IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, KIAGE & ODEK, JJ.A)

ELECTION PETITION APPEAL NO. 25 OF 2018

BETWEEN

PHILIP KYALO KITUTI KALOKI.....APPELLANT

AND

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

THE RETURNING OFFICER

(KIBWEZI EAST CONSTITUENCY).....2ND RESPONDENT

JESSICA NDUKU KIKO MBALU.....3RD RESPONDENT

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

in

Makueni Election Petition No 1 of 2017)

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JUDGMENT OF THE COURT

This contest is between Professor Philip Kyalo Kituti Kaloki (appellant) and Jessica Nduku Kiko Mbalu (3rd respondent). The appellant is a distinguished professor in business administration. He is also a trade and business consultant, born in 1950.

The 3rd respondent is equally pursuing a PhD in Strategic Management at the University of Nairobi but so far unable to complete due to political commitments. In line with the alleged norm that no man shall disclose the age of a lady, we will not go there. For a professor like the appellant to abandon class and books for politics is an act of political bravery and like most brave acts, it left the Professor unguarded and alone. To seek a political office while risking the comfort of being a professor portends a clear, immediate and absolute danger with financial and psychiatric consequences. As we all know professors have ultra-meticulous taste for perfection. The dress, mind and manner of a professor reflects a sense of self-worth and importance. But politics is a dirty game which does not recognize and reward that immaculate and rather formal education. Politics does not require craft and experience, it is conducted with great fanfare. The professor has now twice failed in pursuit of his political dreams, hence politics is not a fireside chat.

As we all know, petitions are primarily filed in pursuit of a right and in redress for grievances committed. Again it is true that often times such action is undertaken in satisfaction of a personal ego, to remain relevant and inform supporters that theft of monumental magnitude was committed against their will. Not to mention, it is also filed to make something out of the winner or his party.

Admittedly every candidate who seeks an elective position is in the frame of mind of winning and when he loses, the thought of victory unfairly and illegally stolen comes to his mind. From that moment he gathers courage, vigour and strength to upset the alleged unfair win of

the opponent. He/she files a petition, with all and every kind of available allegations. Depending on the sophistication and ingenuity of the Advocate he hires, he presents a somewhat voluminous document before court, allegedly with a watertight or waterproof case.

That mistaken belief and confidence is usually shattered when the trial court dismisses the petition as without merit. It is at that moment in time, that the petitioner realizes the consequences of his fruitless and futile journey, resulting in huge costs, the labour of his imaginary dream now made into reality.

It also dawns on him that he/she is now faced with his stolen victory legitimized by act of law, costs to the respondents and above all a demand of fees from his Advocates. Not to mention, the undesirable situation of being jobless and irrelevant for the next 5 years. A man or woman faced with such a dilemma requires psychiatric counseling, religious comfort and family support. As is customary the law must play its role of determining the truth from falsehood and conjecture. That is what we intend to do in this appeal.

This court, in exercise of its jurisdiction under **Section 85A** of the Elections Act, considers matters of law. That section of law provides:

> ***?An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of county governor shall lie to the Court of Appeal on matters of law only – ?***

The import of this section was under consideration by the Supreme Court in ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR (Petition 2B of 2014*****)** and that

Court noted that this section is a deliberate prescription of law,

> ***?a product of a constitutional scheme requiring electoral disputes to be settled in a timely fashion. The Section is directed at litigants who may be dissatisfied with the judgment of the High Court in an election petition.?***

What then is a matter of law? The Supreme Court continued in its consideration of **section 85A** and after reviewing the jurisprudence from various comparative jurisdictions held as follows:

> ***(66) what, essentially, is an appeal on a question or a matter of law, as distinct from a question or a matter of fact? How ought the Court of Appeal to proceed, in considering appeals brought before it under Section 85A of the Elections Act? This question is not new to judicial discourse, nor is it unique to this part of the world. It is a matter that has exercised judicial and scholarly attention over the years.***
>
> **…**
>
> ***[80]… we would characterize the three elements of the phrase ?matters of law? as follows:***
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> ***(a) the technical element: involving the interpretation of a constitutional or statutory provision;***
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> ***(b) the practical element: involving the application of the Constitution and the law to a set of facts or evidence on record;***
>
> ***(c) the evidentiary element: involving the evaluation of the conclusions of a trial Court on the basis of the evidence on record.***

The Court therefore held, that with respect to **section 85A** of the Elections Act, the jurisdiction of this Court would mean a question involving either of the following: first, the interpretation of

> **"a** ***provision of the*** **Constitution,** ***an Act of Parliament, Subsidiary Legislation, or any legal doctrine, or the application of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, to a set of facts or evidence on record, by the election court or the conclusions arrived at by the election court where it is claimed 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.' On this latter score, it is important to note that the Court clarified that ?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.?***

This is what we must bear in mind as we embark on determining the appeal that is now before us whose background is as follows: On 8th August 2018, the constituents of Kibwezi East Constituency conducted an election for their representative to the National Assembly. There were five candidates in that election; and Philip Kyalo Kituti Kaloki, the appellant herein, and Jessica Nduku Kiko Mbalu, 3rd respondent, were among them. At the end of the election, the results with respect to the appellant and the 3rd respondent, as declared by the returning officer of the Kibwezi East Constituency, the 2nd respondent herein were as follows:

> ***Philip Kyalo Kituti Kaloki 13,192 votes***
>
> ***Jessica Nduku Kiko Mbalu 26,131 votes.***

The appellant, aggrieved by his loss, filed a petition dated 7th September 2017 in which he challenged the election of the 3rd respondent as the Member of Parliament for Kibwezi East Constituency. He pleaded various malpractices and irregularities that occurred in the course of the election as well as during the vote counting stage that tarnished the election. In brief, these included that: the 1st respondent abdicated its

role in exercising the sovereign will of the people of Kibwezi East and that the election was so badly conducted and marred with irregularities, that it was not conducted in accordance with **Article 81** and **86** of the Constitution.

The grounds upon which the appellant relied were that: he and his agents, despite being present at the voting stations in time, were not allowed to enter into the stations until much later when the appellant and his chief agent intervened; his agents were not allowed to sign any declarations in respect of the election by the presiding officer in most of the polling stations; and they were not provided with copies of the declaration of the results. In addition, the appellant claimed that some of the 3rd respondent's employees and agents, together with the presiding officers in the various polling stations, sought to engage in acts of intimidation and misleading of illiterate voters.

The appellant also claimed that the 1st respondent abdicated its role and duty by failing to respond or act upon the illegality which surrounded the appointment of the 2nd respondent as the returning officer for Kibwezi East Constituency, and that he, the 2nd respondent, was partisan, refused to hear and entertain complaints on glaring irregularities by the appellant or his agents and openly sided with the 3rd respondent whom he ultimately announced and declared as the winner of the said election.

The appellant also alleged that before the election and even on election day, the 3rd respondent and her agents were engaged in electoral malpractices in bribing the voters and taking their identification cards, and that she carried out her campaigns outside of the time allowed in law. For these reasons, the appellant asked the election court to find that the election failed to comply with the election laws as well as the procedures set thereunder and were marred with irregularities.

The respondents on their part all denied the assertions made by the appellant, contending that the election as held was proper and that any irregularities that may have occurred were immaterial. In a judgment dated 2nd March 2018, the election court agreed with the respondents and dismissed the petition, finding that many of the appellant's assertions were not proven to the required standard, and that the errors pointed out by the appellant were minor and did not affect the outcome of the election.

The appellant was aggrieved with the whole of the judgment and order of the election court, and filed the present appeal. The 3rd respondent too was aggrieved with the order made by the election court with respect to costs and filed a cross appeal. The parties herein presented their positions by way of written submissions which were highlighted orally by Mr Makundi, Mr Kituku and Mr Musili for the appellant; Mr J. Anyoka for the 1st and 2nd respondent while the 3rd respondent was represented by a team comprising Mr Mutula Kilonzo Jr, Mr Charles Kanjama and Ms Lynne Owano. The grounds of appeal as raised in the memorandum of appeal were prolix, and in an endeavor to fulfill our mandate under **section 85A** of the Elections Act, we will consider them in turn according to the various issues of law that the appellant has raised.

The appellant's first challenge on the findings of the election court are with respect to some of the Forms 35A that were used in the election. The appellant submits that the forms that were not stamped and signed and could not be said to contain authentic results. For this proposition, learned counsel relied on the case of ***Raila Amolo Odinga & Another v IEBC & 2 Others*** ***[2017] eKLR (Petition No 1 of 2017)*** in which the Supreme Court remarked that:

> "***Of the 4,229 Forms 34A that were scrutinized, many were not stamped, yet others, were unsigned by the presiding officers, and still many more were photocopies. 5 of the Forms 34B were not signed by the returning officers. Why would a returning officer, or for that matter a presiding officer, fail or neglect to append his signature to a document whose contents, he/she has generated? Isn't the appending of a signature to a form bearing the tabulated results, the last solemn act of assurance to the voter by such officer, that he stands by the ?numbers? on that form??***

The appellant also relied on the decision of this Court in ***Abdikhaim Osman Mohamed & Another v IEBC & 2 Others*** ***(2014) eKLR*** (**Civil Appeal 293 of 2013)** where the court held that

> ***?(29) The learned judge estimated the affected votes to have been about 100. That is exactly wrong because the results in respect of the 12 forms 35 which had neither the seal of the 2nd respondent nor the presiding officer's signatures should have been excluded on the ground that their authenticity could not be vouchsafed.?***

In the appellants view, his agents were not allowed to sign the statutory forms in 34 polling stations, and thus, the total number of votes in those stations, which amount to a total of 8900 votes ought to have been excluded. Moreover, despite the fact that the agents did not sign these forms, the presiding officer failed to record the reason for refusal to sign the forms as required by regulation 79 of the Elections (General) Regulations 2012.

This regulation provides that the presiding officer, as well as each of the candidates or the agents must sign the declaration of results. Should the candidates or agents not sign, then Regulation 79(3) requires the presiding officer to record the reason for failure to sign the declaration form. Where this provision is not complied with, then Regulation 79(6) is instructive:

> ***?The refusal or failure of a candidate or an agent to sign a declaration form under sub-regulation (4) or to record the reasons for their refusal to sign as required under this regulation shall not by itself invalidate the results announced under sub-regulation (2) (a)?.***

Moreover, Regulation 79(7) provides that the absence of a candidate or an agent at the signing of a declaration form or the announcement of results shall not, by itself, invalidate the results announced. This means that it is not mandatory for the agents to sign the statutory forms. The agents' signature on the statutory forms are not mandatory. However, the signature of the presiding officer is mandatory.

It is clear that that the election court considered this point when it rendered itself as follows:

> ***?126. Having perused all the declaration forms attached to the pleadings, I came across only three polling stations where form***

> ***35A's were unsigned by both the PO and DPO i.e. Ndauni primary school (452 votes), Mtito Andei stream1 (465 votes) and Kithiiani primary school (229 votes). The combined votes from the three polling stations amounted to 1,146. In my view, these results were invalid and should not be included in the overall results.?***

We agree with this assessment. There were only three polling stations where the presiding offices did not sign the forms, and these results could therefore not count towards the final tally. However, in view of the margin of votes between the appellant and the third respondent, it is clear that the exclusion of these results from the final results did not ultimately affect the outcome of the election.

The appellant asserts that the election court abdicated its duty by not making a finding with respect to whether or not any electoral offences were committed. He submitted that the failure of the presiding officers to record the fact that some forms were not signed by the agents, and that the fact that the presiding officers allowed strangers to enter the polling station and mislead the voters who were being assisted were all indications that the employees of the 2nd respondent worked to breach **section 6** of the Election Offences Act. In his view, violations to the Elections (General) Regulations, 2012 amount to election offences, and the election court has a duty, under **section 87A** of the Elections Act, to make a recommendation to the Director of Public Prosecution to take action with respect to an electoral offence that may have taken place.

So what is the duty of an election court should it appear that an election offence has been committed? First, we note, as this Court did in ***Moses Masika Wetang'ula v Musikari Nazi Kombo 2 others [2014] eKLR (Civil Appeal 43 of 2013)*** that the standard of proof in proving an election offence is the same as that of any other criminal offence; such an offence must be proved beyond a reasonable doubt. The Court stated that:

> ***?40. However, if there are allegations of commission of election offences in an election, the law requires that those allegations be proved beyond reasonable doubt. In other words, the standard of proof required in allegations of commission of election offences made in election petitions is beyond reasonable doubt. Once again see Raila Odinga Vs IEBC & Others and Joho v Nyange (supra).***
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> ***41. There is good reason for this requirement. Election offences are criminal offences. For anyone to be held criminally liable, Article 50(2)(a) of the Constitution requires that the case against such person should be proved beyond reasonable doubt. In election petitions, the law requires the election court to report such person to the IEBC, which may bar such person from contesting in that or future elections. This is besides the sentence that may be meted out to such person if criminal charges are brought against him. It is on account of these dire consequences that the law demands proof beyond reasonable doubt of allegations of commission of election offences.***

At the time this Court made the aforementioned decision, **section 87(1)** of the Elections Act empowered a court to make a definitive finding as to the guilt of a party with respect to an election offence. The Supreme Court found this law to be ambiguous and likely to cause the risk of double jeopardy to affected persons in ***Moses Masika Wetangula v Musikari Nazi Kombo & 2 others [2015] eKLR (Petition 12 of 2014)*** and recommended that the law be amended to safeguard the principles of natural justice. The amendment came in the form of the Election Laws (Amendment) **Act No 36 of 2016** which amended **section 87(1)** of the Elections Act which now reads as follows:

> ***?An election court may, at the conclusion of the hearing of a petition, in addition to any other orders, make a determination on whether an electoral malpractice of a criminal nature may have occurred.?***

Section 87(2) continues that where the court makes a recommendation that an electoral offence may have occurred, then the said order is to be transmitted to the Director of Public Prosecution for his further action. We reject the appellant's submission that this section requires the court to make a determination on whether an electoral offence has occurred. In our view, this section gives the court room, where necessary or where it is apparent, to make a determination that a malpractice of a criminal nature may have taken place. Once the court makes such a determination, then the court is required to ensure that it reaches the Director of Public Prosecutions for appropriate mention.

A finding that there has occurred a malpractice of a criminal nature that may have been committed has serious consequences, and cannot be made without adequate evidence; in an election petition, the parties are not defending themselves against a criminal charge related to an electoral offence, instead they are more concerned with the process of the conduct of the election. Should the evidence be clear, then the court is empowered under **section 87** to make the appropriate recommendation to the Director of Public Prosecution and the party that would be adversely affected would have adequate notice to defend themselves against the charge. But should the court make a determination under **section 87** without adequate evidence, then it would only serve to embarrass the party concerned and the court itself.

In the end we find that the court did not err in failing to make a determination under **section 87**. In any event, if the appellant feels very strongly that there were malpractices of a criminal nature, he can still make a report to the police on the same, and the Director of Public Prosecutions would still have the authority to take action on the same. This limb of the appellant's challenge to the judgment of the trial court therefore fails.

The appellant also challenged the appointment of the 2nd respondent, submitting that he was not properly appointed to act as a returning officer, which was contrary to Regulation 3 of the Elections (General) Regulations 2012. Neither the appellant nor the 3rd respondent knew that the 2nd respondent had been appointed as the returning officer. The respondents on their part argued that the issue of the appointment of the 2nd respondent, alongside other returning officers was the subject of the court's determination in ***Republic v IEBC ex-parte Khelef Khalifa & Another (2017) eKLR (Miscellaneous Application 628 of 2017).*** In that matter, learned judge of the High Court held as follows:

> ***(1) The Respondent was under a constitutional and statutory obligation pursuant to Regulation 3(2) of the Elections (General) Regulations, 2012 to provide the list of persons proposed for appointment to political parties and independent candidates at least fourteen days prior to the proposed date of appointment to enable them make any representations.***
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> ***(2) The Respondent did not provide the list of persons proposed for appointment to political parties and independent candidates***

at least fourteen days prior to the proposed date of appointment to enable them make any representations.?

The election court found that despite this finding from Odunga J, the status quo established by this Court in ***Khelef Khalifa v Hassan Abdi Abdile Civil Application No 246 of 2017*** which ordered that pending the hearing and determination of the appeal, the constitutional and statutory functions of the county returning officers and their deputies would remain valid for the purposes of the election. It is noteworthy however that these orders related to the returning officers whose names were published in the Kenya Gazette of 12th September 2017 to aid in the conduct of the repeat presidential election that was held on 26th October 2017. In our opinion, these orders did not apply to the returning officers who were appointed for the purpose of the election held on 8th August 2017.

Even so, the appellant claimed to have found out about the irregularity of the 2nd respondent's appointment after the judgment by Odunga J was delivered, and argued that the finding of unconstitutionality of the appointment should therefore apply in his petition. To determine this, we go back to the petition. The only challenge that the appellant presented with respect to the appointment of the 2nd respondent was that he was from Makueni County. The non-compliance with regulation 3(2) was never pleaded, and as we have stated above, parties are bound by their pleadings. Moreover, the appellant never showed what drawbacks were experienced by the fact that neither he nor the 3rd respondent were given the name of the returning officer before he was appointed. This challenge on the judgment of the election court therefore fails.

The appellant also takes issue with the fact that the trial court limited its right to information by allowing it to access only 7 polling stations. The appellant submit that by way of an application made on 17th October 2017, he applied to court to have the 1st and 2nd respondents compelled to grant access to the KIEMS devices, logs as well as details on the identification and number of voters and the transmitted results of all the polling stations for Kibwezi East Constituency. However, the trial court, in a ruling delivered on 10th November 2017, limited the right to information by granting access to only six polling stations as opposed to granting access to all the KIEMS devices in all the polling stations. The appellant therefore contends that the election court should have submitted the information instead of limiting it as it would not have caused any prejudice. Moreover, the appellant contends that during the trial, he sought to be supplied with polling station diaries, which was granted by the court, but despite the court order, the said documents were never filed in court. We do not agree. It is clear that the learned judge did order that some of the diaries be availed in court, and even referred to them in the course of the judgment. We find it interesting also, that one of the appellant's submissions was that the learned judge referred to these polling stations diaries only when it favoured the respondent's case. It is clear therefore that this latter submission by the appellant is baseless.

Was the appellant's right to access information improperly impeded when the judge made the order of scrutiny? Scrutiny and recount can only be granted where the party requesting these orders has laid a basis either in the petition, the application or the evidence adduced in court. In ***Gitaru Peter Munya –Vs- Dickson Mwenda Kithinji & 2 Others [2014] eKLR (Petition No.2B of 2014)*** at paragraph 153 the Supreme Court of Kenya set out various guiding principles that would guide courts in making orders of scrutiny. Among these are that**:**

> ***?… the right to scrutiny and recount do not lie as a matter of course. The party seeking a recount or scrutiny of votes in an election petition is to establish a basis for such a request, to the satisfaction of the trial judge or magistrate ….?***

In addition,

> ***?Where a party makes a request for scrutiny or recount of votes, such scrutiny or recount if granted, [it] is to be conducted in specific polling stations in respect of which the results are disputed, or where the validity of the vote is called into question in the terms of Rule 33(4) [now rule 29(4)] of the Election (Parliamentary and County Elections) Petition Rules.?***

As we stated in ***John Munuve Mati v Returning Officer Mwingi North Constitutency, Independent Electoral & Boundaries Commission & Paul Musyimi Nzengu [2018] eKLR (Election Petition Appeal No. 5 of 2018):***

> ***?It was [the appellant's] to apply and lay the basis to justify an order of access to or scrutiny of that information. Having failed to so plead and lay the basis, the appellant cannot turn round at this stage and blame the trial court for failing to make an order for scrutiny of the KIEMS kit. Parties are bound by their pleadings and the learned judge would have been justifiably accused of committing errors if she had granted orders that none of the parties had applied for.?***

The election court noted, as we have, that the petition did not state, in any detail, what grievances the appellant had in order to lay a basis for scrutiny. We have considered the application that the appellant made to the election court. The prayer for scrutiny was supported by the appellant's affidavit in the following terms:

> ***"I have pleaded in my petition that there were election irregularities in several polling stations including but not limited to DWA, Usalama, Kilunugi, Ndauni, Mwanyani and Nzayo among others, and if this application is allowed as prayed then all the irregularities will be unearthed and the will of the Kibwezi East Constituents established.?***

In the petition, the appellant made various general allegations with respect to what he perceived as irregularities in various polling stations. It is only in the application for scrutiny that he particularized the polling stations where he thought that there were irregularities. It is no doubt for this reason that the election court granted the order sought in the following terms:

> ***?the [1st and 2nd respondents] to allow access of information in KIEMS detailing the identification of numbers of votes and the transmitted results at the polling stations listed in paragraph 15 of the appellant's supporting affidavit….?***

The election court granted the order as prayed for. It was not the election court's duty to determine what the terms *"including but not limited to"* and *"among others"* meant.

We agree with the appellant that the right to access to information held by the State is available to every citizen, as provided by **Article 35** of the Constitution. This right is not affected by the belief of the State as to what the person requesting will do with the information provided.

Indeed, the prescription to provide information to citizens will not be limited in any way save those that are set out in the Access to Information Act. However, in the context of seeking information to be used in an election petition, all the parties concerned must remember that the constitutional imperative rests on the timely resolution of electoral disputes. As such, parties will not be allowed to seek scrutiny or access to any other information where the only aim seems to be to expand the scope of the pleadings already filed in court or to fish for additional evidence. This point was aptly settled by the Supreme Court in ***Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 others*** in the following terms:

> ***?a party must be bound by its pleadings and secondly, 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 expansion 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.?***

We are similarly minded. The constitutional principle of access to information, while very wide, cannot be allowed to widen the scope of an election petition. This is particularly because allowing a fishing expedition, allowing scrutiny where none has been laid would amount to expanding the cause of action for the petitioner. Thus, the petitioner must lay a basis for the orders of scrutiny that he seeks, and cannot leave it to the court to glean what he means by putting in broad prayers. We therefore see no error in the orders that the election court made, and find that this limb of the appeal must accordingly fail.

The appellant has alleged that there were strangers who signed the forms. We note from the petition that this issue was not pleaded and neither was evidence led to support this assertion. We are aware that during an election, there are bound to be various people in the polling station, who play different roles. The 1st and 2nd respondents explained that there were chief agents and other agents who participated in the counting and tallying process. The appellant gave no evidence to rebut this assertion, yet the burden of proving that there were strangers who were engaged in electoral malpractices fell on him. As he did not give any evidence, we are inclined to find, that this ground of appeal has no basis, and we therefore reject it.

During the course of the trial, when the appellant's counsel was cross-examining the 3rd respondent, she refused to answer certain questions with respect to prior conduct of her husband, the Retired Justice Mutava Mbalu. In this Court, the appellant submitted to us that the line of questioning that had been taken had been intended to show the evidence of bribery, and that since the election court refused to compel the 3rd respondent to answer those questions, it fell into error and hindered the taking of evidence as provided in section 128 of the Evidence Act. Moreover, the appellant faulted the trial court for failing to rely on the report of the probe into the 3rd respondent's conduct, which in his view would have served to show that the 3rd respondent had engaged in bribery.

We have carefully considered the record with respect to this evidence. It is clear that the election court analysed and considered the evidence led before it with respect to the allegations of bribery that had been made and found that the appellant had not presented cogent evidence to establish the same. We agree. The burden of proof in election petitions is very high, often said to be above the civil standard of 'a balance of probabilities'. Where cogent evidence is not led to show, to the standard required, that bribery took place, then the court cannot make a finding that it did. We do not agree that the election court erred by excluding the evidence of the prior conduct of the 3rd respondent's husband. While he may have been implicated in a prior report of a tribunal for the offence of bribery, for the court to rely only on this would have amounted to relying on extraneous material. What the appellant was required to show was that he undertook the activities complained of in the course of the election that was held in Kibwezi East Constituency on 8th August 2017. The appellant failed to discharge this burden.

This applies also to the assertion that the 3rd respondent campaigned out of the allowed time. The only evidence that the appellant led to this effect was that the appellant had hired a vehicle for campaign purposes whose lease was ending on the election date. No other evidence was led that the 3rd respondent conducted her campaign until the election date leading the election court to conclude that these assertions had not been proved to the required standard. We are of a similar view. The appellant's submissions that the election court made findings that were not based on evidence are therefore misplaced.

We turn to the appellant's assertion that the election court misinterpreted **section 83** of the Elections Act and imposed the burden of proof on the appellant. Related to this is the assertion that the election court misapprehended the meaning and import of **section 83** of the Elections Act. It is alleged that the fundamental errors and mistakes in the statutory forms and the polling station diaries which were not explained by the 2nd respondent should not have been attributed to human error. Moreover, that these errors were numerous; so numerous, that the will of the electorate of Kibwezi constituency cannot be said to be reflected in the result.

Relying on the decision of ***Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 others*** the appellant urged us to remember that in an election the process of voting is as important as the outcome of the election. He therefore invited us to find that there were a plethora of errors that occurred during this particular election that greatly affected the outcome of the election.

The respondents on their part argued that the appellant had raised issues to do with the qualitative irregularities revealed in the election which were beyond the purview of this Court. Collectively, learned counsel for the respondents submitted that while there may have been errors, the threshold provided under section 83 of the Elections Act was whether the election had been conducted in compliance with the law. They urged that the election court had correctly found that even though there were minor errors in the course of the election, these had no effect on the results. **Section 83** of the Elections Act provides as follows:

> ***?Nullification of an election***
>
> ***(1) A Court shall not declare an election void for non-compliance with any written law relating to that election if it appears that —***
>
> ***(a) the election was conducted in accordance with the principles laid down in the Constitution and in that written law; and***
>
> ***(b) the non-compliance did not substantially affect the result of the election.?***

Elections are conducted by humans of whom none are infallible. As such, errors will always occur in the course of the election and the question that an election court must ask itself is not whether these errors and mistakes would occur. The proper question is how the same affected the outcome in a substantial, material and decisive manner. Where the errors are in the nature and scope of mattes which cannot change the final result, the same cannot lead to a nullification of the election. Our analysis of the material before us reveals that there was no dispute as to the results from the polling stations; the appellant at no point suggested that there was a contradiction in the figures, or that there was a significant departure in the figures that were presented.

One such error that occurred is that the 1st and 2nd respondents declared the 3rd respondent as the winner of the election one day before the statutory declaration form 35B was prepared, filled and signed. In the appellant's view, this error is incurable and should, on its own, serve to nullify the election. We do not agree. While it is clear that this is clearly a breach of the regulations, we do not accept this to be enough to nullify an entire election, particularly because the appellant did not show how this was either as a result of other malpractices, or how this error went to the root of the election.

While there are several minor errors that occurred in the course of the election, these were not in any way shown to have had any impact on the outcome of the election. The judgment of the election court was therefore properly grounded in the evidence placed before it.

We now turn to the appellant's submission on costs and the cross appeal. The appellant contends that the costs awarded were unreasonably and manifestly excessive and that they were not backed by the Advocates Remuneration Order, 2014, while in the cross-appeal it is alleged that the costs are minimal and not reflective on the amount of labour expended on the case. In its judgment, the election court capped the instruction fees for the 1st and 2nd respondents at Kshs.1,500,000/= whereas those of the 3rd respondent were capped at Kshs.2,500,000/=. The court also ordered that the costs be taxed and the total costs be certified by the Deputy Registrar.

Section 84 of the Elections Act requires the election court to award costs to the winner of an election petition. Rule 30 of the Elections (Parliamentary and County) Petitions Rules, 2917 empowers the court to specify the manner in which those costs are paid. As a general rule, costs follow the cause, meaning that the party who succeeds in court will normally get the costs of the matter. In ***Martha Wangari Karua v Independent Electoral & Boundaries Commission & 3 others [2018] eKLR (Election Petition Appeal 1 of 2017)*** this Court set out the rationale behind an award of costs as follows:

> ***?It is up to the election court to determine whether a party would be awarded costs or not and in doing so the court must be guided by the principles of fairness, justice and access to justice.?***

The appellant contends that the award, in the sum of Kshs.4,000,000/=, was excessive and submitted that the amount awarded should not exceed the amount of Kshs.500,000/=. This is based on the fact that the Elections (Parliamentary and County) Petition Rules, 2017 sets out the amount for security for costs as Kshs.500,000/=. Moreover, it is also the amount that is set out by in the Advocates Remuneration Order, 2014. Learned counsel for the 3rd respondent on their part had cross-appealed the award of costs, arguing that capping the instruction fees at Kshs.2,500,000/= was wrong, and that the amount would not be sufficient to cover the labour provided by three advocates who appeared in the course of the petition. According to counsel, the petition was complex, and the advocates spent a huge amount of time in preparation, hearing and presentation. The 3rd respondents therefore asked that this court vary and review the amount awarded upwards to the sum of Kshs.15,000,000/=.

On our part, we are of the considered view that a total costs of 4 million in parliamentary election is excessive. Accordingly, we interfere with the award made by the trial court and reduce the costs and capped it at 2 million in the High Court to be paid by the appellant equally to the respondents. The costs at the Court of Appeal is capped at Kshs.500,000/= to be paid equally by the appellant to the respondents.

After careful consideration of the issues of law raised by the appellants as well as the reasons that we have given above, we find that this appeal is devoid of merit and is hereby dismissed.

Orders accordingly.

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

M. WARSAME

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

True copy of the original

DEPUTY REGISTRAR