IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MAKHANDIA, GATEMBU & M'INOTI, JJ.A)

ELECTION PETITION APPEAL NO. 33 OF 2018

BETWEEN

ZAHEER JHANDA.....1ST APPELLANT

JAMES F. O. KENANI.....2ND APPELLANT

AND

THE INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....1ST RESPONDENT

JULIUS MEJA OKEYO.....2ND RESPONDENT

RICHARD NYAGAKA TONGI.....3RD RESPONDENT

CHRIS MUNGA N. BICHAGE.....4TH RESPONDENT

(An appeal from the Rulings, Judgment and Decree of the High Court of Kenya at Kisii ***(A. K. Ndung'u, J****.) delivered on 5th, 18th, 19th of December, 2017 and 1st and 28th February, 2018 respectively*

in

High Court Election Petition No. 10 of 2017)

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JUDGMENT OF THE COURT

Kenya is a sovereign and democratic Republic predicated upon democracy, human rights and the rule of law. Article 1(1) of the Constitution reinforces the sovereign power of the people of Kenya, when it proclaims that all sovereign power belongs to the people and shall only be exercised in accordance with the Constitution. By virtue of Article 1(2), such power may be exercised by the people either directly or through their democratically elected representatives. Articles 38(2) and 81(e) of the Constitution envisage democratically elected representatives being chosen through free, fair and regular elections based on universal suffrage, whose hallmark is an election by secret ballot, free from violence, intimidation, improper influence and corruption, conducted by an independent, impartial, and neutral body in an efficient, accurate and accountable manner.

An election therefore is an expression of the will of the people which must be protected and respected. As was stated by this Court in **Richard Kalembe Ndile & Anor v Patrick Musimba Mweu & 2 Others** [2013] eKLR;

> **"Under our democratic form of government, an election is the ultimate expression of the will of the people and the electoral system is designed to ascertain the intent of the voters and to give it effect wherever possible…"**

Further, in **John Fitch v Tom Stephenson & 3 Others**, QDB [2008] EWHC 501, the court observed;

> **"…The decided cases including those which Lord Denning considered in Morgan v Simpson, established that the courts will strive to preserve an election as being in accordance with the law, even where there have been significant breaches of official duty and election rules, provided the results of the election were unaffected by those breaches. This is because where possible the court should seek to give effect to the will of the electorate…"**

No elections are one hundred percent perfect. There are bound to be mistakes here and there. However, if those mistakes do not affect the result, the court will be slow to nullify such an election. It was perhaps with this in mind that section 83 of the Elections Act was enacted, providing as follows:

> **"No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non compliance did not affect the result of the election."**

Where, however, there is evidence that the election was conducted in breach of the Constitution and the law, leading to illegalities and irregularities that affect the results of the election, the court, in the same spirit of deferring to the will of the people, will have no hesitation whatsoever in annulling it. It is against that background that we shall consider this appeal.

The 1st appellant, Zaheer Jhanda, ***the 2nd appellant, James F. O. Kenani***, ***the 3rd Respondent, Richard Nyagaka Tongi***, and ***the 4th respondent, Chris Munga N. Bichage,*** were candidates in the election for member of National Assembly for ***Nyaribari Chache Constituency*** held on the 8th August, 2017. The elections were conducted by ***the 1st respondent, the Independent Electoral and Boundaries Commission*** and the ***2nd respondent, Julius Meja Okeyo***, who was the returning officer. In all, there were nine candidates, with the 3rd respondent emerging the winner with 14,410 votes, followed by the 1st appellant who garnered 11,710 votes, the 4th respondent with 10,445 votes and the 2nd appellant with 5,974 votes. Subsequently the 3rd respondent was declared the duly elected member of the National Assembly for Nyaribari Chache Constituency and duly Gazetted as such.

The appellants and 4th respondent challenged the results by filing Election Petition Nos. 10 and 12 of 2017, respectively, in the High Court at Kisii. They alleged that the election was not conducted in a free, fair, transparent, accountable, accurate and verifiable manner and that it was marred by irregularities, mistakes and malpractices, contrary to the **Constitution**, the **Elections Act** and the **Elections (General) Regulations, 2012**. They averred that eligible voters were barred from voting when the Kiems kits broke down; that some polling stations closed before 5.00 p.m. when voters were still in the queues; that some polling stations were not provided with hard copies of the register as a complimentary system to the Kiems kits; that where such registers were provided and used, no record of voters who were identified by the manual register was kept; that persons whose registration status was not verified in the Kiems kits or manual register were allowed to vote; that after voting, voters were not marked with indelible ink; that voters who required assistance during voting were not assisted; that no record of the assisted voters and the reasons for assistance were kept; that some of the agents of the appellants and of the 4th respondent were not allowed into the polling stations; that there were inconsistencies in the entries in forms 35A, 35B, and the polling station diaries; that in some polling stations the number of people who voted was higher than the ballots issued; that the family members of one of the candidates were unlawfully allowed to participate in the electoral process; that there was intimidation and violence; that the 3rd respondent was declared the winner although he did not receive the greatest number of valid votes cast; that there was manipulation and or doctoring of the results and reliance on fictitious declaration forms; that in some polling stations the votes cast exceeded the number of registered voters; and finally that that the results declared by the 1st and 2nd respondents did not reflect the sovereign will of the people of Nyaribari Chache Constituency.

In their responses, the 1st, 2nd and 3rd respondents maintained that the election was conducted in accordance with the Constitution, the Elections Act and the Regulations made thereunder. They pleaded that nobody who turned up to vote was turned away; that the complementary voting mechanism was put in place for purposes of identifying voters; that only those who were in the register were allowed to vote and that all who voted were marked with indelible ink; that voters requiring assistance were assisted within the law; and that none of the agents of the candidates were denied entry into the polling stations as long as they were duly accredited as party or independent candidate agents. They added that rejected votes were properly declared and recorded in all the statutory forms and polling station diaries and that where clerical errors and or minor mistakes were identified, they were duly corrected. They denied all the alleged electoral malpractices and irregularities and pleaded that if any anomalies or errors occurred during the counting and tallying of votes, it was as a result of human error occasioned by fatigue. The 3rd respondent specifically denied commission of any election offence as no report was filed with the police or statements recorded.

Ndung'u, J. consolidated the two petitions during a pre-trail conference held on 5th October 2017. In the cause of the hearing of the petitions, there were interlocutory applications resulting in rulings that are impugned and form some of the grounds in this appeal. The relevant interlocutory rulings were delivered on 5th December 2017 and 18th February 2018. The first ruling expunged from the record annextures to the affidavit of **Richard Kerima Ratemo** (**PWII**), the appellants' last witness, due to lack of sealing and serialization by a commissioner of oaths whilst in the second ruling the court declined to order scrutiny.

At the close of the hearing, parties filed and served their respective written submissions. In a judgment rendered on 28th February, 2018 the trial court dismissed the petitions and rendering itself thus:

> **"232. Having considered these 2 consolidated petitions being petitions No. 10 of 2017 and No. 12 of 2017, the pleadings, the evidence and learned submissions by counsel, I am of the considered view that the 3 petitioners have not adduced sufficient evidence to overturn the declared results in the election for member of National Assembly, Nyaribari Chache constituency made pursuant to the general elections held on 8/8/2017.**
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> **233. I find great appeal in the words of the Judge in John Okello Nagagwa vs. IEBC and 2 others [2013] eKLR where addressing a similar scenario like the one before this court he stated:**

> *'In my humble view, this petition was a tale of many allegations with little proof. It does not require alchemy to turn allegations into fact. What is required is the gravity of the evidence set by the law. The petitioner, I am afraid has failed to discharge the onus placed on him by the law. This court must at all times keep in view the provisions of section 83 of the Act which are significant enough to deserve recalling…. No election shall be declared to be void by reason of non-compliance with any written law relating to that election, if it appears that the election was conducted in accordance with the principles laid down in the Constitution; and the written law or that the non compliance did not affect the results of the election'.*
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> **234. I can't agree more…"**

Upon dismissal of the petitions, the appellants and the 4th respondent were slapped with costs, which were capped at Kshs 5.4 million for the 3rd respondent and Kshs 3 million for the 1st and 2nd respondents.

Dissatisfied with the verdict, the appellants lodged the instant appeal on grounds that, as regards the first ruling, that the trial court erred by expunging the annextures to the affidavit of PWII; and as regards the second ruling, that it erred by failing to allow scrutiny. With regard to the main judgment, the appellants complain that the trial court erred in law by failing to hold that the election was not conducted in compliance with the Constitution and the law and that the non-compliance affected the results; by failing to consider or wrongly interpreting regulation 79 of the Election (General) Regulations; by holding that the signing of form 35As by agents signified acceptance of the results or waiver of irregularities in the conduct of the election; by failing to consider and make a finding on the admissions by the 2nd and 3rd respondents in oral and affidavit evidence that they did not comply with regulation 69(1) (d) of the Elections (General) Regulations; by failing to find that illiterate voters were assisted in contravention of regulation 72(2) and (6) of the Elections (General) Regulations; by failing to consider the unchallenged evidence of the appellants' witnesses on the illegal assistance of illiterate voters; by failing to find that the 1st and 2nd respondents contravened section 44A of the Elections Act, regulations 59, 61 and 69 of the Elections (General) Regulations and Articles 38 and 81 of the Constitution in the conduct of the election and lastly, by awarding the 1st, 2nd and 3rd respondents manifestly and unjustly excessive costs.

The appeal was canvassed by way of written submissions and limited oral highlights. Pending the filing of the respective written submissions on 10th May, 2018, the 2nd appellant filed a notice of withdrawal of his appeal pursuant to Rule 96 of this Court's Rules. There being no objection to the withdrawal by any of the parties to this appeal, the Court accepted the withdrawal and an order to that effect was accordingly made. This appeal is therefore, by the 1st appellant alone.

In his written submissions in support of the appeal through **Messrs. J. A. B. Orengo** advocate, the appellant appreciated that by dint of section 85A of the Elections Act appeals from the High Court in election petitions concerning membership of the National Assembly lies to this Court on matters of law only. With regard to the ruling dated 18th February 2018, which declined the appellant's application for scrutiny, it was submitted that the court misapprehended the law and applied an onerous standard of proof in the application, resulting in a wrong decision. It was contended that an election petition is an audit process designed to vindicate the right of the citizenry to a free and fair election and should therefore be an objective examination and evaluation of the electoral process to make sure that the return of an election represents fairly and accurately the will of the people. In support of this submission, counsel relied on Articles 38, 81 and 86 of the Constitution. It was further submitted that in the petition, the appellant identified several illegalities and irregularities that put the credibility of the election and the declared results into question and justified further investigations by way of scrutiny. The appellant urged that the right to scrutiny of votes is a statutory right under section 82 of the Elections Act and that a party has liberty to invoke the above provision at any stage of the proceedings. In support of this submission, the appellant cited **Gatirau Peter Munya v IEBC & 2 Others** [2014] eKLR, "**the Munya case**". As far as he was concerned, the scrutiny application was filed during the hearing of the election petition and the learned judge therefore erred by holding that the application was filed late. It was also the appellant's further submission that the application met the requisite threshold and that scrutiny ought to have been allowed, considering that the petition extensively and with specificity set out in advance all the polling stations with irregularities and illegalities that required further investigations. In support of this submission, the appellant relied on **Philip Mukwe Wasike v. James Lusweti Mukwe & 2 Others [2013] eKLR**, "**Philip Mukwe case**", **Raila Omolo Odinga and Another v IEBC & 2 Others** - Supreme Court Presidential Election No. 1 of 2017 "**Raila 2017"** as well as the Munya case.

With regard to the ruling dated 5th December 2017, the appellant submitted that the trial court erred in law and thereby made a perverse decision when it expunged annextures to the affidavit of PWII. He further contended that the trial court elevated subsidiary rules of the Oaths and Statutory Declarations Act above the peremptory provisions of Article 159(2) (d) of the Constitution and subverted substantive justice when no prejudice to the respondents was demonstrated. By expunging the annextures well over 3 months after they were filed and served on the respondents, the appellant contended, the trial court irreparably compromised the fair hearing of the petition and effectively rendered the petition redundant. It was further submitted that the decision to expunge the annextures vis-à-vis the irregularity complained of in the circumstances, was so disproportionate and draconian that no independent and reasonable tribunal properly addressing the issue could have reached that conclusion. The appellant further urged that while it is true that rule 9 of the Oaths and Statutory Declaration Rules require that exhibits to affidavits be securely sealed, under the seal of the Commissioner of Oaths and marked with serial letters of identification, the use of the word "shall" in the rule did not connote that the provision was mandatory. It was contended that in any event, the sealing and marking of exhibits in an affidavit is a matter of form rather than substance. We were urged to find that the exhibits in question were produced in evidence by PWII who was sworn before giving evidence and his oath was sufficient to cure the irregularity complained of. For this proposition, counsel relied on the persuasive High Court case of **Letein Tea Factory Company Ltd. & another v Davis Kiplangat Mutai & others** [2015] eKLR.

Turning to the judgment and decree of the High Court, the appellant submitted that compliance with the provisions of the Elections Act and the Regulations made thereunder in the conduct of an election is not discretionary because it is the cornerstone of a fair, accountable, transparent and free election. Where the 1st respondent is shown to have breached substantial electoral laws and regulations, it was submitted, such breaches go to the very root of compliance with the Constitution and affect the integrity and results of the election. In this regard, it was contended, courts are empowered by section 83 of the Elections Act to invalidate elections that do not comply with the Constitution and the law. The judgments in **Raila 2017, Moses Masika Wetangula v Musikari Kombo** [2014] eKLR) "**Wetangula case**" and **the Munya case** were cited in support of the proposition. The appellant further urged that the findings of the trial court were

fundamentally flawed in light of the totality of the evidence before it and the applicable law. Any reasonable tribunal applying the principles enunciated in the above cases to the illegalities and irregularities set out in the petition, it was contended, would have easily reached the conclusion that the same fundamentally affected the integrity of the election.

According to the appellant, the 1st and 2nd respondents failed to account for the use of the complimentary system without just cause; agents were assisting illiterate voters without supervision of Presiding Officers; there was failure to transmit results electronically to the tallying centre before; and unaccredited persons were allowed into the tallying centre to intimidate and disrupt the tallying of votes. He added that these breaches fundamentally affected the verifiability of the election contrary to Article 81 and 86 of the Constitution. To the extent that it was not possible to ascertain the number of people who voted using the complimentary mechanism pursuant to Article 44A of the Constitution, coupled with the reticence of the 1st and 2nd respondents to provide the register of voters and form 32As to verify the number of people who voted, the appellant submitted, the accountability and transparency of the election was fundamentally affected.

He further contended that in light of admission by the respondents that the Kiems kits failed in several polling stations and the failure to submit form 35As electronically, the credibility of the election results was compromised. In his view, those failures interfered with the only lawful, credible and secure way of verifying results of an election as held in **IEBC v Maina Kiai & 5 Others, Civil Appeal No. 105 of 2017** "**Maina Kiai case**" and **Raila 2017.**

The appellant's further submission was that the evidence of his 10 witnesses was not in any way controverted, including by presiding officers and agents who were present at the respective polling stations. He added that considering the serious nature of the allegations made, including bribery, intimidation of voters, denial of agents' access to polling stations during voting and counting, alterations of forms by Presiding Officers without countersigning and discrepancies between forms 35As and 35Bs, the respondents were obliged to call the affected Presiding Officers and agents to shed light on the complaints. The appellant therefore maintained that the respondents' failure to testify on those concerns was deliberate and that the trial court ought to have drawn an adverse inference against them. He cited the persuasive decision of the High Court in **Ahmed Abdullahi Mohamad & another v Mohamed Abdi Mohamed & 2 Others** [2018] eKLR to support his view.

Accordingly the appellant submitted that the impugned election of the 3rd respondent did not meet the prescribed constitutional standards of fair, transparent and verifiable election administered in an impartial, neutral, efficient, accurate and accountable manner. Instead, he contended the election was marred by fundamental illegalities that violated the principles of the Constitution and the Elections Act to wit, verifiability, transparency, accuracy, impartiality, neutrality, accountability and credibility of the results announced by the 2nd respondent.

On costs, the appellant submitted that the trial court awarded excessive and punitive costs which are a fetter to the constitutional audit system of elections. He concluded by submitting that election petitions being public interest in nature ought to be encouraged to ensure the development of Kenya's democracy.

In his oral highlights, **Mr. Awele**, learned counsel for the appellant reiterated that Kiems kits failed to function in 5 polling stations which failure was admitted by the 2nd respondent; that people were allowed to vote before verification; and that after voting, those who voted were not marked with indelible ink making it hard to tell the number of genuine voters. He further submitted that there were inconsistencies in rejected ballot papers in form 35As and 35Bs which affected 35 polling stations. To counsel, these were *ex-facie* breaches of the express provisions of section 44(a) of the Elections Act as read with regulation 69 of the Election (General) Regulations and were sufficient to annul the election. Counsel further submitted that given the glaring inconsistencies which were uncontroverted and given that on a balance of probability, there were malpractices that required further investigations, the trial court applied an onerous standard in refusing to order scrutiny. He maintained that though the application for scrutiny was filed when the formal hearing of the petition had closed and parties directed to file and serve their respective written submissions, it was still filed during the hearing of the Petition as required by law.

With regard to the expunged exhibits, counsel submitted that the ruling was draconian and that the court ought to have exercised restraint and considered the overriding objective as well as Article 159 of the Constitution. In any event, he submitted, no prejudice had been occasioned to the respondents and that by expunging the exhibits the trial court made fundamental error of law and violated Article 50 of the Constitution.

Lastly counsel took the view that the judgment was perverse due to misapplication of the law to the evidence by the trial court and urged us to find that the election was not free, accountable and verifiable.

The 1st and 2nd respondents opposed the appeal through **Messrs. Lilan & Koech Advocates** and submitted that the trial court properly expunged the exhibits to PWII's affidavit because they offended rule 9 of the Oaths and Statutory Declaration Act. In their view, the sealing and identification of the exhibits is an issue of substance rather than form. In support of the submission they relied on **Francis A. Mbalanya v Cecilia N. Waema, ELC (Machakos**) No. 21 of 2016 (ur) and **Jeremiah Nyangwara Matoke v IEBC & 2 Others**, Kisii Election Petition No. 1 of 2017 (ur). They added that the 3rd respondent was not obliged to file a formal application to expunge the exhibits and that he could validly take an objection at any stage on a pure point of law, which he did. They cited **Mukisa Biscuits Manufacturing Ltd. v West End Distributors Ltd** [1968] EA 696 to support that submission.

On scrutiny, these respondents submitted that the trial court correctly interpreted and applied section 82 of the Elections Act and Rule 29 of the Elections (Parliamentary and County Elections) Petition Rules. They contended that the application for scrutiny was made after conclusion of the hearing and that the appellant misapprehended the essence of scrutiny by seeking production of materials which had nothing to with scrutiny. In their view the application was a disguised request for further and better particulars, which ought to have been made before the commencement of the hearing of the petition. Further, the two respondents took the view that by asking for the production of the documents at the tail end of the trial, the appellant was embarking on a fishing expedition, which the trial court rightly rejected. For this proposition, the respondents relied on the **Philip Mukwe case**. In any event, the respondents argued, the appellant did not lay a basis for scrutiny because apart from mere allegations, he did not lead evidence to show that there were electoral malpractices that would warrant an order of scrutiny.

On the alleged election malpractices, irregularities and offences, the two respondents submitted that the trial court did not err in dismissing the allegation that the details of persons who were identified by means other than the Kiems kits and the physical register were unavailable, because the appellant did not lead any evidence on those complaints. On assisted voters and the alleged denial of agents' access to polling stations, these respondents submitted that the appellant did not prove the allegations and that none of the agents at the stations in question testified to substantiate the allegations.

Regarding use of relatives of candidates as polling clerks, it was submitted that the trial court correctly found that the allegation was not proved. The two respondents added that the alleged culprit, Nancy Maina was the daughter of Charles Chacha Maina, a candidate for the seat of Member of County Assembly, which was not the issue in the petition. Moreover, it was contended, it was not demonstrated how the relationship in that MCA election affect the results for Member of the National Assembly. On the alleged failure to mark voters with indelible ink, the two respondents agreed with the trial court that the appellant did not prove the allegation, which was founded on hearsay. They also contended that no witness testified to having been turned away from voting due to early closure of polling stations.

Turning to electronic transmission of results, the two respondents contended that section 39(1) (c) of the Elections Act does not make it mandatory for results, other than in the presidential election, to be transmitted electronically. They cited **Jackson Ranguma v IEBC & 2 Others**, Election Petition (Kisumu) No. 3 of 2017 to support their view.

As regards admitted errors, the respondents submitted that the only error admitted related to 2 polling stations, namely ***Nyanchwa*** and ***Masongo*** primary schools. For Nyanchwa, form 35A for polling station 2 was erroneously used to declare results for polling station No. 1, resulting in 2 sets of results for one polling station. However, they added, the 3rd respondent garnered zero votes in the station. For Masongo polling station, the error was transposition and affected all the candidates, with the 3rd respondent being the most affected with loss of 100 votes. They added that the appellant's agents authenticated the results by appending their signatures in forms 35A.

On voter bribery, once again these respondents were in agreement with the trial court's finding that the allegation was not supported by any evidence because the appellant did not call the persons who allegedly witnessed the bribery and did not report the alleged commission of the offence to the police. Regarding violence, the two respondents submitted that bribery, intimidation and violence during elections were criminal offences for which the standard of proof is high, beyond reasonable doubt. They supported the view of the trial court that the appellant did not discharge that burden of proof on him.

As regards failure to issue form 34As to agents, alterations of the said forms, stamping of forms and campaigning during voting, the respondents submitted that the allegations were never proved because no agents(s) gave evidence to that effect and further that it is not a legal requirement that form 35As be stamped. According to them, it suffices if the form is signed by the presiding officers and agents, as held by this Court in **Stephen Mutinda Mule & 3 Others v IEBC & another**, Civil Appeal No. 219 of 2014.

Next the two respondents submitted that the appellant had not proved the alleged widespread inconsistencies in the results for candidates, total votes cast, and rejected votes in both forms 35As and 35Bs in 36 polling stations because none of the agents in the listed polling stations confirmed the allegation.

Concluding their submissions, the two respondents urged that the appellant had not discharged his burden of proving the existence of the electoral malpractices set out in the petition. They added that there was no cogent and credible evidence to substantiate the claims in the petition and that whatever imperfections and administrative irregularities were found arose from genuine human errors but were not substantial enough to vitiate the election.

Mr. Terer, learned counsel for the respondents, in his oral highlights reiterated that no basis had been laid to justify an order for scrutiny. He contended that of the 10 witnesses called by the appellant, none adduced evidence of any irregularities that would warrant scrutiny. He added that though the Kiems kits malfunctioned in some polling stations, remedial measures were taken and voting continued smoothly.

Counsel further submitted that the trial court was justified in refusing to order scrutiny because it was a fishing expedition. With regard to the expunging of the exhibits, counsel took the view that sealing and serializing of exhibits was a substantive question of law, which could not be wished away under Article 159 of the Constitution.

On the judgment, counsel submitted that the 1st and 2nd respondents conducted the elections in strict compliance with Articles 38(2), 81(e) and 86 of the Constitution and that during the trial, no evidence was tendered to demonstrate substantial non-compliance with the law in the conduct of the elections. In his view, the appellant's evidence bordered on hearsay as it was based on information given to his witnesses by third parties who never testified. He also maintained that the appellant's agents authenticated the results by signing the statutory forms. He therefore urged us to find that the appeal has no merit and to dismiss it with costs.

The 3rd respondent was represented by **Messrs. Okong'o Omogeni & Co. Advocates.** It was submitted on his behalf that the purported application for scrutiny was in fact an attempt by the appellant to introduce new evidence, 28 days after the conclusion of the hearing of the petition. He added that the gathering of evidence in an election petition is a vital step, which cannot be conducted at the tail end of the trial and that the appellant did not lay any basis for scrutiny. He agreed with the conclusion of the trial court that the polling station diaries and form 35As sought in the application did not form part of his evidence in the case, and contended that allowing scrutiny in the circumstances, would have amounted to introducing the said documents through the backdoor.

It was the 3rd respondent's further submission on the question of scrutiny that there was no evidence that form 35As were overwritten, erased or otherwise corrected before or after the results were announced at the polling stations as claimed by the appellant. He contended that under cross-examination, DW2, conceded that the alterations, if at all, affected only one candidate, Mogaka Benson Musa, proving that it was not a deliberate attempt to prejudice the appellant. Further, he added, no agent from the polling stations in question testified that candidates garnered different results from what was returned, so as to justify scrutiny. He relied on the decision of the High Court in **Lenno Mwambura Mbaga v IEBC & Another**, **Election Petition No. 1 of 2013.**

Turning to the expunged the exhibits, the 3rd respondent submitted that they were properly expunged because they were not properly sealed and serialized as required by rule 9 of the Oaths and Statutory Declarations Act. He contended that rule 12(3) and 12(14) of the Elections (Parliamentary and County Elections) Petition Rules make it mandatory that every witness that a petitioner intends to call as a witness must swear an affidavit and that the Oath and Statutory Declarations Act as well as Order 19 of the Civil Procedure Rules apply to such affidavits. He further submitted that it was after conceding that indeed the exhibits were neither sealed under the seal of a commissioner of oaths and nor serialised, that the appellant invoked Article 159(d) of the Constitution. In his view, Article 159(d) is no magic cure for that kind of omission, and that edicts of the law must to be upheld. In support of this proposition he relied on **Solomon Omwenga Omache & Another v Zachary O. Ayieko & 2 others** (2016) eKLR and **Francis A. Mbalanya** (supra).

On errors and irregularities in the conduct of the election, the 3rd respondent contended that the appellant's complaints were generalized and that he did not adduce evidence of any errors and irregularities that materially affected the results of the election. He added than none of the appellant's agents adduced evidence of inconsistencies in the results in form 35As and 35Bs or in polling station diaries. The two agents who testified, he added, had signed the relevant forms thus confirming their agreement with the results. In the premises, he submitted that the trial court was right in holding that an agent who had signed the forms without recording any objection could not afterwards credibly claim that there were irregularities.

On the alleged failure to comply with regulation 69(1) of the Elections (General) Regulations, the 3rd respondent submitted that though the Kiems kits had problems in some stations, it was not widespread and in any event, the situation was remedied and voting went on smoothly thereafter. He agreed with the court that it was not credible that an agent could witness an unidentified voter being allowed to vote and still keep quiet about the irregularity.

On admission of agents in the polling stations, the 3rd respondent submitted that under regulation 74(1) of the Election (General) Regulations only a duly appointed, accredited and authorized agent has unfettered access to the polling station. He contended that the agents who claimed to have been denied access to the polling stations did not produce any letter of appointment, oath of secrecy or the IEBC badge to prove that they were accredited agents.

Turning to assisted voters, the 3rd respondent agreed with the trial court that the evidence adduced on the complaint fell short of the required standard. He maintained that the witnesses who testified on the issue did not prove that they were agents and accordingly the court found rightly that they were not credible. Furthermore, he added, none of the alleged assisted voters testified in court. He cited **Nur Nassir Abdi v Ali Wario & 2 Others** [2013] eKLR and **Mahmud Muhumed Sirat v Ali Hassan Abdirahman** [2010] eKLR to support his contention. On the complimentary mechanism for identification of voters, it was submitted that as proved by the 2nd respondent, all voters were identified by the Kiems kit either biometrically or alphanumerically.

Finally, on costs, the 3rd respondent submitted that the trial court considered the fact that the respondent was represented by Senior Counsel based in Nairobi, the input, level of research, time spent and work done by the parties in the preparation for the hearing of the petition when it capped the total costs in the consolidated petitions at Kshs. 5.4 million for the 3rd respondent, shared out equally among the 3 petitioners and 3 million for 1st and 2nd respondents shared equally amongst the 3 petitioners. He added that awarding of costs is within the discretion of the court and that the appellant had failed to show how the costs were prohibitive and unjustly excessive. Reference was made to the case of **Odhiambo Kidero & 4 Others v Ferdinand Ndungu Waititu & 4 Others [2014] eKLR** in support of this submission.

Orally highlighting the written submissions, **Mr. Okong'o Omogeni,** learned SC, for the 3rd respondent contended that the hearing of the petition was concluded on 20th December 2017 and thereafter the trial court gave directions that parties file and serve their final submissions by 23rd January 2018. The appellant did not indicate that he intended to file an application for scrutiny, which he filed two days after the period allocated to him to file and serve his final submissions. In counsel's view the trial court therefore did not misdirect itself when it rejected the application for scrutiny. He added that section 82(1) of the Elections Act does not envisage a party applying for scrutiny after conclusion of the formal hearing of the petition. Having had the advantage of listening to the entire evidence, it was contended, the trial court was in a better position to decide whether there was a proper basis for scrutiny and it found none.

On the exhibits that were expunged, it was submitted that rule 9 of the Oaths and Statutory Declarations Act require, in mandatory terms, that annextures must be sealed and serialized and therefore the trial court did not misdirect itself on the law, having also considered precedent on the issue. The 3rd respondent urged that Article 159 of the Constitution could not be resorted to where there has been a violation of specific provisions of the law.

As far as the 3rd respondent was concerned, the elections were transparent credible, free and fair. He urged us to find that the appellant handled the petition casually as regards witnesses and cogency of evidence and to dismiss the petition with costs.

The starting point in the consideration of this appeal is our jurisdiction. The jurisdiction of this Court to entertain appeals from the High Court in election petitions is derived from Article 164(3) of the Constitution as read with section 85A(1) of the Elections Act. Section 85A(1) provides, *inter alia*, that "**an appeal from the High Court in an election Petition concerning membership of the National Assembly, Senate or the Office of County Governor shall lie to the Court of Appeal on matters of law only**."

The interpretation of this section was considered at length by the Supreme Court in the Munya case. The Supreme Court held thus:

> **"a petition which requires the appellate court to re-examine the probative value of the evidence tendered at the trial court, or invites the court to calibrate any such evidence, especially calling into question the credibility of witnesses, ought not to be admitted. We believe that these principles strike a balance between the need for an appellate court to proceed from a position of deference to the trial judge and the trial record, on one hand, and the trial judge's commitment to the highest standards of knowledge, technical competence, and probity in electoral dispute adjudication, on the other hand…"**

Section 85A of the Elections Act is not a consequential legal provision. Much as the Court is free to navigate the evidential landscape on appeal, it must, in a distinct measure, show deference to the trial judge's findings regarding issues such as the credibility of witnesses and probative value of evidence. The Court must also maintain fidelity to the trial record. The evaluation of the evidence on record is only to enable the Court to determine whether the conclusions of the trial judge were supported by such evidence, or whether such conclusions were so perverse, that no reasonable tribunal would have arrived at the same.

In **Fredrick Otieno Oira v Jared Odoyo Okello & 4 Others** [2014] eKLR the Supreme Court emphasized that:

> **"…credibility of witnesses statements is a factual conclusion that only the trial court can make; and ... an appellate court should treat with a degree of deference the trial judge's finding on the record, thus according due primacy to a trial judges special knowledge derived from first-hand perception – an approach that upholds the integrity and dignity of the judicial process in electoral matters…."**

Given the jurisdictional contours laid down by the Supreme Court to govern resolution of first appeals in electoral disputes, it is not open to the appellant to challenge any factual finding of the trial court, unless such finding is perverse.

We are satisfied though that all the grounds of appeal as drawn are admissible and can be entertained by this Court as they raise purely matters of law.

The trial court too was alive to the principles governing resolution of election petitions. It reverted to "**Raila 2017"** which observed that it is not possible to have a perfect election, where all the rules and regulations are 100% complied with. The court stated:

> **"…At the outset, we must re-emphasize the fact that not every irregularity, not every infraction of the law is enough to nullify an election. Were it to be so, there would hardly be any election in this country, if not the world, that would withstand judicial scrutiny. The correct approach therefore, is for a court of law to not only determine whether the election was characterized by irregularities, but whether those irregularities were of such a nature or such a magnitude as to have either affected the result of the election, or to have so negatively impacted the integrity of the election, that no reasonable tribunal would uphold it…"**

Elections are a process and not an event. This elementary principle was clearly in the trial court's mind. We are also satisfied that it correctly and extensively addressed its mind to the burden and standard of proof in election petitions.

For purposes of this appeal, we shall collapse all the grounds of appeal into three; scrutiny, the annextures that were expunged and whether the election was marred with illegalities or irregularities of such magnitude that it was vitiated.

On scrutiny, the appellant filed an application for scrutiny in the following terms;

> ***"(a) …***
>
> ***(b) …***
>
> ***(c) An order for production of all written statements made by the presiding officers including but not limited to polling station diaries for all the polling stations particularized in paragraphs 8-9 of the grounds to this application, forms 32A's, voters identified by means other than Kiems kit, oath of secrecy and records of voters assisted to vote for purposes of scrutiny, inspection and verification.***
>
> ***(d) An order for production of all the rejected ballot papers cast in the member of the National Assembly Elections in Nyaribari Chache Constituency for purposes of scrutiny, inspection and verification.***
>
> ***(e) An order for examination and recount of all votes cast, rejected and spoilt votes and packets of counterfoils of used ballot papers used in the member of the National Assembly election in Nyaribari Chache Constituency.***
>
> ***(f) An order for production and scrutiny of all forms 35A's and form 35B's and marked register of voters used during the election for the member of the National Assembly for Nyaribari Chache constituency."***

As can readily be seen, the application went well beyond scrutiny. According to the Philip Mukwe case, the purpose of scrutiny is to:-

> (i) assist the court to investigate if the allegation of the irregularities and breaches of the law complained of were valid;
>
> (ii) assist the court in determining the valid votes cast in favour of each candidate; and
>
> (iii) assist the court to better understand the vital details of the electoral process and gain impression on the integrity of the electoral process.

In the Raila 2017 case, the Supreme Court held that an applicant merely needs to signal the intent to seek scrutiny and recount in the petition and to make a *prima facie* case for the same and if granting access to the requested information was practicable, the court ought to grant the same. Citing with approval the Peter Munya case, the Supreme Court further observed that;

> **"On the contrary, judicial opinion distinctly favours a view that commends itself to us: that, an application for scrutiny and recount, must be couched in specific terms, and clothed with particularity as to which polling stations within the constituency are to attract such scrutiny. If a party lays a clear basis for scrutiny in each and all the polling stations within the constituency, then the order ought to be granted. Otherwise, a prayer pointing to a constituency but lacking in specificity is not to be entertained…"**

It is therefore trite that where an applicant for scrutiny signals with particularity the need for scrutiny, the court should as much as possible seek to clear any lingering doubts in the allegations made about the integrity of an election. Section 82 of the Elections Act vests in the trial court the power to order scrutiny of votes in a manner it may determine. The court may make the order either on its own motion or at the instance of a party. Such an application may be made before the commencement of the trial, during the trial or after the witnesses have testified and all the evidence is on record but not after the hearing of the petition has been concluded. The order for scrutiny is also discretionary in nature and being so the discretion has to be exercised judicially.

In the context of this appeal, though the appellant had signaled very early his intention to request scrutiny, he only actualized it at the tail end of the trial. However, the application was denied by the trial court and for cogent reasons. First, the trial court took the view that although couched as a prayer for scrutiny, this was in fact a prayer for further and better particulars, seeking information that was in the possession of the 1st and 2nd respondents, which the appellant felt, would aid his case. As the trial court stated, the law provides adequate and elaborate mechanism for request for particulars, discoveries and interrogatories. An application for scrutiny therefore cannot be used to open doors for introduction of fresh evidence. Yet this is exactly what the appellant was attempting to do. In essence, scrutiny is not a lottery or a gambling exercise, which sets the court rummaging through the ballot boxes to see whether any scintilla of evidence of electoral malpractice or irregularity is available. In the Phillip Mukwe case, the court observed:

> **"It is expected that a party filing an election petition is, from the outset, seized of the grounds, facts and evidence for questioning the validity of an election and where the evidence is unclear, then a party can, on application to court, seek and obtain better particulars of that evidence from its adversary. But it would be an abuse of process to allow a party to use scrutiny for purposes of chancing new evidence. Scrutiny should not be looked upon as a lottery."**

Clearly, the way prayers (c) (d) and (f) were couched cannot be for scrutiny. They fall quite rightly in the realm of request for further and better particulars, discoveries and interrogatories. The trial court was thus right in not entertaining them. The appellant could have asked for these documents to be supplied during discovery.

The second reason advanced by the court was that the application was made at the tail end of the proceedings. From the record, the hearing of the petition was concluded on 20th December 2017. Thereafter the trial court gave directions on the filing and serving of the final written submissions and the oral highlighting of the same. The appellant did not intimate at the time of those directions that he was considering or intent on filing application for scrutiny. In fact the application for scrutiny was filed on 17th January 2018, 2 days past the timelines set for him to file and serve his final written submissions. Given the circumstances of this case and the strict timelines in the resolution of election disputes, we are not persuaded that the application was made in good faith. Much as scrutiny can be demanded anytime before determination of the petition, applying for scrutiny when the formal hearing of the petition has been concluded and directions given on the filing and service of written submissions, without any form of justification why the application was not made before the parties closed their respective cases cannot be encouraged. We are satisfied in the circumstances of this appeal that the application for scrutiny was an afterthought and that the learned judge properly exercised his discretion in rejecting it.

The third reason for the rejection of the application was that when viewed in totality, the testimony and exhibits of the ten witnesses that were called during trial by the appellant did not lay a basis for scrutiny. The Supreme Court stated in the Munya case that;

> **"what the cases establish is that although scrutiny is within the court's discretion, the applicant must establish sufficient basis for the court to order scrutiny. Further, the petitioner must not be permitted to launch a fishing expedition under the guise of an application for scrutiny in order to discover new evidence upon which to foist his or her case to invalidate an election…."**

The court further stated which we are in total agreement with, that the gathering of evidence in an election petition is a vital step which cannot be done at the tail end of a trial by seeking production of documents by way of scrutiny in an application filed 28 days after the completion of the trial. Having sat through the trial, the court had a better impression of the evidence on record in the petition. It concluded that the appellant had not shown a basis for scrutiny and that he did not lead evidence to prove that indeed, there were electoral malpractices that would warrant an order for scrutiny. The impression of the trial court regarding witnesses is a matter we should pay homage to because it was in a better position to observe the witnesses as they testified and gain some impression regarding their credibility and assess the probative value of their testimony. We are disadvantaged in that regard. Accordingly, we can only go by what the trial court observed regarding the witnesses and their evidence. There is nothing on record to remotely suggest that the trial court was wrong in its assessment of the evidence of the witnesses in particular PW1 and PW2 whom it deemed were neither credible nor helpful.

In our view, the court rightly held that the polling stations diaries sought to be scrutinized under prayer c of the application and the forms 35As under prayer (f) did not form the appellant's evidence in the petition. These were the exhibits that were expunged from the affidavit of PWII. Accordingly, allowing scrutiny on that basis would have been tantamount to introducing the same exhibits through the backdoor. Since the exhibits had been expunged, there was totally no basis for their scrutiny. We cannot fault the trial court for so holding.

Turning to the errors that were admitted, as a ground for scrutiny, the trial court held that there were certain irregularities and errors that were admitted by the 1st and 2nd respondents and that remedial measures were taken. Granted those circumstances, we ask ourselves what purpose would have scrutiny served? For example the transposition error in Masongo primary school polling station did not prejudice the appellant because the number of votes could not have affected the outcome of the elections and in any event it was the 3rd respondent who lost 100

votes due to the transposition error. Similarly, at Nyanchwa polling stations the 3rd respondent scored zero votes.

It was alleged in the petition that forms 35As in several polling stations were overwritten, erased or otherwise corrected before, during or after the results were announced. If these allegations were true, they could have formed a proper basis for scrutiny. However, under cross-examination, DW1 conceded to some alterations, but which were countersigned and affected only one candidate, Mogaka Benson Musa. As Meoli, J. stated in **Lenno Mwambura Mbaga v IEBC & Another** (UR), EP No. 1 of 2013:

> **"as irregular as they are, there is no evidence that these alterations were fraudulent or deliberate, rather than the result of usual human fallibilities. The mere existence of alterations by itself, if not shown to be deliberate and designed to affect the results will not suffice to impeach the result…"**

In rejecting the application for scrutiny, the trial court took the foregoing into account.

The appellant also complained that in dismissing the application for scrutiny, the trial court applied a standard of proof that was onerous and inclined towards proof of irregularities beyond reasonable doubt, thereby misdirecting itself. We do not think there is any substance in this claim because, as already demonstrated, the appellant only pleaded irregularities and illegalities in the petition but led no evidence to back up the claims. It is not enough to plead irregularities and illegalities and leave it to the court to beef up the claims so as to justify scrutiny. We are satisfied that the court neither adopted an onerous standard of proof nor misdirected itself.

We now turn our attention to the exhibits that were expunged from the affidavit of PWII. Those exhibits were expunged from the record, following a preliminary objection, for non-compliance with the provisions of Rule 9 of the Oaths and Statutory Declaration Rules regarding sealing and serialization. Here the appellant's complaint is threefold, namely that the preliminary objection was raised too late in the day; that the issue ought to have been raised by way of a formal application; and that the trial court gave undue regard to procedural technicalities at the expense of substantive justice.

It is trite law that a preliminary objection in the nature of the one contemplated in **Mukisa Biscuits Manufacturing Limited** (supra) can be raised at any stage of the proceedings. In this case the fact that the exhibits in question were not sealed and serialized was not disputed. It was thus a pure a point of law whether or not the exhibits were compliant with the mandatory provisions of rule 9 of the Oaths and Statutory Declarations Rules. The rule requires that exhibits be securely sealed under the seal of the commissioner for oaths and be marked with serial letters of identification. The appellant readily concedes non-compliance and does not deny that the issue was on a pure point of law. His contention is that the 3rd respondent ought to have filed a formal application to raise his object. We are not aware of any requirement that a preliminary objection can only be raised through a formal application. It can be raised, as far as we are aware, orally during the hearing if it is purely on matters of law and the opposite party has been given adequate notice. In **Jeremiah Nyangwara Matoke v IEBC & 2 Others** [2017] eKLR, **Okwany, J.** stated as follows on preliminary objections:

> **"I note that the issues raised in the preliminary objection relate to the validity of affidavits and whether this court has jurisdiction to entertain a defective affidavit…Courts have on numerous occasions held that points of law can be raised at any time in the proceedings and more so if they relate to the jurisdiction of the court. I therefore find that there was nothing wrong in timing and raising of the objection just when the hearing had commenced."**

The appellant also contends that the trial court should have ignored this omission, invoked Article 159(2) (d) of the Constitution and opted to do substantive justice. He also contended that the exhibits were produced in evidence by a witness who was under oath, which cured the irregularity. Relying on the case of **Litein Tea Factory Co. Limited** (supra), he urged that the appropriate remedy was not to expunge the exhibits, but have the errors corrected.

For the respondents however, rule 12(3) and 12(14) of the Elections (Parliamentary and County Elections) Petition Rules, make it mandatory for each person that a petitioner intends to call as a witness at the hearing to swear an affidavit, to which the Oaths and Statutory Declarations Act and Order 19 of the Civil Procedure Rules, apply. Under those rules, they contend, exhibits must be sealed and serialized sequentially.

It has been consistently stated by our courts that Article 159 is not a panacea of all manner of maladies. For example in Raila 2017, the Supreme Court stated:

> **"…..Article 159 (2)(d) of the Constitution simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the court…."** (emphasis provided).

And on the same issue, the High Court in **Francis A. Mbalanya** (supra) stated the following:

> **"..…although the plaintiff's advocate submitted that the failure to seal and mark the annextures is a defect in form that should be ignored by the court, the law has declared in mandatory terms that annextures must be sealed and numbered. That is the only way they can be allowed on record. It is therefore not true, as submitted by the Plaintiff's counsel, that the failure to seal and number the annextures is a procedural technicality that can be saved by the provisions of Article (159) (2) (d) of the Constitution and sections 1A and 1B of the Civil Procedure Act…."**

We are in agreement with the above sentiments. Rule 9 of the Oaths and Statutory Declarations Act, is intended to prevent various kinds of mischief and to ensure that a deponent owns and secures all the exhibits annexed to his affidavit. The rule further aims to prevent litigant from sneaking into the record documents that were not part of the affidavit, thus prejudicing their opponents. We therefore cannot fault the learned judge for expunging the annextures to the affidavit of PWII that were not marked as required by law.

The last broad ground for consideration in this appeal is whether the 3rd respondent was validly elected the member of the National Assembly for Nyaribari Chache Constituency. The appellant contends that the election was marred with errors; inconsistencies and irregularities, which taken singularly or collectively, affected the validity and the results of the said election. The election malpractices, irregularities and offences relied upon by the appellant were; failure to account for the use of the complimentary system without justifiable cause; assistance of illiterate voters by agents without supervision by presiding officers; failure to transmit results electronically to the tallying centre before physically doing so; incidents of bribery, violence, intimidation; denying agents access to polling stations during voting and counting; alteration of statutory forms by presiding officers without countersigning; and lastly discrepancies between forms 35As and 35Bs. Due to the foregoing illegalities and irregularities, the appellant submits that the election of the 3rd respondent as conducted by the 1st and 2nd respondents did not meet the prescribed constitutional standards of fair, transparent and verifiable election administered in an impartial, neutral, efficient, accurate and accountable manner. All the respondents hold a different view, and we agree with them for the following reasons.

With regard to the complimentary mechanism and failure of Kiems Kit, the testimony on record is that voters were identified through these gadgets, either biometrically or alphanumerically. In Biometrics, the voter was identified through placing a finger on the kit. Alphanumeric method was used when Biometrics failed. Section 44A of Elections Act underpins the use of the complimentary mechanism. Form 32As were dully filled and none of the agents requested for the same. There is also evidence that where Kiems kits failed in some polling stations, remedial action was immediately taken and voting thereafter proceeded smoothly. The agents of the appellant who claimed to have witnessed voters who had not been identified by Kiems kit being allowed to vote did not raise any issue at the polling stations where they were expected to complain or protest. They even signed form 35As without any reservations thereby confirming the results. The trial court made findings of fact in this regard and of the credibility of the witnesses, which we cannot interfere with.

On assisted voters, the trial court correctly held that the appellant had not proved the allegation that voters in polling stations were assisted to vote contrary to regulations 72(2) and (6) of the Elections (General) Regulations. According to the trial court, the evidence of PW3, PW7, PW10 and PW11 in this regard was totally lacking in credibility. The learned judge explained cogently why he did not believe the evidence of the appellant's witnesses. Those were findings on credibility of witnesses which we cannot interfere with.

The appellant also alleged that there were inconsistencies in the records of the results of the total votes cast and rejected votes as reflected in form 35As, polling station diaries and form 35Bs in 36 polling stations that were listed in the petition. Of all the appellant's agents in those polling stations, only 2 were called to testify. However, they all signed the form 35As. Based on regulation 79(3), if the agents had indeed noticed those irregularities, then they should have refused to sign the forms and recorded the reasons for their refusal. The trial court in our view rightly held that an agent who had signed the forms without recording any irregularity that he witnessed could not afterwards, under normal circumstances, credibly convince the trial court about the occurrence of the irregularities in his or her polling station.

The allegation of denial of access to polling station to agents was based on hearsay evidence. Accordingly, the allegation was not proved as required by law. In the course of the trial, it also came to light that there was mix-up in the appointment of agents of the Wiper Democratic Movement Party where the gubernatorial candidate and the appellant had different agents, thus posing challenges to the officials of the IEBC. Even in the midst of the mix-up, none of the agents in the polling stations listed in the petition came to court to confirm the allegations. The trial court was only invited to rely on the evidence of PW2, 8, 9 and 11. However, these witnesses were not in the polling stations at the time the appellant alleges his agents were denied entry. Regulation 74(2) of the Elections (General) Regulation is clear that it is only a duly appointed and authorized agent who has unfettered access to the polling station. Therefore, any person claiming to have been a party's or candidate's agent could easily have proved his status by presenting evidence of his appointment, oath of secrecy and of adherence to the election laws and regulations. In the absence of such evidence, the court was entitled to hold that no genuine agent was excluded.

On the electronic transmission of results, section 39(1C) of the Elections Act does not impose a duty to transmit results electronically, except in the presidential election. This Court reiterated that position in **Idris Abdi Abdullahi v Ahmed Bashane & 2 Others, EPA No. 19 of 2018**. See also **Seth Ambusiro Panyako v IEBC & 2 others** [2017] eKLR. It follows then that this complaint, even if it had been proved, would not have affected the election or results and was properly rejected by the trial court.

The trial court dismissed the allegation of employment of relatives of the candidates as polling clerks as unproven, and rightly so in our view. The evidence in this regard was rather tenuous. It was not established by evidence that the polling clerk in question was a daughter of any candidate in the election for Member of the County Assembly or the National Assembly.

Turning to the voters, who were allegedly not marked with indelible ink after voting in violation of Regulations 59(3) 61(4) and 69(1) of the Elections (General) Regulations, the trial court found that the compliant was not proved. None of the people alleged not to have been marked with indelible ink testified and the trial court found that the witnesses relied upon by the appellant in this regard were not credible. We cannot interfere with that conclusion.

The allegation that voters were denied the right to vote suffered the same fate as was the allegation that some polling stations were closed early or that some voters were allowed to vote beyond the prescribed time. The appellant neither disclosed the names or identity of such voters nor was any such voter called to testify. In any case, there is evidence that those who claimed that they were denied the right to vote actually voted. Finally, in all those polling stations where the infraction was alleged to have occurred, the appellant's agents signed form 35As confirming the results and signifying that the voting was conducted within the law.

It was pleaded in the petition that in several polling stations, ballot papers were incorrectly declared rejected ballot papers, and recorded as such in the polling stations diaries, as well as form 35As and 35Bs. However, none of the appellant's witnesses testified on the issue and no agent contested the votes assigned to any of the candidates in the forms 35As. As this Court recently stated in **IEBC vs Maina Kiai & 5 Others** [2017] eKLR:

> **"It is clear beyond peradventure that the polling stations is the true locus for the free exercise of the voter's will. The counting of votes as elaborately set out in the Act and the Regulations, with its open, transparent and participatory character using the ballot as the primary material, means, as it must, that the count there is clothed with a finality not to be exposed to**

any risk of variation or subversion. It sounds ill that a contrary argument that is so anathema and antithetical to integrity and accuracy should fall from the appellant's mouth…"

Accordingly, any transposition error in the derivative forms, being forms 35B is for the purposes of tallying only and the returning officer at this stage cannot change the votes as declared at the polling station. There was therefore no substance in the claim.

The trial court dismissed the allegation of voter bribery for the simple reason that those who claimed to have witnessed bribery of voters never came forward to testify. There was also no evidence that they ever made any report to the IEBC or the Police concerning the alleged bribery. In addition, bribery being a criminal offence, the degree of proof required is beyond reasonable doubt. The evidence tendered by the appellant fell short of identifying the person giving the bribes, on whose behalf the bribes were given and those who received. In **Wavinya Ndeti v IEBC & 4 Others** [2013] eKLR, it was held thus:-

"Bribery is an electoral 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 as I am concerned, and rightly so, between bribery in a criminal case and one in an 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…"

The trial court therefore rightly concluded that the evidence before it was insufficient to show that money changed hands with the intention of influencing voters. We agree with that conclusion.

Just like voter bribery, causing violence or intimidation of voters during the election exercise is also criminal in nature. Equally, the standard of proof is beyond reasonable doubt. The trial court after exhaustive evaluation of the evidence in this regard came to the conclusion that the appellant had not proved that there had been violence or intimidation at the tallying centre. The appellant's evidence was properly discounted by the 2nd respondent, who testified that the tallying centre was fully and properly secured with all the county security personnel present. Similarly, the 3rd respondent denied having caused violence at the tallying centre and contended that he was never summoned by the police to record a statement. Having heard the conflicting versions of the evidence, the learned judge accepted one version, as he was entitled to do, granted the evidence adduced. We have no basis for interfering with the findings of the learned judge.

Lastly, on erasing, overwriting and corrections on form 35As, the trial court concluded that there was no credible evidence to support the allegations, in the absence of testimony from agents who were present and witnessed the count and filing of the relevant forms. Without such evidence from agents, the appellant's allegations remained mere allegations, which the court could not act on. Again, as was stated in **Peter Gitenyi Mochorwa v Timothy Mosete E. Bosire & 2 others**, [2013] eKLR:

"There is no requirement that the entries of form 35 or any other form be without alteration. The constitutional requirement for accuracy in election system cannot be construed to mean that the statutory forms for the recording of the results of an election must never have errors, corrections or alterations. Accuracy does not mean free from error which has been corrected, an impossibility in all human endeavors, accuracy will be served, if there exists a means of verification of the entries to test for their accuracy and if necessary import correctness by alterations, whether countersigned or not…"

On costs, the award was within the discretion of the trial court. The appellant though he complains that the costs awarded were excessive, he does not demonstrate how prohibitive and unjustly excessive they were. He has not shown us that in awarding the costs, the trial court applied the wrong principles to invite our intervention. We are satisfied that the trial court did not err in the award of costs.

The upshot of all the foregoing is that the appellant has not made out a case to warrant this Court to disturb the decision of the trial court. Accordingly, the appeal is bereft of merit and is hereby dismissed with costs to the 1st, 2nd and 3rd respondents to be borne by the 1st appellant. The costs are capped at Kshs.1,500,000/- for 1st and 2nd respondents and a similar amount for 3rd respondent.

Dated and delivered at Kisumu this 27th day of July, 2018.

ASIKE-MAKHANDIA

……

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb.

……

JUDGE OF APPEAL

K. M'INOTI

……

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR