IN THE COURT OF APPEAL

AT NAIROBI

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

ELECTION PETITION APPEAL NO. 18 OF 2018

BETWEEN

OWINO PAUL ONGILI BABU.....APPELLANT

AND

FRANCIS WAMBUGU MUREITHI.....1ST RESPONDENT

NICHOLAS K. BUTTUK.....2ND RESPONDENT

INDEPENDENT AND ELECTORAL

BOUNDARIES COMMISSION.....3RD RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nairobi (Sergon, J.) dated 2nd March, 2018

in

Election Petition No. 8 of 2017)

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JUDGMENT OF THE COURT

INTRODUCTION

1. This is an appeal from the judgment of the High Court (Sergon, J.) which nullified the election of the appellant, **Owino Paul Ongili Babu**, as member of the National Assembly for Embakasi East Constituency, **(the Constituency)**. The appellant, being dissatisfied with that decision, preferred an appeal to this Court.

BACKGROUND

2. In the said election, the appellant was declared the winner, having garnered **46,587 votes**, while the 1st respondent, **Francis Wambugu Mureithi,** got **42,501 votes**. There were eight other candidates, none of whom managed to get more than **1,486 votes.**

3. The 1st respondent was dissatisfied with the conduct and outcome of the said election. Consequently, he filed an election petition in the High Court of Kenya at Nairobi, alleging that the election was marred with multiple electoral offences and massive irregularities; that it was not transparent and verifiable; that it failed to comply with constitutional provisions and the applicable electoral laws; and that the declared results were not a true reflection of the will of the electorate of the Constituency.

4. The 1st respondent sought several orders and declarations; *inter alia*; scrutiny and recount of all the votes cast; a determination that the appellant?s election as member of the National Assembly for the Constituency was null and void; a determination that the 1st respondent was validly elected as member of the National Assembly for the Constituency; that such election offences and malpractices by the appellant, the 2nd and 3rd respondents as disclosed and found by the trial court be reported to the investigative and prosecutorial agencies for appropriate action; and that the appellant, the 2nd and 3rd respondents be condemned to pay the costs of the petition.

5. In their respective responses to the petition, the appellant as well as the 2nd and 3rd respondents denied the 1st respondent?s allegations regarding the conduct of the said election. They averred that, save for a few incidents of disorder on the election day, 8th August, 2017, which, in their view, did not affect the final results, the election, including voting, counting of ballots and tallying of results, was conducted peacefully, efficiently, professionally, and in accordance with the dictates of the Constitution and electoral law. They urged the trial court to find that the appellant was validly elected as member of the National Assembly for the Constituency and dismiss the petition with costs.

SUMMARY OF THE HIGH COURT'S FINDINGS

6. After a full hearing of the petition, including scrutiny and recount of all the ballots cast, the learned judge found, *inter alia*:

(a) There were several Forms 35A that did not have the stamp of the Independent Electoral and Boundaries Commission (IEBC) but that was not fatal, so long as the forms were signed by the presiding officers and the agents;

(b) In four (4) polling stations, with a total of 1953 votes cast, Forms 35A did not bear signatures of the presiding officers.

(c) In one of those four polling stations, Forms 35A were altered without being countersigned by the presiding officer.

7. The learned judge held that the results in such Forms cannot be relied upon. He cited this Court?s decision in **NATHIF JAMA ADAM v ABDIKHAIM OSMAN MOHAMED & 3 OTHERS [2014] eKLR** where the Court held:

> ***"In JAMES OMINGO MAGARA v MANSON NYAMWEYA & 2 OTHERS, Civil Appeal No. 8 of 2010, this court held that when a document is not signed by its author it means that the author does not own it. It follows therefore that in this case the forms 35 with no presiding officer's signature were worthless and their results should have been excluded from the final tally. In the same vein, the absence of countersignatures against alterations, especially where such alternations related to votes garnered by the candidates, the results of the election on those forms were unverifiable."***

8. Notwithstanding the above finding, the learned judge held:

> ***"32. The failure by the petitioner and the 3rd respondent to summon the agent and the presiding officers respectively to testify robbed this court the opportunity to settle the issue as to whether or not the altered form 35A in respect of Embakasi Primary School polling station no. 6 was countersigned. Consequently, this court goes as per the report of the scrutiny and recount hence nothing turns on this ground."***

(d) Forms 35A for different polling stations were used to key in results of different polling stations.

(e) Some results in Form 35B did not tally with those announced and declared at the tallying centre, while in some instances the results in Forms 35A were different from those recorded in Form 35B, yet the results in Forms 35A lead to generation of the results in Form 35B.

9. In view of the foregoing irregularities, the learned judge was convinced that the legitimacy of some of the forms could not be established. He however noted that the said irregularities affected the results of other candidates, not those of the appellant and the 1st respondent. That notwithstanding, the judge added, the Court was concerned about **"the validity of the entire process in Embakasi East Constituency. …… After considering the evidence, the submissions and the report on scrutiny and recount over the above issues touching irregularities, illegalities, procedural and unprocedural omissions, I am convinced that the errors identified involve a substantial number of forms and are widespread. These shortcomings alone vitiates** (sic) **the 1st respondent's win." (emphasis ours)**

10. Another major issue that the election court pronounced itself on was regarding violence that was attributed to the appellant. The 1st respondent had alleged that the appellant caused violence at Soweto polling station leading to serious injury of one **Joshua Obiende Otieno**, who testified as PW2. The 1st respondent also submitted that the appellant intimidated the Constituency Returning Officer at the tallying centre into declaring him the

winner; that three of the appellant?s officials namely, **Jackline Mungai, Monica Wambua** and **Naftali Muriithi** committed election offences while performing their duties as presiding officers; that the appellant engaged in undue influence and intimidation of electoral staff at the East African School of Aviation, the tallying centre for the Constituency.

11. The trial court made the following findings:

(a) there was no sufficient evidence that the appellant instigated the violence that occurred at Soweto Social Hall polling centre;

(b) the violence at Soweto Social Hall was attributed to voters and youths;

(c) the appellant coerced and intimidated the Constituency Returning Officer.

(d) there was no evidence of violence in Greenspan Mall polling centre and Embakasi Soweto Social Hall polling centre;

(e) the violence that took place at Soweto Social Hall, though not attributable to the appellant, affected the election in the entire

polling centre;

(f) the appellant intimidated and coerced the Constituency Returning Officer and that act affected the conduct of the election, particularly the declaration of results.

12. In view of the irregularities and shortcomings highlighted hereabove, the learned judge came to the conclusion that the election of the appellant as member of the National Assembly, the Constituency, was neither free nor fair. The court annulled it and ordered a repeat of the election. It awarded the 1st respondent costs of Kshs.5,000,000/= as against the appellant and the 3rd respondent.

APPEAL TO THIS COURT

13. Being aggrieved by the decision of the High Court, the appellant preferred an appeal to this Court. Prior to the filing of the memorandum and record of appeal on 29th March, 2018, the appellant had filed a notice of appeal on 2nd March, 2018. The notice was filed in the High Court.

14. The memorandum of appeal contains 20 grounds. In his written submissions, the appellant?s learned counsel, **Mr. Awele**, who was led by **Mr. Orengo, Senior Counsel**, condensed the submissions to cover only three broad issues that informed the decision of the High Court. The three issues are as follows:

(i) That the results in Forms 35A did not tally with the results as announced in Form 35B;

(ii) That Soweto Social Hall polling centre was marred by violence; and

(iii) That the appellant intimidated and coerced the Constituency Returning Officer.

APPLICATION TO STRIKE OUT THE APPEAL

15. On 5th April, 2018 the 1st respondent filed an application under **rule 17** of the **Court of Appeal (Election Petition) Rules, 2017**, seeking an order to strike out the record of appeal on grounds that:

"(a) No Notice of Appeal was filed at the Registry of the Court under the Rule 6 or service effected as required under Rule 7 of the Court of Appeal (Election Petition) Rules, 2017).

(b) The Record of Appeal as filed does not contain a Notice of Appeal lodged at the Registry of the Court under the Rule 6 or service effected as required under Rule 7 of the Court of Appeal (Election Petition) Rules, 2017).

(c) The Record of Appeal does not contain any certification as required by the provisions of Rule 8(4) of the Court of Appeal (Election Petition) Rules, 2017."

16. When this matter came up for directions on 5th April, 2018, the Court directed that the 1st respondent?s application be set down for hearing together with the appeal on the same day. Parties were directed to file their respective submissions on both the application and the appeal, which they did. We must therefore first consider and determine the 1st respondent?s application since it is a dispositive motion in respect of the entire appeal.

17. The 1st respondent was represented by **Mr. Kiragu Kimani, Mr. Otachi and Mr. Ham Lagat.** In his written submissions filed through Ogetto, Otachi & Company, the 1st respondent stated that an appeal from the High Court in an election petition is commenced by filing of a notice of appeal. He cited **rule 6(1)** of this **Court's Election Petition Rules** which stipulates as follows:

"(1) Unless otherwise provided by statute, all election petition appeals shall be initiated by notice of appeal".

18. Counsel contended that a notice of appeal under **rule 6** of the **Election Petition Rules** is an appeal, while a notice of appeal under **rule 75** of the **Court of Appeal Rules** only signifies an intention to appeal. It was further contended that in an appeal arising from a decision in an election petition the place of filing of the notice of appeal is the Court of Appeal, as opposed to a notice of appeal from other High Court decisions, which is filed in the High Court.

19. To emphasize that in appeals arising from judgments in election petitions it is the filing of the notice of appeal that initiates the appeal, the 1st respondent?s counsel cited **rule 6(3)** of this **Court's Election Petition Rules** which reads as follows:

"(3) A notice of appeal shall identify the judgment from which the appeal is based and shall, in separate numbered paragraphs-

(a) specify whether all or part of the judgment is being appealed and, if a part, which part;

(b) identify the source of the right of appeal and the basis for the jurisdiction of the Court to determine the appeal;

(c) precisely set out the grounds of the appeal;

(d) concisely state the relief sought;

(e) provide the address for service of the appellant and state the names and addresses of all persons intended to be served with copies of the notice; and

(f) contain a request that the appeal be set down for hearing in the appropriate registry."

20. Counsel further submitted that this Court?s Election Petition Rules make no mention of a memorandum of appeal. That is so because the grounds of appeal are set out in the notice of appeal, as opposed to ordinary appeals, where **rule 82** of the **Court of Appeal Rules** specifies that an appeal is instituted through, *inter alia*, the lodging of the memorandum of appeal. In that regard, the appellant?s counsel added, the memorandum of appeal dated 26th March, 2018 is alien to this Court?s Election Petition Rules and ought to be disregarded.

21. In response, the appellant?s counsel submitted that in light of **Article 159(2) (d)** of the **Constitution, Sections 3A** and **3B** of the **Appellate Jurisdiction Act, rules 3, 4(2), 5** and **8(4)** of this **Court's Appeal Rules**, the 1st respondent?s application had no merit. Counsel stated that the notice was, on the instruction and/or directions of this Court?s Registry, filed in the High Court in the first instance; the same was thereafter served on the parties, after which it was lodged in this Court.

22. The appellant?s counsel further submitted that the purpose of a notice of appeal is to notify respondent(s) well in advance that an appeal shall be filed, which was done, and served upon all the respondents well within the prescribed period of 30 days.

23. But even assuming the notice of appeal was not appropriately lodged, Mr. Awele argued, striking out a record of appeal that was filed and served within the prescribed period merely because the notice of appeal was not endorsed by this Court would be disproportionate to the prejudice, if any, that may have been occasioned by the failure to endorse the same.

24. As regards the certificate of correctness of the record of appeal under **rule 8(4),** the appellant?s learned counsel submitted that the same is essentially for the purpose of ensuring that the record of appeal is substantially complete; that the 1st respondent had not pointed out any material omission from the record that would jeopardize the court?s mandate to render substantive justice; and neither had it been demonstrated that any prejudice had been occasioned to the 1st respondent. That notwithstanding, the appellant had filed a formal certificate by way of a supplementary record of appeal. With that, the appellant?s counsel urged us to dismiss the 1st respondent?s application to strike out the appeal.

25. The 2nd and 3rd respondents, through their learned counsel, **Mr. Isaac Odhiambo** and **Mr. Charles Rigoro** respectively, adopted the appellant?s submissions. They urged the Court to follow the path it had charted in **JOHN MUNUVE MATI v INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 2 OTHERS, E.P.A. No. 5 of 2018** where the Court stated as follows:

"In this case there is clear non-compliance with the rules but we have before us the record of appeal and we perceive it to be possible to determine the appeal without any infractions on the set timelines. We have considered the effect of the failure of the appellant to file the notice of appeal within 7 days and to serve the same within the prescribed period. No evidence has been adduced that any party has been prejudiced by non-compliance with the 2017 rules, which we have noted. The three objects of the 2017 rules namely, just impartial and expeditious determination of appeals, which we agree must be given equal consideration, do not stand to be compromised if we hear the appeal on merit."

26. We have carefully considered the submissions by counsel on the 1st respondent?s application to strike out the appeal. As rightly pointed out by the 1st respondent?s learned counsel, in **FERDINAND WAITITU v IEBC & 8 OTHERS, [2013] eKLR,** this Court observed that election petitions are *sui generis* in nature and their conduct is governed by specific rules. The Court cited with approval the Indian Supreme Court in **JYOTI BASU & OTHERS v DEBI GHOSAL & OTHERS [1982] AIR 983** which held that:

"An Election Petition is not an action at common law, nor in equity. It is a statutory proceeding to which neither the common law nor the principles of Equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to Common Law and Equity must remain strangers to Election Law unless statutorily embodied."

27. The conduct of appeals arising from judgments in election petitions by the High Court is governed by **The Court of Appeal (Election Petition) Rules, 2017**. **Rule 4 (1)** thereof provides as follows:

"4(1) These Rules apply to the conduct of appeals from decisions of the High Court in election petitions and matters relating thereto."

28. Where the Election Petition Rules have expressly stipulated the mode of moving the court, a party is duty bound to comply with the provisions of the Rules. However, where there is non-compliance, the Court must bear in mind the dictates of **rule 5** which states:

"5. The effect of any failure to comply with these Rules shall be a matter for determination at the Court's discretion subject to the provisions of Article 159 (2)

(d) of the Constitution and the need to observe the timeliness set by the Constitution or any other electoral law."

Under **rule 17**, the **Court**, for sufficient reason, can also extend or reduce the time set by the rules.

29. In this appeal, it is evident that the appellant did not strictly comply with the provisions of **rule 6** of the **Court's Election Petition Rules**. The notice of appeal that initiates an election petition appeal was initially filed in the High Court, instead of lodging the same in this Court?s registry. The form of the notice was also not strictly in conformity with **Form EPA 2** set out in the schedule to the Rules.

30. The notice of appeal was subsequently transmitted to this Court?s Registry. However, there is no denial that it was served within the stipulated period of seven days.

31. Although the 1st respondent?s counsel submitted that a notice of appeal under **rule 6** is an appeal, we disagree. The Rules define an

> **"appeal"** to mean **"an appeal from the decision of the High Court acting in its original jurisdiction in an election petition"**, whereas a "**notice of appeal**" is defined as a **"notice lodged in accordance with rule 6".** The two are different. The notice of appeal is used to initiate an appeal and it cannot therefore be said that a notice of appeal is an appeal. **Rule 8** defines the contents of a record of appeal, which should contain copies of:
>
> > ***"(a) an index of all the documents in the record with the numbers of the pages at which they appear.***
> >
> > ***(b) a statement showing the address for service of the appellant and the address for service of the respondent being his last known address and proof of service on the respondent of the notice of appeal;***
> >
> > ***(c) the pleadings;***
> >
> > ***(d) the trial judge's notes of the hearing;***
> >
> > ***(e) the transcript of any shorthand notes taken at the trial;***
> >
> > ***(f) the affidavits read and all documents put in evidence at the hearing, or, if such documents are not in the English language, certified translations thereof;***
> >
> > ***(g) the judgment;***
> >
> > ***(h) certified copy of the decree or order;***
> >
> > ***(i) <u>the notice of appeal</u>; and****(emphasis supplied)*
> >
> > ***(j) such other documents, if any, as may be necessary for the proper determination of the appeal, including any interlocutory proceedings which may be directly relevant."***

32. The 1st respondent?s counsel was right in stating that this Court?s Election Petition Rules do not contain any provision for filing a memorandum of appeal, as the case is in ordinary appeals from the High Court. Instead, **rule 6** requires an appellant to precisely set out the grounds of appeal in the notice of appeal. In this appeal, the appellant prepared a memorandum of appeal and included it as well as the notice of appeal in the record of appeal and served it upon the respondents. That was not elegant. It is not the prescribed mode of instituting such an appeal.

33. How should this Court deal with the non-compliant record of appeal? Considering the provisions of **rule 5** which empowers the Court to exercise its discretion in its determination of an application such as the one before us, we are minded to exercise our discretion in a manner that will not prejudice any of the parties, and which shall permit a determination of the appeal on its merits. The drafters of **rule 5** had in mind the purpose and place of **Article 159(2) (d)** of the **Constitution** which ensures and upholds determination of disputes on merit. Again the rule gives powers to the Court to exercise its discretion. And as we all know, discretion must not be exercised whimsically, capriciously or unreasonably. In addition, **section 72** of the **Interpretation and General Provisions Act** provides that whenever a form is prescribed by written law, an instrument or document that purports to be in the prescribed form shall not be void by reason only of deviation, if the deviation does not affect the substance of the instrument or document, or if it is not calculated to mislead.

34. The 1st respondent was duly served with the record of appeal within the stipulated period of five days from the date of its filing. The 1st respondent did not suffer any prejudice as a result of the manner in which the record of appeal was compiled and presented before this Court. We therefore invoke the provisions of **Article 159(2) (d)** of the **Constitution**, **Sections 3A and 3B** of the **Appellate Jurisdiction Act** and **rule 5** of this **Court's Election Petition Rules** and deem the appeal as properly filed. We are fortified in our finding by the Supreme Court?s decision in **<u>LEMANKEN ARAMAT v HARUN MEITAMEI LEMPAKA & 2 OTHERS,</u> eKLR [2014]** that:

> ***"[123] A court dealing with a question of procedure, where jurisdiction is not expressly limited in scope – as in the case of Articles 87(2) and 105(1) (a) of the Constitution – may exercise a discretion to ensure that any procedural failing that lends itself to cure under Article 159, is cured. We agree with learned counsel that certain procedural shortfalls may not have a bearing on the judicial power (jurisdiction) to consider a particular matter. In most cases, procedural shortcomings will only affect the competence of the cause before a Court, without in any way affecting that Court's jurisdiction to entertain it. A Court so placed, taking into account the relevant facts and circumstances, may cure such a defect; and the Constitution requires such an exercise of discretion in matters of a technical character."***

Consequently, we decline to strike out the appeal as prayed by the 1st respondent.

1ST RESPONDENT'S CROSS-APPEAL

35. The 1st respondent filed a notice of cross-appeal which raises six salient issues as summarized in his written submissions. The six issues are:

> ***"1. Whether the court erred in finding that the lack of IEBC stamps did not affect the validity of the statutory Forms 35.***
>
> ***2. Whether the court erred in law and fact in finding that violence was only in Soweto Social Hall.***
>
> ***3. Whether the court erred in law in failing to admit the 1st Respondent's video evidence.***
>
> ***4. Whether the court erred in law in failing to determine or interrogate the nature of countersigning of Forms 35As in Embakasi Social Hall Polling Station No. 6, Edelvale Primary School Polling Station No 3 and Embakasi Primary School Polling Station No 16, in which 1,410 votes were cast hence difficult for IEBC to establish the integrity of the process.***
>
> ***5. Whether the criminal charges against Monica Kasaya Wambua and Jackeline Waithera Muigai of Soweto Social Hall Station Number 5 and Embakasi Social Hall Polling Station Number 18 is conclusive evidence of electoral malpractice and/or fraud.***
>
> ***6. Whether the learned judge properly found on the issues of irregularity and the noncompliance with the law that the same did not meet the threshold of Section 83 of the Election Act as read together with Article 81 of the Constitution."***

We shall consider and determine the grounds raised in the cross-appeal alongside the appellant?s grounds of appeal.

36. The first major issue that informed the learned judge?s decision and which has been impugned by the appellant is that the results in Forms 35A did not tally with the results as announced in Form 35B.

37. In arriving at that conclusion, the learned judge rightly observed that the results as recorded in Forms 35A ought not to differ with those recorded in Form 35B since the results in Forms 35A lead to generation of the results in Form 35B. The learned judge therefore concluded that the results as declared and announced were not verifiable.

38. The appellant?s counsel submitted that the learned judge reached the conclusion without cogent evidence and/or ascribed excessive weight to irrelevant evidence, and by selectively applying the scrutiny and recount report. Counsel made reference to the evidence of **Nicholas Buttuk**, the Constituency Returning Officer, who admitted that some results in Forms 35B did not tally with the ones he declared at the tallying centre. The learned judge cited the results of other candidates namely, **Haji Jibril Abdow, Wangui Maina Faith, Waruinge Stephen Maina** and **Wekesa Francis Masinde**, which showed that the votes attributed to them in Form 35B were initially wrongly entered and later rectified after declaration of the results. Although the learned judge observed that the error gave rise to a difference of **4,874** votes, which did not affect the final result of the election, the court nevertheless went ahead to nullify the election. The appellant?s counsel faulted the learned judge for that finding, saying that the said error was not a transpositional one but was a summation error of the total tallies of the results of the four candidates only.

39. The appellant?s counsel further submitted that a substantial number of the results of the four candidates from individual polling stations were correctly transposed from Forms 35A but wrongly summed up by the Returning Officer?s staff; that the said error did not in any way confer undue advantage to the appellant or to any other candidate, and was promptly rectified by the Returning Officer upon discovery. Counsel faulted the learned judge for nullifying the election on the strength of a purely arithmetic error in Form 35B when the results in Forms 35A and the actual recount consistently showed that the irregularity was a minor administrative error that did not affect the result of the election. In support of the submission, counsel cited the Supreme Court?s decision in **RAILA ODINGA & ANOTHER v IEBC & OTHERS, Petition No. 1 of 2017 ("Raila 2017")** where the Court emphasized the substantiality test as follows:

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

40. The 2nd and 3rd respondents? counsel associated themselves with the submissions made by the appellant?s counsel. Submitting on the scrutiny and recount of the ballots cast, Mr. Odhiambo emphasized that the purpose of the exercise that was ordered by the court is to enable the court ascertain the accuracy of the results as shown in the forms. See **HASSAN ABDALLA ALBEITY v ABU MOHAMED ABU CHIABA & ANOTHER, [2013] eKLR**. The exercise also cures any irregularities or errors that may have been committed in the process of counting, tallying and declaration of results.

41. Mr. Odhiambo further submitted that the scrutiny and recount exercise established that the results as declared were verifiable, save for minor variations in a few stations which did not affect the result of the election.

42. Responding to the issue of the irregularities and variation of the results between those recorded in Forms 35A and the declared ones in Form 35B, Mr. Kiragu stated that the various irregularities as pointed out by the trial court affected the verifiability of the election results.

43. Counsel further submitted that even if the recount revealed that the appellant garnered more votes than the 1st respondent, the results declared were not verifiable by the paper trail left behind. The 1st appellant was not challenging the votes declared only, he was also challenging the process of the election; in other words, his petition challenged both the quantitative and qualitative aspects of the election, counsel submitted. In his view, where the results from 93 polling stations were not accurately collated, it cannot be said that the election met the requirements of **Article 86** of the

Constitution.

44. Counsel cited the Supreme Court decision in **RAILA 2017** where the court held:

> ***"But what if the numbers are themselves a product, not of the expression of the free and sovereign will of the people, but of the many unanswered questions with which we are faced? In such a critical process as the election of the President, isn't quality just as important as quantity? In the face of all these troubling questions, would this Court, even in the absence of a finding of violations of the Constitution and the law, have confidence to lend legitimacy to this election? "***

45. The 1st respondent?s counsel urged this Court to find that the application for scrutiny and recount of the ballots cast, which was made at the tail end of the trial, was well merited, in view of the evidence that had been adduced by the 1strespondent; and that the exercise revealed a multiplicity of serious irregularities that were sufficient to enable the court nullify the election.

46. A determination of the first major issue in this appeal which led to the nullification of the election, that is, variation of the results in Forms 35A and 35B, essentially entails a consideration of the question or concept of

"**Did the irregularity affect the result of the election**?"

47. **Section 83** of the **Elections Act** stipulates 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 non-compliance did not affect the result of the election."***

Article 81 of the **Constitution** sets out general principles for the electoral system in this Country. It states as follows:

> ***"81. General principles for the electoral system***
>
> ***The electoral system shall comply with the following principles-***
>
> ***(a) freedom of citizens to exercise their political rights under Article 38;***
>
> ***(b) not more than two-thirds of the members of elective public bodies shall be of the same gender;***
>
> ***(c) fair representation of persons with disabilities;***
>
> ***(d) universal suffrage based on the aspiration for fair representation and equality of vote; and***
>
> ***(e) free and fair elections, which are-***
>
> ***(i) by secret ballot;***
>
> ***(ii) free from violence, intimidation, improper influence or corruption;***
>
> ***(iii) conducted by an independent body;***
>
> ***(iv) transparent; and***
>
> ***(v) administered in an impartial, neutral, efficient, accurate and accountable manner."***

48. It is trite law that for an election to be invalidated for reason of non-compliance with provisions of the Constitution, the Elections Act and or any other electoral law, a party must demonstrate that the election was not conducted in accordance with the constitutional principles and the relevant electoral law, or that the non-compliance affected the result of the election. It means the court should not chart an easy course of nullifying an election or invalidating it under the slightest pretext. There must be sufficient reasons supported by evidence.

49. In **RAILA 2017**, the majority decision observed that it is a global truism that no conduct of any election can be perfect. Earlier, the

Supreme Court in **GATIRAU PETER MUNYA v DICKSON MWENDA KITHINJI & 2 OTHERS [2014] eKLR (MUNYA's CASE)** had observed that where a petitioner alleges that there were electoral malpractices, the correct question to ask is **"Did these errors/discrepancies affect the result and/or the integrity of the elections?"** If so, in what particulars? The Supreme Court stated:

> *"[217]* ***If it should be shown that an election was conducted substantially in accordance with the principles of the Constitution and the Election Act, then such election is not to be invalidated only on ground of irregularities.***
>
> *[218]* ***Where, however, it is shown that the irregularities were of such magnitude that they*** **affected the election result,** ***then such an election stands to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection, are not enough, by and of themselves, to vitiate an election. In this regard, we stand on the same plane as the learned Judges in Morgan, Opitz and Nana.***
>
> *[219]* ***By way of example, if there would be counting or tallying errors which after scrutiny and recount do not change the result of an election, then a trial court would not be justified, merely on account of such shortfalls, to nullify such an election. However, a scrutiny and recount that reverses an election result against the candidate who had been declared a winner, would occasion the annulment of an election. Examples of irregularities of a magnitude such as to affect the result of an election, are not however, closed."***

50. It is against these principles that we shall consider and determine whether the irregularities in Forms 35A and Form 35B were sufficient to nullify the election. One of the 1st respondent?s complaints in the petition was that 44 Forms 35A which were used to announce the results did not have I.E.B.C stamp. He also complained that several Forms 35A were neither signed nor stamped. The learned Judge was satisfied that those irregularities had been proved. He then posed the question: "**What is the impact of the non-stamped forms 35As**?"

51. In answer to that question, the learned judge considered the decision of this Court in **IEBC & ANOTHER V STEPHEN MUTINDA MULE & 3 OTHERS[2014] eKLR** where the Court held as follows:-

> ***"There is no stamping requirement in the case of the Form 35. All that is required with regard to form 35 as provided for in Regulation 79 is the signature of the presiding officer and the agents of the candidates. We agree with the submission made on behalf of the appellant that it is the signatures of the Presiding officers and the agents that authenticate the Form 35."***

The learned judge held that: "*the failure to affix the I.E.B.C stamp on the form 35As was not fatal so long as the aforesaid forms are signed by the Presiding officers and the agents*."

52. That finding formed one the grounds of the cross-appeal by the 1st respondent. The 1st respondent?s counsel submitted that any anomalies in the statutory forms have serious implications in the whole electoral process. He cited the decision of **Lenaola, J**. (as he then was) in **MASAKA v KHALWALE & 2 OTHERS [2011] KLR 390** at **392**; that:

> ***"……where there was no way of authenticating an election by use of statutory documents, the results were irrelevant because the whole process was as crucial as the final results."***

53. The 1st respondent also fortified that submission by citing the Supreme Court decision in **RAILA 2017**, in which, counsel argued, strict compliance as opposed to substantial compliance with the electoral law was emphasized.

54. On our part, we cannot fault the learned judge?s finding that failure to stamp Forms 35A was not fatal, as long as they were signed by the relevant electoral officials. In any case, the non-stamping was adequately explained and cured by the signature of all agents and presiding officers. That confirmed the authenticity, legitimacy and correctness of the results contained in the said forms. More importantly, we were not shown how that affected the election or result therefrom. In the absence of such vital and important information, we agree with the position taken by the learned trial judge as the correct proposition in law. We have carefully perused **regulation 79** of the **Elections (General) Regulations, 2017** and there is no requirement for stamping of the forms. It may, however, be administratively wise to do so. We adopt our earlier finding on this same issue in **I.E.B.C. & ANOTHER v STEPHEN MUTINDA MULE & 3 OTHERS** (supra) that:

> ***"If any such forms were stamped, it was a gratuitous and superfluous discretionary or administrative act incapable of creating a statutory obligation, less still the invalidation of the Forms 35 that did not contain the stamp."***

In view of the foregoing, the first ground of the cross-appeal must fail.

55. The second issue for consideration as regards the 1st respondent?s cross-appeal is whether the learned judge erred in law in failing to determine or interrogate the nature of countersigning of Forms 35A in Embakasi Social Hall Polling Station No. 6, Edelvale Primary School Polling Station No. 3 and Embakasi Primary School Polling Station No. 16.

56. It is not in dispute that alterations made on the statutory forms require to be countersigned by the Presiding officer(s). Unless they are countersigned, the results therein cannot be verified. See **NATHIF JAMA ADAM v ABDIKHAIM OSMAN MOHAMED & 3 OTHERS** (supra).

In **RAILA 2017** decision, the Supreme Court stated that the appending of a signature to an electoral form bearing the tabulated results is the last solemn act of assurance to the voter by such officer that he stands by the numbers on that form.

57. What was the trial judge?s finding on this issue? He stated:

> ***"It is clear that the alterations in forms 35As of Embakasi Social Hall polling station no. 6 and Edelvale Primary School polling station no. 3 were countersigned by the presiding officer. However, form 35A in respect of Embakasi Primary school polling station no. 6 was not annexed to the affidavit of Nicholas Buttuk. However, the one annexed to the affidavit of Gilbert Njuguna who was an agent to the petitioner shows that the results in form 35A in respect of Embakasi Primary School polling station no. 6 was altered but was not countersigned by the presiding officer….The report on scrutiny and recount dated 21.2.2018 indicates that the 3rd respondent supplied to the Deputy Registrar of this Court a copy of the aforesaid form and upon perusal it was clear that the form was altered but countersigned by the Presiding officer. This court is now dealing with two conflicting situations. Unfortunately, neither the Presiding officer nor the petitioner's agent in the aforesaid polling station testified hence the issue will remain in doubt."***

58. In the circumstances as aforesaid, the learned judge chose to go by the report of the Deputy Registrar regarding the scrutiny and recount exercise, which showed that the alterations had been verified by the counter signatures of the Presiding Officer. This finding was on an issue of fact. Under **Section 85A** of the **Election Act**, the jurisdiction of this Court in election matters is on matters of law only unless the conclusion arrived at, upon assessment of the facts is so perverse or unreasonable that a reasonable tribunal will not arrive at such a conclusion. Was that the case in this matter? We think not. See the Supreme Court decision in **GATIRAU PETER MUNYA v DICKSON MWENDA KITHINJI & 2 OTHERS** (supra). We think the trial judge applied his mind correctly on that issue of fact and that the conclusion he arrived at was neither perverse nor unreasonable.

In the premises, we have no jurisdiction to interrogate the issue of the alleged failure to countersign the said electoral forms as it is an issue of fact which the learned judge determined.

59. We now turn to consider the irregularity in the statutory forms that the learned judge held affected the result of the election; that is, the results in some Forms 35A did not tally with the results as announced in Form 35B. The learned judge?s finding was largely informed by the evidence of Nicholas Buttuk, the Constituency Returning officer. He stated:

> ***"It is on record that Mr. Nicholas Buttuk (DW3) the constituency returning officer for Embakasi East Constituency, admitted during the hearing that some results in forms 35B do not tally with those he announced and declared at the tallying. The results attributed to Haji Jibril Abdow, Wangui Maina Faith, Waruinge Stephen***
>
> ***Maina and Wekesa Francis Masinde were cited. I have examined the votes attributed to the aforementioned candidates and it is apparent that the error gave rise to a difference of 4,874 votes. It is also apparent from the evidence tendered that in some instances like in Soweto Social Hall Polling Station no. 28 and Tassia Catholic Primary School Polling Station no. 3 a multiple form 35A was used for a single polling station. The report on scrutiny and recount by this court dated 21st February 2018 revealed that the empirical comparison between the final results declared by the constituency returning officer in forms 35Bs though appear consistent indicate there are about 93 polling stations with a difference between the results announced and the figures obtained upon recount. The aforesaid mathematical errors affected 68 forms 35As."***

60. We must once again pose the question: Did the variation in the results as contained in Forms 35A and those in Form 35B affect the result of the election? To this question, the learned judge stated:

> ***"In my view it does not matter that the irregularities affected the results of other candidates and not the parties to this petition. What we are concerned here*** *(sic)* ***is the validity of the entire election process in Embakasi East Constituency."***

The learned judge posed the wrong question leading to an incorrect or vague answer.

61. With respect, the learned judge did not take into consideration the fact that the errors as noted were not tranpositional, they were summation errors of the total tallies that affected only four candidates, neither the appellant nor the 1st respondent. In any event, the record shows that upon discovery, the errors were rectified by the Returning Officer. That rectification did not affect the results of the first two leading candidates, the appellant and the 1st respondent. Was it therefore right in law for the learned judge to invalidate the result of the election on the strength of a pure arithmetical error in Form 35B when the results in Forms 35A and the recount showed that the appellant had more than 4000 votes ahead of the 1st respondent? We think not. The error was innocuous in nature in so far as the results obtained by the contestants were concerned.

62. In the **MUNYA's CASE**, the Supreme Court stated that:

> ***" If there would be counting or tallying errors which after scrutiny and recount do not change the result of an election, then a trial court would not be justified, merely on account of such shortfalls, to nullify such an election."***

63. **Odek, JA.** in his book – **"ELECTION TECHNOLOGY LAW AND THE CONCEPT OF: DID THE IRREGULARITY AFFECT THE RESULT?"** the learned judge at pages 081 and 082 argues that:

> ***"For an election irregularity to vitiate the result, the result must be affected. Which result must be affected? There is only one result that must be affected - the result that "A" is the winner of the election. "Result" means the success of one candidate over another and not merely an alteration in the number of votes given to each candidate.***

For an election petition to succeed, evidence must be led to prove that the result and conclusion that "A" is the winner of the election is affected by the irregularities or non-compliance with the constitutional principles and electoral law. The evidence led must demonstrate that the irregularities or non-compliance raise doubt as to whether "A" is the winner and better still that the irregularities or non-compliance prove that "A" is not the winner."

We agree with the learned judge?s views on the issue and adopt the same herein.

64. In **INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION v MAINA KIAI & 5 OTHERS [2017] EKLR**, this Court held that the primary source of results in a Parliamentary election is the ballot box, whose results are recorded in Form 35A at each polling centre, before tallying is done and the results obtained from the various polling centres are captured in Form 35B. There were no complaints regarding the results in Forms 35A and as we have stated earlier. The errors in Form 35B were purely arithmetical and did not affect the results obtained by either the appellant or the 1st respondent.

65. The Returning Officer (DW3) told the trial court that the said arithmetical errors were occasioned by human errors due to fatigue. No interference or manipulation of the ballots and the results were proved. With respect, the learned judge did not give much regard to the explanation advanced by the Returning Officer.

66. Lastly, by nullifying the election on account of the said arithmetical irregularities, we think the learned trial judge gave very little regard to the results of the scrutiny and recount exercise. The recount revealed that the appellant garnered **46,817 votes**, 230 more than the **46,587** as shown in Form 35B, while the 1st respondent had **42,501**, an increase of 248 votes compared to the **42,253** that were shown in Form 35B. The winning margin was **4,316 votes.** The 1st respondent did not dispute the results in any of the polling stations during and after the scrutiny exercise was completed. That, in our view, is prima facie evidence that the 1st respondent was satisfied with the actual results in the entire constituency. We believe the will of the people of Embakasi East Constituency was clear beyond peradventure. It follows, therefore, that the nullification of the election on account of the aforesaid irregularities was not well founded in law.

67. We now turn to the issue of violence at some polling centres which is one of the grounds of appeal by the appellant as well as the cross-appeal by the 1st respondent. The learned judge found that violence rocked Soweto Polling Centre to the extent that voting had to be stopped for some hours; that in Polling Station No.18, Soweto Social Hall, the appellant went there with some supporters and caused a lot of commotion, forcing the election to be stopped for half an hour.

68. The learned judge also found that the appellant intimidated the Constituency Returning Officer, forcing him to announce and declare results before he concluded the exercise of vote tallying.

69. In paragraph 66 of his judgment, the learned judge stated:

"I find no evidence there was violence in Greenspan Mall Polling Centre and Embakasi Social Hall Polling Centre."

In his cross-appeal, the 1st respondent urges this Court to find that the learned judge erred in making that factual finding. He also urges us to find that there was violence in the two polling stations aforesaid.

70. On this ground of appeal, the appellant?s counsel submitted that the learned judge?s findings were fundamentally flawed in light of the totality of the evidence on record; for ignoring the testimony and submissions of the appellant and his witnesses; for adopting a lower threshold as the standard of proof of such allegations; for failing to uphold the established jurisprudence that for a court to nullify an election on such a ground there has to be proof of widespread violence and intimidation of voters such that voters were prevented from exercising their right to vote; and for failing to find that the disruptions in the electoral process were minor and did not affect the result of the election.

71. In support of the above submissions, the appellant?s counsel cited **KARANJA KABAGE v JOSEPH KIUNA KARIAMBEGU NG'ANG'A & 2 OTHERS [2013] EKLR, MULIRO v MUSONYE & ANOTHER [2008] 2KLR (EP)** and **JOHO V NYANGE** (supra).

72. Lastly, on the issue of violence, the appellant?s counsel relied on the Supreme Court?s decision in **JOHN HARUN MWAU & 2 OTHERS v IEBC & 2 OTHERS [2017] eKLR**, where the petitioners contended that the Presidential election proceeded amidst riots and violent demonstrations in several counties thus affecting the voter turnout in over 25 constituencies. The Supreme Court upheld the said election implicitly on the basis that **Section 55B** of the **Elections Act** empowers the I.E.B.C. to postpone an election where it is not possible to proceed with it because of the violence, among other causes. This was not the case in the instant matter, counsel argued; adding that voting and counting of all the ballots was done in each and every polling station, the alleged incidences of violence notwithstanding.

73. On this issue, the 2nd and 3rd respondents supported the appellant?s submissions fully. They disagreed with the 1st respondent that there was widespread violence throughout the Constituency. They argued that the incidence of unrest was in only one polling centre, Soweto Social Hall, but its extent did not disenfranchise any voter. Their counsel further submitted that the trial court did not take into account the remedial measures that were taken to ensure that voters exercised their constitutional rights in line with **Articles 38** and **81** of the **Constitution**.

74. The 2nd and 3rd respondents? counsel further submitted that evidence tendered in court showed that for every case of unrest as captured in the poll day diary, the remedial measure taken was that security personnel quickly came in and restored order and voting continued smoothly. The other remedial measure was that any time lost was duly compensated for by extending the voting time in the affected polling station.

75. The 2nd and 3rdrespondents further submitted that the learned judge, in stating that at Soweto Social Hall Polling Centre the appellant and

his supporters caused commotion, forcing the election to be stopped for half an hour, he misapprehended the facts. This is because the scrutiny report showed that it was the 1st respondent?s supporters who were found to have caused commotion in the polling station together with the 1st respondent?s witness, one Joshua Obiende.

76. The 1st respondent?s counsel submitted that polling station diaries revealed that there was violence in Soweto Social Hall Polling Centre, Greenspan Mall Grounds Polling Centre and Embakasi Social Hall Polling Centre. He urged this Court to find that the learned judge "*erred in law in finding that violence was only in Soweto Social Hall*."

77. Much as that ground of cross-appeal is couched in a language that suggests that it is on a matter of law, it is not. The learned judge, who heard all the witnesses and perused all the poll day diaries, found, as a matter of fact, that violence occurred in Soweto Social Hall Polling Centre only. This Court would be exceeding its jurisdiction as granted under **Section 85A** of the **Election Act** if it were to start re-evaluating the evidence tendered before the trial court with a view to verifying a factual finding and/or reversing the trial court?s finding.

78. In **MUNYA'S CASE**, the Supreme Court, in analyzing the jurisdiction of this Court in an appeal of this nature held:

> ***"...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."***

We must therefore decline the invitation by the cross-appellant to re-examine the record of appeal and find, as a matter of fact, that there was violence in more polling centres than the learned judge found. We have no jurisdiction to do so.

79. What we must now determine is whether the violence that rocked Soweto Social Hall Polling Station had any negative impact on the outcome of the election. Before we make that determination, let us first examine what the learned judge found regarding the alleged violence at that station.

> ***"Having considered and analysed the evidence presented in support of this allegation, I am not persuaded that the 1st respondent [now the appellant] instigated the violence alleged to have taken place in Soweto Social Hall Polling centre. The evidence tendered to establish the allegation is not consistent nor reliable."***

80. In our view, that conclusion completely exonerated the appellant from any violence that may have occurred at the said polling station. The only evidence that pointed to occurrence of some violence at Soweto Social Hall Polling Centre was Polling Station day diaries, which, after their perusal the learned judge stated:

> ***"I am convinced that the polling centre was marred by violence. The evidence shows that the voting exercise had to be adjourned in some instances for hours… The incidences of violence and fracas were attributed to the voters and youths."***

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

82. In the impugned judgment, the learned judge simply stated:

> ***"Though the violence cannot be attributed to the 1st respondent, (the appellant herein), the truth of the matter is that the election in the entire polling centre was affected."***

With respect, the learned judge ought to have shown the manner in which the election was affected by the violence. There was not a single voter who testified that they were disenfranchised and thus failed to exercise their constitutional right to vote. To the contrary, evidence was tendered to the effect that voting hours were extended to compensate for any time that was lost due to the unrest that occurred at Soweto Social Hall Polling Centre. The learned judge?s conclusion that the election in the entire polling station was affected had no legal premise and must therefore be rejected.

83. In a related issue, the trial court found that the appellant intimidated and coerced the Constituency Returning Officer (DW3) into announcing results before they were properly tallied. This is what the Returning Officer told the trial court:

> ***"I announced the results for Embakasi East under immense pressure from Mr. Babu Owino. When I wanted to announce the results I misplaced form 35C. It is a certificate issued to a winner. The results were streaming from the screen and all that was remaining was for me to declare the winner. Mr. Babu Owino should have been patient to enable me locate the missing Form 35C.***
>
> ***Despite the pressure from Mr. Babu Owino, I announced the same results."***

84. While not in anyway approving or condoning the appellant?s impatience and bravado, considering the above scenario, we do not think that there was any lawful justification for finding that the appellant coerced and intimidated the Constituency Returning Officer. Not only is that conclusion not supported by the evidence adduced, it is actually contrary to the evidence. The appellant, having seen the results

that were streaming in, and having followed up the counting process at the various polling centres, must have been edgy and jittery when he realized that the Returning Officer was unnecessarily delaying declaration of the result of the election simply because he had misplaced Form 35C.

85. We agree with the appellant?s counsel that the appellant?s agitation in the circumstances was honest and legitimate. After all, **regulation 83 (1)** requires the Returning Officer "**immediately after the results of the poll from all polling stations have been received**," to tally the final results and promptly declare them, and in the case of election of a member of the National Assembly, issue the winner with Form 35C.

86. We think the Returning Officer was under pressure to announce the results, rather than under intimidation by the appellant. The work of a Returning Officer in a highly competitive election is a high-pressure job that requires a Returning Officer to be able to withstand pressure from different quotas. The Returning Officer told the trial court that: "**Despite the pressure from Mr. Babu Owino, I announced the same results."** In those circumstances, we do not understand how the trial court came to the conclusion that the appellant intimidated and coerced the Returning officer; and if at all, how that intimidation materially affected the result of the election.

87. The fact that the appellant exerted pressure upon the Returning Officer shortly before the declaration of the results is neither suggestion nor ground of wrong-doing. To so conclude would be easily vitiating an election on the basis of mere pressure. The Returning Officer had at his disposal security personnel who were well able to contain unwarranted use of force or intimidation by any party. The question we pose is whether the pressure exerted upon the Returning Officer aborted the true election results or diluted the results; or whether he wrongly announced or declared the appellant the winner due to the pressure.

Again we may ask whether the Returning Officer announced the results without rational appraisal of facts available to him, which was the results from all the polling stations. We think not. The Returning Officer told the trial court that inspite of the pressure from the appellant he still announced the correct results. Consequently, we must allow this ground of appeal.

88. Regarding the video evidence that the 1st respondent wanted admitted by the trial court, the learned judge declined to do so because its production did not comply with **Sections 78A** and **106B** of the **Evidence Act**. For the same reason, the learned judge also declined to admit a videotape that the appellant wanted to rely upon. The 1st respondent?s videotape was intended to show that there was violence at some polling stations.

89. In his cross-appeal, the 1st respondent stated that the learned judge erred in law in failing to admit his video evidence. The learned judge stated:

> ***"It is the submission of the 1st respondent that the video evidence produced by the petitioner in this petition is inadmissible since they were broadcasts of a media outlet known as KASS FM whose agents did not testify in these proceedings thus rendering the same as hearsay. The 1st respondent attacked the certificate of electronic record signed by Mr. David Kemei Lelei, a freelance journalist. It is said that Mr. David Kemei Lelei does not identify himself as an agent of KASS FM. It is further pointed out that the video is not attributed to him. The petitioner on the other hand is of the view that the video evidence he produced to prove his case is admissible as they are relevant to his case and comply with the provisions of Section 106 of the Evidence Act. It is pointed out that the person who took the video, a Mr. David Kemei Lelei has issued the relevant certificate therefore the court should adopt the video produced by the petitioner since the same comply with the provisions of Sections 78A and 106B of the Evidence Act. Having considered the rival submissions over the issue touching on the admissibility of video evidence, with respect I agree with the submissions of the 1st respondent. I am persuaded by the decision of Ochieng, J in the case of*** *Ndwiga Steve Mbogo vs I.E.B.C. & 2 others Election Petition no. 7 of 2017 (2017) eKLR* ***where he held*** *inter alia „When a person watches news items on television, he may choose to record it. If the said person was to later replay the recording, he would not be the originator of the contents.*
>
> *The person who produced the original record would be the most appropriate person to produce the record in evidence…..?*
>
> ***I hereby decline to admit the video evidence presented by the petitioner."***

90. **Section 78A** of the **Evidence Act** states as follows:

> ***"(1) In any legal proceedings, electronic messages and digital material shall be admissible as evidence.***
>
> ***(2) The court shall not deny admissibility of evidence under subsection (1) only on the ground that it is not in its original form.***
>
> ***(3) In estimating the weight, if any, to be attached to electronic and digital evidence, under subsection***
>
> ***(1), regard shall be had to-***
>
> > ***(a) the reliability of the manner in which the electronic and digital evidence was generated, stored or communicated;***
> >
> > ***(b) the reliability of the manner in which the integrity of the electronic and digital evidence was maintained;***
> >
> > ***(c) the manner in which the origin at or of the electronic and digital evidence was identified; and***
> >
> > ***(d) any other relevant factor.***

(4) Electronic and digital evidence generated by a person in the ordinary course of business, or a copy or printout of or an extract from the electronic and digital evidence certified to be correct by a person in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self-regulatory organization or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract."

91. The 1st respondent?s counsel submitted that the certificate of production of the said video was made by the person who took the video, one Mr. David Kemei Lelei; that the certificate was produced in court; the video was produced from the primary source; and the video was taken in the ordinary course of business. He therefore stated that the trial judge ought to have found that there was no legal requirement for the person producing the certificate to swear an affidavit under **Section 106B** of the **Evidence Act**. Counsel urged this Court to reverse the finding by the learned judge and hold that the video produced by the 1st respondent complied with all the requirements of **Sections 78A** and **106B** of the **Evidence Act**.

92. **Section 106B** of the **Evidence Act** states as follows:

"106B.

(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as "computer output") shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.

(2) The conditions mentioned in subsection (1), in respect of a computer output, are the following-

(a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in paragraph (a) of subsection (2) was regularly performed by computers, whether-

(a) by combination of computers operating in succession over that period; or

(b) by different computers operating in succession over that period; or

(c) in any manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, then all computers used for that purpose during that period shall be treated for the purposes of this section to constitute a single computer and references in this sections to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following*-(emphasis supplied)*

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any matters to which conditions mentioned in subsection(2) relate; and

(d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the shall *(sic)* ***be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.***

(5) For the purpose of this section, information is supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of an appropriate equipment whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purpose

of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities."

93. Having carefully perused **Section 106B** of the **Evidence Act**, we agree with the 1st respondent that there is no legal requirement for the person producing a certificate to swear an affidavit. In our view, the video(s) had met the requirements set out under the aforesaid section and was therefore admissible.

94. Having so found, how should this Court deal with that kind of evidence, considering that the learned judge did not apply his mind to the contents thereof and decide on it, one way or the other? Although **rule 29(b)** of this **Court's Rules** empowers this Court to take additional evidence or to direct that additional evidence be taken by the trial court, or by a commissioner, the court was not moved appropriately. In the cross-appeal, the 1st respondent simply urged the court to find that "**the 1st respondent's video evidence was admissible and should have been taken into account**." That is all we can, which we hereby do. We shall say no more regarding that issue.

95. The last issue in the 1st respondent?s cross-appeal is whether the criminal charges against Jackline Waithira Muigai and Monica Kasaya Wambua, who were Presiding officers at Soweto Social Hall Polling Station No. 5 and Embakasi Social Hall Polling Station No. 18 respectively, is conclusive of electoral malpractice and/or fraud. Monica Kasaya Wambua together with Naftali Muriithi David were charged with aiding and abetting offences contrary to **Section 19(1)** as read with **Section 24(1)** of the **Election Act**. It was alleged that on 9th August, 2017 at Embakasi Social Hall Polling Station No. 18 the two aided the concealment of various election material as stated in the charge sheet.

96. Jackline Waithira Muigai was charged with breach of official duty contrary to **Section 6(j)** of the **Election Offences Act No. 37 of 2016**. It was alleged that on 9th August, 2017 at East African School of Aviation in Embakasi, being the Presiding Officer at Soweto Social Hall Polling Station No. 5, the said person left unattended election materials, namely; six ballot boxes.

97. It is the appellant who alleged before the High Court that the two ladies aforesaid, as officials of the I.E.B.C, committed election offences. The charge sheets, which were produced before the learned judge and form part of the record, reveal that the two ladies were arraigned in court on 22nd August, 2017. At the time the petition was heard the matter was still pending before the Makadara Chief Magistrate?s Court. The learned judge therefore refrained from making any comment or finding about the criminal case. In his written submissions, the 1st respondent?s counsel now urges this Court **"to take Judicial notice"** that the two ladies were recently convicted of the aforesaid offences.

98. With respect, we cannot do that. We have nothing on record to prove that the said ladies were duly convicted as alleged. But even if such material now exists, the learned judge could not have pronounced himself on an issue that was still before a criminal court. This ground of the cross-appeal is without any merit and is accordingly dismissed.

CONCLUSION.

99. Having carefully considered the entire record of appeal, submissions by counsel and the various authorities cited, for the reasons that we have already advanced, we are not satisfied that the irregularities and the non-compliance with the electoral law affected the result of the election of the appellant as member of the National Assembly for Embakasi East Constituency. Consequently, we allow the appeal and set aside the decision of the High Court given on 2nd March, 2018 invalidating the appellant?s election. It is hereby declared that the appellant was validly elected as member of the National Assembly for Embakasi East Constituency and the order nullifying his election and ordering fresh election is hereby quashed and set aside. A certificate confirming that the appellant was duly elected as member of the National Assembly for Embakasi East Constituency during the elections held on 8th August, 2017 shall issue in accordance with **Section 86(1)** of the **Elections Act, 2011;** and shall be forwarded to the Independent Electoral and Boundaries Commission and the Speaker of the National Assembly.

100. As regards the 1st respondent?s cross-appeal, we dismiss all the grounds thereof save for the one that challenged the non-admission of the 1st respondent?s video, which we have found ought to have been admitted into evidence.

101. As costs follow the event, the appellant is awarded the costs of the petition in the High Court as against the 1st respondent, which are capped at **Kshs.3,000,000/=.** The appellant is also awarded the costs of this appeal as against the 1st respondent which are capped at **Kshs.1,000,000/=.** It is so ordered.

Dated and delivered at Nairobi this 8th day of June, 2018.

M. WARSAME

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR