IN THE COURT OFAPPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

ELECTION PETITION APPEAL NO. 5 OF 2018

BETWEEN

DANIEL ONGONG'A ABWAO.....APPELLANT

VERSUS

MOHAMED ALI MOHAMED.....1ST RESPONDENT

MWANAJUMA GANDANI.....2ND RESPONDENT

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....3RD RESPONDENT

(Appeal from the Judgment of the Election Court at Mombasa (Achode, J.)

Dated 23rd February, 2018

in

Mombasa High Court Election Petition No. 6 of 2017)

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JUDGMENT OF THE COURT

[1] This is an appeal against the judgment of the Election Court at Mombasa regarding the election of the Member of the National Assembly for Nyali constituency during the General Elections held on 8th August, 2017. After the said elections were concluded, **Mohamed Ali Mohamed** (1st respondent) was declared duly elected Member of the National Assembly by one **Mwanajuma Gandani** (2nd respondent), being the returning officer of the **Independent Electoral and Boundaries Commission (IEBC)** ("the 3rd respondent"). The seat was hotly contested by no less than 10 candidates and each scored as follows;-

1.	Mohamed Ali Mohamed	26,798
2.	Said Abdalla Salim	16,798
3.	Ashraf Hassan Awadh Bayusuf	10,121
4.	John Charles Mcharo	3,409
5.	Kelvin Kwena LunanI	1,566
6.	Chrispus Waithaka Macharia	1,022
7.	Milicent L. Atieno Othiambo	651

8. Simon Othiambo Adalla 412

9. Ferdinard Katana C. Mwarandu 341

10. Geofrey Ochieng Ouma 335

TOTAL 61,128

Being dissatisfied with the said declaration of the 1st respondent as winner, **Daniel Ogong'a Abwao,** (appellant) describing himself as a voter within Nyali constituency filed the aforesaid election petition, the subject of this appeal, on 6th September, 2017.

[2] The petition was grounded on a myriad of allegations of irregularities and breach of Electoral Code of Conduct. As against the 1st Respondent and/or his agents, they were accused of perpetuating violence and intimidation by misuse of public resources and national security organs such as armed Prison officers, bribery of voters, campaigning and unduly influencing voters at the polling station and passing

off as a member of ODM political party by use of party colours, symbols and images associated with the NASA leader when the 1st respondent was not a candidate under the said political party. As against the 2nd & 3rd respondents and their agents, the petitioner alleged that there were discrepancies between the polling and tallying stations; that there were widespread failures of biometric machines during voting and the IEBC officials demonstrated open bias for the 1st respondent; that the 2nd and 3rd respondents allowed display of candidates' campaign material at the polling stations which was against the Regulations. During the hearing, the petitioner called 14 witnesses in his bid to support the above allegations which were also detailed in the petition.

[3] As would be expected in any hotly contested political seat such as this one, the petition was strenuously opposed by all respondents; they all filed their respective responses together with supporting affidavits. The 1st respondent filed an affidavit sworn by himself and dated 19th September, 2017 raising an objection to the petition which he contended was bad in law. He went on to justify his election which he prayed should not be invalidated as he was validly elected according to the law and that the petitioner failed to demonstrate any substantial irregularity or breach of the that law occurred during the voting to affect the results. During the hearing and in support of his case, the 1st Respondent called one witness. On the other hand, the 2nd & 3rd respondents filed a joint response to the petition dated 25th September, 2017 and a further affidavit in support to their response to the petition dated 10th January, 2018. The IEBC denied the averments in the petition contending that the impugned election was free, fair, transparent, credible and verifiable. Further, that it was conducted in full compliance with the Constitution, the Election Act and all applicable laws and regulations. In support of their case, the IEBC called 4 witnesses.

[4] The petition was fully heard by Achode J. who, upon weighing all the evidence adduced, the issues raised in the pleadings, and the applicable law, reached a conclusion that the petition was not merited and dismissed it in its entirety with costs to the respondents. This is what the learned Judge concluded in her own words;-

> **"Upon considering the pleadings, the evidence and the submissions of the counsels on record, the court finds that there was no evidence that the election herein was compromised or that the voters did not express their will at the ballot. The Petitioner herein has been unable to demonstrate to the required standards that the 1st Respondent committed the election offences as alleged. The Petitioner has also failed to demonstrate that the 2nd and 3rd Respondents failed in their mandate to ensure that the elections were conducted in a free, fair, transparent, credible and verifiable manner, and in compliance with the Constitution, the Election Act and all applicable laws and regulations. In the premise the petition dated 6th September, 2017 is hereby dismissed in its entirety with costs to the Respondents.**
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> **Section 84 of the Elections Act gives Court jurisdiction to award costs. Accordingly, in making an order for costs a Court may specify the total or maximum amount payable and the person from whom the costs are payable. In awarding costs, the Court is guided by the principle that they ought to be adequate to compensate the work done on the one hand and not to be so high as to undermine access to justice as enshrined in Article 48 of the Constitution on the other hand.**
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> **With the above in mind I therefore cap the instructions fees at Kenya Shillings 3.5 Million to the 1st Respondent and Kenya Shillings 3.5 Million to the 2nd and 3rd Respondent. In reaching my decision I am guided by the fact that the issues herein which were not complex, the number of witnesses called, the nature of the evidence adduced and the time spent on research, preparation of pleadings, applications and submissions, preparation of witnesses and in court during the actual hearing".**

[5] This is what provoked the instant appeal that is predicated on a proliferation of some 21 grounds of appeal which the petitioner also clustered under five thematic areas as follows;-

i. The learned Judge was faulted for not finding the 1st respondent committed a breach of Election Code of Conduct of passing out or plagiarizing party colours, symbols and images of ODM party leader while he was an Independent candidate.

ii. The 1st respondent was also accused of misusing state resources; notwithstanding the fact that the Judge made a specific finding that he was assigned armed prison officers as his security detail, the Judge erred by failing to hold there was breach of the provisions of the Prisons Act which amounted to an offence under the Election Offences Act and contravened paragraph 6(1) of the Electoral Code of Conduct.

iii. The judgement of the Election court was also challenged for failing to consider there was widespread violence and intimidation

of voters by the said armed prison officers who accompanied the 1st respondent while he campaigned at Uwanja wa Mbuzi and at Free Town after the close of polling but while counting was ongoing.

iv. According to the appellant, his allegations of bribery of voters were proven as a report was made to the presiding officer, therefore the Judge erred by inventing a standard of proof not known to law; the burden should have shifted to the 1st respondent who did not rebut the same.

v. On quantitative versus qualitative threshold, it was the appellant's ground that despite the Judge affirming the position in law that an election would be nullified notwithstanding the number of votes obtained as long as there were breaches of the law; in this case the Judge ignored the breaches of the law.

[6] This appeal was opposed; the 2nd and 3rd respondents filed a notice affirming the decision of the Election Court dated 9th April, 2018. With regard to breach of paragraph 6 of the Code of Conduct, the 2nd and 3rd respondents stated that the appellant did not report any of the alleged plagiarism by the 1st respondent to the 3rd respondent as required under paragraph 9(b) of the Code of Conduct while considering the alleged acts happened during the campaign period; they went on to distinguish the authorities cited by the appellant before the Election Court as irrelevant as they dealt with violations of the Electoral Code of Conduct instituted in conformity with **Sections 7, 8, 9, 10** and **11** of the 2012 Code which expressly provide such disputes are lodged before the date of the election before the **Political Parties Dispute Resolution Tribunal (PPDT).** They urged the decision of the trial court on the issue of misuse of state funds be rejected on the same grounds as the appellant failed to lead any evidence to prove the officers induce or compel any person to vote for the 1st respondent. Finally, we were urged to affirm the findings that the appellant failed to prove or lead any evidence at all to show the 2nd and 3rd respondents failed to conduct the Nyali Constituency Member of National Assembly election in a free, fair, transparent, credible and verifiable manner and in compliance with the Constitution, the Election Act and the applicable laws and regulations.

[7] During the plenary hearing of this appeal, Mr Saeed Ali, learned counsel for the appellant relied on his written submissions which he highlighted by arguing that the appellant discharged the burden of proof that the 1st respondent passed out by using ODM party colours. Counsel for the appellant faulted the trial Judge's finding that the 1st respondent did not commit an election offence of passing off in contravention of the law; for finding there was no proper evidence to show that colour, image and symbols used by the 1st respondent mislead voters to the detriment of other candidates. In this regard, counsel made reference to paragraph 6 (g) of the Electoral Code of Conduct that forbids candidates from plagiarizing the symbols and acronyms of other parties; **Article 84** of the Constitution of Kenya 2010 and **Section 110(1)** of the Elections Act, 2011 that require candidates and political parties to adhere to the Code of Conduct.

[8] In his further arguments on misuse of state resources and violence, the appellant faulted the trial court for failing to make a specific finding there having been no contention that the use of prison officers assigned to the 1st respondent contravened the Prisons Act, and by extension the Constitution and the Election laws. Moreover, the Judge failed to consider the evidence on record regarding violence and intimidation of voters by the said officers. The third issue raised by the appellant touched on bribery of voters; counsel went on to submit that the trial court erred in finding the alleged bribery of voters was not proved by way of evidence adduced in court; in his view this was a misnomer as the appellants' witnesses discharged the evidential burden of proof cast on him. Furthermore, the Election court erred in finding that an act of bribery occurring outside a polling station did not affect the actual election process which according to counsel was a misdirection. Moreover, the Judge erred by not finding any acts of bribery even if it was after a voter had cast his or her ballot constituted bribery.

[9] Lastly, on qualitative and quantitative threshold, Mr. Saeed urged us to find that despite the trial court affirming the position in law that an election would be nullified regardless of the number of voters albeit through a flawed process, as the end does not justify the means, the court erred in disregarding the breaches of the law by the 1st respondent and by laying more emphasizes on the quantitative aspect of votes. For those reasons, counsel urged us to allow the appeal and set aside the judgment of 23rd February, 2018.

[10] Rising to oppose the appeal on behalf of the 1st respondent was Mr. Chacha Odera; he relied on his written submissions and made some brief highlights thereto. Counsel reminded us of the provisions of **Section 85A** of the Elections Act which stipulates that appeals from the High court to the Court of Appeal are limited to matters of law only. He cited the cases of **John Munuve Mati v. Returning Officer Mwingi North Constituency & 2 others** [2018] eKLR and **Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others** [2014] eKLR in support of this position. Commenting on the standard of proof required in an election petition, counsel posited that this is higher than on a balance of probabilities as has been repeatedly stated in many decisions among them the one of **Clement Kungu Waibara v. Bernard Chege Mburu & 2 others**.

[11] On the substantive grounds of the appeal, Mr. Chacha supported the trial court's findings and conclusions that the allegations made by the appellant regarding the possible influence of voters by colour, image and symbols of ODM party during the campaign period was not backed by any evidence; that indeed it was accepted by the Judge who had the opportunity to view the different shades of colours that the colour tones were different; the colours, symbols and images used by the 1st respondent did not amount to plagiarism. In any event the proper jurisdiction to deal with the alleged breach(es) contained in **paragraph 6(g)** of the Code of Conduct vested on the 3rd respondent or the PPDT. It was noteworthy that no complaint was

lodged thereto in relation to the alleged breach. Responding to grounds that touched on allegations of misuse of State resources and violence; counsel for the 1st respondent advanced the view that prison officers who were attached to the 1st respondent were properly and legally assigned the said duties after he complained to the County Commander of threats on his life. The 1st respondent did not assign himself the police officers, as it is the duty of the state to provide security, therefore the trial court's decision was properly arrived at.

[12] On the appellant's allegation that the trial court erred in law in failing to consider the evidence relating to violence and intimidation perpetrated by the 1st respondent to the constituents of Nyali during the election period, counsel urged us to bring to bear the jurisdiction of

this Court, which is to consider only matters of law and not matters of fact. As regards the grounds clustered under allegations of bribery of voters; counsel for the 1st respondent reiterated the trial court's decision that from the materials and evidence before court, it fell short of proving that any bribes were given out on behalf of the 1st respondent. Lastly, on the qualitative and quantitative threshold, counsel for the 1st respondent associated himself with the trial court's finding that no evidence was tendered to prove any compromise on the voters or any obstacle to the voters to express their will at the ballot on 8th August, 2017. Counsel for the 1st respondent therefore concluded by urging us to dismiss the instant appeal with costs to the respondents.

[13] This appeal was also opposed by the 2nd and 3rd respondents represented by Mr. Tony Odera learned counsel; he relied on the notice of grounds affirming the trial court's decision and his written submissions. On the alleged use of ODM party colours, image and symbols, counsel urged us to find in addition to the factual determination by the trial Judge that there were marked differences in the shade of colours and it is the trial Judge who had the advantage of being taken through the various shades, to take judicial notice that the 2017 general election, was largely predicated on party coalitions and there are many candidates that identified themselves with a particular coalition without belonging to ODM party. Another point to note was the fact that the appellant did not invoke the jurisdiction of the Political Party Dispute Resolution Tribunal that had the mandate to arbitrate on the Electoral Code of Conduct or even the IEBC. The appellant failed also to report the alleged plagiarism by the 1st respondent to the 3rd respondent as required under **paragraph 9 (b)** of the Code of Conduct.

[14] Although counsel admitted that the Election Offences Act prohibits bribery and treating by candidates so as to influence them to vote or refrain from voting for a particular candidate, he strongly argued that a person making such allegations that are *quasi* criminal in nature bears the burden of proof which the appellant failed to discharge. Counsel for the 2nd and 3rd respondent sided with the trial court's decision that the incidences complained of did not affect the electioneering process and that

the allegation of voter bribery was not proved whatsoever. Counsel cited the cases of **Mercy Kirito Mutegi v. Beatrice Nkatha Nyaga & 2 Others** [2013] eKLR and **Richard Nchapi Leigagu v. IEBC & 2 Others** [2013] eKLR.

[15] On the last issue of qualitative and quantitative threshold, counsel for the 2nd and 3rd respondents submitted that there was no evidence at all to show the impugned election was not conducted in compliance with **Article 38(3)** of the Constitution on the citizens' right to vote; it adhered to the general principles of elections under **Article 81(e)** of the Constitution; and that the 2nd and 3rd respondents failed or neglected to follow the standards outlined under **Article 86** of the Constitution in the conduct of the said election. Counsel also submitted that the appellant did not fault the quantitative figures that constituted the declared results. As such, he had to prove that the irregularities were such that they would affect the integrity of the election and thus affect the results. Counsel supported this by citing case of **; - Moses Masika Wetangula v. Musikari Nazi Kombo & 2 Others** [2014] eKLR. In conclusion, counsel urged us to consider the totality of the issues raised in this appeal were not even legal issues and uphold the decision of the Judge that the election for Nyali Constituency Member of National Assembly was conducted substantially in accordance with the principles of the Constitution and any irregularities if at all were minimal, not deliberate, or were occasioned by fatigue and human imperfections.

[16] Having considered the grounds of appeal, the record, the submissions of the parties herein as summarized here above and the law; it is appropriate to rehash the jurisdiction of this Court in an appeal such as this which is donated by **Section 85A** of the Elections Act as follows;

> **"(1) 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 and shall be-"**

It therefore follows only points of law shall fall for determination in this appeal. We also restate that election disputes are not ordinary suits, they are *sui generis*, matters which in matters of appeal are the ones aptly envisaged in the Constitution as under **Article 164(3):**

> ***"The Court of Appeal has jurisdiction to hear appeals from:-***
>
> ***a. The High Court and***
>
> ***b. Any other court or tribunal as prescribed by an Act of Parliament".***

See also the dicta by the Supreme Court of India in the decision of **Jyoti Basu & Others V. Debi Bhosal & Others** reported in AIR 1982 SC, 983. The Court held;

> **"An election petition is not an action at common law, or in equity. It is a statutory proceeding to which neither the common law nor the principles of equity apply but only those rules which the statute makes and applies it is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to common law and equity must remain strangers to the election law unless statutorily embodied. A court has no right to resort to them on considerations of alleged policy in such matters, as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, the court is put in a strait jacket…"**

[17] What are the points of law raised in this appeal? These are basically matters to be extrapolated from the facts; in other words, the nature of the issues raised in this appeal will necessitate our examination of the conclusions reached by the trial Judge, to establish whether they were erroneous or so perverse that no reasonable tribunal guided by the same facts would arrive at the same conclusion. We will do so cautiously while bearing in mind the guiding principles that no appellate Court will ordinarily differ with the findings on a question of fact, by the trial Judge who had the advantage of hearing and seeing the witnesses. Our role is to review the evidence and determine whether the conclusions reached are in accordance with the evidence and the law. A conclusion although based on primary factual evidence that is erroneous becomes a point of law. See the case of **Timamy Issa Abdalla v Swaleh Salim Imu & Others,** Civil Appeal No. 36 of 2013:

"…Although the court has jurisdiction to re-consider the evidence, re-evaluate and draw its own conclusion, this jurisdiction must be exercised cautiously. This caution is of greater significance in an appeal such as the one before us where the right of appeal is limited to matters of law only, because, the jurisdiction of this court to draw its own conclusion can only apply to conclusions of law. We must therefore be careful to isolate conclusions of law from conclusions of facts and only interfere if two conditions are met. Firstly that the conclusions are conclusions of law, and secondly that the conclusions of law arrived at cannot reasonably be drawn from the findings of the lower court on the facts…"

In a similar case, this Court held in **Hahn V Singh [1985] KLR 716** that:

"On appeal of course, before coming to a different conclusion on the typed evidence this court should be satisfied that the advantage enjoyed by the trial judge of seeing and hearing the witnesses is not sufficient to explain or justify his conclusion."

[18] Following the same outline of presentation of this appeal, the 1st issue was an allegation that the 1st respondent, an independent candidate wrongly used the ODM or NASA leaders' colors, symbols and images to pass out as an ODM candidate which was a breach of the Code of Conduct which forbids plagiarizing the symbols, colors and acronyms of other parties. First of all, the trial Judge considered and accepted the arguments by the respondents, that the 2017 elections were conducted through coalitions of political parties that coalesced on policy and carried out campaigns based on the preferred Presidential candidate. Further they argued that since this was a continuing complaint during the campaigns it ought to have been raised before the PPDT or the IEBC as both bodies were vested with some power to settle disputes regarding political parties and breach of the code of conduct.

[19] According to the respondents where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be followed. To reinforce the above argument the following cases were cited; **Speaker of National Assembly v. Karume** [1992] KLR 22; and **Kimani Wanyoike v. Eectoral Commission of Kenya** [1995] eKLR. The ratio decidendi in both cases was that where a dispute resolution mechanism exists outside courts, the same must be exhausted before the jurisdiction of the courts is invoked. Courts ought to be for a last resort and not the first port of call the moment a storm brews.

[20] We agree with the elucidation of the above arguments by the respondents that the appellant should not have squandered the opportunity to present his grievances to the PPDT or the IEBC as the case may have been and who would have determined the same, and perhaps granted him an effective remedy if found to have a good case. Paragraph 7 of the Code of Conduct grants the 3rd respondent authority to deal with matters arising out of breach of the Code. In that regard the 3rd respondent is mandated to impose several sanctions including issuing of a formal warning; imposing a fine; limiting the utilization of media airtime among others. Further, under Paragraph 9 of the same, the 3rd respondent has the option, on its own motion or upon a report made to it, to institute proceedings in the High Court in the case of alleged infringement of the Code of conduct by a political party or by a candidate. On the other hand, the High Court is mandated under paragraph 11 of the Code of Conduct to render a decision on such a matter before the election is conducted.

[21] Just like the trial Judge, we find the above referenced provisions of the Code of Conduct reveal that the 3rd respondent was responsible for dealing with disputes relating to the Code of Conduct, either as the arbiter or as the party mandated to institute proceedings before the High court. In any event, the dispute ought to be concluded before the election in question. PPDT was the institution that was mandated to determine disputes touching on political parties while IEBC dealt with breaches of Code of Conduct. We are guarded that where Parliament has provided statutory mechanism for resolving disputes, parties must exhaust the available mechanisms for resolving disputes. We also find the trial Judge evaluated the evidence as indeed was required and made her conclusion in this regard which we cannot depart from as it is the Judge who had the advantage of seeing the witnesses testify. This is what the Judge stated in her own words;-

"PW1 and PW2 both testified that the posters of the 1st respondent did not cause them any confusion; neither did they produce any evidence to demonstrate that the 1st respondent gained unfairly by using the picture of Mr. Raila Odinga. In fact, their testimonies were to the contrary. In their testimonies. PW1 stated thus;

"No, I have not named any person in my affidavit who swore that he was deceived into voting for the 1st respondent because of the perception that he was of NASA. I was not confused in that way either."

PW6 testified in the same vein as follows;-

"I have not come across anyone who voted for Mohamed Ali. I did not vote for him."

From the forgoing, the Judge concluded;-

"It would therefore appear that the petitioner's assertions concerning the influence that the colour and image used in the campaign by the 1st respondent exerted on the voters are not backed by any evidence to show that the colour and image did influence other candidate's followers negatively or at all."

These allegations were disposed as stated above and on our part, we find no justifiable reason to depart from these findings that were based on the Judges evaluation of the evidence and examination of the party colours, symbols and images which the Judge had the advantage of seeing and hearing the witnesses as they testified. Consequently, these set of grounds of appeal under this thematic area would fail.

[22] We will consider the next cluster of allegations on violence, intimidation and misuse of state resources together. Counsel for the appellant generally faulted the trial court for failing to find that the 1st respondent contravened the Prisons Act, the Electoral Code of Conduct and the Election Offences Act; despite finding that prison officers were assigned to the 1st respondent as his security detail. In

particular, counsel complained about failure of the court to make a specific finding that there was contravention of **Section 12** of the Election Offences Act; in that prison officers used fire arms and ammunition during the elections period to intimidate and unduly influence voters in favour of the 1st respondent; and that the 1st respondent perpetrated violence and used those officers to intimidate voters within Nyali Constituency.

[23] On the other hand, the 1st respondent contended that the trial Judge accepted his version of how the prison officers ended up being his security detail as plausible since he had procedurally applied for police protection following threats on his life. It was apparent from the evidence tendered that the 1st respondent formally applied for body guards vide a letter that he produced in court. It was against that background that he was assigned the two prison officers. The Judge observed that no evidence was tendered to show the manner in which the 1st respondent misused public resources, or how the said officers influenced the outcome of the election. We take note of the provisions of **Section 68** of the Elections Act that forbids a candidate or other person from using public resources for purposes of campaigning during an election or referendum. In this case, the issue of use of state resources speaks to the prison officers attached to the 1st respondent. There is no dispute that the officers were assigned to the 1st respondent by the County Commandant upon formal application. We agree with the conclusion by the Judge that the 1st respondent did not assign himself the said officers. They were assigned by the County Commandant who was not a party to the said proceedings. Use of Prison officers who are described as public officers, or their influence during electioneering process is forbidden under **Section 12** of the Election Offences Act which makes provisions on use of national security organs as follows:-

> **"A candidate or any other person who uses a public officer, or the national security organs to induce or compel any person to support a particular candidate or political party commits an offence and is liable on conviction to a fine not exceeding ten million shillings or to imprisonment for a term not exceeding six years or to both".**

[24] Flowing from the said provisions of the law, the public officer has to be shown to have been used to induce or compel any person to support a particular candidate or political party. This, as was concluded by the trial Judge, the elements of the offence created by the aforesaid section was not proved. As we draw this conclusion, we need to reiterate we have a very limited scope in examining conclusions that were drawn after the evidence by various witnesses which touch on the credibility of witnesses. This, therefore, is also the case as regards the analysis of the evidence regarding acts of violence and intimidation at Uwanja wa Mbuzi and at Free Town which the Judge found happened one month before the elections and thus could not have affected the elections and the outcome thereto. The same applies to the question of whether the presence of prison officers created undue influence on the voters. The evidence of mere presence of armed prison officers, without more as found by the trial Judge could not suffice as inducement or undue influence on voters to vote in favour of the 1st respondent. See also the Supreme Court decision in the case of;- **Raila Odinga & 5 Others v. IEBC & 3 Others** [2013] eKLR the Supreme Court held that:-

> **"…Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections".**

[25] On the issue of bribery of voters, the appellant faulted the trial court for failing to consider the evidence put forth by the appellant on allegations of bribery by the 1st respondent and/or his agents; for failing to find that a report that was made to the presiding officer of a station or police officer on bribery was not proved so as to shift the burden of proof to the 1st respondent to controvert the appellant's evidence; for making a finding that an act of bribery outside a polling station but within the vicinity had no relation to the election despite the same having been done during election day; and for finding that acts of bribery after a voter had cast his ballot did not constitute bribery. In answer to these allegations, the Judge observed that whereas **Babu Said Abdalla** (PW2) testified that he was standing next to police officers when he saw the 1st respondent and a Somali woman giving out money at Khadija Primary School Polling Station, he neither reported the incident to the police officers nor to agents of the 3rd respondent or any officer at the polling station. Another witness who gave evidence in this regard, **Wycliff Otieno Odongo** (PW7) stated that he witnessed one Mr. Otieno enter the 1st respondent's car and emerge later with his pockets bulging with what he concluded was money. This witness did not, however, see the actual money in the pocket or as it was being distributed. He also did not see the 1st respondent giving the said Mr. Otieno money. The evidence of yet another witness, Kelvin Kwena Lunani (PW8), was that he saw women who had been giving out bribes on behalf of the 1st respondent enter his car but when he approached the car to confront them on the bribery allegations, he was restrained by the 1st respondent's security who drew out guns. Mohamed Omar Karama (PW12) on his part stated that he did not see the 1st respondent give out money at any time and that the women who were giving out money were giving it to people who had already voted. Based on these observations, the trial court concluded that the allegations of bribery against the 1st respondent was not proved.

[26] The Judge further observed that for the offence of bribery to be proved under the Elections Act, there had to be evidence that voters were influenced. The Judge relied on the case of **Simon Nyaundi Ogari & Another v. Joel Omagwa Onyancha & 2 others** (2008) eKLR where Musinga J. (as he then was) stated:-

> **"Clear and unequivocal proof is required to prove an allegation of bribery. Mere suspicion is not sufficient. It is true that it is not that easy to prove bribery, especially where it is done in secrecy. In such cases, perhaps bribery may be inferred from some peculiar aspects of a case but when it is alleged that the bribery took place publicly in the presence of many people, the court cannot be satisfied by anything less than the best evidence which is always direct evidence given first hand."**

[27] The Supreme Court in **Raila Amollo Odinga & Another v. IEBC & 2 others** (2017) eKLR reiterated its position in **Raila Odinga & 5 Others v. IEBC & 3 others** [2013] eKLR where the court stated:-

> **"The law places the common law principle of onus probandi on the person who asserts a fact to prove it. Section 107 of the Evidence Act, Cap 80 of the Laws of Kenya, legislates this principle in the words: "Whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." In election disputes, as was stated by the Canadian Supreme Court in the case of Opitz v. Wrzesnewsky (2012) SCC**

55, an applicant who seeks to annul an election bears the legal burden of proof throughout"

[28] Were the conclusions drawn by the Judge supported by the evidence as postulated by the appellant that his witnesses had discharged the burden of proof and thus shifted it to the respondents? It is trite that an inference leading to a conclusion of fact can only be drawn when there is one irresistible deduction made from proven set of facts. The circumstances in this case did not warrant the trial court to draw an adverse inference against the respondents whose legal effect would be to shift the legal burden of proof from the petitioner to the respondents. We agree the appellant's witnesses did not clearly connect the acts of bribery with the respondents and it is for that reason that the legal burden of proof remained with the petitioner. With specific reference to bribery, the Court of Appeal in **M'nkiria Petkay Shem Miriti v Ragwa Samuel Mbae & 2 others** [2014] eKLR observed:-

> **"We concur with the learned Judge that the offence of bribery and communication with voters was not proved to the required standard. Why do we say so? This is because there was no evidence connecting the 1st respondent to the alleged offences. The appellant on cross-examination admitted that neither he nor any of his witnesses saw the 1st respondent personally bribing voters. He contended that it was the 1st respondent's agents who bribed voters. We find that there was need for the appellant to connect the alleged agents with the 1st respondent and that they had acted under the direction of the 1st respondent."**

In the present case, it cannot be said conclusively that the offence of bribery was proved given the speculative evidence presented before the trial court. The grounds of appeal predicated thereto fails.

[29] Lastly, on qualitative versus quantitative threshold, it was the appellant's case that the trial court erred in law in disregarding the breaches of law by the 1st respondent and instead paid undue regard to the quantity of votes obtained by the 1st respondent even after affirming the position of law that an election would be nullified, notwithstanding the number of votes obtained where the process is flawed. In his submissions, he quoted the interpretation given to **section 83** of the Elections Act by the Supreme Court in **Raila Amollo Odinga & Another v. IEBC & 2 others** (2017) eKLR. It was stated that it would be tantamount to misreading the said provision if a petitioner were required to prove both limbs of the section. It was his submission that the result in the impugned election cannot be said to reflect the sovereignty and the will of the people when it had been marred by violence, intimidation, undue influence and improper use of public resources and state organs.

[30] To counter this, counsel for the 1st respondent submitted that the appellant's case did not meet the threshold of proof as set out in the case of **Clement Kungu Waibara** (supra). He went on to state that in order for a court to upset an election, the evidence adduced by the appellant must be consistent, credible and cogent. In this case, it was generally conceded by all the witnesses including the appellant's that no voter was impeded from expressing his or her will at the ballot and that the alleged election offences were not proved to the required standard. In further elaboration, counsel for the 2nd and 3rd respondents submitted that the impugned election was conducted in compliance with **Article 38(3)** of the Constitution on the citizens' right to vote; it adhered to the general principles of elections under **Article 81(e)** of the Constitution; and that the 2nd and 3rd respondents followed the standards outlined under **Article 86** of the Constitution during the conduct of the said election. Also, the appellant did not fault the quantitative figures that constituted the declared results. As such, he had to prove that the irregularities were to such an extent that they would impeach the integrity of the election and thus affect the results. In totality, the election for Nyali Constituency Member of National Assembly was conducted substantially in accordance with the principles of the Constitution and any irregularities if at all were minimal, not deliberate, were occasioned by fatigue and human imperfections.

[31] On our part, we have followed the dicta in;- **Raila Amollo Odinga & Another v. IEBC & 2 Others** (2017) eKLR which rendered an interpretation of the provisions of **Section 83** of the Elections Act as thus:-

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

Accordingly, there is no indication whatsoever of a warped interpretation by the trial court in its analysis and conclusion of the qualitative and quantitative threshold as captured under **Section 83** of the Elections Act. Having considered the totality of the evidence adduced in support of the petition, the trial court quite correctly and arrived at the conclusion that the appellant was unable to prove that the conduct of the election in respect of Member of National Assembly for Nyali constituency substantially violated the principles laid down in the Constitution as well as other written law on elections. Accordingly, we find this appeal lacking in merit, which we hereby order dismissed as we uphold the decision of the High Court.

[32] On costs, the appellant did not contest the costs awarded by the High Court, therefore, nothing arises thereto. As regards costs of the appeal, we shall follow the general principle that costs follow the event and the appellant shall bear the costs of this appeal as well.

FINAL ORDERS

a. The appellant's appeal fails and the judgment of the High court given on 23rd February, 2018 is hereby upheld.

b. The appellant shall bear the costs of the 1st respondent in this appeal to be taxed, but not to exceed Kshs.500,000 (Kenya shillings five hundred thousand).

c. The appellant shall bear the costs of the 2nd and 3rd respondents in this appeal, to be taxed, but not to exceed Kshs 500,000 (Kenya shillings five hundred thousand).

Dated and delivered at Mombasa this 26th day of July, 2018.

ALNASHIR VISRAM

…….……..

JUDGE OF APPEAL

W. KARANJA

……..……..

JUDGE OF APPEAL

M. K. KOOME

…….

JUDGE OF APPEAL

I certify that this is a

true copy of the original,

DEPUTY REGISTRAR