



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, GATEMBU & ODEK, JJA)

ELECTION PETITION APPEAL NO. 16 OF 2018

BETWEEN

HUSSEIN ABSHIRO HERIN.....1ST APPELLANT
ISMAIL MOHAMUD IBRAHIM.....2ND APPELLANT
ISSACK SHEIKH AHMED.....3RD APPELLANT
ABDI ADAN.....4TH APPELLANT
NOOR HASSAN EDO.....5TH APPELLANT
ADAN MATHOBE BOSHE.....6TH APPELLANT
HASSAN IBRAHIM ALLIOW.....7TH APPELLANT
HASSAN ISSACK MAALIM.....8TH APPELLANT
MOHAMED ALIOW MOHAMED.....9TH APPELLANT
MOHAMEDNOOR OSMAN MOHAMUD.....10TH APPELLANT
ADOW MOLU KIKE.....11TH APPELLANT
ABDI IBRAHIM MOHAMED.....12TH APPELLANT
IBRAHIM MOHAMED NUNOW.....13TH APPELLANT
SULEIMAN MOHAMUD FILA.....14TH APPELLANT
BASHIR ADAN ISSACK..... 15TH APPELLANT
MOHAMUD IBRAHIM ALIOW.....16TH APPELLANT
HUSSEIN BILLOW ABDI.....17TH APPELLANT
HASSAN ALI BALAYA.....18TH APPELLANT
KALLA ISSAK ALIOW.....19TH APPELLANT
ALI ABDI ADAN.....20TH APPELLANT

ISSACK ABDIRAHMAN.....21ST APPELLANT
MOHAMED ABDOW ALI.....22ND APPELLANT
HASSAN IBRAHIM ALI.....23RD APPELLANT

AND

THE INDEPENDENT ELECTRAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

THE MANDERA NORTH CONSTITUENCY RETURNING

OFFICER (ABDIBAHIR ALINOOR ALI).....2ND RESPONDENT

BASHIR SHEIKH ABDULLAHI.....3RD RESPONDENT

(Being an appeal from the entire judgment of the High Court of Kenya at Nairobi (Hon. Lady Justice Hedwig I. Ongudi) given at Nairobi on the 27th February, 2018

in

Election Petition No. 7 of 2007)

JUDGMENT OF THE COURT

1. In this appeal, the appellants have challenged the judgment of the High Court at Nairobi (H. Ong’udi, J) delivered on 27th February 2018 upholding the election of Bashir Sheikh Abdullahi, the 3rd respondent, as the duly elected Member of National Assembly for Mandera North Constituency following the general elections held on 8th August 2017.

Background

2. Five candidates contested for the position of Member of National Assembly for Mandera North Constituency during the 8th August 2017 general elections. Following that election, the 2nd respondent, the Independent Electoral and Boundaries Commission (IEBC) declared the 3rd respondent, as the duly elected Member of National Assembly for Mandera North Constituency with 24,999 votes. Mohammed Ibrahim Abdi was second with 14,363 votes. Abdullahi Mohammed Ahmed was third with 20 votes. Abdi Ali Mohammed was fourth with 11 votes. Last, with the least number of votes, was the 1st appellant in this appeal, Hussein Abshiro Herin, who garnered 9 votes.

3. Mohammed Ibrahim Abdi, who garnered the second highest number of votes, was not satisfied that those results were a true reflection of the will of the people Mandera North Constituency. He petitioned the High Court (the election court) by a petition dated 5th September 2017 to declare, among other things: that the 3rd respondent was not validly elected as Member of National Assembly for Mandera North Constituency; that the certificate of declaration of results to that effect be cancelled; and that he (Mohammed Ibrahim Abdi) was duly elected in that position. He contended in the petition, that he was undoubtedly the people’s choice but was ‘rigged out’ and robbed of his victory through “*fraud*” and “*illegal maneuvering and machination*” during the election process. He asserted in the petition that the election was not conducted in accordance with the Constitution and the election laws.

4. It was averred in the petition that presiding officers and deputy presiding officers were irregularly employed and deployed by IEBC; that electoral materials, namely ballot boxes and voting materials were illegally transported by police officers; that gazetted polling stations were illegally moved; that Forms 35As were altered without countersigning; that presiding officers and deputy presiding officers failed to sign Forms 35As; that the same forms were not signed by agents of the candidates or their sponsoring political parties; that agents of candidates were chased away from polling stations and there was deliberate failure to use the Kenya Integrated Election Management System (KIEMS) kits in order to facilitate or abet ballot stuffing in favour of the 3rd respondent; that in most polling stations in Guticha Ward, Morothile Ward and Rhamu Dimtu Wards in particular, voters were not only allowed to vote more than once but were given the ballot papers for Member of County Assembly only and denied the opportunity to cast votes for the other 5 elective positions; that there was failure to count votes and announce results at polling stations; and that there was unusually high turnout of voters in Guticha Ward, Morothile Ward and Rhamu Dimtu Wards.

5. In their responses to the petition, the respondents denied the claims that the election was marred by irregularities and illegalities. They maintained that the election was conducted in accordance with the constitutional principles on elections and in accordance with the electoral laws and regulations and that the 3rd respondent was validly declared as the duly elected Member of National Assembly for Mandera North Constituency.

6. On 17th November 2017, Mohammed Ibrahim Abdi formally withdrew the petition. The 23 appellants in this appeal were then substituted to go ahead with the petition.

7. The election court conducted a trial in which 19 witnesses testified in support of the petition. 10 witnesses testified in opposition to the petition. After reviewing the evidence and submissions by counsel, the learned Judge delivered the impugned judgment on 27th February 2018 in which she concluded that the

“*generalized allegations*” in the petition were not supported by “*cogent, credible and consistent evidence.*” She accordingly dismissed the petition with costs to the respondents.

The appeal and submissions by counsel

8. The appellants 18 grounds of appeal in the memorandum of appeal were condensed by counsel into the following grounds: that the Judge: failed to apply the provisions of Regulation 5 of the Elections (General) Regulations which require a list of proposed presiding officers to be shared with political parties and independent candidates prior to appointment; erred in holding that IEBC could use Forms that had alterations without countersigning; erred in failing to find that the failure by IEBC to supply SD cards violated the principle of accountability under Articles 81 and 86 of the Constitution; erred in failing to hold that the elections were not conducted by an independent body in accordance with Articles 81 and 86 of the Constitution to the extent that IEBC delegated the delivery of election materials to police officers and also changed the tallying center; and that the Judge erred in accepting that polling could take place in polling stations that had not been gazetted.

9. Expounding on those grounds, learned counsel for the appellants Mr. Willis Otieno urged, in his written and oral submissions, that there was evidence by PW 11 that IEBC did not provide a list of proposed presiding officers prior to their appointment; that it was incumbent on IEBC, on the face of that evidence, to demonstrate that it had indeed supplied the list and that the election was conducted by presiding officers duly appointed in accordance with Regulation 5(1) and not by strangers. Citing the High Court decision in **Khelef Khalifa & another vs IEBC, JR No. 628 of 2017**, counsel stressed that the requirement to share a list of proposed appointees under Regulation 5(1) is mandatory and the failure to do so is an infringement of the law and a breach of constitutional principles on conduct of elections.

10. On alterations, counsel submitted that failure to countersign erasures on results declaration forms contravenes the principle of accountability under Articles 81 and 86 of the Constitution and the learned Judge should have made a finding to that effect. In support, counsel relied on decisions in **William Kabogo vs George Thuo & 2 others [2010] eKLR**; and **Dickson Mwenda Kithinji vs Gatirau Peter Munya & 2 others [2013] eKLR** among others. In the same vein, counsel urged that the failure of IEBC to make available SD cards in respect of two polling stations breached the same constitutional principle of accountability.

11. Counsel further submitted that under Article 81 of the Constitution an election must be administered by an independent body for the same to be free and fair; that to the extent that IEBC delegated the delivery of election materials to police officers and changed the location of the tallying center to the boardroom of the County Commissioner, the election was not conducted by an independent body. In support, a decision of the South African court in **Independent Electoral Commission vs Langeberg Municipality (CCT 49/00) [2001] ZACC 23** was cited.

12. Counsel concluded by urging that the learned Judge erred in accepting, contrary to the requirement of Regulation 7 of the Elections (General) Regulation, that polling could take place in polling stations that had not been gazetted as such.

13. For the 1st and 2nd respondents, Mr. Brian Odhiambo, learned counsel submitted that under Section 85A (1) of the Elections Act, the jurisdiction of this Court is limited to matters of law only; that on the strength of the Supreme Court decisions in **Gatirau Peter Munya vs Dickson Mwenda Kithinji and 2 others [2014] eKLR** and **Zachary Okoth Obado vs. Edward Akongo Oyugi and 2 others [2014] eKLR**, this Court must pay homage to findings of fact by the lower court; that the Court can only part from such findings if the same are perverse and if no reasonable tribunal could have reached such findings.

14. It was submitted that the appellants did not discharge their burden to prove the allegations made in the petition to the required standard and neither did they demonstrate, as required under Section 83 of the Elections Act, that any irregularities that may have occurred affected the result or outcome of the election. In that regard counsel referred to the case of **Raila Odinga vs IEBC, Election Petition No. 5 of 2013** [Raila 2013]

15. With regard to the claim that IEBC breached Regulation 5(2) of the Elections (General) Regulations, 2012 in failing to provide political parties and independent candidates with a list of proposed presiding and deputy presiding officers, it was submitted that the learned Judge arrived at the correct conclusion; that the appellants failed to prove that the list of proposed presiding and deputy presiding officers was not supplied to their political party as they could not speak for the party.

16. Regarding claims of alterations of forms without countersigning, it was submitted that there was nothing to suggest that the forms were not authentic or that the results contained therein were not correct; that there was no evidence tendered by the appellants to show that any results were altered; that any mistakes done were not actuated by malice or ill motive on the part of the IEBC officials; and that no prejudice was occasioned to any of the parties.

17. With regard to the failure by IEBC to supply SD cards for some of the polling stations, it was submitted that an explanation was given, namely that the same had been presented for scrutiny in other election petitions, and the misplacing of the SD cards, as a result, was not deliberate. Furthermore, it was urged, the results for the two polling stations with respect to which the SD cards were misplaced, were cancelled by the returning officer and no candidate benefitted as a result.

18. As to the claim that the election was not conducted by an independent body on account of electoral materials having allegedly been

distributed by the police and on account also of the tallying center having been changed, counsel submitted that IEBC sought the assistance of the police in securing the materials in accordance with Regulation 63 of the Election(General) Regulations, 2012; that the distribution of the materials was undertaken by the returning officers, and not by the police as claimed; and that there were legitimate security reasons for doing so. On movement of the tallying center, it was submitted that an order of the High Court preventing the movement was stayed by this Court; that in any event the tallying center was moved upon consultation with all the parties concerned.

19. As to the claim that un-gazetted stations were used as polling stations, counsel submitted that it is not correct, as asserted by the appellants, that the trial Judge accepted that polling could take place in such stations. It was submitted that no polling took place outside of the gazetted polling stations; that the scrutiny report on SD cards confirms that elections were conducted in the gazetted stations.

20. Mr. N. Havi learned counsel for the 3rd respondent submitted that the appeal is wholly unmeritorious; that the election court arrived at the correct conclusions; that on the alleged failure by IEBC to share list of proposed presiding officers, the Judge duly considered the evidence tendered and rightly found that due procedure under the Regulation 5(2) of Election(General) Regulations, 2012 was followed; that the claim that altered forms affecting 3,630 votes were used was also duly considered and properly rejected. In any event, counsel submitted, not every noncompliance or act of omission or breach of election regulations should render an election invalid. In that regard counsel referred to the decisions of this Court in *Mercy Kirito Mutegi vs Beatrice Nkatha Nyaga & 2 others [2013]eKLR; Ferdinand Ndungu Waititu vs IEBC & 8 others [2013]eKLR.*

21. With regard to the contention that IEBC was unable to account for the election on the basis that SD cards for two polling stations were not supplied for scrutiny, it was submitted that Judge arrived at the correct conclusion; and that the results relating to those two polling stations did not form part of the tally on the basis of which the results were declared.

22. As to the alleged lack of independence on the part of IEBC on account of use of police officer in delivery of election materials, and the relocation of the tallying center, counsel submitted the election court made correct findings on both matters. That the assistance of the police in providing escort was justified on account of violence during the election period; and that the moving of tallying center was also justified on the basis of a decision of this Court that stayed an order of the High Court that had prevented the movement of the center.

23. Finally, on the claim that un-gazetted stations were used as polling stations, counsel submitted that, quite apart from the fact that this complaint did not form part of the grounds in the memorandum of appeal, the election court correctly found that no polling station was moved from the gazetted locations.

Analysis and determination

24. We have considered the appeal and the submissions by counsel. Based on the grounds of appeal and the submissions by counsel, the principal issue of law for our consideration is whether the learned Judge erred in holding that the appellants failed to discharge their burden of proof, to the required standard, to establish that the election was not conducted in accordance with the constitutional principles for the conduct of elections and in accordance with electoral laws and regulations. Within that, we consider whether the Judge erred in failing to apply the provisions of Regulation 5 of the Elections (General) Regulations, 2012 which require a list of proposed presiding officers to be shared with political parties and independent candidates prior to appointment; whether the Judge erred in holding that IEBC could use Forms that had alterations without the same being countersigned; whether the Judge erred in failing to find that the failure by IEBC to supply SD cards violated the principle of accountability under Articles 81 and 86 of the Constitution; whether the Judge erred in failing to hold that the elections were not conducted by an independent body in accordance with Articles 81 and 86 of the Constitution to the extent that IEBC is said to have delegated the delivery of election material to police officers and also changed the tallying center; and whether the Judge erred in accepting that polling could take place in polling stations that had not been gazetted

25. To begin with, Articles 81 and 86 of the Constitution as amplified in the Elections Act and the Regulations made thereunder set standards against which an election is to be judged. It is a requirement under Article 81 that for elections to pass the test of being free and fair, they should be conducted by an independent body, they must be transparent and administered in an impartial, neutral, efficient, accurate and accountable manner. Under Article 86, IEBC is required to ensure that at every election, the electoral system is simple, accurate, verifiable, secure, accountable and transparent; that the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station; and that the results from the polling station are openly and accurately collated and promptly announced by the returning officer. The Supreme Court summed up the values encapsulated in those constitutional provisions in *Raila Odinga and another vs IEBC and others [2017] eKLR (Raila 2017)* as follows:

“The principles cutting across all these Articles include integrity; transparency; accuracy; accountability; impartiality; simplicity; verifiability; security; and efficiency as well as those of a free and fair election which are by secret ballot, free from violence, intimidation, improper influence or corruption, and the conduct of an election by an independent body in transparent, impartial, neutral, efficient, accurate and accountable manner.”

26. To the extent that the appellants alleged in the petition before the election court that the election of the Member of National Assembly for Mandera North Constituency fell short of those standards, it was incumbent upon them to prove, to the required standard, the allegations that they made.

27. In *Raila 2017*, the Supreme Court declared that a petitioner who seeks nullification of an election on account of non-conformity with the law or on the basis of irregularities must adduce cogent and credible evidence to prove those grounds to the satisfaction of the court. That Court stated at paragraph 131 and 132 of its judgment that:

“[131] Thus a petitioner who seeks the nullification of an election on account of non-conformity with the law or on the basis of irregularities must adduce cogent and credible evidence to prove those grounds “to the satisfaction of the court.” That is fixed at the onset of the trial and unless circumstances change, it remains unchanged. In this case therefore, it is common ground that it

is the petitioners who bear the burden of proving to the required standard that, on account of non-conformity with the law or on the basis of commission of irregularities which affected the result of this election, the 3rd respondent's election as President of Kenya should be nullified."

28. And at paragraph 132, the Court went on to say:

"Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and remains constant throughout a trial with the plaintiff, however, "depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting" and "its position at any time is determined by answering the question as to who would lose if no further evidence were introduced."

29. In the same case, the Supreme Court went on to say that a petitioner in an election petition has the evidentiary burden to adduce evidence to prove the allegations of breach. At paragraph 133 of its judgment that Court stated that:

"It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce 'factual' evidence to prove his/her allegations of breach, then the burden shifts and it behoves the respondent to adduce evidence to prove compliance with the law."

30. Beyond the burden of proving that there was non-conformity with the electoral laws, the appellants also had the burden to prove that such non-conformity affected the validity of the election. [See Raila Odinga 2013; Zachariah Okoth Obado vs Edward Akong'o Oyugi and 2 others [2014] eKLR.] In the latter case, the Supreme Court stated that:

"... irregularities in the conduct of an election should not lead to annulment, where the election substantially complied with the applicable law, and results of the election are unaffected."

31. It is the appellants' case that they established before the election court, to the required standard, that the election of Member of National Assembly for Mandera North Constituency was not conducted in conformity with electoral laws and that as a result of the breaches, the results of the election was affected. As already stated, the appellants fault the findings of the election court and assert that, contrary to the Judge's finding, the list of proposed officials was not shared with political parties and independent candidates and IEBC failed to prove it had complied with the regulations in that regard; that the Judge should have found that altered forms must be counter-signed; that the failure to supply SD cards from two polling stations violated the principle of accountability under the Constitution; that the elections must be conducted by an independent body; and ungazetted stations were used to conduct elections.

32. We will examine each of those complaints in turn. In doing so, we caution ourselves that we can only interfere with the Judge's findings if the same were arrived at without evidence. As Justice Kurian of the Supreme Court of India stated in Damodar Lal vs. Sohan Devi and others, Civil Appeal No. 231 of 2015,

"30. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is against the weight of evidence, or if the finding so outrageously defies logic as to suffer from the vice of irrationality. If a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with." [Emphasis].

33. We have already set out above the respective positions taken by the parties on the complaints. We begin with the appellants' complaint that the Judge erred in failing to uphold that IEBC breached Regulation 5(2) of the Elections (General) Regulations, 2012 in that it did not provide the political parties and independent candidates with the list of proposed presiding officers. Related to this was the assertion that polling stations were manned by strangers.

34. Regulation 5(2) provides that:

"Prior to appointment under sub-regulation (1), the Commission shall provide the list of persons (presiding officers) proposed for appointment to political parties and independent candidates at least fourteen days prior to the proposed date of appointment to enable them make any representations."

35. The evidence of PW 12, PW 13 and PW 14 in support of the allegation that that regulation was breached was rejected by the Judge. The trial court however accepted the evidence of returning officer, RW 6, that Regulation 5(2) was indeed complied with. It may well be that IEBC, being the custodian of records relating to the conduct of elections, could have further corroborated the testimony of RW6 by producing further evidence, perhaps correspondence forwarding the list of proposed presiding officers to the political parties. That did not however hinder the trial court from making a finding, based on the evidence that was presented. The Judge rejected the evidence of PW 12, PW 13 and PW 14 on sound basis, namely that none of those witnesses could testify, authoritatively, on whether the political parties sponsoring candidates or independent candidates received the list of proposed presiding officers as those witnesses were neither officials of the political parties nor were they independent candidates who would have been entitled to receive such list. As the findings by the Judge were, demonstrably supported by evidence, we do not have any basis for interfering with the same.

36. We turn to the claim that the Judge erred in failing to find that 3,630 votes were affected by altered forms that were not countersigned. Following the decision in *William Kabogo Gitau*, this Court, in *Dickson Mwendu Githinji vs Gatirau Peter Munya & 2 others* [2014] eKLR had taken the position that alterations in Forms 35 that were not countersigned rendered the results in such form invalid. That decision was however overturned on appeal to the Supreme Court which held 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 an election is not invalidated only on grounds of irregularities that do not affect the election result. The Supreme Court stated that:

“Procedural or administrative irregularities and other errors occasioned by human imperfection, are not enough, by and of themselves, to vitiate an election.”

37. In this case, the election court ordered scrutiny of SD cards from the affected polling stations and on re-examination of Forms 35A, the Judge found all of them were signed by the presiding officers and the agents. The Judge however found a difference of 503 votes that she reasoned was explained by the fact that voters identified manually would not be captured by the KIEMS kit.

38. In *Moses Masika Wetang'ula v Musikari Nazi Kombo & 2 others* [2014] eKLR this Court dealt with a similar issue and stated thus:

“The alleged qualitative irregularities committed were: having more than one Forms 35 in some polling stations; erroneous entries relating the number of registered voters and voter turnout on some of them; others had cancellations and alterations on those figures that were not countersigned; others were not signed by agents; others did not have the presiding officers’ statutory comments; and some had other mistakes. We should here point out that as Mr. Gumbo for the 2nd and 3rd respondents said, IEBC did not have photocopying facilities in polling stations. As the presiding officers were required to give copies of Form 35 to each candidate’s agent, post one on the wall of the polling station and give one to the Returning Officer for collation, it meant that each presiding officer had to complete by hand several copies of that form. In such situation errors are bound to have occurred. On their own, the anomalies alleged in this election, in our respective view, cannot be said to have rendered the Bungoma Senatorial election a sham. In other words the qualitative irregularities committed in the election in this case also did not “prevent the election [from] being a true election” or one which was not “an election really and in substance conducted under the existing law.” The ground of irregularities affecting the result of the Bungoma Senatorial election therefore fails.” (Emphasis added)

39. In the appeal to the Supreme Court that arose from that case, namely, *Moses Masika Wetangula v Musikari Nazi Kombo & 2 others* [2015] eKLR, the Supreme Court did not, interfere with that holding. The purpose of countersigning alterations is to authenticate the amendment. As stated in the Nigerian Case of

Alhaji Waziri Ibrahim vs. Shehu Shagari (1983) All N. L. R 507, quoted with approval in the *Munya* case, ***“Without more, an altered or amended document is as genuine as an unamended one”*** and an amendment to a document does not, in itself, vitiate the document absent any ***“evidence of indictment or of immoral, unlawful and illegal motive”*** in the alteration or amendment.

40. In the present case, the presiding officers explained that alterations were necessitated by the need to correct errors. The presiding officers took ownership over those alterations. Furthermore, scrutiny of the SD cards in the identified polling stations that was ordered by the election court ascertained that only 503 votes were affected and the question of the results being affected, where the margin of votes between the declared winner and the first runner up was over 10,000 votes, did not therefore arise. There is no merit in this ground.

41. With regard to the missing SD cards, the learned Judge correctly determined, in our view, that it was rather late for the appellants to complain in their closing submissions that SD cards had not been supplied. Furthermore, the results of the two polling stations to which those two SD cards related, were excluded from the final tally with the result that none of the candidates benefitted from the omission.

42. As to the complaint that the independence of IEBC was compromised on account of involvement of police in distribution of election materials, the police have a duty under the law generally, and under Section 105 of the Elections Act in particular, to maintain law and order and to provide support to IEBC as circumstances may demand. Section 105(2) of the Elections Act provides that:

“(2) It shall be the duty of police officers in their respective areas of operation, to take all necessary measures for the maintenance of law and order and stability necessary for the conduct of an election and to protect and uphold the rights of all persons under any written law relating to elections.

(3) ...

(4) It shall be the duty of –

(a) all officers of the county administration, in their respective administrative units;

(b) all persons in charge of local authority facilities;

(c) persons in charge of facilities;

... to give the Commission and its officers the support and collaboration necessary for the Commission to execute the activities relating to the conduct of an election.” (Emphasis added).

43. The role of the police in maintenance of law and order in the context of conduct of elections was acknowledged by the Supreme Court in John Harun Mwau & 2 others vs IEBC & 3 others [2017] eKLR when it observed, in the context of presidential election that: **“the evidence adduced indicates that the State (particularly the Police and the Ministry of Interior and Co-ordination of National Government) took preventative action to safeguard the safety of election officials, voters, election material and infrastructure.”** Similarly, the Supreme Court of Uganda opined in Besigye vs Museveni & anor, Election Petition No. 1 of 2001 that **“it was not unconstitutional or illegal to deploy the UPDF to assist in maintaining security to ensure that the elections were conducted under conditions of freedom and fairness.”**

44. In the present case, the learned judge determined, correctly in our view, that given the chaos outside IEBC offices alluded to by the evidence of PW16, IEBC was entitled to rely on the police for security. We are accordingly unable to upset the finding by the Judge that there was no evidence that IEBC had abdicated its duty to distribute election materials. Furthermore, there was no complaint that there was any polling station that had not been supplied with these materials. We do not have any basis for interfering the decision by the Judge. We must refrain from addressing the question of the movement of the tallying centre as we understand from counsel that that is a live issue in a different appeal that is pending before this Court.

45. The complaint that the Judge erred in holding that polling could be carried on at stations that were not gazetted is not borne out by the record. The Judge did not make such finding. The Judge dismissed the allegation that polling stations were changed after considering the 1st appellant’s claims vis a vis documentary evidence tendered by IEBC regarding where the elections were conducted as well as the deputy registrar’s scrutiny report. There is no basis for us to interfere with those findings.

46. Lastly there is the question of costs. Counsel for the appellants urged us to upset the decision by the election court to award costs to the respondents. In his view, the Judge found that there were irregularities in the conduct of the election and should have awarded costs against IEBC on that basis. Section 84 of the Elections Act provides that:

“An election court shall award the costs of and incidental to a petition and such costs shall follow the cause.”

47. The power to award of costs in election matters is therefore a matter of exercise of judicial discretion. In Mercy Kirito Mutegi vs Beatrice Nkatha Nyaga & 2 others [2013] eKLR this Court held:

“[59]...The power to impose costs on parties is usually discretionary. Therefore, before an appellate court can interfere with the Judge’s discretion, it must be satisfied that there was misdirection in some matter and as a result, the Judge arrived at a wrong decision or, that he/ she misapprehended the law or failed to take into account some relevant matter.”

48. The irregularities counsel alluded did not affect the result of the election or the outcome of the petition. Having dismissed the petition, the Judge was entitled, under Section 84 of the Elections Act, to award costs against the losing party. No basis has been laid for us to interfere with the Judge’s exercise of discretion in awarding and in capping the costs as she did.

49. The upshot of the foregoing is that the appellants appeal is devoid of merit and is dismissed with costs to the respondents. The instruction fees shall be capped at Kshs. 1,500,000.00 in favour of the 1st and 2nd respondents and at the same amount for the 3rd respondent.

Orders accordingly.

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

P. N. WAKI

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR