



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MAKHANDIA & KIAGE, JJ.A)

ELECTION PETITION APPEAL NO. 2 OF 2018

BETWEEN

HON. MOHAMED ABDI MAHAMUDAPPELLANT

AND

AHMED ABDULLAHI MOHAMAD 1ST RESPONDENT

AHMED MUHUMED ABDI2ND RESPONDENT

GICHOHI GATUMA PATRICK3RD RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION4TH RESPONDENT

(Appeal from the judgment & decree of the High Court of Kenya at Nairobi (Mabeya, J.) dated 12th January 2018

in

Election Petition No. 14 of 2017)

JUDGMENT OF THE COURT

Following the August 8th 2017 general election the appellant **Mohammed Abdi Mohammed** was declared as the Governor of Wajir County having contested the seat on a Jubilee Party ticket. He garnered some 49,401 votes. His closest competitors **Ahmed Abdullahi Mohammed** and **Ahmed Muhumed Abdi** who happen to be the 1st and 2nd respondents herein, contested on Orange Democratic Party and the Party for Development and Reforms and garnered 36,598 and 31, 902 votes, respectively.

Shortly after that declaration, on 6th September 2017, those two respondents filed a petition before the High Court in Nairobi by which they sought the nullification of the appellant's election. The appellant was named as the 1st respondent while the other two were **Gichohi Gatume Patrick**, the Returning Officer (R.O) and the Independent Electoral and Boundaries Commission (IEBC).

The grounds on which the nullification was sought, the particulars were given in great detail, were these;

- (a) Disqualification of the [appellant] under section 22(2) of the Elections Act 2011 as a candidate for Governor Wajir County.
- (b) Irregular, unprocedural and unlawful assisted voting
- (c) Incorrect tallying

- (d) A sample of votes cast exceeding the number of registered votes in some polling stations.
- (e) Tampering with the number of registered voters as per the results posted on the public portal
- (f) Making of false entries.
- (g) Striking coincidences and incredible figures/vote result padding/manipulation.
- (h) Commission of offences in implementation of technology (i) Failure to secure ballot papers and boxes.
- (j) Violence and intimidation.

In view of the centrality that the appellant's educational qualifications have assumed in this appeal, as in the High Court, we set out the particulars that were given in the petition with regard to it including in paragraphs 8 to 13, 20 to 23 and 27 to 30 thereof;

“8. The petitioners aver that the 1st respondent herein stood constitutionally/and/or statutorily disqualified to contest the elections and thus he was not qualified to participate in the election as a candidate for the Governor's seat.

9. The petitioners reiterate that the 1st respondent herein did not satisfy the requirements of section 22(2) of the Elections Act, 2011.

10. It is the petitioner's contention that the 1st respondent's clearance to be a candidate for the position of Governor Wajir County in the 8th August 2017 election was obtained fraudulently on the basis of forged degree certificate allegedly from Kampala University.

11. The petitioners further state that it takes at least four to six academic years to acquire and/or graduate with a degree.

12. The Petitioners further aver that the 1st respondent herein could not have been eligible to enroll in any University for he had neither sat for “O” level nor “A” level examinations that would have enabled him to do so.

13. The petitioners aver that by 3rd September 2014; 1st respondent had not acquired a degree, a fact that he admitted during his vetting for the position of Ambassador of Riyadh, Saudi Arabia before the Parliamentary Departmental Committee on Defence and Foreign Relations that took place on 3rd of September 2014.

...

20. The petitioners state that it follows therefore that the concealment, alteration and falsification of any relevant information by a candidate filling the self-declaration form is unethical and bespeaks lack of integrity on the part of the concerned.

21. The petitioners aver that the 1st respondent was constitutionally and/or statutorily disqualified from contesting for the election of Governor Wajir County as demonstrated below;

22. The petitioners further aver that the 1st respondent does not satisfy the educational requirements for qualification for the position of Governor.

23. The petitioners aver that the 1st respondent, while filling the self-declaration form, concealed, altered and falsified information on his education background

...

27. The petitioners state that a statutorily disqualified candidate cannot be validly elected to a state or public office.

28. The petitioners aver that the constitutional and statutory disqualification of the 1st respondent to contest elections means that his nomination as candidate and subsequent election was invalid, illegal, null and void.

29. The petitioners state that the illegality to clear the 1st respondent by the 3rd respondent to contest the gubernatorial elections was a direct breach of the Constitution and the law.

30. The petitioners aver that the election of the 1st respondent was unlawful and ought to be invalidated by this honourable court.”

In his affidavit supporting the motion, the 2nd respondent addressed the issue of the appellant's alleged non-qualification under **section 22** of the Elections Act in paragraphs 13 to 21 as follows;

“13. That I have been advised by my advocates on record which advice I verily believe to be true that Hon. Mohamed Abdi Mahamud the 1st respondent herein stood constitutionally disqualified to contest the elections and thus his election was null and void.

14. That I have been advised by my advocates on record which advice I verily believe to be true that Hon. Mohamed Abdi Mahamud the 1st respondent herein did not satisfy the requirements of section 2(2) of the Elections Act 2012.

15. That I have been advised by my advocates on record which advice I verily believe to be true that Hon. Mohamed Abdi Mahamud the 1st respondent herein purportedly presented misleading information to the Independent Electoral Commission to be cleared as a candidate for Governor position Wajir County code 008 in the just concluded General Elections of 8th August 2017 which showed that he had acquired a degree from Kampala University during the Graduation Ceremony of 1st March 2012 which he knew was untrue. (Attached herewith and marked “AMMA-5”) is a copy of the degree certificate that Hon. Mohamed Abdi Mahamud presented to Independent Electoral and boundaries commission for clearance to run as Wajir Governor.)

16. That I am seized of the fact that Hon. Mohamed Abdi Mahamud's name is not among the graduands for Bachelor of Business Administration as can be noted from the 1st March 2012, 9th Graduation Book, Kampala University. (Attached herewith and marked “AMMA-6”) is a copy of the 1st March 2012, 9th Graduation Book, Kampala University)

17. That I have been advised by my advocates on record which advice I verily believe to be true that it takes at least four years to six years to acquire and/or graduate with a degree.

18. That I have been advised by my advocates on record which advice I verily believe to be true the Hon. Mohamed Abdi Mahamud the 1st respondent herein could not have been eligible in enroll in any University for he had neither sat for O level nor A level examination that would have enabled him do so.

19. That I am aware that by 3rd September 2014 Hon. Mohamed Abdi Mahamud had not acquired a degree, a fact that he admitted during his vetting for the position of Ambassador to Riyadh, Saudi Arabia before the Departmental Committee on Defence and Foreign Relations that took place in the Mini Chamber, County Hall, at 9.00 am Nairobi. (Attached herewith and marked “AMMA-7”) is a copy of the Hansard pullout with minutes and proceedings of the vetting department showing the declared results)

20. That I have been advised by my advocates on record which advice I verily believe to be true that the conduct of Hon. Mohamed Abdi Mahamud as in 13 above amounts to fraud and can only pass for an election offence which is punishable in law and should be totally discouraged.

21. That I have been advised by my advocates on record which advice I verily believe to be true that contention that (sic) Mohamed Abdi Mahamud is not fit to occupy the said office.”

The various documents referred to were duly annexed.

When served with the petition, the appellant did not file a response to petition as required under **Rule 11(1)** of the Election Petition Rules 2017. He did, however, file a replying affidavit sworn on 1st September 2017 which the learned Judge who heard the Petition, (Mabeya, J.) treated as the appellant's response to petition.

To those allegations touching on his education qualification to vie for the post of governor, the appellant's remarkably brief reply was as follows;

“a) Disqualification under Section 2(2) of the Elections Act 2012

3. That the petitioners are trying to mislead this honourable court as the issue of my educational requirements was litigated upon and decided by the Ugandan High Court where the said complaint was dismissed

(Attached herewith please find a copy of the pleadings that were filed in the High Court at Uganda in respect of the 1st respondent's degree certificate being a chamber summons & supporting affidavit, a notice of motion and supporting affidavit, a summary of evidence and an affidavit by the real Abdirahman Mohamed Abdille where he denounced having filed the suit, a copy of the order issued dismissing the matter and copies of my academic certificates marked MAM-1).

4. That the petitioners equally raised the same concerns with the 3rd respondent but the same was dismissed. (Attached herewith please find a copy of the complaint at the IEBC and the decision marked MAM-2)

5. That petitioners are now trying to raise pre-nomination issues which have been determined.”

The appellant's 21-page affidavit did address the rest of the allegations in the petition at greater length denying them and concluding that the petition was devoid of merit, and good only for dismissal.

On their part, the Returning Officer and the IEBC filed a joint response to the petition dated 18th September 2017 in which they gave detailed responses to the allegations contained in the petition. They prayed that the High Court determine that the appellant was duly elected and that they conducted the Wajir Gubernatorial election in compliance with the Constitution and the electoral laws. They sought the petition's dismissal. Their position was evidentially backed by the supporting affidavit of the Returning Officer sworn on 18th September 2018.

Witness statements were filed by the parties and pre-trial preliminaries, including a consent entered into at the pre-trial conference held on 9th October 2017 to the effect that documents were to be admitted in evidence without the requirement of strict proof. The matter thereafter proceeded to trial before the learned Judge with a total of 18 witnesses testifying. Significantly, the appellant did not appear to testify in his own defence against the allegations leveled against him in the petition and be cross-examined on his replying affidavit. The learned Judge adopted the issues for determination that had been agreed on by the parties, namely;

“(a) Whether the Gubernatorial Election for Wajir County held on 8th August, 2017 was in accordance with the Constitution and electoral laws.

(b) Whether there were any electoral malpractice and/or offences during the Wajir County Gubernatorial Election held on 8th August, 2017 which affected the outcome of the Gubernatorial Election.

(c) Whether the 1st respondent was lawfully qualified to vie for the Wajir County Gubernatorial Election on the 8th August, 2017.

(d) Who should bear the costs of the petition and what should be the instructions fee on the petition.”

By the judgment dated and delivered on 12th January 2018, the learned Judge made the following findings on the petition. Combining the first and second issues on the manner in which the gubernatorial election was held and to answer the question whether it was constitutionally and legally compliant or fraught with malpractices, and illegalities that affected the outcome he found;

- there was irregular, unprocedural assisted voting which seriously compromised the principle of secrecy of the ballot.
- there was no proof that there were instances where the total number of votes cast exceeded the registered voters on the identified polling stations.
- Due to lack of training some of the presiding officers exhibited sheer incompetence with some failing to sign statutory forms, failing to countersign alterations; some sealing all the results in the ballot boxes, and the like. The IEBC's officers were supplied with faulty equipment which affected the accuracy and efficiency of the election.
- There were discrepancies and inaccuracy in the number of votes cast revealed in the scrutiny report but it did not reveal a systematic scheme or pattern and abnormal high voter turnout was not proved.
- Violence and intimidation was not proved.
- The Returning Officer acted *ultra vires* by taking over the process of vote tallying and declaration of Wajir East Tallying Centre but this did not affect the results of the election.
- Ballot boxes previously sealed at the polling station were irregularly opened which interfered with the integrity and credibility of results at two polling stations.
- There was failure to properly transmit the results electronically to both the Constituency and County Tallying Centres but there was no evidence to show that the failure affected the results.
- Allegations of voter bribery by representatives of the appellant failed *in limine* .
- Alleged ejection of the 1st and 2nd respondents' agents from polling station was not proved.

On the issue whether the appellant was lawfully qualified to vie for the Wajir Gubernatorial Seat, the learned Judge held as follows;

- The High Court had the jurisdiction to determine the question of the appellant's qualification to be nominated as a candidate as an election does not refer to the single event that occurs on the voting day but to the ***“entire process of electing leaders commencing from registration of votes up to the declaration of results.”***
- The fact that the IEBC had the responsibility of determining candidates' eligibility to vie did not preclude the election court from satisfying itself that a candidate was eligible to stand.
- The appellant did not specifically or generally deny the allegations as to his qualifications, content to only state that the matter had been litigated and dismissed at the High Court in Uganda. He also did not turn up to be cross examined on his affidavit leaving the 1st and 2nd respondents' evidence uncontroverted.
- As at 3rd September 2014 the appellant had not yet graduated with any degree and it is impossible that he would have obtained a masters degree six months later on 12th March 2015.
- Accordingly as at 8th August 2017, the appellant did not have the academic qualifications for the position of governor and he was not legally cleared to vie for it as he did not satisfy the requirements of section 22(2) of the Elections Act.

Finally, on the question whether the appellant was validly elected as Governor of Wajir County, the learned Judge, after setting out the findings we have cited, held that the election was not conducted in accordance with the Constitution and the law and that the proven irregularities were so grave that they affected both the credibility and the result that no reasonable tribunal could uphold the election. The appellant was thus not validly elected.

With those findings the learned Judge concluded his judgment with orders that the appellant, the IEBC and the Returning Officer do pay costs to the 1st and 2nd respondents, the instructing fee whereof he capped at Kshs. 2,000,000. He then made the following final declarations;

“(a) the 1st respondent was not validly cleared to vie for the seat of Governor for Wajir County as he did not possess the educational qualifications;

(b) the 1st respondent was not validly elected to the position of Governor and his election is hereby declared null and void;

c) the 3rd respondent do hold a fresh election in conformity with the Constitution and the Elections Act, 2011.

(d) the respondents do jointly and severally, pay costs to the petitioners to be taxed by the Deputy Registrar provided however that the instructions fee is capped at Kshs. 2 million.”

The appellant was aggrieved by that decision and preferred this appeal. The memorandum of appeal raises five grounds of complaint against the judgment which are that;

“1. The trial judge erred in law by assuming jurisdiction and re-opening matters that were and/or should have been dealt with at the nomination stage namely whether the appellant had been awarded a recognized degree by Kampala University.

2. The learned judge erred in fact and law by not appreciating sufficiently or at all that the 1st and 2nd respondents were obligated in law to prove their accusations against the appellant.

3. The learned judge erred in fact and law in not holding that the appellant was validly nominated to contest the position of governor, Wajir County.

4. The trial judge erred in fact and law in not appreciating sufficiently or at all that the clerical irregularities, if any, did not:

(i) Affect the outcome of the election.

(ii) Confer any numerical advantage to the appellant.

5. The trial judge erred in fact and law in holding that the appellant was not validly elected to the position of Governor, Wajir County.”

It is immediately noteworthy that with the exception of the first, all the grounds of appeal purport to raise issues of “*fact and law*” in clear contravention of the jurisdictional bar imposed by **section 85A** of the Elections Act, which expressly stipulates that appeals to this Court in election matters shall be limited to questions of law only. It was thus no surprise that the 1st and 2nd respondents by their notice of motion dated 6th February 2018 and brought under the said provisions as well as **Rule 19(1)** of the Court of Appeal, Elections Petitions Rules 2017 and **Rule 86** of the Court of Appeal Rules, made the following prayers;

“2. That this Court be pleased and hereby directs that grounds 2,3,4 and 5 of the memorandum of appeal dated 31st January be struck out for contravening section 85A of the Elections Act.

3. That in any event the Court of Appeal completely lacks jurisdiction to inquire into the matters/and or complaints set out in grounds 2,3,4 and 5 of the memorandum of appeal dated 31st January, 2018.”

Cognizant that appeals in electoral matters are strictly time bound and must be concluded and determined within 6 months of filing, this Court directed that the motion be urged together with the appeal proper so as to economize on scant judicial time. Further directions were given for the filing and exchange of written submissions as well as lists and bundles of authorities in readiness for oral highlights of those submissions in plenary.

At the hearing of the appeal, learned counsel who appeared were **Mr. Ngatia** with **Mr. Macharia** for the appellant; **Mr. Ahmednassir S.C.** with **Messrs Omwansa Ombati, Jesse Oduor** and **Brian Onderi** for the 1st and 2nd respondents and, finally, **Messrs Kamau Karori, Mahat Some** and **Ken Melly** for the Returning Officer and the IEBC.

In urging the appeal, **Mr. Ngatia** gave a summary of the pleadings and procedural history of the case that is largely as we have already set it out herein. He pointed out at the outset that the appellant's election was nullified on the two broad grounds of not having been validly cleared to vie under educational qualifications, and the various irregularities on voting day that were found by the Judge. In counsel's view, the case against the appellant as pleaded in the petition was that he had fraudulently acquired or forged the degree certificates he presented to the IEBC. He went on to say that the appellant's answer to those allegations was that he was awarded a degree by Kampala University in Uganda and a challenge to it by way of judicial review before the High Court in Uganda by one **Abdirahim Mohammed Abdille**, being Misc. Cause No. 200 of 2007 filed against the University and the appellant, was dismissed. The reason for the dismissal was that the applicant therein had never instructed the law firm of **Ms Arcadia Advocates** to file the said cause.

Counsel contended that the appellant's academic transcripts from the university had not been challenged. Nor had his second degree, a Masters in Diplomacy and International Relations awarded by the same university on 12th March 2015, been challenged in Kenya.

Turning to the merits of the appeal proper, **Mr. Ngatia** argued that as the issue of the authenticity of the degree certificate remained unresolved, the learned Judge fell into error in holding that a *prima facie* case had been made out by the 1st and 2nd respondents, and used that standard to hold that they had proved their case, when he ought to have used the standard of *beyond reasonable doubt* given that allegations of a criminal or *quasi* criminal character, namely fraud and forgery, had been made against the appellant. He further faulted the learned Judge for taking the minutes of the Parliamentary Committee for Defence and International Relations as conclusive that the words “*he is yet to graduate*,” in relation to the appellant, meant that he did not possess a degree as at 3rd September 2014 when he was being vetted for the position of Ambassador to Saudi Arabia. He went on to contend that the learned Judge misapplied **section 112** of the Evidence Act in holding that the appellant's educational background were matters within his special knowledge, which he required to prove, thereby derogating from the requirement of **section 107** of the same statute that obligated the 1st and 2nd respondents to prove their case.

Counsel charged that the twin issues of the burden and standard of proof as deployed by the learned Judge amounted to errors of law committed as the learned Judge “*moved from the case of forgery*,” to a different one of whether the degree certificate was genuinely issued to the appellant thus introducing the question of authenticity.

Turning to the question of whether the learned Judge had jurisdiction to enquire into qualification for nomination for the seat of governor, counsel cited the case of **JOSIAH TARAIYA KIPELIAN OLE KORES vs. DR. DAVID OLE NKEDIENYE & 3 OTHERS [2013] eKLR** a decision of the learned Judge himself in which, as an election court, he had declined to delve into pre-election disputes and to extend jurisdiction to determine matters relating to qualification and eligibility. He criticized the learned Judge for departing from his own “correct approach” in that earlier case.

Mr. Ngatia did also attempt to make submissions on the question of assisted voters but abandoned it when objection was raised that there was ground of appeal raising that specific complaint, nor could it be subsumed without some violence to logic and the specified stipulates of the Rules of Court, in the generic ground 5 to the effect that the learned Judge erred in holding that the appellant was not validly elected.

Taking over from where Mr. Ngatia left off, learned counsel Mr. Macharia highlighted the appellant's submission on the accountability and credibility of the election and continued that the jurisprudence on the point at all levels of our Superior Courts is that, as was put by the Supreme Court in **PETER GICHUKI KINGARA vs. IEBC & 2 OTHERS [2014] EKL**R, “electoral processes the world over are not perfect [but] are susceptible to human errors and other inadvertent mistakes as long as those mistakes do not affect the overall results and the democratic will of the people.” Counsel criticized the learned Judge for disregarding that principle followed and established in many other cases including this Court's decision in **MERCY KIRITO MUTEGI vs. BEATRICE NKATHA NYAGA & 2 OTHERS [2013] eKLR** and the High Court in **JOHO vs. NYANGE & ANOR [2008] 3 KLR (EP) 500** and **MOSES MASIKA WETANGULA vs. MUSIKARI NAZI KOMBO & 2 OTHERS [2014] eKLR**. He asserted that whatever irregularities there may have been in the statutory forms used in the tallying of the results, they should not have vitiated the results because the forms did substantially comply with the statutory requirements.

Mr. Karori, while supporting the appellant's appeal, focused his submissions on the joint cross-appeal of the IEBC and the Returning Officer. He submitted that the learned Judge was wrong to hold that the presiding officers fatally failed to sign statutory **Form 32** yet under Regulation 72 the said Form is to be filled by persons, other than presiding officers, who assisted. He also castigated the learned Judge for equating illiteracy with disability in voting as it would still be possible for illiterate voters to effectively vote unassisted as long as they could distinguish the photographs and party symbols of the various candidates. The Judge was also wrong, according to counsel, for presuming that the secrecy of the vote was absolute yet the law allowed for assisted voting so long as the candidates' agents were duly involved for transparency. Mr. Karori also took issue with the learned Judge's findings with regard to the filling of the statutory forms and the role of the returning officer which, he urged, were mis-directions as were the conclusions that the IEBC's witnesses had „doctored“ the statutory documents. He was of the view that the criticism the learned Judge leveled at the IEBC was based on a misinterpretation of the law. To him, the learned Judge ought to have ordered a recount of the votes to establish the winner instead of nullifying the election.

Regarding the IEBC's clearance of the appellant to contest in the gubernatorial election, learned counsel stated that the task was in the specific statutory mandate of the IEBC and it had no obligation to further investigate whatever documents were presented to it by candidates. He pointed out that a complaint had been lodged against the appellant's nomination but was duly dismissed for want of prosecution. The IEBC therefore had no material upon which it could conclude that the documents presented to it were not valid. He suggested that the 1st and 2nd respondents ought to have written to the university to authenticate the degree certificates but did not do so, and criticized them for challenging the degrees but not the academic transcripts also produced. He urged us to overturn the impugned judgment and uphold the appellant's election.

Taking his turn, Mr. Ahmednassir was dismissive of the appeal as being a shallow and frivolous abuse of the court process devoid of a single issue of law worthy of consideration. He pointed out that under the law the appellant ought not to have been allowed to appear as a party having defaulted in filing a response to the petition as mandatorily required by **Rule 11(1)** of the Election Petition Rules, 2017. By virtue of **sub-rule 8** he had no right of audience. He also underlined the fact that even though the appellant filed a replying affidavit, he skipped the hearing and did not turn up for the trial so that his entire case suffered two insurmountable and decisive limitations, namely; the absence of a response to the petition and the absence of cross-examination. He pointed out that even though the learned Judge did not strike out the appellant's replying affidavit as he had been urged, he correctly termed it as „evidentially worthless“. To counsel, it was „a mindboggling and a bewildering conundrum“ that under those circumstances the appellant should have decided to come before this Court on appeal. Having failed to avail evidence when properly called upon to do so, the appellant's appeal is devoid of foundation or substratum and is bound to fail.

Counsel next urged us, as another preliminary matter, to consider that the issue of the appellant's lack of a degree qualification was water under the bridge because the learned Judge made a factual determination of it which is clothed with finality. He followed this with emphasis that by dint of **section 85A** of the Elections Act, the standard of review on an appeal to this Court is very narrow and limited to pure points of law, any and all factual issue being out of bounds for us and we are therefore required to pay due deference, credit, and respect to the factual determination of the High Court. He cited the cases of **FREDRICK OTIENO OUTA vs. JARED ODOYO OKELLO & 4 OTHERS [2014] eKLR** and **GATIRAU PETER MUNYA vs. DICKSON MWENDA KITHINJI & 2 OTHERS [2014]eKLR** in which the Supreme Court upheld the constitutionality of that jurisdictionally limiting provision as manifesting Parliament's intention to regulate the scope of appeals to this Court in electoral cases to matters of law only.

In Senior Counsel's view, this appeal “though cleverly constructed to appear to be having legal questions,” discloses only two issues of law namely;

“(1) the burden and standard of proof in electoral petitions.

(2) whether the High Court is possessed of jurisdiction to address nomination qualification matters.”

Regarding the burden and standard of proof, Mr. Ahmednassir posited that the burden of proof rested with the 1st and 2nd respondents who had been the petitioners at the High Court and that it was a legal burden that never shifted, whereas the evidentiary burden, which is wholly different, was always shifting like a pendulum. He accused the appellant of failing to appreciate that difference between the legal and the evidentiary burden which, according to counsel, he deliberately mixes to confuse the case.

Referring to a number of cases including the Supreme Court's **RAILA ODINGA & 5 OTHERS vs. IEBC & 3 OTHERS [2013] eKLR** and the High Court's **MOSES WANJALA LUKOYE vs. BERNARD ALFRED**

WEKESA SAMBU & 3 OTHERS [2013] eKLR, counsel submitted that the legal burden of proof is constant, never shifting but the evidentiary one keeps shifting, but shifts to the respondent only after the petitioner first adduces necessary evidence. It was his contention that the 1st and 2nd respondents did adduce that evidence which “*not only crashed on the appellant’s shoulders but crystallized all over his body*” when he failed to adduce any evidence to discharge his evidentiary burden.

Contending that the standard of proof is necessarily dependent on the nature of the case, Mr. Ahmednassir maintained that what was before the election court was the statutory question of the appellant’s qualification to vie, and not an inquiry into criminal forgery and fraud “*as the appellant would prefer with the concomittant insistence of proof beyond reasonable doubt.*” Fraud and forgery, according to counsel, were only peripherally pleaded in the petition which was all about qualification. Urging us to let the pleadings speak for themselves, Mr. Ahmednassir drew our attention to the petition which specifically cited the ground of constitutional and statutory disqualification of the appellant. The supporting affidavit did characterize the appellant’s conduct as amounting to fraud but fraud was never the basis for challenge and, in fact, the learned Judge did not find the appellant guilty of fraud. Indeed, in his testimony the first respondent indicated that he was in court to say only that the appellant was not qualified to vie.

Terming the appellant’s response to those allegations of non-qualification as „*evasive?*”, stating only that a challenge to his academic credentials had been dismissed and that it was a pre-nomination issue, learned counsel posited that the only question before the court was simply whether the appellant had a degree, which counsel answered in the negative.

Senior counsel asserted that the applicable standard of proof was the „*intermediate?*” test enunciated by the Supreme Court in RAILA 2013 (supra) and lambasted the appellant for „*attempting to hold us to a standard of his choice.*” On this score the learned Judge got it right and was keenly aware, which he stated, that had the issue been fraud the test would have been beyond reasonable doubt, but he made no finding on fraud the same having been a peripheral issue. There was sufficient evidence which was wholly uncontroverted by the appellant, that he did not have a degree. That evidence was the Hansard Parliamentary record; the graduation booklet in which the appellant’s name was missing; and the „his own replying affidavit which did not rebut the challenge to his want of qualification.

Counsel drew our attention to the self-declaration form filled by the appellant when seeking nomination in which he indicated that his highest academic qualification was a Bachelor’s degree, yet, at the time, he is supposed to have attained a Masters degree more than two years previously. All this did not add up and the reality was that he had no degree at all since, upon being vetted by Parliament, he was cleared and proceeded to Saudi Arabia. He ought to have come to court and be cross-examined on when and how he was able to attend school in Uganda at the same time but, because he could not answer the anticipated questions, “*his best response was to flee.*” In those circumstances, pressed counsel, the learned Judge was perfectly entitled to find that the 1st and 2nd respondents case that the appellant was not qualified was uncontroverted.

Turning to the question of jurisdiction, Mr. Ahmednassir stated that the 1st and 2nd respondents were defying the appellant’s cavalier stance which was essentially that even if he was not actually qualified, no challenge to it could be mounted in court since the IEBC had cleared him. Such a position proceeded from an absurd misinterpretation of **Article 88(4) (e)** of the Constitution which makes the IEBC responsible for settlement of electoral disputes, including nomination disputes. He contended that his clients could not possibly have dealt with the appellant’s qualifications at the nomination stage as they belonged to different political parties. It is only afterwards that they discovered that the appellant’s party had nominated an unqualified person. At any rate, there never could be an estoppel against a statute, much less the Constitution. He maintained that an election is a process and a transgression, even at the voter registration stage could, if proved, invalidate an election. He cited the Supreme Court decision in RAILA ONDINGA & ANOR vs. IEBC & 2 OTHERS [2017] eKLR to buttress the point that elections are a process not merely a voting-day event.

Reiterating the appellant’s refusal to appear and meet the weighty case presented against his qualification to vie, coupled with his failure to file a response thereto, Mr. Ahmednassir concluded by describing the appellant’s case before the High Court as having lacked a backbone and could therefore not be expected to stand on appeal.

On his part, Mr. Omwanza made the brief submission that the learned Judge was justified to hold that the IEBC witnesses had doctored statutory documents and mentioned in particular the Returning Officer who admitted to having had room to improve documents with some bearing stamps which they did not bear before. Moreover, the Returning Officer for Wajir Constituency North, Noor Gedi, disowned his own comments appearing on the Form 37B that he had himself prepared and attached to his witness statement. Counsel contended that there was evidence that the statutory forms were “*computer generated*” at the tallying centres and did not reflect the reality, so that the learned judge reached a proper finding when he found that the election was not free, fair and verifiable.

Making his reply to these submissions, **Mr. Karori** reiterated that there was no systematic scheme or pattern of alteration or interference with the results. As regards the appellant’s qualification, he maintained that the court could not come to the aid of indolent parties who failed to raise objection earlier. He urged us to consider the interests of those who went out and voted in the election and therefore preserve and

uphold their choice unless there is compelling contrary evidence.

Mr. Ngatia prefaced his reply with the acknowledgement that the issues had become even clearer and that the fundamental issue in this appeal is whether or not the appellant was qualified to vie for the seat of Governor. He defended the learned Judge's treatment of the appellant's replying affidavit as the response to the petition. He denied that forgery or fraud were peripheral matters on the petition and stated that they were part of the case that the learned Judge defined at the start of his judgment.

Counsel took issue with the learned Judge's consideration of the graduation list. According to him, non-attendance at a graduation ceremony does not make one any less a graduate. He placed reliance on the decision of Lenaola, J. (as he then was) in **JANET NDAGU EKUMBO MBETE vs. IEBC & 2 OTHERS [2013] eKLR**. He also criticized the learned judge for treating the Minutes of the National Assembly as conclusive yet fraud and forgery had not been proved. Counsel conceded, without offering explanation, that the appellant did not testify but contended that the non-appearance did not confer a higher status to the evidence adduced by the petitioners before the learned Judge. He criticized the learned Judge for arriving at the conclusion of the appellant's non qualification "through a process of inference and assumptions but not through evidence". He urged us to allow the appeal.

We have given due and anxious consideration to the record of appeal, the submissions by counsel and the copious authorities cited and tendered before us. In determining this appeal, we first delineate in specific terms our jurisdiction. It is set out explicitly in **Section 85A** of the Election Act which is exclusionary in effect in so far as it limits our jurisdiction to a consideration of questions of law only. The Supreme Court in the **MUNYA vs. KITHINJI** case (supra), which is relied on by both the appellant and the 1st and 2nd respondents, very succinctly and authoritatively pronounced itself on what constitutes "questions of law only" as used in **Section 85A** of the Elections Act apropos the jurisdiction of this Court. That judicial distillate was arrived at after a comprehensive comparative analysis of the law on the distinction between „questions of law' and „questions of fact' from jurisdictions as varied as Canada, England, India, South Africa and the Philippines, as well as pronouncements of this Court. A question of law was captured at paragraph 81 of that court's judgment as meaning; a question or an issue involving;

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

b. the application of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, to a set of facts or evidence on record, by the trial Judge in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of County Governor.

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

The Supreme Court was very categorical that it is for this Court to determine whether the memorandum of appeal lodged before us by an appellant conforms to these principles before admitting the same for hearing and determination. That clear guidance from the apex court resonates with our own decision in **IEBC & ANOR VS STEPHEN MUTINDA MULE & 3 OTHERS [2014] eKLR** where we deprecated the filing of memoranda of appeal with grounds purporting to complain that the High Court erred "in law and fact" and warned that such grounds of appeal invited jurisdictional objection.

Given that sparkling clear position in both the statute itself and authoritative pronouncements that this Court cannot, without an unlawful usurpation of jurisdiction, entertain questions of fact, we find it perplexing that the memorandum of appeal herein expressly purports to challenge factual findings. We think it is a case of artful dodging for an appellant to frame a complaint as comprising an "error of law and fact." We are quite clear in our minds that in electoral matters there is no such thing as "questions of mixed law and fact" and grounds of appeal that are a composite of both are clearly inappropriate and probably incompetent. We reiterate what this Court stated in **M?IRUNGU vs. R [1983] KLR 455** at p 466;

"In conclusion, we would agree with the views expressed in the English case of Martin v. Glyneed Distributors Ltd that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower courts and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law...unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding

the decision is bad in law. We have resisted the temptation.” [Emphasis supplied].

We must emphasize that for a memorandum of appeal to pass muster and be compliant with **section 85A**, it must raise only questions of law which must be distinctly, concisely and precisely set forth. Anything short is deserving only of dismissal. We agree with the reasoning of the Supreme Court of the Philippines which was quoted with approval by our own in *MUNYA vs. KITHINJI* (supra). Dismissing an offending petition in *NEW RURAL BANK OF GUMBA vs. FERMINA S. ABAD AND RAFAEL SUSAN* G.R. No. **16818 [2008]** that court stated;

“The petitioner would have us delve into the veracity of the documentary evidence and truthfulness of the testimonial evidence presented during the trial of the case at bar ... We reiterate the distinction between a question of law and a question of fact. A question of law exists when the doubt or controversy concerns the correct application of law or jurisprudence to a certain set of facts; or when the issue does not call for an examination of the probative value of the evidence presented, the truth or falsehood of facts being admitted. A question of fact exists when the doubt or difference arises as to the truth or falsehood of facts being admitted or when the query invites calibration of the whole evidence considering mainly the credibility of the witness, the existence and relevancy of specific surrounding circumstances, as well as their relation to each other and to the whole, and to the probability of the situation. This Court cannot adjudicate which party told the truth... by reviewing and revising the evidence adduced at the trial court. Neither verbal sophistry, nor artful misinterpretations of supposed facts can compel this Court to re-examine findings of fact which were made by the trial court.... absent any showing that there are significant issues involving questions of law.”

[Our emphasis]

Given that clear position we could with justification strike out all save one of the grounds of appeal presented by the appellant on their self-declared factual foundations. However, as it is agreed by the parties that the appeal hinges on two legal issues only, namely, whether the appellant met the constitutional and statutory qualifications to vie for the position of governor and whether the High Court had jurisdiction to enquire into the issue which related back to the appellant's nomination to vie, we shall address the two, which are effectively determinative of this appeal, but in reverse order.

Jurisdiction is truly everything and without it a court has no power to make one more step as Nyarangi JA famously stated in *THE OWNERS OF THE MOTOR VESSEL “LILLIANS” vs. CALTEX OIL (K) LTD* [1989] KLR 1 at (p14). Jurisdiction is the soul, source, breath and life blood of judicial authority. It clothes a court's determinations with the majesty of the law. And any orders made devoid of jurisdiction are empty nullities with neither coercive nor compulsive authority. It is the appellant's case that the learned Judge embarked on an examination of the appellant's academic qualifications devoid of authority as the subject fell in the exclusive domain of the IEBC by virtue of **Article 88(4)(e)** of the Constitution. If we understand the appellant correctly once the IEBC cleared the appellant as a candidate to contest the election for Governor of Wajir County, that clearance had a finality that the election court could not go behind to enquire into. Should this position be correct in law, then, of course, the learned Judge's determination must be declared null and void and the appellant's election must be upheld.

The appellant placed reliance on *JARED ODOYO OKELLO vs. IEBC & 3 OTHERS* [2013] eKLR and on an earlier decision of the learned Judge, himself in *JOSIAH TARAIYA KIPELIAN OLE KORES vs. DR. DAVID OLE NKEDIENCE & 3 OTHERS* (supra) and in particular where he had held in that case that the law does provide a detailed procedure for pre-election dispute resolution which must be followed and that it would be a usurpation of jurisdiction for the High Court as an election court to enquire into re-election disputes which are the preserve of another body, the IEBC. The appellant sought to draw parallels between that case and the present one by contending that the challenges mounted by third parties against the appellant's qualification both in the Uganda High Court and before the IEBC as already set out in this judgment were effectively determinations since, as was stated in *NJUE NGAJI vs. EPHANTUS NJIRU NGAJI & ANOR* 2016 eKLR, a dismissal for want of prosecution is as good as a final judgment unless it is set aside on application.

Is the appellant right in these contentions? The learned Judge in his judgment dealt with this precise point as follows as he distinguished the *JARED ODOYO OKELLO* case;

“In the Jared Odoyo Okello Case the nomination had been challenged before the Commission's Dispute Resolution Committee and a decision made. In the present case, although one Abdirahman Mohamed Abdille is shown to have lodged a complaint with the said Committee, that complaint was not prosecuted and no decision was made thereon. Nothing was produced to show that a decision was made on it. The petitioners cannot therefore be said to be appealing against the decision of that Committee here.”

With respect, we think that the learned Judge was absolutely right in arriving at that conclusion. The petitioners before him not having been the parties to the challenge before the IEBC, it would have been a signal injustice and quite an absurdity to hoist upon and bind them with the consequences of the failure to prosecute the said challenge. The case cited was therefore properly, indeed inevitably, distinguishable.

The answer to the jurisdictional question lies in a determination of whether an election is a process straddling the entire electioneering period from registration of votes to declaration of results; or the specific event of voting and determining a winner on election day. And we think it is not a difficult question to answer. There is a substantial body of law that is quite categorical and authoritative that election is *a process* and not *an event* and that being so, the High Court, as an election court, is possessed of jurisdiction to enquire into matters nomination.

In *KITUO CHA SHERIA vs. JOHN NDIRANGU KARIUKI* [2013] eKLR Kimondo, J after acknowledging other dispute resolution procedures, still recognized the High Court's jurisdiction to intervene. He gave the hypothetical example that if by negligence or otherwise a non-citizen was nominated for election and was elected, it would be perfectly in order for the court to right the wrong. We need only add that citizenship is not the only qualification that may justify, indeed necessitate and compel such intervention as the case before us so amply demonstrates. The learned Judge made reference to and aptly applied the reasoning of the court in *LUKA LUBWAYO & ANOTHER vs. GERALD OTIENO KAJWANG & ANOR* [2013] eKLR to the effect that **Article 105(1)**

(a) of the Constitution seems to widen the scope of the court in a petition to determine whether a person has been validly elected as a Member of Parliament and that the question of validity may encompass the clearance to run. That reasoning would apply with equal force to a gubernatorial election. Suffice to say that nominations or determinations of qualification to run are part of the “*continuum*” consisting in “*a plurality of stages*” that make up an election as expressed by the Supreme Court in *ADVISORY OPINION NO. 2 OF 2012 IN THE MATTER OF THE GENDER REPRESENTATION IN THE NATIONAL ASSEMBLY AND SENATE*.

As such, qualifications are a valid contested point outside the framework of the events of election date but which may yet be legitimately enquired into by an election court.

There is neither novelty nor peculiarity in this view. It is not an idiosyncrasy of Kenya courts. Across the border, the Ugandan, Supreme Court in *ABDUL BAUGRA NAKENDO vs. PATRICK MWONDHA* Election Petition Appeal No. 9 of 2007 held that the High Court had jurisdiction to determine whether or not the appellant had the qualifications requisite for election as a Member of Parliament. Proof that one of the candidates was not academically qualified went “*to the very root of the process leading to his nomination and subsequent election*” as expressed by Katuurebe JSC, in that case. This has to be so as there is a real and substantial interest in ensuring that only people with the required academic qualifications get elected to the posts that entail great duties and responsibility as was recognized in *JOHNSON MUTHAMA vs. MINISTER FOR JUSTICE & CONSTITUTIONAL AFFAIRS & ANOR* [2012] eKLR.

On the basis of law and plain common sense, we are fully persuaded that an election court has jurisdiction to enquire into a question as to the qualification of a candidate which goes to his eligibility to vie in cases such as was before the learned Judge where the matter had not been dealt with finality by any other body constitutionally or statutorily mandated to do so. The learned Judge, committed no error holding that he had jurisdiction. He had.

Having found that the learned Judge had jurisdiction, the principal question we have to decide is whether he erred in holding that the appellant was not legally qualified to vie for the governor's seat. It is clear from the petition and from the learned Judge's judgment that this was the issue that was dispositive of the litigation at the High Court and must be of this appeal. Indeed, the first ground of the petition as captured in part (B) (a) of the petition was “*Disqualification of the [1st] respondent under section 22(2) of the Elections Act 2012 as a candidate for Governor Wajir County*” and the averments in support of it as captured in paragraphs 8 to 30.

Even though the learned counsel for the appellant made a spirited attempt to portray the case as one of fraud or forgery, our own assessment of the record, which accords with that of the learned Judge, is that the case was first and foremost about whether or not the appellant had the requisite degree qualification for one to run for governor under **section 22(2)** the Elections Act, 2011. That provision is in express and mandatory terms;

“Notwithstanding section (1)(b) a person may be nominated as candidate for an election as President, Deputy President, county governor as deputy county governor only if the person is a holder of a degree recognized in Kenya.”

Those allegations having been made by the 1st and 2nd respondents as petitioners, the onus of proving them, the legal burden, rested on them to discharge because if they failed to do so their petition would fail. This is too plain to belabour. We reiterate what the Supreme Court in *JOHN HARUN MWAU & 2 OTHERS vs. IEBC & 2 OTHERS* [2017] eKLR said;

“As stated in both the RAILA 2013 and 2017 decisions, the burden of proof, at all times, lies on a petitioner and generalized claims, without evidence that meets clear threshold, are of no value.”

The evidence that was laid before the High Court was essentially that the appellant did not have a valid degree certificate from Kampala University. It was alleged that he did not possess any qualifications that would have fitted him for admission to that or any other university not having completed high school. Moreover, the appellant had himself told a committee of the national assembly on 3rd September 2014, while being vetted for an ambassadorial posting to Saudi Arabia, that he was yet to graduate. That statement was under oath and captured in the Parliamentary record. He stated he was pursuing a degree in business administration and a diploma in international relations. He thereafter went on his posting to Riyadh and there was no evidence of his attending classes at the university in Kampala until he came to contest the gubernatorial seat. While filling the statutory self declaration for purposes of being cleared to contest, the appellant indicated that his highest educational qualification was a bachelors degree yet he purported to produce to the IEBC, contemporaneously, a Masters degree certificate dated 12th March 2015. There was no evidence that he engaged in any full time accelerated post-graduate studies to qualify him for that Master’s degree. The appellant’s name did not even appear in the university’s graduation booklet.

The 1st respondent appearing as **PW1** testified to the appellant’s academic non-qualification. He swore that the appellant had never sat any „0? or „A? level examinations and so could not meet enrolment criteria for any university. He produced the graduation booklet for the 1st March 2012 graduation ceremony of Kampala University and the appellant’s name was not on the list. He also produced the record of proceedings of the Departmental Committee on defence and foreign relations minutes for 3rd September 2014. In those proceedings the appellant, was recorded as having stated that he was yet to graduate meaning he had no degree as at that date. Through searching and intense cross-examination, the 1st respondent was unmoved in this testimony.

As we have already stated the appellant did not file a response to the petition. We think that by dint of **rule 11(8)** of the Election Petition Rules, that omission was a grave default that would have entitled, nay required, the learned Judge to exclude the appellant from the proceedings as a party. The learned Judge, however, allowed the appellant’s replying affidavit to supply the omission. That affidavit itself, as we have previously observed, is a study in brevity. It did not meet the allegations against the appellant with any degree of seriousness. Indeed, the learned Judge observed, and correctly so, that the appellant did not specifically deny any of those allegations, stating only that the issue had been litigated in the Uganda High Court and had been dismissed. The cavalier attitude evinced by the appellant in the face of serious questions about his eligibility to vie for the seat of governor was compounded and rendered tragic by his choice to stay away from the proceedings and therefore not only fail to present his side of the story, but also keep himself from being cross-examined on his replying affidavit thereby robbing it of any probative value.

The learned Judge in his analysis of the evidence and the appellant’s failure to present himself in court expressed himself thus at paragraph 192;

“I have taken note of the fact that although the 1st respondent had the opportunity to either deny or challenge all these facts, he did not do so in his replying affidavit. He also failed to appear in court and shed light on this issue. The petitioners’ evidence therefore remained uncontroverted. The petitioners had therefore succeeded in shifting the evidentiary burden of proof to the 1st respondent. The moment they produced the graduation list and the alleged admission made before the Committee of the House of not having had a degree by 2014, the burden shifted to the 1st respondent to prove that the Bachelor’s degree dated 1st March 2012, had been genuinely issued to him by Kampala University. This he failed to.”

With respect we think that the learned Judge’s reasoning cannot be faulted. Nor can he be blamed for stating that what was placed before him by the petitioners did establish a *prima facie* case about the invalidity of the degree dated 1st March 2012, which therefore shifted the evidential burden of proof to the appellant to discharge. The learned Judge remained faithful to the law on burden of proof in that the legal burden remained with the 1st and 2nd respondents but a basis had been established for the evidentiary burden to shift to the appellant. There is a lot of case law on this subject but we approve of the succinct analysis and formulation of it (by Gikonyo, J.) in **MOSES WANJALA LUKOYE vs. BERNARD ALFRED WEKESA SAMBU & 3 OTHERS** (supra), which is deserving of quoting in *extenso*:

“More trouble is found in understanding that burden of proof entails legal burden of proof and evidential burden. The legal burden of proof in an election petition rests with the petitioner; for he is the party desiring the court to take action on the allegations in the petition. The evidential burden initially rests upon the party bearing the legal burden, but as the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence. See HALSBURY’S Law of England, 4th Edition, vol. 17. Therefore, where the petitioner has laid *prima facie* evidence against the respondent including the electoral body which as matter of law must be a

respondent in an election petition, the law says that evidential burden has been created on the shoulders of the respondent who would fail if he does not adduce evidence in rebuttal.

It is, thus, not in doubt that at the point where the respondent would fail without further evidence, the respondent should discharge the evidential burden through offering evidence in rebuttal. If the respondent offers no evidence in rebuttal, judgment may be entered against him on the basis of the preponderant evidence adduced by the petitioner. The petitioner will not, however, succeed because the respondent has not offered evidence in rebuttal but because the petitioner has proved his case to the required standard of proof, and the absence of evidence in rebuttal by the respondent only sanctifies the confidence of the court to enter judgment in favour of the petitioner. Of the essence is that the evidential burden is the obligation of the respondent once it has been properly created by the evidence tendered, and failure to discharge the evidential burden disadvantages the respondent with the result that he fails and the petitioner succeeds. [Emphasis added]

See also **RAILA 2013** (supra) and the Indian Supreme Court's decisions of **ADDAGADA RAGHAVAMMA & ANOR vs. ADDAGADA CHENCHAMMA & ANOR [1964] AIR 136** and **ANIL RISHI vs. GURBAKSH SINGH (Civil) 2413 of 2006.**

We think that the learned Judge was perfectly justified in his appreciation of the evidence as presented before him by the witnesses, whose credibility he alone was in a position to weigh and gauge, and analyse of the documents placed before him, to make the factual finding that the petitioners before him had made out a strong *prima facie* which obligated the appellant to answer by evidence.

That evidence was not forthcoming, beyond the three-paragraphs in the replying affidavit, as the appellant elected to give the trial and the witness box a wide berth. What was the learned Judge to do in the face of that curious decision on the part of the appellant? First, we reiterate that under the Election Petition Rules, it was obligatory for the appellant, as a party, to appear and participate in the proceedings. He ought to have made himself available, at the very least, for cross-examination on his replying affidavit. That much is clear from **Rule 12(13)** which provides that every deponent of (an affidavit) shall, subject to the election court's direction, be examined in chief and cross-examined. That is so unless the parties by consent agree to admit affidavit evidence as presented without cross-examination of the deponent. There was no consent for the appellant's excusal and no explanation whatsoever was given for his failure to testify.

As to the consequences of such deliberate and unexplained absenteeism on the part of the appellant, we find persuasive the judgment of Lightman J of the English High Court of Justice in **RAJA vs. VAN HOOGSTRAATEN [2005] E WHC 2990 (Ch).** After finding that the defendant had given no reason for not attending the trial and that there was no credible justification other than "*a well-founded concern that his account would not survive oral examination,*" the Judge inferred that he had run scared of cross-examination and, in the circumstances,

"(i) adverse inferences may be drawn from his failure to give evidence on the issues on which he might reasonably be expected to answer the case against him (ii) statements in [his] witness statements in issue in the case which ought reasonably to be tested may carry little or no weight (iii) the unchallenged evidence against him may without more be accepted so long as it is credible ..."

That reasoning is in consonance with the Privy Council decision in **GIBBS vs. REA [1998] AC 786** to the effect that when defendants elect to give no evidence such a choice "***carries the risk that should it transpire that there was some evidence tending to establish the plaintiff's case, albeit slender evidence, their silence in circumstances in which they would be expected to answer might convert that evidence into proof.***"

Now, without a doubt, there had been placed before the learned Judge sufficient evidence on which he could, without more, find for the petitioners as against the appellant. The issue of the appellant's academic qualifications was a matter specifically within the appellants' knowledge. He and he alone could have testified as to which high schools, if any, he attended and what grades he attained. He alone could speak as to when he was enrolled at which university to study which course and for what duration. Only he could say what his student number was, who his tutors and lecturers were, what grades he attained and when he graduated. Only he could explain the strange absence of his name from the graduation list for the day the degree certificate he produced related to. Only he could explain why, being a graduate, if one he was, as from 1st March 2012, he should have stated under oath to a Committee of Parliament more than 2 years later on September 2014, that he had enrolled at Kampala University *but was yet to graduate*. Finally, he alone could explain how, not having graduated as at September 2014, he somehow managed to have in his possession and present to the IEBC a Masters degree issued in March 2015; but which he somehow forgot that he had, when he filed the self-declaration form in 2017 stating that his highest academic qualification was a bachelors degree. Those are the facts he was reasonably expected to depose to in his affidavit. Those are the questions he was expected to answer in cross-examination. Yet he chose not to.

We have set out these rather open and uncontested issues, not because we are delving into an examination of factual issues, which we cannot be jurisdictionally debarred, but only to show that the learned Judge had a firm and secure, indeed a compelling basis, for making the categorical factual conclusion at paragraph 198 of his judgment that;

"In my view, the 1st respondent failed to show that he had actually obtained the two degrees from Kampala University. The petitioners proved this allegation to the required standard. The source and how the two degrees came into being are facts that were in the special knowledge of the 1st respondent. In view of the uncontroverted evidence on record, they are not what they

purport to be.”

We think that given the facts as were established before him, the learned Judge properly distinguished the case of JANET NDOGO EKIMBO METE vs. IEBC (supra) on the basis that in the latter case the respondent had undertaken the studies leading to the conferment of the subject degree and was only waiting to graduate so that he was academically qualified while in the case at hand there was no evidence that the appellant did undertake the academic studies at the university.

There really can be no difficulty, therefore, in arriving at the conclusion that the learned Judge was justified, on the evidence and the law, to hold and find that the appellant was not legally cleared to vie for the position of governor as he did not satisfy the qualification criteria set out in **section 22(2)** of the Elections Act. He was not eligible to contest, and the challenge to that finding and conclusion fails, as it is bound to.

The consequence of that finding is obvious: the election of the appellant had to be invalidated. A person who is not qualified to vie for a particular seat cannot hold onto his false victory by pointing to the margin of his vote *vis-à-vis* his competitors. He ought not to have been in the race in the first place and the alleged victory is a distortion of reality and a subversion of the electoral process. In this respect we agree with the persuasive decisions of the Supreme Court of India in MAIREMBAM PRITHUIRAJ SINGH vs. PUKHREM SHAKATCHANDRA Civil Appeal No. 2649 of 2016 and AZHAR HUSSAIN vs. RAJIV GANDHI [1986] AIR 1253.

The effect of our upholding of the learned Judge on the question of the appellant's lack of academic qualifications is that it renders our examination of the other grounds of appeal quite superfluous. The reason is quite simple, whether the election was properly conducted or was fraught with irregularities of so grave a character that they affected not only the credibility of the election but the results of the election as well so that no reasonable tribunal can uphold them, as the learned Judge found, it must stand invalidated because the person declared the winner, namely the appellant, was not qualified to vie and was not validly elected. That being the inescapable adjudicative result, we do not see any utility in embarking on a forensic examination of the other grounds in pursuit of a merely didactic of academic aim.

In the result, the appeal before us is devoid of merit and is dismissed with costs to the 1st and 2nd respondents. The cross appeal by the IEBC and the Returning Officer must also per force stand dismissed but with no order as to costs.

Orders accordingly.

Dated and delivered at Nairobi this 20th day of April, 2018.

P. N. WAKI

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR