personnel and independent election observers. An incident where a presiding officer is alleged to be openly telling people to vote for a particular candidate or party is one that would not easily pass without notice. There is no credible evidence on record to support such serious allegations, save that of some of the appellant's witnesses, which the trial court clearly did not believe. Consequently, we are inclined to find that the trial court did not err in coming to the conclusion that the allegation of partiality was not proved.

47. We note too that the scrutiny report on record did not reveal any material or substantial irregularity in the declared results of the election. We see no good reason to interfere with the declared results.The appellant contended that the trial court was influence by extraneous considerations. We have examined the written and oral submissions by the Appellant. No satisfactory submission was made on this allegation. We have ourselves examined the record and found nothing that would amount to reliance of extraneous or irrelevant matters. The appellant has accordingly not satisfied us that extraneous matters influence the trial court in arriving at its decisions.

48. The appellant also contended that the learned judge erred by refusing to allow his petition, yet the respondents did not call the presiding officers to testify. This ground has no merit. The burden of proof lay with the appellant. It was his duty to call cogent and credible evidence to prove the facts that he alleged in the petition. We agree with the respondents that it does not invariably follow that failure by a respondent to call a witness

> s. means that the petition must be allowed. The petitioner must first adduce evidence of the nature that would entitle him to judgment if the respondent did not adduce any evidence at all in rebuttal.

49. Having carefully considered the grounds of appeal and the submissions in support together with the response, we are convinced, like the the trial court that the election of Member of Parliament for Mwingi North Constituency was conducted in accordance with the Constitution and the relevant laws. We are also satisfied that there was no evidence placed before the trial court to justify nullification of the 3rd respondent's election.

50. For all the foregoing reasons, we have come to the conclusion that this appeal has no merit, and make the following final orders:

> **a. Election Petition Appeal No. 5 of 2018 be and is hereby dismissed.**
>
> **b. The Judgment and Decree of the High Court in Kitui Election Petition No. 3 of 2017 be and is hereby upheld.**
>
> ***c. . The appellant shall bear the costs of this appeal, capped at Kshs 1 million.***

Dated and Delivered at Nairobi this 22*nd* *day of March, 2018*

M. WARSAME

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JUDGE OF APPEAL

KATHURIMA M'INOTI

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR