**IN THE COURT OF APPEAL**

**AT NAIROBI**

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

**ELECTION PETITION APPEAL NO. 10 OF 2018**

**BETWEEN**

**PIUS YATTANI WARIO.....APPELLANT**

**AND**

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....1ST RESPONDENT**

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

**ALI MOHAMUD MOHAMED.....3RD RESPONDENT**

**NOAH AKALA ODUWO.....4TH RESPONDENT**

***(Appeal from the judgment and decree of the High Court of Kenya at Marsabit (Chitembwe, J.), dated 19th February 2018 in EP. No. 2 of 2017, (Formerly Nairobi EP. No. 15 of 2017))***

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**JUDGMENT OF THE COURT**

In the first general election under the Constitution of Kenya, 2010 held in March 2013, ***Ukur Yatani Kanacho (Kanacho)***, who is not a party to this appeal, was duly elected the first ***Governor*** of ***Marsabit County*** on an ***Orange Democratic Movement Party*** ticket. In the second general election held on 8th August 2017, he defended his seat on a ***Frontier Alliance Party*** ticket, against four other candidates, among them ***Ali Mohamud Mohamed, the 3rd respondent***. At the conclusion of that election, the ***2nd respondent, Arnold Mutwiri Njabani***, who was the Marsabit County Returning Officer, declared the 3rd respondent to have been duly elected Governor of Marsabit County. The 3rd respondent was on 18th August 2017 gazzetted as the governor-elect and ultimately sworn into office. According to the return, the voter turnout was ***78.33%*** of the registered voters. The candidates garnered votes as follows:

| *Candidate* | *Political Party* | *Votes* |
|---|---|---|
| *1. Adano Umuro Sora* | *Kenya African National Union* | *6,262* |
| *2. Ali Mohamud Mohamed* | *Jubilee Party* | *56,146* |
| *3. Kanacho Ukur Yatani* | *Frontier Alliance Party* | *47,929* |
| *4. Wario Ibrahim Dambi* | *Orange Democratic Movement* | *346* |

Kanacho was aggrieved by the outcome of the election and on 8th September 2017 lodged ***Election Petition No. 15 of 2017*** in the High Court of Kenya at Nairobi, challenging the election of the 3rd respondent. In addition to the 2nd and 3rd respondents, the ***Independent Electoral*** & ***Boundaries Commission (IEBC),*** the institution that under ***Article 88*** of the ***Constitution*** is responsible for, among others, conducting or supervising transparent, free and fair election, was made a respondent to the petition. The petition was subsequently transferred to the High Court of Kenya at Marsabit for hearing and determination, where it became ***Election Petition No 2 of 2017***. However, before the petition could be heard, Kanacho applied, on 15th January 2018, to withdraw the same and in accordance with **rules 21** and ***24*** of the ***Elections (Parliamentary and County Elections) Petition Rules, 2017,*** the court

allowed him to withdraw from the petition and substituted the ***appellant, Pius Yattani Wario*** and the ***4th respondent, Noah Akala Oduwo*** as petitioners.

The petition challenged the election of the 3rd respondent on the ground that it was not conducted in accordance with the principles and values of the Constitution and provisions of the Elections Act and the regulations made thereunder. The specific complaints were pleaded according to alleged violations in each of the four constituencies of Marsabit County. In ***Laisamis Constituency***, it was averred that Kanacho's agents were denied the right to participate in the election at the polling and the tallying centres; presiding officers purported to assist illiterate voters in the absence of agents and coerced them to vote for Jubilee Party candidates; Form 32s, in respect of assisted voters, were not filled as required by the regulations; votes were counted in a room without electricity and with lanterns switched off so as to create a conducive environment for manipulation of the results; Kanacho's agents were denied the right of recount of the votes and access to Form 37As; and that the constituency returning officer was changed illegally a few weeks to the election at the prompting of the 3rd respondent and was never gazetted as a returning officer.

In ***Saku Constituency***, it was pleaded that Kanacho's agents were denied access to Form 37As and 37B; marked ballot papers were found scattered around; illiterate voters were coerced into being assisted to vote in the absence of agents of the candidates or parties and to vote for Jubilee Party candidates; Kanacho's agents were denied the right to verify the counting and tallying of votes; Form 37B did not contain security features and was not signed by polling officials or agents; and that the results in the IEBC online portal were different from those in Form 37B.

As for ***Moyale Constituency***, the contention was that in some wards the IEBC and the 2nd respondent chased away Kanacho's agents before counting of the votes, closed the doors and stuffed the ballot boxes with votes; voters were denied the right to vote for no reason; voters on the queues at 5.00 pm were chased away and denied the right to vote; there were unusually high number of spoilt votes in the portal affecting Kanacho's strongholds; and that one of the agents or candidates alleged to have signed Form 37B could not have so signed because at the material time she was some 250 kms away.

Lastly, as regards ***North Horr Constituency,*** it was averred that the results in the IEBC online portal differed substantially from those in Form 37B; the online portal did not have results for various polling stations; and that in ***Dukana Ward***, mobile polling stations were located at ***Dukana Primary School*** instead of being dispersed to 8 different places in the ward.

It was also pleaded that although each voter was given a ballot paper for each of the six elections that were held simultaneously on 8th August 2017, there was a mismatch in the total number of votes cast in each election, affecting a total of ***99,787*** votes.

On the basis of the irregularities alleged above, the appellant and the 4th respondent prayed the court to find that the election was not conducted in accordance with the Constitution, the Elections Act and the regulation made thereunder; declare that the 3rd respondent was not validly elected Governor of Marsabit County; nullify his election; and direct the IEBC to conduct a fresh gubernatorial election in the County.

The IEBC and the 2nd respondent filed their joint response to the petition on 19th September 2017, whilst the 3rd respondent filed his response also on the same day. All those respondents denied the averments in the petition and contended that the Marsabit gubernatorial election was free and fair, conducted strictly in accordance with the Constitution, the Elections Act and the regulations made thereunder, and that the election of the 3rd respondent reflected the true and free will of the voters of Marsabit County. They further addressed individually all the complaints raised in each of the four constituencies of the County. In particular, they contended that no assisted voter had sworn an affidavit to vouchsafe for the alleged coercion to vote; that the results entered in Forms 37As were the primary data which the appellant and the 4th respondent did not challenge; that Kanacho's agents duly signed those forms signifying their correctness and satisfaction; and that Form 37Bs were accurate and formed the basis of declaration of the winner rather than what was in the online portal, which was only provisional. Accordingly the IEBC, the 2nd and the 3rd respondents urged the court to dismiss the petition for lack of merit and to uphold the 3rd respondents election.

***Chitembwe, J.*** heard a total of 30 witnesses in support and opposition of the petition and by his judgment dated 19th February 2018 which is the subject of this appeal, dismissed the petition and awarded the IEBC and the 2nd respondent costs of Kshs 2,500,000. The 3rd respondent was also awarded costs of the same amount. The appellant, one of the two people who had taken over the petition from Kanacho, was aggrieved and lodged the current appeal. His co-petitioner did not appeal but instead became the 4th respondent. That respondent not only supported the appeal, but also filed a cross-appeal, which we shall consider and determine together with the appeal.

Pursuant to ***rule 20*** of the ***Court of Appeal (Election Petition) Rules 2017***, a pre-hearing conference was held 3rd April 2018 at which the parties agreed by consent to file and exchange written submissions and subsequently to highlight them orally. The appellant's appeal was premised on 19 grounds of appeal, of which 10 claimed that in reaching his decision, the learned judge ***"erred in law and in fact"***. The 4th respondent followed a similar approach in his cross-appeal in which he set forth 7 grounds, 4 of which claimed that the learned judge ***"erred in law and in fact"*** in reaching his decision. In view of the express jurisdictional remit of this Court set by ***section 85A*** of the Elections Act and the strong objection by the IEBC, the 2nd and 3rd respondents to the grounds of appeal and cross-appeal raising matters of fact, we shall first dispose of that issue before considering the merits of the appeal.

In his written submissions, the appellant condensed all his grounds of appeal into two issues, namely; whether the learned judge erred by holding the appellant had failed to prove electoral irregularities that could vitiate the election of the 3rd respondent and whether he erred by awarding costs that were manifestly excessive. For his part, the 4th respondent contended in his cross-appeal that the learned judge erred by misrepresenting the deputy registrar's report on the storage and condition of the electoral materials; by selectively taking judicial notice of the contents of the statutory forms in the election for Woman Representative to the National Assembly in Marsabit County and failing to take judicial notice that they contradicted the evidence adduced by the 3rd respondent; by awarding manifestly excessive costs; and by holding that the irregularities that were proved did not vitiate the 3rd respondent's election.

Starting with the first broad ground of appeal, the appellant, who was represented by ***Mr. Omwanza Ombati*** and ***Mr. Onderi Nyabuti***,

learned counsel, submitted that the learned judge erred by failing to hold that the Forms 37Bs that were used to declare the results of the election were not authentic due to lack of security features and signatures. Although conceding that the Form 37Bs produced by the IEBC at the trial were duly stamped and signed, the appellant invited us to find, contrary to the findings by the learned judge, that those forms were not genuine or authentic and that the unstamped and unsigned forms which he had, were the forms that had been used to declare the results. For Saku Constituency, the appellant contended that the evidence on record showed that the Form 37B was not signed. He relied on the judgments of the Supreme Court in ***Raila Amolo Odinga & Another v. IEBC & 2 Others [2017] eKLR***, ***George Mike Wanjohi v. Steven Kariuki & 2 Others [2014] eKLR*** and ***Hassan Ali Joho & Another v. Suleiman Said Shabal & 2 Others [2014] eKLR*** to emphasise the importance of signing the result declaration forms. We were urged not to ignore the qualitative aspects of the election in favour of the quantitative aspect alone.

Secondly, it was the appellant's submission that the evidence on record proved that illiterate voters were improperly assisted to vote in violation of ***regulation 72*** of the ***Elections (General) Regulations, 2012*** and their political rights under ***Article 38*** of the Constitution. He added that the scrutiny report showed that there were no Form 32s and that the printed register was not duly marked as regards assisted voters. He relied on the decision of the High Court in ***Ahmed Abdullahi Mohamad & Another v. Mohamed Abdi Mohamed & 2 Others [2018] eKLR*** and submitted that in the absence of filled Forms 32s and marked register, the number of assisted voters could not be verified.

The third issue addressed by the appellant was violence, which he contended discouraged voters from voting, thereby affecting the election. He urged that sufficient evidence was adduced to show that Kanacho and the 3rd respondent were on 27th July 2017 found by the IEBC Tribunal to have breached the electoral code of conduct and sentenced to pay fines, which constituted conviction for election offences. The appellant urged us to find that the learned judge therefore erred in his conclusions as regards violence in the County and relied on ***Karanja Kabage v. Joseph Kiuna Kariambegu Ngana & 2 Others [2013] eKLR*** to make the point that elections are a process and that violence, which took place prior to the election date, cannot be ignored.

Lastly on costs, the appellant submitted that the costs awarded by the learned judge were manifestly excessive. He relied on the judgment of the High Court in ***Hezbon Omondi v. IEBC & 2 Others [2018] eKLR*** and submitted that costs in election petitions should be awarded on the footing that petitions are akin to public interest litigation and therefore should indemnify rather than deter would be petitioners. On the basis of the above arguments the appellant urged us to allow the appeal and declare the election of the 3rd respondent null and void.

We heard the 4th respondent first because he was supporting the appeal and had cross-appealed. Represented by ***Mr. Welukwe***, learned counsel, the 4th respondent started by justifying why we should consider both matters of law and matters of fact raised in both the appeal and his cross-appeal. He contended that the jurisdiction conferred on this Court by ***Article 164(3)*** of the Constitution is to hear ***"appeals from the High Court"*** without any form of limitation. Contrasting the provision with ***section 64 (1)*** of the former Constitution under which the jurisdiction of the Court was set by an Act of Parliament, the 4th respondent argued that under Article 164(3) Parliament has no role to play in determining the jurisdiction of this Court, which is set by the Constitution itself. Accordingly, and in his view, section 85A is not consistent with the Constitution to the extent that it limits appeals to this Court to matters of law only. He added that even in an election petition appeal, this Court retains the power under ***rule 29(1)*** of the ***Court of Appeal Rules*** to re-appraise the evidence and to draw inferences of fact. He boldly asserted that neither the Supreme Court nor this Court has ever addressed the question of the constitutionality of section 85A of the Elections Act, and urged us to find that the argument he had presented was "novel in nature", find section 85A unconstitutional and hold that the judgment of the Supreme Court in ***Gatirau Peter Munya v. Dickson Mwenda Kithinji [2014] eKLR*** is no bar to consideration of issues of fact in an election petition appeal. In the 4th respondent's view, citing section 85A to justify confining appeals to this Court from election petitions to matters of fact only, is "simplistic" and a "miscomprehension" of the jurisdiction of the Court.

Turning to support the appeal and present the cross-appeal which he argued together, the 4th respondent submitted that the learned judge erred by upholding the appointment of ***Jaffar Galgalo*** as the returning officer of Laisamis Constituency while his appointment was in violation of ***regulation 3*** of the Elections (General) Regulations, 2012, which requires the IEBC to recruit returning officers transparently and competitively; to avail the list of prospective appointees to political parties and independent candidates at least 14 days before appointment; and to publish the names of the appointees in the Gazette and in such other manner as it may deem necessary. He contended that even though Galgalo was transferred to Laisamis Constituency, the transfer was a new appointment, which required compliance with regulation 3. The 4th respondent cited the judgment of the High Court in ***Republic v. IEBC ex parte Khelef Khalifa & Another [2017] eKLR*** in support of the view that compliance with regulation 3 is mandatory. It was further contended that the learned judge also erred by failing to consider the qualitative effect of the evidence that Galgalo was a Borana like the 3rd respondent, and therefore partial and biased towards him. The decision of this Cour in ***Abdikhaim Osman Mohammed & Another v. IEBC & 2 Others [2014] eKLR*** was cited to support the view that the court must consider clanism in voting.

On violation of the right to vote, the 4th respondent submitted that evidence was adduced by PW1, PW2 and PW7 to prove that several registered voters were denied the right to vote on account of their ethnicity and that the learned judge erred in concluding otherwise. He also contended that evidence was adduced which showed failure by the IEBC to use the manual register either to identify voters or to record the particulars of the assisted voters.

On preservation of the election materials, the 4th respondent submitted that on 19th October 2017 the learned judge ordered preservation of the election materials and directed the deputy registrar to prepare a report showing the general condition of those materials. He contended further that the report showed major anomalies such as seals without the IEBC logos, broken seals, missing seals, broken ballot boxes and ballot boxes with interchanged lids for different elections, but the learned judge concluded, erroneously and contrary to the evidence, that the materials were intact. The 4th respondent further contended that on 30th November 2017 the learned judge ordered the IEBC to furnish copies of the original poll book diaries, the register of voters and information from KIEMS kits or SD Cards on identification of voters, which order the IEBC did not comply with. It was submitted that the learned judge erred by failing to draw an adverse inference against the IEBC and the 2nd respondent; by failing to consider the forensic report prepared by the 4th respondent; and by concluding that the Forms 37As were not contested. The judgment of the Supreme Court in ***Raila Amolo Odinga & Another v IEBC & Others [2017] eKLR*** was cited in support of the argument that the learned judge was obliged to draw an adverse inference against IEBC for failure to comply with the court's order.

Regarding the use of non-authentic forms, the 4th respondent adopted the submissions by the appellant and went into a detailed revisit of the

evidence on the form 37Bs for the four constituencies and argued that they were signed on different dates and purportedly by only 3 persons for the entire county. He therefore invited us to find differently from the learned judge regarding the circumstances under which the forms 37Bs were signed and dated, contending that although the issues were factual, the inconsistencies in the forms made the issues legal.

On judicial notice, the 4th respondent submitted that the learned judge erred by selectively taking judicial notice of the form 39Bs that were produced in the petition challenging the election of the Woman Representative to the National Assembly in Marsabit County. He contended that the learned judge should have taken judicial notice of the contents of the forms, which contradicted the evidence of the IEBC and the 3rd respondent. He cited the decision of the Supreme Court in ***Nicholas Kiptoo arap Korir Salat v IEBC & 7 Others*** ***[2015] eKLR*** on the circumstances under which the court can take judicial notice.

Lastly regarding costs, the 4th respondent submitted that the learned judge erred by taking into account the distance to Marsabit in awarding costs and by failing to take into account the fact that the appellant and the 4th respondent joined the petition after four months. Like the appellant, the 4th respondent urged us to find that the irregularities that were established were fundamental; that they vitiated the election of the 3rd respondent; and that by reason thereof, we should allow the appeal and nullify the election.

The IEBC and the 2nd respondent, who were represented jointly by ***Mr. Odhiambo*** and ***Mr. Kosgei***, learned counsel, were of a different mind regarding the validity of the 3rd respondent's election which they maintained was conducted strictly in accordance with the Constitution and the law. These respondents challenged the competence of the appeal and the cross-appeal to the extent that they raised matters of fact instead of matters of law only and urged that section 85A of the Elections Act was not inconsistent with the Constitution. They relied on the judgment of the Supreme Court in ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others*** (supra) where the Court held that section 85A was neither a legislative accident nor a routine legal prescription, but one giving effect to a constitutional demand. They also cited the judgment of this Court in ***IEBC & Another v. Stephen Mutinda Mule & 3 Others*** ***[2014] eKLR*** and the recent one in ***Mohamed Abdi Mahamud v. Ahmed Mohamad*** ***[2018] eKLR*** where it was emphasised that for a memorandum of appeal in an election petition to this Court to pass muster, it must raise only questions of law.

Moving on to what they considered issues of law raised in the appeal, these respondents submitted that the learned judge had properly concluded that the appellant and the 4th respondent had failed to discharge the burden of proof on them to the required standard of above a balance of probabilities but below proof beyond reasonable doubt. On the authenticity of the forms, it was submitted that the learned judge properly considered all the evidence and concluded that they were authentic and properly stamped and signed, including by the agents of the various candidates. It was further contended that the appellant and the 4th respondent did not challenge the authenticity of Form 37As or the results contained therein as declared at the polling stations, which were the primary results that could not be altered.

On assisted voters and violation of the right to vote, the IEBC and the 2nd respondent submitted that Form 32 is only required to be filled if the assisted voter is assisted by a person other than the presiding officer and that as properly found by the learned judge, not a single assisted voter was called as a witness.

On the election being tainted by violence, it was submitted that the issue was not pleaded in the petition and that in any event, the violent incident in question was caused by supporters of two of the candidates and that Kanacho, who had filed the petition, was himself fined ***Kshs 3 million*** compared to the 3rd respondent who was fined ***Kshs 1 million***. That notwithstanding, it was submitted, the IEBC allowed both to contest the election and that the appellant could not raise the issue in this appeal against the 3rd respondent.

Turning to preservation of the election materials, these two respondents submitted that the report of the deputy registrar confirmed that all the ballot boxes were intact and in good condition. They added that ***regulation 61(4)(e)*** of the Elections (General) Regulations required the IEBC to use suitable seals and did not require the seals to have the IEBC's logos, and further that the lack of logos on the seals did not affect the sanctity of the contents of the ballot boxes.

Lastly on costs, the IEBC and the 2nd respondent submitted that the amount awarded by the learned judge was not excessive. They added that under ***section 84*** of the Elections Act, costs follow the cause and the quantum thereof is at the discretion of the trial court. We were urged to find that petitions are of exceptional importance, involve a lot of work, care, attention and complex issues, which must all be taken into account in determining the quantum of costs. It was also emphasised that the parties in this appeal and their advocates had to travel from Nairobi to Marsabit for the hearing of the petition. These respondents cited the awards in ***Marble Muruli v. Wycliffe Oparanya & 3 Others*** ***[2013] eKLR,*** ***Jackstone Ranguma v. IEBC & 2 Others*** ***[2017] eKLR*** and ***Ferdinard Waititu v. IEBC & 8 Others*** ***[2013] eKLR,*** and submitted that the award of costs by the learned judge was within the same range.

The 3rd respondent, represented by ***Mr. Innocent Muganda*** and ***Ms. Amina Hashi***, learned counsel, was the last to take the podium. Like the IEBC and the 2nd respondent, the 3rd respondent took strong objection to some of the grounds of appeal and cross-appeal that raised issues of fact, rather than issues of law, which he urged us to ignore or dismiss *in limine*. He contended, on the authority of the decision of the Supreme Court in ***Zachary Okoth Obado v. Edwrad Akongo Oyugi & 2 Others*** ***[2014] eKLR,*** that this Court's jurisdiction in election appeals flows from section 85A of the Elections Act and that the Court cannot arrogate to itself jurisdiction in excess of that conferred by law. He also cited the decisions of the same Court in ***Gatirau Peter Munya v. Dickson Mwenda Kithinji*** (supra) and ***Nathif Jama Adam v Abdikhaim Osman & 3 Others*** ***[2014] eKLR,*** and submitted that the Supreme Court has consistently reiterated that appeals to this Court in election petitions are only on matters of law. In his view, there was nothing unconstitutional about section 85A of the Elections Act. It was also the 3rd respondent's view that once the right of appeal is restricted to matters of law only, an appellate court will not interfere merely because the trial court made a wrong finding of fact.

Turning to the appeal and cross-appeal, the 3rd respondent submitted that before the trial court the appellant and 4th respondent totally failed to discharge the burden of proof upon them to the intermediate standard of above a balance of probabilities but below proof beyond reasonable doubt. He also added that whatever irregularities were established were not of a nature or magnitude as to invalidate the election in view of ***section 83*** of the Elections Act.

Regarding the forms that the appellant claimed were not authentic, the 3rd respondent submitted that the issue was not pleaded in the petition

and despite objection the learned judge entertained and determined the same. In any event, the 3rd respondent urged, the issue of authenticity, serialization and signing of the forms is a matter of fact which was fully considered by the learned judge before he made a finding, which we should not readily interfere with. He added that the results in Form 37A, which is the primary form and which cannot be changed by the tallying officers, were never queried or challenged by the appellant.

On the appointment of the constituency returning officer for Laisamis Constituency, the 3rd respondent submitted that his initial appointment was not contested or challenged, only his transfer. He contended that as concerns transfer of returning officers, the law does not make any specific requirements as it does regarding their appointment.

On assisted voters, the 3rd respondent submitted that none of the alleged assisted voters were called to testify on being coerced how to vote and that after considering the evidence that was adduced, the learned judge was satisfied that assisted voters were handled within the law. He further contended that the alleged failure to use and mark the register of voters or to fill Form 32s was never a pleaded issue in the petition. He also contended that Form 32s were not among the forms that the court ordered the IEBC to produce and therefore the appellant failed to prove non-existence of the forms. Regarding storage of the election materials, the 3rd respondent submitted that the regulations did not require branded seals of the IEBC and therefore there was no legitimate basis for complaint that the seals used did not have the IEBC logos.

Turning to the question of violence, the 3rd respondent submitted that the same was not pleaded and was a mere afterthought. In any event, he added, the IEBC found the supporters of the two camps rather than the candidates, to blame and accordingly cleared and allowed both Kanacho and himself to contest the election. The 3rd respondent also submitted that no evidence was adduced to show how the violence, which occurred weeks before the date of the election, affected the outcome of the election or that it prevented even a single person from voting. On judicial notice, the 3rd respondent urged that the learned judge had properly applied section 60 of the Evidence Act. Lastly on costs, this respondent submitted that by dint of section 84 of the Elections Act and rule 30 of the Election Petition Rules, costs follow the event and that granted the volume of work and the distance to Marsabit, the award of costs made by the learned judge was far on the lower side.

The 3rd respondent therefore urged us to find that the appeal has no merit; that no violation of the law or irregularities of the magnitude that would justify invalidating the election were proved, that he was validly elected the Governor of Marsabit County, and to dismiss the appeal with costs.

We have carefully considered the petition, the responses thereto, the judgment of the trial court and its findings on facts and law, the grounds of appeal and cross-appeal, the submissions of learned counsel and the authorities they relied on. The first issue to dispose of is the extent of the jurisdiction of this Court in election petition appeals. The pertinent part of section 85A of the Elections Act provides as follows:

> ***"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 office of County Governor shall lie to the Court of Appeal on matters of law only and shall be-***
>
> ***(i) filed within thirty days of the decision of the High Court; and***
>
> ***(ii) heard and determined within six months of the filing of the appeal."*** (Emphasis added).

As we have already noted, many of the grounds of appeal and of the cross-appeal are prefixed by the assertion that the learned judge ***"erred in law and in fact"*** in arriving at various determinations. Of late, we have encountered two strands of response from appellants when we query why they have framed their grounds appeal in an election petition to include invitations to the Court to determine issues of fact. The first is denial that the appeal indeed raises issues of fact, notwithstanding how the grounds of appeal are framed. In this response, the matter is reduced to an issue of semantics, raising the question why a party who seeks determination of issues of law only is not able to say so in a straightforward manner. The second, a more honest, if lazy approach, is to admit that the appeal indeed raises issues of fact and throw back the problem to the Court to sort out matters of fact from matters of law, before making its determination. We think both approaches are to be deprecated. It is not the business of the Court in each and every appeal to jump into the haystack to look for the needle. It is for the appellant to frame the issues that aggrieve him or her with precision and clarity. Encouraging that kind of practice will ultimately make nonsense of the rules of pleadings and encourage parties to present to the Court a potpourri of myths, rumours, allegations, facts, and so on, in the mistaken belief that it is the business of the Court to sort out the relevant from the irrelevant, as it strives to sustain all and sundry claims, however presented.

In the appeal before us, the appellant and the 4th respondent, in their appeal and cross-appeal respectively, do not deny they have raised matters of fact. They do not even ask us to assume the task, which is properly theirs, of sorting out matters of fact from matters of law. Their response, especially the 4th respondent, is that we have all along been proceeding on the wrong footing and that alas, on a proper reading of the law, we have jurisdiction to entertain appeals on both matters of law and matters of fact. The view is premised on the argument that section 85A is inconsistent with Article 164(3) of the Constitution and therefore by dint of Article 2(4) of the Constitution, is null and void to the extent of the inconsistency. This argument, which the 4th respondent claims is novel by nature and has never been raised before in this Court or the Supreme Court, posits that the jurisdiction of this Court to hear appeals from the High Court is conferred by Article 164(3) of the Constitution and is not limited in any manner or form. Accordingly, the 4th respondent argues, section 85A of the Elections Act, being a lower legal norm than the Constitution, cannot purport to qualify or contradict what is provided in the Constitution.

Truth be told, there is nothing novel in the argument because it was advanced and rejected by the Supreme Court in ***Frederick Otieno Outa v. Jared Odoyo & 4 Others (SC. Pet. No. 10 of 2014)*** where a judgment of this Court was impugned for among other things, reversing findings of fact by the trial court contrary to the injunction in section 85A of the Elections Act. The 1st respondent therein made a spirited defence of the right of this Court to determine matters of fact in an appeal from an election petition. The Supreme Court captured his central argument thus:

> ***"[30] Mr. Issa, learned counsel for the 1st respondent, urged the Court to hold that Section 85A of the Elections Act is inconsistent with Article 164 (3) of the Constitution. He argued that the Court of Appeal has unlimited powers to hear appeals from the High Court, and that this position could not be qualified by virtue of Section 85A of the elections Act...***
>
> ***[32] Against that background, learned counsel submitted that the Court of Appeal was right to look at the evaluation of the evidence by the High Court, together with the interpretation of the relevant law, to assess whether the High Court properly evaluated the evidence. It was his view that the Court of Appeal had a duty to reevaluate that evidence. He urged that if it was intended that the right to appeal under Article 105 be limited to matters of law only, then Article 164 (3) would have expressly limited such jurisdiction."***

The Supreme Court identified one of the issues in that appeal, which it was called upon to determine, to be ***"whether Section 85A of the Elections Act is ultra-vires the Constitution."*** In upholding the validity of section 85A, the Court found that the section, far from being inconsistent with the Constitution, was intended to give effect to the values of timely resolution of electoral disputes embodied in ***Article 87(1)*** of the Constitution. Its final and ringing endorsement of section 85A was expressed as follows:

> ***"[73] This Court?s perception of the configuration of the governing electoral law has been clearly signaled in the recent Munya Case. 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). It is our view that the appellate jurisdiction in electoral disputes, is donated not simply by virtue of Article 164 (3) (a), but also by legislation contemplated under Article 105 (3) of the Constitution."***

We do not need to add anything to that clear exposition, save to say that the 4th respondent's contention is not well founded and we reject it. The effect is that in considering the appeal and the cross-appeal before us, we shall confine ourselves to matters of law only. In ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*** (supra), the Supreme Court delineated the parameters of matters of law which this Court can legitimately engage with to mean first, the interpretation or construction of the Constitution, statutes or regulations made thereunder as relates to elections, second, their application to the sets of facts established by the trial court, and third, determination of whether the conclusions of the trial judge are not based on the evidence on record or are so perverse that no reasonable tribunal would have arrived at them. (See also ***Zachary Okoth Obado v. Edward Akongo Oyugi & 2*** Other (supra) and ***Nathif Jama Adam Abdikhaim Osman & 3 Others*** (supra).

And more recently, this Court, in ***Mohamed Abdi Mahamud v. Ahmed Abdullahi Mohamad [2018] eKLR*** declaimed that in an election petition it can be invited to deal with a mongrel of law and facts, when it stated:

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

Where we are invited to determine whether the conclusions of fact by the trial court are based on the evidence on record or are so perverse that no reasonable tribunal, properly directing itself, would have come to the conclusion reached by the trial court, the approach that we shall adopt is that articulated by the Supreme Court of India in ***Damodar Lal v. Sohan Devi & Others, CA No. 231 of 2015.*** In that case it was held 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 as follows:

> ***"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."***

[Emphasis added).

The first ground is the alleged use of inauthentic and fake statutory forms. The forms were criticised primarily on factual grounds. It was contended that the Laisamis Constituency Form 37B did not have the totals for each candidate; those for Saku, Mayale and North Horr constituencies were witnessed by people who were not at the tallying centres; some of those forms had alterations such that it was not possible to determine whether they were made at the constituency or county tallying centres; some bore wrong dates; and that some did not have security features. As a result it was contended that the forms were not authentic and verifiable.

The learned judge considered the evidence of, among others, the returning officers, namely ***Jaffar Galgalo (DW1), Justus Mwanza Nzomo (DW5),*** and ***Evanson Githinji Ngomano (DW6).*** He also considered the evidence of ***Hussein Marsa Umuro Malicha (DW21)*** and ***Halake Waqo,*** who it was contended could not possibly have signed the forms as they were elsewhere. The learned judge was satisfied that the forms were signed at different times. He considered the evidence of the movement of the agents, their testimony that they did not sleep; that one of

them was being driven rather than driving, whilst the other used an helicopter, and was satisfied that indeed they could have signed the forms as they claimed.

As regards lack of the signatures of some of the agents on the forms, the learned judge considered ***regulation 79*** and concluded that it was not mandatory and that failure by an agent to sign the forms *per se* cannot be a ground for nullification of the results. On the authenticity of the forms, he concluded as follows, after analysing the evidence:

> ***"The original forms 37As, 37Bs and 37C were produced in court. My view is that the form 37Bs are simply tallying sheets. The results are found in the forms 37As. The county returning officer testified that he received all the forms 37As and tallied the results from those forms. The form 37 gives the results from each polling station."***

The learned judge added that no evidence was adduced to show that the results in Form 37Bs were different from those in Forms 37As and 37C.

Against the above evidence and conclusion, the appellant and the 4th respondent invite us to find that the forms that formed the basis of their complaint and which were annexed to the petition were the real forms and not the original forms that were produced in court, which the learned judge found to be authentic and to have no problem.

We do not think there is any basis for us to prefer the first set of forms to the originals that were produced in court and accepted by the learned judge as authentic. In ***Owino Paul Ongili Babu v. Francis Wambugu Mureithi & 2 Others, EPA No. 18 of 2018***, this Court held that an election ought not to be nullified merely because there has been some errors in the B series forms which do not affect the results as contained in the A series forms. The Court stated:

> ***"In Independent Boundaries & Electoral Commission v. Maina Kiai & 5 Others [2017] eKLR, this Court held that the primary source of results in a Parliamentary election is the ballot box, whose results are recorded in Form 35A at each polling centre, before tallying is done and the results obtained from the various polling centres are captured in Form 35B. There were no complaints regarding the results in Forms 35A and as we have stated earlier, the errors in Form 35B were purely arithmetical and did not affect the results obtained by either the appellant or the 1st respondent."***

Accordingly we are not persuaded that this ground of appeal has any merit.

The next issue relates to assisted voters, who the appellant and the 4th respondent contend were not assisted as required by law. In reaching his determination on this point, the learned judge evaluated the evidence presented by the petitioners' witnesses, namely; ***Julius Lekorole (PW4)*** and ***Daudi Kifile Dalache (PW5),*** the evidence of three presiding officers at the stations complained of, namely ***James Nawe (DW1), Josephine Jilo Bidu (DW2), Abbdirashid Adisomo (DW3)*** and ***Lotabon Kamboti David (DW7),*** as well as the evidence of ***Hussein Burje Sago, (PW13),*** a Maendeleo Chap Chap Party agent and ***Wario Roba Barire (DW 20),*** a Jubilee Party agent. He also considered the provisions of ***regulation 72*** of the Elections (General) Regulations, 2012 regarding assisted voters. He noted that the petitioners did not call even a single assisted voter to testify how he or she was assisted contrary to the law. His conclusion was as follows:

> ***"The petitioner?s evidence was disproved by those who were at the respective polling stations. PW4 did not witness the alleged incident at Loiyangalani. The presiding officer at the polling station testified in court. With regard to the evidence of Daudi Kifile, the two presiding officers were in court and testified on how they assisted illiterate voters. The evidence on record is to the effect that over 50% of the voters in Marsabit County required assistance. There is no evidence to the effect that the IEBC had instructed its presiding officers to bar anyone from assisting a voter who required assistance or to mark the ballots for the illiterate voters in favour of the Jubilee candidates. The petitioners? contentions are general allegations without cogent evidence...***
>
> ***Although the Petition makes allegations that assisted voters were coerced to vote for Jubilee candidates, I do find that there is no evidence to support those allegations. I am satisfied that the presiding officers properly assisted those voters who would not vote on their own. The respondents have through evidence effectively rebutted that allegation. There was no coercion of the assisted votes. The presiding officers did not assist the voters in the absence of the party agents. DW13 Hussein Burje Sago who was a Maendeleo Chap Chap party agent at Saku primary school stream 1 witnessed the voting by assisted voters. He explained how the presiding officer conducted the process which is in compliance with the regulations."***

Having carefully considered the appellant's and the 4th respondent's arguments on this ground of appeal, we are afraid that all they want us to do is to reconsider the evidence, which was considered by the learned judge, and come to a different conclusion. The learned judge heard the evidence and having considered the different contentions preferred one version to the other. We have not seen any relevant evidence that was adduced by the petitioners, which he did not consider. He had the advantage of hearing and seeing the witnesses and cannot be faulted merely for believing one set of witnesses rather than a different set. We are satisfied there was evidence before the learned judge on the basis of which he could reasonably arrive at the conclusion he reached.

We now turn to the issue of violence. We agree with the IEBC, 2nd and 3rd respondents that this issue was not pleaded in the petition, as it properly ought to have been, being a rather weighty issue, which alleged commission of an election offence. The learned judge nevertheless entertained and determined it, meaning that we cannot ignore it. It is common knowledge that use of violence is one of the scourges that have over time plagued and undermined free and fair elections in Kenya. It is no wonder therefore that violence in elections is prohibited by ***Article 81 (e) (ii)*** of the Constitution and legislated into a criminal offence by ***section 11*** of the ***Election Offences Act.*** It must not only be discouraged, but also dealt with firmly within the legal framework.

The background to this complaint is that on 26th July 2017, about a fortnight before the general election, the President and the Deputy President visited Marsabit County and addressed public rallies there. At one of the rallies there was violent confrontation between the

supporters of Kanacho and those of the 3rd respondent, compelling the President to intervene and ask the two camps to maintain peace and order. On 2nd August 2017 the IEBC Committee responsible for enforcement of the election code of conduct fined Kanacho Kshs 3 million and the 3rd respondent Kshs 1 million, having found that the confrontation was caused by their supporters. The IEBC however cleared the two candidates to vie in the gubernatorial elections on 8th August 2017.

The appellant and the 4th respondent contend that by reason of the violence and the sentence to a fine, the appellant was not qualified to vie in the gubernatorial election. We agree with the decision of this Court in ***Mohamed Abdi Mahamud v. Ahmed Abdullahi Mohamad*** (supra) that a question of eligibility of a candidate to vie in an election can properly be raised in a petition, notwithstanding the fact that he or she had otherwise been cleared by the IEBC to run for office. It is however not clear from the appellant's and the 4th respondent's submissions, which particular provisions of the law were violated by the IEBC in clearing 3rd respondent to contest in the gubernatorial election.

Under ***Article 180 (2)*** of the Constitution, to be eligible for election as a Governor, the candidate must be eligible for election as a member of the county assembly. The qualifications for election as a member of a county assembly are set out in ***section 25*** of the Elections Act. As far as we are able to discern, the only relevant grounds for disqualification in this appeal would be those set out in ***section 25(2),*** the pertinent part of which provides:

> ***"25 (2) A person is disqualified from being elected a member of the county assembly if the person-***
>
> ***(a)...***
>
> ***(f) if serving a sentence of imprisonment of at least six months***
>
> ***(g) has been found, in accordance with any law, to have misused or abused a State office or public office or to have contravened Chapter Six of the Constitution.***
>
> ***(3) A person is not disqualified under subsection (2) unless all possibility of appeal or review of the relevant sentence or decision has been exhausted."***

The only provision that comes close to the ground of appeal under consideration in this appeal is ***section 25(2) (g).*** However, it is not in dispute that the IEBC did not find Kanacho or the 3rd respondent to have personally contravened Chapter Six of the Constitution. They were fined because of the misconduct of their supporters. We firstly note that in this case, the IEBC itself cleared the two candidates to contest, after finding that the violence was caused by their supporters. Secondly, neither the appellant nor the 4th respondent raised any objection with the IEBC regarding the eligibility of either Kanacho or the 3rd respondent to vie in the gubernatorial elections. Thirdly, that this issue was not even raised in the petition strongly suggests, as the learned judge concluded, that it was really an afterthought to shore up the petition, which the appellant and the 4th respondent inherited from Kanacho. Fourthly, the appellant and the 4th respondent did not demonstrate that the incident, two weeks before the elections, had any effect on the elections or that it discouraged any registered voter from exercising his or her right to vote. In ***Owino Paul Ongili Babu v. Francis Wambugu Mureithi & 2 Others*** (supra) this Court stated thus as regards violence in elections:

> ***"As we have said before, it is not enough to find that there was some form of violence in a given station and then proceed to nullify the result of an election. There has to be a demonstration that the violence affected not only the voting but the final result of the election; for example, that the violence disfranchised some voters and/or gave an undue advantage to one of the parties."***

In light of the foregoing, we do not see any basis for faulting the conclusion by the learned judge as regards the violence that occurred before the date of the elections. This ground of appeal too has no merit.

The next issue of complaint is the recruitment of Galgalo as the Laisamis Constituency returning officer, which the appellant and the 4th respondent claim was done clandestinely, illegally, and at the instigation of the 3rd respondent, so as to favour him because he is from the same ethnic community as Galgalo. The evidence that was adduced proved that the IEBC initially appointed Galgalo, who hails from Isiolo County, the returning officer for Isiolo North Constituency and duly published his appointment in the Kenya Gazette of 5th May 2017. However, due to administrative and logistical challenges, the IEBC was forced to swap Galgalo with ***Anthony Kiriri Kimani***, who had initially been appointed and gazetted the returning officer for Laisamis Constituency. The transfer of Galgalo to Laisamis Constituency and that of Kimani to Isiolo North Constituency were duly published in *corrigenda* on 10th July 2017, approximately a month before the elections.

The relevant part of regulation 3, which the appellant and the 4th respondent claim was violated in the appointment of Galgalo 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 officers 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."***

That provision addresses the initial appointment of returning officers and requires IEBC to furnish political parties and independent candidates with the list of the persons it proposes to appoint. Thereafter the names of the appointed officers are required to be published in the Gazette and any other media that the IEBC deems fit. We do not understand the basis of the complaint by the appellant and the 4th respondent, because neither of them was contesting the gubernatorial election under the umbrella of a political party or as an independent

candidate so as to entitle them to consultations. There is no suggestion that the above regulation was not complied with as regards the initial appointments and no evidence to suggest that the Frontier Alliance Party, which had sponsored Kanacho was not consulted.

Contrary to the appellant and the 4th respondents' assertion, no evidence was adduced to show that Galgalo was transferred to Laisamis Constituency at the instigation of the 3rd respondent or on a mission to rig the election in his favour. We are satisfied, as the learned judge was, that the transfer of Galgalo to Laisamis Constituency cannot be faulted because of the following reasons. First, no evidence was adduced to prove that the political parties and independent candidates were not consulted as required by regulation 3. Second, the transfer was normal course-of-business transfer and did not affect Galgalo alone. Third, Galgalo hailed from Isiolo County, not Marsabit County. Fourth, no evidence was adduced to show that the 3rd respondent or any other candidate for that matter, was behind the transfer. Fifth, his role was restricted to tallying the results that were announced at the polling stations, which, by virtue of the judgment in ***IEBC v. Maina Kiai & 5 Others*** (supra), he could not amend or alter to benefit or disadvantage any of the candidates. Lastly, as this Court stated in ***Richard Nchapi Leiyagu v IEBC & 2 Others [2014] eKLR,*** 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 did not find.

The next ground relates to the alleged violation of the right to vote and disenfranchisement of voters. The appellant's claim was that some registered voters were denied the right to vote on account of their ethnicity. The IEBC's response was that no registered voter whose name was in the register of voters was denied the right to vote and that the people who were turned away were those who were not in the register or who tried to vote using registration slips rather than identification documents as required the by the regulations. Having considered the evidence, the learned judge was satisfied that no registered voter was denied an opportunity to vote. He expressed himself thus at page 105 of the judgment:

> ***"The evidence shows that those who alleged to have been registered could not be traced in the voters? register. Even if we can assume that they had applied for registration, their biometric data was not sent to the Commission for inclusion...There is evidence that some of the 38 people in PW1?s list were not registered voters. One Hassan Yayo Godana was a registered voter in Kiamaiko Ward, Mathare Constituency in Nairobi County."***

At page 106, he concluded as follows:

> ***"I am satisfied that those whose names were not found in the voters? register were not allowed to vote. The presiding officers could not simply allow people holding acknowledgement slips to proceed and vote. A voter should go the extra mile of verifying his registration status before going to the polling station...It is my finding that there was no disenfranchisement of voters. All eligible voters were allowed to vote."***

Once again, and with respect, the complaints by the appellant and the 4th respondent boil down to a claim that the learned judge did not properly evaluate the evidence and an invitation to this Court to re-evaluate the evidence, particularly of PW1, PW2 and PW7 and come to a different conclusion from the learned judge. As we have already emphasised, that, we shall not do because there is evidence on record upon which the learned judge could hold as he did.

On preservation of the election materials, the complaint by the 4th respondent is that the learned judge erred by misrepresenting the report of the deputy registrar regarding the condition in which the electoral materials were found, following a preservation order made on 19th October 2017. He claims that the report unearthed major irregularities including seals without the IEBC logos, broken seals, missing seals, broken ballot boxes and ballot boxes with interchanged lids for different elections, which the learned judge ignored. The response of the IEBC, the 2nd and 3rd respondents is that the so called irregularities were minor and did not affect the results of the election and that overall, the deputy registrar found that all the ballot boxes were intact.

The report by the deputy registrar examined 68 ballot boxes from Saku Constituency, all of which were found to be intact; 101 from North Horr Constituency, all of which were found to be intact, save one where the voter turnout was not indicated; 79 from Laisamis Constituency, all of which were found to be intact, save one where the lid was "slightly broken", and 136 from Moyale Constituency, all of which were found to be intact. While some ballot boxes had seals that were broken, no ballot box was found to be completely seal-less. The bulk of the appellant's and the 4th respondent's complaint in this ground of appeal is that some of the seals affixed on the ballot boxes by the IEBC did not bear its logos. Their submission, as we understand it, is that a ballot box secured with a seal that does not bear the IEBC logo is as good as a ballot box without a seal at all. Regulation 61(4) (e) of the Elections (General) Regulations, 2012 provides as follows:

> ***"61(4) The returning officer shall provide each polling station with-***
>
> ***(a)....***
>
> ***(e) a seal of the Commission suitable for the purpose of regulation 69(1) (g)."***

The cross-reference to regulation 69(1)(g) is clearly an error, because Legal Notice No.72 of 2017 subsequently deleted that particular clause of the regulation. Regulation 61(4)(e) however leaves no doubt in our minds that the seal required is a seal of the Commission suitable for purposes of securing the contents in the ballot box. We do not see anything in the provision that specifically requires the seals to bear the IEBC logo. In our view, the primary concern of the regulation is to ensure that whatever seal is used is positively identified as a seal of the Commission. In this case the evidence that was adduced was that the seals bearing the IEBC logos were not enough for all the polling stations where six elections were taking place simultaneously on the same day. The IEBC therefore used seals that did not have its logo, but instead had serial numbers that identified them to belong to the Commission. In those circumstances, we are not satisfied that the learned judge misapprehended the report of the deputy registrar or otherwise misdirected himself as regards the interpretation and application of regulation 61(4)(e).

The other issue that aggrieved the appellant and the 4th respondent is that while hearing the petition on the gubernatorial election, the learned

judge considered the results in the election for the Woman Representative to the National Assembly, which he was hearing simultaneously, but failed to take judicial notice of the evidence in the forms in that election that would have contradicted the evidence of the IEBC, the 2nd respondent and the 3rd respondent on the signing of the forms. This arose in the context of the complaint by the appellant and the 4th respondent that there were wide variations in the number of votes cast in all the three different elections as to make the gubernatorial election unreliable and unverifiable.

While addressing the issue, the learned judge delivered himself thus:

> ***"It is contended that there is difference in the results for the six polls. The petition gives the following comparison***
>
> ***(i) Presidential 112,399 votes cast***
>
> ***(ii) Gubernatorial 103,514 votes cast***
>
> ***(iii) Senatorial 108,948 votes cast***
>
> ***(iv) Women Representative 106,094 votes cast***
>
> ***The petition itself give the results of the election as follows:-***
>
> ***Total valid votes cast***
>
> ***110,685***
>
> ***Rejected votes***
>
> ***2,417***
>
> ***113,102***
>
> ***This court had the advantage of handling the election petition for the Women Representative Election. At page 3 of that petition the results are tabulated as follows:***
>
> ***Total valid votes***
>
> ***110,708***
>
> ***Rejected votes***
>
> ***1,644***
>
> ***113,352***
>
> ***The forms 37C 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***
>
> ***Women Representative: Total valid voted 110,628***
>
> ***Rejected***
>
> ***330***
>
> ***110,958***
>
> ***The above tabulation gives a comparison of the two elections. The C series forms give a difference of 48 votes for the entire county. More people are shown to have voted for the Governor than for the Women 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 voters for that poll. The petitioner?s tabulation on the polls for the governor and Women member of***

***National Assembly is incorrect. The results in the forms C series give a small margin of 48 votes. That cannot be regarded as an irregularity, which should call for the 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 the IEBC."***

For our part, we are not persuaded that the learned judge was entitled to consider the evidence adduced in the Woman Representative petition while hearing the gubernatorial petition. Such evidence required to be produced before him to afford the parties an opportunity, if they wished, to test it by cross-examination. The parties could have even produced it by consent, granted that the same learned counsel appeared for the parties in the two petitions. Unfortunately the learned judge referred to that evidence when he retired to write his judgment, which he should not have done.

We do not think that the learned judge could even take judicial notice of that evidence as the appellant and the 4th respondent assume because that evidence was not a matter of public 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."***

The appellant and the 4th respondent somehow do not find anything irregular with the manner in which the evidence was considered. Their complaint is that the learned judge should have considered other aspects of that irregularly admitted evidence. We are not persuaded by that argument. Having found that the learned judge improperly referred to evidence, which was not adduced in the petition before him, we cannot give a seal of approval for consideration of other aspects of that same evidence beyond what the learned judge improperly considered. All that evidence was for exclusion and the moment it is excluded, it means that the appellant and the 4th respondent did not prove the variations in the six elections as they alleged and cannot foist on the irregular evidence to contradict the evidence adduced by the 1EBC, the 2nd respondent and the 3rd respondent which the learned judge accepted.

The last ground is on quantum of costs, which the appellant and the 4th respondent contend was manifestly excessive. They argue further that the learned judge failed to appreciate that they joined in the petition rather late. The IEBC, the 2nd and the 3rd respondents defend the award, with the latter, who did not cross-appeal on costs, even urging us to enhance the costs awarded because they were manifestly low.

***Section 84*** of the Elections Act is a restatement of 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 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. We do not think it can fall from the mouths of the appellant and the 4th respondent, who voluntarily and without compulsion, elected to inherit the petition from Kanacho to complain that they joined the petition late. The short answer is that the respondents, who were the successful parties were in the petition from the beginning.

The general principle is that before an appellate court can interfere with award of costs by the trial court, it must be demonstrated that that it took into consideration irrelevant matters. (See ***Kohli v. Popatlal [1964] EA 219*** and ***Supermarine Handling Services Ltd v. Kenya Revenue Authority, CA. No. 85 of 2006).*** We are not persuaded that in the circumstances of this case the trial court awarded manifestly excessive costs. This ground of appeal too must therefore fail.

To entitle a court to nullify an election, it must be satisfied, in terms of section 83 of the Elections Act that there has been non-compliance with the Constitution and the written law or that the non-compliance affected the result of the election. After emphasising that section 83 must be read disjunctively rather than conjunctively, the Supreme Court, in ***Raila Amolo Odinga & Another v. IEBC & Others*** (supra), explained itself thus:

***"[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 gubernatorial election in Marsabit County was conducted, we would agree with the learned judge that the appellant and the 4th respondent failed to prove to the required standard that there was substantial breach of the Constitution or the law 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 and the 4th respondent shall jointly and severally pay costs of ***Kshs. 500,000.00*** to the IEBC and a like sum to the 2nd respondent. They 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**