IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, JJ.A)

ELECTION PETITION APPEAL NO 22 OF 2018

BETWEEN

DENNIS MAGARE MAKORI.....1ST APPELLANT

SAMSON BICHANGA.....2ND APPELLANT

AND

THE INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION.....1ST RESPONDENT

WILSON KIMUTAI KIPCHUMBA.....2ND RESPONDENT

SILVANUS OSORO ONYIEGO..... .....3RD RESPONDENT

JACOB MBICHA MOGERE.....4TH RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Kisii, (Ndung'u, J.) dated 2nd March 2018

in

Election Petition No 5 of 2017)

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JUDGMENT OF THE COURT

Introduction and Background

1. In the contest for the position of Member of National Assembly in South Mugirango Constituency in Kisii County, which culminated in the election of 8th August 2017, the appellants, **Denis Magare Makori** (the 1st appellant) and **Samson Bichanga** (the 2nd appellant), as well as the 3rd Respondent, **Silvanus Osoro Onyiego**, were candidates. They emerged the top three candidates with the **Independent Electoral Boundaries & Boundaries Commission** (IEBC), the 1st respondent herein, declaring the results as follows:

Silvanus Osoro Onyiego 11,168

Denis Magare Makori 10,434

Samson Bichanga 7,074

2. **Wilson Kimutai Kipchumba**, the 2nd respondent, who was the returning officer appointed by the 1st respondent to conduct the election in South Mugirango Constituency, declared the results and issued the 3rd respondent with a certificate confirming that he had been duly elected

as the Member of National Assembly for South Mugirango Constituency.

3. During the elections, **Jacob Mbicha Mogere** (the 4th respondent) was the Presiding Officer duly appointed by the 1st respondent as its official to conduct the election at Makara Polling Station in South Mugirango Constituency.

4. The appellants were aggrieved with the results and filed a petition dated 4th September 2017 in the High Court of Kenya at Kisii in which they challenged the declaration of the 3rd respondent as the winner of the election. The appellants disputed the tally of the votes from the polling stations contending that it was inaccurate. The appellants also alleged that there were various errors, flaws, fraud, illegalities, irregularities and contraventions of the law, and as such the election was neither free, nor fair or credible, nor did it represent the will of the people of South Mugirango Constituency.

5. The appellants raised various grounds in the petition including that there was incorrect tallying of the valid votes cast and that the presiding officer used invalid results to declare the 3rd respondent as the winner of the election; that there were various election offences conducted during the tallying and declaration stage, including the making of false entries in the statutory declaration forms as well as giving and receiving of bribes which undermined the credibility of the elections and rendered the results declared null and void; that the presiding officers failed to seal the ballot boxes contrary to the **Elections (General) Regulations, 2012 (the Regulations, 2012)** which led to stuffing of the ballot boxes with ballot papers, making the results from the affected polling stations unverifiable; and that there was violence and intimidation instigated by the 3rd respondent and his agents all of which cumulatively affected the conduct and the outcome of the election and rendered it a nullity.

6. On these grounds, the appellants urged the court to declare that the 3rd respondent was not properly elected, and to order the 1st respondent to organize and conduct a fresh election for the position of Member of National Assembly for South Mugirango Constituency. The petitioners also invited the election court to make a determination on the commission of malpractices of a criminal nature that may have been conducted by either the 2nd respondent or the 4th respondent, and for an order of costs of the petition.

7. The respondents collectively denied the averments set out in the petition and submitted that the election was conducted in strict compliance with the law and that any flaws or irregularities were as a result of minor clerical errors which did not in any way affect the results of the election. The respondents urged the court to be guided by **section 83** of the **Elections Act** which limits the power of the court from invalidating an election on the basis of mere allegations of non-compliance by a petitioner. They further contended that there was no proof of any of the appellants' claims with respect to bribery, violence or intimidation. The 3rd respondent contended that the petition was incurably defective as the affidavit sworn by the 1st appellant in support of the petition did not indicate that he had been duly authorized to swear the affidavit on behalf of the 2nd respondent.

8. After receiving oral testimony as well as hearing the submissions of counsel for the parties, the election court framed six issues for its determination. These were whether or not; the election was conducted in accordance with the legal framework; there was non-compliance which affected the results of the election; the 4th respondent was guilty of an election offence; the 3rd respondent was validly declared as the winner of the election; and who should bear the costs of the petition.

9. After considering the issues raised by the appellants, the election court found that while there were administrative lapses on the part of the 1st respondent, these did not impact negatively on the appellants nor did they give the 3rd respondent any undue advantage. The court held that the election had been conducted substantially in compliance with the law, that the appellants had failed to adequately prove the grounds in their petition and dismissed it with costs to the respondents.

The appeal

10. Aggrieved by the findings of the election court, the appellants preferred this appeal. The memorandum of appeal contains 12 grounds upon which the appellants urge this Court to set aside the judgment of the election court and find that the 3rd respondent was not validly elected as the Member of National Assembly for South Mugirango Constituency.

11. Pursuant to directions given by this Court during the pre-hearing conference on 20th April 2018, learned counsel for each of the parties filed lists of issues for determination. These issues were presented together with written submissions which were highlighted orally on 23rd May 2015. Learned counsel **Mr Omwanza Ombati** and **Mr Titus Koceyo** represented the appellants while **Mr Michael Muchemi** represented the 1st, 2nd and 4th respondents while **Dr Otiende Amollo** and **Mr Geoffrey Mokua** represented the 3rd respondent.

The appellants' submissions

12. The appellants' first submission is with respect to the issue of whether the learned judge erred in law by deviating from the electoral principles set in the decision of the Supreme Court in ***Raila Amolo Odinga & Another v IEBC (2017) eKLR,*** **(Raila Odinga, 2017)** and whether the learned judge erred in law in relying on section 83 of the **Elections Act**, without taking into account the provisions of Articles 81, 86, 87 and 88 of the Constitution with respect to the threshold of the conduct of the elections in Kenya. He submitted that in ***Raila Odinga, 2017*** the Supreme Court found that the process of elections was as important as the numbers in an election and that the results of an election can be invalidated if a petitioner can prove that the election was not conducted in compliance with the principles laid down in the law.

13. The appellants pointed out several errors that occurred during the election which, in their view, vitiated the entire election. The first is

with respect to the tallying of votes at **Mariwa Primary School Polling Station stream one**, where the form 35A that was used by the 1st and 2nd respondents was visibly different from the rest of the forms 35A used in the other polling stations; that this polling station had three different sets of results. The appellants submitted that the 1st respondent had standardized the forms for use in the election and embedded security features to safeguard the elections and in compliance with Article 86(a) of the Constitution of Kenya which mandates the 1st respondent to secure the election and ensure that it is transparent and accountable. To buttress this submission, the appellants relied on the decision of the Supreme Court of Kenya in ***Raila Odinga 2017*** where the Court, considering the various duties of the 1st respondent as well as the forms to be used in the election observed that:

> ***[362] "... there is a reasonable expectation that all the forms ought to be in a standard form and format; and though there is no specific provision requiring the forms to have watermarks and serial numbers as security features…."***

14. In explaining this anomaly the 2nd Respondent submitted that the form was different because it had been downloaded from the internet yet he failed to avail the original form. The appellants contended that had the election court addressed this issue, it would have reached a different conclusion but instead chose to find that no complaint on the same had been raised on the said polling station. The appellants invited us to find, like the court did in ***Peter Kimori Maranga & Another v Joel Omagwa & 2 Others (2013) eKLR*** where the High Court considered allegations of violations of the Constitution notwithstanding that these had not been raised in the petition, and stated that:-

> ***"33. For my part, I have considered that where there is an alleged issue of illegality, I have allowed the matter to be raised notwithstanding that the issue has not been raised in the petition. I consider that the substantial justice principle of Article 159 of the Constitution allows the consideration of such an issue of alleged illegality not withstanding non-pleaded status because the rule of law of which legality is a central part is one of the values of the new constitution. There cannot be greater illegality than the contravention of the Constitution."***

15. The appellants submitted that the election court fell into error when it failed to consider this evidence, and that had it done its duty, it would have reached a different conclusion since the number of registered voters at this polling station were 471, and the gap in votes between the 1st appellant and the 3rd respondent was 734 votes, and removing these votes from the final tally would have fundamentally affected the results of the election.

16. The appellants further submitted that the presiding officers at Nyangweta SDA Primary School polling station 2, Gensoso Primary School polling station 2, Kenoria Primary school polling station failed to stamp and sign the declaratory forms; that the election court misdirected itself on the admission of the breaking of the ballot boxes by the 2nd respondent, which was done without a court order and in violation of Regulation 93(4) of the **Regulations, 2012.** The appellants contended that the election court erred by holding that these were administrative issues that had no impact on the results of the election yet they were infractions and in the appellants' view, this was an infraction of the provisions of **Articles 81(e)(v**) and **Article 86(a)** and **(d) of the Constitution** and that the integrity of the election was affected by the breakage of the ballot boxes and the tampering of the election material for Gensonso Primary School, Orwaki Primary School, Rionsaka Primary School and Makara Polling Stations.

17. It was the appellants' contention that **Article 86(d) of the Constitution** requires that the 1st respondent ensure that at every election, there are appropriate structures and mechanisms to eliminate electoral malpractice, which mechanisms ought to cater for the safekeeping of election material; that in regulation 86 of the **Regulations, 2012** which requires that the returning officer put the polling station diaries in a separate ballot box, seal and label it, was not compiled with. Further, that **Regulation 93** requires that all documents relating to an election be kept in safe custody by the returning officer and that these documents be accessed only by way of a court order; that in contravention of these regulations, the 2nd respondent in his affidavit produced polling station diaries, forms 35A, list of the political party agents without the authority of the court, without a court order and the unsealing of the ballot boxes was not done in the presence of all the other candidates.

18. It was the appellant's further contention that the 3rd respondent relied on evidence that was not legally obtained, and further was obtained contrary to public policy rendered it inadmissible and of no probative value. For this proposition, the appellants relied on the decisions of the South African Court in ***Mathew Robert Michael Lestr v Ndlambe Municipality and Another (514/12) 2013 ZASCA 95*** as well as the decisions of the Supreme Court of Kenya in ***Njonjo Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others [2017] eKLR (Presidential Petition No 4 of 2017)*** as well as ***Alfred N. Mutua v Ethics & Anti-Corruption Commission (EACC) & 4 others [2016] eKLR.***

19. In the face of these irregularities, the appellants submitted that the election court was bound by the decision ***Raila Odinga, 2017*** on the import of irregularities and illegalities that are found to have occurred in an election. In this case, the Supreme Court stated that:

> ***"379. … the illegalities and irregularities committed by the 1st respondent were of such a substantial nature that no Court properly applying its mind to the evidence and the law as well as the administrative arrangements put in place by IEBC can, in good conscience, declare that they do not matter, and that the will of the people was expressed nonetheless."***

20. The appellants further submitted that in that appeal, the Supreme Court held as follows on the meaning of **section 83 of the Elections Act:**

> ***"[211] 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.***

21. Drawing on the decision of the Supreme Court in ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*** ***[2014] eKLR (Munya Decision)*** the appellants submitted that the Election Court was bound by the pronouncements of the Supreme Court on **section 83 of the Elections Act**. In the latter petition, the Supreme Court held that:

> ***"[196] Article 163 (7) of the Constitution is the embodiment of the time-hallowed common law doctrine of stare decisis. It holds that the precedents set by this Court are binding on all other Courts in the land. The application, utility and purpose of this constitutional imperative are matters already considered in several decisions of this Court:***
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> ***…***
>
> ***[220] Where an election is conducted in such a manner as demonstrably violates the principles of the Constitution and the law, such an election stands to be invalidated."***

22. The appellants submitted that while the learned judge appreciated that he would be required to determine whether the election was conducted in conformity with both the Constitution and the Elections Act, he did not apply the constitutional test. The appellants contended that the learned judge should first have determined whether the election was conducted in conformity with **Articles 81 and 86 of the Constitution**, what learned counsel termed as the constitutional principle test, and subsequently the test on the effect of the irregularities and the illegalities on the results of the election. The appellants further contended that the election court ought to first have applied the test of the Constitution, that is the per se standard of elections, then determine the applicability of **section 83 of the Elections Act.** In the appellants' view, these infractions on the Constitution were clearly laid before the court and were sufficient to nullify the election.

23. The appellants' further issue is that the election court failed in making an adverse inference from the failure by the presiding officer of the **Basoga Polling station** to testify. The testimony before the election court was that the 2nd respondent conceded that ballot boxes from this polling station had been delivered unsealed; however, that the presiding officer at this polling station was not availed to testify, or to be cross-examined, despite the fact that she had sworn an affidavit in support of the respondents' case; that by failing to make an adverse inference on this, the election court reached the wrong conclusion regarding the conduct of elections at the Bosaga Polling Station; that the election court ought to have been guided by the principles for making an adverse inference as set out in ***Gordon Ramsay v Gary Love*** ***[2015] EWHC 65 (Ch)*** as follows:

> ***"(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.***
>
> ***(2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.***
>
> ***(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.***
>
> ***(4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."***

24. The appellants submitted that the Presiding Officer had a case to answer with respect to the unsealed ballot boxes which were delivered unsealed in contravention of **regulation 81(2) (a) of the Regulations.** Relying on the English decision in ***Prest v Petrodel Resources Limited & Others*** ***(2013) UKSC 34,*** the appellants contended that the election court erred in failing to make an adverse inference that the missing witness would have testified adversely against the 1st respondent; that the standard of proof in election petitions was as stated in ***Raila Odinga, 2017*** and ***Moses Masika Wetangula v Musikari Nazi Kombo & 2 others [2015] eKLR*** higher than a balance of probabilities but lower than beyond a reasonable doubt; that since the 2nd respondent admitted that ballot boxes in respect of some polling stations had been delivered unsealed, this was an indication that the appellants had discharged their burden to the standard required; that there was cogent evidence that there were various infractions of law on the part of the 1st and 2nd respondents, which the election court found had occurred, but yet it fell into error in stating that the standard of proof had not been met; that the learned judge created his own standard of proof that is unknown in electoral law, which is akin to a scientific standard of proof.

25. The appellants further submitted that it is not disputed by any of the respondents that the 1st respondent displayed different results on its public portal from those contained in the statutory Forms 35B; that the results displayed had errors and differed from those contained in form 35B which was an indication that the results on the portal were not authenticated. The appellants urged us to follow the decision of the Court in ***Mohamed Ali Mursal v Saadia Mohamed & 2 Others*** ***(2013) eKLR*** where it was held that errors in the transmission of the results from the forms could not be excused. It was the appellants' further submission that once the 1st respondent chose to transmit the already tabulated results from the polling station, it had a constitutional duty to ensure that the results therein were accurate and verifiable and failure to do so infringed on the Constitution; that the 1st respondent could not therefore argue that there was no legal requirement for transmission of the results for the election by way of the public portal; that the fact that there were mistakes in the electronic portal was an indication that the results were not accurate and verifiable and therefore the 1st and 2nd respondents breached the Constitutional precept that the electoral system must be simple, accurate, verifiable, secure, accountable and transparent.

26. By way of a notice of motion dated 8th December 2017, the appellants prayed for orders of scrutiny and recount with respect to various polling stations. In a ruling dated 21st December, 2017, this application was denied. The appellants submitted that the learned judge erred by injudiciously exercising his discretion when he dismissed this application, which ultimately led to the election court making an erroneous finding in law that the appellants did not prove their petition to the required standard; that they had properly laid out their basis for scrutiny

and recount in their petition, in that there was incorrect tallying which led to the announcement of the results, that various forms 35A were not signed by the Presiding Officers, that in Makara Polling Station there were two sets of results, that is those on the public portal and those that were in the forms 35B, as well as the admission of the 2nd respondent that he broke the seals of the ballot boxes in the absence of the other candidates or their agents. It was the appellants' submission that all of these issues could have been sorted out had the learned judge correctly exercised his discretion and allowed the prayer for scrutiny and recount.

27. It was the appellants' further submission that there was apparent bias and collusion between the respondents which could be seen in the uniformity of the responses to the petition filed by the 1st and 3rd respondents; that despite this fact, the learned judge gave the issue a wide berth and failed to make a finding of the same, and therefore came to the wrong conclusion; that there was more evidence of the collusion between the respondents: the 1st respondent granted the 3rd respondent exclusive access to election material without following due process under **Regulation 93** and in contravention of **Article 86(d) of the Constitution**, and the similarities between the replies to the Petition; that the conduct of the respondents during and after the election indicates that there has been a lack of independence and impartiality on the part of the 1st respondent; that where witnesses have identical statements, their evidence is devalued as it indicates that there is some agreed intention or coordinated attempt to cover up what happened. For this proposition, the appellants relied on the decisions of ***Abbot v RCI Europe (2016) EWHC 2602 (ch)*** where the Court adopted with approval statements made in ***Smith New Court Securities Limited v. Scrimgeour Vickers (Asset Management) Limited [1992] BCLC 1104* at *1115-6*** where the admissibility of identical witness statements was impugned by the Court.

28. The appellants' further submitted that the election court was biased against the appellants, and that the learned Judge denied the appellants equal protection and benefit of the law by entirely relying on the submissions of the advocates with an inclination towards the respondents and to the exclusion of the appellants' own evidence; that from the judgment of the court, it is evident that the election court did not consider any of the appellants' submissions; and that the judge was duty bound to consider the issue of collusion and partiality. The appellants referred us to the persuasive authority of the ***European Court of Human Rights in Turija v Spain Application No 18390 of 1991 and Hiro Balani v Spain Application No 18064 of 1991*** which considered Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms which is similar to **Article 50 (1) of the Kenya Constitution**.

29. On the issue of costs; the appellants submitted that the learned judge wrongfully awarded costs against the appellants in light of the illegalities and breaches of the law that were apparent in the conduct of the 1st, 2nd and 4th respondents. For this proposition, counsel relied on the decision of the High Court in ***Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another (2016) eKLR*** where the court adopted with approval the holding of the High Court in ***Orix (K) Limited vs Paul Kabeu & 2 others (2014) eKLR*** that:-

> ***"…the court should have been guided by the law that costs follow the event, and the plaintiff being the successful party should ordinarily be awarded costs unless its conduct is such that it would be denied costs or the successful issue was not attracting costs. None of the deviant factors are present in this case and the court would still have awarded costs to the plaintiff, which I do."***

30. It was appellants' submission that the conduct of the 1st and 2nd respondents was not beyond reproach and they conducted themselves with little regard to the law and therefore did not deserve an award of costs. For this, the appellants cited the Namibian decision of ***Rally for Democracy and progress and 17 others v Electoral Commission of Namibia* & 5 others SA 12/2011** where the Court, after considering the conduct of the Director of Elections, found that costs ought not to be awarded.

1st, 2nd and 4th respondent's submissions

31. The 1st, 2nd and 4th respondents on their part urged us to only consider issues of law as our jurisdiction is circumscribed under **Article 85A of the Elections Act**. They disagreed that the election court violated the doctrine of stare decisis, and submitted that the election court rightly found that the appellants had to discharge the legal and evidentiary burden of proof with respect to the irregularities and how they affected the election. For this proposition, they relied on the decisions of the Supreme court in ***Raila Odinga ,2013*** where the Court stated that:

> ***"[195] There is, apparently, a common thread in the foregoing comparative jurisprudence on burden of proof in election cases. Its essence is that an electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner, but, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting. Ultimately, of course, it falls to the Court to determine whether a firm and unanswered case has been made."***

32. Based on this authority, reaffirmed in ***Raila Odinga, 2017*** where the Court rendered itself as follows:

> "**[***131] Thus a petitioner who seeks the nullification of an election on account of non-conformity with the law or on the basis of irregularities must adduce cogent and credible evidence to prove those grounds "to the satisfaction of the court." That is fixed at the onset of the trial and unless circumstances change, it remains unchanged. In this case therefore, it is common ground that it is the petitioners who bear the burden of proving to the required standard that, on account of non-conformity with the law or on the basis of commission of irregularities which affected the result of this election, the 3rd respondent's election as President of Kenya should be nullified.***
>
> ***[132] Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and "remains constant throughout a trial with the plaintiff, however, "depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting" and "its position at any time is determined by answering the question as to who would lose if no further evidence were introduced."***

33. The 1st, 2nd & 4th respondents submitted that the legal burden is always on the petitioner to prove, and the evidential burden would only shift if the petitioner discharges his burden. Thus, they contended that the election court properly addressed itself on the burden of proof and that it was guided by the judgment of the Supreme Court in the **Munya Decision** when it failed to shift the burden of proof where the evidence on record did not warrant it. They submitted that for the appellants' claims to be proven, they not only needed to allege them, but also had to show, by objective evidence, that their claims were true. Instead, they tendered generalized allegations and claims which did not suffice to discharge the burden of proof.

34. The 1st, 2nd and 4th respondents saw no error on the alterations on the forms 35A or the lack of counter signatures on them. To buttress their submission, they relied on the decision of the High Court in ***Paul Gitenyi Mochorwa v Timothy Moseti E. Bosire & 2 Others [2013] eKLR*** where it was held that:-

> ***"There is no requirement that the entries on 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 endeavor; accuracy will be served, if there exists a means of verification of the entries to test for their accuracy and it necessarily imports corrections by alterations, whether countersigned or not."***

35. The 1st, 2nd and 4th respondents agreed with the findings of the election court with respect to **section 83 of the Elections Act,** stating that the appellants failed to prove either of the disjunctive limbs contained in this section in order to invalidate the election. For this proposition they relied on the sentiments of Maraga J (as he then was) in ***Joho v Nyange & another (4) [2007] eKLR.***

> ***"In my view the errors made and the irregularities committed in this petition fall in to two categories. The first one are the errors or mistakes, that I would call innocent even though negligent mistakes. The second category are those deliberate irregularities or forgeries that were committed. In respect of the first category I would like to say this: Error is to human. Some errors in an election like this conducted under a frenetic schedule are nothing more than what is always likely in the conduct of any human activity. If they are not fundamental they should always be excused and ignored. But where deliberate irregularities or forgeries are committed different considerations come into play. In either case, however, serious consideration should be given as to what effect, if any, that those errors, whether innocent or deliberate, have on an election before the same is vitiated. As I have said if they are minor and do not affect the election or its result they should be ignored.***

36. The 1st, 2nd and 4th respondents also relied on the decision of the Supreme Court in ***Raila Odinga, 2017*** wherein the Supreme Court set out how courts ought to determine the effect of irregularities as follows:

> ***"[211] 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…***
>
> ***[373] It is also against this background that we consider the impact of the irregularities that characterized the presidential election. 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."***

37. The 1st, 2nd and 4th respondents submitted that it was not enough for the appellants to plead non-compliance, irregularities and improprieties in the election without relating these to the effect on the validity, credibility and integrity of the results and the election.

38. With respect to the prayer for scrutiny and guided by the decision of the Supreme Court in the **Munya Decision** the 1st, 2nd and 4th respondents contended that the law with respect to scrutiny is set out at **section 80(4)(a) and 82** of the Elections Act as well as Rules 28 and 29 of the **Elections (Parliamentary and County Elections) Petition Rules, 2017**; **(Elections Rules, 2017)** that the appellants did not establish any basis for their request, either through the application for scrutiny or by way of evidence or in their pleadings.

39. The 1st, 2nd and 4th respondents submitted that they did not collude with the 3rd respondent and urged this court to find that there was no evidence of such collusion and that it was in any event, an extraneous matter that was not relevant to the determination as to the propriety of the election; that similarly, there was no evidence of bribery, or any other malpractice that proved that there was a scheme to bribe the 2nd respondent to influence the outcome of the election. The respondents relied on the finding in ***Simon Nyaundi Ogari & Another v Joel Omwaga Onyancha (2008) eKLR*** where the High court held that:-

> ***"Clear and unequivocal proof is required to prove an allegation of bribery Mere suspicion is not sufficient. It is true that it is not easy to prove bribery, more especially where it is done in secrecy 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 and in the presence of many people, the court cannot be satisfied by anything less than the best evidence which always direct evidence is given first hand."***

40. With respect to the non-attendance in court of the presiding officer at the polling station, the 1st, 2nd and 4th respondents submitted that **rules 14 and 15 of the Election Petition Rules** do not require that all the witnesses be cross examined; that the election court, being under a constitutional timeline to hear and determine the petition could make a decision not to cross-examine certain candidates if in its opinion there was no good reason for cross examination. For this proposition, the respondents relied on the case of ***Republic v Kenya Revenue Authority Exparte Althaus Management & Consultancy Limited (2015) eKLR*** where the High Court expressed itself in the following terms;-

> ***"14. Cross-examination on the affidavit is a discretionary power conferred upon the court by the provision of Order 19 Rule 2 of the Civil Procedure Rules. It is not given as a matter of right and therefore any party who wishes to cross-examine a deponent must satisfy the court that there is a good reason for the purpose of examination. In other words a party ought to lay down a proper legal foundation to justify his application for leave to cross-examine the deponent. As the requisite rules recognize the use of affidavits in evidence especially in the course of interlocutory applications, the courts ought not to readily permit cross-examination of the deponent's affidavits otherwise if the courts become too willing to allow for cross-examination, the already limited time available for applications would be further curtailed to the detriment of the wider interests of justice."***

41. On the allegation that there were different sets of results declared, the 1st, 2nd and 4th respondents contested the appellants' submission that they were duty bound to transmit the election results by way of a public portal; that instead the correct position is as stated by the Supreme Court in ***Raila Odinga, 2013*** where it was appreciated that the deployment of appropriate technology is an important tool for reducing the risks of electoral malpractice and increasing the efficiency in the management of elections, and noted that it can be undependable and prone to failure. The 1st, 2nd and 4th respondents submitted that technology is not the sole or decisive determination of the validity of the election and agreed with the assessment of the election court that it was a technological failure that led to a difference between the results displayed on the portal and those that were contained in the forms 35A from the polling stations.

42. It was the 1st, 2nd and 4th respondents' further contention that the results in form 35A form the basis for determining the will of the people, and that the results contained in form 35A were final. They urged us to follow the finding of ***Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR*** which was cited and approved in Raila Odinga, 2017. In that appeal, this Court, differently constituted, held that:

> ***"It is clear beyond peradventure that the polling station is the true locus for the free exercise of the voters' will. The counting of the 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."***

43. It was the 1st, 2nd and 4th respondents' further submission that the evidence as a whole indicates that the election court exhaustively and conclusively addressed all the issues raised, and urged that non-compliance of the law alone, without evidence that the electoral process or the results had been materially or fundamentally affected is not a basis for invalidating the outcome of an election. For this reason, they urged us to dismiss this appeal with costs.

44. On the issue of costs, the 1st, 2nd and 4th respondents urged us not to interfere with the costs granted by the election court, and that as stated by the Supreme Court in ***Jasbir Singh Rai & 3 Others v Tarlochan Sigh Rai & 4 Others [2014] eKLR:-***

> ***"[14] So the basic rule on attribution of costs is: costs follow the event. But it is well recognized that this principle is not to be used to penalize the losing party; rather, it is for compensating the successful party for the trouble taken in prosecuting or defending the suit."***

45. It was the 1st, 2nd and 4th respondents' submission that the costs awarded by the election court were proportionate, fair and reasonable, and took into account the entire prosecution of the election. For these reasons, the 1st, 2nd and 4th respondents urged us to dismiss the appeal with costs.

The 3rd Respondent's submissions

46. The 3rd respondent opposed the appeal with respect to the issue of the lack of security features on the statutory forms, as well as the failure to sign the forms 35A by the presiding officers. He submitted that these issues were correctly noted by the election court as not fatal and thus could not vitiate the credibility and substance of an election; that pursuant to section 83 of the Elections Act, any non-compliance with the law did not go to the root of the election and did not affect the result. They relied on ***Raila Odinga, 2013*** and urged us to follow the standard set by the Supreme Court when it stated:

> ***"[304] Did the Petitioner clearly and decisively show the conduct of the election to have been so devoid of merits, and so distorted, as not to reflect the expression of the people's electoral intent? It is this broad test that should guide us in this kind of case, in deciding whether we should disturb the outcome of the Presidential election."***

47. The 3rd respondent also maintained that the results contained in Form 35B are the final and authentic results, and not those that are contained in the public portal. On this issue, the 3rd respondent relied on the decision of the High Court in ***Jackton Nyanungo Ranguma v Independent Electoral and Boundaries Commission & 2 others [2018] eKLR*** for the proposition that there is no statutory requirement for the transmission of results for other elective positions, other than those of the presidential election.

48. The 3rd respondent submitted that the election court fully enquired into whether the difference on the results displayed on the public portal and those derived from the Forms 35A was deliberate or a result of technological failure, and finding that it was the latter, held that it could not have affected the outcome of the election; that the learned judge did not act capriciously in dismissing the appellants' prayers for scrutiny; that a court exercising its discretion would only grant an order of scrutiny and recount once it was satisfied, after considering the pleadings and the evidence adduced during hearing, that there was a basis for scrutiny; that in this appeal, the election court correctly found, after receiving all the evidence, that the appellants had not laid a proper basis for scrutiny.

49. With respect to the appellants' complaint that the election court ought to have made an adverse inference against the respondents as the Presiding Officers of the polling stations were not availed for cross examination, the 3rd respondent disagreed. In his view, the parties reserve the right to call the witnesses they wish if they deem it necessary for the advancement of their respective positions; that the election court was right in not making an inference as to whether or not the presiding officer testified. For this proposition, the 3rd respondent referred us to the authority of ***John Munuve Mati v Returning Officer Mwingi North Constitutency, Independent Electoral & Boundaries Commission & Paul Musyimi Nzengu [2018] eKLR***, where this Court held that:

> ***"It was his duty to call cogent and credible evidence to prove the facts that he alleged in the petition. We agree with the respondents that it does not invariably follow that failure by a respondent to call a witness means that the petition must be allowed. The petitioner must first adduce evidence of the nature that would entitle him to judgment if the respondent did not adduce any evidence at all in rebuttal."***

50. The 3rd respondent also submitted that the standard and burden of proof in election petitions has been long settled; that in this case, the appellants did not prove their case to the required standard and as such, the decision of the Supreme Court in ***Raila Odinga, 2017*** on the applicability of the disjunctive test as stated in **section 83 of the Elections Act** could not be appropriately applied to this case.

51. The 3rd respondent denied the assertion that the election court was biased and did not consider the appellants' submissions. He contended that the election petition and the responses thereto constitute the main pleadings in an election petition, and a reading of the judgment indicates that the election court considered all the pleadings, evidence, oral and sworn statements before arriving at its judgment. From the 3rd respondent's point of view, this was merely an allegation that remains unproved.

52. With respect to the allegation that the integrity of the election was affected by the breakage of the ballot boxes at Gesonso, Orwaki Primary School, Rionsata Primary School and Makara Polling stations, and the later use of the material as evidence during the trial by the respondents, the 3rd respondents contended that at the point at which the 3rd respondent applied to be supplied with these material, the election had already been concluded and the petition leading to these proceedings filed. The 3rd respondent therefore contended that the supply of the electoral material did not in any way affect the election, or the results of the election; that **Regulation 93(4) of the Regulations, 2012** does not bar the supply of the said materials where there is an election petition pending; that this ground was not even pleaded in the petition, and therefore asked us to disregard it as an attempt by the appellants to include new grounds in the appeal.

53. The 3rd respondent submitted that the duty of the election court was to adjudge whether the election was carried out in a free, fair, transparent and credible manner, and that it carried out this duty and rendered a judgment that exhaustively and conclusively addressed each issue raised during the petition.

54. On the costs of the appeal, the 3rd respondent relied on the decision of the High Court in **Kalembe Ndile Decision *(Election Petition Nos 1 & 7 of 2013 (Consolidated)):***

> ***"… [Costs awarded should be fairly adequate to compensate for work done but at the same time should not be exorbitant as to unjustly enrich the parties or cause unwarranted dent on the public purse or injure the body politic by undermining the principle of access to justice enshrined in Article 38***

exercising his discretion misdirected himself in some matters and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been mis-justice."

We have distilled the following issues for determination;-

1) Whether the election court erred in rejecting the application for scrutiny and recount.

2) Whether the 1st and 2nd respondents were duty bound to electronically transmit the results of the election.

3) Whether there was a failure by the presiding officers to sign the statutory forms.

4) Whether the learned judge exhibited bias against the appellants and whether the appellants' right to a fair trial was violated.

5) Whether the learned judge should have drawn an adverse inference from the fact that that some presiding officers did not testify.

6) Whether the learned judge erred in law in relying on section 83 of the Elections Act without taking into account the provisions of Articles 81, 86, 87 and 88 of the Constitution.

7) Whether the costs awarded by the Election Court were manifestly excessive.

Whether the election court erred in rejecting the application for scrutiny and recount.

57. As we bear the above principles in mind, we now turn to address ourselves on the various issues presented in this appeal. The first is whether the judge erred in refusing the applicants application for scrutiny. The power to grant scrutiny of electoral material is granted to the election court under **Rule 29(2) of the Elections (Parliamentary and County Elections) Petition Rules 2017** which states as follows:

"(2) On an application under sub-rule (1), an election court may, if it is satisfied that there is sufficient reason, order for scrutiny or recount of the votes."

58. In dealing with the application for scrutiny that was before the court, the election court was of the view that the evidence given to support the application for scrutiny only related to ***"incorrect tallying, announcements of invalid results, making of false entries, an alleged election offence and failure to seal ballot boxes."*** The learned judge ruled although the evidence raised weighty issues for consideration and determination by the election court in the petition, it was not enough to lay a basis for the grant of an order of scrutiny and recount.

59. The election court then, rightly in our view, relied on the **Munya Decision** to deny the application for scrutiny. It appears to us, from our careful consideration of the impugned ruling of the election court, that the order for scrutiny was denied for two reasons: the first was because there was no basis laid down either in the petition, the application or the evidence adduced before the court, and because the learned judge was of the view that it would amount to ***"widening the scope of the petition and open the door for a possible fishing of evidence."*** We agree. There is ample authority that scrutiny cannot be used to widen the scope of a petition, and neither can it be used as a ground for the party impugning an election to seek to find evidence in support of his claims.

60. Save for the misdirection on this latter point, we find that the learned judge did exercise his discretion judicially in declining the grant of the prayers of scrutiny and recount. In ***Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR (Supra)*** this Court stated that;-

"The discretion to order scrutiny is conferred under Section 82(1) of the Elections Act No. 24 of 2011. … A party may at any stage of the proceedings apply for scrutiny for purposes of establishing the validity of votes cast. Rule 33(2) requires the court to be satisfied that there is sufficient reason and the manner in which the scrutiny is to be carried out is set out in detail. An order for scrutiny and recount is therefore not automatic; sufficient reason has to be shown before the court orders scrutiny and recount. There must be enough material placed before the court, which will impel the court to order scrutiny or re-count of votes. Whether or not that criterion is met will depend on the nature of the claims being put forward by the petitioner and the weight the court will attach to the evidence in support of the matters complained of. The irregularities complained of by the petitioner should be of such a nature that would compromise the electoral process so that it was capable of affecting the results and cannot be said to have been free and fair."

61. These general sentiments were upheld on appeal to the Supreme Court in ***Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2015] eKLR*** with the Court holding that:

"As in existing authority, so will it be in this case: we are disinclined to countenance a scrutiny process that becomes open season for petitioners who would turn it into a forum for gathering all such information as they would fancy."

62. The second reason that the election court refused the application for the orders for scrutiny are found in paragraphs 25, 26 and 38 of the

judgment of the election court. These paragraphs provide that:

> ***"25. Equally important in an application like the one before Court and especially where it relates to recount, is the relevance of Regulation 80(1) of the Elections (General Regulations) 2012.***
>
> ***26. It follows then that a party who fails to exercise the right under Regulation 80, in my considered view, diminishes the chances of success of his application for recount…***
>
> ***38. Notably there is no evidence at all that the Petitioners exercised the right to seek recount under Regulation 80 of the Elections (General Regulations) 2012 at the respective polling stations."***

63. With respect to the learned judge, this is a misdirection in law. **Regulation 80 of the Regulations, 2012** provides that:

> ***"80(1): A candidate or agent present when the counting is completed may require the presiding officer to have the votes rechecked and recounted or the presiding officer may on his or her own initiative have the votes recounted; provided that the recount shall not take place more than thrice.***
>
> ***(2) No steps shall be taken on the completion of a count or recount of votes until the candidates and agents present at the completion of the counting have been given a reasonable opportunity to exercise the right given by this regulation."***

64. This regulation provides for a situation where a candidate or an agent would request a recount of votes at the polling station, after tallying of the votes but before declaration has occurred. As such, it regulates the procedure for such a recount before the jurisdiction of the court is triggered. In our view, the fact that a party has not taken action under this regulation does not have any bearing whatsoever on an application for recount or scrutiny that has been made during the course of the hearing of an election petition. This was the view taken by the High Court in Kakamega in ***Joseph Amisi Omukanda v Independent Electoral & Boundaries Commission (I.E.B.C.) & 2 others (2013) eKLR*** where the learned judge hearing that petition, determined, correctly in our view, that:

> ***" … [R]egulation 80 does not bar a party who had not sought a recount at the polling station from making an application in court. It is obvious that when the election is being conducted the candidates cannot be at all polling stations. Whereas a candidate's agent might be satisfied with the vote count at a particular polling station, the candidate himself might on a second thought be of the view that the results of that polling station were not properly given by the presiding officer and therefore seeks scrutiny of the votes through an application in an election petition. Regulation 80 only deals with situations at the polling stations and does not govern election petitions."***

65. We see no reason for our interfering with the order of the election court. Once the appellants failed to lay a basis for the grant of the order, the court had no option but to deny the application. As such, this ground of appeal fails.

Whether the 1st and 2nd respondents were duty bound to electronically transmit the results of the election

66. It is beyond dispute that the 1st respondent transmitted results by way of a public portal that was accessible to the general public. However these results were not the same as those used to declare the 3rd respondent as the winner of the election, and based on this the appellant would have us nullify the election. In determining this issue, we take cognizance that **section 39 of the Elections Act** does not require the 1st respondent to transmit results for all the elective positions, only for the presidential election. The 1st respondent transmitted the results of the other positions, among them the subject of this appeal. However, this does not mean that the election itself should be vitiated. A similar view was taken by this court in ***Jackton Nyanungo Ranguma v IEBC & 2 Others Election Appeal No 1 of 2018 (Kisumu)*** where it was held that even though the results transmitted were erroneous, they did not affect the actual results of the election of the Kisumu County Governor. Indeed, drawing from the decision of this court in ***Independent Electoral and Boundaries Commission vs Maina Kiai [2017] eKLR***, final results are those that are found in the statutory forms. This was the finding of the election court and we find it properly anchored in law. The appellants' challenge of the judgment of the election court on this issue therefore fails.

Whether there was a failure by the presiding officers to sign the statutory forms.

67. On the issue whether or not there was failure to sign statutory forms by the Presiding Officers, **Regulation 79(1) of the Regulations, 2012** provides that:

> ***"(1) the Presiding Officer, the candidates or agents shall sign the declaration in respect of the elections."***

68. This regulation makes it mandatory for the Presiding Officer to sign the forms. Where a statutory form is not signed by the Presiding Officer, then the results therein ought to be excluded from the final tally. This much was stated by this Court in ***Abdikhaim Osman Mohammed & Another v. IEBC & 2 Others [2014] eKLR*** which pronounced itself on this issue as follows:

> ***"…That is clearly wrong because the results in respect of twelve forms 35 which had neither the seal of the 2nd respondent nor the presiding officer's signatures should have been excluded on the ground that their authenticity could not be vouchsafed."***

69. In considering this issue, we have examined the judgment of the election court and noted that the learned judge found that the forms 35A in respect of Manywanda 'B' Primary School Polling Station, Nyabigege DOK Primary School polling station, Nyakorere Primary School polling station, and Mariwa Primary School polling station had indeed been signed by the Presiding Officers, or the deputy Presiding Officers in those stations. Nothing therefore turns on this ground of appeal. As directed by this Court in the authorities we have cited before us, we must pay deference to the findings of fact as they have been established by the election court.

Whether the learned judge exhibited bias against the appellants and whether the appellants' right to a fair trial was violated.

70. We now turn to consider the appellants' contention that the election court exhibited bias against them. In the appellants' view, the election court was biased against them as it did not at all consider their submissions in its judgment; and that the appellants' right to a fair trial as enshrined in Article 50(1) of the Constitution was violated. This article provides that ***"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court, or if appropriate, another independent and impartial tribunal or body."***

71. The appellants referred us to the ***Case of Hiro Balani v Spain, No. 18064/91, ECtHR (Chamber), Judgment (Merits and Just Satisfaction) of 09.12.1994, A303-B*** the European Court of Human Rights, **(ECtHR)** was determining whether the Supreme Court of Spain had violated Article 6(1) of the Convention which provides:

> ***"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."***

Regarding the court's failure to consider the applicant's submissions, the ECtHR found that it was impossible to tell whether the submissions had been considered at all and therefore found that there was violation of Article 6(1). We do not think that this matter is applicable in the appeal before us. We have considered at the judgment of the election court and find no merit in the assertion that the judge did not consider the appellants' submissions and solely relied on those of the respondents. To our minds, the election court properly set out the issues laid out by each of the parties and then proceeded to determine them.

72. Similarly, nothing turns on the assertion that the election court was biased. For this we rely on the decision of this Court in ***Judicial Service Commission v Gladys Boss Shollei & Another [2014] eKLR (Supra)*** where the Court noted that any perception of bias must be evaluated with reference to a reasonable or fair-minded man who has been informed of all the circumstances of the case. In addition, in ***Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others [2017] eKLR*** this Court held that:

> ***"Bias may take many different forms but the main distinction is between actual and apprehended bias. A claim of actual bias requires proof that the decision-maker approached the issues with a closed mind or had prejudged the matter and, for reasons of either partiality in favour of a party or some form of prejudice affecting the decision, could not be swayed by the evidence in the case at hand."***

73. There is nothing on the record to show that the election court approached the petition with a prejudged mind and went out of its way to find in favour of the appellants. Therefore we find the allegations of bias to be baseless and unsupported, and this ground of appeal must also fail.

74. We have also considered the fact that the advocates for the respondents all filed similar responses and submissions alongside the cited authority of ***Smith New Court Securities Limited v. Scrimgeour Vickers (Asset Management) Limited (supra)*** for the proposition that the court ought to have expunged similar evidence. We are not satisfied that a similarity of responses points to collusion by the respondents against the appellants. A similarity in the evidence does not necessarily mean that there was collusion. It could point to a co-ordinated effort by the respondents to defend themselves against the allegations in the petition, perhaps even a joint strategy, but this alone would not suffice to prove that there was an effort to deprive the appellants of a victory from the election. All it would warrant, if anything, would be a reduction of the costs paid to the advocates, and nothing more. Therefore this ground of appeal is without merit.

Whether the learned judge should have drawn an adverse inference from the fact that some presiding officers did not testify

75. Should the court have drawn an adverse inference against the respondents' from the fact that the presiding officers in some polling stations did not testify? We do not believe so. While we appreciate the various persuasive authorities cited by the appellants on situations where a court is entitled to draw an adverse inference, we are not satisfied that they are applicable in the instant appeal. Even in those cases, such as ***Gordon Ramsay v Gary Love (supra)*** the court stated that while the court is entitled to draw an adverse inference from the absence of a witnesses who is expected to give material evidence on an issue or action, however, for this to happen, there must be some evidence that has been adduced upon which such adverse inference can be drawn. In the instant case, it is clear that the election court did not accept the evidence that there were unsealed ballot boxes delivered to the constituency tallying centre. In particular, the election court delivered itself on this matter as follows:

> ***"127. Having carefully analysed the evidence regarding the unsealed ballot boxes, the burden of proof lay on the Petitioners to show that there were unsealed ballot boxes delivered to the polling station, they related to the election for Member of National Assembly for South Mugirango Constituency and were for a specific polling station(s). The Petitioners had to prove that the***

voices in the audio clip belonged to the alleged persons.

128. There is admission by the 2nd Respondent that there were some ballot papers (sic) delivered to the tallying centre unsealed. However, the Petitioners have not established by way of evidence to which polling station the ballot boxes belonged and that they related to the impugned election herein."

76. After finding that the appellants had failed to discharge the burden of proof with respect to the unsealed ballot boxes, the election court thereafter held that:

"137. Even if one was to assume that true, some ballot boxes were delivered unsealed to the tallying centre, a nexus has to be drawn between the failure to seal the ballot boxes after counting and declaration of results and the effect of that on the results or loss of votes by a candidate.

138. The invalidation of the people's will cannot be predicated on mere misdemeanours of IEBC officials where the infractions do not have a bearing on the declared results."

77. The election court cannot be faulted for so finding. We are fortified in our findings on this issue by the holding of this Court in ***John Munuve Mati v Returning Officer Mwingi North Constituency, Independent Electoral & Boundaries Commission & Paul Musyimi Nzengu [2018] eKLR*** **where this Court, determining a similar point rendered itself as follows:**

"We agree with the respondents that it does not invariably follow that failure by a respondent to call a witness means that the petition must be allowed. The petitioner must first adduce evidence of the nature that would entitle him to judgment if the respondent did not adduce any evidence at all in rebuttal."

78. This holding was adopted with approval in ***Jackton Nyanungo Ranguma v Independent Electoral and Boundaries Commission & 2 others [2018]*** wherein the Court, dealing with a similar complaint, observed that:

"An inference leading to a conclusion of fact can only be drawn when there is one irresistible deduction to be made from a proven set of facts. In the instant case, if the trial court were to draw an adverse inference against the 1st and 2nd respondents, the legal effect would be to shift the legal burden of proof from the petitioner to the respondent. This would be wrong in law. Further, noting that there is no legal requirement stipulating the number of witnesses a party can call to prove a fact in issue, an adverse inference ordinarily should not be drawn simply because a respondent has chosen not to call any or some witnesses. The legal burden of proof always remains with the petitioner and a court should be careful not to draw adverse inference when a respondent who has no legal burden to prove any fact fails to call a witness or witnesses."

79. We think the foregoing sentiments are on all fours with the appeal that is now before us. We need say no more on the issue to show that this ground of appeal also fails.

Whether the learned judge erred in law in relying on section 83 of the Elections Act, 2011 without taking into account the provisions of Articles 81, 86, 87 and 88 of the Constitution.

80. The Constitution stipulates various principles with respect to the elections. **Article 81 of the Constitution** provides general principles that the electoral system must comply with. These include the freedom of citizens to exercise their political rights, the representation of gender and persons with disabilities, universal suffrage, and the principles of a free and fair election. **Article 86 of the Constitution** places a duty on the 1st respondent to ensure that the voting method used is simple, accurate, verifiable, secure, accountable and transparent; that the votes cast are counted, tabulated and the results announced promptly at the polling station; and that appropriate structures and mechanisms are put in place to eliminate electoral malpractice. **Article 87 of the Constitution** provides for resolution of electoral disputes, while **Article 88 of the Constitution** establishes the 1st respondent and sets out its responsibilities.

81. These sections, read together, provide for the electoral system through which the electoral rights of Kenyans as provided under **Article 38 of the Constitution** are realized. In the appellants' view, the election court ought to have first ensured that the election complied with these constitutional provisions before making a finding under **section 83 of the Elections Act**. A consideration of the evidence given to the election court as well as the submissions of the appellants before us lead us to conclude that there was no direct violation of the Constitution.

82. It is clear to us that the **Elections Act** is a direct product of **Article 87(1) of the Constitution**, which requires Parliament to enact legislation to facilitate the timely settling of electoral disputes. **Section 83** thereof clearly mandates the Court not to nullify an election if it finds that the conditions therein have not been satisfied.

83. As found by the election court, the evidence on record, while pointing to minor non-compliance with the **Regulations, 2012**, was not enough to go to the root of the election. Thus, we agree with the finding of the election court that the irregularities were not substantial, and neither did they materially affect the result of the elections.

Costs

84. On the issue of costs, the power of an election court to award costs is found in **section 84 of the Elections Act** in the following terms:

> ***"84. An election court shall award the costs of and incidental to a petition and such costs shall follow the cause."***

This section is complemented by **rule 30** of the **Elections Rules, 2017** which give the election court discretion to specify the amount of costs, the party that is responsible for the payment of costs and the maximum amount to be paid. These two sections of law have been the subject of much judicial consideration since their enactment. However, the jurisprudence is quite clear: the award of costs by an election court is discretionary, and the appellate court can only interfere with such an award where it is apparent that there has been a misdirection on the same and; costs are to compensate a successful litigant and should not be seen to deter litigants of modest means from accessing the courts. This is demonstrated in ***Martha Wangari Karua v Independent Electoral & Boundaries Commission & 3 others [2018] eKLR*** where this Court **rendered itself on this point as follows:**

> ***"It is up to the election court to determine whether a party would be awarded costs or not and in doing so the court must be guided by the principles of fairness, justice and access to justice. It is meant to compensate a successful litigant. It is not a punishment or a deterrent measure to scare away litigants from the doors of justice."***

85. The costs in the election court were awarded as follows:

> ***"(i) Instruction fees at Kshs. 2.5 million for the 3rd Respondent.***
>
> ***(ii) A global sum of Kshs. 2.5 million in instruction fees for the 1st, 2nd and 4th Respondents whose defence was mounted jointly.***
>
> ***(iii) The costs shall be taxed and total costs certified by the Deputy Registrar of this Court."***

Bearing in mind that the petition was fully heard, and that there was an application for scrutiny heard in the course of determining it, we do not find the costs awarded to be so manifestly excessive that would warrant our interference. We therefore decline to interfere with the award made by the election court.

Disposition

86. Having carefully considered the issues raised by the appellant, the responses by the respondents and their rival submissions, we find no merit in the appeal and make the following orders:

> **a)** ***The appeal is dismissed with costs to the respondents;***
>
> **b)** ***If the parties do not agree on the quantum of costs, the same shall be taxed by the Deputy Registrar of this Court.***

Dated and Delivered at Kisumu this 26TH day of July, 2018

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR