IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, KIAGE & M'INOTI, JJ.A.)

ELECTION PETITION APPEAL NO. 9 OF 2018

BETWEEN

NASRA IBRAHIM IBREN.......................................APPELLANT

AND

INDEPENDENT ELECTORAL

& BOUNDARIES COMMISSION...............1ST RESPONDENT

ARNOLD MUTWIRI NJABANI.................2ND RESPONDENT

SAFIA SHEIKH ADAN................................3RD RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Marsabit (Chitembwe, J.), dated 19th February 2018 in

EP. No. 1 of 2017, (Formerly Nairobi EP. No. 22 of 2017))

****

JUDGMENT OF THE COURT

The ***appellant, Nasra Ibrahim Ibren***, was one of the seven candidates who contested the seat of ***Woman Representative to the National Assembly*** for ***Marsabit County*** in the general elections held on 8th August 2017. After the conclusion of the elections, ***the 2nd respondent, Arnold Mutwiri Njabani***, who was the Marsabit County Returning Officer, declared the ***3rd respondent***, ***Safia Sheikh Adan,*** to have been duly elected the Marsabit County Woman Representative to the National Assembly. According to the results of the final tally declared by the 2nd respondent, the candidates in the election garnered votes as follows:

	Candidate	*Political Party*	*Votes*
1	*Elizabeth Pius Pantoren*	*Kenya African National Union*	*19,866*
2	*Safia Sheikh Adan*	*Jubilee Party*	*41,012*
3	*Nasra Ibrahim Ibren*	*Frontier Alliance Party*	*35,340*
4	*Amina Guyo Halake*	*Orange Democratic Movement*	*3,709*
5	*Christine Koreya Seyere*	*Maendeleo Chap Chap Party*	*8,933*

6	*Farhiya Yarow Abdi*	*Democratic Party*	*690*
7	*Bernadetta Okutu Shama*	*Party of National Unity*	*1,151*

The appellant, who happened to be the incumbent woman representative in the County, was aggrieved by the outcome of the election and on 7th September 2017 filed ***Election Petition No. 22 of 2017,*** in the High Court at Nairobi, challenging the 3rd respondent's election. In addition to the 2nd and 3rd respondents, the appellant named the ***Independent Electoral and Boundaries Commission (the IEBC)***, the institution responsible under ***Article 88*** of the ***Constitution*** for conducting or supervising free and fair elections, as the ***1st respondent.*** Subsequently the petition was transferred to the High Court at Marsabit for hearing and determination, where it became ***Election Petition No. 1 of 2017***.

The appellant impugned the election of the 3rd respondent on the basis of illegalities and irregularities alleged to have been committed in all the four constituencies in the County, namely ***Laisamis, Saku, Moyale*** and ***North Horr***, which she contended violated the provisions and principles of the Constitution, the Elections Act, the regulations made thereunder, and the Electoral Code of Conduct.

Starting with Laisamis Constituency, the appellant pleaded that there were discrepancies between the results in ***Form 39B*** and the IEBC's online portal; that the Form 39B did not indicate the total number of votes garnered by each candidate; that ***Jaffar Galgalo*** who signed Form 39B was not gazetted as a returning officer; that her agents were denied the right to participate in the elections; that assisted voters were denied the right to choose who should assist them and were instead compelled by the presiding officers to vote for Jubilee Party candidates; that ***Forms 32*** on assisted voters were not signed as required by law; that the votes were counted in an opaque manner in rooms devoid of electricity or with lanterns that were switched off; that her agents were denied the right of recount and access to ***Form 39As;*** and lastly that the constituency returning officer was changed a few weeks before the elections and, at the 3rd respondent's instigation, replaced by another who was not gazetted.

Turning to Saku Constituency, the appellant's complaint was that voters who could not be identified biometrically by the KIEMS machines were allowed to vote without execution of the relevant forms; that her agents were denied access to Forms 39As and 39Bs; that marked ballot papers were found scattered around in violation of the regulations; that polling officers coerced assisted voters to vote for Jubilee Party candidates in the absence of agents of other parties; that her agents were unlawfully denied the right to verify the counting and tallying of votes; and that the results in Form 39B were different from those transmitted to the online portal.

As for Moyale Constituency, there was a similar complaint on alleged discrepancies between the results in Form 39B and the online portal. The appellant added that in some wards, the IEBC and the 2nd respondent chased away her agents from the polling stations before counting of the votes started, closed the doors, and thus created an opportunity to stuff the ballot boxes in favour of the 3rd respondent; that in some polling stations voters were denied the right to vote without any reasons and those in the queues after 5 pm were chased away; that other polling stations opened very late and closed early thus denying voters the right to vote; and lastly that in Kinisu polling station, ballot papers marked in favour of the appellant were deliberately put in the MCA ballot box to make them stray votes.

Finally, as regards North Horr Constituency, the appellant claimed that the mobile polling stations were concentrated at one place, namely, Dukana Primary School, instead of locating them at seven different places, thus denying voters the right to vote.

On the entire election, the appellant contended that there was an unexplained mismatch of the total votes cast in all the six elections, thus undermining the credibility of the election. She accordingly prayed for declarations that the election for Marsabit Woman Representative to the National Assembly was not conducted in accordance with constitutional principles; that the 3rd respondent was not validly elected the Marsabit County Woman Representative to the National Assembly; an order directing the IEBC to

conduct a fresh election; and costs of the petition.

The IEBC and the 2nd respondent delivered their response to the petition on 19th September 2017 and denied the averments on which it was founded. They pleaded instead that the election in question was conducted strictly in compliance with the Constitution and the Elections Act and that the declared results were a true expression of the will of the people of Marsabit County regarding their Woman Representative to the National Assembly.

On the complaints pertaining to Laisamis Constituency, these respondents contended that Form 39B contained the accurate aggregate count in the election in question. They further averred that the County Returning Officer, Jaffar Galgalo, was properly gazetted as the County Returning Officer for ***Isiolo North Constituency*** but was subsequently and lawfully transferred to Laisamis Constituency and *corrigenda* published to that effect. In other respects their response was that the Form 32s were duly filled for assisted voters; that they did not receive any request for Form 39As from the appellant's agents; and that the only persons denied access to the polling and tallying centres were those that did not identify themselves or where a candidate or party had more than one agent.

On Saku Constituency, these respondents denied that the appellant's agents made any request for the statutory forms or that they were denied access to them. They further pleaded that none of the agents who were properly accredited were denied the right to verify the voting, counting and tallying of votes and that neither the appellant nor her agents had filed a complaint in that regard, either with the police or the IEBC. As for Moyale Constituency, the IEBC and the 2nd respondent once again averred that the primary results were correctly captured in Form 39B and that every voter on the queue at 5.00 pm was allowed to vote. Finally, on North Horr Constituency, the concentration of polling stations in one place was denied and it was contended that even if the polling stations were in one place, it did not affect the voting, counting and tallying of votes or benefit any of the candidates to the prejudice of the others.

Lastly, these respondents averred that the appellant's agents duly and voluntarily signed the statutory forms and polling station diaries, which signalled their participation and satisfaction with the conduct of the election. As for the assisted voters, they contended that they were assisted strictly within the law and on identification on voters they maintained that they were identified via the KIEMS kit or the complimentary mechanism provided. On the variation of the votes cast in the different elections, it was contended that it was not prejudicial to the appellant and in any case, due to spoilt, rejected and stray votes, it was not practical to expect the same total number of votes cast in all the six elections. They accordingly prayed for dismissal of the petition with costs.

On her part, the 3rd respondent filed her response to the petition on 18th September 2017 and maintained that she was validly elected in free, fair and transparent elections conducted by the IEBC and the 2nd respondent in accordance with the Constitution and the Elections Act. Specifically on Laisamis Constituency, the 3rd respondent averred that the primary data was in the statutory forms and that it was only in respect of the presidential election that the law required electronic transmission of the results to the online portal; that the appellant's agents duly signed the necessary forms and authenticated the results; that the returning officer was lawfully appointed and a *corrigenda* duly published; and that the 3rd respondent had no role in the appointment of returning officers.

Turning to Saku Constituency, the 3rd respondent denied all the petitioner's averments in respect thereto and in particular the existence of the marked ballot papers that were allegedly found there. As for Moyale constituency, she pleaded that the results in the primary documents were not challenged, were authenticated by the appellant's agents, and that in any event, the online portal was not a source of the election results; that there was no credible pleading or evidence of stuffing of ballot papers; that no registered voter was denied the right or opportunity to vote; and that the claim of deliberate rendering the appellant's votes stray votes was a bare allegation.

Lastly, as regards North Horr Constituency, the 3rd respondent pleaded that no voter was disenfranchised by the alleged concentration of polling stations at Dukana Primary School and that Form 39A showed that people voted in all the areas that the appellant alleged had no polling stations. Like her co-respondents, the 3rd respondent urged the court to find no merit in the petition, confirm that she was validly elected and dismiss the petition with costs.

Chitembwe, J. heard the petition and took evidence from a total of 26 witnesses. By his judgment, which is impugned in this appeal, the learned judge held that the allegations in the petition were not proven and that the 3rd respondent was validly elected the Marsabit County Woman Representative to the National Assembly. Accordingly he dismissed the petition with costs and awarded the IEBC and the 2nd respondent costs of ***Kshs 2,500,000.00*** and the same amount to the 3rd respondent. The appellant was aggrieved by the judgment and preferred this appeal.

The appeal is founded on 28 grounds of appeal, which from the outset make nonsense of the requirement by the rules of this Court that a memorandum of appeal should only ***"set forth concisely and under distinct head, without argument or narrative, the grounds of objection to the decision appealed against."*** We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric. As this Court noted in ***Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR,*** a surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs. As if the superfluity of

grounds of appeal was not bad enough, 16 of the 28 grounds put forth by the appellant purport to challenge the findings of the trial court on matters of fact, with the express employment of the phrase that ***"the learned judge erred in law and in fact",*** which is a blatant violation of ***Section 85A*** of the Elections Act, that confines appeals to this Court from election petitions to matters of law only. When we drew the attention of the appellant's counsel to these obvious pitfalls, he did not dispute that many of the issues raised in the appeal challenged the trial court's factual findings, but his answer was that section 85A of the Elections Act is unconstitutional, an issue we shall revert to later in this judgment.

After a pre-hearing conference, the parties to the appeal agreed by consent to file and exchange written submissions, which they subsequently highlighted orally. In her written and oral submissions, the appellant's numerous grounds of appeal somehow coalesced into only six, in which she contended that the learned judge erred by irregularly admitting and relying on Form 39s after the parties had closed their respective cases, which was a violation of her right to fair hearing; by upholding the illegal and irregular appointment of Jaffar Galgalo as the Laisamis constituency returning officer; by failing to hold that the right to vote was violated or diminuted in the impugned elections; by ignoring irregularities regarding the storage and preservation of the electoral materials and refusing to order scrutiny and recount; by selectively taking judicial notice of the results in Form 39C relating to the gubernatorial election in Marsabit County but failed to take judicial notice that it could not possibly have been signed by Hussein Malicha, the KANU party agent, as he claimed; and lastly as a consequence of the foregoing, by holding that the 3rd respondent was duly elected the Marsabit County Woman Representative to the National Assembly.

Starting with the jurisdictional question, ***Mr. Ochieng? Welukwe,*** learned counsel for the appellant, submitted, rather exuberantly we might add, that in ***Peter Gatirau Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR,*** the Supreme Court dealt only with the interpretation and application of section 85A of the Elections Act and not the constitutionality of the provision. In his view, the constitutionality of that provision was being raised for the very first time in this appeal. He urged us to find that section 85A is unconstitutional because it limits appeals to this Court from election petitions to matters of law only, whilst the jurisdiction of the Court under ***Article 164(3)*** is unlimited. In his perception, there is an inconsistency between section 85A of the Elections Act and Article 164(3) of the Constitution, which by dint of ***Article 2 (4)*** of the Constitution renders the former null and void to the extent of the inconsistency.

Turning to the first issue in the appeal, counsel submitted that the appellant filed contemporaneously with the petition a notice to produce requiring the IEBC and the 2nd respondent to avail, among others, original Forms 39As, 39Bs and 39C which they failed to comply with. Vide an application dated 12th October 2017, the appellant added that she applied for production of the said forms but the application was not heard and determined until after the parties had closed their cases and that the Forms were ultimately produced on 18th December 2017. She submitted that production of the documents after closure of her case constituted a violation of her right to access information guaranteed by ***Article 35*** of the Constitution and the ***Access to Information Act***. She further faulted the learned judge for basing his decision on those forms and for holding that they had not been challenged, which was a violation of her right to fair trial. She relied on the judgment of this Court in ***County Assembly of Kisumu & 2 Others v. Kisumu County Assembly Service Board & 6 Others [2015] eKLR*** and submitted that a fair trial is a constitutional imperative and by dint of ***Article 25(c)*** the right to a fair trial cannot be limited.

On the appointment of the Constituency Returning Officer for Laisamis, the appellant submitted that it was irregular and illegal and a violation of the principle of transparency and accountability in elections. Citing ***regulation 3*** of the ***Elections (General) Regulations, 2012***, she submitted that the IEBC was obliged to provide a list of prospective constituency returning officers and their deputies at least 14 days prior to appointment and that the regulations demanded that the recruitment be transparent and competitive. In the case of Galgalo, she submitted that he was recruited clandestinely a few weeks before the elections without any notice to candidates and their political parties. She added that he was a member and supporter of the *Borana* community, from which the 3rd respondent hails. The appellant relied on the judgment of the High Court in ***Republic v. IEBC ex parte Khelef Khalifa & Another [2017] eKLR*** and submitted that compliance with regulation 3 is mandatory.

The appellant further contended that because of the irregular appointment of Galgalo and his bias towards the 3rd respondent, it was proved that he refused to show her agents the results at the tallying centre or to give them copies despite request and also allowed the Form 39B for the constituency to be signed by a polling station agent who had no capacity to sign the form. She added that the voting in the County was on ethnic lines and that the learned judge erred by upholding the appointment of Galgalo, who was from one of the contesting ethnic groups, as a county returning officer. On the authority of the judgment in ***Abdikhaim Osman Mohammed & Another v. IEBC & 2 Others [2014] eKLR,*** the appellant submitted that the learned judge was obliged to seriously consider her complaints in that regard.

Regarding the violation of the right to vote, it was the appellant's submission that the learned judge erred by failing to find that the IEBC and the 2nd respondent failed to use the manual register of voters contrary to **Regulations 69** and ***72***, thus denying voters the right to vote. She

added that sufficient evidence was adduced of several voters who were denied the right to vote contrary to Articles 38 and 83 of the Constitution on the pretext that their names were not in the register of voters, whilst the real reason for excluding them was their ethnicity. She contended too that the complementary identification mechanism was not deployed to identify voters who the KIEMS machines were unable to identify.

On preservation of the election materials and scrutiny and recount, the appellant submitted that the court issued a preservatory order on 19th October 2018 before trial and directed the deputy registrar to submit a report on the condition of the materials. She submitted that the report unearthed major irregularities such as securing of the ballot boxes by seals without the IEBC logo; broken or missing seals; interchanged ballot box lids; and many ballot boxes that could not be identified with their polling stations. It was contended that ***regulation 61*** requires the IEBC to provide returning officers with seals of the Commission and also provides the manner in which the ballot boxes were to be sealed. The learned judge was faulted for ignoring or failing to properly appreciate the effect of all those irregularities. The appellant relied on ***William Odhiambo Oduol v. IEBC & 2 Others [2013] eKLR*** on the role and responsibility of the IEBC to safeguard election materials.

The appellant further contended that by a ruling delivered on 30th November 2017, the court ordered the IEBC to supply her with, among others things, Forms 32s; copies of all the original poll book diaries for the polling stations and tallying centres; voter register; and information from KIEMs kits or SD cards on voters who were identified biometrically or by the complimentary system. She urged that the IEBC refused to supply the Form 32s and the poll book diaries, and only partially complied with the order as regards the other materials. The Forms that were partially supplied, it was contended, showed many irregularities such as lack of signatures by agents, one agent singing the forms at different tallying centres, signing by an unauthorised polling clerk, and discrepancies on the date the forms were signed. It was contended that once again the learned judge erred by ignoring the irregularities as well as the IEBC's failure to comply with the court order. On the authority of ***Raila Odinga & Another v. IEBC & 6 Others [2017] eKLR,*** it was contended that the learned judge should have drawn an adverse inference against the respondents.

As regards scrutiny, the appellant submitted that the learned judge erred by dismissing her application on the grounds that the Form 39As had no mistakes and errors. She added that the learned judge misapprehended the law because in her view, the role of the court in scrutiny and recount is inquisitorial.

Regarding the selective taking of judicial notice by the learned judge of the Form 39C, the appellant submitted that the learned judge took judicial notice of the results of the gubernatorial election but failed to take judicial notice that the form was signed by the KANU party agent, who could not practically have signed the form as it was dated on a different date when he was far away. She relied on the decision of the Supreme Court in ***Nicholas Kiptoo arap Korir Salat v. IEBC & 7 Others [2015] eKLR*** on when judicial notice can be properly taken. Even some of the forms that the learned judge considered, it was contended, were not signed by agents and no reasons were given for their failure to sign contrary to ***regulation 79.*** The appellant relied on the decision of the High Court in ***Ahmed Abdullahi Mohamad & Another v. Mohamed Abdi Mohamed & 2 Others [2017] eKLR*** and submitted that where the forms have not been signed, the results are not credible.

Lastly, on whether the learned judge erred by holding that the 3rd respondent was validly elected, the appellant submitted that the irregularities that were proven were of a magnitude that vitiated the entire election because it was conduct in breach of the principles set out in **Articles 38, 81(e)** and ***86*** of the Constitution and did not represent the will of the people of Marsabit County. It was further contended that the margin of victory of ***5,677*** votes was insignificant in the face of the irregularities and on the authority of the decision of this Court in ***James Omingo Magara v. Manson Onyongo Nyamweya & 2 Others [2010] eKLR***, that the current ***section 83*** of the Elections Act is not intended to whitewash all electoral malpractices and irregularities. The appellant therefore urged us to allow the appeal, nullify the election of the 3rd respondent and award her costs.

The IEBC and 2nd respondent, who were represented jointly by ***Mr. Ochieng? Opiyo*** and ***Mr. Crispus Kabene***, learned counsel, opposed the appeal. Not surprising, counsel, who submitted in turns, started off by attacking the appeal for violating, in many respects, section 85A of the Elections Act which restricts appeals to this Court to matters of law only. They submitted that there was nothing unconstitutional about section 85A of the Elections Act and relied on the judgment of the Supreme Court in ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others*** (supra) on what constitutes a matter of law. They added that the Supreme Court had implicitly upheld the constitutionality of the provision and urged us to ignore issues of fact raised by the appellant. These respondents submitted that the appellant failed to discharge the burden of proof upon her, which required her to prove the allegations in the petition to a standard higher than on a balance of probabilities, but not beyond reasonable doubt, as articulated by the Supreme Court in ***Raila Odinga & Another v. IEBC & Others [2017] eKLR.***

Turning to the question of admission and reliance on the Form 39s, the IEBC and the 2nd respondent submitted that they had already produced those Forms and that in her application of 12th October 2017, the appellant had only sought production of the original Forms for purposes of confirming their authenticity and the security features. They added that the appellant had not challenged the results contained in the Forms. When the learned judge, after hearing all the parties, ordered the IEBC to furnish the original Forms 39As, 39Bs and 39c, he also directed the appellant to analyse the forms within 3 days and make copies, if she wished.

The IEBC contended that it promptly complied with the order and provided the materials on 18th December 2017. It added that the appellant's witness, ***Dr. Noah Akala (PW11),*** had already analysed the Forms that it had presented, prepared a report and testified on the

Forms, leading to recall of one of their witnesses to clarify on the security features of the Forms. It was also contended that after the appellant was granted access to the Forms and leave to analyse them, she did not apply to the court for recall of any witness or to re-open her case for purposes of introducing any new issue arising from the analysis, meaning that she was satisfied. Instead she opted to address the issue in her submissions, which were duly considered by the learned judge. We were therefore urged to find that in the circumstances, there was no basis on which the learned judge could be faulted.

On the appointment of the Laisamis Constituency returning officer, these two respondents submitted that the appointment was proper and within the law to the satisfaction of the trial judge, whose findings we should not disturb. They contended that Galgalo was duly appointed and gazetted as a returning officer for Isiolo North Constituency, but was subsequently transferred to Laisamis Constituency and *corrigenda* published to that effect. They added that no evidence of bias on the part of the returning officer was adduced, beyond general allegations based on his ethnicity.

Turning to the alleged violation of the right to vote, the two respondents contended that whether a particular person was allowed to vote or not and the reasons therefor or whether the manual voter register was marked or crossed out or not were all questions of fact which the learned judge considered and resolved and which we cannot delve into at this stage. Nevertheless they added that possession of a voter's registration slip without the name of the voter appearing in the register of voters for the relevant polling station did not entitle such a person to vote. They added that the register of voters was produced in court and that none of the people the appellant alleged to have been denied the right to vote were pointed out in any of the polling station registers.

Next the IEBC and the 2nd respondent addressed the issue of preservation of the election materials and scrutiny and recount. They submitted that contrary to the assertions by the appellant, the inspection report prepared by the deputy registrar found the ballot boxes to be intact and in good condition. They added that ***regulation 61(4)(e)*** does not require seals to bear the IEBC logos and that the law leaves it to the IEBC to determine the security features. In the case of seals, it was submitted, all the seals that the IEBC used had serial numbers, which were duly recorded. The one broken ballot box and few broken seals were caused by transportation on rough terrain, which the learned judge accepted and whose conclusion we were urged not to interfere with.

Accordingly the IEBC and the 2nd respondent urged us to uphold the finding by the learned judge that the 3rd respondent was validly elected and to dismiss the appeal with costs. They added that whatever irregularities occurred did not affect the will of the people of Marsabit County as regards their Woman Representative to the National Assembly and were curable under ***section 83*** of the Elections Act.

Last to take the podium were ***Mr. Innocent Muganda*** and ***Ms. Amina Hashi,*** learned counsel for the 3rd respondent, who also submitted in turns. Like the other two respondents, the 3rd respondent started by taking strong objection to the appeal to the extent that it expressly urged this Court to delve into matters of fact, which they contended are beyond the Court's jurisdictional remit under section 85A of the Elections Act. Citing the judgments of the Supreme Court in ***Gatirau Pater Munya v. Dickson Mwenda Kithinji & 2 Others*** (supra), ***Zachary Okoth Obado v. Edward Akongo Oyugi & 2 Other [2014] eKLR*** and ***Nathif Jama Adam v. Abdikhaim Osman & 3 Others [2014] EKLR*** the 3rd respondent submitted that this Court should not entertain an appeal founded on a challenge of the trial court's findings on probative value of evidence and credibility of witnesses, as invited to do by the appellant. Like the IEBC and the 2nd respondent, the 3rd respondent submitted that there was no inconstancy between Section 85A of the Elections Act and Article 164(3) of the Constitution.

The 3rd respondent urged, on the basis of ***Raila Odinga & 3 Others v. IEBC & 3 Others [2013] eKLR*** and ***Raila Odinga & Another v IEBC & Others [2017] eKLR***, that the burden of proof in an election petition seeking nullification of an election on alleged non-compliance with the law, lies with the petitioner who is obliged to prove his or her case to a threshold "above balance of probability" and below "beyond reasonable doubt". She added that by dint of section 83 of the Elections

Act, if the election is conducted substantially in accordance with the principles of the Constitution and electoral law and that any established breaches have not affected the result, the court cannot nullify the election. She contended, on the basis of the foregoing, that the appellant utterly failed to discharge the burden of proof on her to the required standard.

Turning to the merits of the appeal, the 3rd respondent submitted that the appellant did not dispute or challenge the results as contained in the statutory forms, which were supplied by the IEBC and did not call any witnesses in that regard. Further that when the learned judge ordered IEBC to provide the statutory forms and access to the servers, he also directed the appellant to file any application she desired to file by 16th December 2017. Instead the appellant opted to file an application for scrutiny and recount, which failed and thereafter neither made any application as allowed by the court nor sought the re-opening of the petition or recall of any witness. We were therefore urged to find that the fault lay squarely with the appellant and that she cannot shift blame to the court. The 3rd respondent also maintained that the appellant totally failed to demonstrate how her right to information was violated, because the forms were produced and access to the servers granted as directed by the court.

Regarding of the appointment of Jaffar Galgalo as the returning officer, the 3rd respondent submitted that the issues raised by the appellant were factual and amount to a bare challenge of the conclusions reached by the learned judge after he heard, saw, determined the probative value of the competing evidence, and chose which evidence to believe. Additionally, the 3rd respondent submitted that the appellant did not establish how the appointment of Galgalo affected the outcome of the election. She argued that his appointment was in conformity with regulation 3 and was duly published in *corrigenda*. On the authority of ***Francis Mwangangi Kilonzo v. IEBC & 2 Others [2018] eKLR***, the appellant submitted that any allegations of bias on the part of a returning office must be substantiated, which the appellant failed to do in this

case.

On preservation of the election materials and scrutiny and recount, the 3rd respondent submitted that not a single ballot box was found with ***all*** the seals broken and the learned judge accepted the explanation for the broken seals, which we should not disturb. She also contended that regulation 61(4)(e) does not require the IEBC seals to be branded. As regards the IEBC's alleged failure to provide the appellant with Form 32s, the 3rd respondent submitted that the issue was not pleaded in the petition and therefore was not before the trial court. She relied on the judgment of the Supreme Court in ***Raila Odinga & Another v. IEBC & 2 Others*** (supra) and that of this Court in ***Stephen Mutinda Mule & 3 Others [2014] eKLR*** and submitted that the court can only address issues that the parties have pleaded.

As for scrutiny and recount, the 3rd respondent submitted that it is ordered at the discretion of the court rather than as a matter of course and further that when the court is satisfied that a petitioner has established the basis, scrutiny and recount is limited only to the disputed polling stations. In support of those propositions the 3rd respondent cited the decisions in ***Nathif Jama Adam v. Abdikhaim Osman Mohamed & 3 Others*** (supra) ***Nicholas Salat v. Wilfred Rotich Lesan & Others [2013] eKLR,*** and ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others*** (supra). She added that the appellant had sought scrutiny and recount in all the polling stations which was contrary to the pleadings and that on the basis of the evidence already adduced, the learned judge properly exercised his discretion and refused to allow scrutiny and recount.

On the alleged violation of the right to vote and failure to use or mark the manual register, the 3rd respondent submitted that the issue was not pleaded in the petition and therefore should not be considered. She relied in support of that view on the judgements of this Court in ***IEBC & Another v. Stephen Mutinda Mule & 3 Others*** (supra) and that of the Supreme Court in ***Zachary Okoth Obado v Edward Akongo Oyugi & 2 Other [2014] eKLR*** (supra). In any event, the 3rd respondent submitted, although the registers were produced in court, the appellant failed to identify a single voter whose name was in the register and was denied an opportunity to vote. We were urged to find that a voter registration slip is not an identification document for purposes of exercising the right to vote. The 3rd respondent also added that the appellant did not call even a single assisted voter to testify on the alleged denial of the right to vote or being coerced to vote contrary to his or her wish.

Concluding her submissions, the 3rd respondent submitted that to annul her election, the appellant was obliged to prove beyond a balance of probabilities that the election was not conducted in compliance with the Constitution and electoral law or that substantial or material electoral malpractices and irregularities, which affected the result, were committed. She contended that the appellant had failed to establish any of the foregoing and urged us to dismiss the petition with costs.

We will start with the jurisdictional issue on what we can properly entertain in this appeal from an election petition. Section 85A of the Elections Act provides that:

> ***"85A Appeals to the Court of Appeal***
>
> ***(1) An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of county governor shall lie to the Court of Appeal on matters of law only and shall be-***
>
> ***(a) filed within thirty days of the decision of the High Court; and***
>
> ***(b) heard and determined within six months of the filing of the appeal."*** [Emphasis added].

That provision has been the subject of exhaustive consideration and interpretation by the Supreme Court, particularly the rationale behind restriction of appeals to this Court to matters of law only. In ***Gatirau Peter Munya v. Dickson Mwenda Kithinji*** (supra) that Court expressed itself as follows:

> ***"It is now a constitutional imperative that the electorate should know with finality, and within reasonable time, who their representatives are. The people?s will, in name of which elections are decreed and conducted, should not be held captive to endless litigation. Herein lies the nexus between Article 87 (1) of the Constitution and Section 85A of the Elections Act. Election petitions, not surprisingly, come up for special legislation that prescribes the procedures and scope within which Courts of law have to resolve disputes. Thus, judicial resources should be utilized efficiently, effectively and prudently. By limiting the scope of appeals to the Court of Appeal to matters of law only, Section 85A restricts the number, length and cost of petitions and, by so doing, meets the constitutional command in Article 87, for timely resolution of electoral disputes. Section 85 A of the Elections Act is, therefore, neither a legislative accident nor a routine legal prescription. It is a product of a constitutional scheme requiring electoral disputes to be settled in a timely fashion. The Section is directed at litigants who may be dissatisfied with the judgment of the High Court in an election petition. To those litigants, it says: "Limit your appeals to the Court of Appeal to matters of law only."*** [Emphasis added].

In our view, there can be no illusion that in the above pronouncement, the Supreme Court found that the limitation by section 85A of appeals to this Court to matters of law only is an actualization of constitutional values and principles on finality and expeditious determination of electoral disputes. It therefore does not make much sense to assert, as the appellant does, that a provision which has been expressly found by the Supreme Court to give effect to values and principles of the Constitution, is nevertheless unconstitutional.

If ***Gatirau Peter Munya v. Dickson Mwenda Kithinji*** was not clear enough on the constitutionality of section 85A of the Elections Act, which we have no doubt it was, the Supreme Court addressed the question head-on in ***Frederick Otieno Outa v. Jared Odoyo & 4 Others*** ***(SC. Pet. No. 10 of 2014)*** where it was contended, as the appellant does in this appeal, that Article 164(3) of the Constitution does not limit the jurisdiction of this Court in appeals from the High Court, and that section 85A of the Elections Act is inconsistent therewith and unconstitutional to the extent that it purports to limit appeals in election petitions to matters of law only.

Rejecting the contention, the Supreme Court held that the Elections Act is a special regime of law enacted pursuant to power expressly donated by the Constitution to Parliament to put in place a framework for timely electoral dispute resolution. The Court explained itself thus:

> ***"From that foundation, we would observe that Section 85A manifests Parliament?s intention to regulate the scope of appeals to the Court of Appeal to „matters of law only?. We decline, with respect, the 1st respondent?s contention that the provision should be struck out, as an undue limitation on the Court of Appeal?s jurisdiction as conferred by Article 164 (3)***
>
> ***(a) of the Constitution. We reaffirm our earlier position, that the statutory provision regarding the jurisdiction of the Court of Appeal, and in relation to "matters of law," is not a limitation to, or a restriction of the Court of Appeal?s jurisdiction under Article 164 (3) (a)."***

Ultimately the Court Concluded as follows:

> ***"We hold that the law can regulate or confine the time within which, or the scope or nature of questions that, an appeal Court may accord a hearing – as long as that restriction does not negate or defeat the essence of the right of appeal, or diminish the spirit of the fundamental right to adjudication of electoral disputes. Any such restrictions embodied in statute law, we would hold, are not to be regarded as a breach of the Constitution. We hold, accordingly, that Section 85A of the Elections Act entails no qualification to the terms of the Constitution."***

In light of the foregoing, we do not see any merit in the appellant's purported challenge of section 85A of the Elections Act, which is neither new, novel, nor earth-shaking as the appellant's counsel supposes. We hereby reject.

As regards the interpretation and application of section 85A, the Supreme Court has stated and restated that a matter of law which this Court can validly consider in an election petition appeal is one involving firstly, the interpretation or construction of the Constitution, statutes or regulations made thereunder, or secondly, their application to the sets of facts established by the trial court, and lastly, determination of whether the conclusions of the trial judge are based on the evidence on record or are so perverse that no reasonable tribunal would have arrived at them. (See ***Gatirau Peter Munya v. Dickson Mwenda Kithinji*** (supra), ***Zachary Okoth Obado v. Edward Akongo Oyugi & 2*** Other (supra) and ***Nathif Jama Adam v Abdikhaim Osman & 3 Others*** (supra)). Barely a month ago in ***Mohamed Abdi Mahamud v. Ahmed Abdullahi Mohamad*** & ***3 Others [2018] eKLR***, this Court rejected the notion that it can be invited in an election petition appeal to consider "questions of mixed law and fact" and reiterated as follows:

> ***"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."***

That is the approach that we shall take in this appeal. We shall not delve into any issues that require us to re-evaluate the evidence and come to our own conclusion, as we would normally do in any other first appeal. We shall defer to conclusions of fact by the trial court as regards the credibility of witnesses and the probative value of the evidence that was adduced.

Where it is alleged that the trial court acted on no evidence or that its decision is so perverse that no reasonable tribunal would have come to the decision, we are persuaded that the correct approach to take is that articulated by the Supreme Court of India in ***Damodar Lal v. Sohan Devi & Others, CA No. 231 of 2015,*** namely that if there is some evidence on record which is acceptable and which could be relied upon, the conclusions of the trial court cannot be treated as perverse and its findings cannot be interfered with. The court expressed the proposition in these terms:

> ***"Even if the finding of fact is wrong, that by itself will not constitute a question of law. The wrong finding should stem out on a complete misreading of evidence or it should be based only on conjectures and surmises. Safest approach on perversity is the classic approach on the reasonable man?s inference on the facts. To him, if the conclusion on the facts in evidence made by the court below is possible, there is no perversity. If not, the finding is perverse. Inadequacy of evidence or a different reading of evidence is not perversity."***

In the first issue, the appellant contends that her right to fair trial was violated by late admission and reliance by the court on Form 39s availed after closure of the parties' cases. In view of this complaint, it is apposite to consider what really transpired in court so as to determine whether the appellant was denied fair trial of her petition as she alleges.

The record shows that when she filed the petition, the appellant also filed a notice to produce, requiring the 2nd and 3rd respondents (not the

IEBC) to produce among others, copies of Forms 39As, 39Bs and 39C, all used poll diaries, and voting logs contained in the KIEMS kits used at the polling stations, which she claimed were in their custody. The 3rd respondent filed a notice of objection dated 17th September 2017 in response to the notice to produce on the basis that there were no pleadings backing the notice to produce. Nevertheless, when the respondents filed their responses to the petition and witness affidavits in support of the response, they annexed copies of Forms 39As for the polling stations identified in the petition, 39Bs for Laisamis, Saku, Moyale and North Horr Constituencies, 39C, 39D, and copies of various polling centre registers.

On or about 12th October 2017 the appellant applied to be given access to the IEBC election technology system network architecture, KIEMS kits, all original Forms 39As, 39Bs and 39C, poll book diaries, and the register of voters. The application was heard on 13th November 2017 and ruling reserved for 30th November 2017. It is apt at this point to reiterate that the respondents and their witnesses had already provided copies of the forms and the voter registers for the polling stations complained about, as annextures to affidavits in support of the responses. Indeed the contention of the IEBC was that it had supplied the forms to the appellant far much earlier and that she had used the forms to frame her petition.

On 27th November 2017, before the ruling was delivered, all the parties agreed by consent, to commence the hearing of the petition. The court heard the appellant and her witnesses on 27th and 28th November 2017, when she requested for time to call her last two witnesses. In the meantime, again by consent, the parties agreed that the hearing of the IEBC and the 2nd respondent's case should begin immediately. The witnesses for those parties were heard on 29th November 2017. On 30th November the 3rd respondent's witnesses took the stand but their evidence was interrupted to hear the appellant's last two witnesses, one of whom was Dr. Noah Akala Aduwo (PW11), an analyst and technical adviser who was National Super Alliance's (NASA) technical team leader. The significance of his evidence for the purposes of this ground of appeal was that he confirmed having analysed, on behalf of the appellant, the forms already provided by the IEBC and thought they were counterfeit. The appellant then closed her case and the IEBC applied for recall of Jaffar Galgalo (DW2) in light of PW11's evidence. That witness testified on the authenticity of the forms and was subjected to further cross-examination, before the IEBC closed its case.

All this happened on 30th November 2017, the date the learned judge had scheduled to deliver the ruling on the appellant's application to access the specified electoral materials. The ruling was delivered and the learned judge directed the IEBC to provide the appellant, latest by 18th December 2017, with the original statutory forms, the register of voters, SD cards and read-only access to KIEMs Kit and SD cards data. The hearing of the petition resumed the next day, when the 3rd respondent completed and closed her case.

The appellant then intimated to the court that she might file an application after perusing the materials supplied by the IEBC.

Accordingly, the court fixed the petition for mention on 20th December 2017 to enable the appellant file an application, if any, in that regard. On the date scheduled for the mention, after complaints that the appellant had not had time to analyse the forms that were provided by the IEBC and allegations of lack of full compliance with the order, the learned judge gave the appellant an additional three days to analyse the forms supplied and for full compliance with its orders.

On 15th January 2018 when the court next sat, the appellant had neither filed any application regarding the statutory forms nor sought any further hearing regarding those forms. Instead she filed an application for scrutiny and recount, which was heard and dismissed, vide a ruling dated 31st January 2018. Subsequently the court heard the parties' submissions before rendering the impugned judgment on 19th February 2018.

We have gone to some detail in this background to demonstrate that the appellant cheerfully, readily and by consent, went along with the other parties as regards the conduct of the trial. In the absence of any evidence that the trial court adopted extra-legal or unconstitutional procedures, the appellant, just like all the other parties, was the master or mistress of her own interests in the litigation. Only she could determine what was in in her best interest. She was at liberty to forgo her rights or fully insist on her pound of flesh. In this case, the parties, the appellant included, agreed in unison to commence the hearing of the petition well knowing that there was a pending ruling on provision of the materials that the appellant had applied for. As of the date the appellant's witness, PW11, testified on the basis of his witness affidavit prepared before the filing of the petition, he informed the court that he had already analysed the relevant statutory forms, which appears to support the IEBC's contention that they had provided the forms to the appellant, which she used to frame her petition. We note that the appellant applied for time to call that particular witness, even delaying closure of her case, for that purpose. She could easily have taken similar course of action, or applied for recall of witnesses, after being supplied with the electoral materials by the IEBC in compliance with the court order. Indeed, the court allowed the appellant when it made the order for mention of the petition on 20th December 2017, to make any relevant application arising from analysis of the forms supplied by IEBC, but she failed make any application.

In these circumstances, we are not persuaded that it can rightfully fall from the mouth of the appellant to claim that she was denied the right to fair trial of the petition. She had opportunities galore to make whatever application she deemed in her best interest, which she readily and consciously allowed to slip by. We do not see any merit in this ground of appeal at all.

The second ground of complaint is the appointment of the Laisamis Constituency returning officer, Jaffar Galgalo. The appellant averred in the petition that he was clandestinely, irregularly and illegally appointed in violation of regulation 3, just a few weeks to the elections. She contended that he was appointed at the instigation and prompting of the 3rd respondent, was never gazetted, and accused him of bias on the basis of his ethnicity as a Borana, like the 3rd respondent. All the respondents dismissed this ground as baseless, contending that the returning officer was lawfully appointed and that no evidence of bias on his part was ever adduced.

The pertinent part of regulation 3 of the Elections (General) Regulations, 2012, which the appellant alleges was violated, provides as follows:

> ***"3. (1) The Commission shall appoint a constituency returning officer for each constituency and may appoint such number of deputy constituency returning officer for each constituency as it may consider necessary.***
>
> ***(2) Prior to appointment under paragraph (1), the Commission shall provide the list of persons proposed for appointment to political parties and independent candidates at least 14 days prior to the proposed date of appointment to enable them make any representations."***

The evidence that was adduced by the IEBC and which the learned judge accepted, was that Galgalo was initially appointed as the constituency returning officer for ***Isiolo North Constituency*** in ***Isiolo County*** whilst ***Anthony Kiriri Kimani*** was appointed the constituency returning officer for Laisamis Constituency. Their appointments were duly published in the Kenya Gazette of 5th May 2017. There was no allegation or evidence that those appointments were anything but regular.

Due to administrative and logistical challenges, IEBC was forced to effect transfer of some of the constituency returning officers. Towards that end Galgalo was moved from Isiolo North Constituency to Laisamis Constituency, Kimani from Laisamis Constituency to Wajir South and Abdikadir Abdullahi Ahmed from Wajir South to Isiolo North. Those transfers were duly published in *corrigenda* in the Kenya Gazette dated 10th July 2017, about one month before the elections, for public information and notice.

The evidence, which we cannot interfere with, shows that the transfers were nothing but normal course-of-business transfers. There was no evidence of involvement of the 3rd appellant in the transfers, which, as is vividly clear, did not affect Galgalo alone. More importantly, the evidence, which the learned judge accepted, showed that Galgalo does not hail from Marsabit County where he was redeployed, but from Isiolo County. Regulation 3 required notification of the initial appointment of the retuning officer to the political parties and to independent candidates. Even assuming, without deciding, that subsequent transfers required similar notification, the appellant was not entitled to personal notification as she contends because she was not an independent candidate. Her party, the Frontier Alliance Party, is the one that was entitled to notification, and no credible evidence was adduced before the learned judge that it complained that it was never so notified.

With respect, the complaint against Galgalo's transfer was founded on pure conjecture informed by his ethnicity, rather that anything unworthy that he had done as a constituency returning officer. His role was primarily to tally and announce the results contained in the primary forms emanating from the polling station, which were final, and he had no power to alter or modify. In ***IEBC v. Maina Kiai & 5 Others*** (supra), this Court stated emphatically that the results announced at the polling stations are final and cannot be altered, even by IEBC. The learned judge found, and properly so in our view, that the appellant did not adduce any evidence to show that Galgalo announced results other than those that were in the Form 39As.

No person should be vilified or condemned only on account of their ethnicity, over which they have no control. The mere fact that Galgalo and the 3rd respondent were from the same ethnic community could not disqualify him as a returning officer, without evidence of bias or partiality on his part, which the trial court, again, did not find. In ***Richard Nchapi Leiyagu v IEBC & 2 Others [2014] eKLR*** this Court was confronted with, among others, contentions that appointment of election presiding officers in ***Laikipia North Constituency*** was vitiated by reason of their clans. The Court emphasized that the IEBC has a constitutional obligation, stemming from the demand in ***Article 81*** of the Constitution that elections should be conducted in a transparent, neutral and impartial manner, to ensure that the recruitment of officers to superintend over elections as well as the actual discharge of duty by such officers, truly manifest transparency, neutrality, impartiality and other constitutional values. It added that it would be a contradiction in terms to expect election officials recruited through an opaque procedure that promotes cronyism, nepotism and favouristism to deliver a transparent, free and fair election. Nevertheless the Court rejected the argument that a presiding officer was disqualified purely on account of his or her clan or ethnicity. The Court stated thus:

> ***"Before us, Mr. Issa laid more emphasis on the fact that some of the officials were members of the 3rd respondent?s "clan" and that fact by and of itself undermined the constitutional principle on neutrality and impartiality Bearing in mind what we have said about the importance of impartiality and neutrality on the part of the election management body and its election officials, we must add that there are realities that also must be borne in mind, without necessarily negating the constitutional principle. In our view, it would be undermining the constitutional principle, if we were to interpret it as narrowly as the appellant invites us to do, so as to exclude sundry and all potential election officials on the basis that some candidates are their clansmen or clanswomen. In an election like that of Laikipia North Constituency where six candidates, presumably from different clans, were contesting, IEBC would have to disqualify many otherwise professional, honest and impartial Kenyans purely on the basis of their clans. In our view, a more realistic interpretation of the constitutional principle of neutrality and impartiality in elections, as it relates to relatives, would require more than vague allegations of clan ties, to disqualify a person as an election official."***

We reiterate that view and ultimately find no merit in this ground of appeal.

Turning to the third issue in this appeal pertaining to violation of the right to vote and the failure of the IEBC to use the manual register during the voting, the latter issue was never pleaded in the petition as a complaint in any polling station in the four constituencies of the County. It is not open to the appellant to introduce at the appellate stage issues that were neither pleaded in the petition nor determined by the trial court. That proposition is too well entrenched in this jurisdiction to require elaborate reiteration. We shall only refer to ***IEBC & Another v. Stephen Mutinda Mule & 3 Others*** (supra) where this Court quoted with approval, among others, the following passage from decision of the Supreme Court of Malawi in ***Malawi Railway Corporation v. Nyasulu*** ***[1998] MWSC 3:***

> ***"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings…for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute, which the parties themselves have raised by the pleadings."***

As regards the alleged denial of the right to vote, this is one of the issues where the appellant expressly invited us to dribble into matters of fact and supplant the findings of the learned judge on veracity and credibility of witnesses. In her submissions, the appellant has boldly invited us to reappraise the evidence of ***Hussein Issa Woche (PW4), Aharu Ayala Chacho (PW5), David Ganale Shamo (PW6)*** and ***Adan Mahulo Shame (PW7)***, hold that it was corroborated by that of ***Hassan Marsa Sarbo (PW3)*** and make our own findings that registered voters were denied the right to vote. This is an invitation to reach conclusions contrary to those reached by the learned judge as regards the evidence of those witnesses. We have already stated that our jurisdictional remit does not extend to such an undertaking. The learned judge reviewed all the evidence that was adduced on the alleged turning away of voters and concluded:

> ***"I do find that a majority of voters in Marsabit County did exercise their right to elect their political leaders by turning up at the polling stations and cast their votes. I have already explained how the petitioner?s agents participated in the election and signed the Form 39As at the polling stations. No voter who was found to be eligible to vote was turned away."***
>
> (emphasis added).

On the evidence on record, that is a conclusion that the learned judge was entitled to make and in our view is manifestly reasonable. The conclusion cannot, by any stretch of imagination be described as perverse in the sense we adverted to earlier. This complaint too, is baseless.

The next ground is the preservation of election materials, which the appellant contends was in violation of the regulations and pointed to massive irregularities, such as use of seals without IEBC logos, broken or missing seals, interchanged ballot box lids, and ballot boxes that could not be identified with the polling stations. The respondents deny the irregularities cited by the appellant, contending that none of the ballot boxes was found bereft of all seals, the law does not require IEBC logos on the seals and that the breakage of some of the ballot boxes was explained to the satisfaction of the learned judge.

After the trial court ordered preservation of the election materials, the deputy registrar prepared and submitted to court a report on the condition of the ballot boxes from all the four constituencies of the County. 138 boxes were examined from Moyale Constituency, 69 from Saku Constituency, 79 from Laisamis Constituency and 101 from North Horr Constituency.

For Moyale Constituency, all the ballot boxes were found to have serial numbers and all but one had the IEBC seals. Even that one ballot box was not entirely seal-less; it had the appellant's seal intact. All the IEBC seals on the ballot boxes had serial numbers, except three seals, which did not have the IEBC logos. On all the ballot boxes the appellant's seals were intact. The condition of all the ballot boxes was noted as "intact" except one, which was noted as "damaged". Lastly, 2 ballot boxes had lids for Governor's ballot boxes and one a lid for the Senator's ballot box.

In Saku constituency, all the ballot boxes had serial numbers and all the IEBC seals had serial numbers. Two ballot boxes however did not have the IEBC seals but the appellant's seals were found intact. The condition of all the ballot boxes was noted as "good condition". For Laisamis Constituency, all the ballot boxes were found to have serial numbers, while all the IEBC seals had serial numbers, save that some of the seals did not bear the IEBC logos. Three ballot boxes did not have the IEBC seals, but had the appellant's seals intact. In one of the ballot boxes the IEBC seal and that of the 3rd respondent were noted as broken, but the appellant's seal was noted as intact. The condition of all the ballot boxes for that constituency was noted as "intact". Lastly, as regards North Horr Constituency, all the ballot boxes had the IEBC serial numbers and all the IEBC seals had serial numbers except one, but the ballot box to which it related was secured by the appellant's seal, which was noted to be intact. Two ballot boxes had missing the IEBC seals but those of the appellant were found to be intact. Finally, on one ballot box the IEBC seal was broken, but that of the appellant was intact. All the ballot boxes from this constituency were marked as in "intact" condition.

As submitted by the respondents, none of the ballot boxes was found to be completely without any seal. The IEBC explained that the one damaged ballot box and the few broken seals were as a result of transportation on rough terrain. The bulk of the appellant's complaint was lack of the IEBC logos on some of its seals. Regulation 61(4) (e) requires the IEBC to provide its returning officers with, among others, seals of the Commission suitable for purposes of securing the ballot boxes as provided by the regulations. That regulation does not require the seals to necessarily have the logo of the IEBC. What is important in our view is that any seal used by the IEBC should be identifiable as its seal. The IEBC's evidence was that due to the sheer numbers of

ballot boxes employed in all the six elections countrywide on 8th August 2017, the seals bearing its logos were not enough. So it used seals without its logo, but with serial numbers that were duly recorded and used to identify the seals as the IEBC seals.

The learned judge, having weighed all the evidence, accepted the evidence that was adduced by the respondents instead of that by the appellant. He accepted the explanations on the broken seal, the damaged ballot box and the use of seals with serial numbers rather than logos. He concluded that the deputy registrar's report did not raise any doubt on the security of the election materials and that all the ballot boxes were intact. Unlike us, he had the advantage of seeing and hearing the witnesses live. There was evidence upon which the learned judge could have concluded as he did. We find that there was nothing irrational or perverse about his conclusions.

The next complaint by the appellant regards the manner in which the learned judge exercised his discretion and denied scrutiny and recount. On 12th January 2018, after conclusion of the hearing, the appellant applied for scrutiny and recount of ***all*** the ballots cast in favour of ***all*** the candidates in ***all*** the polling stations in the County. As a corollary, she sought scrutiny, in all polling stations in the County, of all the printed registers that were used; all form 32s and 32As; and all spoilt, rejected, stray, and counted ballots and counter foils. The respondents opposed the application, contending that the appellant had not laid any basis for scrutiny and recount; that the registers and statutory forms sought had already been provided by the IEBC; that the figures in the statutory forms which were the primary data had not been disputed or challenged; and that the appellant was requesting the court to conduct an inquiry in respect of matters that she had not pleaded or complained about in the petition.

In dismissing the application, the learned judge reiterated, among others, that scrutiny and recount should be confined to the specific polling stations where the results are disputed and that the purpose of scrutiny and recount is not to fish for new evidence to bolster a petitioner's case. He noted that the appellant had sought scrutiny and recount in all polling stations in the County, which was not consistent with the complaints in the petition and that some of the reasons for which recount was applied for, such as voting after 5 pm or the number of assisted voters, went to the manner in which the election was conducted and could not be resolved through recount. He further noted that he had directed the IEBC to avail the voters' registers and statutory forms and had allowed the appellant access to SD cards and that the electoral materials had been preserved after which the deputy registrar had submitted a report that indicated that all the ballot boxes were intact. The learned judge examined the statutory forms, whose figures he found were not disputed and all, except 16, were signed by the agents of the political parties and found that they had no problems. He accordingly declined to grant the application for scrutiny and recount. That is what the appellant is challenging in this ground of appeal.

Section 82 of the Elections Act empowers the election court, on its own motion or on application by any party to the petition, to order for a scrutiny of votes. The pertinent part of ***rule 29*** of the Elections (Parliamentary and County Elections) Rules, 2017 provides as follows:

> ***"29 (1) The parties to the proceedings may apply for scrutiny of the votes for purposes of establishing the validity of the votes cast.***
>
> ***(2) On an application under-rule (1), an election court may, if it is satisfied that there is sufficient reason, order for scrutiny or recount of the votes."***

By rule 29(4), the scrutiny or recount of votes is confined to the polling stations in which the results are disputed.

In ***Raila Odinga v. Uhuru Muigai Kenyatta [2013] eKLR***, the Supreme Court explained that the purpose of scrutiny is to understand the vital details of the electoral process and to gain impressions on the integrity of the election. And in ***Gatirau Peter Munya v. Dickson Mwenda Kithinji*** (supra) the same Court set the following guidelines as regards scrutiny and recount, which we reproduce verbatim:

> ***"[153] From the foregoing review of the emerging jurisprudence in our courts, on the right to scrutiny and recount of votes in an election petition, we would propose certain guiding principles, as follows:***
>
> > ***a. The right to scrutiny and recount of votes in an election petition is anchored in Section 82(1) of the Elections Act and Rule 33 of the Elections (Parliamentary and County Elections) Petition Rules, 2013. Consequently, any party to an election petition is entitled to make a request for a recount and/or scrutiny of votes, at any stage after the filing of petition, and before the determination of the petition.***
> >
> > ***b. The trial Court is vested with discretion under Section 82(1) of the Elections Act to make an order on its own motion for a recount or scrutiny of votes as it may specify, if it considers that such scrutiny or recount is necessary to enable it to arrive at a just and fair determination of the petition. In exercising this discretion, the Court is to have sufficient reasons in the context of the pleadings or the evidence or both. It is appropriate that the Court should record the reasons for the order for scrutiny or recount.***
> >
> > ***c. The right to scrutiny and recount does not lie as a matter of course. The party seeking a recount or scrutiny of votes in an election petition is to establish the basis for such a request, to the satisfaction of the trial Judge or Magistrate. Such a basis may be established by way of pleadings and affidavits, or by way of evidence adduced during the hearing of the petition.***

d. Where a party makes a request for scrutiny or recount of votes, such scrutiny or recount if granted, is to be conducted in specific polling stations in respect of which the results are disputed, or where the validity of the vote is called into question in the terms of Rule 33(4) of the Election (Parliamentary and County Elections) Petition Rules."

We have noted that in rejecting the application for scrutiny and recount, the learned judge took into account the factors we have set above and in particular the mischievous request for scrutiny and recount in ***all*** the polling stations in the County when no such corresponding complaint was laid in the petition. The learned judge also considered the Form 39As on record, which he properly found to be the primary documents and whose figures were neither challenged nor contested by the appellant. We are not able to discern any misdirection on the law in the manner in which the learned judge dealt with the application for scrutiny and recount. We must also reiterate that where a complaint essentially challenges exercise of discretion by the trial court, as this one does, this Court is not entitled to readily substitute its discretion for that of the trial court. An appellate court will not interfere with the exercise of discretion by the trial court unless it is satisfied that its decision is clearly wrong because it misdirected itself, or because it considered matters its should not have considered, or failed to consider matters it should have. (See ***Matiba v. Moi & 2 Others*** ***[2008] 1 KLR 670).***

The last ground of appeal relates to the taking of judicial notice by the trial court. The complaint rose from the appellant's contention thatthere were fundamental differences in the votes cast in the six elections as to render the results in the Woman Representative to the National Assembly election questionable. As it turned out, the learned judge was simultaneously hearing the appellant's petition with another petition challenging the outcome of the gubernatorial election in Marsabit County. Counsel who appeared for the parties in the appellant's petition were the same counsel appearing for the parties in the gubernatorial petition. When he came to address the issue, the learned judge delivered himself as follows:

"This court did not see the results of the other elections but had the advantage of dealing with the gubernatorial petition. The Forms 37 and 39C for the two elections of Governor and Women Representative give the results as follows:

Governor:	***Total valid votes***	***110,683***	
	Rejected votes	***323***	
			111,006
Woman Representative:	***Total valid votes***	***110,628***	
	Rejected votes	***330***	
			110,958

The above tabulation gives the comparison of the two elections. The "C" series give a difference of 48 votes for the entire county. More people are shown to have voted for the Governor that the Woman Representative. The difference is minimal, the difference can be attributed to stray votes that were deposited in the wrong ballot boxes. The prisoners voted for the president only and that led to more votes for that poll. The petitioner?s tabulation on the polls for the Governor and Woman Member of National Assembly is incorrect. The results in in the forms C series give a small margin of 48 votes. That cannot be regarded as an irregularity, which should call for nullification of the election. The source of the results for the other polls is not known. The Court cannot rely on those figures as they were not provided by IEBC."

We seriously doubt whether the learned judge could validly refer to and rely on evidence, which was not produced before him, the way he did. We are not convinced that he could even take judicial notice of that evidence, which really was not a matter of general or local notoriety. In ***Gupta v. Continental Builders Ltd*** ***(1976-80) 1 KLR 809, Madan, JA,*** (as he then was) stated as follows on judicial notice:

"The party who asks that judicial notice be taken of a fact has the burden of convincing the judge (a) that the matter is so notorious as not to be the subject of dispute among reasonable men, or (b) that the matter is capable of immediate accurate demonstration by resort to readily accessible sources of indisputable accuracy."

In this appeal, the appellant does not fault the learned judge for relying on forms that were produced in a different case, as we would have expected. Instead, she faults the judge for failing to rely on those forms so as to determine other disputed matters. Our finding that in the circumstances before him the learned judge was not entitled to take judicial notice of evidence that was produced before him in a different case, must put paid to the appellant's contention.

Exclusion of the evidence of the forms produced in the gubernatorial elections does not assist the appellant at all, because the learned judge,

having rejected as unreliable her evidence on the alleged disparities between the six elections, it meant that there was no credible evidence adduced in support of the her contention in this regard. From the record, we are satisfied that the appellant indeed did not adduce any credible and cogent evidence on the basis of which the court could find discrepancies in all the six elections proved.

On the question of costs, ***section 84*** of the Elections Act restates the trite principle that costs follow the event, unless for good reason the trial judge directs otherwise. The learned judge did not depart from that principle when he awarded both the IEBC and the 2nd respondent costs capped at Kshs 2,500,000 and the 3rd respondent a similarly capped figure, all which he was entitled to do under ***rule 90*** of the Election Petition (Parliamentary & County Elections) Petition Rules 2017. Considering that the advocates had to travel from Nairobi to Marsabit for the hearing of the petition, which took slightly more that four months, we do not think that the award can justifiably be described as extravagant or excessive. As ***Crabbe, JA.*** aptly stated in ***Kohli v. Popatlal [1964] EA 219***, a discretionary decision on costs by the trial court will not be altered by an appellate court unless it is demonstrated that it took into consideration irrelevant matters. (See also ***Supermarine Handling Services Ltd v. Kenya Revenue Authority, CA. No. 85 of 2006).*** In the event, we too find that this ground of appeal lacks merit.

In ***Raila Amolo Odinga & Another v. IEBC & Others*** (supra), the Supreme Court considered the application of section 83 of the Elections Act and the circumstances under which an election may be nullified for failure to adhere to provisions of the Constitution and the law or on account of irregularities. That provision provides as follows:

> ***"S. 83 No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election."***

The Court held that the provision must be read disjunctively rather than conjunctively because of the use of the word "or" in lieu of "and". It conclusion was as follows:

> ***"[203] Guided by these principles, and given the use of the word "or" in Section 83 of the Elections Act as well as some of our previous decisions, we cannot see how we can conjunctively apply the two limbs of that section and demand that to succeed, a petitioner must not only prove that the conduct of the election violated the principles in our Constitution as well as other written law on elections but that he must also prove that the irregularities or illegalities complained of affected the result of the election as counsel for the respondents assert. In our view, such an approach would be tantamount to a misreading of the provision."***

On the effect of section 83 as regards violation of the Constitution, the law and other irregularities, the Court delivered itself in these terms:

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

Looking, as a whole, at the manner in which the election for the Woman Representative to the National Assembly was conducted in Marsabit County, we would agree with the learned judge that there was no substantial breach of the Constitution or the law proved that would have justified nullification of the election. In the event, we find no merit in this appeal, which is hereby dismissed in its entirety. The appellant shall pay costs of ***Kshs. 500,000.00*** to the IEBC and a like sum to the 2nd respondent. She shall also pay costs of ***Kshs. 1,500,000.00*** to the 3rd respondent. It is so ordered.

Dated and delivered at Nairobi this 22nd day of June, 2018

D. K. MUSINGA

....

JUDGE OF APPEAL

P. O. KIAGE

....

JUDGE OF APPEAL

K. M'INOTI

....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR