IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, GATEMBU & MURGOR, JJ.A)

ELECTION PETITION APPEAL NO. 20 OF 2018

BETWEEN

HON. ANNIE WANJIKU KIBEH ..... APPELLANT

AND

HON. CLEMENT KUNGU WAIBARA ..... 1ST RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION (IEBC) ..... 2ND RESPONDENT

(Being an appeal from the judgment and decree of the High Court at Nairobi (Ngugi, J.) delivered on 1st March 2018 in Election Petition Appeal No. 1 of 2017)

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JUDGMENT OF THE COURT

This appeal arises out of the General Elections of 8th August 2017, when the people of Gatundu North Constituency, in the exercise of their democratic rights of universal suffrage under the Constitution of Kenya 2010, sought to elect their candidates for the vacant electoral positions in the said General Elections.

This appeal concerns the election for the Member of the National Assembly for Gatundu North Constituency, where a total of seven candidates vied for the position of Member of the Parliament for Gatundu North Constituency. After vote counting and tallying the election results were announced as follows:

1. Dominic Kanyi Gicheru 1999

2. Patrick Mungai Karigi 545

3. John Njenga Keziah 78

4. Anne Wanjuku Kibeh 39,447

5. Joseph Githuka Kihiu 53

6. Francis Kigo Njenga 8,124

7. Clement Kungu Waibara 9,314

Total votes cast 59,096

Rejected votes 203

From the results ***Annie Wanjiku Kibeh, the appellant*** who garnered the highest number of votes was declared the winner and the duly elected Member of Parliament for Gatundu North Constituency. Being dissatisfied with the election results, the ***1st respondent, Clement Kungu Waibara*** filed Election Petition No. 1 of 2017 at the High Court of Kenya at Kiambu, comprising numerous issues for the election court to consider. ***The appellant, was the 1st respondent*** in the election court and ***the Independent Electoral Commission (the IEBC)*** was the 2nd respondent. The 1st respondent sought the following orders;

i) A declaration that the 1st Respondent (the appellant) was not validly elected.

ii) A declaration that the Petitioner was the validly elected representative for Gatundu North Constituency.

iii) An order for scrutiny and recount and/or re-tallying of all the votes cast to ascertain the actual winner.

iv) A declaration that the election for Gatundu North Constituency held on 8th August 2017 and the subsequent tallying and declaration of results and certificate issued to the 1st Respondent was invalid, null and void for not being free, fair, credible, verifiable and transparent and for lacking credibility.

v) A declaration by the Court whether an electoral malpractice of a criminal nature occurred.

vi) That the declaration of results for Gatundu North Constituency made on 10th August, 2017 and the Certificate issued pursuant thereto and the subsequent special Issue Gazette Notice No. Vol. CXIX-No. 121 of 22nd August, 2017 housed in Gazette Notice No. 8239 declaring the 1st Respondent as Member of National Assembly for Gatundu North Constituency be quashed and nullified.

vii) In alternative to (ii) above, an order that a fresh election for Gatundu North Constituency in Kiambu County be held.

viii) The Respondents bears the costs of this Petition.

ix) Such other orders and consequential directions as the Honourable Court shall deem fit taking all the circumstances of this case into account.

In the course of the proceedings, the parties filed various interlocutory applications. The first application was a Notice of Motion dated 18th September 2017 filed by the appellant seeking to strike out numerous allegations and averments from the 1st respondent's Petition and Supporting Affidavit. The 1st respondent filed the second Notice of Motion on 9th October 2017 where he sought orders to file affidavits in support of the petition out of time. On 2nd October 2017, the 1st respondent filed a third Notice of Motion this time seeking orders for scrutiny and re-tallying of votes cast; preserving of the KIEMs SD cards, the appellant's employment and salary records from the Kiambu County Government, and to direct the DCIO in Kiamwangi Police Station to produce original ballot papers amongst other election material.

In a ruling dated 30th October 2017 the trial judge addressed all the applications together. In respect of the first application, the learned judge struck out a number of paragraphs and averments from the 1st respondent's petition. On the second application, the learned judge allowed the 1st respondent to file additional affidavits in support of the petition. With regard to the third application, the learned judge ordered inter alia for, limited scrutiny, a print out of all the information on the KIEMs SD Cards, the physical SD Cards for each polling station, and a KIEMs SD Card reader. But the court declined to order the production of the appellant's employment and salary records from the Kiambu County Government, and an order compelling the DCIO in Kiamwangi Police Station to produce original ballot papers amongst other election material.

Thereafter following the hearing of the petition and the submission of the parties, the election court *(Ngugi, J) "…reached the conclusion that the election of Member of Parliament of the National Assembly for Gatundu North was conducted so badly that it was not substantially in accordance with the law as to elections…"*, and in so finding, the learned judge vitiated the election.

In reaching that decision, the learned judge discerned that there were thirty issues for consideration out of which the court dismissed twenty nine of them having found them to have been unsubstantiated and lacking in evidence.

In summary, the twenty eight allegations that the court dismissed were that, the KIEMs Kits contained different results from the hard copy; that the tallying of votes was marred by violence, intimidation, and improper influence; that the 1st respondent's votes were deliberately allocated to the appellant during the tallying exercise; that there was a scheme to take the 1st respondent's votes and allocate them to the appellant; that the 1st respondent's agents were denied entry into the various polling stations; that the KIEMS kits malfunctioned in Gikindu, Kawira, Ihing-ini Muirigo and Njatha-ini Polling Stations; that the 1st respondent's agents were forced to take a 30 minute break before the tallying and tabulation of votes cast, so as to interfere with the credibility of the whole process; that the Mwea Primary school Presiding Officer influenced the assisted voter's choice by refusing to read out all the candidates names on the ballot paper; that non officials of the 2nd respondent were tasked with counting of votes at Gatunguru Polling Station, where voting and tabulation of votes did not commence until 10 hours after the close of voting; that the 1st respondent's agents were denied copies of the signed Forms 35 As; that the Form 35 As were not displayed at the door of the polling stations; that the respondents conspired to use illegal and fake ballot papers; that at Huruma Kieni Primary School, the Presiding Officer intentionally spoilt votes; that members of the public found ballot papers used in the general elections scattered in various shopping centres and in Mangu Primary School; that the Presiding Officers did not display the Form 35As properly for verification by agents; that there was insufficient lighting in some polling stations; that the elections were marred by bad influence, violence, and agents were threatened and intimidated; that the party leader and presidential leader of the Jubilee Party urged voters to vote as a block

for Jubilee thus disadvantaging other candidates; that 203 rejected votes cast in the 1st respondent's favour were wrongly counted as rejected votes; that violence, threats and intimidation scared away voters from Gikandi, Njathai-ini, Murigo, Kawira polling stations that certain polling stations had overcast votes, and that finally, witchcraft was used to scare away voters.

Concerning the twenty ninth allegation on the appellant's failure to resign from the position of Member of County Assembly, the court held that it did not have jurisdiction to entertain the complaint and also dismissed it.

The thirtieth and final allegation was that the tallying and collation of votes was not carried out in an impartial, neutral, efficient, accurate or accountable manner, and did not meet the legal requirements. Regarding this allegation, the learned judge concluded that the election was so badly conducted due to not only the failure by the IEBC to strictly comply with the Constitution and the statutory law, but that the decision was also informed by Kenya's history of electoral injustice, electoral lawlessness and failure to adhere to the Constitution and the laws.

Being aggrieved by the decision of the election court, the appellant filed this appeal citing 15 grounds in the memorandum of appeal, which were that the learned judge;

i) failed to consider whether any irregularities affected the outcome of the elections;

ii) misinterpreted section 83 of the Elections Act, 2011;

iii) wrongly conducted an inquiry with the Deputy Registrar in the absence of the parties;

iv) wrongly nullified the Appellant's election on errors in the entry of details in polling Station Diaries without considering whether such errors affected the results as contained in the Forms 35A;

v) disregarded the results of the elections as contained in Forms 35A;

vi) determined the petition on un-pleaded issues and expanding the scope of the Petition;

vii) disregarded the Scrutiny of 23rd November 2017 and conducting an analysis to which the Parties were excluded;

viii) wrongly held that there was a statutory requirement to stamp Result Declaration Forms where there was none;

ix) improperly applied a test ***['the per se' test]*** *and holding that proof of the per se test would result in nullification, without considering section 83 of the Elections Act, 2011;*

x) failed to apply section 83 of the Elections Act to proven irregularities;

xi) failed to exclude/subtract from the final count, results contained in the Forms 35A; thus trivializing the declared results;

xii) failed to apply the principle of Stare Decisis;

xiii) wrongly found that the 2nd Respondent had failed, to provide Form 35A for Maria-ini Polling station and Polling Station Diaries from Gatei Primary School, Kanyambi Primary School and Maria-ini Primary School; and

xiv) committed a perverse error of law by subjecting the Appellant to an unfair trial, contrary to Article 50 (1) of the Constitution of Kenya, 2010.

Also filed were the 1st respondent's Notice of Motion of 9th April 2018 to strike out the Notice of appeal and the entire appeal.

On 6th April, 2018 the 1st respondent filed a cross appeal comprising two issues, namely,

i) whether the appellant was eligible to contest for the seat of member of Parliament for Gatundu North Constituency; and

ii) whether the 1st respondent should be excluded from the investigations in to an election offence ordered by the learned judge.

On 9th April, 2018 the 2nd respondent filed a cross appeal contending that, the learned judge;

i) misdirected himself on the law on validity and nullification of Elections in Kenya having introduced and used the per se" test to nullify the Election.

ii) misapplied the principle of the burden and standard of proof in Election Petitions.

iii) misdirected himself on the principle of Judicial Restraint as regards the balance between preserving the will of the people as expressed by the majority of voters.

iv) misapprehended the law on scrutiny.

v) misdirected himself by enlarging the Petition and considering new issues which were not pleaded in the Petition;

vi) erred in obtaining further submission from the Deputy Registrar on the Scrutiny report dated 23rd November, 2017 without according the 2nd Respondent an opportunity to reply;

vii) misdirected himself by relying on alleged errors in Polling Day Diaries to nullify the election which errors had not been specifically pleaded.

viii) exceeded his jurisdiction by conducting after close of hearing an exclusive suo muto analysis/ scrutiny of all form 35As and polling Day Diaries;

ix) failed to accord the 2nd Respondent the right to reply to the twenty-one parameters;

x) disregarded in totality all the evidence adduced at trial and relying solely on his suo muto analysis/ scrutiny of all form 35A and Polling Day Diaries in nullifying the election;

xi) failed to determine whether the finding of non-compliance of the law and irregularities was occasioned by either outright negligence and deliberate action by the 2nd Respondent or by innocent mistake and human error and whether the said non-compliance and irregularities was substantial to nullify the election;

xii) failed to find that the Petitioner benefited from illegalities he committed by being in possession of ballot materials contrary to the Law;

xiii) erred in finding that the 2nd Respondent failed to produce Polling day diaries for Gatei Primary School, Kanyambi Primary School and Maria-ini Primary School and Form 35A for Maria-ini Primary School, yet there was no application and or order seeking such production;

xiv) erred in finding that it was a statutory and or legal requirement to;

a) countersign alterations on form 35A

b) the form 35s ought to be stamped by IEBC stamp.

When the appeal was argued before us on 6th June 2018, learned senior counsel ***Mr. Ahmednassir Abdullahi***, appearing with Mr. Omwanza Ombati, and Mr. Onderi Nyabuti represented the appellant. In outlining the appeal, senior counsel submitted that the appellant was one of the few women who had contested in the elections for Member of Parliament and won her seat in the general elections by 39,447 votes as against the 1st respondents' 9,314 votes. It was submitted that the 1st respondent petition was not supported by evidence yet, the election was nullified. Counsel argued that of the 30 grounds raised, only one succeeded, and that the decision of the learned judge was hinged on that specific ground, where the appellant was neither a party nor a witness. Counsel's complaint was that the learned judge took over the case, "shaped it", "molded it", conducted a forensic audit upon which he concluded that the IEBC had bungled the election. In addition, it was submitted, the learned judge formulated a new standard referred to as a *per se* standard which was unknown under Kenyan electoral laws to nullify elections. As a consequence, counsel asserted, the learned judge's errors gave rise to the 4 main grounds of appeal which were sufficient to set aside the judgment of the trial court.

Counsel clustered the grounds into four issues which were:

i) the wrongful establishment of a new test to invalidate elections, and displace the tests applicable to ***section 83*** of the ***Election Act;***

ii) in invalidating the election, the learned judge based his reasons on a historical contextual analysis, and not on the proven facts of the case;

iii) that the learned judge conducted a forensic audit of the entire material that was before the court after the closure of the proceedings, and determined the petition upon matters which were neither pleaded nor proved; and iv) the learned judge wrongfully ordered for scrutiny of 10 polling stations when the 1st respondent had not specified any polling station in the application.

Beginning with the question of a new standard for nullification of elections, counsel faulted the learned judge for nullifying the appellant's election on a different standard, unknown in law from that spelt out by ***section 83*** of the ***Elections Act***. It was argued that, the purported new stand-alone standard referred to by the trial judge as the "*per se* standard" was a strict compliance test, so that even the slightest of transgressions was sufficient to invalidate an election; that the judge's interpretation in effect meant that an election had to be devoid of errors. Counsel asserted that this was contrary to the substantial compliance test set out by the Supreme Court in the ***Raila Odinga & Another vs Independent Electoral and Boundaries Commission & 2 others, Presidential Petition No. 1 of 2017 (Raila 2017);*** that ***section 83*** of the ***Elections Act*** was not capable of being delinked from ***Article 81*** and ***86*** of the ***Constitution***. Counsel further argued that by disregarding the standard set out in the ***Raila 2017*** the learned judge failed to adhere to the doctrine of *stare decisis.*

On the ground that the learned judge applied a historical contextual narrative to nullify the election, counsel submitted that this was relied

upon in total disregard of the burden of proof placed on the petitioner to prove the allegations. It was further contended that the historical context was not pleaded by the 1st respondent, and that no expert witness or historian was called to testify on the history of elections in Kenya; that the historical enumeration referred to was the learned judge's personal encounter with history that was not applicable to the facts of the case, and that in any event, ***section 60*** of the ***Evidence Act*** did not empower a court to take judicial notice of the history of the country. Counsel took the view that by adopting language such as "human imperfection thesis", "lords of impunity" amongst other descriptions, the learned judge ceased to be a neutral arbiter.

Next, counsel went on to submit that scrutiny was improperly ordered as, the 1st respondent's Notice of Motion dated 2nd October 2017 did not identify any polling station where scrutiny was to be conducted, and that no basis was established upon which to order scrutiny. Despite this, the court nevertheless ordered scrutiny for 10 representative polling stations. This, counsel asserted, was contrary to the Supreme Court's guidelines set out in ***Peter Gatirau Munya vs Independent Electoral and Boundaries Commission and Others SC Appeal No. 28 of 2014*** and ***Nathif Jama Adama vs Abdikhain Osman Mohammed & 3 others, S.C. Petition No. 13 of 2014.***

Counsel further took issue with the forensic audit of form 35As and Bs prepared on the basis of 'the judge's own singular enterprise', which, in counsel's view showed that the judge was intent on invalidating the elections. Counsel's complaint was that the parties were not afforded an opportunity to comment on the analysis which was contrary to the requirements of ***rule 28*** and ***29*** of the ***Elections (Parliamentary and County) Petition Regulations 2017*** and the general rules on scrutiny. Counsel asserted that the forensic audit should be disregarded given that it delved into unpleaded matters.

Counsel concluded that the 1st respondent had not proved its case, and in seeking to pre-orchestrate the facts of the 1st respondent's case, the election court misdirected itself and arrived at the wrong conclusion.

Mr. Muchemi, learned counsel for the 2nd respondent associated himself with the appellant's submissions. On scrutiny, counsel submitted that it ought not to have been allowed as it was based on a blanket request; that ***section 82*** of the ***Elections Act*** specified that scrutiny should only be ordered, either on an application of the parties or by a court order, *suo moto*; that despite the learned judge appreciating that the threshold requirements had not been met, in that, the 1st respondent had failed to specify polling stations for scrutiny, the court still ordered scrutiny of 10 polling centres, *suo moto*, without providing reasons for such order.

Counsel further submitted that the independent forensic analysis carried out by the learned judge, went beyond the remit of the pleadings, that its conduct not having been pleaded or canvassed in court, the learned judge ought not to have undertaken it. Citing ***Independent and Electoral Boundaries Commission & another vs Stephen Mutinda Mule & 3 others [2014] eKLR*** and ***Raila 2017*** counsel submitted that a party is bound by their pleadings. It was also argued that the learned judge wrongly relied upon the forensic analysis of the Form 35 As and Bs and the Polling Station Diaries to nullify the elections. Counsel further complained that the appellant and the IEBC were not accorded a fair trial in accordance with ***Article 50*** of the ***Constitution***, as once the submissions were concluded the parties did not have an opportunity to respond to the Deputy Registrar's comments made after filing of the scrutiny report, and to the outcomes of the learned judge's independent forensic analysis.

With respect to the 1st respondent's cross appeal against the investigations ordered by the election court, counsel asserted that the 1st respondent should be investigated as he was found in possession of copies of the missing ballot papers.

Learned counsel for the 1st respondent, ***Mr. Ondieki*** begun his submissions by addressing the 1st respondent's cross appeal of 6th April 2018. Counsel submitted that the learned judge failed to determine whether under ***Article 99 (2) (a)*** and ***(d)*** of the constitution, the appellant was properly qualified to vie for the position of Member of Parliament having retained her position as member of the County Assembly and continued drawing a salary up to the time of the General elections. Citing ***Hon. Mohamed Abdi Mohamud vs Ahmed Abdullahi Mohamad & 3 others, Nairobi***

Election Petition Appeal No. 2 of 2018, for the proposition that the appellant was not properly qualified to stand as member of Parliament, counsel argued that the court wrongly determined that it did not have jurisdiction to hear and determine the issue, and urged us to make a determination on this issue.

On the election court's order for investigation, counsel requested that the order be varied to exclude the 1st respondent from investigations, since the court had since struck out the 1st respondent's witness affidavits which included the offending copies of the ballot papers, and the 1st respondent had already provided an explanation as to how he came to be in possession of the documents; that the cross appeal should succeed for the reasons set out.

Turning to the Notice of Motion of 9th April 2018, counsel submitted that, the appeal should be struck out for incompetence as it did not comply with the requirements of the Court of Appeal Election Rules; that the appellant's notice of appeal failed to specify whether 'all or part' of the appeal should be struck out, but specified that the whole of the decision be struck out.

Next, counsel addressed the main appeal, and submitted that ***Article 10 (1)*** of the ***Constitution*** provides for values and principles of governance; that IEBC is a state agency and is bound by the provisions of the Constitution, including ***Article 21 (1)***, ***Articles 81*** and ***86***. It was stated that the historical context of election violence is encapsulated in the values as enumerated by the Committee of Experts, and therefore the prudential values and the historical context are admissible for consideration in interpretation of the constitutional provisions, and that the Constitution provided for the safe keeping of all election material by the IEBC.

Counsel submitted that following scrutiny, the learned judge found that 322 votes and some counterfoils were missing from the ballot boxes; that these were documents specified in the pleadings; that the learned judge was empowered to call for the scrutiny and following scrutiny, the court found that the petitioner had proved ground 18 of the petition which was that the 1st respondent's agents were denied copies of form 35 A which bore the official results recorded by the Presiding Officers.

Counsel further submitted that the Polling Station Diaries (PSD) did not show how many ballots were issued and further 45 PSDs were not signed; that the failure to sign the PSDs entitled the learned judge to nullify the election, that the court could not be faulted for exercising its discretion to order scrutiny, and in any event ***section 143*** of the ***Evidence Act*** specified that a case need only be proved by one witness, so that the 1st respondent's evidence was corroborated by the documentary evidence on the record. Counsel urged that the election be repeated.

In reply ***Mr. Ahmednassir Abdullahi*** submitted, with regard to the motion to strike out the appeal, that only ***rule 6 (3) (c)*** of the Court of Appeal Election Petition rules was not complied with, but that the rest of the notice is compliant. Counsel specified that this was not a fundamental omission, it was a procedural technicality which went to the form and not the content of the notice, and therefore nothing turned on it.

On the two issues raised in the cross appeal, one being the allegation that the appellant had retained the position of MCA despite being a candidate for the seat of Member of Parliament, it was submitted that, no evidence was produced to support the allegation, and that the onus was on the 1st respondent to prove that the appellant was still a member of the County Assembly of Kiambu as at the time of the General elections. It was further argued that both the evidentiary and legal burden had not shifted from the 1st respondent. In any event, counsel submitted, the appellant had testified that she had resigned from the position as required.

On the court's order for the conduct of investigations into possible electoral offences committed by the 1st respondent, it was submitted that all the missing materials were annexed to his documents, and that no explanation was provided as to how they came to be in his possession. We were therefore urged not to interfere with the order for investigations.

Returning to the historical contextual analysis, counsel asserted that though a court was entitled to recognize the mistakes of the past, those mistakes should not be attributed to or visited upon the appellant as in the instant case.

We have considered the parties' pleadings, testimony and submissions, and take the view that the learned judge having dismissed the twenty nine issues, this appeal turns only on the final issue of whether the tallying and collation of votes for Member of Parliament for Gatundu North Constituency was not carried out in an impartial, neutral, efficient, accurate or accountable manner and did not meet the legal requirements.

We have considered the Memorandum of Appeal, the written submissions by parties and authorities cited by the parties. We remind ourselves that ***section 85 A*** of the ***Elections Act*** restricts the jurisdiction of this Court to matters of law only. Of the issues raised, we find that there are three categories of the issues of law for our consideration;

1. 1st respondent's Notice of Motion filed on 9th April 2018 to strike out the Notice of appeal and the entire appeal.

2. The 1st respondent's cross appeal

    i) whether the appellant was eligible to contest for the seat of member of Parliament for Gatundu North Constituency; and

    ii) whether the 1st respondent should be excluded from the investigations in to an election offence ordered by the learned judge.

3. The substantive appeal and the 2nd respondent's cross appeal.

We hasten to point out that what the 2nd respondent refers to as a cross appeal is no more than the grounds on which it supports the substantive appeal.

As the appellant's appeal and the matters raised in the 2nd respondent's "cross appeal" are concerned with similar issues, we consider it prudent to merge and determine them as follows;

i) whether the election court's order of scrutiny of 10 representative polling stations was proper when no specific particulars were pleaded;

ii) whether the learned judge established a new test to invalidate elections, which displaced the two tests applicable to section 83 of the Election Act;

iii) whether by invalidating the election the learned judge based his reasons on a historical context rather than on the proven facts of the case.

iv) whether the learned judge determined the petition upon findings of a forensic audit of the entire material that was before the court after the closure of the proceedings, which were neither pleaded nor proved;

v) whether the learned judge misapprehended the law when nullifying the elections for Gatundu North Constituency.

1. <u>1st respondent's Notice of Motion dated 9th April 2018 to strike out the appeal.</u>

We begin with the Notice of Motion filed on 9th April 2018, where the 1st respondent has sought to have the appellant's Notice of appeal and

appeal struck out on grounds that the Notice of appeal lacked the grounds of appeal, the reliefs sought, and the request that the appeal be set down for hearing in the appropriate registry; that the appellant had not taken steps to compile, file and serve a complete record of appeal including the Polling Station Diaries and submissions, and that the appeal had not raised points of law. The application was supported by the affidavit of the 1st respondent sworn on 9th April 2018.

In grounds of opposition filed on 20th April 2018, the appellant contended that the appeal on record was complete, that the notice of motion was premised on procedural technicalities, and that the appeal raised substantial questions of law for the determination of this Court.

We have considered the application and the parties' submissions, and are of the view that the 1st respondent's grounds as pleaded are mainly concerned with the form and not the substance of the Notice of Appeal. Counsel for the 1st respondent was unable to articulate, upon enquiry by the Court during the hearing of the appeal, in what specific respects, the Notice of Appeal fell short of the legal requirements. Our view is that these are matters that do not go to the root of the appeal, and could very well be overcome by ***Article 159(2) (d)*** of the ***Constitution***. As this Court stated recently in ***Martha Wangari Karua vs IEBC & 3 others [2018] eKLR***, it "behooves the courts to undertake and place substantive considerations above those of procedure especially where the procedural infractions are curable." Though Mr. Ondieki sought to submit on whether ***rule 6*** of the Court's rules has been complied with, it was not a matter that was specifically pleaded. The notice of motion is therefore dismissed.

The 1st respondent's cross appeal

On the question of the appellant's eligibility to contest for the position of Member of Parliament for Gatundu North Constituency, it was contended that by the time the General Elections were held on 8th August 2017, the appellant had not resigned from her position as member of County Assembly for Kiambu County, which was contrary to ***Article 99 (2) (d)*** of the ***Constitution***. This issue arose during the proceedings before the trial court, when by the third Notice of Motion filed on 2nd October 2017, the 1st respondent applied for the production of the appellant's employment records and salary payments for July and August, 2017 from the County Secretary of Kiambu.

The 1st respondent's complaint was that the learned judge erred in failing to address the issue on the basis that the election court was not satisfied that it had jurisdiction to determine whether the appellant was qualified to vie for the seat of member of Parliament, because it was not demonstrated that the mechanisms laid down in law as provided for by the Constitution and Statutes were exhausted.

In the ruling of 30th October 2017, the learned judge dismissed the application and stated that;

> ***"I find this argument to be persuasive: it is too late for the Petitioner to raise this argument now- long after nominations and elections were held. The Court would, as a prudential matter, refuse to take jurisdiction to deal with this question at this time. In any event, I note that any information supplied by the County Secretary on the employment and salary of the 1st respondent would not support any specific ground for annulment of the Petition. As such any production and admission of evidence in this regard would impermissibly expand the Petition beyond the constitutional timelines".***

In the judgment, the learned judge maintained this position and reiterated the decision that was set out in the ruling of 30th October, 2017.

In determining this issue, it is important to appreciate that the dispute herein concerns an election petition, where the High Court is sitting as an election court to determine whether or not the appellant was validly elected as the member of Parliament for Gatundu North Constituency. The application that was before the election court was for the production of additional evidence, where the court was required to exercise its discretion to determine whether or not to order the County Secretary for the production of the additional materials.

At this stage, what we are called upon to consider is, whether or not the learned judge properly exercised his discretion to decline granting the orders sought for reasons, firstly that the election court did not have jurisdiction to determine the issue, secondly that, no nexus was established between the application for additional evidence appertaining to the appellant's employment status and the petition, and thirdly, that the petition being time bound, it was too late in the day to be seeking additional documentation.

Concerning the question of whether the court had jurisdiction, we are of the view that the election court was wrong in declining jurisdiction in respect of the issue of the appellant's qualification.

In the case of ***Kennedy Moki vs Hon. Rachael Kaki Nyamai & 2 others, Election Petition Appeal No. 4 of 2018*** this Court recently

stated;

> ***"Convinced that election is a process which includes nomination of candidates, we take the view that subject to finality and constitutional time lines of the jurisdiction of other competent organs, an election court has jurisdiction to hear and determine pre-election nomination disputes if such dispute goes to eligibility and qualification to vie and contest in an election. If a nomination certificate is issued to a person who is neither qualified nor eligible to vie in an election, the Certificate is not conclusive proof of eligibility and qualification to vie. If a dispute arises as to the validity of such a certificate and eligibility to vie, an election court has jurisdiction to determine the validity of the nomination certificate and the eligibility to vie of the person bearing the certificate."***

See also ***Honourable Mohammed Abdi Mohamed vs Ahmed Abdullahi Mohamed & 3 Others***, ***Nairobi Election Petition Appeal No. 20 of 2018***. Whether the appellant remained an MCA by the time of the general elections was a matter that brought into question her ability to vie for the position of member of Parliament, and went to the root of an election. This was a matter in which the election court had jurisdiction,

and therefore, the learned judge ought not to have declined jurisdiction over this issue. As such we find that this was not a sufficient basis upon which to decline the application for additional documents.

On whether the application was connected to the petition, we find that the learned judge was wrong in declining to grant the orders for this reason. This is because at paragraph 39 of the petition, the 1st respondent specifically pleaded that; *"The petitioner avers that the 1st respondent violated the law, the constitution, regulations and good practice by continuing to draw salary and privileges as nominated MCA until 8th August 2017."* It was therefore apparent that this was one of the grounds that the 1st respondent sought to canvass and therefore it was a matter that was concerned with the petition.

The third reason given by the judge for declining to grant the orders was that an order for "*…production and admission of evidence in this regard would impermissibly expand the Petition beyond the constitutional timelines"*, in our view this was a relevant factor for consideration when exercising the court's discretion whether to grant the orders sought. This is because it is true that elections petitions are required to be concluded within strict constitutional timelines, which the court was required to adhere to, and there was the possibility that any delay in obtaining the documents could extend determination of the petition beyond the constitutional time lines.

Accordingly, we consider that, the learned judge took into account matters that he should have taken into consideration, and in so doing arrived at the right conclusion. See ***Mbogo & Another vs Shah [1968] EA 93.*** Notwithstanding our finding that the trial court erred in declining jurisdiction, and by finding that there was no connection between the application and the petition, we are satisfied that the judge properly exercised his discretion in declining to grant the Motion filed on 2nd October 2017.

We now turn to address the other issue raised in the 1st respondent's cross appeal which is whether the election court was wrong to order an investigation into the election offence of ballot box tampering; and whether this Court should vary that order to exclude the 1st respondent from the list of persons to be investigated, particularly as the offending documents were expunged from the court record.

In the ruling of 30th October 2017, which the learned judge repeated in the judgment the learned judge concluded that;

> ***"It is fairly obvious from the evidence that has emerged on the missing votes and how they found their way into the Petition, that aside from the moral culpability of the agents and employees of the 2nd respondent in conducting an election marred by irregularities, a serious election crime was committed. A person or group of people were able, in blatant and criminal disregard of the law, to break open two ballot boxes for at least two Polling Stations in Gatundu North and stole 332 votes therefrom. There is no question that this is a serious offence. The perpetrator(s) need(s) to be found, prosecuted and punished in accordance with the law".***

In so concluding, the learned judge ordered that seven individuals amongst them the 1st respondent be investigated to explain how he came into contact with the election materials and whether the circumstances under which he came into contact with those materials would suggest that an offence had been committed.

As a starting point, like the learned judge, we consider ballot box tampering to be a matter of grave transgression. It is an election offence under ***Section 13(d)*** of the ***Election Offences Act*** number 37 of 2016. In the 1st respondent's case, it is not lost on us that central to the 1st respondent's petition for nullification of the elections for Gatundu North Constituency are missing ballot papers, some of which were found scattered around the Constituency, and which complaint has been relied on in the petition to question the integrity of the election. It is also not lost on us that the appellant subsequently sought to have some of these documents expunged from the record.

The 1st respondent cannot approbate and reprobate on the question of the missing documents by on the one hand, seeking to have the election nullified on the basis of missing ballot papers, and on the other hand having some of the missing ballot papers withdrawn and then using this as a basis to exclude himself from the list of persons facing investigations merely because he has withdrawn them. In both cases, the issues turn on missing ballot papers, and the seriousness of ballot box tampering cannot be underscored. This makes it essential for the 1st respondent to assist in shedding light into the matter of the missing ballot papers, copies of which were in his possession. As such, we agree with the learned judge that the 1st respondent together with other named persons should be investigated, and we find no reason to interfere with that decision.

3. The substantive appeal and the 2nd respondent's cross appeal.

We will begin with the issue as to whether the learned judge ordered for scrutiny of 10 polling stations when no specific polling stations were pleaded. By a Notice of Motion dated 2nd October 2017, the 1st respondent filed an application seeking inter alia for orders *"… the Honourable court be pleased to direct for a scrutiny and re-tallying of votes cast for all Gatundu North Constituency"*.

The application that was supported by the affidavit of the 1st respondent sworn on 2nd October 2017, was made on the grounds *inter alia* that the 1st respondent had valid and sufficient basis to warrant the opening of the ballot boxes for scrutiny; that a recount and scrutiny of the ballot papers would decisively conclude the petition.

The learned judge ruled that the case was inappropriate for recount and re-tallying, as the margin of votes was too wide, but granted a limited order of scrutiny restricted to 10 representative polling stations which the Court indicated it would select after due consultation with the parties. Limited scrutiny was ordered on the basis of two twin claims in the 1st respondent's petition, namely pre-marked fake ballots and ballot stuffing that occurred in favour of the appellant, which would either be proved or disproved by opening some ballot boxes from representative polling stations. Following consultation with the parties, the learned judge ordered scrutiny to be conducted in Mutuma, Gikindu, Mungai, Ndekei, Muirigo, Kiangunu, Kawira, Mangu Primary School, Ihigaini and Mwea polling stations.

It is important to appreciate that, in granting an order of scrutiny, an election court is exercising a judicial discretion under ***Section 82*** of the ***Elections Act,*** and in exercising such discretion, the court must exercise it judiciously.

In ***Matiba v Moi & 2 Others, 2008 1 KLR 670***, this Court reiterated that;

> ***"The High Court was exercising discretion and the Court of Appeal was not entitled to substitute the Judges' discretion with its own discretion. It had to be shown that the Judges' decision was clearly wrong because he misdirected himself or because he acted on matters on which he should not have acted on or because he failed to take into consideration matters which he should have taken into consideration and in doing so, arrived at a wrong decision".***

Section 82 (1) of the ***Elections Act*** specifies;

> ***"An election court may, on its own motion or on application by any party to the petition, during the hearing of the election petition, order for a scrutiny of votes to be carried out in such manner as the election court may determine."***

Rules 28 and ***29*** of the ***Election (Parliamentary and County Elections) Petition Regulations 2017*** are clear.

Rule 28 provides;

> ***"A petitioner may apply to an election court for an order to-***
>
> ***(a) recount the votes; or***
>
> ***(b) examine the tallying, if the only issue for determination in the petition is the count or tallying of votes received by the candidates.***

Rule 29 further stipulates that;

> ***(1) The parties to the proceedings may, at any stage, apply for scrutiny of the votes for purposes of establishing the validity of the votes cast.***
>
> ***(2) Upon an application under sub-rule (1), the court may, if it is satisfied that there is sufficient reason, order for a scrutiny or recount of the votes.***
>
> ***(3) The scrutiny or recount of votes ordered under sub-rule***
>
> ***(2) shall be carried out under the direct supervision of the Registrar or magistrate and shall be subject to directions the election court gives.***
>
> ***(4) The scrutiny or recount of voted in accordance with sub-rule (2) shall be confined to the polling stations in which the results are disputed and shall be limited to the examination of—***
>
> ***(a) the written statements made by the returning officers under the provisions of the Act;***
>
> ***(b) the printed copy of the Register of voters used during the elections sealed in a tamper proof envelope;***
>
> ***(c) the copies of the results of each polling station in which the results of the election are in dispute;***
>
> ***(d) the written complaints of the candidates and their representatives;***
>
> ***(e) the packets of spoilt papers;***
>
> ***(f) the marked copy register;***
>
> ***(g) the packets of counterfoils of used ballot papers;***
>
> ***(h) the packets of counted ballot papers;***
>
> ***(i) the packets of rejected ballot papers;***
>
> ***(j) the polling day diary: and***

(k) the statements showing the number of rejected ballot papers.

In particular, ***rule 29 (4)*** of the ***Election (Parliamentary and County Elections) Petition Regulations 2017*** specifically states that scrutiny and recount should be limited to polling stations in which the results are disputed.

In the case of ***William Maina Kamanda vs Margaret Wanjiru Kariuki & 2 others (2008) eKLR***, the court held:-

> ***"It is now well established that an order of scrutiny can be made at any stage of the hearing before final judgment whether on the court's own motion or if a basis laid requires so. It can be made if it is prayed in the petition itself – as is the case in this petition – or when there is ground for believing that there were irregularities in the election process or if there was a mistake or mistakes on the part of the Returning Officer or other elections officials.***

In the case of ***Peter Gatirau Munya (supra),*** the Supreme Court set out the principles to be applied when considering an application for an order of scrutiny in election petitions thus;

> ***"From the foregoing, review of the emerging jurisprudence in our courts, on the right to scrutiny and recount of votes in an election petition, we would propose certain guiding principles, as follows:-***
>
> ***a) The right of scrutiny and recount of votes in an election petition is anchored in Section 82(1) of the Elections Act and Rule 33 of the Elections (Parliamentary and County Elections) Petition rules, 2013. Consequently, any party to an election petition is entitled to make a request for a recount and/or scrutiny of votes, at any stage after the filing of petition, and before the determination of the petition.***
>
> ***b) The trial Court is vested with discretion under Section 82(1) of the Elections Act to make an order on its own motion for a recount or scrutiny of votes as it may specify, if it considers that such scrutiny or recount is necessary to enable it to arrive at a just and fair determination of the petition. In exercising this discretion, the Court is to have sufficient reasons in the context of the pleadings or the evidence or both. It is appropriate that the court should record the reasons for the order for scrutiny or recount.***
>
> ***c) The right to scrutiny and recount does not lie as a matter of course. The party seeking a recount or scrutiny of votes in an election petition is to establish the basis for such a request, to the satisfaction of the trial Judge or Magistrate. Such a basis may be established by way of pleadings and affidavits, or by way of evidence adduced during the hearing of the petition.***
>
> ***d) Where a party makes a request for scrutiny or recount of votes, such scrutiny or recount if granted, is to be conducted in specific polling stations in respect of which the results are disputed, or where the validity of the votes is called into question in the terms of Rule 33 (4) of the Election (Parliamentary and County Elections) Petition Rules."***

In ***Nicholas Kiptoo Arap Korir Salat vs Independent Electoral & Boundaries Commission SC Petition No. 23 of 2014,*** the Supreme Court expounded upon the necessity of clarity and particularizing pleadings in applications for scrutiny when it stated thus;

> ***"The aim of conducting scrutiny and recount is not to enable the court [to] unearth new evidence on the basis of which the petition could be sustained. Its aim is to assist the court to verify the allegations made by the parties to the petition which allegations themselves must be hinged on pleadings. In other words a party should not expect the court to make an order for scrutiny simply because he has sought such an order in the petition. The petitioner ought to set out his case with sufficient clarity and particularity and adduce sufficient evidence in support thereof in order to justify the court to feel that there is a need to verify not only the facts pleaded but the evidence adduced by the petitioner in support of his pleaded facts. Where a party does not sufficiently plead his facts with the necessary particulars but hinges his case merely on the documents filed pursuant to Rule 21 of the Rules, the court would be justified in forming the view that the petitioner is engaging in a fishing expedition or seeking to expand his petition outside the four corners of the petition" [emphasis supplied].***

In the case of ***Ledama ole Kina vs Samual Kuntai Tunai & 10 others, [2013] eKLR*** Wendo, J stated;

> ***"An application for scrutiny for all of Narok South Constituency lacks specificity, and it is a blanket prayer that, in my view, cannot be granted. The applicant needed to be specific on which polling stations he wanted a scrutiny to be done in. If he wanted scrutiny to be done in all the polling stations, then a basis should have been laid for each polling station. The rationale is clear; the process of scrutiny is laborious, time consuming, and the applicants cannot be left at liberty to seek ambiguous prayers and waste precious Court time and incur unnecessary costs. They must be specific. For the above reason, the Court cannot give a blanket order for scrutiny in Narok South Constituency, because such order will be prejudicial to the respondent, now that the evidence of witnesses has already been taken."***

Having regard for the law as it appertains to scrutiny and the above cited cases, it is clear that in order for scrutiny to be granted, it is necessary for the petitioner to specify the polling stations to which scrutiny is to be confined, which polling stations can be ascertained from the petition, the affidavits in support of the petition and the evidence; that the pleadings including the petition and the affidavits should particularize the petitioner's case with clarity, and should lay a basis for which polling stations will undergo scrutiny. Finally, the court should provide reasons for granting an order of scrutiny. Yet, despite appreciating these conditionalities, the learned judge disregarded them and went on to order scrutiny.

At this point it is worth clarifying that since the election court did not specify that the scrutiny order was made *suo moto*, or on its own

motion which it was empowered to do under ***section 82 (1)*** of the ***Elections Act,*** this meant that the limited order for scrutiny was made on the basis of the 1st respondent's application.

It is therefore with this in mind that we will interrogate whether the established guidelines were complied with.

As illustrated by the appellant and the IEBC, it is true that the prayers in the scrutiny application did not specify any polling stations where scrutiny was to be carried out. But from the principles outlined above, the learned judge was allowed to order scrutiny where the petition and the supporting affidavits set out the complaints that required further interrogation with specificity, and also identified the polling stations to which such complaints could be attributed.

An analysis of the petition and the supporting affidavit shows that the 1st respondent made numerous and random allegations, many of which lacked specificity, and did not identify the polling stations to which the complaints were attributed. Of these, the learned judge selected two complaints upon which to order scrutiny. One was a claim that there were fake ballot papers, and the other that ballot stuffing had taken place. But, he did not identify any polling stations where the alleged illegalities took place and instead, sought to select polling stations upon consultation with the parties.

When the pleadings are considered in relation to these particular allegations, paragraph 24 of the petition, stated that;

> ***"The Petitioner avers that the 1st Respondent in collaboration with the 2nd Respondent used illegal and fake ballot papers to give the 2nd Respondent."***

Other related complaints were at paragraph 35 (f) (v) and (vi) where it was contended that;

> ***"Ballot papers for the Member for National Assembly for Gatundu North Constituency were manipulated by the 1st and 2nd Respondent in favour of the Petitioner's opponents."***

And;

> ***"The Petitioner avers that there was discovery of counterfeit ballot papers which were all pre-marked in favour of the 1st respondent."***

None of these allegations even remotely identified polling stations where fake ballots were found or ballot stuffing occurred, and it is no wonder that the learned judge opted to consult with the parties before selecting polling stations where scrutiny was to be carried out. There is no doubt that the allegations were random, arbitrary and unspecific, and when this is compounded by the fact that no polling stations where the alleged illegalities occurred could be ascertained from the petition or the supporting affidavits, then it is plain to see that scrutiny ought not to have been ordered as no basis was laid for the same. Scrutiny for undefined reasons, or for its own sake, particularly where no polling stations are indicated, had, in our view all the hallmarks of a grand fishing expedition, and an incredible journey into the unknown. And this would become apparent from this judgment as shall be seen later.

We are not satisfied that the learned judge complied with the threshold requirements of ***section 82 (1)*** of the ***Elections Act,*** the regulations and the guidelines set out by the Supreme Court in the ***Peter Gatirau Munya case (supra)***. We find that the exercise of discretion to order scrutiny in these circumstances was injudiciously, made and in disregard of the laid down principles, and we find it necessary to interfere with the exercise of that discretion.

Having said that, there is an additional matter that we would consider necessary to address at this juncture. The appellant and IEBC have complained that the learned judge sought to undertake an independent forensic audit on Form 35 As and Bs yet, this was not an issue that was pleaded by the 1st respondent, and neither was there any application or an order *suo moto* made by the court to conduct it.

In the case of ***Philip Osore Ogutu vs Michael Onyura Aringo [2013] eKLR*** Tuiyott J. stated;

> ***"At the close of arguments the Court indicated that it proposed to make a suo moto Order for an examination of tallying on Form 36. Counsels were invited to give their view of the Court's proposal. All parties were agreeable. This Court is obliged to give its reasons for proposing a re-tally. The 2nd and 3rd Respondents told the Court that the final results of the elections of Butula National Assembly elections were announced on the basis of the handwritten tallying sheet (Form 36) (P Exhibit 12). It was apparent that there were numerous erasures, overwritings, cancellations and alterations on that Form. This was confirmed by the Document Examiner in his report. Form 36 is an important document in so far as it captures the final tally of the votes garnered by each candidate to a National Assembly Election (Regulation 83 of The Elections (General) Regulations 2012). If the Form is replete with erasures, cancellations and alterations then an examination appears necessary to establish with it faithfully captures the will of the voters from various Polling Stations."***

We think that this was the approach the learned judge ought to have adopted prior to conducting the forensic audit. Our review of the record does not disclose that the court afforded any opportunity to the parties to address him on its conduct or its scope, whether *suo moto* or otherwise. Neither was an opportunity provided after the audit to address him on its outcome. In view of the strictures in ***Articles 25*** and ***50*** of the Constitution, we consider that it was wrong for the learned judge to proceed to undertake the forensic audit unknown to the parties. We will revisit the outcome of the audit later on in this judgment.

Turning to the issue that the learned judge sought to establish a new standard to invalidate elections, which displaced the already existing

qualitative and quantitative standards stipulated by ***Articles 81 and 86*** of the ***Constitution***, ***section 83*** of the ***Election Act***, the appellant's complaint is that by creating the unknown *per se* standard the learned judge set out a strict and unwieldy standard with so low a tolerance threshold, that even the slightest of transgressions would lead to a nullification of an election. In addressing the issue, the learned judge begun by stating;

> ***"In my considered view, while much emphasis has been put on section 83 of the Elections Act as the legislative enunciation of the constitutional threshold that must be met in order to void an election, the Constitution itself in Article 81 and 86 thereof provides the initial per se standard for determining the validity of an election. I refer to it as a per se standard because, in my view if a party aggrieved by the outcome of an election proves that any of the principles or values specifically mentioned in Article 81 and 86 of the Constitution has been violated, the threshold for invalidating the election would have been reached without requiring more— and without the need to test the case against the scheme provided under section 83 of the Constitution.***
>
> ***It is important to note that the per se constitutional standards in Articles 81 and 86 of the Constitution are both qualitative and quantitative- just like the disjunctive standard provided in section 83 of the Elections Act".***

The learned judge then went on to say that;

> ***"The implication of this reading of section 83 of the Elections Act by the Supreme Court is that an election can be nullified under three different thresholds;***
>
> ***a) Where the electoral system established or the conduct of the election does not meet the clear standards enunciated in Article 81 and 86 of the Constitution respectively;***
>
> ***b) Where the conduct of the election in question substantially violated written law – otherwise known as the qualitative test under section 83 of the Elections Act.***
>
> ***c) Where there were irregularities in the conduct of the impugned election that affect the outcome of the election – otherwise referred to as the quantitative test under section 83 of the Elections act.***

The judge took the view that;

> ***"… while much emphasis has been put on section 83 of the Elections act as the legislative enunciation of the constitutional threshold that must be met in order to void an election, the constitution itself in Article 81 and 86 thereof provides the initial per se standard of determining the validity of an election. I refer to it as the per se standard because in my view, if a party aggrieved by the outcome of an election proves that any of the principles or values specifically mentioned in Articles 81 and 86 of the Constitution has been violated, the threshold for invalidating the election would have been reached without requiring more and without the need to test the case against the scheme provided under section 83 of the Constitution.***
>
> ***The petition seeking the nullification of an election bears the burden of proving one of the three thresholds stated above has been met; the per se constitutional violation standard; the quantitative standard or the qualitative standard."***

In other words, what we understand the learned judge to be saying is that in addition to the already extant qualitative and quantitative standard established by ***Articles 81 and 86 of the Constitution,*** and ***section 83*** which is applicable to breaches arising under any written or legislative law, there is another more stringent standard for nullifying elections outside those parameters; so that the threshold requirements for nullifying an election for constitutional breaches is lowered.

This begs the question as to whether, in addition to the standards established by ***Articles 81 and 86*** and ***section 83*** of the ***Elections Act***. There is another standard called the per se standard, any breach of which would immediately nullify an election.

Article 81 of the ***Constitution*** reads:

> ***"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 corruptions;

(iii) conducted by an independent body;

(iv) transparent; and

(v) administered in an impartial, neutral, efficient, accurate and accountable manner.

As regards voting, ***Article 86*** requires that;

"At every election, the Independent Electoral and Boundaries Commission shall ensure that –

a. ***whatever voting method is used the system is simple, accurate, verifiable, secure, accountable and transparent;***

b. ***the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station.***

c. ***The results from polling stations are openly and accurately collated and promptly announced by the retuning officer; and***

d. ***appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election material." (Emphasis supplied) Black's Law Dictionary***, ***Ninth Edition*** defines "***Per se" as – "of, in, or by itself. Standing alone, without reference to additional***

facts".

Section 83, was lifted from ***section 28*** of the ***National Assembly and Parliamentary Elections Act,*** which in turn was transposed from the United Kingdom's Ballot Act 1872 of the United Kingdom. The origins of the provision are therefore to be found in UK legislation, and it will be appreciated that the UK, unlike Kenya, does not have a written Constitution, which is why no reference to a constitution was made. This is one of the reasons for the distinct difference between ***section 83*** of Kenya's Election Act and the UK provision. Other reasons were aptly explained by the Supreme Court in ***Raila 2017;***

"Our present provision is different from that in other countries in two other fundamental aspects. First, the Kenyan Act does not have the word "substantially", which is in many of the provisions of other countries. Secondly, and fundamentally, in 2011, the Elections Act (No. 24 of 2011) was enacted and repealed the National Assembly and Presidential Elections Act. Section 83 of the new Elections Act, obviously to harmonize it with our Constitution, added that to be valid, the conduct of our elections in our country must comply* "with the principles laid down in the Constitution." *This addition was purposive given that the retired Constitution did not contain any constitutional principles relating to elections. In interpreting the Section therefore, this Court must first pay due regard to the meaning and import of the Constitutional Principles it envisages."

What this means is that it was always intended that, the electoral laws including, ***section 83*** like all other laws were to be construed within and conform to the provisions of the Constitution, and more particularly with ***Articles 81*** and ***86. Section 83*** provides;

"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".

And in the case of ***Raila 2017,*** the Supreme Court succinctly distilled the ambits of the provision thus;

"In our respectful view, the two limbs of section 83 of the Elections Act should be applied disjunctively. In the circumstances, a petitioner who is able to satisfactorily prove either of the two limbs of the Section can void an election. In other words, a petitioner who is able to prove that the conduct of the election in question substantially violated the principles laid down in our Constitution as well as other written law on elections, will on that ground alone, void an election. He will also be able to void an election if he is able to prove that although the election was conducted substantially in accordance with the principles laid down in our Constitution as well as other written law on elections, it was fraught with irregularities or illegalities that affected the result of the election."

The court went on to state that therefore "*…an election must be one that meets the constitutional standards…"* and "*…has to be one that is both quantitatively and qualitatively in accordance with the Constitution..."* which essentially meant that ***section 83*** was to be applied to the provisions of the Constitution.

Yet despite the Supreme Court's clear pronouncement of the standards specified by ***Article 81*** and ***86*** and ***section 83***, the learned judge sought to introduce a low threshold for nullifying elections**.**

But in terms of the Supreme Court decision in the ***Raila 2017 case*** any nullification of an election must be on the basis of substantial

violation of the principles laid down in the Constitution as well as other written law or that, although the election was conducted substantially in accordance with the principles laid down in the Constitution and other written law, it was subject to irregularities and illegalities that affected the result of the election; that is, the qualitative and quantitative standards. So that, to the extent that the learned judge disregarded the threshold that the violation has to be "substantial" before an election can be voided, we are of the view that he misapplied the law.

The next issue for consideration is whether the learned judge relied on the historical context of elections in Kenya to nullify the elections for Gatundu North Constituency, rather than on the facts of the case.

It is the appellant's argument that the learned judge applied a historical contextual analysis to the case without due regard for the burden of proof. It was contended that this was not a matter that was pleaded by the 1st respondent, and no expert witness or historian was called to testify on the history of elections; and ***section 60*** of the ***Evidence Act*** did not empower a court to take judicial notice of the history of the country.

Article 259 (1) of the Constitution provides that:

> ***"This Constitution shall be interpreted in the manner that:***
>
> ***a) Promotes its purposes, values and principles;***
>
> ***b) Advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights;***
>
> ***c) Permits the development of the law; and***
>
> ***d) Contributes to good governance."***

Article 259 (3) further states that:

> ***"Every provision of this constitution shall be construed according to the doctrine of interpretation that the law is always speaking…"***

In support of this constitutional directive, various decisions of the courts have emphasized the need for a holistic approach to be adopted when interpreting the Constitution, one that would incorporate the historical, economic, social, political and cultural context of the Kenyan people. ***In the Matter of Kenya National Human Rights Commission, Supreme Court Advisory Opinion Ref. No.1 of 2012***, it was stated thus:

> ***"But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions in each other, so as to arrive at a desired result."***

In ***Peter Gatiarau Munya vs. Dickson Mwenda Kithinji & 2 others, Supreme Court Petition (supra)*** the court held at paragraph

167 that;

> ***"In Pepper v. Hart [1992] 3 WLR, Lord Griffiths observed that the "purposive approach to legislative interpretation" has evolved to resolve ambiguities in meaning. In this regard, where the literal words used in a statute create an ambiguity, the Court is not to be held captive to such phraseology. Where the Court is not sure of what the legislature meant, it is free to look beyond the words themselves, and consider the historical context underpinning the legislation."*** *(emphasis ours)*

In the Supreme Court Advisory Opinion, the case of ***Re Interim Independent Election Commission [2011] eKLR, para [86]*** the court pronounced itself thus;

> ***"The rules of constitutional interpretation do not favour formalistic or positivistic approaches (Articles 20(4) and 259(1)). The Constitution has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. The Constitution has a most modern Bill of Rights, that envisions a human rights based, and social-justice oriented State and society. The values and principles articulated in the Preamble, in Article 10, in Chapter 6, and in various provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the Courts."***

More recently, in the case of the ***Independent Electoral and Boundaries Commission vs Maina Kiai & 5 others [2017] eKLR*** this

Court was categorical when it stated that;

> ***"Ultimately, we are clear in our minds that, owing to the prescriptive requirements of Article 259, and the various pronouncements by the courts that we have adverted to, we are compelled to adopt a purposive approach when interpreting the Constitution, having regard to the intent and purpose, the historical socio-political context, the values, aspirations and the spirit of the Constitution."*** *(emphasis ours)*

In view of the above, it is evident that courts are mandated as of necessity to take into account the historical context behind the provisions of the Constitution, which background has an integral role to play in its interpretation- the electoral laws no less. In undertaking a historical detour into the electoral provisions, the learned judge sought to outline the basis of their enactment, and considering the history of electoral misconduct by the body charged with managing elections, and the violence and electoral lawlessness that ensued on account of its mismanagement. The electoral provisions of the Constitution were consequently enacted to ensure adherence to the rule of law in the electoral process and system. It is for this reason that the election court stated that, *"…This is the history and context we have in mind in interpreting and applying Articles 81 and 86 of the Constitution as well as section 83 of the Elections Act,"* and that in applying the electoral standard to judging the integrity of elections provided in the Constitution and statutory law, it considered it essential to have the history that produced the law firmly embedded in our minds.

Based on this constitutional imperative, we consider that the learned judge rightly kept in focus the historical contextual background in the interpretation of the electoral provisions of the Constitution. There is therefore no merit in the complaint that the learned Judge erred in keeping in view, the historical context underlying the constitutional principles on elections.

That said, the appellant's grievance is that the learned judge simply applied a historical contextual analysis to nullify the election, without due regard for whether the illegalities alleged to have been committed by the IEBC were proved. This is because the learned judge concluded that the failure by IEBC to strictly comply with the Constitution and statutory law was informed by a history of electoral injustice, and the failure to strictly adhere to electoral justice principles. The court was of the view that the IEBC must be held to the high standards of excellence and integrity that is demanded of it by the Constitution.

In as much as significant reference was made by the Judge to the historical contextual narrative of elections in Kenya, we do not agree with the appellant that this was the basis upon which the learned judge nullified the elections. A further consideration of the judgment makes it clear that the learned judge nullified the election for reasons of; firstly, commission of irregularities and anomalies by the IEBC arising from disobedience of the electoral laws and regulations, and secondly, arising from the missing electoral materials from the ballot boxes which were in the IEBC's custody.

With respect to the first reason, the learned judge found that there were irregularities and anomalies following an audit carried out on form 35 As and Bs. In this regard, judge stated;

> ***"The Court performed an independent analysis of the Forms 35As deposited in Court. The Court identified 10 parameters over which an error or irregularity could palpably be evinced in a form 35A and scrutinized each of the 125 Form 35As against these parameters for errors. The raw data is summarized in a chart which is available in the Court file."***

This is the same report that we earlier found was formulated without the participation of the parties. And it is on the outcomes of this report that the election court concluded that when counting and tallying of votes, the IEBC failed to abide by the electoral laws, rules and regulations. And for this reason, the court nullified the elections.

Notwithstanding the unprocedural *faux pas* in which it came into existence, an analysis of the report shows that it detailed the number of Form 35As and Bs that were not signed by the Presiding and Deputy Presiding officers, and the agents, whether the reasons for failure by the agents to sign was included, and whether or not the forms were properly filled.

When these details are considered alongside the pleadings, what becomes apparent is that the findings and conclusions were not based on matters that were pleaded in the petition.

For instance, the petition makes reference to forms 35 As and Bs in the following ways;

i) that the 1st respondent's agents were denied copies of form

35 As;

ii) that there were no form 35 As displayed on the door of the polling station;

iii) that at St. Francis Girls, Mangu some of the Form 35 As had cooked up results;

iv) forms 35A at Mataara recorded valid votes cast as 477 yet 478 votes were recorded;

v) that form 35A from Kawera Primary School had several cancellations and wrong entries;

vi) that in most polling stations form 35As and Bs have different entries;

vii) that form 35As and Bs used to declare the results were not stamped;

viii) that form 35As at Kiriko Primary School (Stream 1), Kamunyaka Primary School, Gakoe Tea Estate Nursery School,

Kamwangi Primary School (Stream 2) Kairi Primary School (Stream 2) Mataara Primary School (Stream 2) Makohokoho Primary School (Stream 2) Muimuto Nursery, Mwea Primary School (Stream 2), Kiangunu Secondary School (Stream 2) Ndekei Primary School (Stream 2) James Njenga Primary School, Nguna Primary School (Stream 3) were where the forms lacked the official IEBC stamps;

ix) that at Gikinda, Ihagu-ini, and Njathaini polling stations tallying differed from those recorded in the Form 35 As;

x) that form 35A of Kangaita school stream 1 was not signed by an agent and;

xi) that form 35 A in Makwa primary school (Stream 2) was not recorded.

We would point out that in the judgment, many of these allegations were among the twenty nine issues that were out rightly dismissed by the learned judge for lacking in specificity, proof and for lack of evidence.

With the exception of Form 35As at Kiriko Primary School (Stream 1), Kamunyaka Primary School, Gakoe Tea Estate Nursery School, Kamwangi Primary School (Stream 2) Kairi Primary School (Stream 2) Mataara Primary School (Stream 2) Makohokoho Primary School (Stream 2) Muimuto Nursery, Mwea Primary School (Stream 2), Kiangunu Secondary School (Stream 2) Ndekei Primary School (Stream 2) James Njenga Primary School, Nguna Primary School (Stream 3) where the forms lacked the official IEBC stamps, and Kangaita school (Stream 1) where an agent did not sign, and Kawera Primary School where the form 35 A had several cancellations and wrong entries, none of the other findings in the election court's report were matters that were pleaded.

In the case of ***Adetoun Oladeji (NIG) vs Nigeria Breweries PLC S.C 91/2002*** Judge Pius Aderemi J.S.C. pronounced himself thus;

> ***"…it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in any other way, which is at variance with the averments of the pleadings goes to no issue and should be disregarded."***

Similarly, as was stated by this Court in ***Independent and Electoral Boundaries Commission & another vs Stephen Mutinda Mule (supra)*** which cited the Supreme Court in ***Malawi Railways vs Nyasulu [1998] MWSC 3*** thus;

> ***"… the court itself is bound by the pleadings of parties as they are themselves. It is no part of the duty of the court to enter upon any enquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties have raised by themselves in pleadings. Indeed the court will be acting contrary to its own character and nature if it were to pronounce any claim of defence not made by the parties. To do so would be to enter into the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice…"***

By carrying out a forensic analysis of the Forms 35 As and Bs in the manner that he did, the learned judge not only carried it out without the participation of the parties, but also crafted issues that went well beyond the scope of the petitioner's case. The number of Form 35As and Bs that were not signed by the Presiding and Deputy Presiding officers, and the agents, and whether the reasons for failure by the agents to sign was included, and whether or not the forms were properly filled, were not matters complained of in the petition. And neither were the shortcomings in the 11 Polling Station Diaries which did not have the materials checklist properly filled out nor were the 21 Polling Station Diaries with errors, or the 17 that did not have the certificate of closure properly filled out, or the 20 which lacked the Presiding Officer's/Deputy Presiding Officer's affirmation, or the Polling Station Diaries for Gatei Primary School, Kanyambi Primary School and Maria-ini Primary School which were missing and no explanation as to their whereabouts was provided by the IEBC.

As these matters were not pleaded by the petitioner, the learned judge ought not to have ventured into this arena or presented the outcome as the findings of the court, or worse still to rely upon them to determine the petition. In our view, this was an error and a misdirection on the part of the learned judge, which was further exacerbated by his reliance on the findings to nullify the election.

Notwithstanding that we have already said that the forensic audit was improperly formulated and relied upon, with regard to the pleaded issues, where it was established that some forms lacked the official IEBC stamps, or where some of the agents did not sign, or where the Form 35 A had several cancellations and wrong entries, we consider that these were administrative or procedural errors, that were not of the severity or substantive illegality as to be significant enough to void an election.

Taking all these considerations into account, our conclusion on this issue is that, since the forensic audit report was formulated without participation of the parties, and comprised unpleaded matters, it cannot be relied upon as a basis for nullifying the election. And with regard to the pleaded issues, and the delinquencies of the form 35 As for some 14 polling stations, we consider that these were administrative errors or anomalies, incapable of forming a basis for nullification of an election.

The second reason for nullification, was the failure by the IEBC to ensure the safe keeping of all the electoral material following ballot box tampering, and missing votes, the learned judge stated;

> ***"While instances of venial inattention and minor administrative mishaps can be excused in the conduct of elections, cases of ballot box tampering, missing votes and seemingly systematic failures by electoral officials to follow election rules and regulations cannot be dismissed with a nonchalant wave of the hand"***

Clearly the learned judge considered the ballot box tampering and missing votes to be a matter of grave concern, and attributed IEBC's

failure to keep the ballot boxes safely sufficient reason to nullify the election.

Article 81 (e) (iv) of the ***Constitution*** stipulates that elections are required to be free and fair manner, and should be conducted in an impartial neutral, efficient, accurate and accountable manner. More specifically, ***Article 86*** of the ***Constitution*** provides inter alia that at every election, the IEBC shall ensure that whatever voting method is used the system is simple, accurate, verifiable, secure, accountable and transparent. Of relevance is sub article (d) which commands the IEBC to ensure that appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election material.

Pursuant to this provision, ***section 86*** of the ***Elections Act*** provides for safe keeping of election materials by the returning officers after the final tallying and announcement of results. In addition, ***section 86 (2) (b)*** states that;

> ***"The returning officer shall keep the sealed ballot boxes and all materials relating to the election in safe custody for such a period as may be required under those regulations and the Act."***

Under ***rule 16*** of the ***Elections (Parliamentary and County Elections) Petitions Rules, 2017***, the election court may give directions on the storage of election materials including ballot boxes and documents relating to the petition, the handling and safety of election materials and the time for furnishing the election materials to the election court.

In the case of *William Odhiambo Oduol vs Independent Electoral and Boundaries Commission & 2 others [2013] eKLR* Muchelule J, spelt out the role of IEBC when he stated thus;

> ***"Having looked at all these decisions, the jurisprudence that emerges from them is that, the votes in the ballot boxes following an election contain the best, primary and controlling evidence of the votes cast by the electorate. The Commission has, therefore, the responsibility to safeguard those votes by making sure that the ballot boxes in which they are contained are scrupulously secured until any litigation on them is concluded. The results as declared in the election forms should agree with the votes in the ballot boxes, and when they don't agree the Commission has to explain the discrepancy. "***

Without doubt, there is an obligation on IEBC's part to ensure that once voting, computing and tallying of the results is completed, the electoral materials are placed in safe custody. And it is its responsibility to ensure that ballot boxes and other electoral materials are not tampered with whilst in storage. The reason for this is so that, the stored electoral materials is readily available to be used as a basis upon which an election court can verify the election results in the event that scrutiny is ordered.

The question that arises is whether the missing items from the ballot boxes was sufficient evidence to demonstrate that the IEBC had conducted the election so substantially badly so as to affect the validity of the election, and to lead to the conclusion that the election was not free and fair.

In the case of ***Morgan & Simpson & another [1974] 3 AII ER 722*** it was stated that;

> ***"We are dealing here with a challenge based on administrative errors. There is no allegation of fraud corruption or illegal practices. Nor is there any suggestion of wrongdoing by any candidate or illegal party. Given the complexity of administering a federal election, tens of thousands of election workers involved, many of whom have no on-the–job experience, and the short timeframe for hiring and training them, it is inevitable that administrative mistakes will be made. If elections can be easily annulled on the basis of administrative errors, public confidence in the finality and legitimacy of election results will be eroded. Only irregularities that affect the result of the election and thereby undermine the integrity of the electoral process are grounds for overturning an election."***

And the Supreme Court in ***Peter Gatirau Munya case (supra)*** further explained that;

> ***"If it should be shown that an election was conducted substantially in accordance with the principles of the Constitution and the Elections Act, then such election is not to be invalidated only on grounds of irregularities. When however it is shown that the irregularities were of such magnitude that they affected the election results, 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 petition, the 1st respondent's complaint was that ballot papers used during the general elections of 8th August 2017 were found strewn around Gakoe Shopping Centre, Gituamba Shopping Centre, Mataara Shopping Centre, Mang'u Primary School, Mang'u town. Though the 1st respondent declined to confirm that he was in possession of the election materials, Mr. Muthee the Returning Officer testified that the ballot papers found missing during scrutiny were found in his (the 1st respondent's) documents.

Following scrutiny, the items that were found to be missing included un-used ballot papers, a total of 332 votes for the 1st respondent, Francis Kago and Dominic Kanyi Gicheru, tallying sheets for Mutuma Primary School (Stream 1) and 12 copies of Form 35As from Maria-ini Primary School and the results for Gikindi Primary School Form 35B and 26 seals were missing from the ballot boxes.

There is no question that some of the ballot boxes that underwent scrutiny were tampered with, and there is also no question that the scrutiny found certain items missing from the ballot boxes. Indeed, the evidence of ***Patrick Muthee (DW 2)*** the IEBC Returning Officer is clear that;

> ***"When we went through the scrutiny, there were specific Polling stations picked up by the Petitioner. In all the Polling stations***

where the Petitioner specifically requested for scrutiny, the ballot boxes were tampered with and I (sic) some instances the ballot papers were completely missing. Therefore, my conclusion is that this must have happened during storage."

He later stated that;

"Something seems to have happened and ballot boxes tampered with, seals broken and the same boxes we had checked and confirmed were in order are now suddenly with issues".

On cross examination Mr. Muthee went on to state;

"It would appear that some stranger accessed the documents and tampered with them. But the tampering occurred after we had declared the results."

But though there was tampering with some of the ballot boxes, despite our findings on scrutiny, it is instructive to note that, when the issues complained of in the petition are considered alongside the scrutiny outcomes, none of the missing items were among those that were pleaded.

In addition, in so far as the facts surrounding the missing electoral materials are concerned, we are not satisfied that they were sufficient to nullify the election. We say this because, it was not established that the IEBC and the appellant deliberately stage-managed the disappearance of these materials to manipulate the elections for her benefit, and lead to the conclusion that the election principles for a free and fair election were breached. Indeed the learned judge stated;

"It is important to record here that the Court found no evidence whatsoever that the 1st respondent did anything wrong or participated in any way in the propagation of the irregularities that have led to the nullification of this election."

In fact, the scattered ballot papers did not in any way affect the election process or the result. They did not augment or decrease the 1st respondent's final result. Scrutiny revealed that a total of 332 votes belonging to the 1st respondent, Francis Kago and Dominic Kanyi Gicheru, were found to have been missing. Against the appellant's 39,447 votes garnered this was insignificant and did not prejudice the 1st respondent or the integrity of the elections for Gatundu North Constituency so as to warrant a nullification.

Yet it is upon the two findings that the IEBC's failure to count and tally votes and to secure the electoral materials that the learned judge concluded;

"[A]fter due consideration of the evidence before me about the extent, nature, and prevalence of irregularities, anomalies, failures, errors and omissions propagated by the 2nd Respondent in its conduct that attended the election for Member of National Assembly for Gatundu North in the election held on 8/8/2017 as I have reviewed above, and properly applying the correct legal standard in the contextualized manner that takes out history into account, I have come to the conclusion that the election for Member of National Assembly for Gatundu North was conducted so badly that it was not substantially that it as not in accordance with the law as to elections…"

At this juncture the question for determination is whether in nullifying the election the learned judge rightly concluded that the elections were not substantially in accordance with the Constitution and the law. We have already established that the learned judge wrongly applied the strict and sever standard which he referred to as *per se* standard to nullify the elections. But an application of the correct standard as set out in the Constitution in conjunction with ***section 83,*** leads us to conclude differently.

To reiterate, the applicable standard is that stipulated by ***section 83*** of the ***Elections Act*** that;

"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".

In interpreting the meaning of ***section 83***, in ***Raila 2017 (supra)*** at paragraph 211 the Supreme Court emphasized that;

"… a petitioner who is able to prove that the conduct of the election in question substantially violated the principles laid down in our Constitution as well as other written law on elections, will on that ground alone, void an election. He will also be able to void an election if he is able to prove that although the election was conducted substantially in accordance with the principles laid down in our Constitution as well as other written law on elections, it was fraught with irregularities or illegalities that affected the result of the election.

Our evaluation of the reasons for which the learned judge nullified the election which were because of the missing ballot papers and the identified administrative and procedural irregularities concerning form 35 As, brings us to the conclusion that nothing demonstrated that there was a substantial violation of the principles laid down in the Constitution and other written law on elections as to demand for the election to be nullified.

Furthermore, we find that the irregularities and illegalities alleged were both insufficient and too insignificant to affect the result of the election. By nullifying the election in the manner that he did, the learned judge failed to appreciate that the overwhelming majority of votes attained by the appellant was an explicit manifestation of the will of the people of Gatundu North Constituency, and we so declare.

Accordingly, we make the following final orders;

1. The appeal is merited and is allowed;

2. The judgment and decree of the High Court at Kiambu dated 1st March 2018 in Election Petition No. 1 of 2017 is hereby set aside;

3. The appellant is declared the validly elected member of National Assembly for Gatundu North Constituency following the General election of 8th August 2017;

4. A certificate of validity be duly issued and transmitted to the Speaker of the National Assembly; and

5. The appellant and the 2nd respondent shall have the costs in the High Court and in this Court.

It is so ordered.

Dated and delivered at Nairobi this 31st day of July, 2018

R. N. NAMBUYE

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JUDGE OF APPEAL

S.GATEMBU KAIRU, FCIArb

……..…….

JUDGE OF APPEAL

A. K. MURGOR

……..…….

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR