IN THE COURT OF APPEAL

AT KISUMU

(CORAM: WAKI, SICHALE & OTIENO-ODEK, JJ.A)

ELECTION PETITION APPEAL NO. 1 OF 2018

BETWEEN

JACKTON NYANUNGO RANGUMA.....APPELLANT

AND

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

COUNTY RETURNING OFFICER, INDEPENDENT

ELECTORAL AND BOUNDARIES COMMISSION,

KISUMU COUNTY.....2ND RESPONDENT

H. E. PETER ANYANG' NYONGO..... 3RD RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Kisumu

(Majanja, J.), dated 3rd January, 2018

in

H. C. Election Petition No. 3 of 2017)

****

JUDGMENT OF THE COURT

1. On 8th August 2017, the people of Kisumu County participated in gubernatorial elections to elect the Governor of the County. There were five candidates for the seat. The votes garnered and returned for each candidate were as follows:

(a) Peter Anyang' Nyongo …….. 272,127

(b) Peter Charles Owino Omollo …… 1,955

(c) Christine R. A. Atieno …….. 2, 383

(d) Jackton Nyanungo Ranguma …… 156,963

(e) David Otieno Wayiera …….. 821

2. Based on the returned votes, the 3rd respondent was declared winner of the elections. Aggrieved by the declaration, the appellant lodged

an election petition before the High Court. The grounds in support of the Petition were enumerated *inter alia* as:

> ***(a) Violation of the principles of free and fair elections and electoral process as provided in Article 81 (e) of the Constitution.***
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> ***(b) Relay and transmission of results from polling stations to Constituency and County Tallying Centre was not simple, accurate, verifiable, secure, accountable, transparent, open and prompt and violated Article 81 (e) (iv) and (v) of the Constitution.***
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> ***(c) Failure of the 1st and 2nd Respondents to administer the elections with impartiality, neutrality, efficiency, accuracy and accountability.***
>
> ***(d) Lack and failure of operational transparency.***
>
> ***(e) The Results declared were inaccurate as in a significant number of polling stations the votes captured in the 1st Respondent's Forms 37A differ from the Results captured in Forms 37B and***
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> ***(f) That the votes cast in a significant number of polling stations were not counted, tabulated and accurately collated as required under Article 86 (b) and 86 (c) of the Constitution as read with the Elections Act.***

3. In the petition, the appellant prayed for, *inter alia*, a declaration that the 3rd respondent was not validly declared as Governor-elect for Kisumu County.

4. The 1st and 2nd respondents averred in response that the gubernatorial elections for Kisumu County were conducted and held in compliance with the Constitution, Elections Act and the Regulations made thereunder. All allegations in the petition were denied.

5. Upon hearing the parties, the trial court in a judgment dated and delivered on 3rd January, 2018 dismissed the petition with costs. The instruction fees for the 1st and 2nd respondent was capped at Ksh. 2,500,000/=. The instruction fee for the 3rd respondent was similarly capped at Ksh. 2,500,000/=.

6. Aggrieved with the judgment dismissing the petition, the appellant filed the instant appeal citing, *inter alia*, the following grounds in the memorandum of appeal:

> ***(a) That the learned judge erred in law when he ignored evidence of electoral malpractice on the grounds that they were purportedly not formally pleaded.***
>
> ***(b) The judge erred in law when he ignored clear evidence of electoral fraud purportedly because they were not pleaded when the same were in fact pleaded.***
>
> ***(c) The judge erred in law when he ignored (and therefore refused to consider) evidence showing material non-compliance with electoral laws and the Constitution only to paradoxically find that no such evidence was adduced.***
>
> ***(d) The judge misdirected himself on the issue of burden of proof in election matters.***
>
> ***(e) The judge misdirected himself with regards to the ratio decidendi of the Court of Appeal decision in Independent Electoral and Boundaries Commission vs Maina Kiai & 5 Others, [2017] eKLR in relation to the scope of Section 39 of the Elections Act. (hereinafter referred to as the Maina Kiai case).***
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> ***(f) The judge erred in failing to grant orders of scrutiny and recount particularly in view of the evidence given in the case.***
>
> ***(g) The judge erred in law by failing to find that the extent of non-compliance with the Constitution, Elections Act and Election Regulations was so material that it vitiated the legality of the declaration of the 3rd respondent as the governor-elect for Kisumu County.***
>
> ***(h) The judge erred in law by failing to consider the legal effect of discrepancies between the Presidential and Senatorial election results and the gubernatorial election results.***
>
> ***(i) The judge erred by failing to consider whether the disclosed electoral malpractices and irregularities affected the outcome of the election results.***

7. In the memorandum, we are urged to vacate in its entirety the judgment delivered on 3rd January, 2018 and order that the appellant be declared as having been validly elected the Governor-elect for Kisumu County gubernatorial elections.

8. At the hearing, the appellant was represented by learned counsel Mr. Richard Onsongo, Mr. Samual Aduda and Mr. Kimutai Bosek. Counsel Mr. Edwin Mukele and Mr. Edwin Kubebea appeared for the 1st and 2nd respondents while Senior Counsel Mr. James Orengo, Ms. Julie Soweto, Mr. Victor Obonyo and Mr. Biran Onyango appeared for the 3rd respondent.

9. All parties in this appeal filed written submissions and cited various authorities.

10. The appellant's counsel recalled that the jurisdiction of this Court as per ***Section 85 A*** of the Elections Act is restricted to matters of law. Citing dicta from ***Independent Electoral and Boundaries Commission vs Maina Kiai & 5 Others (2016) eKLR***, the appellant submitted that this Court, being a first appellate court has a duty as spelt out in ***Rule 29*** of the **Court of Appeal Rules** to re-evaluate and re-analyze the evidence on record exhaustively, draw its own inferences and make independent conclusions. Grounded on this dictum, the appellant urged us to depart from erroneous findings by the trial court that were not based on evidence. We were also urged to depart from findings grounded on legal misapprehensions or those that were plainly wrong. The appellant cited Supreme Court dicta in **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others S C Petition No. 2B of 2014** where the Court defined the meaning of the phrase "matters of law" and held that "a matter of law includes conclusions arrived at by the trial judge in an election petition where the appellant claims that such conclusions were based on no evidence or that the conclusions were not supported by the established facts or the evidence on record or that the conclusions were so perverse or so illegal that no reasonable tribunal would arrive at the same." Founded on these two dicta, the appellant submitted that the conclusions and determination by the trial judge were not founded on the evidence on record.

11. *Centralto*, the appellant's case is that the trial court erred by ignoring, overlooking and or failing to consider pleadings and evidence of electoral malpractice and fraud which evidence was led by the petitioner. It is contended that the judge erroneously held that the evidence as tendered was not in support of any pleading in the petition; that there was no pleading in the petition alleging electoral malpractices and electoral fraud; that the record of appeal bears proof that electoral malpractice was formally pleaded; that electoral flaws, inaccuracy, lack of transparency and promptitude amounting to electoral malpractices were pleaded; that there was specific pleading of alterations and deletions of entries on Form 37As done on the IEBC server to manipulate data in favour of the 3rd respondent; and that failure by IEBC to electronically collate, tally and accurately transmit the results was also pleaded.

12. The appellant contests that the trial court erred in failing to consider and evaluate the evidence of **PW2** ***(Jacob Onyango K'Odera)***, an IT Specialist, who testified on oath and proved electoral malpractices. The malpractices pleaded and proved included failing to capture and post results of five (5) polling stations; suspiciously high incidence of rejected votes in specified 95 polling stations; and election results downloaded from the IEBC portal which did not tally and were incomparable with Presidential and Senatorial election results collected from all constituencies in Kisumu County in Forms 34Bs, 37Bs and 37Cs. The cumulative effect of the malpractices was that the results for Kisumu gubernatorial elections presented by the 1st and 2nd respondents were inaccurate, unverifiable, incredible and contrary to law.

13. It is further contended that the trial court erred in failing to properly evaluate the testimony of **PW3** ***(Levi Oduor Otieno)***, a telecommunication expert, who testified that scanned Forms 37A contained in the IEBC server were manipulated and tampered with by an IEBC official with the user name *nmigot@iebc.co.ke* who logged in and altered data on the said Form 37As containing gubernatorial results for Kisumu County in favour of the 3rd respondent.

14. In faulting the trial court, the appellant submitted that the judge erred in failing to appreciate that the purity of the elections and accuracy of the declared results was not attained. He contended that five (5) polling stations in Kisumu East Constituency were not included in the final tally; that the 2nd respondent as the Returning Officer admitted that he declared the results of the gubernatorial elections when he had not received results from the five (5) polling stations and that such an omission was inexcusable and fatal to the declared results. Counsel further submitted that failure to account for the results from 5 polling stations frustrated, defeated and or infringed on the universal suffrage rights of all voters in those stations contrary to ***Article 38 (2)*** and ***(3) (b)*** of the Constitution. In his view, the failure contravened ***Articles 86 (b)*** and ***(c)*** of the Constitution that requires IEBC to accurately collate and tally results from all polling stations and offends every expectation of ***Section 39 (1A) (ii)*** of the Elections Act and every principle of ***Articles 81*** and ***86*** of the Constitution that require transparency, accountability, simplicity, security, accuracy, efficiency and verifiability of the electoral process.

15. The appellant further submitted that the trial court erred in failing to appreciate and correctly apply ***Section 83*** of the **Elections Act** as interpreted by the Supreme Court in **Raila Odinga & Another vs IEBC & Others, [2017] eKLR.**

16. Counsel faulted the trial court and alleged that the court condescended to the appellant in a patronizing manner by stating that at the end of the day, the failure to record the results of the five polling stations on Form 37B and Form 37C would not in any way affect the result as the 3rd respondent was the winner of the elections even assuming that the petitioner would have garnered all the votes in those stations. Counsel submitted that this argument elevates momentary convenience over and above substantive constitutional ideals, values and principles.

17. The trial judge was faulted for failing to appreciate the discrepancies between the Presidential and Senatorial votes cast and the gubernatorial votes cast. It was urged that every voter is given six (6) ballot papers to cast in the six elections and therefore, *prima facie*, the votes cast in all electoral seats should be the same. It is not conceivable, the appellant postulated, that discrepancies should exist between the numbers of gubernatorial votes cast on one hand and the number of Presidential, Senatorial and County Women Representative votes cast for the entire Kisumu County. In the instant case, it was submitted, the discrepancies in the votes cast in the various electoral seats is proof of electoral malpractices to the requisite legal and evidentiary standard.

18. On transmission of electoral results, the appellant cited the decision in **Independent Electoral and Boundaries Commission vs Maina Kiai [2017] eKLR** and faulted the trial judge for holding that ***Section 39*** of the **Elections Act** created no obligation to electronically transmit the gubernatorial election results. Counsel emphasized that the polling station is the locus and focus of election results and it is the responsibility of IEBC to collate and announce the results from each polling station in the Constituency. In the instant case, it was contended, IEBC vitiated the integrity of the election results in so far as it failed to secure an accurate collation and tabulation of the results for all polling stations.

19. The appellant submitted that from the evidence of **PW3**, there was proof of data manipulation in the IEBC server by an IEBC official who tweaked election results in favour of the 3rd respondent, and that computational inaccuracy in Forms 37B was demonstrated. It was further submitted that there were differences in the entries in Forms 37A and Form 37B.

20. One of the contestations by the appellant is that the learned judge erred in applying the legal and evidentiary burden of proof. Of significance, it was submitted that election petitions are subject to an intermediate standard of proof – one higher than a balance of

probabilities – and does not assume the standard of beyond reasonable doubt save for allegations relating to commission of electoral criminal offences. In the appellant's view, the trial court erred in dealing with evidence on failure to electronically transmit election results and applied 'beyond reasonable doubt' as the standard of proof.

21. On evidentiary burden of proof, the appellant submitted that the trial court erred in failing to find that the evidentiary burden had shifted to the 1st and 2nd respondents who failed to explain what happened in the five polling stations. The respondents did not discharge their evidentiary burden.

22 On scrutiny and recount, the appellant observed that the trial court ordered the 1st and 2nd respondents to grant him access to IEBC servers on 10th October, 2017. However, by the time the hearing commenced on 7th November, 2017, no access had been granted. On that premise, it was contended, there was an error of law for the hearing to be conducted yet the appellant was denied access to material information and data critical to his petition. According to the appellant, the refusal to allow the appellant's application for scrutiny and recount of votes caused substantial and irreparable injustice, and besmirched the probity of the gubernatorial election and thus, the IEBC failed to guarantee a secure and accountable election within the meaning of ***Article 86*** of the Constitution.

23. A critical submission and contestation by the appellant relating to scrutiny and access to IEBC servers is that the 1st and 2nd respondents failed to avail witnesses who could be cross-examined relating to data manipulation in the IEBC server. It was submitted that the 1st and 2nd respondents not only failed to call ***Mr. Calisto Oyugi Omuomo***, the County Information Communication Technology Officer, to be cross-examined on his witness statement that had been filed by the respondents; but also failed to call Presiding Officers of the five polling stations whose results were missing. It was submitted that by failing to avail these witnesses for cross-examination, an adverse inference should be drawn and conclusion made that the gubernatorial elections for Kisumu County was fraught with electoral irregularities and malpractices.

24. The respondents in opposing the appeal relied on submissions filed before the trial court and written submissions filed in this appeal. The 1st and 2nd respondents also filed a list of authorities. The respondents urged us to note that the jurisdiction of this Court is confined to matters of law and that it is not permissible to re-agitate factual contestations or conclusions based on facts. It was submitted that the instant appeal is an attempt to re-litigate matters of fact and the appeal should be disallowed in entirety as the same falls beyond the jurisdiction of this Court.

25. It was submitted that the learned judge dealt with all issues of fact and law urged by the appellants more particularly, the correct interpretation and application of the law on un-pleaded issues. On the issue that no results were captured and posted for five polling stations, the respondents submitted that the trial court correctly addressed the issue and observed that even if the unaccounted for votes were added to the appellant's tally, the declared results of the elections would not change. On the issue of discrepancies between the Presidential, Senatorial and Gubernatorial votes cast, it was submitted that the trial court properly evaluated the evidence and expressed that *"nothing could be inferred from the spoilt or extrapolated results of the Presidential or Senatorial election that could assist the petitioner without establishing a factual basis for the alleged malpractices or irregularities in each polling station which led either to the spoilt votes or the difference in variation in the number of votes in the gubernatorial election on one hand and the Presidential or Senatorial election on the other."*

26. On the issue relating to the testimony of PW2 and PW3, the respondents submitted that it is misleading to allege that the trial court ignored and or refused to consider and evaluate the testimony of these two witnesses. They noted that the trial court went at great lengths to consider their evidence and cited the Supreme Court decision in **Raila Odinga & Another vs IEBC & 2 Others, Petition No. 1 of 2017** where citing the Indian case of ***Arikala Narasa Reddy vs Venkata Ram Reddygari & Another*** it was stated that "in the absence of the pleadings, evidence if any, produced by the parties, cannot be considered."

27. The respondents submitted that it is a misdirection to allege that the trial court did not consider the evidence showing material non-compliance with electoral laws and the Constitution. On the alleged errors of counting, tabulation and transmission of results, the respondents submitted that the trial court correctly evaluated the evidence and made specific findings on the same. For instance, it was noted that the trial court correctly held at paragraph 42 of the judgment that failure to record the results of the five polling stations in Form 37B and Form 37C was an irregularity but at the end of day, the results from the five polling stations would not in any way affect the results of the election.

28. On transmission of results, the respondents submitted that the trial judge cannot be faulted for finding that the requirement for the electronic transmission and publication of polling results is only a statutory requirement for the presidential elections. As correctly held by the trial court, the process of voting, counting, tallying and transmission of results for other elective seats is manual.

29. On the contestation that the trial court erred in applying ***Section 83*** of the **Elections Act**, the respondents submitted that the section was correctly applied, as the court stated as follows:

> ***"Applying the provisions of Section 83 of the Act, I find that these irregularities would not have affected the ultimate result given the margin of votes and the fact the irregularity occurred in only 5 out of over 1000 polling stations in the county."***

30. In reply to the Appellant's submission that the trial judge misdirected himself with regard to the *ratio decidendi* in the ***Maina Kiai case***, the respondent submitted that there was no misdirection. In their view, the provisions of ***Sections 39 (1A)*** and ***39 (1B)*** of the **Elections Act** should be distinguished from the provision of ***Section 39 (1C)*** which specifically commands electronic transmission of results for presidential elections from a polling station. ***Sections 39 (1A)*** and ***39 (1B)***, it was submitted, do not impose a mandatory requirement for electronic transmission of results for other elective positions. In support, counsel cited the persuasive Ruling of the High Court in ***Hon. Martha Wangari Karua & Another vs The IEBC & 3 Others, Kerugoya Election Petition No. 2 of 2017.***

31. On the issue that the trial court erred in failing to order scrutiny and recount, the respondents submitted that this ground of appeal was an afterthought. They observed that the trial court delivered its Ruling on 7th November, 2017 permitting the appellant to have a "Read Only

Access" to all the electronic information relating to Kisumu County gubernatorial election. No notice of appeal was filed against that Ruling. Furthermore, the appellant neither raised the issue of delay on the part of the 1st and 2nd respondents to furnish it with a Read Only Access nor complained that the Read Only Access was denied. In those circumstances, it was submitted, raising these issues at the appellate stage is an afterthought which this Court should ignore.

32. The 3rd respondent through Senior Counsel James Orengo opposed the appeal. Counsel faulted the appellant's submission that the trial court misdirected himself in applying the *ratio decidendi* of the ***Maina Kiai case***. It was submitted that the ***Maina Kiai case*** was an ordinary civil suit on interpretation of ***Articles 81*** and ***86*** of the Constitution. That being so, this Court in the ***Maina Kiai*** **case** had jurisdiction to re-evaluate the evidence, draw its own conclusions and make an independent decision. Senior Counsel emphasized that the ***Maina Kiai case*** was not an election petition appeal in which the jurisdiction of this Court is confined under ***Section 85 A*** of the **Elections Act** to matters of law. He submitted that the ***Maina Kiai case*** does not espouse principles on jurisdiction of this Court in so far as election petition appeals are concerned. It is thus fallacious to urge that the ***Maina Kiai case*** confers jurisdiction on this Court to re-evaluate the evidence on record.

33. In opposing the appeal, Mr. Orengo submitted that the appellant's petition before the trial court did not disclose any electoral malpractice or irregularity sufficient, qualitatively or quantitatively, to vitiate and void the declaration of the 3rd respondent as winner of Kisumu County gubernatorial elections. He observed that the centrality of the petition before the trial court was the claim that the appellant had won the gubernatorial elections held on 8th August, 2017. It was submitted that the appellant was given the opportunity to prove that he won the elections but never tendered cogent and credible evidence to prove it. Counsel pondered and asked us to examine from the record the type of evidence tendered by the appellant to prove that he allegedly won the gubernatorial elections.

34. The 3rd respondent submitted that in attempt to prove that he won the elections, the appellant tendered two categories of evidence that were neither cogent nor credible. First, the appellant tendered documentary evidence titled **"JR Campaign Secretariat"** from his own campaign team alleging that he had won the elections. The document is annexed to the Affidavit of **PW3**, ***Levi Otieno Oduor***, and referred to in paragraph 10 of the appellant's affidavit in support of the petition. In this document, it was observed, the appellant deposes that he won the elections. He also deposed that he undertook a comparative analysis of the declared results with the figures appearing in Form 37C from the 2nd respondent and it was clear that he, the appellant, won the elections with a figure of 270,866 votes. Counsel submitted that the election results and source of the data and information contained in the document titled "JR Secretariat" is unknown, the origin of data and the accompanying statutory Forms are not given, and there is no worksheet to demonstrate how the figures and data in the "JR Secretariat" election results was derived. It was clear, according to Counsel that the appellant introduced his own election results which does not constitute cogent and credible evidence.

35. Second, it was submitted that the appellant tendered in evidence a document alleged to be from "Prof. Nyongo IT Team" to support his unfounded belief that he won the elections. This document is at pages 101 to 112 of the Record titled ***"Server Details: 6No. Sparc Enterprise M900 Server Unit."*** According to the appellant, this document contains details of alleged server log in and manipulation of election results in favour of the 3rd respondent. It is deposed that the person who logged in was *nmigot@iebc.or.ke*. Between pages 103 to 112 of the Record, the appellant annexed Exhibit JOK which details the election results of the Kisumu County Gubernatorial elections. The last page of this document is page 112 of the Record and it alleges that the 3rd respondent's IT had access to a KIEMS user account created by the Super Users which they used to input an algorithm that altered incoming votes by a factor of between 0.01 to 0.02.

36. The 3rd respondent challenged the veracity, authenticity and source of the document titled "**Server Details: 6No. Sparc Enterprise M900 Server Unit**" and the electoral results allegedly declared therein. Senior Counsel contended that this document lacked credibility and can neither be the source of electoral results nor be used as proof that there was manipulation of election results or proof of hacking of the IEBC server.

37. The 3rd respondent further submitted that based on the two documents whose authenticity and veracity were not established, the appellant was not able to demonstrate with cogent and credible evidence how he won the elections. It was pointed out from the record that the appellant's own witness testified that the 3rd respondent had won the elections.

38. Submitting on alleged violation of ***Articles 38*** and ***81*** of the Constitution, Senior Counsel stated that there was no cogent evidence on record to prove that any voter was disenfranchised or refused to vote; that every person who wanted to vote and came out to vote was allowed to vote; and that it was neither shown nor demonstrated how the rights in ***Article 38*** of the Constitution were violated.

39. Referring to un-pleaded issues, the 3rd respondent urged that a party is bound by his pleadings. According to counsel, it is not enough to reproduce constitutional and statutory provisions in a petition and assert that a matter has been pleaded. There must be cogent and factual averments to support any allegations of election irregularity or malpractice, not merely regurgitating constitutional provisions. On the issue of scrutiny of IEBC servers, counsel submitted that the trial court gave the appellant an unfettered "Read Only Access" but nothing came out of it as the appellant did not tender any evidence to show that the Read Only Access had unearthed any irregularity or inconsistency in the declared results.

40. In concluding his submission, the 3rd respondent referred us to the numbers formula for a candidate to be declared winner in gubernatorial elections. He cited ***Article 180 (4)*** of the Constitution which provides that:

> ***"If two or more candidates are nominated, an election shall be held in the county and the candidate who receives the greatest number of votes shall be declared elected."*** (Emphasis supplied)

41. It was submitted that the 3rd respondent, having garnered the greatest number of votes cast in the Kisumu County gubernatorial elections held on 8th August, 2017, he was legally declared winner of the elections.

42. We have considered the memorandum of appeal, the written submissions filed by all parties, the authorities cited and the Record of Appeal. We remind ourselves about the provisions of ***Section 85 A*** of the **Elections Act** which restricts and confines the appellate jurisdiction of this Court only to matters of law.

43. We are also cognizant of the Supreme Court definition of matters of law in the case of **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others [2014] eKLR** where it was expressed *inter alia* that a matter of law includes the evidentiary element involving the evaluation of the conclusions of a trial Court on the basis of the evidence on record. It includes the conclusions arrived at by the trial Judge in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of County Governor, where the appellant claims that such conclusions were based on "no evidence", or that the conclusions were not supported by the established facts or evidence on record, or that the conclusions were "so perverse", or so illegal, that no reasonable tribunal would arrive at the same." It is not enough for the appellant to contend that the trial Judge would probably have arrived at a different conclusion on the basis of the evidence.

44. In **Zacharia Okoth Obado vs Edward Akong'o Oyugi & 2 Others [2014] eKLR,** the Supreme Court in interpreting the jurisdiction of this Court in election petition appeals observed and expressed that:

> **"[107]** This Court's decision in the ***Peter Munya case*** is a reference-point, in determining whether a Court has made a finding on a *point of fact*, or a *point of law.* We had thus held (paragraph 90):
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> > ***"The critical question is whether the Court of Appeal in making such an inquiry, exceeded its powers to review only matters of law, under Section 85A of the Elections Act. Was the Court cautious enough to limit itself to issues regarding the interpretation and application of the law by the trial Judge, in relation to the petition at the High Court? Did the Judges of Appeal limit themselves to evaluating the conclusions of the trial Judge on the basis of the evidence on record; and to determining whether such conclusions were not supported by the evidence; or to ascertaining that the conclusions were not so perverse that no reasonable tribunal could arrive at the same?"***

45. Guided by the foregoing decisions of the Supreme Court, in this appeal, we have identified the following issues for determination:

(a) Jurisdiction of this Court vis-à-vis the grounds urged in the memorandum of appeal.

(b) The finding by the trial court that un-pleaded issues cannot be determined.

(c) The discrepancy in the votes casts in the Presidential, Senatorial, Women Representative and the gubernatorial elections.

(d) Failure to find that the irregularity by IEBC in declaring results without results from five (5) polling stations was fatal to the integrity and results of the Kisumu County gubernatorial elections.

(e) The alleged high number of rejected votes.

(f) Failure on the part of the 1st and 2nd respondents to call witnesses for cross-examination.

(g) Issues related to the legal and evidentiary burden of proof and whether the trial court erred in applying the evidentiary burden and standard of proof.

(h) Alleged failure on the part of the trial court to consider the probative value and evidence of PW2 (Jacob Onyango K'Odera) and PW3 (Levi Oduor Otieno).

(i) Failure of the trial court to order scrutiny and recount of the votes.

(j) Alleged erroneous finding by the trial court and erroneous interpretation of Section 39 of the Elections Act on electronic transmission of gubernatorial election results.

46. Each of the above issues is considered and determined as below.

Discrepancy in the Presidential, Senatorial and Gubernatorial Election Results

47. The appellant contends that the trial court erred in law in failing to consider the legal effect of the disclosed discrepancies in the total votes cast for the Presidential, Senatorial, Women Representative and Gubernatorial elections for Kisumu County. That *ipso facto*, the number of votes cast should be the same for all the four electoral seats. The trial court in dealing with this issue expressed itself as follows:

> ***"34. In my view, PW 2 and PW 3 were not particularly helpful to the petitioner's case. Their conclusions were founded on opinion. Apart from the fact that these issues were not pleaded, nothing could be inferred from the spoilt votes or extrapolated from the results of the Presidential or Senatorial election that could assist the petitioner without establishing a factual basis for the alleged malpractices or irregularities in each polling station which led either to the spoilt votes or the difference or variation in the number of votes in the Gubernatorial election on one hand and the Presidential and Senatorial election on the other."***

48. In this appeal, our consideration of the ground of discrepancies of votes between the Presidential, Senatorial and gubernatorial elections

invites us to review case law on the subject. We note the dicta in ***Gitau vs Thuo & 2 Others, [2010] 1 KLR 526,* at 554** where one of the issues raised by the petitioner was that there was discrepancy between the results contained in the presidential and civic votes as contrasted with the results of the parliamentary votes. The appellant contended that the discrepancy was proof that the parliamentary vote had been rigged. The trial court, Kimaru, J. correctly opined that *"in normal circumstances, the tally of the total number of votes cast in the presidential, parliamentary and civic elections is expected more or less to be the same. That there may be instances where a voter makes a conscious choice to vote in a particular election and not in the other. That such instance is however few. That the difference of over 5,000 votes between the parliamentary votes on the one hand and the presidential and civic vote on the other, is evidence of serious electoral malpractice."* In ***Ndolo vs Mwangi & 2 Others, [2010] 1 KLR 372***, it was held that the difference of about 10,000 votes cast between the presidential and parliamentary election was not usual and would lead to the conclusion that all was not well. The court observed that a voter cannot be forced to vote for all the streams of election but the ballot papers for each stream of election had to be issued and had to be put in the ballot box by the voter.

49. Comparatively, in **Khalid Hussain Magsi vs Mir Abdul Rahim Rind and Others, Civil Appeal No. 1219 of 2014** the Supreme Court of Pakistan at paragraph 7 of its judgment stated:

> ***"…The other question that arises is why on these 54 polling stations the turnout was almost triple in comparison to turnout on the rest of 111 polling stations i.e. the percentage of turnout on the above mentioned 54 polling stations was 96% whereas turnout in the remaining 111 polling stations stood around 40% only. These unimaginable differences in the voting pattern on 54 polling stations as against the remaining 111 polling stations cannot be a simple case of mere coincidence, given the fact that both the contesting candidates were not candidates with marginal following."***

50. In ***Mohamed Tubi Bidu vs IEBC & Others, Meru Election Petition No. 3 of 2017,*** the trial court held, correctly in our view, that:

> ***"Votes cast for all positions need not necessarily be uniform. There could be various reasons which would account for any difference that may be realized. Therefore, unless cogent evidence is adduced, mere difference of numbers in votes cast in various positions is not per se proof of electoral malpractice. Except, where the difference is so huge that it cannot be said to be a result of a mistake or error, or it is incapable of any explanation, questions abound and backed with other evidence it may be a profitable argument in an election petition"***
>
> ***"Another consideration; recording of votes in the statutory forms may be erroneous….These errors may occur in any or some or all of the elective positions. When that happens, there will be no uniformity in numbers of votes cast. I should also state that the other elections are not part or subject of this petition. Therefore, it will be a wrong assumption or unfair inference that difference in number of votes cast among the three elections per se amounts to electoral malpractice. Cogent evidence is needed to prove the particular malpractice. I am however aware that it is a red flag if the difference is so huge that it cannot be a result of a simple mistake or error, or it is incapable of any explanation."***

51. In ***Moses Wanjala Lukoye vs Benard Alfred Wekesa Sambu& 3 Others [2013] eKLR,*** the Court at **paragraph 77** citing with approval the decision in **Justus *Gesito vs IEBC & 2 Others* [2013] eKLR** correctly stated;

> ***"It is possible that a voter chooses to vote for only one elective position, say presidential, and leaves the rest. The outcome is that the results of the six elective posts will not tally. For that reason alone, the court cannot delve into the results of other elective posts in comparison to that of the Member of National Assembly, for doing so will be setting a dangerous precedent."***

52. In a persuasive dictum in ***Mark Nkonana Supeyo & Another vs Independent Electoral and Boundaries Commission & 2 Others [2018] eKLR***, Justice Onyiego of the High Court expressed himself as follows:

> ***"[62] It is the Petitioners' contention that, a voter who is given six ballot papers for the six elective posts should cast one ballot paper for each elective post in a separate ballot box hence no room for one post having more votes than the other. An example given during cross examination of DW1-(RW-1-) by Ms Maumo Advocate for the Petitioners was Ewuaso Nyiro Polling station 1 of 3 where the president (form 34B) got 538 votes and the member of National Assembly 539 (form 35B) a difference of one vote which discrepancy she (DW1) associated to stray ballot papers. It is true that a stray or rejected ballot is not counted for any candidate meaning that if the victim of such action is the presidential post, it will be short of one vote by virtue of casting its vote in a wrong ballot box. The Petitioners did not demonstrate how such inevitable error which is quite negligible in this case substantially affects or affected results. The explanation given by the returning officer is convincing in the circumstances and therefore that ground fails…."***

53. In ***M'nkiria Petkay Shen Miriti vs Ragwa Samuel Mbae & 2 Others [2013] eKLR***, the trial court in upholding the gubernatorial elections on the issue of discrepancies stated that:

> ***"The error was the number of registered voters in 10 out of 165 Polling Stations. In total, the discrepancy involving the Governors election in terms of numbers of votes was 300. That number was so insignificant that it could not make any difference to the result of the election especially considering that the margin between the winner and the runner up was over 15000 votes.***
>
> ***I find and hold that it was clear to the court that the discrepancies complained of in that paragraph were trivial and topographical in nature and that they do not fundamentally affect the results of the election. There was nothing adduced in evidence to suggest that they were deliberately made to perpetrate irregularity, unlawful or unfairness against any candidate. They do not create any doubt as to the integrity of the election or the validity of the results."***

54. Having reviewed case law as above, we have considered the record of appeal and submissions by counsel on the discrepancies in votes

cast between the Presidential, Senatorial and gubernatorial elections. The affidavit of PW2 (Jacob Onyango K'Odera) at paragraph 10 thereof itemizes differences between the aggregate number of voters for Member of Parliament and Gubernatorial elections and the Presidential elections. After noticing the differences, at paragraph 12 of his affidavit, he deposes that *"therefore, I have cause to believe that the results presented by the 1st and 2nd respondents are not accurate, are not verifiable and lack credibility."*

55. In our minds, a question that comes to the fore is whether mere differences in votes cast in the various electoral seats is a basis for concluding that the declared results are neither accurate, verifiable and lack credibility. There is no evidence on record to prove that the difference in votes cast in the various electoral seats was due to an electoral malpractice; all that is on record is *"a cause to believe"* by the deponent.

56. Whereas comparison of votes cast in one election with another is informative, such comparison *per se* cannot be a ground to nullify the results of one election as against the other. Each election result must be challenged on its own ground. Each election petition is a stand-alone petition and any allegation contained therein must be proved. It is the result of a specific election that is being challenged and not the results of all other elections. It is impermissible to use the results of one elective position to challenge or prove that the result of another elective post is vitiated. If one were allowed to do so, this would be speculative and extrapolation of evidence which is impermissible. We find that it is inappropriate without cogent evidence to draw an inference that mere difference in votes cast between the various electoral seats is proof of electoral malpractice or irregularity. Accordingly, we find that the trial court did not err in its finding that the appellant had not laid out a factual basis for the alleged malpractices or irregularities in each polling station which led to the difference or variation in the number of votes cast in the Presidential, Senatorial and the gubernatorial elections. This ground of appeal fails.

High Percentage of Rejected Votes in sampled polling stations

57. The appellant in his submissions stated that the trial court erred in failing to evaluate and interrogate the evidence of PW2 (John Onyango K'Odera) particularly on the issue of results not having been captured in several polling stations and the huge number of rejected votes in 95 polling stations. That it was for the trial judge to make a determination as to whether these pieces of evidence were substantial.

58. We have examined the Record and more particularly paragraph 8 of the affidavit of PW2 (John Onyango K'Odera). In this paragraph, the deponent states that he noticed a very high number of rejected votes. In total, he sampled 95 polling stations and he deposes at paragraph 9 of his affidavit that *"therefore, I have cause to believe that it is not just coincidental that the same polling stations where the petitioner's agents have highlighted several electoral malpractices to have occurred are also the self-same ones exhibiting a high incidence of rejected votes."*

59. In his submissions, the appellant urged us to find that taking into account that a sample of 95 polling stations revealed high rejected votes, if scrutiny and recount had been done in the entire Kisumu County, a higher and an unexplained coincidence in the number of rejected votes would ensue. Founded on this supposition, we were urged to find that the declared result for the Kisumu County gubernatorial elections was not accurate, verifiable and transparent and this violated ***Articles 81*** and ***86*** of the Constitution.

60. We have considered this submission and note that the appellant is urging us to consider his findings of the sample of 95 polling stations and extrapolate the findings to all the polling stations in Kisumu County and find that there was high unexplained coincidence of rejected votes thereby vitiating and voiding the declared results. Once again, we reiterate that extrapolation of evidence is not allowed in law.

61. In **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others [2014] eKLR** the Supreme Court held that extrapolation of evidence is not permissible to determine if an irregularity affected the results of the election. Extrapolation of evidence is not allowed as this leads to conjecture and speculation. In **Nathif Jama Adam vs Abdikhan Osman Mohamed & 3 Others, Supreme Court Petition No. 13 of 2014**, the Supreme Court re-affirmed that:

> ***"[87] As to the effect of irregularities, and the point at which a Court should overturn an election, we stated that Courts must only act on ascertained facts, not conjecture, and must demonstrate how the final statistical outcome has been compromised."***

62. In ***Nahashon Akunga vs Independent Electoral and Boundaries Commission, Roberty Isaac Sidney Namulungu & Janet Ong'era [2018] eKLR***, the trial court held:

> ***"[115] If there be discrepancies in the recorded numbers of registered voters in other of the six elections, the legal mandate to interrogate such anomalies would be in the hands of the courts gazetted to deal with any petitions that may arise from such elections."***

63. In persuasive dicta in ***Mark Nkonana Supeyo & Another vs Independent Electoral and Boundaries Commission & 2 Others [2018] eKLR***, Justice Onyiego of the High Court aptly expressed himself thus:

> ***"[78] The Petitioners raised concern on the high percentage of rejected votes in Kajiado West at 2% against Kajiado North at 4%, Kajiado East 1%, Kajiado South 0% and Kajiado Central at 2%. This was a generalized observation which did not translate to any interference or manipulation of results in the instant case. It was not demonstrated to the satisfaction of the court how such variation in terms of percentage amongst constituencies affected the results in Kajiado West constituency and most importantly the will of the people."***

64. Guided by the dicta of the Supreme Court in **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others [2014] eKLR** we find that the appellant's submission that the trial judge erred in failing to consider that there was a high number of rejected votes in 95 polling stations has no merit.

Failure of the 1st and 2nd respondents to call witnesses for cross-examination

65. The appellant submitted that the 1st and 2nd respondents had a total of 15 witnesses whose witness statements were filed and are part of the Record. Only four of them were called to testify leaving out the other eleven and thus preventing the appellant from conducting cross-examination. Among the eleven witnesses were the presiding officers from 5 polling stations whose results were not collated and tallied. The most crucial witness who was not called was, ***Mr. Calisto Oyugi Omuomo***, the ICT Officer of the 1st respondent for Kisumu County whose witness statement related to relay, transmission of results and security of IEBC servers. His statement had denied the allegations made by the appellant's witness **PW3** ***(Levi Oduor Otieno)*** that the IEBC server was tampered with and asserted that the safeguard and security features in the KIEMS system eliminated any possibility of intrusion or compromise by an unauthorized third party.

66. The appellant submitted that the trial court erred in law in failing to draw an adverse inference against the 1st and 2nd respondents on their failure to call all the eleven witnesses who had filed witness statements. In our considered view, the gravamen of this submission relates to the issue whether the trial court erred in the application of the legal and evidentiary burden of proof which we shall address later in this judgment. As for now, the legal issue is whether the trial court erred in not drawing an adverse inference against the 1st and 2nd respondents for not calling eleven persons who filed witness statements.

67. This court is alive to the fact there is no legal requirement in law on the number of witnesses required to prove a fact. ***Section 143* of Evidence Act (Cap 80) Laws of Kenya** provides: -

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

68. It is trite that when a person fails to call a relevant witness to prove or disprove a fact in issue, the court may draw an adverse inference from the failure to call such a witness. In **Hon. Mohamed Abdi Mohamud –v- Ahemd Abdullahi Muhamad & 3 others, (2018) eKLR Nairobi Election Petition Appeal No. 2 of 2018**, this Court expressed the view that a deponent who has given a witness statement and stays away from proceedings thereby avoiding cross-examination robs his/her witness statement any probative value. The failure to testify and be cross-examined shifts the burden of proof to the party who has failed to call the deponent to testify. This is because the deponent had the opportunity to either deny or challenge all facts levelled against him/her and has failed to appear in court to shade light on the issue. The opposing party's evidence therefore remains uncontroverted.

69. In the instant case, did the trial court err in failing to draw an adverse inference against the 1st and 2nd respondents? It is the appellant's contention that failure to call the witnesses denied him an opportunity to conduct cross-examination. In ***Law Society of Kenya vs Faith Waigwa & 8 Others [2015] eKLR***, the rationale for cross-examination was explained thus:

> ***"Let me once more restate the rationale of cross-examination of witnesses. First, it is a mechanism which is used to bring out desirable facts to modify or clarify or to establish the cross-examiner's case. In other words, cross-examination is meant to extract the qualifying facts or circumstances left out by a witness in a testimony given in examination in chief. Secondly, the exercise of cross-examination is intended to impeach the credit worthiness of a witness. In cross-examination a witness may be asked questions tending for example to expose the errors, contradictions, omissions and improbabilities. In the process, the veracity of a witness's averments is tested. Thirdly, the exercise of cross-examination in some cases gives the court an early chance to get the glimpse of what to expect during the substantive hearing. This may assist the court in making the necessary directions at the pre-trial conferences envisaged under Order 11 of the Civil Procedure Rules. However, the process of cross-examination should not be used to convert the hearing of an interlocutory application into a mini or full trial of the suit. It is a difficult balancing act which the court has to live with for a long time."***

70. It sometimes happens that, although having filed an affidavit, the deponent does not wish to be cross-examined or the legal adviser takes the view that it is highly undesirable for him or her to be cross-examined. The question still remains will the opposite party be prejudiced in that case?

71. The provisions of ***Section 143*** of the Evidence Act is useful but must be read together with other provisions of the Evidence Act. ***Section 108*** of the Evidence Act states that, *"the burden of proof in a suit or procedure lies on the person who would fail if no evidence at all were given on either side."* ***Section 109*** of the Evidence Act states that,*" the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."*

72. While the provisions of ***Section 143*** of the Evidence Act, state that no particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact, the order and direction of examination of witnesses is provided for under ***Section 146*** of the Evidence Act, which states that:

> ***"the witness shall first be examined in chief, then if the adversary party so desires cross examined, then if the party calling them so desires, re-examined."***

73. In ***Jacinta Wanjala Mwatela vs IEBC & 3 Others, (2013) eKLR*** the Court held:

> ***"I do agree with Counsel for the petitioner that the court will eventually be at liberty to draw an adverse inference from the failure of these witnesses to avail themselves for cross-examination. In the United Kingdom case of Wisniewski vs Central Manchester Health Authority 1997 PIQR 324, the Court of Appeal held as follows:***
>
> ***"In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might***

be expected to have material evidence to give on an issue in any action."

74. In ***Noah Makhalang'ang'a Wekesa vs Albert Adome & 3 Others [2013] eKLR*** the court held that:-

> ***"In as much as the rest of the petitioner's witnesses who deponed supporting affidavits were not availed in court for cross-examination for purposes of testing the veracity of their averments, their evidence though forming part of the petitioner's case may be treated as being inconsequential and devoid of probative value…".*** *(Emphasis added).*

75. The dictum in Noah Wekesa case (supra) should be treated with caution as it refers to petitioners' witnesses. In the instant case, the witnesses who were not called for cross-examination are 1st and 2nd respondents' witnesses. What inference can be drawn from failure to call them for cross-examination?

76. In ***John Munuve Mati vs Returning Officer Mwingi North Constitutency, Independent Electoral & Boundaries Commission & Paul Musyimi Nzengu [2018] eKLR***, on the alleged failure by the Returning Officers to testify, the court observed that it does not invariably follow that failure by a respondent to call a witness means that the petition must be allowed. The petitioner must first adduce evidence of the nature that would entitle him to judgment if the respondent did not adduce any evidence at all in rebuttal.

77. **Justice Kihara Kariuki in *Election Petition No. 1 of 2013 Peter Leo Agweli Onalo vs Eliakim Lindeki and 2 Others [2000] eKLR*** held that it would be in bad taste to compel the alleged witnesses to attend court on behalf of the petitioner if it is not confirmed they are willing to do so.

78. We have perused the record of appeal. We note that the appellant neither requested nor made an application before the trial court for any or all the eleven witnesses to be called for cross-examination. Two inferences can be drawn from this fact: first, the appellant felt no need to have them called for cross-examination and their testimony was not challenged or second, the appellant waived his right to cross-examine these witnesses. An inference leading to a conclusion of fact can only be drawn when there is one irresistible deduction to be made from a proven set of facts. In the instant case, if the trial court were to draw an adverse inference against the 1st and 2nd respondents, the legal effect would be to shift the legal burden of proof from the petitioner to the respondent. This would be wrong in law. Further, noting that there is no legal requirement stipulating the number of witnesses a party can call to prove a fact in issue, an adverse inference ordinarily should not be drawn simply because a respondent has chosen not to call any or some witnesses. The legal burden of proof always remains with the petitioner and a court should be careful not to draw adverse inference when a respondent who has no legal burden to prove any fact fails to call a witness or witnesses.

Legal and Evidentiary Burden of Proof

79. In the instant case, the appellant contends that failure to call all witnesses by the 1st and 2nd respondent meant that the appellant had discharged his legal burden of proof and the evidentiary burden shifted to the 1st and 2nd respondents; that the respondents did not discharge their evidentiary burden and as such, the trial court erred in failing to properly apply the law on legal and evidentiary burden of proof; and that the trial court should have found that the appellant had proved the allegations in the petition to the required standard of proof.

80. In considering this issue, we are alive to the legal principle that in an election petition, the legal burden of proof remains with the Petitioner at all times. In **Raila Odinga & 5 Others vs Independent Electoral and Boundaries Commission & 3 Others [2013] eKLR,** the Supreme Court expressed itself thus:

> ***"[195] There is, apparently, a common thread in the foregoing comparative jurisprudence on burden of proof in election cases. Its essence is that an electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner, but, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting. Ultimately, of course, it falls to the Court to determine whether a firm and unanswered case has been made.***
>
> ***[196] We find merit in such a judicial approach, as is well exemplified in the several cases from Nigeria. Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondent bears the burden of proving the contrary. This emerges from a long-standing common law approach in respect of alleged irregularity in the acts of public bodies. Omnia praesumuntur rite etsolemniteresseacta: all acts are presumed to have been done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescriptions of the law."***

81. The critical issue on the alleged error on the part of the trial court in considering the burden of proof is whether in any election petition, the IEBC bears a legal or evidentiary burden to prove that the elections were conducted in compliance with constitutional principles, the Elections Act and Regulations thereunder.

82. In the comparative case of ***St. Claire Simon vs Winston Baldwin Spencer & Another, Claim No. ANUHCV2009/0141,*** the Eastern Caribbean Supreme Court of Antigua and Barbuda expressed itself as follows:

> ***"[94] The burden of proof is initially on the Petitioner to establish the act or omission or other breach of the Rules. Once that is established, in determining whether the election was substantially in conformity with the law as to elections or the irregularity affected the result, the burden of proof is not on the respondent, but the question must be decided on the evidence as a whole.*** (Emphasis supplied).
>
> ***[231] It is the law that there is no onus cast on the Respondent to prove, in the event of a breach, that the election was***

nevertheless conducted so as to be substantially in accordance with the election law. In contradistinction, the Court must examine the whole of the evidence in order to determine whether this was so or whether the result was affected." (Emphasis supplied).

83. We have considered the law on shifting evidential burden of proof and we are satisfied that it is the law that there is no onus cast on the respondent to prove, in the event of a breach, that an election was nevertheless conducted substantially in accordance with the election law. The submission by the respondent goes against the tenet of this legal principle as it invites the court to find that if breach has been proved, the legal and evidentiary burden is on the respondent IEBC, to prove that the election was conducted substantially in accordance with the law. In our considered view, this is not the law. The appellant failed to *prima facie* produce cogent and credible evidence to prove the allegation that he had won the Kisumu County gubernatorial election or that the result of the election was affected by any irregularity. In this regard, there was no *prima facie* evidence on record that could warrant the evidentiary burden to shift to the respondents. Accordingly, we find that the trial judge did not err in the application of the legal and evidentiary burden of proof.

Failure to include results from five (5) polling stations in the final declaration of results

84. One of the repeated issues central to this appeal is that the trial court erred in law in failing to find that the declaration of the 3rd respondent as the duly elected governor for Kisumu County was null and void because the 1st and 2nd respondents declared him winner when results from five (5) polling stations had not been included in the tally of the final result. It was contended that the failure to include the results from the five polling stations frustrated, defeated and infringed on the universal suffrage rights of all the voters in those stations; that failure to include the results from the five polling stations meant that as a matter of law, the declared results were not accurate, verifiable and credible; that failure to include the results meant that the 1st and 2nd respondents did not conduct the Kisumu County gubernatorial elections in accordance with ***Articles 81*** and ***86*** of the Constitution; and that the requirements for transparency, accountability, simplicity, security, efficiency and verifiability of the election were not attained.

85. In the affidavit of Mr. Jon Cox Lorionokou, the 2nd respondent and Returning Officer for Kisumu County gubernatorial elections, he admits and deposes at paragraph 13 as follows:

"THAT in response to the contents of paragraph 7 of the supporting affidavit by Jacob Onyango Odera, I wish to state that whereas it is true that Mamboleo Market - 003, Kayango Market 003, Nyalenda "A" Community Hall - 003; Nyalenda "A" Community Hall-005 and Akado Polytechnic -002 polling stations were yet to make returns, I proceeded to make the declaration on the basis that the 3rd Respondent had attained an unassailable lead." (Emphasis supplied).

86. We have considered the appellant's submissions on failure to include results from the five polling stations. We have also considered the 2nd respondent's admission and explanation that he declared the results for Kisumu gubernatorial election on the basis that the 3rd respondent had attained an unassailable lead. The question of law is whether the explanation by the 2nd respondent is sufficient and whether he had the legal authority to declare the results on the basis that there was an unassailable lead by the 3rd respondent. The other issue is whether failure to include results from the five polling stations affected the declared results of Kisumu gubernatorial elections. The final issue is whether failure to include the results of the five polling stations affected the integrity of the elections and was a substantial non-compliance with the Constitutional principles and Election law sufficient to vitiate and void the declared results.

87. In arriving at our determination on this ground of appeal, we remind ourselves of the Supreme Court pronouncement in the case of **Zacharia Okoth Obado vs Edward Akong'o Oyugi & 2 Others [2014] eKLR** where it was stated *in extenso*:

"[108] The Court of Appeal observed that the issues summarized for determination were issues of law. The Court restated the findings of the High Court on the evidence adduced before it, and took note of the content of the report of the Deputy Registrar on the re-tally conducted pursuant to the order of the trial Judge. The Court of Appeal, however (pages 45-46 of its Judgment), came to make the observation that the election *"was conducted in a manner that [made it] difficult to determine the winner [outright]…."*

[109] The Court of Appeal reinforced the foregoing statement by its observation that the irregularities vitiated the election:

"[D]ue to widespread errors of tallying, transposition and entry of data … in many instances, votes in Form 35 were different from those in Form 36; votes of candidates were interchanged in some cases, while votes were either understated or overstated. … figures publicly announced were recorded into separate Form 36 as distinct figures; … there were differences between the manually tabulated figures and those generated electronically; original votes record in respect of three polling stations (Kosodo, Siala and Marera Primary Schools) were altered by hand in such a way that the original recorded votes could not be ascertained; … although Nyamaharaga ACK Nursery School had only one stream an additional non-existent stream II was created and votes which the candidates did not deserve awarded to them; … the examination and re-tallying by the Deputy Registrar revealed irregularities and mistakes in all the eight constituencies in Migori County and some 5,226 votes questioned…".

[110] In making these observations, as we find, the appellate Court exceeded its mandate, by its conclusions of fact, thus contravening Section 85A of the Elections Act. The Court of Appeal accorded no deference to the High Court's findings on facts; and the claims made by the petitioner were on the accuracy of the tallying of the results, rather than on what occurred at the polling station, with the exception of two polling stations, namely, Kengariso Primary School, and Ombo Primary School. On this matter, the findings of the trial Court are clearly recorded, as follows:

"The pleadings and evidence only pointed out to problems in those 2 stations. Issues arising in other polling stations were only raised in the submission and the Respondents were not therefore in a position to call evidence on those. Many of the issues raised touched on tallying of results, not what transpired at the polling stations. If the Petitioner wanted he could have asked for a

scrutiny and recount of all the votes. …The scrutiny and recount ordered by this Court was never intended to be a fishing expedition and any effort to treat it as such must be resisted."

[111] The Court of Appeal overlooked these vital observations of the trial Court, and made findings of fact regarding the Kosodo, Siala and Marera Primary School polling stations, as well as Nyamaharaga ACK Nursery School which had not been pleaded as an item of dispute. The Court of Appeal, as we hold, ought not to have overstepped the evidentiary bounds marked out by the trial Court, whether on the basis of pleaded or unpleaded issues. By making findings regarding irregularities in those polling stations, which the trial Judge discounted on the ground that the petitioner had not pleaded them – and thus denying the respondents the right of reply – the Court of Appeal made plain findings of fact, and in this way misdirected itself. Parties, as is well recognised, are bound by their pleadings. The Court of Appeal also erred, with much respect, by failing to restrict their observations to the limit of the findings of fact by the High Court; the appellate Court extended the scope of such observations – avowing that the irregularities appeared to have been widespread, and of a greater magnitude than was observed by the High Court."

88. It is not in dispute that when the 3rd respondent was declared the winner, the results from five polling stations had not been collated and tallied. Counsel for the 3rd respondent submitted that the total votes cast for all candidates in the five polling stations were not more than three thousand five hundred votes. It is worth noting that the figure of three thousand five hundred is derived from the calculation that each polling station had a maximum of 700 registered voters. The trial court on its part opined that at the end of the day, the failure to record the results of the 5 polling stations within Kisumu East Constituency on Form 37B and Form 37C would not in any way affect the result as the 3rd respondent was the winner of the elections even assuming that the petitioner would have garnered all the votes in those stations.

89. In ***Ndolo vs Mwangi & 2 Others [2010] 1 KLR 372***, the trial court observed that there were arithmetical errors in the results of all candidates. The results of two polling stations were not included and figures in respect of the final tally of results were altered without authenticating the same or by countersigning. The certificate of results was issued before the tallying process was complete. It was held among other reasons that the election was not conducted in a free and fair manner.

90. In our considered view, unless expressly authorized by law, the presiding or returning officer can only declare results once the results of all polling stations have been received. It is an irregularity to declare partial results. Failure to include results from all polling stations may vitiate the election if such failure affects the result of the election. In ***Josiah Tarayia Kipelian Kores & Another vs Joseph Jama Ole Lenku & 4 Others [2018] eKLR*** the trial court observed that "it would be a travesty of justice and indeed an affront on the electorate, a mockery of the will and sovereign power of the people, if a court was to vitiate an election result because of an irregularity committed in only 3 polling stations with a total of less than 2000 votes out of 797 polling stations with over 500,000 registered voters on account of a presiding officers' failure to sign 3 Forms 37A."

91. In the instant case, the margin between the appellant and the 3rd respondent is 115,164 votes. The disputed votes from the five polling stations a maximum of 3,500 votes. The trial court observed that even if the appellant was given all the votes from the five polling stations, the 3rd respondent would still be the winner. On our part, persuaded by the soundness of the reasoning in ***Josiah Tarayia Kipelian Kores & Another vs Joseph Jama Ole Lenku& 4 Others [2018] eKLR,*** and convinced of the sound reasoning by the trial judge, we find that the trial court did not err in finding that failure to include the results from the five polling stations did not vitiate the results of Kisumu County gubernatorial elections. We hasten to add that whereas the 2nd respondent admitted to failure to include the results from the five polling stations, it is our considered view that given the margin between the winner and runner up, the will of the people of Kisumu County was loudly and clearly stated in electing the 3rd respondent as the Governor elect and the people's will was not vitiated and rendered a nullity by failure to include the results of the five polling stations in the final results.

Misdirection on the *Ratio Decidendi* in the Maina Kiai Case

92. We now turn to consider the ground of appeal alleging failure by the trial judge to appreciate the *ratio decidendi* in the ***Maina Kiai case*** and the issue of electronic transmission of gubernatorial election results as per ***Section 39*** of the Elections Act.

93. ***Section 39*** of the **Elections Act** provides as follows:

"39. (1) The Commission shall determine, declare and publish the results of an election immediately after close of polling.

(1A) The Commission shall appoint constituency returning officers to be responsible for:

(i) tallying, announcement and declaration, in the prescribed form, of the final results from each polling station in a constituency for the election of a member of the National Assembly and members of the county assembly;

(ii) collating and announcing the results from each polling station in the constituency for the election of the President, county Governor, Senator and county women representative to the National Assembly; and

(iii) submitting, in the prescribed form, the collated results for the election of the President to the national tallying centre and the collated results for the election of the county Governor, Senator and county women representative to the National Assembly to the respective county returning officer.

(1B)The Commission shall appoint county returning officers to be responsible for tallying, announcement and declaration, in the prescribed form, of final results from constituencies in the county for purposes of the election of the county Governor, Senator and county women representative to the National Assembly.

(1C) For purposes of a presidential election the Commission shall —

> ***(a) electronically transmit, in the prescribed form, the tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre;***
>
> ***(b) tally and verify the results received at the national tallying centre; and***
>
> ***(c) publish the polling result forms on an online public portal maintained by the Commission."***

94. The appellant contends that the trial court erred and misdirected itself on the *ratio decidendi* of the ***Maina Kiai case***. The court erred in the interpretation and application of ***Section 39*** as relates to relay and transmission of gubernatorial election results. The appellant submitted that several principles arise from the ***Maina Kiai case*** such as finality of results from the polling station; that accuracy of vote count is fundamental in any elections; that the responsibility of IEBC to deliver a credible and acceptable election is so grave and so awesome that IEBC must approach and execute it with absolute fidelity, probity and integrity ; and that before the IEBC County Returning Officer makes a declaration, he must ensure the accurate tally of all the results received from the constituency returning officers.

95. The appellant submitted that the trial judge misdirected himself and erred in appreciating the above mentioned principles from the ***Maina Kiai case*****.** The judge further failed to appreciate the evidence led by the appellant providing data manipulation in the IEBC server and ignored evidence of computational inaccuracies in Forms 37B, disparity in data captured in Form 37A and Form 37B, and ultimately the final data in Form 37C. It was further submitted that the trial court erred and misdirected itself in applying the *ratio decidendi* of the ***Maina Kiai case*** in so far as ***Section 39 (1A) (iii)*** of the **Elections Act** relates to electronic transmission of results. In the appellant's view, under ***Section 39 (1A) (iii)***, the Commission is mandated to appoint constituency returning officers to be responsible for submitting in the prescribed form, the collated results for the election of the President to the National Tallying Center and the collated results for the election of the County Governor, Senator and County Women Representative to the National Assembly, to the respective County Returning Officers.

96. We have considered the submission relating to electronic transmission of electoral results as per ***Section 39 (1C)*** of the **Elections Act**. The trial judge expressed himself as follows in his judgment:

> ***"38. A reading of Section 39 (1C) of the Act shows that electronic transmission and publication of polling result in a public portal is only a statutory requirement for the presidential election. Further, except for voter registration and voter identification; voting, counting, tallying and transmission of results for the election of the other elective posts including that of the Governor are mainly manual. In all other cases, including the County Governor election, the transmission of results contemplated by Section 39 (1A) and (1B) of the Act is that the votes at the polling station are counted and recorded in Form 37B."***

97. Upon our reading, analysis and comparison of ***Sections 39 (1A), 39 (1B)*** and ***39 (1C)*** of the Elections Act, we are satisfied that electronic transmission of results is a mandatory requirement for presidential elections. It is not a mandatory requirement for all other electoral seats. Further, in our view, there is no evidence on record to show that failure to properly transmit the results electronically to both the Constituency and County Tallying Centres affected the results of the Kisumu County gubernatorial election results. We find that the trial judge did not misdirect himself in applying the *ratio decidendi* in the ***Maina Kiai case***.

Failure by the trial court to consider evidence of electoral malpractice and electoral fraud.

98. One of the core issues in this appeal is the contestation by the appellant that the trial judge erred in law by ignoring, overlooking and or failing to consider the pleadings and evidence of electoral malpractice and fraud led by the petitioner on the pretext that they were not formally pleaded yet the same were in fact pleaded and proved.

99. In support of this ground, it was submitted that the record bears proof that electoral malpractice was in fact pleaded as required by law. It was submitted that at paragraphs 20 and 21 of the petition, the appellant pleaded with particularity the details of the alleged electoral malpractices. At paragraph 20 of the petition, the appellant reproduced the provisions of ***Article 81*** of the Constitution which states that the electoral system shall comply with ***Article 38*** and the elections shall be free and fair conducted by secret ballot, free from violence, intimidation, improper influence or corruption. That the election must be administered in an efficient, accurate and accountable manner.

100. In support of the contestation that there was pleading of electoral malpractices in the petition, the appellant submitted that at paragraph 22 of the petition, it is stated that *"as a result of the flaws, inaccuracy, lack of transparency and promptitude, the 1st, 2nd and 3rd respondents committed election malpractices, election offences and ended up compromising, adulterating and tampering with the purity of the elections".* At paragraph 23 of the petition it was pleaded that the 1st and 3rd respondents through their agents, servants, employees and or persons acting under their authority illegally, unlawfully and with ill-motive entered and logged into the IEBC servers and made several deletions of entries relating to Form 37As. It is also pleaded that the 1st respondent failed to electronically collate, tally and transmit the results accurately as per the ***Maina Kiai case***.

101. The appellant submitted that paragraphs 20, 21 and 22 of the petition as highlighted above contained the formal pleadings of relevant facts and law upon which the election petition was grounded. The trial judge therefore erred in law when he made a finding that there was no formal pleading relating to electoral malpractices and electoral fraud.

102. In support, the appellant cited the case of ***Odd Jobs vs Mubia (1979) E.A 476*** where it was held *inter alia* "that a court may base its decision on an un-pleaded issue if it appears from the course followed at the trial that the issue had been left to the court for decision."

103. In this appeal, the appellant takes issue with paragraphs 30, 31, 32, 33 and 34 of the trial court's judgment where the learned judge stated:

"30. Before I proceed to consider the petitioner's allegations and right off the bat, I find that although pleaded, there was no evidence of unofficial ballot papers counted in favour of the 3rd respondent. There was no evidence of stuffing ballot boxes with votes that were not marked and or cast by any voter but marked by the 3rd respondent's agents with the connivance of the 1st respondent. There was also no evidence of use of extra ballot papers, no evidence of introduction of unofficial, illegal and or irregular ballot paper booklets and no evidence of the use of documents without consistent and universal security features. I now turn to the testimony led in support of this ground.

31. Jacob Onyango K'odera (PW 2), an IT specialist, engaged by the petitioner as the overall campaign and poll day coordinator, testified that he received all the Forms 37B and noted several issues. First, that no results were captured for the following polling stations within Kisumu East Constituency and no explanation had been offered by the IEBC; Mamboleo Market (No. 3), Koyango Market (No. 3), Nyalenda 'A' Community Hall (No. 4) and Nyalenda 'A' Community Hall (No. 5).

32. Second, he noticed a high number of rejected votes in 95 polling stations across the County averaging between 5 and 10 votes. PW 2 opined that the incidence of these rejected voted coincided with the polling stations where the petitioner's agents alleged malpractices. Third, PW 2 sourced and downloaded election results for the Kisumu Presidential and Senatorial race from the IEBC portal, aggregated them and worked out the differences between the votes cast for each race. He noted marked differences between the tallies of the said results. Based on those parameters he concluded that the results presented by IEBC were neither accurate nor verifiable and lacked credibility.

33. There was also the testimony of Levi Oduor Otieno (PW 3), who testified that he was telecommunication expert. He told the court that he was given access to the IEBC servers and found that several deletions were made to files containing the results as transmitted using the scanned copies of Forms 37A. He was able to confirm and verify the correctness of the results downloaded from the server and those from Form 37C and he came to the conclusion that there was massive variance between the two which indicated interference with the data in the IEBC server. He further deposed that the person who logged onto the system, interfered with the results in favour of 3rd respondent."

104. The 1st and 2nd respondents in opposing the appeal submitted that the trial judge did not err in finding that the appellant did not formally plead evidence of electoral malpractice and electoral fraud. They contended that the judge considered all issues pleaded in the Petition and made determination thereon and that the judge did not ignore the testimony of **PW2** and **PW3** as it was evaluated and considered.

105. We have examined the petition filed before the trial court, considered the contents of the judgment and submission by parties on the alleged failure on the part of the trial court to consider evidence of electoral malpractice and electoral fraud. Pleadings provide the formal initiation of a suit containing a complaint. The pleading initiates the grievance and complaint and contains a presentation of facts as known by the claimant including the relevant provisions of law.

106. The parties to an election petition are *bound* by their pleadings. (See ***Mahamud Sirat vs Ali Hassan Abdirahman & 2 Others***, ***Nairobi High Court E. Petition No. 15 of 2008***, and ***Steven Kariuki vs George Mike Wanjohi and Others*** ***Nairobi High Court E. Petition No. 2 of 2013 [2013] eKLR.***

107. In **Raila Odinga & Another vs IEBC & 2 Others, S C Election Petition No. 1 of 2017 case,** the Supreme Court quoted with approval the Supreme Court of India in **Arikala Narasa Reddy vs Verikala Ram Reddy Reddygari and Another Civil Appeals Nos. 5710 – 5711 of 2012 [2014] 2 SCR** where it was stated that:

"In absence of pleadings, evidence if any, produced by the parties cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and that they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a Court to frame an issue not arising on the pleadings..."

108. In ***Charles C. Sande vs Kenya Cooperative Creameries Limited Mombasa Civil Appeal No. 154 of 1992,*** the Court of Appeal said that:

'... in our view, the only way to raise issues before a Judge is through the pleadings and as far as we are aware, that has always been the legal position. All the rules of pleadings and procedure are designed to crystalize the issue which the Judge is to be called upon to determine and the parties are themselves made aware well in advance as what the issues between them are.'

109. In ***Standard Chartered Bank Kenya Limited vs Intercon Services Ltd. & 4 Others, [2004] 2 KLR 183***, the Court of Appeal stated that:

"the law requires a court to determine a case on the issues that flow from the pleadings and to pronounce judgment on the issues arising from the pleadings or from issues framed for the court's determination by the parties unless the pleadings are amended."

110. In persuasive *dicta* by Odunga, J in ***Gideon Mwangangi Wambua & Another vs Independent Electoral and Boundaries Commission & 2 Others [2013] eKLR:***

"where a party does not sufficiently plead his facts with the necessary particulars but hinges his case merely on documents filed pursuant to Rule 21 of the Rules [ballot boxes, results & other election material], the court would be justified in forming the view that the petitioner is engaging in a fishing expedition or seeking to expand his petition outside the four corners of the petition."

111. In ***Mahamud Sirat vs Ali Hassan Abdirahman and 2 Others*** ***Nairobi Election Petition No. 15 of 2008*** Kimaru, J. in a persuasive *dicta* observed that:

> ***"From the outset, this court wishes to state that the petitioner adduced evidence, and even made submissions in respect of matters that had not been specifically pleaded in his petition. It is trite law that a decision rendered by a court of law shall only be on the basis of the pleadings that have been filed by the party moving the court for appropriate relief. In the present petition, this court declined the invitation offered by the petitioner that required of it to make decisions in respect of matters that were not specifically pleaded. This court will therefore not render any opinion in respect of aspects of the petitioner's case which he adduced evidence but which were not based on the pleadings that he had filed in court, and in particular, the petition."***

112. In the instant case, the first observation we make is that the appellant submitted that electoral fraud was pleaded in the petition. It is trite that an allegation of fraud must be pleaded with particulars given. This Court stated in ***Kinyanjui Kamau vs George Kamau Njoroge [2015] eKLR,*** that to succeed in a claim for fraud, the appellant need not only to plead and particularize the claim of fraud, but also lay a basis by way of evidence, upon which the court would make a finding. In ***Maithene Malindi Enterprises Limited vs Kaniki Karisa Kaniki & 2 Others [2018] eKLR,*** this Court emphasized as follows:

> ***"29. Our perusal of the record reveals that the issues of fraud and rendering of accounts of rent collected from the suit property were neither pleaded by any of the parties nor did they arise for the court's determination. Moreover, as previously held by this Court, in cases where fraud and/or misrepresentation is alleged, it is not enough to simply infer fraud from the facts. In Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR Tunoi, JA (as he then was) stated as follows:***
>
> ***"It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts."*** (Emphasis added).
>
> ***It is our finding therefore that the learned Judge erred in considering and determining these issues."***

113. In this appeal, we have examined the petition and there is no formal pleading and particularity on the alleged electoral fraud. There are no particulars specifying the nature of electoral fraud alleged to have been committed by the respondents. In the petition, there are no specific particulars as to which election offence was allegedly committed by the respondents. In our view, reproducing a constitutional or statutory provision is not a pleading with specificity and particularity. There must be facts that support the allegation of violation of the specific constitutional or statutory provisions cited. The appellant at paragraph 20 of his petition reproduced ***Article 86*** of the Constitution without specific facts supporting violation thereof. Paragraph 20 of the Petition is not a pleading with particularity. It is simply a verbatim reproduction of the provisions of ***Article 86*** of the Constitution.

114. The next observation we make is that upon our perusal and analysis of the contents of the judgment of the trial court in entirety, we are satisfied that the judge evaluated, considered and discounted the testimony of PW2 and PW3. The court made specific findings of fact and determined the probative value of the evidence tendered by these two witnesses. In this regard, we are reminded of the dictum by the Supreme Court in **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others [2014] eKLR** expressed as follows:

> ***[82]*** **….a petition which requires the appellate Court to re-examine the** ***probative value of the evidence*** **tendered at the trial Court, or invites the Court to** ***calibrate any such evidence,*** **especially calling into question the** ***credibility of witnesses,*** **ought** ***not*** **to be admitted.** ***We believe that these principles strike a balance between the need for an appellate Court to proceed from a position of deference to the trial Judge and the trial record, on the one hand, and the trial Judge's commitment to the highest standards of knowledge, technical competence, and probity in electoral-dispute adjudication, on the other hand.***

115. Guided by the afore stated dictum from the Supreme Court, we find no good reason to interfere with findings of fact made by the trial court in this matter. More particularly, we are convinced that the trial court considered the probative value of the testimony of **PW2** and **PW3**; we are satisfied that the trial judge evaluated their testimony and established as a fact that the two witnesses gave opinion expert evidence without a factual basis to support their statements of belief and findings.

116. To support the submission that it is the appellant who won the 8th August gubernatorial elections, the appellant tendered alleged election results from "JR Campaign Secretariat" and another from an entity called "Prof. Nyongo IT Team." These results carry zero and no probative value. In this regard, we refer to decision in **Obado vs Oyugi and Others SC Petition 4 of 2014**, where it was held that:

> **"the Constitution gives exclusive jurisdiction and mandate to the IEBC to hold election for all elective positions in the Country. This role cannot be transferred to other persons so that results generated from any other source cannot be given due consideration by the court. Such results from unauthorized sources lack legal sanction and substance in election law."**

117. We find that as a matter of law, the only lawful and legal results for any electoral seat is the results released and declared by the IEBC, the 1st and 2nd respondent herein. We agree with the submissions by Senior Counsel Orengo for the 3rd respondent that the "alleged electoral results" from "JR Campaign Secretariat" is not cogent, credible and is of unknown source and lack legal sanction and substance in election law.

Misdirection on Section 83 of the Elections Act

118. In this appeal, the appellant contends that the trial judge erred in law and misdirected himself as to the effect of ***Section 83*** of the **Elections Act**. The Section provides that:

> **"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 noncompliance did not affect the result of the election."**

119. The Supreme Court in **Raila & Another vs IEBC & 2 Others, [2017] eKLR SC Election Petition No. 1 of 2017** observed that there are two limbs in ***Section 83*** of the **Elections Act**, thus:

> ***"[192] There are clearly two limbs to all the above quoted provisions: compliance with the law on elections, and irregularities that may affect the result of the election. The issue in the interpretation of the provisions is whether or not the two limbs are conjunctive or disjunctive.***
>
> ***[211] In our respectful view, the two limbs of Section 83 of the Elections Act should be applied disjunctively. In the circumstances, a petitioner who is able to satisfactorily prove either of the two limbs of the Section can void an election. In other words, a petitioner who is able to prove that the conduct of the election in question substantially violated the principles laid down in our Constitution as well as other written law on elections, will on that ground alone, void an election. He will also be able to void an election if he is able to prove that although the election was conducted substantially in accordance with the principles laid down in our Constitution as well as other written law on elections, it was fraught with irregularities or illegalities that affected the result of the election."***

120. The appellant states that the trial judge misdirected himself on ***Section 83*** and failed to consider whether the electoral irregularities and malpractices affected the outcome of the elections; the judge erred by failing to consider the legal effect of discrepancies between Presidential, Senatorial and gubernatorial election results; the judge erred in law by failing to consider otherwise admissible and weighty evidence of the petitioner as well as six other witnesses called by the petitioners showing material non-compliance with electoral principles laid down in the Constitution and written law and that the petitioner did clearly show that the conduct of the gubernatorial elections was devoid of merit and distorted to the extent that it did not reflect the expression of will and intent of the electorate in Kisumu County.

121. We have considered the items cited by the appellant to support the submission that the trial judge misdirected himself on the effect of ***Section 83*** of the **Elections Act**. Our examination of the record reveals that there was no misdirection on the part of the trial judge. First, the trial judge considered and made a determination on the legal effect of failure to include results from five polling stations. The judge was clear that the results from the five polling stations could not affect the declared results of the election. Second, on the discrepancies between Presidential, Senatorial and Gubernatorial election results, the court considered the legal effect of the evidence tendered and found that "nothing could be inferred from the spoilt or extrapolated results of the Presidential or Senatorial election that could assist the petitioner without establishing a factual basis for the alleged malpractices or irregularities in each polling station which led either to the spoilt votes or the difference in variation in the number of votes in the gubernatorial election on one hand and the Presidential or Senatorial election on the other." On the issue that the trial court erred in failing to consider weighty evidence, it is manifest from the record that the trial court considered and evaluated the testimony of **PW2** and **PW3**.

122. In our view, whether the election petition was grounded on one or both limbs of ***Section 83*** of the **Elections Act**, the trial court properly evaluated the evidence on record and found no cogent and credible evidence that could vitiate and void the declared results on any limb of ***Section 83***. Quantitatively, the trial court correctly found that the missing results from the five polling stations could not affect the results of the elections. Qualitatively, the trial court found that the Kisumu gubernatorial election was conducted substantially in accordance with the principles laid down in the Constitution and written law. The appellant has neither demonstrated to us nor convinced us that there is admissible, cogent and credible evidence on record proving that there was qualitatively a substantial non-compliance with the principles laid out in the Constitution or written law. All that was shown to us quantitatively was the appellants own self-generated election results from "JR Secretariat" and unauthorized results from "Prof. Nyongo IT Team". These are entities with no constitutional or legal authority to declare any election results. For the foregoing reasons, we find that the trial court did not misdirect itself on the legal effect of ***Section 83*** of the Elections Act.

Failure to order scrutiny and recount

123. An issue urged by the appellant is that the learned judge erred in law in failing to order scrutiny and recount of the votes cast in the entire Kisumu County gubernatorial election. It was submitted that whereas the trial court granted an order for unfettered access to the IEBC servers, no access was granted by IEBC. It was further contended that the trial court reserved its ruling on whether or not to grant orders for scrutiny, recount and re-tallying of votes pending cross-examination of the 1st and 2nd respondents witnesses and that despite reserving in its ruling the decision to make an order for scrutiny, the learned judge erred and proceeded to deliver judgment without delivering the reserved ruling on scrutiny and recount. In the memorandum of appeal, it is contended that having granted an order for access to the IEBC servers, the trial judge should have granted the orders for scrutiny and recount.

124. In ***Francis Mwangangi Kilonzo vs Independent Electoral and Boundaries Commission & 2 Others [2018] eKLR*** the trial court aptly stated that access to election technology KIEMs Kit equipment is not supposed to be for a fishing exercise. By a Ruling dated 28th October, 2017, the Supreme Court in **Raila Amolo Odinga & Another vs Independent Electoral and Boundaries Commission & 2 Others No. 1 of [2017] eKLR** held that *scrutiny is to be confined to the polling stations in which results are disputed.* The Court stated that any *scrutiny of either the forms or the technology must be made for a sufficient reason. Any prayer in the application that would seem to be an extension of the case for the petitioners or which would in effect be a fishing exercise to procure fresh evidence not already contained in the petition would and must be rejected.*

125. We have considered the appellant's submission on scrutiny and recount and examined the memorandum of appeal. In ***Great Lakes Transport Co. (U) Ltd vs Kenya Revenue Authority [2009] eKLR,*** this Court observed that it has in several decisions made it clear that a court has no power to grant a relief a party has not specifically prayed for – see also the case of ***Malindi Air Services and Another vs Halima A. Hassan, Civil Appeal No. 69 of 2000.***

126. In the memorandum, there is no prayer for any relief by the appellant founded on failure by the trial court to make an order for scrutiny and recount. Even if a relief was prayed for, scrutiny and recount engender and lead to disclosure and determination of issues of fact which is outside the jurisdiction of this Court. Further, upon delivery of the Rulings on scrutiny and recount, the appellant never raised before the trial court the issue of non-compliance with the "Read Only Access Order" granted for the IEBC servers. No notice of appeal was filed to challenge the Rulings delivered by the trial court. Failure by the appellant to file a notice of appeal or raise non-compliance with the Read Only Access Order before the trial court is a belated afterthought, and we so find. Compliance or non-compliance with the "Read Only Access Order" by the trial court is a contestation on matters of fact outside the jurisdiction of this Court. Accordingly, this ground of appeal has no merit.

127. Overall, upon considering and analyzing the grounds urged in this appeal, submissions made by counsel and all authorities cited and the applicable law, we are convinced that this appeal has no merit.

128. The final orders of this Court are as follows:

(a) This appeal has no merit.

(b) The judgment delivered on 3rd of January, 2018 in Kisumu High Court Election Petition No. 3 of 2017 be and is hereby confirmed and upheld in its entirety.

(c) The appellant shall bear the costs of this appeal, to be taxed if not agreed.

Dated and delivered at Kisumu this 14th day of June, 2018.

P. N. WAKI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.