IN THE COURT OF APPEAL

AT NAKURU

(CORAM: MAKHANDIA, MUSINGA & GATEMBU, JJ.A)

ELECTION PETITION APPEAL NO. 11 OF 2018

BETWEEN

JULIUS LEKAKENY OLE SUNKULI.....APPELLANT

AND

GIDEON SITELU KONCHELLAH…….....1ST RESPONDENT

ELIJAH MBOGO…..……..…….….2ND RESPONDENT

THE INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION ……..….....3RD RESPONDENT

(An appeal from the Judgment and Order of the High Court of Kenya at Narok ***(Martin Muya, J****.) delivered on 27th February 2018*

in

High Court Election Petition No. 1 of 2017)

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JUDGMENT OF THE COURT

In competitive elections as was witnessed in Kilgoris constituency on 8th August 2017, there was bound to be a winner and a loser. In few instances a loser will take it lying down and live to fight it out another day when the cycle of election is next announced. However, in most cases losers will never accept that they lost fairly and squarely. They tend to impugn the results on all manner of allegations and grievances. The case of Kilgoris constituency is therefore no exception.

After coming second following the declaration of results in which the 1st respondent was declared the winner with a total vote of 23,812 and subsequently gazetted as member of the National Assembly for Kilgoris constituency, the appellant who garnered 17,160 votes mounted a challenge of the results declared by the 2nd respondent on behalf of the 3rd respondent by filing an election petition in the High Court at Narok. The other contestants in the race were **Siparo Joseph** who garnered 1,803 votes, **Oiboo Morinatat Peter,** 3,801 votes and **Kelele Richard,** 7,017 votes respectively.

In the petition the appellant averred that the declared margin of votes of the 1st respondent over the next candidate who is the appellant was 6,652 votes; the election was badly conducted, administered and managed by the 2nd and 3rd respondents as they failed to comply with the governing principles found in **Articles 1, 2, 4, 10, 81** and **86** of the **Constitution,** the **Elections Act** and the **General Regulations** made thereunder. Further, the appellant averred that the election was not administered in an impartial, neutral, efficient, accurate and accountable manner contrary to **Article 81 (e) (v)** as read together with **section 39, 44,** and **44A** of the **Elections Act,** the **Regulations** made thereunder and **section 25 (e)(e)** of the **Independent Electoral and Boundaries Act;** the election as conducted could not pass the test of being free and fair as it was not by way of secret ballot, free from violence, intimidation, improper influence or corruption; neither was it conducted by an independent body, transparent, and administered in impartial, neutral, efficient, accurate and accountable manner; and that in violation of **Article 86** of the **Constitution** the 2nd and 3rd respondents adopted a voting method that was not simple, accurate, verifiable, secure, accountable and transparent.

The appellant went on to aver that there were massive and deliberate ingredients in operational transparency in that the 2nd respondent failed, refused and ignored to openly and accurately collate and promptly announce the results from 100 named polling stations at the Kilgoris Boys' High School Tallying centre. In any event, the tallying was conducted in an opaque and clandestine manner to the advantage of the 1st respondent. Further, it was the appellant's averment that his agents were denied access in named polling stations and were further denied Forms 35A's after counting as required by regulation (79)(2A) (d) of the **Elections (General) Regulations, 2012** "*the General Rules*".

It was the appellant's case that the 2nd respondent announced results without having received all the requisite Form 35A's from named polling stations which was contrary to **regulation 83** of the **General Rules**; that there were many ballot boxes hidden in particular houses in Kilgoris town, the appellant having personally seen three agents of the 1st respondent evacuating the same, a matter he reported to the police; that in particular on 9th August, 2017 six ballot boxes from **Endonyo Onkopit polling station** were found in the house of the Presiding Officer, **Mr. George Odera** being tampered with while guarded by armed policemen. The six boxes were a sample of many that were diverted and tampered with. Pursuant to that incident, the Presiding Officer, George Odera and his deputy, **Yaimat Leperon Sarah**, and a Police Officer, **APC Pius Otieng**, were arrested and charged for the offence of breach of official duty contrary to **section 6(j)** of the **Election Offences Act**, false entry into a return document, contrary **section 6(a)** of the **Election Offences Act**, wilfully giving undue advantage to a candidate contrary to **section 6(1)** of the **Election Offences Act**, and forgery of official documents contrary to **section 351** of the **Penal Code**. Similarly, the Presiding Officer, **Onyinkwa Obara alias Leparan Jacob**, for Enenkeshui primary school polling station having been involved in the same game was arrested and arraigned in court on same charges.

It was therefore the view of the appellant that the diversion and failure to deliver the said electoral material was a wilful and criminal subversion of the will of the people of Kilgoris constituency, an act aimed at disenfranchising the registered voters of those polling stations and indeed the entire constituency. The appellant contended that the data entries in the portal managed by the 2nd and 3rd respondents did not comply with the mandatory provisions of **section 44** of the **Elections Act** which makes it obligatory for the same to be true, accurate, verifiable and accountable, which was not the case here; and that the quantitative effect of the irregularities affected 7,740 votes.

The appellant further complained that the 3rd respondent through his agents, servants and or employees conducted elections in non designated and non gazetted premises namely Styles Cyber Cafe in Kilgoris town, nor were the 2nd and 3rd respondents able to account for all the ballot boxes and/or election materials used on the election day; on the very same day the 1st respondent's agent, Gilbert Stanley Sang was involved in open voter bribery by paying voters in the queues at Logos Sopia primary school polling station; that the 1st respondent and his agents used Constituency Development Fund Land Rover and other facilities to campaign; used named public officers, in his campaigns; misused **Constituency Development Fund** *"CDF"* during campaigns by issuing and presenting at campaign rallies cheques drawn from CDF as well as cash in an effort to unduly influence the voters; that Kiems kits and system of transmission of results were hacked and their functioning massively compromised to produce incorrect results.

The appellant concluded by maintaining that Form 35A's which contained the results and which were supplied by the 3rd respondent's presiding officers were deliberately ineligible, not signed by agents and stamped by the 3rd respondent's officials, making it hard to verify the results. He then prayed that:-

> **"(a) There be a scrutiny of the results recorded in the aforesaid Member of National Assembly election for Kilgoris Constituency in the Election held of the 8th August 2017;**
>
> **(b) There be a scrutiny of the actual Voter's Registers including KIEMs Kits used at all polling stations within Kilgoris Constituency during the said election of Member of National Assembly;**
>
> **(c) The results of the election for Member of National Assembly Kilgoris Constituency held on the 8th August 2017 in Kilgoris Constituency be declared invalid, null and void;**
>
> **(d) It be determined that the 1st respondent has not been validly elected to the Member of the National Assembly for Kilgoris Constituency;**
>
> **(e) There be a repeat of the election for Member of National Assembly Kilgoris Constituency;**
>
> **(f) Such election offences and electoral malpractices on the part of the 1st respondent and acts of omission and commission by the 2nd respondent as disclosed and found by this Honourable Court be reported to the Director of Public Prosecutions for appropriate action;**
>
> **(g) The Honourable Court do find that the 1st respondent has committed serious electoral offences and order him barred from participating in subsequent elections for a period of at least five years or as the court may deem just and expedient;**
>
> **(h) The respondents be condemned to pay your petitioner's costs of and incidentals to this petition; and**
>
> **(i) Such further, other and consequential orders as this Honourable Court may lawfully make."**

The response by the 1st respondent was fast and furious. He denied each and every allegation levelled against him by the appellant, maintained that the elections were conducted in accordance with the Constitution, the Elections Act, the Regulations made thereunder and the Independent Electoral and Boundaries Act. He denied that there was massive and deliberate irregularities in operational transparency; that the results from all the polling stations, except Endoinyo Nkopit primary school polling station were accurately collated and promptly announced at the tallying centre, which tallying was conducted in accordance and in strict compliance with the Elections regulations and in

conformity with the constitutional principles set out in **Articles 38, 81** and **86** of the **Constitution**. With regard to the agents, he averred that only duly authorised agents for political parties and independent candidates were allowed into the polling stations and that the Presiding Officers in all the polling stations gave the agents Form 35A's after the counting and public announcement of the results; that neither were they prepared without any data or otherwise illegible with intent of manufacturing results in the particularised polling stations.

As for the ballot boxes, it was the contention of the 1st respondent that all ballot boxes were delivered and received at the tallying centre except six ballot boxes from Endoinyo Nkopit which were the subject of criminal proceedings in **Case Number 714 of 2017** pending before the Principal Magistrates' court at Kilgoris. In further answer to the allegation, it was the contention of the 1st respondent that the criminal conduct of individuals, whether or not such individuals are electoral officials, cannot vitiate an election. In any event, the alleged criminal enterprise was calculated and designed to advantage the appellant and not the 1st respondent; that the entry of results from all polling stations was posted to Forms 35B except those from Endoinyo Nkopit, which, as already stated, were the subject of criminal proceedings.

On irregularities, he averred that there was no nexus between the alleged irregularities and the votes actually cast for each candidate. In any event, taking into account the voter turnout at the listed polling stations where the alleged irregularities occurred, the votes could not materially alter the results. With regard to Stylus Cyber Cafe, it was the contention of the 1st respondent that it was not a gazetted polling station and no electoral activity took place there. The cyber cafe only offered independent commercial photocopying services and cyber services for printing of materials sent through emails to party agents by the 2nd respondent at the cost of such agents. With regard to the use of CDF Land Rover and funds in campaigns and to bribe voters, it was the case of the 1st respondent that it simply did not happen and that the CDF cheques he issued to schools were drawn long before the campaign period.

Finally, the 1st respondent averred that any imperfections in the election were not intentional and reflects what happens in all imperfect human endeavours; that any non compliance with the electoral regulations did not materially affect the results of the election. He therefore prayed for the dismissal of the petition.

As for the 2nd and 3rd respondents respectively, they jointly averred in response that the election was conducted in accordance with the **Constitution**, the **Elections Act** and the **Elections (General) Regulations** *"General Regulations"* and all other applicable law. The election was free, fair, secure and transparent as the results from all polling stations were submitted at the tallying centre, tallied and a declaration of votes cast in each polling station made for each of the candidates, save for Endoinyo Nkopit; that the tallying and declaration of results was open, transparent and in compliance with the law; that all accredited agents at the respective polling stations were allowed entry into the stations and afforded opportunity to witness the election process from inception to conclusion and were invited to append their signatures on the respective forms for various elective posts. As far as these respondents were concerned, any errors or omissions noted were insignificant and had no effect on the results eventually declared and the results so declared were a true reflection of the political will expressed by the voters of Kilgoris constituency. They too prayed for the dismissal of the petition.

After a marathon hearing of the petition which lasted between 5th September 2017 and 27th February, 2018, **Muya, J.** rendered his judgment in which he dismissed the petition in its entirety. In so doing he delivered himself thus:

> **"From the foregoing it is my considered and humble view that the petitioner in this case failed to prove either of the two limbs stated in section 83 of the Elections Act. It is noted however, that the 3rd respondent failed to secure the election when ballot papers were diverted from Endoinyo Nkopit polling station to a private residence. The court did note that election results of Endoinyo Nkopit polling were not factored in the eventual counting and tallying and this affected all the candidates across the board including the 1st respondent. It is my considered view that this did not substantially affect the results. However, l do find that the 3rd respondent should be condemned to pay costs of this election to the 1st respondent and the petitioner, which costs have been capped at kshs. 2.5 million for eac**h."

Aggrieved by the decision of the High Court aforesaid, the appellant lodged the instant appeal now before us. It is pegged on a whooping 29 grounds, some of which are unnecessarily repetitive. Word of caution to the appellants though, an appeal is neither strong nor weak depending on the many grounds an appellant raises. A myriad of grounds of appeal only help to obfuscate and muddy the real issues for determination in the appeal.

In retaliation, the 2nd and 3rd respondents filed a cross appeal on the grounds that the learned Judge erred in law in: condemning the 3rd respondent to pay costs which decision was contrary to the provisions of **section 84** of the **Elections Act**; failed to take into account the principles and general rules applicable in awarding of costs; determining that the respondent was liable to pay costs to the appellant and the 1st respondent capped at Kshs 2.5 million for each notwithstanding the finding that the 3rd respondent was a successful party in the petition; failing to award costs to the 2nd and 3rd respondents who were successful in defending the petition and lastly, awarding excessive costs to the appellant and the 1st respondent which costs were in any event punitive.

Be that as it may, we think that the 29 grounds of appeal and cross-appeal can be collapsed into 11 broad grounds to wit; whether the Election Court erred in law in: upholding the election after declaring it to be unconstitutional; in subjecting a constitutional requirement to the quantitative test of an election; misinterpreted and or misapplied section 83 of the Elections Act; in failing to make a fact finding and misapprehended the burden of proof; failure to take judicial notice of bribery and corrupt practices; failing to take into consideration the qualitative aspects of the election and their effect on the outcome; in finding that the illegalities were not sufficient to void the impugned election, drawing of adverse inference, scrutiny, election offences, electronic transmission and costs.

Directions as to the disposal of the appeal were given on the 2nd May 2018 when all the parties agreed that the appeal and cross-appeal be canvassed by way of written submissions with limited oral highlights. We think that grounds one, two and three of the appeal can be taken up together. These are; whether the judge erred in law by upholding the election after declaring it to be unconstitutional, subjecting the constitutional test to the statutory test of a valid election and merging the materiality and substantial non-compliance tests in **section 83** of the **Elections Act**. The appellant submitted that the judge having found that the diversion of ballot boxes from Endoinyo Nkopit polling

station to the house of the presiding officer, one George Adera, followed by falsification, was a contravention of **Article 86(a)** of the **Constitution** on the part of the 3rd respondent; that finding alone was sufficient to have nullified the election.

The judge should not have reached the conclusion that despite the glaring breach of the Constitution, illegalities and irregularities, taken together could not affect the results of the election. The view of the appellant was that an election conducted in violation of the precepts of the Constitution was a nullity without more. Reliance was placed on the Supreme Court authorities of **Gatirau Peter Munya v Dickson Mwenda Kithinji and 2 others (2014) eKLR**, "**Munya case**", **Raila Amollo Odinga v Independent Electoral and Boundaries Commission and 4 others (2017) eKLR "Raila 2017**" and **Clement Kungu Waibara v Annie Wanjiku Kibeh and another (2018) eKLR "Waibara case**" for that proposition.

In response, the respondents argued that the judge did not declare the impugned election unconstitutional as alleged by the appellant; that what the judge found was that the criminal diversion of all the six ballot boxes from Endoinyo Nkopit polling station to the private residence of the Presiding Officer was a "***contravention of Article 86 (a) of the Constitution on the part of the 3rd respondent***"; that the finding was limited to safe keeping of election materials which infraction cannot be a basis for nullifying an election as it was not substantial. They further urged that the vote difference between the appellant and the 1st respondent was 6,652 so that even if the votes in the impugned polling station were disregarded, they could not substantially alter the outcome of the election.

They went on to submit that the corporate obligation to keep the election materials safe was not breached by the 3rd respondent as a corporate entity. Its agents merely went on a frolic of their own to engage in criminal activities; that the totality of the evidence was that there was criminal diversion of electoral materials and falsification of electoral records by named individuals; that criminal responsibility is personal and not corporate. These individuals clearly went outside their authorised mandate and engaged in a conduct that was criminal in nature for which they were duly charged in a court of law; that in any event, the beneficiary of the criminal enterprise was the appellant who should not be allowed to benefit from his own mischief by nullifying the election. For this proposition the respondents relied on the case of **Union of India &Ors v Major General Madan Lal Yadav (1996) AIR 1340**. Finally, they submitted that the fundamental issue is the constitutional franchise right of the electorate which should be protected and failures by electoral officials in their duties should not be used to curtail such rights. This was on the authority **Nathif Juma Adam v Abdikhaim Osman Mohammed & 3 others** (2014) eKLR.

On this question, this is how the trial judge delivered himself;

> **"The 2nd respondent in his evidence did term the incident as a wonder of the world. I do find that this was in contravention of Article 86(a) of the Constitution on the part of the 3rd respondent."**

It appears to us that though it was pleaded and proved that there was also diversion, interference, as well as alteration of the election results by the Presiding Officer, in Enenkeshui primary school polling station by one Onyinkwa Obara alias Leparan Jacob, the judge does not appear to have addressed this issue substantively in his judgment though it was conceded to. This was a grave omission on the part of the judge. It should be noted nonetheless that as a result of this violation of the Electoral laws and the Constitution, the named officers, both from Endoinyo Nkopit and Enenkeshui polling stations were arrested and charged with the offences of breach of official duty contrary to section 6(j) of the Election Offences Act; false entry into a return contrary to section 6(a) of the Election Offences Act; wilfully giving undue advantage to a candidate contrary to section 6(1) of the Election Offences Act; and Forgery of official documents contrary to section 35 of the Penal Code. The verdict of the former is in. In a judgment delivered on 5th May 2018, the Principal Magistrate's court, Kilgoris, convicted the accused for the offence of breach of official duty and acquitted them of the rest. The verdict in respect of the offences committed at Enenkeshui has not been brought to our attention. Be that as it may, what is of importance on this ground of appeal is the acquittal of the accused in respect of the count of wilfully giving undue advantage to a candidate. The alleged candidate was none other than the appellant. With the acquittal, the submission or argument by the respondents, that the appellant being the *ex facie* beneficiary of the criminal enterprise cannot benefit from his wrong doing stands on quick sand. Thus, the maxim enunciated by the **Supreme Court of India in Union of India & Ors** (supra) to the effect that

> **"***...nullus commondum capere potest de injuria sua propia* - **meaning no man can take advantage of his own wrong"** is inapplicable.

The judge made an emphatic finding that the actions of the 2nd and 3rd respondents breached Article 86(a) of the Constitution. With that finding how can the respondents argue that the judge did not make a specific finding on the breach of the Constitution or that the finding was with regard to the criminal diversion which was not a contravention of Article 86(a) of the Constitution? This is a clear misreading and misleading construction of the finding by the judge. Nor is the argument that the finding was in accordance with the Article 86(a), rather it should have been pursuant to **Article 86(d)** of the Constitution. The submission is clearly misplaced, in our view. The guiding principles regarding election matters are underpinned by **Article 81** and **86** of the Constitution. In particular **Article 86 (a)** of the Constitution is emphatic that the 3rd respondent should, at every election, ensure that whatever method of voting it adopts should be simple, accurate, verifiable, secure, accountable and transparent. Further, **Article 86(d)** provides that appropriate structures and mechanism to eliminate electoral malpractice are put in place, including the safe keeping of election materials.

How can an election where ballot boxes are diverted by Presiding Officers, who are employees of 3rd respondent for reasons unknown, and even without the knowledge of the Returning Officer, accompanied by falsification and alterations of the same be said to have been accurate, verifiable, secure, accountable, transparent and free from electoral malpractice? There was obviously breach of **Article 86(a)** of the Constitution. All parties to the petition and indeed in this appeal concede to that fact. The Constitution has itself proclaimed pursuant to Article 2(4) thereof that any act or omission in contravention of the Constitution is invalid. In **Munya, Raila 2017** and **Waibara** cases, the Supreme Court was firm that an election which substantially contravenes the Constitution cannot be allowed to stand. In the **Munya case** the Supreme Court delivered itself thus on the issue:

> **"**216. **It is clear to us that an election should be conducted substantially in accordance with the principles of the constitution,**

as set out in Article 81(e). Voting is to be conducted in accordance with the principles set out in Article 85. The Elections Act and the regulations thereunder, constitute the substantive and procedural law for conduct of elections.

217. **If it should be shown that an election was conducted substantially in accordance with the principles of the Constitution and Elections Act, then such election is not to be invalidated only on grounds of irregularities.**

218. **Where however, it is shown that the irregularities were of such magnitude that they affected the election result then such an election stands to be invalidated, otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection are not by and of themselves, to vitiate an election..."**

In Raila 2017, the Supreme Court made reference to section 83 of the Elections Act which is to the effect that no election should be voided for non-compliance with any written law relating to elections if it appears that the election was conducted substantially in accordance with the principles laid down in the Constitution and written law or that the non compliance did not affect the results of the election. The court then observed that:

> **"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."**

We entirely agree with the elucidation of the law in the above authorities. That being the position, the argument by the respondents that, the contravention as found by the judge was limited to safe keeping of the election materials, an aspect not covered by Article 86(a) but Article 86(d) of the Constitution or the submission that the violation of the Constitution if at all, was minor and did not affect the overall result is rendered inept. The same goes for the appellant that the perpetrators went on a frolic of their own and the 2nd and 3rd respondents ought not to be held liable. A violation of an article of the Constitution is just that – a violation. It was therefore an error and completely untenable for the judge to have found that the election substantially breached Article 86(a) of the Constitution and fail to annul the election on that ground alone. In purporting to save the said election on the grounds that the proved violation of the Constitution did not affect the results, the judge fell in to an egregious error. The judge simply applied the wrong principle in arriving at the conclusion. It is instructive that no appeal was proffered against the finding by the judge, that there was substantial violation of the Constitution. These three grounds are sufficient to dispose of the appeal. However, for completeness sake, we shall consider the remaining grounds of appeal as well.

In ground four of the appeal, the complaint by the appellant is that the judge failed to make vital findings of fact and in the process therefore abdicated his judicial duty and responsibility, which occasioned injustice. The appellant has tabulated several issues on which the judge committed the alleged omissions to which we shall revert.

On the part of the respondents, they took the view that the judge subjected the evidence to an exhaustive examination and analysis and made all the critical findings of fact that were germane to the determination of the dispute; that a careful reading of the judgment reveals that the judge considered all the matters raised by the appellant and rendered a verdict as to whether the issues were pleaded or not and if pleaded, whether evidence to the required standard was adduced. Finally, they submitted that this complaint was not a matter of law but fact, hence want of jurisdiction on our part. They rely on the case of **Mercy Kirito Mutegi vs Beatrice Nkatha Nyaga & 2 others (2013) eKLR** for that proposition. In that case this Court stated;

> **"...We are nonetheless conscious that our jurisdiction is only limited to the determination of points of law and thus, our concern regarding the issues that dealt on facts will be limited to our duty of revaluation of the judge's conclusions; and the law; the matter becomes a point of law."**

We do not think that where an issue is pleaded, evidence led, and submissions made thereon and is totally ignored or omitted in the judgment of the court yet, is crucial in the determination of the dispute can be treated as a matter of fact on an appeal as submitted by the respondents. It is a matter of law liable to interrogation by the appellate court.

Looking at the judgment as a whole, the learned judge did not address some of the key issues raised in the petition and canvassed before him through evidence and even in submissions. In **English v Emery Reimbold & Strick (2002) 1 WLR 2409**, the Court of Appeal (England) stated that;

> **"...if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision...the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained...it does require the judge to identify and record those matters which were critical to his decision".**

The Court, in that case, went on to rule that failure to make vital findings of fact, will lead to failure of justice.

The judge did not address the complaint regarding the absence of data entries in Form 35B for some polling stations, bribery, non identification of voters in some polling stations, announcement of results without Forms 35A's and preparation of such forms without data, the 1st respondent's use of public resources in his campaigns, the findings and discrepancies disclosed by the scrutiny report, the complaint that there were blank, illegible and unsigned declaration forms and failure of the 3rd respondent to publicly and openly announce results from 100 polling stations. Yet all these claims were pleaded and at the hearing of the petition, evidence was led. Indeed, even in their detailed

submissions, the issues were canvassed at length. Lastly, some of the issues were framed by the parties for determination by the court. It is not clear why the judge did not address and determine these issues. On the basis of the foregoing, we are satisfied that there is merit in the complaint that the judge failed to address issues raised before him. Accordingly, this ground of appeal must succeed.

On the ground that the judge failed to take judicial notice of the information contained in the Kenya Gazette, it was submitted on behalf of the appellant that he had complained that the 1st respondent had used public resources in his campaigns, which was an election offence. The resources included a CDF Land Rover, funds as well as public officers. The public officers, being employees of CDF, were named and gazetted as per section 24(3) (e) and 24 (4) of the **Constituencies Development Fund (CDF) Act**. He further submitted that section 60 (1) (f) of the Evidence Act obliges the court to take judicial notice of the information contained in the Kenya Gazette. However, the judge never took that route. Instead the judge's quarrel with the appellant was that he did not proffer evidence showing that the alleged public officers were indeed such officers. Yet the appellant's witnesses had set out in their affidavits evidence of the involvement of the named officers in the campaigns and therefore there was no need for any other evidence, concluded the appellant.

On the part of the respondents, they urged that the CDF Act was defunct and therefore the appellant could not rely on it to bolster his argument. Secondly, that the appellant did not avail the said gazette notice in any event. Thirdly, that the appellant was invoking concept of judicial notice for the very first time in this appeal. That, in his written submissions before the trial court, the appellant never invited the judge to take any judicial notice of any fact, or matter. Even at this appellate stage, the fact that the appellant has not cited the gazette notice is telling. We are satisfied that although the appellant contended that the 1st respondent used public officers, to wit, CDF officials in his campaigns, there was no credible evidence to support the allegation. Yes, the said officers may have been gazetted but the appellant did not tender in evidence the said gazette notice or even the date, if at all, of such gazette notice for the court to take judicial notice. The invocation of judicial notice, we think, was predicated upon the fact that the appellant did not lead any evidence at all to demonstrate; that the six persons named were public officers, nor was there any evidence as to when they were appointed, whether they were still in public service at the time of the election and whether they participated in any way in the election and more fundamentally; whether it was in a manner prohibited by law. In the premises we would agree with the holding of the judge that:

> **" ...On the issue of public officers, the petitioner did not proffer any evidence to show that the alleged public officers were indeed public officers and that they participated in the campaigns and in what form or manner".**

This ground of appeal must of necessity fail.

The 6th ground of appeal was that the judge failed to find that there was bribery and corrupt practices on the eve of the election. In support of this ground the appellant submitted that though the judge found that it was suspicious why cheques drawn in February were given in July, less than a month to the election, he nonetheless fell short of calling it by its rightful name, a corrupt practice; that there was clear and uncontroverted evidence that the 1st respondent actually handed over CDF cheques to schools on the eve of the election at a political rally.

The respondents' reaction to the allegation was that there was no evidence tendered that on the eve of election, CDF cheques were issued by the 1st respondent; that the evidence on record was in fact that the cheques were given a month prior to the election date. The judge made a finding of fact that:-

> **" ...In the present petition the petitioner was obligated to adduce evidence on how, when and where and in what circumstances the CDF cheques were issued and proceed to show how the alleged acts of issuing the cheques influenced the voters. It is instructive to note that the petitioner did not report the issue to the relevant authorities.....The petitioner in this petition is an officer of this court. He would have done himself and his petition a lot of good if he had promptly reported the issue of bribery and undue influence to police. As stated supra it's not easy to prove a case of bribery. An early report would have armed police with the necessary information to conduct investigations.....whereas it is suspicious why the cheques allegedly drawn in February were given in July less than a month to the election, suspicion alone is not enough. There must be clear and unequivocal proof. By reason of the foregoing, I find that the petitioner has not proved the issue of the bribery beyond reasonable doubt".**

We are fully in agreement with that summation. This ground of appeal therefore fails and is dismissed.

We now turn to ground seven of the appeal. This is to the effect that the judge erred in misapprehending the principles of evidentiary burden, burden of proof and standard of proof. In this regard the appellant submitted that the judge misapprehended the principle of evidentiary burden as set out in the Munya case in which the Supreme Court held that a petitioner should be under obligation to discharge the initial burden of proof before the respondent is invited to bear the evidential burden. That evidentiary burden keeps shifting as a pendulum. It shifts to the respondent after the petitioner discharges the initial burden of proof. In other words, the burden shifts when the petitioner makes a *prima facie* case, where if the respondent does not offer evidence in rebuttal, the case is proved as against the respondent. It was the submission of the appellant that he discharged the initial burden of proof in several instances effectively shifting the burden to the respondents who failed to discharge evidential burden once it shifted to them. The appellant particularly took umbrage with the judge's finding that he did not proffer any evidence to prove allegations that public officers participated in the campaigns and in what form as well as his finding that bribery, treating of voters and other pre-election events that were levelled against the 1st respondent were not proved.

Reference was made to the case of **Moses Masika Wetangula v Musikari Kombo (2015) eKLR** with regard to standard of proof where it was held that the standard of proof where criminal allegations are made against a party in an election petition is one beyond reasonable doubt. The judge having found that it was suspicious why cheques drawn in February were given in July, less than a month to the election, was proof enough of allegation of bribery and the judge ought to have annulled the election therefor.

In rebuttal, the respondents argued that from the onset the judge was alive to the issues of burden of proof, evidentiary burden and standard of proof. That the evidence of use of Land Rover and CDF funds was properly countered. Further, no *prima facie* evidence was offered about the participation of public officers to warrant the shifting of the evidentiary burden to them. Accordingly, the court addressed its mind and

rightfully so, according to the respondents, to all the issues. In any event the appellant had not demonstrated in what way the court had misapplied the same.

Looking at the judgment, we have no difficulty in concluding that the judge was from the outset alive to the issues of burden of proof, evidentiary burden and standard of proof and indeed addressed them as preliminary issues. He placed reliance on the decisions binding on him from the Supreme Court. The judge for instance observed:

> **" ..A petitioner should be under obligation to discharge the initial burden of proof before the respondents are invited to bear the evidential burden. The threshold of proof should be in principle, above the balance of probabilities, though not as high as beyond reasonable doubt. Where a party alleges non-conformity with that electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondents bear the burden of proving the contrary."**

This position was restated by the Supreme Court in Raila 2017. This Court, in the case **Khatib Abdalla Mwashetani v Gedion Mwangangi Wambua (2014) eKLR** observed;

> **" ...purely from the consequences that flow from the finding that a person is guilty of improper influence, we must conclude that improper influence is serious conduct that has attributes akin to those of an election offence. It is now settled beyond peradventure that the standard of proof where an election offence or such kind of conduct is alleged, is proof beyond balance of probabilities".**

The judge appreciated this standard of proof as well. On our part just like the judge held, there was no evidence upon which he would have determined that the Land Rover was used in the campaigns by the 1st respondent nor was there sufficient evidence that CDF cheques were issued as a way of bribing the would be voters. The appellant, erroneously in our view, took the position that because the judge found that the act of disbursing CDF cheques in July while they were drawn in February suspicious, he should have concluded that, that was a case of bribery. Suspicion, however strong, can never be the basis upon which a court of law can conclude that a criminal offence has been committed. As held by this Court in **Joan Chebichii Sawe v Republic (2003) eKLR**;

> **"...suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence.....beyond reasonable doubt".**

As observed by counsel for the 1st respondent in his submissions, the appellant's submission that election offences that overlap as breaches of the substantive constitutional provisions need only be proved to the intermediate standard to nullify an election; but beyond reasonable doubt in order to convict and punish the alleged offender in a criminal case does not hold. In fact, it runs contrary to the decisions of the Supreme Court and this Court on the issue. There is no different standard of proof for an electoral offence in an election petition and any other criminal offence. Both must be proved beyond reasonable doubt. As the Supreme Court stated in **Moses Masika Wetangula vs Musikari Kombo** (supra);

> **"....It is, therefore, necessary that the offences in question were duly established. Bribery is a criminal offence in general penal parlance; but besides, it is a specifically defined electoral offence, recognised as an incident capable of disrupting the due process of the electoral law. In the case of Mohamed Ali Mursal v Saudia Mohamed and Others, Garissa - Election Petition No. 1 of 2013, Mutuku. J described bribery in the context of an election offence, as follows:**
>
> > *"....Bribery is an election offence. It is also a criminal offence in ordinary life. Being such, proof of the same must be by credible evidence and in my view, nothing short of proving this offence beyond reasonable doubt will suffice. There is no distinction as far I am concerned, and rightly so, between bribery in a criminal case and one in election petition. Bribery involves offering, giving, receiving, or soliciting of something of value for the purpose of influencing the action of the person receiving. Under the Act, bribery is an election offence under section 64 and both the giver and the taker of a bribe in order to influence voting are guilty of this offence upon proof".*

We have no basis to hold that the Judge did not address his mind to the above principles when he returned the verdict that none of the alleged electoral offences had been proved by the appellant to the required standard.

The next ground of appeal is that the judge failed to draw adverse and spoliation inferences. In this regard the appellant submitted that the failure by the respondents to call certain deponents of affidavits on record to testify, should have invited the Judge to draw adverse inference instead of simply ruling that the evidence of the said witnesses or affidavits was of little or no probative value for want of cross examination. Reliance for this submission was placed on the cases of **Jacinta Wanjala Mwatela v IEBC & 3 others [2013] eKLR** and **Wisniewski v Central Manchester Authority (1997) PIOR 324** where it was held in the latter case that courts are at liberty to draw adverse inferences from the failure of witnesses to avail themselves for cross examination. The appellant has also criticised the judge for failure to draw a spoliation inference against the respondents for supplying political party agents with blank, illegible and unsigned declaration forms, whose serial numbers were different from those presented in court, and secondly, during scrutiny, they supplied polling station dairies with missing pages. To the appellant therefore had the judge acceded to his request, that would have rendered the evidence by the respondents worthless and incredible in rebuttal to the petition.

In response, the respondents argued that the fact that the respondents filed affidavits of intended witnesses did not make it mandatory for them to call all persons who had filed affidavits as witnesses. That the judge was therefore right in not drawing any inference, but making a finding that the evidence contained in the affidavits whose deponents were not called was of little or no probative value. On spoliation, they submitted that the inference can only be drawn if a party to proceedings deliberately and intentionally destroys or spoils evidentiary materials. This was not the case here. Indeed they urged that the threshold for such inference had not been attained by the appellant.

Reference was made to an article by **Anthony C. Casamassima** titled "***Spoliation of Evidence and Medical Malpractice***" 14 Pace Law Review 235 (1995) at page 241 for the above proposition.

Its truism that the respondents were not obligated to call witnesses. In the absence of such legal obligation no adverse inference can be drawn. As correctly observed by learned counsel for the 1st respondent, the fact that the respondents filed affidavits of intended witnesses did not make it mandatory for the respondents to call all witnesses who had filed affidavits at the hearing. It was the respondents' choice to call or not to call witnesses. However, in the event that the respondents did not call witnesses at the hearing, the filed affidavits were valueless and in the absence of consent of the parties their contents could not be used to determine the electoral dispute as correctly observed by the judge. See also **Moses Wanjala Lukoye v Bernard Wekesa Sambu & 3 others (2013) eKLR** as well as Rule 12 (13) of the **Elections (Parliamentary and County Elections) Petition Rules, 2017** (**the Petition Rules**). The respondents having elected not to call some of the witnesses who had filed affidavits cannot be punished through drawing of adverse inferences when no legal duty rested on them to adduce specific and particular evidence.

Again on spoliation, an adverse inference can only be drawn if a party to the proceedings deliberately and intentionally destroys or spoils evidentiary materials. There was no such evidence adduced by the appellant. The judge too never made a finding that any of the respondents deliberately and intentionally destroyed evidentiary materials. The spoliation principle is summarised by the maxim "*omniapraesumuntur contra spoliatorem*" meaning all things are presumed against a despoiler or wrongdoer. The threshold for such inference was stated by **Anthony C. Casamassima** (supra) as follows:

> **"Traditionally, in order to apply the inference of Spoliation, five elements must be shown: (1) destruction; (2) the destroyed matter must be relevant to the dispute; (3) the destruction must be intentional; (4) the evidence must be destroyed at a time when legal proceedings are pending or reasonably foreseeable; and (5) the destruction must be carried out by a party or its agent."**

The impugned documents were the ineligible and faint Forms 35A and missing pages in the polling station Diaries. The evidence rendered in respect of such breach was by the Constituency Returning Officer and it was to the effect that:

> **"Form 35A are contained in a booklet containing six forms. We give these booklets to each polling station of form 35A. They are filled so that they can be served on the parties. There is one original the rest (5) are carbon copies. The first page is legible. The last copy would be very faint."**

With regard to polling station diaries, only photocopies were availed to court and not the originals. Some of the pages had not been photocopied. They were not destroyed as claimed by the appellant. In light of the foregoing, the judge could not draw a spoliation inference. Certainly the threshold for such an invitation had not been attained by the appellant. There was no evidence of intentional destruction of election material by these respondents or their officials. The explanation offered was plausible.

Let us now consider the ground of appeal that the judge erred in failing to allow scrutiny of the ballot boxes from Endoinyo Nkopit polling station. The request was declined by the judge on the footing that the ballot boxes were the subject of ongoing criminal proceedings in the Magistrates' Court at Kilgoris. This is how the judge delivered himself:

> **"On the issue of diversion of ballot boxes from Endoinyo Nkopit polling station to the house of the Presiding Officer, one George Adera. It is not disputed that charges have been preferred against accused persons in the lower court at Kilgoris and the case is pending determination."**

The appellant argued that it was still possible, practicable, and perfectly legal to grant the request as it is an election court's duty to get to the bottom of all that transpired in the conduct of the elections and get a real impression of what had happened. The respondents on the other hand argued that it was not in dispute that the presiding officer of this particular station was facing criminal charges for diverting the polling station's electoral materials and falsification of the same. Indeed the said materials were exhibits in the court. He submitted further that in his application for scrutiny, the appellant specifically sought to have the ballot boxes from this particular station availed. The court in its ruling was categorical that production of the ballot boxes may present some challenges which might be prejudicial to the accused persons.

In our view, the judge was exercising judicial discretion in rejecting the application to scrutinise those electoral materials. He gave reason(s) that were valid. The discretion was in the circumstances exercised not capriciously or whimsically. It was based on sound judicial reasoning. The judge cannot therefore be faulted. Whether or not to allow an application for scrutiny, being an exercise in discretion, an appellate court would not lightly interfere in such exercise in the absence of clear misdirection in law. **Mbogo v Shah (1968) EA 93** refers. We have no reason to interfere with the holding. Accordingly, this ground of appeal fails. Obviously, allowing such scrutiny would have impacted on the ongoing criminal proceedings in the magistrates' court, albeit prejudicial to the accused.

On the question of the judge's failure to determine that an election offence had been committed regarding the diversion of the ballot boxes, the appellant submitted that the judge should not have turned a blind eye to the issue that was pertinently integral to the determination of the dispute just because it was a live issue before another court; that, that was doing a disservice to the electorate who deserve answers to what transpired during the elections and ultimately, deserve leaders who they democratically elected and not through a corrupt and polluted process. The appellant referred us to the case of **Moses Masika Wetangula vs Musikari Kombo** (supra) for the proposition that an election court has wide and unfettered powers under the Elections Act to deal with all allegations in the petition including election offences. In countering that argument, the respondents took the view that the judge was justified in declining to make that determination due to concurrent proceedings before the election court and the subordinate court in Kilgoris.

Our take is that the decision by the judge not to enter the fray and determine whether or not an election offence had been committed was sound and pragmatic. This was to avoid an embarrassing situation where the two courts could have come to different conclusions on the same matter. The subordinate court was undertaking criminal proceedings where the accused persons were entitled to the presumption of

innocence until proven guilty, which is one of the packages of fair trial provisions. The judge in deference to the Constitution refrained from jeopardizing the fair trial of the accused and cannot be faulted for upholding the Constitution. As correctly opined by counsel for the 1st respondent, criminal offences, including election offences should be tried by the ordinary criminal courts where trial rights under Articles 50(2) read together with Article 25 of the Constitution are fully complied with. The election court is not the forum to try election offences. Under section 23 of the Election Offences Act, it is envisaged that such trials would be conducted before special magistrates.

On 17th March 2015, the Supreme Court in **Moses Masika Wetangula vs Musikari Kombo** (supra) recommended for the re-formulation of a legislation, delimiting the respective mandates of the election court and the ordinary criminal court, with due attention paid to the issues of jurisdiction for the different court's adjudicating upon the sets of matters.

Pursuant to that recommendation, amendments to the Elections Act and the Elections Offences Act were subsequently enacted. The effect of the re-formulated legislation was to let the criminal courts to exclusively try election offences. The judge cannot therefore be faulted for proceeding in the manner that he did.

We now wish to deal with the issue of the electronic transmission of results. Here the appellant's umbrage is that the 3rd respondent having elected to transmit the results electronically, and presenting them in a public portal available to all and sundry, implicitly bound itself to do so as per the Election Technology Rules and as per the Elections Act. On the part of the respondents, their answer was simply that under section 39 (1) (C) of the Elections Act only the presidential results are transmitted electronically. Accordingly, it was argued that the judge was right in upholding the law.

It is true that the 3rd respondent is under no obligation to electronically transmit election results of parliamentary elections. The law only obligates him/her to do so in the case of presidential results. Nonetheless, we note that the 3rd respondent did electronically transmit election results of parliamentary election. However, the appellant's grievances were that the results of two polling stations, namely; Olsashire and Endoinyo Nkopit were not posted on the public portal. The judge made factual finding that the information was easily available on the portal which was not contested. This being a finding of fact there is no need for further interrogation by us.

This brings us to the end of the main appeal. How about the cross-appeal? The cross-appeal is by the 3rd respondent and essentially questions the award of costs of the petition to the appellant and the 1st respondent capped at Kshs 2.5 million for each by the judge. The 3rd respondent laments that although section 84 of the Elections Act stipulates that costs shall follow the cause, the judge erred in awarding the costs to the appellant and the 1st respondent which it terms excessive, punitive and non justifiable; that no explanation whatsoever was given as to how the court arrived at the figure. Relying on the case of **Martha Wangare Karua v IEBC & 3 others (2018) eKLR**, the 3rd respondent submitted that there was a serious misdirection on the part of the judge and as a result arrived at a wrong decision. The 3rd respondent finally submitted that the judge failed to appreciate the principles enunciated in the above case hence arriving at an amount that was not only punitive but also an impediment to a party's right to access justice under Article 48 of the Constitution.

For the appellant, it was submitted that the judge did not err in awarding the costs; that in awarding the costs the judge considered the conduct of the parties during elections and the prosecution of the petition. The judge found the conduct of the 3rd respondent during the elections discreditable and reprehensible, hence the imposition of costs. The judge had good reason to impose an order of costs on the 3rd respondent which were in any event, neither excessive nor punitive. The 1st respondent did not submit on this question.

Section 84 of the Elections Act, and rule 30(2) (b) of the Petition Rules permits courts to impose costs on an unsuccessful party or a successful party who may have caused unnecessary expense in the proceedings. Therefore the judge is bound to consider the conduct of the parties during election and more fundamentally during the hearing of the petition. Should the judge find that there was discreditable and reprehensible conduct, as correctly submitted by the counsel for the appellant, it can impose the burden of costs on such a party. In the Namibian case of **Rally for Democracy and Seventeen Others v Electoral Commission of Namibia**, Case Number A01/2010, the High Court stated that it can disentitle a successful party of costs it would otherwise receive if it is proved that the successful party was guilty of a reprehensible and discreditable conduct. In the same case the court defined reprehensible and discreditable conduct as conduct that is criminal, prohibited or proscribed. The High Court in **Stephen Kariuki v George Wanjohi, Petition No. 2 of 2013**, (Kimondo, J.) denied the 2nd and 3rd respondents costs despite having successfully defended the election. He stated that denial of costs was as a result of the respondents' indolence and being the author of the misfortune which befell the petitioner.

According to the appellant, the same lack of exercise of diligence and due care was manifest in this case, following the diversion of ballot boxes from Endoinyo Nkopit polling station to the house of the Presiding Officer, as well as events at Enenkeshui Primary School polling station, which were a contravention of Article 86 of the Constitution and which, in any event, were criminal in nature. Of course, this conduct was discreditable and reprehensible as it amounted to wilful mischief by the 3rd respondent's employees to subvert the will of the people as expressed in the election. They interfered with the electoral mechanism, polling equipment and the voting process in general. That was the basis upon which the judge awarded the aforesaid costs against the 3rd respondent.

We have no reason to fault the reasoning of the judge. The conduct of the 3rd respondent had to be looked into. At the end of the day the award of costs is discretionary. It has not been demonstrated to us that in reaching the decision the judge applied wrong principles or that he exercised the discretion capriciously or whimsically. Nonetheless we reiterate what this Court said in the case of **Martha Wangare Karua v IEBC & 3 others (2018) eKLR** on the question of costs. We expressed ourselves thus;

> **"... In our understanding, the capping of costs provided under rule 30 of the Petition Rules, 2017 was to ensure that parties approach courts without fear of being subjected to excessive costs. Despite this rule, the current trend in the capping of costs at inordinately high amounts shows that we are going back to the era where costs in election petitions were very high. Capping of costs was intended to curb the practice of awarding large sums in costs. High costs are an impediment to the right of access to justice and are not meant to be punitive...It is up to the election court to determine whether a party would be awarded costs or not and in doing so the court must be guided by the principles of fairness, justice and access to justice. It**

is meant to compensate a successful litigant. It is not a punishment or a deterrent measure to scare away litigants from the doors of justice..."

Having given the issue considerable attention, we are satisfied that the judge appreciated the principles enunciated in the above case and therefore arrived at a correct decision with regard to the award of costs. The costs so awarded were neither punitive nor excessive. Accordingly, our intervention is uncalled for.

We think we have said enough to demonstrate that this appeal is for allowing, specifically on the ground of substantial breach of Article 86(a) of the Constitution by the 2nd and 3rd respondents. Accordingly, we make the following orders:

1. That the appeal is allowed.

2. Save for the order on costs, which we have found were rightly awarded, the judgment of the High Court rendered on 27th February 2018 is otherwise set aside.

3. In substitution we declare that the 1st respondent was invalidly elected to the position of member of the National Assembly for Kilgoris Constituency and the declaration of the results was invalid, null and void.

4. The 3rd respondent is hereby directed to organise and conduct a fresh parliamentary election in Kilgoris Constituency in strict conformity with the Constitution and the Elections Act.

5. The certificate issued by the election court pursuant to section 86 of the Elections Act is hereby recalled and set aside and substituted with a certificate that the 1st respondent was not validly declared as having been elected member of the National Assembly for Kilgoris Constituency on the 8th of August 2017.

6. The cross-appeal fails and is dismissed with costs.

7. The 1st respondent shall pay the appellant costs of this appeal to be taxed, but shall not exceed Kshs. 1,000,000.00. Similarly the 2nd and 3rd respondents shall pay the appellant costs of this appeal and cross-appeal, to be taxed, but not to exceed Kshs. 1,000,000.00.

Those, then, are our orders.

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

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

D. K. MUSINGA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb.

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR