



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: GITHINJI, OKWENGU & J. MOHAMMED, J.J.A.)

ELECTION PETITION APPEAL NO. 23 OF 2018

BETWEEN

EDWARD TALE NABANGI.....APPELLANT

AND

JAMES LUSWETI MUKWE.....1ST RESPONDENT

THE INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION (I.E.B.C.)....2ND RESPONDENT

BENSON ESUZA LUMWAGI.....3RD RESPONDENT

(Being an appeal against the Judgment, Decree and Orders of the High Court of Kenya

at Bungoma (Hon. Lady Justice Abida Aroni) delivered on 28th February, 2018

in

H.C. ELECTION PETITION NO. 1 OF 2017)

JUDGMENT OF THE COURT

[1] This is an appeal from judgment of election court (**Ali Aroni, J.**) dismissing the appellant's petition for invalidation of the election of **James Luswet Mukwe**, the 1st respondent herein, as a Member of National Assembly for Kubuchai Constituency.

[2] The appellant and the 1st respondent were among the seven candidates, who vied for election as a Member of National Assembly for Kabuchai Constituency in Bungoma County in the election held on 8th August, 2017. On 10th August, 2017 the 1st respondent was declared duly elected with 18,485 votes. The appellant was the runners-up with 18,062 votes.

[3] The petition was supported by the appellant's affidavit and sixteen witness affidavits. The basis of the petition was that the electoral process failed to meet the minimum threshold of a democratic electoral system and process set out in Article 81, 82(2), 84, 86 and 88(4) of the Constitution as read together with the Elections Act, 2011; Election Laws (Amendments) Act 2017; the Elections (General) Regulations, 2012 and the Electoral Code of Conduct, 2017.

[4] The appellant gave particulars of nonconformity with electoral laws in the petition including the following;

(a) The Independent Electoral and Boundaries Commission (IEBC), the 2nd respondent herein failed to use the Kenya Integrated Electoral Management System (KIEMS) kit in the identification of voters in several polling stations including Sirare, Kisiwa, Musese and Mukuyuni Cattle Dip polling stations and therefore allowed voters who were not persons eligible to vote and voters who voted more than once. The appellant averred that more than 100 people voted at Sirare when their details and particulars were not captured or confirmed by the KIEMS kit as registered voters. He also averred that more than 70 people voted at Kisiwa, more than 100 people at Musese, more than 102 people at Sitila, and more than 60 people at Mukuyuni voted in similar circumstances. Further,

the appellant averred that in all those polling stations, IEBC recalled some of the voters to vote again or to have their particulars captured in the KIEMS kit.

(b) At Bwake polling station, the Presiding Officer took the ballot boxes with ballot papers to his house to “**complete some balancing**”. The results entered on form 35 B show that 0 (zero) number of valid votes were cast at Bwake polling station yet more than 350 voters cast their votes.

(c) The 1st respondent personally and/or with his agents and servants heavily and with impunity engaged themselves in outright bribery and treating of voters prior to the polling day. The petitioner averred that on 27th July 2017, the 1st respondent held a campaign rally attended by more than 100 people where he gave Kshs. 100, to each of them.

(d) On 8th August 2017, the 1st respondent in collusion with IEBC and their officers engaged in acts of intimidation, threats and harassment of the appellant’s supporters and agents. At Namakhe R C Primary School polling station, IEBC conspired with the 1st respondent and allowed the 1st respondent to have four agents who intimidated, harassed and manipulated voters.

(e) The Returning Officer refused and denied the appellant’s agents access to statutory forms and information in respect of the election during the voting, counting, tallying and declaration of results.

(f) The 2nd and 3rd respondents did not carry out adequate voter education for informed citizenry participation.

[5] The reliefs in the petition included an order for scrutiny and audit of the system and technology including, KIEMS kit, servers and website portal used in the constituency, scrutiny and recount of ballot cast and scrutiny of all returns of the election. However, at the close of hearing the appellant abandoned those prayers.

[6] Before the hearing of the petition started, the petitioner filed a notice of motion dated 11th September 2017 seeking various orders including an order against IEBC to produce and deliver in court all KIEMS kits used in the election. By a ruling dated 3rd November, 2017, the election court allowed the application partially and ordered IEBC to make available certified copies of the record and/or data from the KIEMS kit of the number of voters identified during the voting exercise in respect of nine polling stations, which the court specified. The KIEMS kit data on authenticated (identified) voters for six polling stations was produced by **Joel Okomoli** the County ICT, Officer Bungoma, at the hearing of the petition. However, he did not avail the data in respect of three polling stations.

[7] Thereafter the appellant gave evidence in support of the petition and called eleven witnesses. The appellant relied on his supporting affidavit. He testified, amongst other things, that Kubuchai constituency had 123 polling stations; the margin of difference of declared results between him and 1st respondent was 423 votes; IEBC portal showed that he garnered 18,362 votes while the 1st respondent garnered 18,543 votes, a difference of 181 votes; he voted at Bwake polling station his stronghold which had 469 registered voters; the results from Bwake polling station were not declared; the Presiding Officer of Bwake polling station 2 was arrested by members of public and charged with an election offence; if the results of Bwake polling station which is in his home area were declared, he would have won; in some polling stations, voters were not identified by KIEMS kits and were recalled, and that, there were differences in some polling stations between the number of voters authenticated by the KIEMS kit and the results entered in form 35As.

[8] Of the 11 witnesses called, two, namely; **Nkuruma Kituyi** and **Meshack Owira** gave evidence relating to the arrest of two boys who were carrying two (2) ballot boxes from a house and taking them to the constituency tallying centre at Nalondo Boys Secondary School. They testified that the two boys disclosed that they had been sent by the Presiding Officer of Bwake polling station to remove the ballot boxes from his house near the tallying centre. Two other witnesses, David **Kamande Wafula** and **Sylvester Masaba Wambwa** testified that they voted at Bwake primary school polling centre. Four other witnesses namely; **Jane Nasimiyu Barasa**, **Peter Wakoli Butala**, **Samuel Wafula Shikuku** and **Magnus Baraka Simali** gave evidence relating to the failure of the KIEMS kit in some polling stations, and the recalling of some of the voters.

[9] The 1st respondent filed an affidavit in response to the petition in which he asserted that the elections were free and fair, transparent, and conducted in accordance with the principles of the Constitution, Elections Act and Regulations. He denied engaging in acts of intimidation, threat, harassment and bribery of voters. As regards the results for Bwake polling station, he stated that the results were cancelled by the Returning Officer and were not included in Form 35B because of a possible commission of an election offence and not because of wilful refusal by the Returning Officer. Further, the 1st respondent denied that the KIEMS kit were not used in the identification of voters at Sirare, Kisiwa, Sitila and Mukuyuni cattle dip polling stations and that people who were not identified voted, and stated that all eligible people were allowed to vote after their details were captured in the KIEMS kit. Nevertheless, he stated that:

“...during the early hours of voting KIEMS kit did not update the number of voters who had cast their votes. Voters were therefore recalled to enter their finger prints in the KIEMS kit so that their votes could be added to the number of votes that had been cast. The recalled voters did not vote a second time.”

[10] The 1st respondent gave evidence at the trial and adopted his affidavit in response but did not call any witnesses. He stated in his evidence in cross-examination, *inter alia*, that it was proper for some voters to be recalled to place fingers on the KIEMS kit; that he does not know how many voters were recalled; that there were 469 registered voters at Bwake polling station; that if the votes for Bwake polling station had been considered there would have been no difference; that he did not have form 35A for Bwake polling station and that the KIEMS kit did not fully function.

[11] The 3rd respondent filed a replying affidavit in which he denied the averments in the petition, including averments relating to failure of the KIEMS kit. As regards the averment that the Presiding Officer took ballot boxes for Bwake polling station to his house, he stated that the

allegation was subject of an ongoing case and within the jurisdiction of the trial court.

The 3rd respondent gave evidence at the trial and was cross-examined at length, especially in connection with the results of Bwake polling station and the operation of KIEMS kit in various polling stations.

[12] The 2nd and 3rd respondents called three witnesses namely, **Rosemary Nasambu Watemba** – the Presiding Officer at CDF Musese 1 of 2 polling station; **Martin Wafula Wachisi**, Presiding Officer at CDF Musese polling station 2 of 2 and **Joseph Masika Juma**, Presiding Officer at Sitila FYM primary school polling station 1 of 1. Their evidence relates to use of KIEMS kit.

[13] For completeness of the record, it is appropriate to mention that both the 1st, 2nd and 3rd respondents filed respective applications at the trial. The 2nd and 3rd respondents filed a notice of motion dated 15th November, 2017 before the conclusion of the trial seeking an order that the officer in charge, Nalondo Police station be compelled to deliver to court for inspection ballot boxes, form 35A, the black pack KIEMS kit and its components, QR code and polling station diary in respect of Bwake primary polling station No. 2 of 2.

The application was brought on the basis that the materials were held by the police for criminal investigation and that the Returning Officer could not comply with the court order requiring him to produce them to court as they were not in his custody. The application was opposed by the appellant on the grounds, *inter alia*, that the election materials have been interfered with. That application was dismissed by the election court by a ruling dated 15th November 2017.

[14] The application by the 1st respondent dated 18th December, 2017 filed after the conclusion of the trial, asked the election court to order scrutiny of the ballot boxes, votes cast, copies of register of voters, results of polling stations, counted ballot boxes, ballot boxes for Bwake polling station and other election materials in respect to the election of a member of National Assembly for Kubuchai constituency. The appellant opposed the application. That application was similarly dismissed by a ruling dated 23rd January 2018.

[15] The election court considered the evidence. The grounds of voter bribery, voter intimidation, harassment, assault, manipulation, lack of voter education and breach of oath of secrecy appointment of four agents instead of one by 1st respondent, were dismissed. Regarding the identification of voters by KIEMS kit at various polling stations, the election court said:

“There is substantial evidence that 6 stations namely Kisiwa polling station 1 and 2; Musese CDF polling station 1 and 2, Sitila FYM primary School polling station and Mukuyuni Cattle Dip polling station for the first 2 hours or so until there was a routine 2 hourly check by the presiding officers the KIEMS kit in those stations did not update the record of those who had been identified and voted; in other words, the kit did not store the data of the people identified. The 3rd respondent attributed this to failure by polling clerks to press the necessary icon for purposes of storing data”.

[16] Further the election court made findings that:

- (i) The evidence of failure of the KIEMS kit was not supported by evidence.
- (ii) The evidence before the court is that there was human error on the part of the polling clerks who failed to process an icon that would have updated the kit with data captured while identifying voters which error was immediately corrected upon detection.
- (iii) Failing to update the KIEMS kit *per se* cannot vitiate an election as the KIEMS kit did not count results.
- (v) there was no evidence of contravention of either the Constitution or any other law applicable to technology nor any evidence to suggest non compliance with any law or regulations by polling clerks in updating the KIEMS kit.
- (vi) The recall of voters was not only irregular but unnecessary as the data captured by those who returned did not help much since the record could prove that the number of those who returned was negligible in any event.
- (vii) The irregularity did not go to the core of the election or affect the final results.
- (viii) The irregularity of recalling voters did not pin down the Presiding Officer with breach of oath of secrecy as, *inter alia*, no evidence was placed before the court of the method used in identifying and recalling voters.

[17] On the question of the results of Bwake polling station, the election court made a finding that the reasons for non-inclusion of the results were that the ballot boxes were found in questionable circumstances, the appellant refused despite assurance by the returning officer that the seals were intact and that there were no signs of tampering and that the election materials were impounded by the police.

The court made further findings that since the Returning Officer did not receive any election materials from Bwake, he committed no illegality; the appellant did not prove e.g. by producing form 35A that had the results been included, he would have emerged the winner; notably the appellant did not dispute the evidence of the Returning Officer that in the announced results posted on form 35A, he had 300 votes whereas the 1st respondent got 58 votes; and that the circumstances were not as grave as envisaged by section 55B of the Elections Act for postponement of elections.

[18] The appeal is based on thirty-two (32) grounds which the appellant condensed to four broad issues namely;

- (a) whether the appellant proved that the 2nd respondent failed to use and apply the KIEMS kit to identify voters and to store data in several polling stations and if so whether this affected the conduct and the result of the election.
- (b) whether the appellant proved there were illegalities and irregularities committed by the use or non use of the KIEMS kit during the election and if so, whether the illegalities and irregularities affected the conduct; and the results of the election
- (c) whether the appellant proved that there were illegalities and irregularities committed by the 2nd respondent at Bwake polling station 2 and if so whether the illegalities and irregularities affected the conduct, and the results of the election.
- (d) whether the election was conducted in compliance of the principles of the Constitution and law on elections.

The 2nd and 3rd respondents filed notice of ground affirming the decision of the election court.

[19] Before the appeal was scheduled for pre-hearing conference, the 2nd and 3rd respondents filed a notice of motion dated 19th March, 2018 seeking an order that the notice of appeal dated 8th March 2018 be struck out on the ground that it was filed out of time and without leave of the court.

In response, on 27th March, 2018 the appellant filed a notice of motion seeking three orders, namely, the extension of time within which to file the notice of appeal; leave to file and serve the notice of appeal dated 26th March 2018 out of time; and if leave is granted, the notice of appeal dated 26th March 2018 and contained in the record of appeal dated 26th March, 2018 to be deemed as duly filed and served.

At the pre-hearing conference, the Court directed that the two interlocutory applications be argued in the appeal.

[20] It is logical to deal first with the appellant's application. The application is supported by the grounds on the body of the application. It is also supported by the affidavit of the appellant applicant sworn on 26th March 2018; the appellant's supplementary affidavit sworn on 3rd April, 2018; the affidavit of Charles Nzoka Muthoku – a legal clerk sworn on 3rd April 2018 and the annexed documents. The application is opposed by the three respondents.

[21] By rule 6(1) of the **Court of Appeal (Election Petition) Rules, 2017 (2017 Rules)**, a person who desires to appeal to the Court is required to lodge a notice of appeal in the registry. By rule 6(2) of the 2017 Rules, the notice of appeal is required to be filed within seven days of the date of the decision appealed against. By rule 7(1), the notice of appeal should be served within five days of the date of filing. Rule 17(1) gives the Court discretion, and for sufficient reason, to extend or reduce the timelines prescribed by the 2017 Rules. However, rule 17(2) stipulates that the power of the Court to extend or reduce time does not apply to timelines set by the Constitution and the Elections Act, 2011.

Further, Rule 5 provides that the effect of any failure to comply with the 2017 Rules is a matter for determination at the court's discretion subject to the provisions of Article 159(2)(d) of the Constitution and the need to observe the timelines set by the Constitution or any other written law.

Article 159(2) (d) of the Constitution referred to provides that in exercising judicial authority, the courts and tribunals shall be guided by the principle that justice shall be administered without undue regard to procedural technicalities.

[22] Charles Nzioka Muthoka, the legal clerk of the advocates for the appellant has in his affidavit explained that; he was on 6th March, 2018 instructed to travel from Nairobi to the High Court in Bungoma to file a notice of appeal; that a bus to Bungoma was not available until the morning of 7th March, 2018; that he arrived at Bungoma at 5.30 p.m. on 7th March, 2018 and found the court closed; that he filed the notice of appeal on 8th March, 2018 at Bungoma High Court and on 9th March, 2018 he filed another notice of appeal at the Kisumu Court of Appeal Registry; and that he served the notices of appeal on the respective respondents' advocates on 12th March, 2018. He has annexed a copy of the bus ticket, a copy of a fees receipt issued by the High Court in Bungoma dated 8th March, 2018 and a copy of the notice of appeal dated 6th March, 2018 and received by the Court of Appeal registry on 9th March, 2018. The appellant's advocates states in the application that the notice of appeal dated 6th March, 2018 was lodged under the wrong provisions of the law. The notice of motion dated 26th March 2018 annexed to the application contains 30 grounds of appeal.

[23] We take judicial notice of the fact that the **Court of Appeal (Election Petition) Rules 2017** were circulated before they were gazetted and that the provisions of the un-gazetted rules have been used occasionally by both the bench and the bar. Under the un-gazetted rules, a notice of appeal was required to contain the grounds of appeal. The Court of Appeal (Election Petition) Rules, 2017 were gazetted under **Legal Notice No. 114 of 2017**. There is no requirement under rule 6(3) of the gazetted rules that a notice of appeal should contain the grounds of appeal. Instead, rule 6(5) provides that the notice of appeal shall be substantially in form EPA 1 set out in the schedule. The notice of appeal dated 6th of March 2018 and filed at the Court of Appeal registry at Kisumu on 9th March, 2018 substantially conforms with the 2017 Rules. The notice of appeal dated 26th March, 2018 does not. In the premises and in the interest of justice, we treat the appellant's application as referring to the notice of appeal dated 6th March 2018 and lodged at the Court of Appeal Registry on 9th March, 2018.

[24] The notice of appeal dated 6th March, 2018 and filed at the Kisumu Court of Appeal Registry on 9th March, 2018, was lodged two days out of time. By rule 15 of the 2017 Rules, the Registrar of the Court was entitled to accept it although it was filed out of time. It follows, therefore, that by the time the record of appeal was filed on 27th March 2018, there was in existence a notice of appeal.

[25] The notice of appeal lodged on 9th March 2018 was served on 12th March 2018 which was within the five days prescribed by the 2017

Rules. The late filing of the notice of appeal has not affected the timelines for the determination of the appeal nor is there any complaint by the respondents that the delay has caused any undue prejudice. This Court in **John Munuve Mati v Returning Officer Mwingi North Constituency, Independent Electoral & Boundaries Commission & Paul Musyimi Nzengu [2018] eKLR** extended time for filing a notice of appeal in similar circumstances.

[26] We have considered the respective submissions and we are satisfied that the short delay of two days has been reasonably explained; that this is a proper case for exercise of the Court's discretion in favour of the appellant; and that procedural technicalities should not stand in the way of electoral justice. Accordingly, the appellant's application is allowed and the notice of appeal dated 6th March, 2018 and lodged on 9th March, 2018 is deemed as filed within time and incorporated in the record of appeal. Consequently, the 2nd and 3rd respondents' application to strike out the notice of appeal is dismissed. We make no order as to costs in respect of the two applications.

[27] On the first broad ground of appeal relating to failure to use and apply the KIEMS kit to identify voters and store data in several polling stations, Mr. Ndambiri, the learned counsel for the appellant submitted, in essence, that, the appellant fully discharged the evidential burden of proof that the KIEMS kit failed to optimally identify voters and store data in several polling stations. He also submitted that the appellant gave oral evidence of the specific number of people who voted in each of the mentioned polling stations without being identified by the KIEMS kit and also evidence from the KIEMS kit data, of the number of people who were identified by the KIEMS kit in several polling stations which showed that there was a difference between the number of votes cast and manually counted in three polling stations. The appellant's counsel contended that the appellant's evidence showing failure of the KIEMS kit was not challenged by the respondents and faulted the finding of the election court that the allegation of failure of the KIEMS kit was not supported by evidence and was due to human error on several grounds including the fact that the polling clerks who failed to press the icon were not called as witnesses and the failure by the Presiding Officers to report the non-functioning of KIEMS kits to the Returning Officer.

[28] **Mr. Wena**, learned counsel for the 1st respondent submitted that the allegation relating to the use of the KIEMS kit were not proved to the required standard; that no witness testified that he or she was allowed to vote without their details being captured by the KIEMS kit or that they voted more than once; that the appellant's agents signed form 35As without challenging the results; that the votes were cast manually, counted manually, and entered in form 35As manually; that the primary purpose of the KIEMS kit was voter identification and that failure to update the number of people identified did not affect the results from the affected polling stations.

[29] **Mr. Akide**, learned Senior Counsel, for the 2nd and 3rd respondents submitted, amongst other things, that, the primary function of the KIEMS kit was to identify voters and store data on the voting day; that the exercise of voting, counting and filling of form 35A was manual; that none of the appellant's witnesses claimed that they were allowed to cast their votes without being identified by KIEMS kit or that they were re-called to the polling station to vote a second time; that the minor error of failing to store voter identification data during the early hours of the voting in some stations did not affect the election in those polling stations or in the entire constituency and that there is no provision in the electoral laws or regulations that prohibit the recalling of a voter or voters to the polling station.

[30] The appellant pleaded in paragraph 16 of the petition that IEBC and its officers failed to use the KIEMS kit in the identification of voters in the mentioned polling stations and therefore allowed people who were not eligible to vote and voters to vote more than once. In paragraph 18 of the petition, the appellant pleaded:

“The 2nd and 3rd respondents' failure and/or refusal to correctly, transparently and accurately enter the results of the polling stations in KIEMS kit was a flagrant breach of the fundamental constitutional principles and a violation of the provisions of the Elections Act and Elections (General) Regulations 2012 (Rev. 2017)”.

[31] The general principles for electoral system in Article 81 of the Constitution include:

“(e) Free and fair elections which are –

(i) By secret ballot

(ii) Free from violence, intimidation, improper influence or corruption

(iii) Conducted by an independent body and

(iv) Transparent; and

(v) Administered in an impartial, neutral, efficient, accurate and accountable manner”

As regards voting, Article 86 of the Constitution provides that IEBC shall ensure *inter alia* that:

“(a) whatever voting method is used, the system is simple accurate, verifiable, secure, accountable and transparent”

The political rights of citizens in Article 38 of the Constitution includes the right to free, fair and regular elections based on universal suffrage and free expression of the will of the electors for any elective public body or office established under the Constitution (**Article 38(2)**), and, a right without restriction to be registered as a voter and to vote by secret ballot in any election (**Article 38(3)**).

[32] The integrated electronic electoral system established under section 44 of Elections Act enables biometric voter registration; electronic voter identification and electronic transmission of results. By **section 44(3)** of the **Election Act**, the IEBC is required to ensure that the

technology used is simple, accurate, verifiable, secure, accountable and transparent.

Section 44A authorises the IEBC to put in place a complimentary mechanism for identification of voters that is simple, accurate, verifiable, secure, accountable and transparent.

Regulation 26 of the Elections (Technology) Regulation, 2017 authorises IEBC to suspend or terminate the use of election technology and the procedure to be followed before suspension or termination of the use of election technology.

Lastly, regulation 69(1)(e) of Election (General) Regulations, 2012 stipulates the procedure to be followed by the Presiding Officer of a polling station where electronic votes identification device fails to identify a voter. In that case, the Presiding Officer is mandatorily required to:

- “(i) invite the agents and candidates in the station to witness that the voter cannot be identified using the device;***
- (ii) complete form 32A in the presence of agents and candidates;***
- (iii) identify the voter using the printed Register of voters; and***
- (iv) once identified proceed to issue the voter with the ballot paper to vote.”***

[33] In **Raila Odinga & 5 Others vs. Independent Electoral and Boundaries Commission & 3 Others** [2013] eKLR (**Raila 2013**) the Supreme Court said at paragraph 195 that the legal burden in election cases rests on the petitioner but depending on the effectiveness with which he or she discharges the burden, the initial burden keeps shifting. Regarding the standard or proof, the Supreme Court said in the same case at para. 203 that the threshold of proof should be in principle, above the balance of probability though not as high as beyond reasonable doubt.

Section 83 of the Elections Act which is applicable to this appeal provided before the 2017 amendment thus:

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

In **Raila 2013** (supra), the Supreme Court said at para 1986;

“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 non-compliance did affect the validity of the elections.”

In **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others** [2014] eKLR (**Peter Munya case**), the Supreme Court said at para 217 in relation to section 83 of the Elections Act:

“If it should be shown that an election was conducted substantially in accordance with the principles of the Constitution and the Elections Act then such election is not to be invalidated only on ground of irregularities”

and in para 218 thereof:

“where however it is shown that the irregularities were of such magnitude that they affected the election result, then such an election stands to be invalidated”.

Referring to gubernatorial election, the Supreme Court said at Para 201 of **Peter Munya case** that:

“It matters not how wide or small margin of victory is”

Lastly, the Supreme Court said in **Peter Munya case** at para 205A:

“We should state as a principle of electoral law, that an election is not to be annulled except on cogent and ascertained factual premises.”

We shall apply the principles in **Raila 2013** and in **Peter Munya case** in this appeal.

[34] Turning to the general grounds of appeal, particularly the failure to use and apply the KIEMS kit to identify voters and store data in several polling stations, we refer to the finding of fact by the election court at para 15 of this judgment that the KIEMS kit did not update the record of those who had been identified and voted in six polling stations for the first two hours or so. There is no cross-appeal by the respondents against that finding. Indeed, that finding was supported by four of the appellant’s witnesses. It was also admitted by the respondent and also by the three witnesses called by the 2nd and 3rd respondents. However, the evidence of the respondents was that all those people who voted were identified by the KIEMS kit and that the failure to store data did not affect the results.

Rosemary Nasambu Watemba, the Presiding Officer for CDF Musese 1 of 2 described vividly what happened in her polling station. She could see ballots in the ballot boxes but the KIEMS kits had not recorded the voting or people who had been identified and voted. She checked the number of people recorded by the KIEMS kit against the ballot cast and found that the names of about 67 votes had not been captured. According to Joseph Masika Juma, the Presiding Officer of Sitita FYM primary school 1 of 1, he discovered the anomaly after two and half hours. He found that the voter turnout was not recorded by the KIEMS kit. According to him the KIEMS kit was supposed to identify voters, give name, picture, voting station and bio data of the voter. He found that about 100 people had voted but had not been captured in the KIEMS kit.

According to the 3rd respondent, no polling station reported KIEMS kit failure and all KIEMS kits were functional and manual identification was not resorted to.

[35] Section 10 of the Elections Act provides for eligibility to vote and section 10(1) specifically provides:

“A person whose name and biometric data are entered in a register of voters in a particular polling station and produces an identification document shall be eligible to vote in that polling station.”

The electoral system provides for electronic voter identification at the polling station. The persons eligible to vote are the ones, *inter alia*, whose biometric data are entered in the KIEMS kit. The evidence before the election court proved, as claimed by the appellant, that persons voted in six polling stations without being identified by KIEMS kit.

The assertion by the respondents and the three witnesses called by the 2nd and 3rd respondents that those people were identified by the KIEMS kit was not supported by the KIEMS kit itself. The KIEMS kit is required, among other things, to be accurate, verifiable, accountable and transparent. For identification of voters for purposes of election, the KIEMS kit is supposed to complete all its functions relating to the identification of a voter otherwise, it will have failed to serve its purpose and to perform its function as a technology in the electoral system. If the data of the voter are not recorded in the KIEMS kit, his ballot has not been accounted for and there is possibility that the same voter can vote again at the same polling station. Thus, the assertion by the respondents and the finding of the election court that the voters whose data were not captured by the KIEMS kit were identified by the KIEMS kit is erroneous.

It did not matter that the failure to capture the data was due to human error for the effect is that people voted who were not reckoned in the KIEMS kit to have been identified and to have voted.

[36] There was also ample evidence that when the error was discovered after about 2 hours of voting, the Presiding Officers instructed agents to recall the voters whose data had not been captured by the KIEMS kit to place their finger prints on the scanner. Some of the people who had voted returned to the respective polling stations and the process was restarted. However, there was evidence that they did not vote again. This process was not authorized by the Returning Officer. He was informed after the fact. The law provides for electronic identification of a voter before the voting and for the purpose of voting. The procedure applied is not recognized by law. In our view, the procedure was tantamount to tampering with the KIEMS kit to record a false fact that people identified were going to vote when they had already voted.

The Presiding Officer should have left the error to remain for the decision of the Returning Officer or the election court on the effect of the errors on the result of the election.

[37] Persons who were not electronically identified were not eligible to vote. By allowing such people to vote and the subsequent tampering with the KIEMS kit was a serious breach of the constitutional principles of transparency, accuracy and accountability of the electoral system and of the Elections Act. That is sufficient ground for annulling the results of the six polling stations which were affected.

Moreover, the finding of the election court that such breach did not affect the result of the election was erroneous. The winning margin by the 1st respondent was 423 votes. Considering that it was impossible to distinguish between the votes cast by the identified voters and the votes of those genuinely identified by the KIEMS kit, and number of votes cast in the respective polling stations, the winning votes of the 1st respondent would have been substantially reduced, if not completely wiped out.

More specifically, there was uncontested evidence that in CDF Masese 1 of 2; CDF Masese 2 of 2 and Sitila FYM primary school polling stations, the number of votes cast exceeded the number of votes authenticated by the KIEMS kit. By **Regulation 83(1) (c) the Elections (General) Regulations, 2012**, the Returning Officer is required at the time of tallying to disregard the results of the count of a polling station where the total votes exceeds the total number of the voters who turned out to vote in that polling station. If the results from the three polling stations were disregarded, the results of the election would have been affected.

[38] The results for Bwake polling station 2 of 2 were not tallied and were not entered in Form 35B. The Returning Officer entered “0” results, meaning that there were no votes. The Returning Officer explained that he did not receive form 35A for the polling station and that he formed the opinion that the results from the polling station would not have affected the overall results. There was ample evidence that the Presiding Officer, who did not give evidence, took the ballot boxes and election material to his house near the tallying centre and about 8 kilometers from the polling station. The Returning Officer gave evidence that the Presiding Officer may have had the ballot boxes in his house for about eight hours. Some ballot boxes were intercepted when two boys were taking them to the tallying center. There was evidence that more ballot boxes were found in the Presiding Officer’s house. The incident was reported to the police who charged the Presiding Officer with an electoral offence. The ballot boxes and the election materials were impounded by the police and were not available at the trial. There were 469 registered voters at the affected polling station. The appellant claimed that he voted at the polling station and that this was his stronghold.

[39] The 1st respondent stated at paragraph 7 of the affidavit to support his notice of motion dated 18th December, 2017 as follows:

“I know of my own knowledge that I garnered some votes from Bwake II while I know that the majority of votes in that polling station were in favour of the petitioner but despite which having regard to vote margin before inclusion of the results of Bwake II, the ultimate results would not have materially changed as to deprive the majority of vote in Kabuchai constituency.”

The Returning Officer gave the number of votes for the appellant at that polling station as 300 and the 1st respondent as 58 from an unofficial source.

[40] The reasoning of the election court is reflected in para. 17 of this judgment. Regardless the reasons the Presiding Officer had for taking the ballot boxes and election material to his house, this was, *prima facie*, in breach of the election law which affected the integrity of the election. It was speculative for the Returning Officer and the election court to say that the results could not have affected the outcome of the results. Considering the narrow margin by which the 1st respondent won the election, the result of Bwake polling station 2 of 2 would at least have substantially reduced the winning margin and cast doubt on the true winner of the election.

[41] We find that the incident relating to ballot boxes and election material of Bwake polling station 2 of 2 breached the constitutional principles of electoral system and the Elections Act and also that the non inclusion of the results affected the results of the election.

[42] The grounds for affirming the decision of the election court are not in truth additional grounds for affirming the decision, but a reiteration of the decision of the election court. They are at best grounds for opposing the appeal and do not require separate consideration.

[43] For the foregoing reasons:

(i) The appeal is allowed and the judgment of the election court dated 28th February, 2018 is set aside with costs to the appellant against the respondents.

(ii) The petition of the appellant dated 4th September, 2017 is allowed with costs to the appellant against the respondents.

(iii) A declaration is issued that the election for member of National Assembly, Kubuchai Constituency held on 8th August, 2017 was not conducted in accordance with the principles laid out in the Constitution of Kenya 2010 and the Election Act and Regulations, rendering the results declared on 10th August, 2017 and gazetted on 22nd August, 2017 invalid, null and void.

(iv) A declaration is issued that James Lusweti Mukwe was not validly elected as the member of National Assembly of Kubuchai Constituency during the 8th August, 2017 election and a certificate to that effect to issue to the Speaker of the National Assembly.

(v) A fresh election to be held for election of a member of National Assembly for Kubuchai Constituency within the time stipulated by law.

(vi) The costs of the petition and of the appeal to be shared equally by the 1st respondent on one part and the 2nd and 3rd respondents on the other part.

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

E. M. GITHINJI

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR