IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, WARSAME & OTIENO-ODEK JJA)

ELECTION PETITION APPEAL NO. 24 OF 2018

BETWEEN

DR. JULIUS MAKAU MALOMBE.....APPELLANT

AND

CHARITY KALUKI NGILU .....1ST RESPONDENT

INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION.....2ND RESPONDENT

GOGO ALBERT NGUMA.....3RD RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Kitui, (Nyamweya, J.), dated 2nd March 2018

in

Kitui Election Petition No. 4 of 2017)

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JUDGMENT OF THE COURT

1. ***Charity Kaluki Ngilu***, the 1st respondent, was declared Governor-elect for Kitui County after the 8th August 2017 gubernatorial elections. ***Dr. Julius Makau Malombe***, the appellant, was the 2nd runner up. The declared results were as follows:

(i) Dr. Julius Makau Malombe.....74,681 votes

(ii) David Musila……. 114,827 votes

(iii) Charity Kaluki Ngilu .....169,990 votes

2. Aggrieved by the declared results, the appellant filed a petition at the High Court in Kitui challenging the declaration of the 1st respondent as winner of the election. The grounds in support of the petition were that the election and declaration of the 1st respondent as governor-elect was irregular, illegal and did not reflect the will of the people of Kitui County. That the appellant's agents were denied access to various polling stations; that the voting process was marred by violence and intimidation of voters; that the data entered into the KIEMS Kit was not consistent, comparable and verifiable with the information recorded in Forms 37As; that the 2nd and 3rd respondents unlawfully issued more than one ballot paper to some voters in contravention of ***Section 59*** of the **Elections Act**; that the 1st respondent did not administer the election in an efficient, accurate and accountable manner as envisaged in ***Article 81 (e)*** of the Constitution; that the results were based on false figures arrived at as a result of forgery of the Statutory Forms 37As, Form 37B and Form 37C; that the security of the ballot boxes at polling stations was compromised; that the 1st respondent mismanaged the gubernatorial elections; that in sum total, the Kitui gubernatorial elections was not conducted in a free, fair and transparent manner.

3. The respondents denied the allegations in support of the petition. The 2nd and 3rd respondents denied that agents of the appellant were

denied access and entry into polling stations. It was stated that in the process of vote counting, the votes were displayed to all persons present to confirm the identity of the person voted for; that there were no acts of violence and intimidation in the polling stations; that the election was conducted in a free, fair and transparent manner, in accordance with constitutional principles and electoral laws. In addition, it was contended that the appellant engaged in voter bribery and breached the electoral code of conduct by misrepresenting that the 1st respondent was no longer contesting the gubernatorial seat and falsely branding a vehicle with the 1st respondent's posters during the polling day. The 1st respondent also denied all the allegations in the petition.

4. Whereas the appellant called a total of nine (9) witnesses, the respondents called a total of four (4) witnesses. Upon hearing the parties, the trial court in a judgment dated 2nd March 2018 dismissed the appellant's petition. The court expressed itself as follows:

> **"172. The sum total of the foregoing findings is that the Petitioner's case was largely based on allegations, suppositions and arguments which were either not pleaded in his Petition, or not supported by sufficient evidence. In addition, the irregularities noted and found by this Court to exist will not in any way affect the results of the 1st Respondent as the winner of the election for Governor of Kitui County. Furthermore, after applying the provisions of Section 83 of the Elections *Act,* I find that these irregularities would not have affected the ultimate result given the margin of votes and the fact that the irregularities were established to have occurred in only 10 out of over 1000 polling stations in the Kitui County."**

5. The trial court awarded costs as follows:

> *(i) Instruction fees to be paid by the appellant to the 1st respondent capped at Kshs. 3,000,000/=.*
>
> *(ii) Instruction fees to be paid to the 1st respondent jointly or severally by the 2nd and 3rd Respondents capped at Kshs. 1,000,000/=.*
>
> *(iii) The 2nd and 3rd Respondents to be paid instruction fees by the appellant capped at Kshs. 2,000,000/=.*

6. Aggrieved by the judgment of the trial court, the appellant lodged the instant appeal citing the following grounds:

> *(i) Whether the learned judge erred in law in her failure to appreciate the legal effect of illegalities, irregularities and malpractices proven by the appellant.*
>
> *(ii) Whether the learned judge erred in law in holding that the appellant had not discharged the burden of proof.*
>
> *(iii) Whether the judge erred in law in not taking into account the uncontroverted evidence of the appellant.*
>
> *(iv) Whether the conclusions arrived at in the judgment is supported by analysis of the evidence on record.*
>
> *(v) Whether the judge erred in law in awarding costs in the terms expressed in the judgment.*

7. On their part, the 2nd and 3rd respondents filed a cross-appeal contending that the trial judge erred in law in condemning them to pay jointly and severally costs in the sum of Ksh. 1,000,000/= to the 1st respondent. That the trial court award of Ksh. 2,000,000/= payable by the appellant to the 2nd and 3rd respondents are an error in principle and discriminatory. That the judge erred in failing to take into account the principle that costs follow the event. We were on that account urged to set aside the trial courts order on costs and award costs to the 2nd and 3rd respondents who were successful in the petition. That the 2nd and 3rd respondents be awarded costs capped at Ksh. 4,000,000/=.

8. At the hearing of this appeal, learned counsel Mr. Steve Ogolla appeared for the appellant while learned counsel Mr. Kioko Kilukumi appeared for the 1st respondent and learned counsel Mr. Elias Masika appeared for the 2nd and 3rd respondents. All parties filed written submissions and list of authorities in the appeal.

APPELLANT'S SUBMISSIONS

9. Counsel for the appellant submitted that the substratum of the appeal is in ground 9 of the memorandum which states that the trial judge misapplied the law by failing to note the appellant's testimony as petitioner was without rebuttal. That the trial court did not consider the qualitative aspects of the conduct of the elections; that the judge erred in the application of the law to proven facts; that resolution of election disputes require a predictable philosophy *to wit* there must be compliance with the law at every step in the conduct of elections. That the IEBC is at the epicenter of democracy and election management in Kenya and non-compliance by the IEBC of any electoral principles and laws demonstrates lack of competence, openness, transparency and accountability in the conduct of elections. That the net effect of all proven irregularities and illegalities demonstrates that qualitatively, the Kitui gubernatorial elections was not conducted in a free, fair, transparent and accountable manner. That the trial court erred in law in failing to appreciate the qualitative effect of the proved irregularities, illegalities and malpractices.

10. Counsel contended that the petitioner pleaded and proved that the entire Kitui gubernatorial election was marred with irregularities which singularly and collectively rendered the process and the declared results lacking in integrity; that the credibility of the declared results is impugned due to substantial, glaring and qualitative anomalies; that the appellant led evidence that revealed irregularities in the electoral process; that the irregularities included massive inflation of votes in favour of the 1st respondent in at least 10 out of 54 polling stations; votes cast exceeded registered voters in most polling stations; that there was flagrant violation of and substantial non-compliance with the Constitution and applicable laws and principally, that a number of Forms 37As did not bear the IEBC stamp; that alterations on statutory forms were not countersigned; that there was irregular and illegal issuance of Form 37D; that in the instant case, Form 37D which is the

Certificate for the Winner is dated 11th August 2017 while Form 37C which contains the results of the election is dated 12th August 2017. That it is irregular and illegal for the Certificate to predate the declaration of results.

11. It was further submitted that there is proven evidence on record that there was violence and intimidation on the polling day. That ***Kalungu Nzau***, (**PW5)** testified that he was violently attacked by a group of 9 men and beaten up just moments after voting and within the precincts of the polling station. That this evidence was uncontroverted and the trial court erred in failing to find that this proven violence qualitatively affected the result of the election.

12. Another ground raised is that the appellant's agents were denied access to more than 400 polling stations. ***Bernard Kitheka*** **(PW8)** testified that he made several calls to the 3rd respondent who was the County Returning Officer to address the complaint on denial of access. That the complaint was not resolved and neither the presiding officers nor returning officers testified in court. That the Polling Day Diary was not produced in court to establish the claims that the agents were either denied access or admitted to the polling stations. That various Forms 37As did not bear the names and signatures of Wiper Party Agents who were agents of the political party for the appellant. Counsel contended that the illegalities, irregularities and malpractices established by the appellant proved that the IEBC conducted the Kitui gubernatorial elections without a sense of responsibility, justice or common decency in violation of ***Articles 38, 81, 86*** and ***88*** of the Constitution.

13. The appellant urged us to examine the irregularities, illegalities and malpractices disclosed and place emphasis on the entire electoral system and processes rather than focusing on the results alone. That in this way, this Court will unearth inconsistent administrative actions on the part of IEBC and its agents.

14. On the question of burden of proof, it was submitted that none of the presiding officers were called to testify and neither were polling station diaries produced in court. That the appellant adduced cogent and credible evidence to show that agents were denied access to polling stations; that there was violence and intimidation; that the appellant had proved there was substantial non-compliance with the electoral law with regard to counting, tallying and declaration of results. That it was proved that there was massive inflation of votes in favour of the returned candidate; that there was connivance, complacency, incompetence and illegality in the conduct of elections; that there was irregular and illegal issuance of Form 37D. That in the face of these proven illegalities, irregularities and malpractices, the trial court erred in finding that the burden of proof had not been discharged by the appellant. That in this context, the learned judge erred in failing to find that the appellant's evidence was uncontroverted and consequently, the conclusions and findings of the trial court are not supported by the evidence on the record. That the judge erred in taking a quantitative and numerical approach to determine whether non-compliance significantly affected the results.

15. The appellant urged that the issues in this appeal require a qualitative approach that looks at the overall process of the election especially the transparency of voting, chaos at polling stations, the process of counting, tallying and declaration of results and the ability of each voter to cast their vote. Counsel therefore urged us to adopt a historical, teleological and purposive interpretative approach when examining the issues canvassed in the appeal.

16. On costs, we were urged to reverse the orders of the trial court and find that this appeal has merit and the respondents should pay costs in the trial court and in this appeal.

1st RESPONDENT'S SUBMISSIONS

17. Learned Counsel Mr. Kilukumi submitted that pursuant to ***Section 85A*** of the **Elections Act**, an appeal to this Court is confined to matters of law. That the memorandum of appeal raises 20 grounds; that out of the 20 grounds, 17 are based on matters of fact; that only grounds 9, 16 and 20 raises matters of law. Consequently, counsel submitted that this Court has no jurisdiction to consider the grounds premised on matters of fact. Counsel cited dicta in **Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 others [2014] eKLR** where the Supreme Court expressed that a petition which requires the appellate Court to re-examine the *probative value of the evidence* tendered 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. It was further stated that the test of whether a question is one of law or of fact is not the appellation given to such question by the party raising the same; rather, it is whether the appellate court can determine the issue raised without reviewing or evaluating the evidence, in which case, it is a question of law; otherwise it is a question of fact.

18. On the merits of the appeal, the 1st respondent submitted that the trial court did not err in arriving at its conclusions. That the errors of transpositions of results from Forms 37As to Form 37B and ultimately to Form 37C were freely admitted by the 3rd respondent. That the errors of transposition did not affect the result of the impugned election. That the learned judge correctly analyzed the evidence and came to a finding of fact that the transposition errors did not affect the result.

19. Regarding the allegation that there was massive inflation of votes, it was submitted that there was no factual finding by the trial court of 100% inflation of votes in favour of the 1st respondent. The fact that a few Forms 37As were not stamped did not in any way affect the result of the election. That the **Elections (General) Regulations 2012** do not make provision for stamping of Forms 37As; that the only legal requirement in ***Regulation 61 (4) (c)*** is the stamping of ballot papers. That the results reflected in the statutory Forms were not forgeries but the actual results which were also stored electronically in the SD cards. Counsel submitted that there is no legal requirement on counter-signing expressed either in ***Article 86*** of the ***Constitution or Regulations 73, 75, 76, 79,*** and ***82***.

20. The 1st respondent submitted that the allegation on illegal and irregular issuance of Form 37D was sufficiently explained by the Returning Officer who testified that Form 37D was dated 11th August 2017 as that was the time when he announced the results; that it takes longer to fill Form 37C and to get it signed by the agents; that when the process of filling Form 37C was completed, it was 1.00 am and the date had changed to 12th August 2017. Accordingly, the Returning Officer explained that he signed Form 37C and dated it 12th August 2017. Counsel submitted that notwithstanding the cogent explanation given by the Returning Officer, the trial court did not err in law in finding that the difference in dates between Form 37C and 37D was not pleaded in the petition. That it is trite that in an election petition, a court

should not consider and determine un-pleaded issues.

21. On violence and intimidation, the 1st respondent submitted that the violence proved was neither widespread nor attributed to the 1st respondent and thus the trial court did not err in finding that the isolated incident of violence did not affect the result of the election.

22. Submitting on the allegation that the appellant's agents were denied access to the polling stations and tallying centers, Counsel expressed that it was the appellant's duty to lead evidence and establish that his agents were denied access. That the evidence tendered by the appellant was hearsay; that the trial court correctly held so at paragraphs 68 and 70 of the judgment. Noting that hearsay evidence was led in an attempt to prove that agents were denied access, it was submitted that the legal and evidential burden was not discharged by the appellant. That there was no cogent and credible prima facie evidence to shift the evidential burden to the respondents. That the irregularities admitted by the 2nd and 3rd respondents were peripheral and inconsequential transposition errors that did not affect the result. That it was the duty of the appellant to demonstrate that the admitted transposition errors quantitatively affected the result. That the appellant failed to discharge this legal and evidential burden. Counsel further submitted that the evidence by the appellant was not uncontroverted; it was challenged in all material aspects, issue by issue, through extensive cross-examination.

23. We were urged by the 1st respondent to find that the trial court examined both the quantitative and qualitative aspects of the impugned election; that the trial court was satisfied that the declared results was not affected by any irregularity; the court correctly applied ***Section 83*** of the **Elections Act** and found that the evidence led by the appellant did not affect the declared result of the election. On costs, it was submitted that the appellant subjected the respondents to incur costs in defending the petition and it is only just, fair and equitable that the appellant should reimburse the costs. That failure to make the appellant liable in costs would encourage vexatious litigants under the guise of access to electoral justice.

2nd and 3rd RESPONDENTS' SUBMISSIONS

24. The respondents, through learned counsel Mr. Masika, made submissions in the main appeal and on the cross-appeal on costs. Submitting on the cross-appeal, counsel emphasized that costs follow the event; that the 2nd and 3rd respondents having successfully defended the petition, the trial court erred in making an order that they pay costs capped at Ksh. 1 million to the 1st respondent. That the respondents only admitted transposition errors which affected 10 polling stations out of a total of 1454 polling stations. That the transposition errors were not deliberate and were as a result of inadvertent human error. That by denying the respondents full costs and condemning them to pay the 1st respondent costs, the trial court was in effect punishing the 2nd and 3rd respondents despite them having delivered an election in accordance with Constitutional principles and the election law. That it is trite that costs should follow the event and the respondents having successfully defended the petition, they should be awarded costs and not punished with costs.

25. On the main appeal, counsel emphasized the pivotal role of ***Section 83*** of the **Elections Act**. That under the Section, no election shall be declared void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election. Counsel cited **Raila Odinga & 2 others v Independent Electoral & Boundaries Commission** & **3 others [2013] eKLR** where the Supreme Court expressed itself as follows:

> **"[196] …. Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been *non-compliance with the law,* but that such failure of compliance *did affect the validity of the elections.* It is on that basis that the respondent bears the burden of proving the contrary. This emerges from a long-standing common law approach in respect of alleged irregularity in the acts of public bodies. *Omnia praesumuntur rite et solemniter esse acta:* all acts are presumed to have been done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescriptions of the law."**

26. It was submitted that none of the witnesses that were called by the appellant gave any cogent evidence to establish that the Kitui gubernatorial elections was conducted contrary to the principles set out in the Constitution or the Elections Act and Regulations made thereunder. That in the absence of such evidence, the appellant failed to discharge the legal and evidentiary burden to prove that the gubernatorial elections were not free, fair, transparent and that the declared results were not accurate and verifiable. Counsel agreed with the finding of the trial court that the margin between the 1st respondent and the appellant was 95,309 votes and the margin was not affected by the errors of transposition or other irregularities that were proven. It was submitted that the scrutiny, recount and re-tallying Report by the Deputy Registrar confirmed that the variances or minor inconsistencies or inaccuracies in 10 out of 51 polling stations were transposition errors. That the trial judge correctly relied on the Deputy Registrar's Report and held that the proven errors did not benefit any candidate. It was submitted that based on the clear finding of the Scrutiny Report, the appellant's allegation that there was inflation of votes had no factual basis. We were urged to find that the Scrutiny, Recount and Re-tallying Report showed and confirmed that the errors did not render the results of the election liable for nullification as provided for under ***Section 83*** of the Elections Act.

27. Submitting on the alleged lack of IEBC stamps on some Forms 37As, counsel stated that stamping of Forms 37As is not a legal requirement; that it is the signatures of the presiding officers and the agents that authenticate the results; that if any Form is stamped, it is a gratuitous and superfluous discretionary or administrative act incapable of creating a statutory obligation. On the allegation that some Forms 37As had alterations that were not countersigned, counsel submitted that it is this allegation that was the basis of the scrutiny and recount exercise. That the Deputy Registrar's Report revealed that entries in most Forms 37As were accurate and the few errors did not materially affect the overall result. Besides, it was submitted that countersigning is an administrative act not founded in any law; that an inadvertent failure to countersign an alteration cannot manifest as a breach of any law to give rise to nullification of an election result.

28. On the illegal and irregular issuance of Form 37D, it was submitted that the trial court did not err in finding that this issue was not pleaded in the petition. Counsel cited the case of **Zakariah Okoth Obado -v- Edward Akongo Oyugi & 2 others, [2014] eKLR,** where it was held that "an appellate court cannot overrule a trial court and make finding on previously undisputed matters and introduce fresh matters which had not been the subject of dispute in the pleadings." Notwithstanding, counsel submitted that in the instant case, Form 37D confirms

that the person named thereon was duly elected as per the results in Form 37C. That it is very clear from the evidence on record that the results and content of Form 37D is in line with the certified results in Form 37C and that the IEBC respondent correctly declared the 1st respondent as the winner of Kitui gubernatorial election.

29. On alleged violence and voter intimidation, it was submitted that PW5 who testified on violence stated that the violence occurred after he had voted; that there was no violence that prevented him from voting.

30. In totality, the respondents reiterated that there is no cogent evidence on record to prove that the appellant's agents were denied access to the polling stations. That although ***Section 30*** of the **Elections Act** provides for appointment of agents, it does not provide that the agents must sign Form 37A since it is the responsibility of the candidates to ensure that their agents are present throughout the conduct of the elections and that they sign Form 37A. Counsel urged that the trial court did not err in finding that the Kitui gubernatorial election was conducted substantially in compliance with constitutional principles and the election laws.

APPELLANT'S REPLY

31. The appellant reiterated that the present appeal is grounded on the application of electoral law to the facts established and proved by the evidence on record. That the design of the appeal is on the application of law to proven facts. That the trial court erred in applying the law to the set of proved facts; the court erred in ignoring the qualitative aspects of the conduct of elections and further erred in failing to consider and evaluate collectively and in totality the irregularities and malpractices proved. That had the trial court considered the irregularities collectively, the court would have found that the Kitui gubernatorial election was not conducted in a free, fair and transparent manner and that the declared results should be nullified.

ANALYSIS AND ISSUES FOR DETERMINATION

32. We have considered the grounds of appeal and cross-appeal. We have also considered submissions by counsel and the authorities cited. The law on burden and standard of proof is well settled. In **Raila Odinga & 2 others -v- Independent Electoral & Boundaries Commission & 3 others [2013] eKLR,** the Supreme Court expressed itself as follows:

> **"[195] …. an electoral cause is established much in the same way as a civil cause: the *legal burden* rests on the petitioner, but, depending on the effectiveness with which he or she discharges this, the *evidential burden* keeps shifting. Ultimately, of course, it falls to the Court to determine whether a *firm* and *unanswered* case has been made."**

33. In **Raila Amolo Odinga & another -v- Independent Electoral and Boundaries Commission & 2 others, SC Election Petition No. 1 of 2017**, it was expressed:

> **"[276] In these circumstances, bearing in mind that IEBC had the custody of the record of elections, the burden of proof shifted to it to prove that it had complied with the law in the conduct of the presidential election especially on the transmission of the presidential election results and it failed to discharge that burden."**

34. The constitutional and legal threshold makes it vital for IEBC to ensure that elections are conducted in accordance with the principles laid down with no deviation or distortion. The first issue for our consideration is the disputed application of ***Section 85 A*** of the **Elections Act** that limits the jurisdiction of this court to matters of law. In **Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 others [2014] eKLR** it was stated that with specific reference to ***Section 85A*** of the **Elections Act**, it emerges that the phrase "matters of law only" means 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 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;*
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> *(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 County 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 a different conclusion on the basis of the evidence.*

35. The parties in this appeal identified five salient issues for determination. We confine ourselves to the issues as identified and urged by the parties namely:

> *(i) Whether the learned judge erred in law in her failure to appreciate the legal effect of illegalities, irregularities and malpractices proven by the petitioner.*
>
> *(ii) Whether the learned judge erred in law in holding that the appellant had not discharged the burden of proof.*

(iii) Whether the judge erred in law in not taking into account the uncontroverted evidence of the appellant.

(iv) Whether the conclusion arrived at in the judgment is supported by the analysis of the evidence.

(v) Whether the judge erred in law in awarding costs in the terms expressed in the judgment.

36. It has been submitted by the 1st respondent that the appeal before us is defective for want of non-compliance with Section 85A of the Elections Act. That 17 out of the 20 grounds of appeal are based and raises matters of fact; and only 3 grounds raise issues of law, consequently this court has no jurisdiction to consider the other grounds. In essence, we have been invited to strike out the said grounds. Time and again, it has been held that the jurisdiction of this Court in election matters kicks on matters of law only unless the conclusion reached by the trial judge on factual evaluation is so perverse, outrageous, unreasonable and that no reasonable justice will arrive at such a conclusion. It means the jurisdiction of this Court is extinguished if the conclusions are those reached by a reasonable tribunal wearing its judicial lenses correctly, and addressing all the pertinent and important questions set for its determination. It is important to restate that we are alive to the fact that drafting of grounds of appeal is a matter of sophistication acquired through experience and good advocacy. It is not a one-day affair but an art acquired through experience, diligence and meticulous attention to the legal requirements. Often times, injustices would arise where an advocate would craft pleadings poorly and below expectation of the Court. We have noted that the grounds of appeal before us contain the words that "the trial judge erred in fact and in law" but that is not a good ground to say that there is non-compliance with Section 85A of the Elections Act. There must be evidence that notwithstanding that the words "the trial judge erred in fact" were used, the grounds are so hopeless that they only raise matters of fact only. The court has to go further, and ensure justice is done to the parties, to decipher whether the grounds although not elegantly drafted disclose issues or matters of law requiring investigation and determination. On our part, we have scrutinized all the grounds of appeal and are satisfied that there are sufficient grounds for us to say that this appeal is rightly before us.

37. In **Wavinya Ndeti & another - v- Independent Electoral and Boundaries Commission & 2 others [2018] eKLR, Nairobi Election Petition Appeal No. 8 of 2018,** this Court expressed as follows:

> **"49. We are aware and appreciate that an appellate court like ours would rarely interfere with a factual determination of a trial judge unless the trial judge has clearly failed on some material point, to take into account particular circumstances, probabilities material to an estimate of the evidence tendered before it, or that the judge failed to appreciate an important and relevant point in the case, or that he misapprehended or misapplied the law on the facts thereby arriving at an outrageous conclusion which is inconsistent or a departure from the evidence adduced by the parties. Section 85A is not a blanket, no entry zone for this Court not to consider and address its mind on grounds of appeal simply on account of a plea in the memorandum of appeal that "the trial judge erred on facts and law."**
>
> **50. We are mindful that drafting of pleadings is a technical matter. If the judge had deduced an unknown legal principle from the facts of the case to arrive at his decision, it would be preposterous to shut out a litigant simply on account of inelegance in drafting. The Court has to ensure that justice prevails at all times and that Section 85A is not used as a roadblock to shut out genuine grounds of appeal on account of poor drafting of the grounds of appeal. In essence the Court has to undertake a delicate examination to ensure that appeals are not outrightly and without proper investigation rejected. In the same breadth, we underscore the importance of compliance with Section 85A but we are mindful that often times points of law may inescapably be difficult to separate from factual determination. The line is opaque and therefore circumspection is necessary. In an appeal such as this, the burden is on the appellant to prove how the decision under appeal is wrong. To succeed the appellant must go beyond asking the Court to re-assess the evidence, because that is not the role of this Court. The appellant must demonstrate that the assessment of the evidence by the trial court was wrong."**

38. In the instant appeal, the appellant contends that the trial court erred in failing to appreciate that there was an illegality involving massive inflation of votes in favour of the 1st respondent. That in at least 10 out of 54 polling stations, the votes cast exceeded the number of registered voters. In considering this allegation, the trial court expressed itself as follows:

> **"141. The above cited results of the scrutiny exercise confirm that the transpositional errors affected all the candidates in the elections for Governor, with all of them getting a few additional votes in the Forms 37B and Form 37C that were not reflected in the Form 37A. In particular, the errors as summarized in the foregoing resulted in the Petitioner getting 40 more votes, the 1st Respondent 106 more votes, and the second runner up who was Mr. David Musila getting 254 more votes. Some of the errors did not benefit any candidate, particularly as regards the errors on transposition of the rejected votes.**
>
> **142. It is thus my finding for these reasons that given the difference of votes that between the votes cast in favour of the Petitioner and those cast in favour of the 1st Respondent which was 95,309 votes, the said errors did not affect the outcome of the election, and cannot be a basis for nullifying the election of the 1st Respondent as presently sought.**
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> **144. Besides the findings on the effect of the transpositional errors and the stamping of Forms 37A hereinabove, this Court finds and agrees with the submissions made by the Respondents that the other allegations made by the Petitioner were not supported by any evidence, and in particular no witnesses were called on the KIEMS data inconsistencies and on the stuffing and sealing of ballot boxes in the pleaded polling stations."**

39. We have examined the record of appeal to determine if the conclusion arrived at by the trial court is supported by the evidence on record. ***Gogo Albert Nguma*** (DW1), the County Returning Officer, testified and agreed that there were transposition errors. He testified that the effect of the transposition error is that ***Dr. Malombe*** garnered 39 extra votes which he should not have gotten; that ***Mr. David Musila*** had an additional 254 votes and ***Ms Charity Ngilu*** had 181 extra votes. That 17 rejected votes were not properly entered. That none of the transposition errors could materially affect the result of each candidate once the extra votes are removed.

40. The trial court in evaluating the evidence expressed itself as follows:

> **"138. The Deputy Registrar of the Kitui High Court conducted the scrutiny, recount and re-tallying of the valid votes cast for each candidate in the presence of the parties and their representatives, and the final report thereof was signed by the Parties and the findings filed and adopted in Court on 1st February, 2018.**
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> **139. From the findings in the report, there is no tangible basis in the Petitioner's assertions that the results in the Forms 37A were forgeries, as the same were confirmed during the scrutiny of the original Forms 37A, and the recount of votes cast in the 51 polling stations where the results had been contested because of the errors and irregularities alleged by the Petitioner. The results in the Forms 37A also dovetailed with the records in the SD Cards of the KIEMS used during the Kitui gubernatorial elections held on 8th August, 2017. In addition, out of the 51 Polling stations, it is only transpositional errors that were identified in 10 of them where mistakes were made when transferring the results from Forms 37A to Forms 37B and Form 37C. The rest of the polling stations' results were accurately reflected in Forms 37A, 37B and 37C."**

41. The evidence of ***Mr. Gogo Albert Nguma*** **(DW1)**, the County Returning Officer, on the overall effect of the transposition errors on the declared result was not challenged. The testimony by **DW1** taken together with the Deputy Registrar's Report rebutted the allegation of massive inflation of votes in favour of the 1st respondent.

42. We have considered the evidence on record and have neither seen nor identified "the massive inflation of votes." The appellant in his submission did not show us on record at which specific polling stations there was massive inflation of votes. We have given the word "massive" its ordinary English meaning. The word means substantial, considerable, immense, colossal, huge or humongous. On record there is no specific polling station where there was "massive" inflation of votes. The appellant has submitted that in 10 out of 54 polling stations there were irregularities. Be that as it may, the scrutiny and recount report did not disclose "massive" inflation of votes in favour of the 1st respondent. The record shows that the appellant never led prima facie evidence to prove the "massive" inflation of votes. The appellant had the legal and evidentiary burden to lead such evidence. Accordingly, we find that the trial court did not err in arriving at the determination that the appellant's allegation was not supported by evidence and that the appellant did not discharge the burden of proof to the required standard. In any case, even if the transposition errors are added or removed, it cannot change the final outcome of the result as declared. There is no evidence to demonstrate that the 1st respondent gained an advantage from the alleged inflation which, we did not find on record. Again, there is no evidence to show that the appellant was disadvantaged in any manner or that the final outcome is not a demonstration of the will of the people of Kitui County. In the absence of evidence, we think the allegation of "massive inflation of votes" in favour of the 1st respondent was not proved. It remains a mere allegation with no foundation and basis. On our part, we cannot interfere with the win of the 1st respondent merely on speculation. To do so would subvert democracy and will of the people of Kitui County. We decline that invitation and consequently, that ground of appeal fails.

43. The other irregularity alleged by the appellant is that some Forms 37As did not bear the stamp of IEBC. The burden to prove that some Forms did not bear the IEBC stamp was on the appellant. The appellant also bore the burden to prove that the absence of such stamps affected the result of the election. In **IEBC -v- Stephen Mutinda Mule & 3 Others [2014] eKLR** it was held that there was no statutory requirement for stamping of Forms. In the persuasive case **of Kalla Jackson Musyoka-v- Independent Electoral &Boundaries Commission (I.E.B.C) & another [2018] eKLR,** the trial court correctly held that the lack of a stamp on the statutory forms did not create a problem as long as the forms had the requisite security features. In **Mark Nkonana Supeyo & another -v- Independent Electoral and Boundaries Commission & 2 others [2018] eKLR** the trial court correctly held that in the absence of proof of any negative effect on the declared results, the omission to stamp a statutory Form cannot *per se* stand on the way of the electorate to frustrate the will of the people especially when the result in the specific polling station including the votes garnered by each candidate is not in question and party agents have signed.

44. In the instant appeal, the appellant did not lead evidence to demonstrate how the absence of IEBC stamp on some Form 37As affected the result. The first question is whether the non-stamping was explained and its effect on the final results. Secondly, whether the appellant contested the results entered in the said Forms; thirdly, whether the results contained therein are legitimate and not a distortion of what actually occurred at the polling station. Lastly, whether the said Forms were actually and legally signed by the relevant persons. In this appeal, it is not contested that the said Forms 37As were signed by the relevant presiding officers and agents of the parties. This is not disputed by the appellant. Again, the contents or results contained in the said Forms were not disputed, as an expression or manifestation that the said Forms are legitimate, legal and accurate. More importantly, there is no requirement under Regulation 79 of the Elections (General) Regulations, 2017 for stamping of Forms. In our view, the question of stamping can be a good ground for nullification where the entries in the statutory Forms, results therein and signatures thereon are contested in terms of authenticity, legitimacy, accuracy and correctness. This is not the case in this matter.

45. Further, the appellant did not lead evidence to prove that the integrity of the declared result had been compromised by the absence of stamps on some Form 37As. The appellant did not lead evidence to show with specificity how many Forms 37As did not have an IEBC stamp. There is no quantitative demonstration how absence of stamps affected the integrity of the declared results of the election. In the absence of such evidence, we affirm the finding by the trial court that the appellant did not discharge the burden of proof to the required standard.

46. One of the contestations by the appellant is that the Kitui gubernatorial election was marred by violence and voter intimidation. To prove this allegation, we were referred to the testimony of ***Kalungu Nzau*** **(PW5)** who testified that on the voting day he went to the polling station at around 1.30 pm accompanied by his mother. That on their way out before leaving the precincts, a group of 9 young men emerged and attacked him, slapping him on his face and tearing his shirt.

47. The trial court in evaluating the evidence on violence and intimidation of voters held as follows:

> **"102. I have considered the evidence adduced and arguments made on the incidents of violence and intimidation alleged by**

the Petitioner. It is evident that there were incidents of violence and assault were some of the Petitioner's witnesses, particularly PW2 and PW5 were injured. Reports of the same were also made to the police. The 1st Respondent has also admitted to having been present at the Syongila Youth polling station when the incident involving PW4'S motor vehicle occurred. (sic)

103. The question before the Court therefore is whether the threshold necessary to invalidate an election on account of these incidents has been met. This threshold is that the Petitioner must show that the violence is traceable to or attributed to the respondent(s), the violence must be widespread and not isolated and the violence must have affected the voting and the election results. See in this regard the decisions in Benson Maneno v Jacob Machekele and Others, [2013] eKLR, Kajembe v Nyange and Others, [2008]2 KLR 1, Lenno Mwambura Mbaga & Another v Independent Electoral & Boundaries Commission & Another, [2013] eKLR, Joho v Nyange & Another, (No 4)(2008) 3KLR(EP) and Justus Gesito Mugali M'mbaya v Independent Electoral & Boundaries Commission & 2 Others, [2013]eKLR.

104. It is my finding that this threshold has not been met for the following reasons. In the case of the incidents narrated by PW2 and PW5, the Petitioner did not adduce evidence linking the said incidents to the Respondents, or showing their active participation therein, or their connection to the perpetrators."

48. We have considered the allegations on violence and intimidation of voters. Proof of violence *per se* cannot vitiate the results of an election. To vitiate the results, the violence must *inter alia* be widespread. In English dictionary, widespread means extending over a wide area, to a large extent or to a great extent. In **Dickson Mwenda Kithinji -v- Gatirau Peter Munya & 2 others [2013] eKLR, Meru High Court Election Petition No. 1 of 2013**, it was stated that in electoral context, widespread violence can only be taken to mean a systematic, planned or organized infliction of injury, harm, damage or loss on any person because they have voted in a particular way or to induce them to vote in any particular way. There must be evidence to prove the widespread violence. Widespread violence may also include indiscriminate violence. In **Ferdinand Nahimana & Jean Bosco Bayaragwiza & another (Media case) (ICTR-99-52)** the Appeals Chamber of the International Criminal Court (ICC) at paragraph 920 of its judgment observed that:

"Widespread" refers to the large-scale nature of the attack and the number of victims, whereas "systematic" refers to "the organized nature of the acts of violence and the improbability of their random occurrence." Patterns of crimes – that is the non-accidental repetition of similar criminal conduct on a regular basis – are a common expression of such systematic occurrence."

49. In **Rahim Khan -v- Khurshid Ahmed, AIR 1975 SC 290** it was stated that imaginary threats of violence and half serious apprehensions are not undue influence by any standards; that such chimerical apprehensions are unreal and cannot receive judicial approval. Realism is a component of judicial determination. In our view, localized and isolated manifestation of violence is not widespread violence. In **Gitau -v- Thuo & 2 Others, [2010] 1 KLR 526 at 547** the court expressed that the violence that engulfed the election was an isolated and one off incident of a fight between supporters and this did not amount to a generalized or widespread violence that could vitiate an election.

50. Settled jurisprudence reveals that widespread violence can nullify and void an election especially when it is the winner or returned candidate who is directly or indirectly responsible for the violence. In **Borgaram Deuri -v-Premodhar Borah, AIR 2003 Gau 135: 2003 (10) GLT 541**, it was held that as the evidence of poll violence was not against the returned candidate but against some other candidate, the plea of violence would not lead to the setting aside of the election. In **Hosea Mundui Kiplagat -v- Sammy Komen Mwita & 2 Others, Election Petition (Eldoret) No. 11 of 2013** it was held that where the election offence is allegedly committed by the agents of a candidate, the connection with the candidate must be established. It is not enough to show that the perpetrators of the offence were proxies or kinsmen of the candidate. It must be shown that the perpetrators were agents of the candidate and they engaged in the alleged acts with the candidate's consent. (See also **Gitau -v- Thuo & 2 Others, [2010] 1 KLR 526)**.

51. In the instant case, there is no evidence on record to link the returned candidate with the violence meted upon PW5. There is evidence that voting, counting and declaration of result was done in accordance with the requirements of the law. There is no evidence that voting was postponed in any polling station on account of violence or intimidation; there is no evidence that counting of votes was disrupted or stopped due to violence; there is no evidence on record to prove that the alleged violence was widespread; there also is no evidence on record to prove that any voter, including **PW2, PW4** and **PW5** and his mother, were disenfranchised by acts of violence. It is the appellant who had the burden of proof to lead prima facie evidence to demonstrate that the violence was widespread; that the returned candidate was linked to the violence or that a substantial number of voters were disenfranchised due to violence and intimidation. The appellant neither discharged the legal burden nor led prima facie evidence that could shift the evidentiary burden to the respondents. In the absence of such evidence on record, we are obliged to find that the trial court did not err in arriving at the conclusion that the violence meted on **PW2, PW4** and **PW5** were isolated cases and that there was no evidence linking the 1st respondent or any candidate to the said violence. The trial court did not err in holding that the appellant did not discharge the burden of proof to the requisite standard. In any case, these are matters of fact, which the trial judge after analyzing the evidence on record correctly reached the conclusion that the violence disclosed did not affect the final results. On our part, we decline the invitation to reconsider that factual determination in line with Section 85A of the Elections Act.

52. A prominent allegation in this appeal is that the appellant's agents were denied access to over 400 polling stations; that various Forms 37As did not bear the names and signatures of agents of the appellants who were Wiper Party Agents. It was contended that faced with this allegation, the 2nd respondent through the testimony of the 3rd respondent explained that some Wiper Party agents had changed their names or were signing for other parties. The trial court in considering the allegation expressed itself as follows:

"62. The 3rd Respondent was also taken through various Forms 37A and admitted that on their face they did not have the names and signatures of Wiper agents. He however explained that the evidence of PW8 had shown that some Wiper Party agents had changed their names or were signing for other parties, and gave examples of some such agents.

63. The 2nd and 3rd Respondents' counsel submitted that only one of the Petitioner's agents, Veronica Syombua Wambua (PW7), gave evidence that the Petitioner's agents were chased away from Moi Primary School at around 10 pm. Nonetheless,

that her evidence does not prove this ground at all, because Moi Primary School was only one of the many polling stations and is not among the 27 Polling Stations pleaded in the Petition where the Petitioner's agents were purportedly denied access, and the witness confirmed that she was at the said Moi Primary Polling Station throughout the day voting.

64. Further, that the Petitioner's evidence was hearsay because he expressly confirmed that he did not personally witness any of the incidents in question in the Petition, but learnt of them from the information from his chief agent and by his experts and agents. In addition, that during the cross-examination of the Petitioner's chief agent, (PW8), it was revealed that over 100 of the Petitioner's agents from the list he produced in Court had signed the Forms 37A in the Polling Stations to which they were attached, but deliberately misstated the party for which they were acting as agents with some mostly indicating that they were NASA (National Super Alliance) coalition, and others naming various political parties.

65. According to the 2nd and 3rd Respondents, the Petitioner's agents at the constituency level and chief agent respectively signed the Forms 37B and 37C ratifying the results on Form 37A. That if they had any problem with such results, they were enjoined by law to record the reasons for their refusal to do so, which they did not."

53. One of the grounds of appeal is that the appellant's agents were denied access to the polling stations. Is there cogent evidence on record to prove denial of access? It is not clear to us, neither can we find on record, which polling station was affected and the person(s) who was denied entry by the respondents. The appellant only alluded to 27 polling stations but PW1 ***(Julius Makau Malombe***), PW7 (***Veronica Syambua Wambua***) and PW8 (***Benard Kitheka Mulatia***) did not show any evidence of denial of access to any specific polling station. Indeed, **PW7** confirmed that she stayed at Moi Primary School throughout the day and she did not encounter any hindrances. We think the trial judge analyzed the evidence on denial of access and came to the correct conclusion. We have no evidence on record and none was shown to us to come to depart from that sound and solid conclusion to say it was perverse or unreasonable. We decline the invitation to reconsider that factual conclusion and determination.

54. Another ground of appeal urged by the appellant relates to the difference in dates between Forms 37C and Form 37D. Form 37C bears the date of 12th August 2017 and Form 37D is dated 11th August 2017. Form 37C contains the declared results of the election, Form 37D is the Certificate given to the winner of the elections. The appellant's argument is how could the Certificate be issued before the results were declared? The trial court in addressing this matter held that it was an un-pleaded issue and the court could not consider it. The Judge expressed himself as follows:

"110. ***I accordingly find that even though the Petitioner called evidence on this limb and made lengthy submissions thereon, this Court will not render a decision thereon and on other particularities that were not pleaded in the Petition. These were aptly identified by the 1st Respondent's counsel in his submissions to include particulars that voters were assisted in a manner that violated the Regulations, that usage of carbon copies of Forms 37A was irregular or contrary to the law, the absence of security features of Forms 37A, such as watermarks or serial numbers; that votes cast exceeded the registered number of voters, that there were ungazetted polling stations, that the formats of the Forms 37B were irregular, and of the different handwritings on the Forms 37A. In addition, the Petitioner's counsel cross-examined the 3rd Respondent, and made lengthy submissions on the time of signing of the Form 37D, whilst there was no mention of any irregularity in the Form 37D in the Petition."***

55. On our part, we have examined the record of appeal. The record reveals that **DW1** was able to explain the difference in time at the signing of Form 37D and Form 37C. We note that the appellant is not challenging the contents of Form 37D. Further, there is no evidence on record that the contents of Form 37D do not reflect the results of the election. As was stated by this Court in **IEBC -vs- Maina Kiai & Others [2014] eKLR**), the polling station is where the people cast their votes and it is where the votes are counted. The results declared at the polling station are final. If the results in Form 37A can stand the test of scrutiny, verifiability and accountability, any irregularity in Form 37D cannot vitiate the election. On our part, we are satisfied that the respondent explained the difference in dates in Form 37C and Form 37D.

56. The appellant passionately urged us to find that the trial court erred in focusing on quantitative and ignored the qualitative aspects of the conduct of elections. That the IEBC failed in its management of the Kitui gubernatorial elections; that the said election was not free and fair; that the multiple irregularities, illegalities and malpractices proved and admitted qualitatively affected the result of the election. Of relevance to this submission is the Supreme Court observation in **Raila Odinga & 5 Others -v- Independent Electoral and Boundaries Commission & 3 others [2013] eKLR** where it was expressed:

"[197] IEBC is a constitutional entity entrusted with specified obligations, to organize, manage and conduct elections, designed to give fulfilment to the people's political rights [Article 38 of the Constitution]. The execution of such a mandate is underpinned by specified constitutional principles and mechanisms, and by detailed provisions of the statute law. While it is conceivable that the law of elections can be infringed, especially through incompetence, malpractices or fraud attributable to the responsible agency, it behoves the person who thus alleges, to produce the necessary evidence in the first place – and thereafter, the evidential burden shifts, and keeps shifting." (Emphasis supplied).

57. Our appraisal of the evidence on record shows that the trial court considered both the quantitative and qualitative aspects of the Kitui gubernatorial elections. The appellant urged us to take into account singularly and collectively the irregularities and illegalities proved in the petition. We have considered the collectivity of the proven irregularities, illegalities and malpractices. Collectively, what has been proved is isolated incidents of violence and transposition errors in 10 out of 1454 polling stations. It has been proved that the transposition errors do not quantitatively affect the declared result. There is no evidence on record proving voter disenfranchisement; there is no direct evidence to prove that polling agents were denied access to any polling station; there is no evidence on record to prove that the admitted or proven irregularities affected the result of the election. In our view, collectively, the admitted and proven irregularities neither affect the integrity of the declared results nor affect the result of the election. Both quantitative and qualitative analysis of the evidence on record shows that the declared result of Kitui gubernatorial election was not affected by admitted or proven irregularities, illegalities or any malpractice.

58. In arriving at this determination, we are guided by dicta in **Raila Amolo Odinga & another -v - Independent Electoral and Boundaries Commission & 2 others, SC Election Petition No. 1 of 2017** where it was expressed that:

> **"[374] …...inquiry about the effect of electoral irregularities and other malpractices, becomes only necessary where an election court has concluded that the non-compliance with the law relating to that election, did not offend the principles laid down in the Constitution or in that law. But even where a Court has concluded that the election was not conducted in accordance with the principles laid down in the Constitution and the applicable electoral laws, it is good judicial practice for the Court to still inquire into the potential effect of any irregularities that may have been noted upon an election. This helps to put the agencies charged with the responsibility of conducting elections on notice"** (Emphasis supplied.)

59. Guided by the Supreme Court dictum in **Raila Amolo Odinga & another -v- Independent Electoral and Boundaries Commission & 2 others, SC Election Petition No. 1 of 2017 (2017) eKLR,** we find that the trial court did not err in delving into the quantitative aspects of the alleged and proven irregularities. We find that the trial court adopted good judicial practice to inquire into the potential effect of any irregularities and in so doing; the trial court correctly held that the proven irregularities did not affect the declared election result.

60. The appellant further contended that the trial court erred in failing to find that the gubernatorial election results were not credible because presiding officers were not called to testify. We are alive to the fact that there is no legal requirement in law on the number of witnesses to prove or disprove a fact. **Section 143 of Evidence Act (Cap 80) Laws of Kenya** provides: -

> **"143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact".**

61. On the appellant's contestation that presiding officers were not called to testify, we are persuaded by and affirm the dicta in **John Munuve Mati -v- Returning Officer Mwingi North Constitutency, Independent Electoral & Boundaries Commission & Paul Musyimi Nzengu [2018] eKLR**, where it was stated that it does not invariably follow that failure by a respondent to call a witness 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. The appellant's ground of appeal that presiding officers were not called to testify fails.

62. An interesting submission by the 1st respondent is to the effect that there is no legal obligation to countersign alterations in any statutory Form. That neither ***Article 81*** nor ***86*** of the Constitution expressly provide for countersigning of alterations in statutory Forms. That there is no express provision in the **Elections Act** or **Regulations** thereunder that require countersigning. We hold that the submission by the 1st respondent has no merit in law. Whereas there is no express constitutional Article requiring countersigning, settled jurisprudence on documentary evidence is that alterations in any written instrument must be countersigned by the maker to authenticate the document. In **William Kabogo Gitau -v-George Thuo& 2 others [2010] Eklr,** it was stated that cancellations and alterations which are not countersigned by the presiding officer may raise the questions regarding veracity and authenticity of the results. In **Ndolo -v- Mwangi & 2 others [2010] 1 KLR 372**, the trial court observed that where there are alterations, the same must be authenticated by countersigning. In **William Odhiambo Oduol –v- Independent Electoral and Boundaries Commission & 2 others [2013] eKLR,** the trial judge observed that it is desirable for each alteration, cancellation or over-writing to be counter-signed and stamped by the maker as a way of owning the same and saying the Form was authentic.

63. All in all, we are satisfied that the Kitui gubernatorial elections held on 8th August 2017 was conducted in accordance with constitutional and legal principles and that the allegations raised against the said elections do not meet the threshold for nullification of an election. Having scrutinized all the issues raised thoroughly and meticulously, we decline the invitation to nullify the said election. We are also satisfied that the 1st respondent's win, declaration and gazettement were legal and legitimate.

64. The final issue for our determination is the trial court's order on costs. The 2nd and 3rd respondents filed cross-appeal on costs. On his part, the appellant urged us to allow the appeal with costs. Both parties urge that costs should follow the event. In **Orix Oil (Kenya) Limited -v- Paul Kabeu & 2 Other [2014] eKLR** it was stated:

> **"…the court should have been guided by the law that costs follow the event, and the Plaintiff being the successful party should ordinarily be awarded costs unless its conduct is such that it would be denied the costs or the successful issue was not attracting costs."**

65. In the instant matter, the trial court ordered the successful 2nd and 3rd respondents jointly and severally to pay the 1st respondent costs capped at Ksh. 1 million. In awarding costs against the successful party, the trial court observed that:

> **"174. In the present Petition, this Court finds that as there were irregularities that were admitted and found to have been committed by the 2nd and 3rd Respondents' agents, it is only fair that the two parties share the burden of the costs borne by the 1st Respondent, even if the Petitioner has largely been unsuccessful.**

66. The gist of the 2nd and 3rd respondents' cross-appeal is that the appellant's petition before the trial court was successfully defended. That the irregularities of transposition were inadvertent and the 2nd and 3rd respondents should not be penalized in costs. The law on costs as it is understood by courts in Kenya is this: where a party comes to enforce a legal right and there has been no misconduct on his part - no omission or neglect, and no vexatious or oppressive conduct is attributed to him, which would induce the court to deprive him of his costs - the court has no discretion and cannot take away the party's right to costs. (See Richard Kuloba, Judicial Hints on Civil Procedure, 2nd Edition, page 101).

67. The trial court in ordering the 2nd and 3rd respondents to pay costs to the 1st respondent expressed that "as there were irregularities that were admitted and found to have been committed by the 2nd and 3rd Respondents' agents, it is only fair that the two parties share the burden of the costs borne by the 1st Respondent." Noting that the trial court gave reasons for awarding costs against the successfully party, we consider whether the reason given by the trial judge demonstrate a proper exercise of judicial discretion. Did an injustice occur by exercise of the discretion to award costs against a successful party? We think that the trial judge erred in law in awarding costs against a party who had successfully defended the election petition. The errors committed and admitted by the respondents did not vitiate and nullify the election results and hence there is no justification for an order of costs against a successful party. Such an award amounts to discrimination as costs follow the event. The cross-appellants have convinced us that there has been some injustice in the exercise of discretion on costs by the trial judge. (See **Mbogo -v- Shah [1968] EA 93).** Accordingly, we set aside the order by the trial court that the 2nd and 3rd respondents are to pay the 1st respondent costs capped in the sum of Ksh. 1 million.

68. As regards costs awarded against the appellant, we are alive to the principle that the award of costs is at the discretion of the trial court. We are also alive to the principle that costs should neither be excessive nor exorbitant. The trial court ordered the appellant to pay the 1st respondent costs capped at Ksh. 3 million; in addition, the trial court ordered the appellant to pay the 2nd and 3rd respondents costs capped at Ksh. 2 million. The total liability of the appellant in terms of cost as per the trial court's order is a maximum of Ksh. 5 million.

69. In **Martha Wangari Karua -v- Independent Electoral & Boundaries Commission & 3 others [2018] eKLR**, this Court expressed itself as follows:

> **"Section 84 of the Election Act provides that it is within the discretion of the election court to award costs and that costs shall follow the cause. Again as stated, Rule 30 of the Election Petition Rules gives the court unfettered discretion which means that the discretion exercisable by the taxing master under paragraph 16 of the Advocates Remuneration Order 2009 has been circumscribed. It is up to the election court to determine whether a party would be awarded costs or not and in doing so the court must be guided by the principles of fairness, justice and access to justice. It is meant to compensate a successful litigant. It is not a punishment or a deterrent measure to scare away litigants from the doors of justice."**

70. This is a gubernatorial election petition and we have considered cases where the trial court has capped costs. In **Ismail Suleman and Others -v- Returning Officer, Isiolo County and Others Meru EP No. 2 of 2011 (Unreproted)** and in **Mohamed Ali Mursal -v- Saadia Mohamed & 2 others [2013] eKLR,** the amount was capped at Ksh. 2 million and Ksh. 1 million for each respondent respectively. Both cases involved the gubernatorial elections. In **Ferdinard Ndungu Waititu -v- Independent Electoral & Boundaries Commission (IEBC) & 8 others [2013] eKLR** the court capped the total costs at Kshs.5 million, capping the costs payable to the 1st to 3rd respondents jointly at Kshs. 2,500,000/= and to both the 4th and 5th respondents jointly at Kshs. 2,500,000/=. This Court in **Martha Wangari Karua -v- Independent Electoral & Boundaries Commission & 3 others [2018] eKLR**, capped costs for gubernatorial elections at Ksh. 2 million. We observe that this matter had not gone to full hearing on the merits.

71. Guided by the above cited comparable judicial capping of costs in gubernatorial elections, we are of the considered view that in the instant case, capping costs at a total of Ksh. 5 million is excessive. We are inclined to interfere and hereby award the respondents total costs capped at Ksh. 3 million as follows: the appellant is to pay the 1st respondent costs capped at Ksh. 2 million. The appellant is to pay the 2nd and 3rd respondent costs capped at Ksh. 1 million.

72. Having considered the grounds of appeal and cross-appeal as well as submission by parties, the final orders of this Court are as follows:

(a) The appeal has no merit and is hereby dismissed with costs.

(b) The appellant shall pay costs to the respondents at the trial court capped at a total of Ksh. 3 million as follows:

(i) the appellant to pay the 1st respondent costs capped at Ksh. 2 million;

(ii) the appellant to pay the 2nd and 3rd respondent costs capped at Ksh. 1 million.

(c) The cross-appeal succeeds to the extent that the cost awarded by the trial court against the 2nd and 3rd respondent be and is hereby set aside.

(d) The Kitui County gubernatorial elections held on 8th August 2017 was conducted in accordance with the constitutional and legal principles and the 1st respondent was validly elected as Governor of Kitui County.

(e) The appellant shall pay costs of the respondents in this appeal.

Dated and delivered at Nairobi this 28th day of June, 2018.

R. N. NAMBUYE

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

DEPUTY REGISTRAR