IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), KIAGE & MURGOR, JJ.A)

ELECTION PETITION APPEAL NO. 15 OF 2018

BETWEEN

ABDIRAHMAN IBRAHIM MOHAMUD .... APPELLANT

AND

MOHAMED AHMED KOLOSH .... 1ST RESPONDENT

INDEPENDENT ELECTORAL AND

BONDARIES COMMISSION .... 2ND RESPONDENT

YASSIN ABDIKARIM HIREY .... 3RD RESPONDENT

***(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Tuiyott, J.) dated 2nd March 2018* in Election Petition No. 4 of 2017)**

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JUDGMENT OF THE COURT

This judgment relates to an appeal by **Abdirahman Ibrahim Mohamud** (Mohamud) the petitioner in the High Court where he had challenged the victory of **Mohammed Ahmed** (Kolosh) in the race for Member of Parliament for Wajir West Constituency in the August 8th 2017 general election, and the cross appeal by Kolosh. Mohamud?s main complaint is that the election court (Tuiyott, J.) should have found him to be the manifest and outright winner of that election and declared him so instead of ordering a by-election while Kolosh?s main grouse is that his victory should not have been annulled.

In the petition dated 4th September 2017, Mohamud stated that the Independent Electoral and Boundaries Commission (IEBC) and Yassin Abdikarim Hirey (the Returning Officer) declared that Kolosh had won the election with 6,701 votes against Mohamud?s 6,224 thus trailing him by 477 votes. At paragraph 7(a) and (b) he specifically complained as follows;

> ***"7. In counting, tabulating and announcing the results on 10th August, 2017, the 2nd and 3rd respondents did not fairly and accurately collate and promptly announce the results in the 4(four) polling stations***;

(a) In Qara polling stations, the results announced by the presiding officer at the polling station differed with the results declared by the returning officer at the Constituency tallying centre in the following ways;

Item No.	Candidate	Votes at polling station	Votes at tallying centre
1.	Abdirahman Ibrahim	2	0

2.	**Dahiye Yakub Mumin**	**20**	**10**
3.	**Elmi Mohamed Yussuf**	**117**	**40**
4.	**Khalif Mohamed Ahmed**	**00**	**00**
5.	**Mohamed Ahmed Kolosh**	**319**	**540**
6.	**Shihaw Abass Nunow**	**04**	**00**

(b) At Koricha polling station, the results announced by the presiding officer at the polling station differed with the results declared by the returning officer at the constituency tallying centre in the following way:

Item No.	**Candidate**	**Votes at pollin station**	**Votes at tallying centre**
1.	**Abdirahman Ibrahim Mohamud**	**6**	**6**
2.	**Dahiye Yakub Mumin**	**362**	**110**
3.	**Elmi Mohamed Yussuf**	**10**	**40**
4.	**Khalif Mohamed Ahmed**	**00**	**00**
5.	**Mohamed Ahmed Kolosh**	**110**	**362**
6.	**Shihaw Abass Nunow**	**04**	**00**

He raised similar complaints in respect of two other polling stations, namely Shandarwa and Barmish but these latter did not feature much in the final determination of the learned Judge. Mohamud also pleaded at paragraph 8 of the petition that it was erroneous for the 3rd respondent to alter and/or falsify the results which were announced at the polling station which were final. His plea was;

> ***"8. The petitioner pleads that it was erroneous for the 3rd respondent to alter and/or falsify the results which were announced at the polling station. The petitioner pleads that the results announced at the polling station were final and could not be altered by the 3rd respondent."***

Next, Mohamud averred that the IEBC and the Returning Officer conducted the elections "***in a most shambolic manner and the exercise was not free, fair and verifiable"*** as his agents were chased from some thirteen named polling stations and never witnessed the counting of votes thereat, and so he sought a recount to establish the total number of votes in favour of the two main protagonists. He charged that in completing and declaring results from nine named polling stations after denying his agents the opportunity to be present, the IEBC and the Returning Officer committed election offences of falsifying statutory forms and willfully giving Kolosh undue advantage. They also presided over an election that was not free and fair, as it was marred by violence and intimidation and was not administered in a manner that was impartial neutral, efficient, accurate and accountable.

Mohamud further complained that anomalous entries made in form 35As for Qura, Karicha and Shandarwa polling stations were brought to the attention of the Returning Officer at Grifta Patoral Training Centre by Mohamud?s tallying centre agent, to no avail, while at Qara his agent, on raising those anomalies, was chased by Kolosh?s supporters who were armed with axes and machetes and threatened to burn the ballot papers with petrol. He charged that the Returning Officer and the IEBC committed election offices in counting, announcing and declaring the results in breach of their official duties and code of conduct including by;

“(d) Making false entries in form 35As for Qara Polling Station, Koricha Polling Station, Shandarwa Polling Station and Barmish Centre.”

As “*the key player and beneficiary*” of those election offences and breaches, it stated that Kolosh was equally liable for their commission. He completed the petition by stating as follows;

> ***“20. The petitioner states that no true and complete election took place in Wajir West Constituency in so far as the same purported to declare the 1st respondent winner of the election in terms of the Form 35A, B and Form 35C and no true return of its vote has taken place. Your petitioner has thereby been deprived of a fair chance and opportunity as provided by the law of being elected.***
>
> ***21. By reason of the contents of all and each of the foregoing paragraphs and by reason of non-compliance with the written law relating to the election, the same was not conducted as to be substantially in accordance with the law or principles laid down in the law and all and each of the foregoing breaches, violations, non-compliance and complaints by the petitioner and each of them, affected the outcome and result of the election.”***

In consequence of these averments, he prayed for various orders including;

> ***“c. There be a recount of the ballot papers cast for the election of the Member of National Assembly for Wajir West in the 13 (thirteen) polling stations pleaded in 7 and 10 above.***
>
> ***d. The results for Qara Polling Station be nullified.***
>
> ***e. IN THE ALTERNATIVE TO PRAYER D ABOVE, the results declared by the 2nd and 3rd respondents for the 1st respondent for Qara Polling Station be discounted by 221 votes.***
>
> ***f. An order be made to the effect that the declaration made that the 1st respondent is the winner of the Wajir West National Assembly election held on 8th August, 2017 is invalid, null and void.***
>
> ***g. As a consequence of the recount, the petitioner be declared the winner for the election of the member of National Assembly for Wajir West Constituency in the election held on 8th August, 2017.”***

In support of the petition Mohamud swore an affidavit on 4th September 2017 which essentially rehashed the contents of the petition and attached a number of documents including a polling station diary from Qara Polling Station showing alterations made to support his averments that “*the alteration made in the votes was to add the 1st respondent?s vote by 473 votes whilst reducing my votes by 7 votes”* and a copy of a charge sheet and proceedings in Criminal Case No. 350 of 2017 ***Republic vs. Abdiharim Shamake Abdi*** to show that the Presiding Officer for Qara Polling Station was subsequently charged with a resultant election offence under section 6(a) of the Election Offences Act. He swore at paragraphs 9, 12 and 13 as follows;

> ***“9. THAT from the PSD, it can be seen that the other five (5) elective positions had a total number of votes cast as 462 while the Member of National Assembly had total votes cast as 590, a clear indication that there was votes alteration for Member of National Assembly at Qara Polling Station.***
>
> ***12. THAT I protested the announcement of the results for Qara polling station because the results announced by the 3rd respondent were different from the results that I had received from the polling station.***
>
> ***13. THAT I was informed by the 3rd respondent that he would only declare results that the Presiding Officer had announced at the polling station and transmitted to the Constituency Tallying Centre but for Qara polling station, the 3rd respondent would consult because the Presiding Officer had confessed to the 3rd respondent that the presiding officer had altered the figures after intimidation and threat to his life by the 1st respondent?s agents at the polling station.”***

He also swore that *“no fair and verifiable election took place in Wajir West Constituency”* as the election was not conducted substantially in accordance with the law or principles laid down in the law and the breaches, violations and non-compliance affected the outcome or the result of the election.

In a response filed in accordance with **Rule 11** of the Elections Parliamentary and County Elections Petitions Rules, 2017, Kolosh denied *in toto* the allegations contained in the petition, asserting that the election was undertaken in compliance with the Constitution, the Elections Act and the Elections (General) Regulations, and the votes were counted, collated, tabulated and declared in accordance with the law. He denied that Mohamud?s agents were chased, or that there was violence or intimidation; that any election offences were committed, that there were any anomalies in the Form 35As. He swore that he received the highest number of votes cast and that his victory was *“a true expression of the sovereign will of the good people of Wajir West Constituency*.” His supporting affidavit was to like effect as were those of his agent at Qara Polling Station **Yasir Omar Abdi** sworn on 14th September 2017 and of his constituency tallying centre agent **Ahmed Abdinasir Mohamed** sworn at the same date.

The IEBC and the Returning Officer filed a joint response to the petition on 14th September 2017. They asserted that the votes cast were properly tallied and accurately announced in the presence of the candidates or their agents. They denied any discrepancy between the results announced by the presiding officers at Qara, Korich, Shandarwa and Barmish centre polling stations and those declared by the Returning Officer at the Constituency Tallying Centre, dismissing the figures indicated in the tables at paragraph 7 of the petition as “*mere*

fabrications." They dismissed the need for recount of votes as sought by Mohamud stating that all the court needed do was verify the information in the statutory Forms 35A and 35B. Regarding two of the polling stations, however, they stated as follows;

> ***"12. In response to paragraph 15 of the petition, the 2nd and 3rd respondents aver that the entries in Forms 35A in the mentioned polling stations were accurately made. There were only two polling stations, that is Qara and Korich where the entries in Forms 35A did not seem clear. However the presiding officers explained why the entries were done in that manner."***

They denied that any reports were made to the police or to themselves about any violent confrontations at any of the polling stations. After denying all other allegations in the petition, these respondents concluded their response thus;

> ***"18. In response to paragraph 21 of the petition, the 2nd and 3rd respondents aver that even if the petitioner were to prove the allegations in this petition (which has not been done) the hitches are not sufficient to show that the election as conducted was not substantially in accordance with the law to warrant the nullification of the election."***

The Returning Officer did swear an affidavit as did the Presiding Officer at Qara Polling Station which were to the same effect as that response. With leave of court the IEBC and the Returning Officer filed six other witness affidavits. They also filed all the statutory Forms 35As and the form 35B for the constituency on 17th November 2017.

By a motion dated 5th October 2017 Mohamud sought scrutiny and recount of votes in 13 polling stations, which was opposed and argued. By a ruling dated and delivered on 5th January 2018, the learned Judge allowed scrutiny and recount in four polling stations only, namely Qara, Korich, Arbajaha and Mathow Primary School. A report thereon was submitted by the deputy registrar on 30th January 2018. This was followed by the impugned judgment delivered on 2nd March 2018 by which the learned Judge found that the election for member of the National Assembly for Wajir West was not conducted in accordance with the law and proceeded to nullify the same. The IEBC was to bear Mohamud?s costs.

That judgment did not go well with Mohamud who, convinced that he should have been declared the winner, filed this appeal aggrieved that the learned Judge erred in law in;

· **Not appreciating that upon the Qara polling station results being disregarded, the final tally was 6,224 votes in his favour against Kolosh's 6,161 as a proper expression of the will of the electorate.**

· **Not holding Kolosh culpable from criminal acts in the election and manipulation of votes at Qara police station.**

· **Not disregarding the unverifiable 252 votes cast in Kolosh's favour in Korich polling station which would have reduced Kolosh's tally to 5,909 votes.**

· **Not appreciating that it would be disproportionate to order a by election when it was manifest that the contaminated votes could be disregarded and excluded.**

· **Capping the instructions fees at a sum not commensurate with the work done and/or awards in similar petitions.**

He therefore sought a declaration from this Court that he was the winner in that election and a quashing of the capping of the instructions fees at Kshs. 1.5 million.

Kolosh was no happier with the judgment and he filed a cross-appeal in which he complained that the learned Judge erred by;

· **Acting without jurisdiction in determining matters not pleaded in the petition and considering evidence at variance with the pleaded case in violation of binding Supreme Court precedent.**

· **Proceeding per incuriam and invoking the decision of this Court and of the former Court that are no longer good law.**

· **Annulling and disregarding the results for Qara Polling station when the court-supervised recount established that the results in Form 35A were correct.**

· **Subverting the will of the voters by disregarding the vote recount for Qara polling station and casting dispersions on the results for Korich polling station.**

· **Perversely finding that there were votes unlawfully inserted in the ballot box for Qara polling station without foundation in pleadings or evidence.**

· **Finding that the results announced and declared in Form 35A exceeded voter turnout at Qara without scrutiny of the results transmitted through the KIEMS kit or scrutiny of the marked printed register of voters.**

· **Nullifying the election yet the petitioner did not discharge the legal and evidentiary burden of proof.**

Kolosh therefore prayed for a declaration that he was validly elected as Member of National Assembly for Wajir West Constituency and that Mohamud do pay him the costs of the appeal and the cross appeal.

In accordance with directions given, the parties filed written submissions which they highlighted before us at plenary. Appearing for Mohamud, learned counsel **Mr. Ngatia**, by way of background, stated that the two complaints raised on the petition at the High Court were first; the results for 4 polling stations as declared at the polling centre differed with those announced at the polling stations and; second, that there was violence at Qara Polling Station.

He pointed at the alterations on a document appearing at page 34 of the record in support of the contention that there was a huge spike in the number of votes cast between the member of National Assembly, the subject election, (590 votes) and the other elections of President, Member of County Assembly, County Governor, Senator and County Women Representative which ranged between 400 and 462. He argued that the voter turnout of 590 at Qara Polling Station was questionable and that were the votes of that polling station to be disregarded, then Kolosh would lose 540 votes allegedly garnered there, and Mohamud would as a consequence have been the winner. He cited **regulation 83(c)** as providing the legal basis for the Returning Officer to disregard votes where the votes are higher than the voter turnout. He agreed with the learned Judge?s view that, if there was ballot stuffing the ballots are contaminated, then affirmatively submitted that "*this was a case of ballot stuffing*." He pointed out that during scrutiny it had been ordered that they be provided with packets of counter foils of used ballot papers and polling day diary, but the counterfoils were not produced and were not in the ballot box either. Random checks showed, however, that some of the ballots were not from the same family or batches. He argued that the S.D. Card had 628 voters out of whom 458 turned out to vote, and were all biometrically identified, yet the votes cast were 590 which was way beyond those who turned out to vote with an inflation of 142 votes. The learned Judge was therefore right to find, argued counsel, that the declaration at Qara was not credible and order the same be disregarded, but criticized him for not declaring Mohamud the winner. This was disproportionate because, in his view, out of the remaining 74 polling stations a clear winner could be established. Kolosh?s victory was false and the figures he allegedly garnered were bereft of meaning, hence the push for nullification.

As regards Korich polling station, Mr. Ngatia submitted that scrutiny revealed a number of irregularities including absence of counterfoils, and interference with seals. He conceded that the complaint in the petition was that there was a swapping of votes so that Mohamud was given Kolosh?s 110 votes and he in turn got the 362 that were Mohamud?s leading the learned Judge to find that it was impossible to verify to whom the 360 votes belonged, for which he was criticized for not disregarding them altogether as he ought. Counsel reiterated that counterfoils are useful for ascertaining the origin of ballot papers, adding that the IEBC?s failure to produce them despite the Judge?s order added credence to Mohamud?s complaint that Korich and Qara polling stations posted incomprehensible and unverifiable results that ought to have been disregarded. He relied on the judgment of Musinga, J. (as he then was) in ***MANSON ONYONGO NYAMWEYA vs. JAMES OMINGO MAGARA & 2 OTHERS*** Kisii Election Petition No. 3 of 2008 affirmed by this Court in ***DICKSON M. GITHINJI vs. GATIRAU PETER MUNYA*** **[2014] eKLR**, where it was held that without the ballot paper counterfoil in the ballot box the ballots therein are unverifiable and unvalidated as there is no way of telling how the ballot papers found themselves in the ballot box.

Penultimately, counsel faulted the learned Judge for not declaring Mohamud the winner seeing that, in his submission, the recount of the votes from the constituency, save the disregarded Qara polling station votes, showed Mohamud to be the clear, manifest and obvious winner. He fortified his submission by reliance on ***JOHN OROO OYIOKA & ANOR vs. IEBC & 2 OTHERS*** **[2013] eKLR** a decision of the High Court to the effect that where it appears after a recount of votes, that the petitioner garnered the most votes and he is not guilty of any election offence, he ought to be declared the winner instead of subjecting the electorate to a new and costly election. He maintained that the rest of the votes cast in the constituency were valid so that upon the voiding of Kolosh?s victory, Mohamud should have been declared winner.

Finally on costs, **Mr. Ngatia** submitted that the capping of instruction fees at Kshs. 1.5 million was erroneous, the sum being paltry. In the interest of harmony in the quantum of costs, he urged that the capping should have been at Kshs. 2.5 million. He urged us to allow the appeal, dismiss the cross appeal, and declare Mohamud the Member of National Assembly elect for Wajir West Constituency.

Rising to oppose the appeal, learned Senior Counsel **Mr. Ahmednassir** leading **Mr. Issa Mansur** and **Ms. Muthoni Mugo** for Kolosh first expressed the view that this appeal is not only devoid of merit but also fanciful and unrealistic, "based on a *peculiar form* of *mathematical algebra*." He boldly asserted that the petition should in fact have been substantially allowed as prayed in line with Mohamud?s assertion that the results declared at the polling station are final.

He dismissed off hand the submission that Kolosh should have been held to have been criminally responsible and castigated the appeal as being based on matters of fact in violation of section 85A of the Elections Act that limits appeals to this Court in electoral disputes to matters of law only.

Attacking Mohamud?s contention that he should have been declared the winner after the partial recount, senior counsel submitted that it amounted to seeking to be court-coronated as MP for Wajir West. He argued that **section 80(4)** of the Elections Act contemplates an election court ordering a person as elected only upon a recount of **all** the ballots cast and applies only in cases where a petition is based exclusively on a recount, which was not the case herein. He went on to state that the result at Qara polling station was not overturned on account of a recount, but rather a striking out of votes by the court which, in his view, was not preceded by a proper analysis before concluding that the Qara results were not credible.

Counsel was of the view that even though under **section 82(2)** of the Elections Act the election court is empowered to strike out certain votes, Mohamud failed to persuade it to do so whereupon the learned Judge resorted to **regulation 83(1)** and purported to strike out the Qara votes. It had no such power as the said regulation reposed the power in the returning officer so that it was a usurpation of authority for the court to have done so. This was

compounded, in counsel?s view, by the fact that the deputy registrar did not fully comply with the court order on scrutiny which required her at paragraph 37 of the ruling dated 5th January to undertake an examination of, *inter alia*;

"The SD card to the KIEMS kit used or any other register of voters that may have been used to establish the total number of voters who turned out to vote."

The deputy registrar?s report contained a list of the documents and items that were examined in scrutiny but they did not include the voters register. He contended that unless one went back to the register, a mere examination of the KIEMS kit would not give an accurate picture of who voted. He cited **regulation 69** which provides that an election official shall require the voter to place his or her finger in the finger-printed scanner and then cross out the name of the voter from the printed copy register once the image had been received.

Accordingly, in counsel?s view, unless the register was brought out and it was shown that fewer names were crossed out than the votes cast, the burden of proof was not discharged. He concluded that in the premises the learned Judge made assumptions instead of ensuring or calling upon the petitioner to discharge the burden of proof. He rested his case by urging us to dismiss the appeal and allow the cross appeal as there was no basis for invalidation of Kolosh?s election and it would be disproportionate to order a by- election.

Still on Kolosh?s case, **Mr. Issa** first addressed us on a jurisdictional challenge to the effect that the learned Judge departed from the case pleaded and considered evidence that was not founded on the petition. This is because there was no allegation therein that the results declared exceeded the voter turnout; counsel never addressed it before the learned Judge; and neither Mohamud nor his witnesses testified that the voters who turned out were less than the voters cast. Counsel pointed out that the learned Judge himself fully appreciated the law on the subject to be as enunciated by the Supreme Court in ***RAILA AMOLO ODINGA & ANOR vs. IEBC & 2 OTHERS SCK*** **Presidential Petition No. 1 of 2017, [2017] eKLR** to the effect that a fair trial in the context of an election petition restricts the petitioner to the case pleaded, which he proceeded to impermissibly ignore though it was undoubtedly binding on him. Mohamud had no excuse for not pleading the voter turnout complaint in the petition, for, as the learned Judge observed at paragraph 38 of the judgment, voter turnout is not a matter that should have awaited scrutiny. It was not open to the petitioner, in counsel?s submission, to abandon his case and expand it into something else emerging out of scrutiny.

Mr. Issa emphasized that the case pleaded in the petition was that the results were altered at the tallying centre yet none of the witnesses called could state where, when and by whom the alterations occurred. Mohamud later claimed that the results were either altered or were erroneous to which Mr. Issa quipped that it was not open to the petitioner to play Russian roulette with the process as evidenced by Mohamud?s counsel?s submissions that were based wholly on the results of scrutiny, yet ballot stuffing was never alleged in the petition and no evidence was led on it.

Counsel criticized the learned Judge for taking the view that the powers statutorily conferred on the returning officer should be exercised by the court and proceeding to arrogate those powers to himself, and for introducing the concept of "*illegal votes cast*" which was never pleaded and was in the absence of any evidence that invalid votes were inserted or stuffed into the ballot box. Citing this Court?s decision in ***JOSEPH MWAURA vs. REPUBLIC [2013] eKLR,*** counsel submitted that the learned Judge grossly erred in law and overstepped his mandate by holding that **regulation 83** was improperly crafted in granting powers to the returning officer that he felt should be exercised by the election court. His mandate was to interpret the law and enforce it as it is, not as he would have preferred it to be.

Regarding the proper scope of scrutiny, Mr. Issa blamed the learned Judge for disregarding the outcome that confirmed the votes which evidenced Kolosh the winner; when in fact, it is only where there is a discrepancy between the votes in the ballot box and the statutory forms that the IEBC should be called upon to offer an explanation. He asserted that Mohamud had categorically stated that he would be satisfied with the outcome of the recount only to renege on it when it confirmed the votes as had been declared. It was not open to the court to disregard the result of the recount when there was no evidence of interference with the ballot box, which Corporal Echesa testified to have been securely sealed.

He concluded by submitting that the learned Judge had no basis for disregarding the actual vote recount but defended the capping of costs as well-justified.

For the IEBC, learned counsel **Mr. Mukele** declared himself opposed to the appeal. He asserted that that appeal turns on the interpretation of **section 80(4)** of the Elections Act "which sets out three parameters for nullification, namely where there has been a recount; a winner is apparent; and the petitioner has not committed an election offence." Counsel?s position was that the case before the election court did not meet any of these parameters. According to him, a recount under **section 80(4)** of the Elections Act must be exercised with caution and restraint and it is a numerical exercise, a question of numbers. He cited this Court?s decision in ***ZEBEDEO JOHN OPORE vs. JOHN OROO OYIOKA*** Civil Appeal No. 44 of 2013 and Ogolla, J?s decision in ***JUSTUS GESITO MUNGALI M.MBAYA vs. IEBC & OTHERS [2013] eKLR*** but went on to admit that **section 28(4)** of the Act is problematic in that it speaks of scrutiny and recount which allows for going beyond a mere counting of votes to encompass a determination of the validity of the votes. He went on to state that in the absence of the packets of unused ballots and counterfoils, it was not possible to determine the validity of votes and so no basis existed for declaring Mohamud the winner and the learned Judge was right to order a by election. He cited the High Court decision in ***MANSON ONYONGO NYAMWEYA vs. JAMES OMINGO MAGARA & 2 OTHERS*** (supra) to emphasize the importance of counterfoils.

Mr. Mukele then addressed frontally what he saw as two troubling issues; the first being the learned Judge?s holding that the returning officer?s powers under **regulation 83** should be exercised by the election court and proceeding to do so. Counsel categorically stated that in so doing the learned Judge erred fundamentally by conferring the power upon himself which was an unlawful usurpation of the jurisdiction of the returning officer. He cited the High Court decisions of ***OKIYA OMTATAH OKOITI vs. ATTORNEY GENERAL & 5 OTHERS*** **[2014]eKLR** and ***JUDICIAL SERVICE COMMISSION vs. SPEAKER OF THE NATIONAL ASSEMBLY & 8 OTHERS [2014] eKLR*** to the effect that courts must not trespass into fields reserved to other bodies, entities and authorities.

The second troubling issue according to counsel, was the learned Judge?s disregarding of the votes at Qara polling station and at the same time nullification of the election. Counsel?s view was that the learned Judge could not apply **regulation 83** to disregard the results and all he could have done was order a repeat election.

Making reply in opposition to Kolosh?s cross-appeal, **Mr. Issa** contended that the absence of counterfoils did not render the recount exercise unsatisfactory, nor the result irregular. Placing reliance in **regulations 73** and **81**, he submitted that the presiding officer was not obligated to seal the sealed envelope containing counterfoils in the ballot box. He pointed out that even though **regulation 81** was amended to so require, **regulation 73** which requires the counterfoils to be delivered separately to the returning officer in separate tamper proof envelopes was not repealed, thus creating two conflicting requirements which the learned Judge appreciated. He went on to assert that nothing turned on the

matter, anyway, as the absence of counterfoils would not amount to an infraction of the law. The Judge had at any rate ordered for their production but the complaining party never questioned the returning officer about the same. Indeed, parties were happy to proceed with scrutiny on the basis of the material then present.

Mr. Issa was unimpressed with the position taken by the IEBC, whose duty it was to avail these materials, stating that it did not lie in its mouth to say that there were irregularities and that there should therefore be a by-election. He reiterated that the only way to conclusively ascertain voter turnout would have been by scrutinizing the register of voters, and as that did not occur the result showing Kolosh the victor should stand instead of wasting scarce public resources to mount a needless by-election.

In his response, **Mr. Ngatia** highlighted that the IEBC did concede irregularities and also did not explain its failure to provide the counterfoils for scrutiny. He submitted that the verifiability of the results announced was one of the issues for the Judge?s determination and that upon scrutiny Mohamud became the apparent and obvious winner. He denied that the learned Judge usurped powers under **regulation 83** or that he acted perversely in disregarding the Qara votes as there can be no wrong without a remedy and he was right to act on the scrutiny report. Anomalies were identified in testimony which were further highlighted on scrutiny. To him, the alteration of results pleaded in the petition was only one aspect of the case. As to the register, he asserted that it was in the KIEMS kit. The huge discrepancy between the votes cast and the voter turn out showed that *"this was not just an irregularity but full electoral fraud. It was a man-made activity to achieve a particular end."* He urged us to allow the appeal and declare Mohamud the duly elected Member of National Assembly for Wajir West Constituency.

We have carefully considered the appeal and cross appeal, the record of appeal, the submissions of counsel and the trove of authorities cited before us, cognizant that under **section 85A** of the Elections Act, our jurisdiction is expressly confined to a consideration of matters of law only. The narrow issues of law that we consider determinative of the appeal and cross-appeal are as follows;

(1) Whether the learned Judge acted without jurisdiction and considered matters not pleaded in the petition.

(2) Whether the learned Judge erred in disregarding the result of the vote count for Qara Constituency.

(3) Whether the learned Judge erred in law in not directing the Commission to issue Mohamud a certificate of election as member of Parliament for Wajir Constituency.

(4) Whether the capping of costs at Kshs. 1.5 million instruction fees was erroneous.

I. **UNPLEADED MATTERS**

That the learned Judge took into consideration and ultimately decided the petition on matters that were not pleaded in the petition is the gravamen of Kolosh?s cross appeal. The decision turned on, principally, the finding that the votes declared and found to have been cast at Qara polling station far exceeded the voter turnout and that the ballot box was contaminated with votes unlawfully inserted therein, yet these matters were not pleaded in the petition and no evidence was led thereon.

The learned Judge was fully conscious that the petition did not deal with those issues on which he eventually determined it. He was also fully cognizant of the fact that the Supreme Court had categorically settled the law on the subject as was argued before him. He was in no doubt whatsoever as to what the law was and he stated it in paragraphs 26 and 27 of the judgment thus;

> ***"26. It is argued by the 1st respondent that a fair trial in the context of an Election Petition is to restrict the petition to the case pleaded. In this regard in Raila Amolo Odinga & Another vs. Independent Electoral and Boundaries Commission** & **2 Others scr Presidential Petition No. 1 of 2017 (2017)eKLR. The Supreme Court approved the following passage in the Decision of the Supreme Court of India in Arikala Nasara Reddy vs. Venrata Ram Reddy Reddygari & Another:-***
>
> *„In the absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.?*
>
> ***27. The Supreme Court was reaffirming an already held view that parties are bound by their pleadings and that election disputes are not exempted from this settled proposition. The affirmation by the Supreme Court rejects the notion that an election petition is an open ended inquiry in which an Election Court picks up for interrogation any issues which arise in the course of the hearing, and which though not pleaded, question credibility of the outcome of an election or its compliance with the Constitution and other Electoral laws…."***

But the learned Judge did not stop there. Instead, he proceeded in the next paragraph to address an alternative proposition from an earlier case of this Court and attempted to distinguish the RAILA 2017 decision as follows;

> ***"28. But there is another proposition accepted by the Court of Appeal & Richard Nchapi Leiyagu vs. Independent Electoral & Boundaries Commission 2 Others [2014] eKLR, when it held,***
>
> *„It is clear to us too, that there was equally many (sic) clear judicial authorities for the proposition that where the parties have*

raised an issue and left it for the decision of the court, the court can determine the issue even though it was not pleaded. Thus in ***Odd Jobs vs. Mubia [1970] EA 476****, the predecessor of this Court held that:-*

"A court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision."

In such instances the court will not be embarking on a rudderless journey, as the parties will have reset the route in the course of the proceedings.

…

29. The Supreme Court in Raila Amollo Odinga & Another [2017]eKLR (supra) was not considering a situation where, although it is not pleaded, an issue is raised by the parties, embraced by all and left to the court to determine. I do not understand the Supreme Court decision to be excluding such situations."

We very much doubt that it was open to the learned Judge to prefer an earlier decision of this Court, which had propounded the view that a court could consider issues not pleaded but which appear to have been left by the parties to the court to decide. First, by virtue of the doctrine of precedent, which has express recognition in **Article 163(7)** of the Constitution, all courts except itself are bound by the decisions of the Supreme Court. See ***KIDERO & 5 OTHERS vs. WAITITU & OTHERS [2014] eKLR***. It was therefore improper for the learned Judge to seem to choose a jurisprudential position of this Court which was at variance with that espoused authoritatively by the apex court. Moreover, since the decision of this Court that the learned Judge chose to rely on was made before the ***RAILA 2017*** decision of the Supreme Court, it must be presumed that the latter court was aware of that alternative position but pronounced itself in binding fashion as it did. The principle of *stare decis* is too basic to require our elucidation. See ***GATIRAU MUNYA vs. DICKSON KITHINJI*** (supra).

It is of course permissible in appropriate cases for a Judge to distinguish a precedent even of the highest court by showing that it does not apply to the facts or context of the case before him and that is what the learned Judge appears to have attempted. That attempt could not, with respect, have succeeded for the rather plain reason that not only did ***RAILA 2017*** not admit to exceptions but, even were it to be assumed that parties could leave it to a court to render a decision on a matter not pleaded but which they essentially invite the court to decide on, the record here shows that the respondents before the learned Judge were strenuous, strident student and consistent in their opposition to his entertaining of unpleaded matters. Both Kolosh and the IEBC as well as the returning officer complained that Mohamud was engaging in a fishing expedition; was opening the scope of his case intolerably way beyond the bounds and confines of his petition; and that his case was undergoing a gross metamorphosis and mutating into a totally different case from the one pleaded. It is plain there was neither consensus nor consent that matters not pleaded be accepted and addressed as potentially determinative of the petition and this sets the case apart from ***RICHARD NCHAPI LEIYAGU vs. IEBC & 2 OTHERS [2014] eKLR***. The attempt by the learned Judge to distinguish ***RAILA 2017*** was therefore no avail.

We think, with respect, that the learned Judge?s attempt to minimize and excuse the failure to specifically plead the issues or complaints of votes cast or tallied exceeding voter turnout and ballot stuffing as merely a lack of "suaveness" and "elegance" in equal measure and was misadvised and intended, quite inefficaciously to sanitize an improper engagement with matters unpleaded. The requirement for specificity in the complaints raised is mandatory both for compliance with the law and for the purpose of orderly conduct of electoral litigation. It is essential to the fair trial of election petitions that the facts, complaints and grounds on which a petition is presented with a view to upsetting an election, by which the voters have expressed their will, be set out with specificity and particularly. It is only those grounds as pleaded that the respondents are required to respond to, confront head on and lead evidence in rebuttal, and only on them should the election court base its determination. To hold otherwise would be to render the process of electoral adjudication a wild adventure, a free for all and an open season where anything and everything goes, which would be not only embarrassing and vexing to the respondents, but a study in confusion that a court does well to eschew so as to avoid turning the hearing of an election petition into a charade and a travesty of justice. It is not for nothing that the Election (Parliamentary and County Election) Petition Rules, 2017 require at Rule 8(1)(e) that an election petition shall state –

"**…** the grounds in which the petition is presented" and under **Rule 11(5)** a response to petitions, "shall respond to each claim made in the petition." The petition must, moreover be supported by an affidavit which sets out the facts and grounds relied on in the petition and states the grounds on which the petition is presented. Clearly, the process of filing a petition ought not be a knee-jerk response to an election defeat reflective more of a crashing of ambitions rather than evidence of malpractice and chicanery. Evidence ought to precede petition, not the other way round. Indeed, the learned Judge got it right when, in relation to the non pleading of voter turnout *vis-à-vis* the declared and tallied results for Qara polling station, he expressed himself as follows;

"The information of voter turnout is not, in my view, a matter that should await scrutiny. Candidates or political parties are entitled to appoint an agent (regulation 62) who is allowed admission to the polling station. An agent is the eye and ear of his candidate or political party. An agent is expected to be vigilant. The issue of voter turnout is one that should concern any agent. If voter turnout is not monitored, then there is opportunity for ballot stuffing or multiple voting. And a typical arrangement of a polling station allows agents to observe voters as they come in and cast their votes. An agent who does not surveil voter turnout does a great disservice to his candidate or party. Short of a plausible explanation a candidate or party that does not have information of voter turnout can only have himself/itself to blame. But I return to this issue of voter turnout shortly."

Notwithstanding that lucid and correct reasoning, however, when he returned to that unpleaded issue the learned Judge went ahead to act in contrarious manner.

We are satisfied that the proper position in law is that courts, and especially election courts, should determine cases before them on the basis of what was pleaded, and not on what may turn up somewhere along the way. This has been the law consistently espoused by this Court. In ***NDOLO vs. WATHIKA & OTHERS [2010] EA 279***, its was held, and it bears repeating that;

*“**In the case of election petitions the petition itself and the particulars where supplied constitute the pleadings and the issues as framed should stem from the pleadings and the evidence must relate to the issues arising from the pleadings <u>Odgers on Pleadings</u>, (19 ed) approved.***

Leading evidence on an issue that is not pleaded circumvents the petition and the particulars supplied, is irrelevant and inadmissible and is unacceptable for introducing an element of surprise and uncertainty. <u>Halsbury?s laws of England</u>, (4 ed) page 211 adopted.

Particulars are part of the pleadings and the purpose of the pleadings is to give a fair notice of the case which has to be met.

Since an election petition is not capable of being amended all issues in the petition crystallize after service of particulars and therefore any attempt to introduce evidence outside the petition as particularized would violate the rule on what issues are before the court and would also violate the principle of relevance.”

Fidelity to pleadings is not an idiosyncrasy spawned by Kenya courts. Rather, it is a sensible jurisprudential position of wide acceptance in common law jurisdictions. We need only refer to one such decision by the Supreme Court of India. In ***<u>ARIKALA NARASA</u> <u>REDDY vs. VENKATA RAM REDDY REDDYGARY & ANOTHER</u> [2014] 2 SCR*** cited by Kolosh?s counsel, that Court delivered itself thus;

“This Court has consistently held that the court cannot go beyond the pleadings of the parties. The parties have to take proper pleadings and establish by adducing evidence that by a particular irregularity/illegality, the result of the election has been “materially affected.” There can be no dispute to the settled legal proposition that “as a rule relief not founded on the pleadings should not be granted.” Thus, a decision of the case should not be based on grounds outside the pleadings of the parties. In absence of pleadings, evidence if any, produced by the parties, and cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.”

We have no difficulty reiterating, having answered this question in the affirmative, the position we expressed in ***<u>IEBC vs. STEPHEN MUTINDA MULE & 3 OTHERS</u> [2014] eKLR,*** where, as here, the court determined a petition on the basis of issues not pleaded in the petition;

“As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. The learned Judge no matter how well intentioned went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on basis of matters not properly before her. To that extent she committed a reversible error and the appeal succeeds on that score.”

II. <u>DISREGARDING OF QARA POLLING STATION VOTES</u>

As we have set out, the learned Judge?s decision to nullify Kolosh?s election stemmed primarily from his having disregarded the votes cast at Qara polling station. In doing so, the learned Judge reasoned as follows;

“163. It is beyond reasonable doubt that the results declared for Qara were not credible. The declaration was fraudulent because the results showed that the total number of votes case was

590. It did not help matters that the ballots found as cast in the ballot box affirmed this number as

590. This exceeded the number of voters who turned out to vote by 162. The result is illegal and it matters not whether it was attained by ballot stuffing, double voting or simply by falsification of form 35A.”

That finding was the basis of the learned Judges disregarding the Qara votes which is challenged by Kolosh as having been without jurisdiction and involved a usurpation of powers that the statute did not donate to the learned Judge. Indeed, that very argument had been made before him and the learned Judge was faithful in capturing it and pronounce the correct legal position as follows;

“165. There was however, argument by the 1st respondent that the jurisdiction of an election court to strike off, cancel or disregard votes is limited and circumscribed by law. It was the view of 1st respondent that striking out of the votes or nullifying the entire result of Qara would be inimical to section 82 of the Elections Act which reads:-

"(1) An election court may, on its own motion or on application by any party to the petition, during the hearing of an election petition, order for a scrutiny of

votes to be carried out in such manner as the election court may determine.

(2) Where the votes at the trial of an election petition are scrutinized, only the following votes shall be struck off-

(a) the vote of a person whose name was not on the register or list of voters assigned to the polling station at which the vote was recorded or who had not been authorized to vote at the station;

(b) the vote of a person whose vote was procured by bribery, treating or undue influence;

(c) the vote of a person who committed or procured the commission of personation at the election;

(d) the vote of a person proved to have voted in more than once constituency;

(e) the vote of a person, who by reason of conviction for an election offence or by reason of the report of the election court, was disqualified from voting at the election; or

(f) the vote cast for a disqualified candidate by a voter knowing that the candidate was disqualified or the facts causing the disqualification, or after sufficient public notice of the disqualification or when the facts causing it were notorious.

(3) The vote of a voter shall not except in the case specified in subsection (1)(e), be struck off under subsection (1) by reason only of the voter not having been or not being qualified to have the voter?s name entered on the register of voters."

166. It was further argued that the petitioner has not laid a basis for striking off of any votes cast in Qara polling station. On this I have no difficulty in agreeing that in respect to the criteria of striking out set under section 82, the petitioner may have not been able to identify with precision any persons who fall under the category in section 82 or who cast illegal votes. But the court will return to this."

Without a question, as the learned Judge himself acknowledged, the election court had no power to strike off any votes except those falling in the six categories listed in **section 82(2)** of the Election Act. But having found, as he had to, that his powers were narrowly constricted, what did the learned Judge do?

First, he theorized that the premise for Mohamud?s plea for the disregarding of the entire result at Qara was that it was contaminated whole due to a mixture of indistinguishable legal and illegal votes. He went on to state that to be the probable policy consideration behind **regulation 83(1)** which empowers the returning officer to disregard. After recognizing that it is the returning officer whose is empowered to do so at the tallying centre in the presence of the candidates and agents, the learned Judge embarked on a curious and, respectfully, wholly impermissible exercise of usurpation and arrogation of jurisdiction, based on his belief that "*this power should be exercised by an Election Court and not the CRO*," and proceeded to disregard the entire result at Qara.

We think that whereas it is questionable whether it would have been possible to establish conclusively the voter turnout without reference to the printed voter register crossed by an election official after each voter is biometrically identified as a required by **rule 69(1)(d)** of the Elections (General) Regulations, and whereas the issue of voter turnout was never pleaded in the petition and therefore ought not to have featured; it was a grave misdirection and a patent breach of law for the learned Judge to have purported to consciously and deliberately exercise a power he did not have merely because he held a strong conviction that the power was his to exercise. As has been said time without number, *jurisdiction is everything*, echoing Nyarangi JA in ***THE OWNERS OF THE MOTOR VESSEL LILLIAN „S? vs. CALTEX OIL (K) LTD [1989] 1,*** and once a court does not have it, it must down its tools.

No matter how well-intentioned a court may be, and no matter how noble, practical and exalted its motivation, any stretching of powers beyond what is donated by the Constitution or the statutes is an exercise in futility and amounting to creative nullity. Courts are bound to operate within the constitutional or statutory limits and, as was stated by the Supreme Court in ***SAMUEL KAMAU MACHARIA & ANOR vs. KENYA COMMERCIAL BANK & 2 OTHERS [2012] eKLR***, a court "*cannot expand its jurisdiction through judicial craft or innovation*" as the learned Judge purported to do herein. It bears repeating what we stated, while rejecting an invitation to declare the death penalty unconstitutional in ***JOSEPH NJUGUNA MWAURA & 2 OTHERS vs. REPUBLIC*** (supra);

"The Court cannot purport to be ahead of the people of Kenya or Parliament. The best the Court can do is exercise judicial authority conferred and interpret and apply the law in the manner envisaged. We upon it in accordance with Article 159 of the Constitution draw inspiration from the words of Stamp LJ I Blackburn vs. Attorney General [1971] EWCA civ 7 where he stated that:

"Parliament enacts laws; and it is the duty of this Court in proper cases to interpret those laws when made; but it is no part of this Court?s function or duty to make declarations in general terms regarding the powers of Parliament, more particularly where the circumstances in which the Court is asked to intervene are purely hypothetical."

This position draws from the famous American case of Marbury vs. Madison 5 U.S. 137, 1 Cranch 137 (1803) where Justice Marshall stated that:

"It is emphatically the province and duty of the judicial department to say what the law is."

It is not the role of judges to engage in wandering and wilderness interpretation of what the law ought to be. To do so would be going outside the province of Article 159 and 259 of the Constitution of Kenya, 2010."

We were categorical then, as now, that a court cannot without overstepping its mandate engage in a capricious or whimsical interpretation of the Constitution and statutes in a bid to hoist a personal vision of the law **as ought** instead of interpreting and stating the law **as is** and

especially to invest itself with powers and competences that are donated in specific, express terms, to other bodies. See also; ***IN THE MATTER OF THE INTERIM INDEPENDENT ELECTORAL COMMISSION* [2011] eKLR**, a decision of the Supreme Court.

That being the law, we come to the conclusion that the learned Judge fell into plain error in purporting to exercise a power he did not have and his disregard, discounting or nullification of the Qara votes was a nullity that had no legal force or effect.

III. **NON-DECLARATION OF PETITIONER AS WINNER**

The heart of Mohamud?s appeal is that once the learned Judge disregarded the Qara votes, the resultant tally was 6224 in his favour as against 6,161 for Kolosh, which automatically made him the apparent, obvious and clear winner of the contested seat. In fact, he insisted his margin should even have improved further had the learned Judge disregarded the 252 votes cast in favour of Kolosh at Korich polling station reducing the latter?s tally to 5,909 votes. Thus the complaint is that the learned Judge erred in not declaring Mohamud the winner and we are beseeched to declare him so.

We could dispose of this issue by simply stating that since, as we have held, the learned Judge had no jurisdiction to consider complaints about voter turnout that had not been pleaded; and since, also, he was bereft of jurisdiction to disregard votes under **regulation 83**, the resultant automatic subtraction does not lie and the tally remains as was declared with the consequence that this plea would fail. Since the question raised is of some interest, however, we shall examine the independent merit of Mohamud?s plea to be declared winner in the circumstances of this case. The power resides in an election court and is spelt out in **section 80(4**) as follows;

> ***"An election court may by order direct the Commission to issue a certificate of election to a President, a Member of Parliament or a Member of a county assembly if –***
>
> ***(a) Upon recount of the ballots cast, the winner is apparent; and***
>
> ***(b) That winner is found not to have committed an election offence."***

[Our emphasis]

This issue turns essentially on the question whether the "*recount of ballots cast*" refers to all the votes in the particular election or it can apply to a recount of only some of the votes as represented by a selection of polling stations.

Our thinking is that the power invested in the election court to literally declare a person elected other than the one who had previously been so declared on election day, is so great that it must be exercised with circumspection and with a taking of great care that there should be no error or omission in the reckoning of votes.

It is a power to be exercised to give the correct position as to who won the election on the basis of the recount of the votes cast in that election. Such recount provides a conclusive answer to the question of who won the election and, logically, it must be on the basis of all the votes cast in that election. Any piecemeal or select counting of votes cannot possibly provide a winner to the election, as a winner is one who gains the most votes in the election. Any other construction seems to us to be unrealistic and even absurd for the reason that the winner of one or two polling stations contended could be declared victor of the elections, yet he may have gained less votes in totality, were the votes from all polling stations to be counted.

In the case of ***ZEBEDEO JOHN OPORE vs. JOHN OROO OYIOKA & 3 OTHERS*** (supra) this Court affirmed that indeed an election court is possessed of power to declare an apparent winner of an election after a recount. It is instructive that it did so in the context of a case where the petitioners in the election court had sought, by application, scrutiny and recount of the votes cast in the election of member of the National Assembly for Bonchari Constituency. The applications were granted and the scrutiny covered 49 polling centres but the recount covered **all** the polling stations.

It was also the case that in ***P.MAILACHAMI vs. M. ANDI AMBALAM & OTHERS*** **[1973] AIR 2077; [1973] SCR(3)** 106, cited by Mr. Ngatia, where the Indian Supreme Court upheld the High Court?s decision to declare the petitioner the winner after a recount of votes, the said recount was a general one involving **all** the votes that had been cast in the election for the seat in question.

We are therefore quite clear in our minds that only by a recount covering all polling stations and all votes cast can the will of the electorate in a particular election be conclusively determined. It would be a strange thing, bizarre even, to alter the outcome of an election on the basis of a limited recount and declare the result thereof a reflection of the will of the voter as Mohamud sought to persuade the court. The learned Judge was right not to declare him the winner of that election, as he was not.

Given the conclusions we have reached, Mohamud did not make a case sufficient to void Kolosh?s election.True, he did not have insubstantial or frivolous complaints, but they were of an emergent kind excluded by his own pleading in the petition which did not contain them. The burden of proving allegations in a petition sufficient to upset an election is upon the petitioner and the same is not discharged when the case is presented, as it was herein. This leads us to the inescapable conclusion that no proper basis had been laid in the law for the nullification of the election and the ordering of a by-election. Mere unease that the election was not a perfect exercise cannot suffice to nullify it absent proof to the required standard.

It is not lost to us that the petition did present an alternative prayer that craved Kolosh?s votes for Qara polling station be discounted by 221 votes, which is quite consistent with the central thrust of the petition that the results that were declared at the constituency tallying centre were inflated by about that figure. Had that prayer been properly considered and granted Kolosh, would still have emerged the winner.

Nothing turns on all of these and other matters such as the charging and subsequent acquittal of the Qara Presiding Officer, however, and the less we say on them the better given our categorical findings hereinabove.

IV. CAPPING OF COSTS

The final issue for our consideration presents little difficulty. Mohamud complains that by capping the instructions fees at Kshs. 1.5 million, the learned Judge was too mean as the sum was not commensurate with the work done and/or awards in similar petitions.

Costs are of course at the discretion of the trial court and we, as an appellate court, interfere therewith only very rarely where the quantum of the sum is so high or so low as to be a wholly erroneous estimate. Costs must be sufficient to compensate the successful party but they must not be so high as to appear to be some kind of a windfall that turns electoral litigation into a form of lucrative business for the winner but at the same time becomes a punitive burden that might impede access to justice.

Noting that what was capped at Kshs. 1.5 million herein was the instruction fees, and the petition having been for a Member of National Assembly, we do not see anything in the cases cited on behalf of Mohamud, including ***JACKTON NYANUNGO RANGUMA vs. IEBC & 2 OTHERS [2018]eKLR*** which cited various other decisions on costs, and ***JAPHETH MUROKO & ANOR vs. IEBC & 2 OTHERS [2017]eKLR,*** that would persuade us to interfere with the learned Judge?s order on costs. We think it was a proper order and accords with determinations on costs that have been upheld or made by this Court in recent months following the 2017 general election including ***PHILIP KYALO KALOKI vs. IEBC & 3 OTHERS [2017] eKLR***, (Election Petition Appeal No. 25 of 2018); ***NASRA IBRAHIM IBREN vs. IEBC & 2 OTHERS*** (Election Petition Appeal No. 9 of 2018) and ***PIUS YATTANI WARIO vs. IEBC & 3 OTHERS*** (Election Petition Appeal No. 10 of 2018).

V. DISPOSITION

Ultimately, the appeal is devoid of merit and it is dismissed with costs.

The cross-appeal succeeds with the result that the judgment and decree of the High Court is set aside and substituted with an order that the petition dated 4th September 2017 is dismissed with costs capped at Kshs. 1.5 million and Kshs. 500,000 instructions fees, respectively payable to the 1st respondent and to the 2nd and 3rd respondents.

We make no order as to costs on the cross appeal.

Made at Nairobi this 27th day of July, 2018.

W. OUKO, (P)

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR