



THE COURT OF APPEAL

AT ELDORET

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

ELECTION PETITION APPEAL NO. 24 OF 2018

BETWEEN

JOHN LOKITARE LODINYO APPELLANT

AND

INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION 1ST RESPONDENT

BONVENTURE OKOCHI OBONGOYA 2ND RESPONDENT

MARK LOMUNOKOL 3RD RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Kapenguria, (S. M. Githinji, J.) dated 1st March, 2018 in Election Petition No. 1 of 2017)

JUDGMENT OF THE COURT

Introduction

1. The election of the position of Member of Parliament for Kacheliba Constituency in West Pokot County was held alongside other elections in the General Elections on 8th August, 2017. Four candidates contested for the seat. These were **Mark Lomunokol** (the 3rd respondent herein) **John Lokitare Lodinyo** (the appellant herein), **Ibrahim Pkiach Longolomo** and **Lokoilereng Peter Alany**. On 10th August, 2017 the Independent Electoral and Boundaries Commission (IEBC) (the 1st respondent herein) declared the 3rd respondent, **Mark Lomunokol** as the duly elected Member of Parliament for Kacheliba Constituency with 16,833 votes. The appellant was the closest contestant having garnered 15,063 votes. **Ibrahim Pkiach Longolomo** and **Lokoilereng Peter Alany** garnered 3,588 votes and 175 votes respectively.

The IEBC, (the 1st respondent herein) is the Constitutional Authority mandated to manage the elections. **Bonventure Okochi Obongoya**, (the 2nd respondent) was at the material time the Returning Officer for Kacheliba Constituency.

2. **John Lokitare Lodinyo**, (the appellant) was dissatisfied with the outcome of the elections for Member of Parliament for Kacheliba Constituency and filed a petition dated 5th September, 2017, challenging the outcome of the elections on the grounds *inter alia* that the results announced at the tallying centre were different from those posted on the 1st respondent's online portal, and also different from the results declared on the Form 35B declared by the 2nd respondent; that eight people appointed as presiding officers and deputy presiding officers were partisan and had an interest in the Kacheliba Constituency election as they had openly declared their support for the 3rd respondent; that despite the fact that the appellant had raised objections to the appointment of these officers, the 1st respondent proceeded to appoint them and to post them to polling stations which had the highest number of registered voters.

3. The appellant further claimed that the election was marred by instances of manipulation of Forms 35A due to variance of votes which differed from the data presented in the **Kenya Integrated Elections Management Systems (KIEMS)** kit; that the election was rigged and that there were instances of voter bribery, improper assistance of illiterate voters and collusion between the officials of the 1st respondent and

the 2nd respondent in committing election offences by allowing persons not identified biometrically and not in the register to vote thus influencing the voters to vote for the 3rd respondent; that the results were declared based on Forms 35As that were incomplete, unverified, unsigned and some forms were signed by persons not authorized to sign them; that the 1st respondent shirked its duty and failed to observe the principles of free and fair elections as the election was not conducted in accordance with Constitutional principles and election laws.

4. The appellant sought *inter alia* a declaration that the parliamentary election held on 8th August, 2017 for Kacheliba Constituency be declared null and void and that the 3rd respondent's election as the Member of Parliament for Kacheliba Constituency be declared null and void.

5. The 1st and 2nd respondents in their response to the Petition, denied the appellant's assertions and maintained that the correct results for the election in Kacheliba Constituency were as contained in Form 35B, which were the final results. They denied that there were any malpractices or offences committed, and claimed that there was no violation of the process of election or the integrity of the election, in a manner that would render the election devoid of fairness and credibility, and that if there were any errors, they were inadvertent and did not affect the outcome of the election.

6. The 3rd respondent denied the allegations of voter bribery or that there were different sets of results, and averred that the results were those contained in Form 35B.

7. During the hearing of the Petition, the appellant called six (6) witnesses (including himself) in support of his Petition while the 1st and 2nd respondents denied the allegations and relied on the evidence of four witnesses. The 3rd respondent also opposed the Petition and relied on his own evidence and that of another witness.

8. In its judgment delivered on 1st March 2018 the election court dismissed the Petition in its entirety and held that the election was conducted in accordance with the Constitution and applicable laws; and that the 3rd respondent was validly declared the Member of Parliament for Kacheliba Constituency. The election court also ordered the appellant to pay each respondent costs of Kshs. 2,500,000/-.

9. Aggrieved by that decision, the appellant herein who was the Petitioner in the election court filed this appeal and raised 14 grounds of appeal, *inter alia*; that the learned Judge erred in law and fact in finding that the election was conducted by independent persons; that the appellant's evidence that the election officials were biased, was inadmissible; that the KIEMS kit did not fail in many polling stations and that there was manual backup; that the Forms 35A annexed to the Petition were not authentic; and that the existence of three different sets of aggregate total results in one Constituency did not affect the elections.

10. It was the appellant's further claim that the learned Judge erred in law and fact in finding; that there were no assisted voters; that the law on assisted voters was not followed; that the learned Judge failed to evaluate the totality of the evidence and the credibility of the respondents' witnesses before making a determination; that the form annexed to the Petition and those annexed to the responses were not similar and did not originate from the same author; that the glaring errors in Forms 35A and 35B were not material to the Petition; and that strangers did not sign Form 35A; that the 3rd respondent was validly elected when there was no time to show the total number of votes garnered. In addition that the election court erred in requiring a burden of proof that was higher than the set standard of proof; in applying wrong principles of law and considering non evidential facts to dismiss the petition and in awarding costs that were exorbitant.

Interlocutory Application

11. The 3rd respondent filed an interlocutory application dated 13th April, 2018 within the appeal, under **Rule 17(1)** of the Court of Appeal (**Election Petition**) Rules, 2017 the (**2017 Court of Appeal Rules**), in which he sought to have the appeal struck off as the record of appeal was filed out of time. In support of this motion, the 3rd respondent swore an affidavit dated 13th April, 2018 where he claimed that the record of appeal was filed after the thirty (30) day period stipulated by the law and without leave of the Court; that the appellant served the record of appeal upon the 3rd respondent outside the five (5) day period required from the date of filing of the record of appeal; and that the appellant thereafter subsequently filed a supplementary record of appeal outside the prescribed time and without leave of the Court. For those reasons, the 3rd respondent argued that the appeal was fatally defective as it failed to comply with the provisions of the law and this Court therefore lacks jurisdiction to entertain it.

12. The 1st and 2nd respondents supported the application by way of a replying affidavit dated 19th April, 2018 sworn by the 2nd respondent. In that affidavit, the 2nd respondent claimed that the record of appeal was served out of time; that the **2017 Court of Appeal Rules** stipulate that the 2nd respondent ought to be served in person or through a newspaper with national circulation; that the 1st respondent was to be served with the appeal at any constituency, county or head office, which was not done; and that failing to serve the record of appeal within time renders both the appeal and the supplementary record of appeal defective.

13. The appellant opposed the motion and filed a replying affidavit dated 20th April, 2018 wherein he claimed that the record of appeal was lodged within time. He submitted that the days between **30th March, 2018** and **2nd April, 2018** were excluded days since they were public holidays during which Good Friday and Easter Monday were celebrated and during which the Court registries remained closed; that the next working date fell on **3rd April, 2018**, the Tuesday after Easter Monday and that service was effected within the five day period on **9th April 2018**; that the supplementary record of appeal was properly before the court and that leave of this Court was therefore not required. The appellant also refuted the 1st and 2nd respondent's allegation regarding service and stated that the appellant served the appeal on the 2nd respondent at the constituency offices and also at the 1st respondent's headquarters, where they were advised to serve the appeal on the advocates on record for the 2nd respondent.

Submissions by counsel

14. The interlocutory application was heard together with the main appeal on 15th May, 2018. Learned counsel **Mr. Akenga Collins** appeared for the appellant, **Mr. D.W. Muyondo** appeared for the 1st and 2nd respondents while **Mr. R.E. Nyamu** appeared for the 3rd respondent. Counsel filed written submissions which they relied on and highlighted orally at the hearing.

15. **Mr. Akenga** while opposing the application to strike out the appeal urged the Court to find that the record of appeal was filed within time. He submitted that computation of time under the Constitution is governed by **Article 259(5), (7), (8) and (9)** and **section 57** of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya as read together with **section 85A of the Elections Act** and the **2017 Court of Appeal Rules**. Counsel asserted that the record of appeal ought to have been filed on or before **31st March 2018** but owing to the fact that the Easter Holiday fell on that date and ended on **2nd April 2018** which was Easter Monday, the Court registry remained closed. Relying on **Article 259** of the Constitution, counsel submitted that the first day is not included in the computation of time, and if the period of time ends on a Sunday or public holiday then the period extends to the subsequent day that is not a Sunday or a public holiday. For this reason, counsel for the appellant urged the Court to find that both the Notice of appeal and the Record of appeal were filed and served within time.

16. **Mr. Muyondo** for the 1st and 2nd respondents argued that the record of appeal was lodged out of time as the thirty (30) day period for filing the record of appeal ended on **31st March 2018** the last Saturday of the month, which was not a public holiday, and that the appellant could therefore not seek refuge under the provisions of Article 259(7) of the Constitution.

Analysis and Determination of the Interlocutory Application

17. The first issue for our consideration and determination is the respondents' claim that this Court has no jurisdiction to determine the appeal as the record of appeal was filed out of time. We are guided by the holding of the Supreme Court in **Lemanken Aramat v Harun Meitamei Lempaka & 2 others [2014] eKLR** where it was observed that:

“(69) A condition set in respect of electoral disputes, is the *strict adherence to the timelines prescribed by the Constitution and the electoral law*. The jurisdiction of the Court to hear and determine electoral disputes is *inherently tied to the issue of time*, and a breach of this strict scheme of time removes the dispute from the jurisdiction of the Court.”

18. The appellant submitted that the computation of time is governed both by the Constitution and the Interpretation and General Provisions Act. Article 259 (5) and (7) provide in part as follows:

(5) In calculating time between two events for any purpose under this Constitution, if the time is expressed—

(a) as days, the day on which the first event occurs shall be excluded, and the day by which the last event may occur shall be included;

...

(7) If, in any particular circumstances, the period of time prescribed by this Constitution ends on a Sunday or a public holiday, the period extends to the first subsequent day that is not a Sunday or public holiday.

19. This Court derives its jurisdiction to hear and determine appeals from the High Court in election matters from **section 85A** of the Elections Act. **Section 85A (1)(a)** thereof requires an appeal to the Court of Appeal to be filed within 30 days of the judgment of the High Court. The section reads:

“85 A (1) An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of County Governor shall lie to the Court of Appeal on matters of law only and shall be:

a) filed within thirty days of the decision of the High Court; and

b) heard and determined within six months of the filing of the appeal.” (Emphasis added)

20. The impugned judgment of the Election Court was delivered on **1st March, 2018**. The present appeal was filed on **3rd April, 2018**. The **Elections Act** and the **2017 Court of Appeal Rules** do not provide for computation of time. Accordingly, **section 57 of the Interpretation and General Provisions Act** applies. The section provides:-

“In computing time for purpose of any written law, unless the contrary intention appears –

(a) A period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;

(b) If the last day of the period is a Sunday or a public holiday or an official non-working days (which are in this section referred to as excluded days), the period shall include the next following day not being an excluded day;

(c) Where an act or proceedings is directed or allowed to be done or taken on a certain day, then, if that day happens to be

an excluded day, the act or proceedings shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;

(d) Where an act or proceedings is directed or allowed to be done or taken within any time not exceeding six days excluded day shall not be reckoned in the computation of time.

Rule 4(2) of the Court of Appeal Rules, 2017 provides;-

“Where there is no application provision in these Rules, the provisions of the Court of Appeal Rules, 2010 relating to civil appeals shall apply to an election petition appeal so far as they are not inconsistent with these Rules.”

21. This Court in the recent case of Evans Nabwera Taracha vs. IEBC & 2 Others, Election Petition Appeal No. 30 of 2018 stated as follows;-

“Rule 3 of the Court of Appeal Rules, 2010 has imported, word for word, the principles of computation of time under a written law stipulated in section 57(a) to (d) of the Interpretation and General Provisions Act.

However, as Rule 3 of the Court of Appeal Rules, 2010 expressly states, the rules applies to:-

“Any period of time fixed by these Rules or by any decision of the Court for doing an act...”

(8) Rule 3 of the Court of Appeal Rules, 2010 is obviously applicable in election petition appeals to computation of time prescribed by the Constitution and by the Election Act. Incidentally, Article 259 of the Constitution provides the manner in which the time prescribed by the Constitution should be computed. The fact that Rule 9(1) of Court Rules, 2017 provides that the record of appeal should be filed within thirty days from the date of the judgment of the High Court does not mean that the time for filing election petition appeals is governed by the Rules. That Rule merely reiterates and echoes the provisions of section 81A (1) (a) of the Elections Act.

The correct legal position is that the time for filing an election petition appeal is prescribed by statute, that is section 85A (1) (a) of the Election Act and that it is section 57 of the Interpretation and General Provisions Act which applies to the computation of time prescribed by section 85A (1) (a) of the Elections Act and not Rule 3 of the Court of Appeal Rules, 2010.” (Emphasis added).

22. In the instant appeal, the thirty (30) day period stipulated by section 85A (1) (a) of the Elections Act expired on 31st March, 2018 which was a **Saturday** an official non-working day. The following two days, 1st and 2nd April, 2018 were **Easter Sunday** and **Easter Monday** respectively. Being public holidays, both days are excluded for purposes of computation of time. The appeal should have been filed by 31st March, 2018 which was a Saturday. It was filed on the next working day, 3rd April, 2018. Accordingly, we find that the precepts of justice demand that we find that the record of appeal is properly before the Court. In the result, the notice of motion by the 3rd respondent dated 13th April, 2018 is without merit, and we hereby dismiss it.

The appeal

23. We now turn to consider the substantive grounds of appeal raised by the appellant. The memorandum of appeal raises fourteen (14) grounds of appeal. At the pre-trial conference before hearing of the appeal, this Court directed parties to file a list of issues which all parties agreed upon and the issues are as follows;

Contested Issue

a) Whether the trial Judge disregarded the fact that existence of three aggregate results in one constituency did affect validity and fairness of the election conducted by the 1st and 2nd respondents.

Agreed Issues for Determination

b) Whether the trial judge disregarded the fact that the electoral forms produced by both the petitioner and the respondent did not tally or was different raising the question of integrity of the whole electoral process and further raising the question of the validity of the aforementioned documents.

c) Whether the burden of proof was lower than the set standard of proof required in the hearing and determination of an election petition.

d) Whether the principal of admissibility of evidence was achieved by the trial judge in determining the election petition.

e) Whether the costs awarded by the trial judge were so exorbitant and/or inordinate.

f) Whether the petitioner had proved his case to the standard required by law.

- g) Whether the record of appeal together with the supplementary record of appeal were filed outside the time prescribed by the law.
- h) Whether the instant appeal is fatally defective.
- i) Whether the Court has jurisdiction to entertain the appeal.
- j) Whether the petitioner proved his case to the standard required by law.

Submissions by Counsel

24. The appellant submitted that the principle of free and fair elections as set out under **Article 81(e) of the Constitution** was not upheld in the election of Member of Parliament for Kacheliba Constituency; that the election Court erred by failing to find that there were three aggregate results which were all conflicting and did not tally; that the results on Form 35B indicated that the total votes cast were **36,137**, while those announced at the tallying centre indicated the total number of votes cast were **35, 659** and those at the IEBC portal were indicated as **36,170**; that the respondents failed to present Form 35B which would have indicated the tabulation of votes as tabulated by the 2nd respondent and the basis on which the 3rd respondent was declared as the winner; that these acts contravened **section 39 of the Elections Act** on the declaration of results and **regulations 73,75,79,82 and 83 of the Elections (General) Regulations 2012 (the Regulations)** and the election process was therefore flawed. Counsel relied on the Supreme Court case of **Raila Amolo Odinga & Another -vs- Independent Electoral and Boundaries Commission & 4 Others & Attorney General & Another (2017) eKLR (Raila Odinga, 2017)** where the Court held that the two limbs of section 83 of the Elections Act should be applied disjunctively and that where a petitioner is able to satisfactorily prove that the conduct of the election in question substantially violated the principles laid down in the Constitution and other written laws the election will be voided.

25. Counsel for the appellant took issue with the election court's finding that the 3rd respondent was the winner of the election despite the 1st and 2nd respondents not filing the form 35B that was used to certify the 3rd respondent as the winner.

26. On election offences, Counsel submitted that the learned Judge erred in finding that there was no bias in the hiring of some of the presiding officers and deputy presiding officers despite the appellant providing evidence to prove that the officers had conducted themselves in a manner clearly indicating their allegiance to the 3rd respondent; that the election Court erred when it proceeded to disregard the evidence adduced by the appellant proving that the presiding officers and deputy presiding officers had sent text messages indicating that they were siding with the 3rd respondent, and were therefore biased; that the appellant complained to the 1st and 2nd respondents regarding the infractions but no action was taken, instead the officials proceeded to preside over the elections; and that the 1st and 2nd respondents failed to comply with **regulations 5 and 6 of the Regulations**.

27. On the issue of assisted voters, it was submitted that the learned Judge failed to consider the evidence that Kacheliba Constituency had a high number of illiterate voters and that the process of assisting voters is provided for under **regulation 72 of the Regulations** where the presiding officer at the polling station is required to fill out Form 32 after assisting the voters as required by law but this was not followed; that the learned Judge disregarded the appellant's evidence that his agents were denied access into some of the polling stations; and that the 1st and 2nd respondents allowed unauthorized persons to sign Form 35A's in contravention of the law.

28. Counsel further faulted the learned Judge for failing to admit evidence attached to the appellant's petition and supporting affidavit and proceeding to disregard this evidence despite the respondents' not raising any objection to the evidence; that the appellant's right to a fair hearing as provided for under **Article 50 of the Constitution** was violated; that the learned Judge failed to effectively record the evidence presented by the appellant and his witnesses during trial resulting in an unfair trial.

29. Finally, on the issue of costs, counsel submitted that they were exorbitant and excessive and that the learned Judge failed to justify how the amount on costs was arrived at. Counsel relied on the case of **Martha Wangari Karua -vs- Independent Electoral and Boundaries Commission [2018] eKLR** where this Court stated:

“Capping costs was intended to curb the practice of awarding high costs. High costs are impediments to the right of access to justice and are not meant to be punitive. In our view, this petition and applications thereunder were not complex or protracted to our collective minds, the amount of Kshs. 10 million even where this amount is to be shared amongst all the respondents excessive.”

30. Opposing the appeal, counsel for the 1st and 2nd respondents submitted that the appellant's grounds of appeal as set out in the notice of appeal were aimed at re-litigating the facts of the case before the election Court; that under **section 85A (1) of the Elections Act**, the jurisdiction of this Court is limited to matters of law and that this appeal does not raise any issues of law but is based on alleged erroneous factual findings. Counsel argued that the jurisdiction of this Court is limited only to points of law. Counsel relied on the case of **Khatib Abdalla Mwashetani -vs- Gideon Mwangangi Wambua & 3 Others [2014] eKLR** where this Court adopted the holding in **Timamy Issa Abdalla -vs- Swaleh Salim Swaleh Imu & 3 Others [2014] eKLR** where this Court set out its jurisdiction while dealing with an appeal on matters of law and pronounced itself as follows:

“We must therefore be careful to isolate conclusions of law from conclusions of facts and only interfere if two conditions are met. Firstly, that the conclusions are conclusions of law, and secondly, that the conclusions of law arrived at cannot reasonably be drawn from the findings of the lower court on the facts.”

31. It was counsel's further submission that the appellant's notice of appeal was very general in nature and failed to comply with the

provisions of **rule 86(1)** of this **Court's Rules**.

32. On the issue that the learned judge disregarded evidence adduced by the appellant, it was counsel's submission that the learned judge evaluated all the evidence, found no merit in the Petition and dismissed it; that the legal burden of proof lay with the appellant at all times and that the evidentiary burden, which initially lay with the appellant shifts between the parties once the appellant as the petitioner proves that there were incidences of electoral irregularities or malpractices and that these instances of electoral irregularities or malpractices affected the results of the election as was held in the case of **Raila Odinga & Another v Independent Electoral and Boundaries Commission & 3 Others [2013] eKLR. (Raila Odinga, 2013)**. It was counsel's submission that the appellant failed to discharge this burden.

33. On the issue of whether the learned judge disregarded evidence that there were three aggregate sets of results and whether the existence of these three sets of results affected the validity and fairness of the election, counsel submitted that the appellant did not specify the polling stations whose results he disputed and did not specify which forms 35A had discrepancies, illegalities and irregularities; that the 1st and 2nd respondents adequately responded to and addressed all the allegations raised by the appellant and the burden of proof did not therefore at any time shift to the 1st and 2nd respondents.

34. On the issue of admission of documents at the election court, it was submitted that all evidence is admissible in Court so long as the Court is satisfied that its probative value has been established and that it was properly collected, preserved and presented to Court. It was counsel's submission that the learned Judge did not err in finding that the evidence presented by the appellant had not complied with the provisions of **section 106(B)** of the **Evidence Act Cap 80**.

35. Finally, on the issue of costs, counsel urged us not to disturb the award of costs and submitted that the election court did not err in awarding the costs of Kshs. 2,500,000/- to each respondent.

36. The 3rd respondent submitted that the appellant was not able to prove his case based on the allegations stated in his petition; that **section 83** of the **Elections Act** places a higher burden of proof in electoral cases as was held in the **Raila Odinga, 2017**; that the appellant had an obligation to demonstrate that the allegations in his petition affected the outcome of the election results. On the issue of there being three different sets of results, counsel submitted that the appellant failed to avail to the Court audio-visual evidence on what was announced at the tallying centre by the returning officer and further failed to avail evidence from the 1st respondents' public portal to prove that the results were different from those contained in the forms 35A.

37. On the issue of appointment of the presiding officers and deputy presiding officers and their deployment and the appellant's complaint that their appointment was not transparent and competitively carried out and that there was collusion between the 3rd respondent and the 1st and 2nd respondents on their appointment, it was submitted that the appellant did not tender any evidence to prove the 3rd respondent's collusion or that the appellant suffered any disadvantage as a result of the employment and deployment of those officers or how their employment affected the outcome of the election; that the allegations that the electronic voting system failed were not substantiated as the appellant failed to demonstrate where there was failure of the electronic transmission of the results or where voters were not electronically identified; that the appellant was not able to substantiate his claims of manipulation of the election results or that there was collusion and tampering of the electoral process by the respondents and that the appellant failed to prove that there were any election offences committed that affected the validity of the elections.

38. On the issue of costs, it was submitted that the election court proceeded to cap the costs awarded to the respondents at Kshs. 2,500,000/- and that as per the provisions of Rule 33 (1) of the **Elections (Parliamentary and County Elections) Petitions Rules, 2017**, once an election court caps the costs of and incidental to an election petition, the actual amount payable is determined through taxation; that the appellant had prematurely moved to this Court by challenging the award on costs before the respondents presented their bill of costs before the taxing master for assessment. Based on these reasons, counsel for the 3rd respondent urged us to dismiss this appeal with costs.

Analysis and determination

Whether the appeal raises issues of fact.

We have considered the appeal, the submissions made by the parties and the authorities cited. The first issue is whether the appeal is properly before this Court in light of **Section 85A of the Elections Act** which limits our mandate to the consideration of only matters of law. We must determine whether or not we have jurisdiction to determine the issues raised by the appellant as the Supreme Court held in **Samuel Kamau Macharia & Another v Kenya Commercial Bank & 2 others [2012] eKLR**;

“a court's jurisdiction flows from either the Constitution or legislation or both” and “can only exercise jurisdiction as conferred by the Constitution or other written law” and that “it cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

39. This Court derives its jurisdiction from **Section 85A** of the **Elections Act, 2011** which provides that **“An appeal from the High Court in an election petition ... shall lie to the Court of Appeal on matters of law only ...”**

40. In **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR. (Munya Decision)** the Supreme Court addressed and settled the question on what is a “matter of law” and stated as follows:-

“By limiting the scope of appeals to the Court of Appeal to matters of law only, Section 85A restricts the number, length and cost of petitions and, by so doing, meets the constitutional command in Article 87, for timely resolution of electoral disputes.

Section 85 A of the Elections Act is, therefore, neither a legislative accident nor a routine legal prescription. It is a product of a constitutional scheme requiring electoral disputes to be settled in a timely fashion. The Section is directed at litigants who may be dissatisfied with the judgment of the High Court in an election petition. To those litigants, it says: “Limit your appeals to the Court of Appeal to matters of law only.”

41. After considering various persuasive authorities from different jurisdictions, the Supreme Court thereafter stated that in the context of section 85A of the Elections Act, an issue of law would be:

“[81] Now with specific reference to Section 85A of the Elections Act, it emerges that the phrase “matters of law only,” means a question or an issue involving:

a. the interpretation, or construction of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, in an election petition in the High Court, concerning membership of the National Assembly, the Senate, or the office of County Governor;

b. the application of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, to a set of facts or evidence on record, by the trial Judge in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of County Governor;

c. the conclusions arrived at by the trial Judge in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of County Governor, where the appellant claims that such conclusions were based on “no evidence”, or that the conclusions were not supported by the established facts or evidence on record, or that the conclusions were “so perverse”, or so illegal, that no reasonable tribunal would arrive at the same; it is not enough for the appellant to contend that the trial Judge would probably have arrived at a different conclusion on the basis of the evidence.”

42. Later, in *Zacharia Okoth Obado v Edward Akong’o Oyugi & 2 others [2014] eKLR* the Supreme Court re-emphasized the jurisdiction of the Court of Appeal in election petition appeals and held that:

“This Court’s decision in the Peter Munya case is a reference-point, in determining whether a Court has made a finding on a point of fact, or a point of law. We had thus held (paragraph 90):

“The critical question is whether the Court of Appeal in making such an inquiry, exceeded its powers to review only matters of law, under Section 85A of the Elections Act. Was the Court cautious enough to limit itself to issues regarding the interpretation and application of the law by the trial Judge, in relation to the petition at the High Court? Did the Judges of Appeal limit themselves to evaluating the conclusions of the trial Judge on the basis of the evidence on record; and to determining whether such conclusions were not supported by the evidence; or to ascertaining that the conclusions were not so perverse that no reasonable tribunal could arrive at the same?”

43. In the more recent case of *Wavinya Ndeti & another v Independent Electoral and Boundaries Commission & 2 others [2018]* this Court, considering the role of the Court in determining whether an appeal from an election court raised questions of law as opposed to questions of fact, was mindful of the fact that it is sometimes hard to discern whether an issue is one of law or fact and observed that:

“Often times points of law may inescapably be difficult to separate from factual determination. The line is opaque and therefore circumspection is necessary”.

Thereafter, the court held that:

“In an appeal such as this, the burden is on the appellant to prove how the decision under appeal is wrong. To succeed the appellant must go beyond asking the Court to re-assess the evidence, because that is not the role of this Court. The appellant must demonstrate that the assessment of the evidence by the trial court was wrong.”

44. From the above cited decisions, it is clear that this Court is not precluded from considering facts with the objective of evaluating the conclusion that the election Court arrived at. We are satisfied that the appeal raises points of law. Accordingly, we find no merit in this ground of appeal and dismiss it.

Whether there were different sets of results announced by the 1st respondent.

45. The appellant asserted that the learned judge erred in his evaluation of the evidence by failing to find that there existed three different sets of results. The appellant’s contention was that the oral results announced at the tallying centre were at variance with the results contained in Form 35B and also those contained on the IEBC portal. The learned Judge in assessing these results held as follows:

“For the oral result allegedly announced at the tallying centre, there is no tangible evidence in support that was adduced in Court. The chief agent of the petitioner (PW-2) had not even a note where he had captured it. One wonders how he got the oral announcement if he did not record it anywhere and how correct it is. The 2nd respondent denies that there was such an announced result. The second set is of allegedly downloaded result from the public portal. The 2nd respondent agreed that the results as contained in form 35B were not agreeing with what was in the public portal. Public portal captures results sent to

Nairobi Bomas of Kenya through scanned forms 35A. It kept on changing on how the results trickled in.”

46. The issue on what constitutes the final result was settled by this Court in ***Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others*** [2017] eKLR. 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.”

47. A close reading of **section 39 (1)(1A)(i)** of the **Elections Act** indicates that the constituency returning officer is only obligated to tally, announce and declare the final results of each polling station for the election of member of National Assembly. There is nothing on electronic transmission of these results and the publication of the constituency results on the IEBC public portal. What then is to be made of the results that were transmitted by the 1st respondent on its public portal? We are guided by the recent pronouncement of this Court in ***Jackton Nyanungo Ranguma v Independent Electoral and Boundaries Commission & 2 others*** [2018] eKLR wherein it held that electronic transmission and publication of polling results in a public portal is only a requirement for the presidential election. The Court further went on to state that the voting, counting, tallying and transmission of results for all elective posts except the presidential post are manual. The Court held;

“A reading of section 39(1C) of the Act shows that electronic transmission and publication of polling result in a public portal is only a statutory requirement for the Presidential election. Further, except for voter registration and voter identification; voting, counting, tallying and transmission of results for the election of the other elective posts including that of the Governor are mainly manual. In all other cases, including the county Governor election, the transmission of results contemplated by section 39(1A) and (1B) of the Act is that the votes at the Polling Station are counted and recorded in Form 37A. Each Form 37A is forwarded to the Constituency Tallying Centre. The Constituency Returning officer tallies all the results from all the polling stations and records them in Form 37B. Forms 37B from all the Constituency Tallying Centres are forwarded to the County Tallying Centre where the County Returning Officer tallies all the results from the Forms 37B and announces the election results based on Form 37C.

Even accepting the errors, omissions and inconsistencies highlighted by PW 4 and the other witnesses, the legal position remains that the votes as recorded in Form 37A are final. Unless Forms 37A are disputed, any errors in electronic transmission of results or publication in IEBC public portal cannot, of themselves and without more, invalidate Forms 37A. Where the results are electronically transmitted from the polling station to any other portal as the IEBC may direct, such results can only be termed as provisional thus underlining the primacy and finality of Form 37A.”

48. Guided by the law as stated above, it follows that the results as contained in the Forms 35A remain final. Even though there may have been errors in the transmission of results and their subsequent publication in the IEBC public portal, this cannot, of itself, invalidate the results as contained in the Forms 35A. The results on the IEBC portal are provisional as provided by Regulation 82 of the Regulations which provides;

“The presiding officer shall, before ferrying the actual results of the election to the returning officer at the tallying venue, submit to the returning officer the results in electronic form, in such a manner as the Commission may direct.

The results submitted under sub-regulation (1) shall be provisional and subject to confirmation after the procedure described in regulation 76.”

49. Accordingly, the results of the election are those that are contained in the statutory forms, and these cannot be invalidated by those contained in the public portal, particularly since there is no statutory requirement for the transmission of results for other elective positions other than those of the presidential election. We cannot therefore find that anything turns on the fact that there were errors in the results transmitted on the 1st respondent’s public portal.

Whether the learned Judge erred in failing to admit into evidence the Forms 35A presented by the appellant.

50. On the question whether or not the election court erred in failing to admit the forms 35A that had been presented by the appellant to the election court; it is without doubt that the 2nd respondent proceeded to announce the results contained in Form 35B which were later gazetted by the 1st respondent as the results of the election. Drawing from the various decisions of this Court on the burden of proof, such as in ***Joho v Nyange & Another*** [2008] 3 KLR (EP) 500 at 507 where it was held that ***“The burden of proof in election petitions lies with the petitioner as he is the person who seeks to nullify an election”***, we reiterate that the appellant had the burden to ensure that he set out a *prima facie* case on this claim by adducing evidence proving the existence of three different sets of results. It was the appellant’s duty to present cogent evidence based on the three different sets of results as alleged in his petition.

51. It was the appellant’s submission that there were glaring errors on the Forms 35A that were material to the election, claims that strangers signed the Forms 35A and to prove these allegations, the appellant had attached the Forms 35A which he claimed proved these allegations to his petition as evidence; that he sought to show that there were irregularities in the forms used to declare the results by attempting to introduce the forms 35A which he admitted to having downloaded from the IEBC public portal.

52. The conditions upon which electronic evidence would be admissible as evidence are as provided for under **section 106 of the Evidence Act. Section 106A** of the Act reads as follows:

“The contents of electronic records may be proved in accordance with the provisions of section 106B.”

53. Section 106B as follows:-

“106B. Admissibility of electronic records

(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as “computer output”) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.

54. Essentially, the sections provide that electronic evidence which is printed out shall be treated like documentary evidence and will be admissible without production of the computer used to generate the information. The appellant claimed that his technical team downloaded the forms and had them printed. He admitted that the forms were from the IEBC public portal. Ordinarily, this would have meant accessing the IEBC portal, which one could only do if they had access to the internet, proceeding to log onto the IEBC portal page, clicking on the Forms 35A uploaded on Kacheliba Constituency, downloading the Forms 35A onto the computer’s hard disk and finally printing the documents via a printer connected to the computer.

55. It is at this juncture that the provisions of section **106B** of the **Evidence Act** come into play as the section sets out the conditions to be fulfilled to have this evidence admissible since evidence shall only be admissible if a certificate is presented identifying the electronic record and a description of the manner in which the electronic evidence was produced, together with any particulars of any device involved in the production of that document, which the appellant did not do. This Court in the case of ***County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others [2015] eKLR*** stated that:

“Section 106B of the Evidence Act states that electronic evidence of a computer recording or output is admissible in evidence as an original document “if the conditions mentioned in this section are satisfied in relation to the information and computer.” In our view, this is a mandatory requirement which was enacted for good reason. The court should not admit into evidence or rely on manipulated (and we all know this is possible) electronic evidence or record hence the stringent conditions in sub-section 106B (2) of that Act to vouchsafe the authenticity and integrity of the electronic record sought to be produced...”

56. In this case, the election court found these forms inadmissible as there was no certificate produced as required by **section 106(1) of the Evidence Act**. We agree with the observations of the election court that various factors come into play when proceeding to admit such evidence as electronic evidence due to the vulnerability and easy manipulation of electronic evidence and the ease with which such evidence can be modified during the collection of the evidence. The evidence may also be easily tampered with making it more difficult to detect any signs of manipulation of documents. We therefore find that the election court did not err in finding the electronic evidence inadmissible, and therefore this ground of appeal must fail.

Whether the appellant proved that the 3rd respondent was biased and engaged in bribery.

57. The appellant claimed that the election court disregarded his evidence on bias and undue influence by election agents employed by the 1st respondent. The appellant’s evidence on bias was based on an array of screenshots of social media messages written by agents whom the appellant alleged supported the 3rd respondent. The messages presented by the appellant were screenshots of some comments made on the Facebook social media application. At page 1339 of the record of appeal, the appellant on cross examination admitted

“At page 31-35 of the petition, I have attached some communications from whatsapp and facebook. I accessed it through my personal computer. I have not indicated the type of computer. I have not put a certificate about it.”

58. We find that this evidence would suffer a similar fate to the extracts of the Forms 35A as the appellant, on his own admission, failed to meet the mandatory requirements of section 106B of the Evidence Act. The appellant failed to provide particulars on how the information was accessed in the form of a certificate to be attached to his petition, and as such the evidence is inadmissible. As we have found in the previous ground of appeal, the election court cannot be faulted for its finding. This ground of appeal therefore fails.

59. We now turn to the allegations of bribery that were made by the appellant. In ***Moses Masika Wetangula -vs- Musikari Kombo & Others [2015] eKLR*** where allegations of bribery had been raised against the petitioner, the Supreme Court rendered itself as follows:

“[bribery is] a criminal offence in general penal parlance; but besides, it is a specifically-defined electoral offence, recognised as an incident capable of disrupting the due process of the electoral law.

The offence is to be proved beyond any reasonable doubt. The petitioner has to adduce evidence that is cogent, reliable, precise and unequivocal, in proof of the offence alleged.”

60. With respect to determining whether an electoral offence had occurred in the course of the conduct of an election, the Supreme Court further held in the case of ***Frederick Otieno Outa v. Jared Odoyo Okello & 4 Others (2014) eKLR*** that:

“The principle thus conveyed, is that the pleadings must be clear, the allegations elaborate, and the evidence adduced, focused and clear-cut. The foundation is clear: election offences bear the mark of a criminal conduct within the framework of an election

petition, yet outside the normal criminal jurisdiction. Election offences are, therefore, quasi-criminal in nature; and the Court ought not to enter a finding of guilt, if the evidence adduced is not definitive and cannot sustain such a finding, or if there is any doubt as to whether such an offence was, indeed, committed, or by whom. The commission of an election offence if proved, will not only lead to the election being set aside, but also to the disqualification of the perceived culprit, from standing as a Parliamentary-election candidate, given the terms of Article 99(2)(h) of the Constitution.”

61. The Supreme Court essentially found that bribery is both a criminal and electoral offence and as such, the same must be proved by credible evidence and the same proved beyond reasonable doubt.

62. At the time these pronouncements were made, **section 87(1) of the Elections Act** empowered a court to make a definitive finding as to the guilt of a party with respect to an election offence. This law was later amended. In any event, the principle that an allegation of bribery must be founded on cogent and credible evidence is still good law.

63. In ***Philip Kyalo Kituti Kaloki v Independent Electoral and Boundaries Commission & 2 others [2018] eKLR*** this Court, differently constituted, faced with a similar allegation rendered itself as follows:

“The burden of proof in election petitions is very high, often said to be above the civil standard of ‘a balance of probabilities’. Where cogent evidence is not led to show, to the standard required, that bribery took place, then the court cannot make a finding that it did. ... What the appellant was required to show was that he undertook the activities complained of in the course of the election that was held in Kibwezi East Constituency on 8th August 2017.”

64. In that appeal, the Court found that it fell on the party alleging bribery to show by means of cogent evidence, that bribery took place. The evidentiary burden lies with the appellant. From his petition, the appellant merely alludes to the bribery allegations but did not present any evidence to prove nor show this Court how the learned Judge erred in assessing the evidence of the alleged bribery presented before it. We have carefully considered the evidence led before the court as well as the judgment of the election court, and find that there was no evidence that the 3rd respondent was involved in any election offences. This challenge on the judgment of the election court fails.

Assisted voters

65. The appellant alleged that his agents were excluded from the process of assisting voters hence the reason why some polling stations recorded more votes cast than the total number of votes tallied. **Regulation 72** provides the procedure by which voters can be assisted. Where a voter requires assistance and is not accompanied by someone to assist him, then the presiding officer is allowed to assist the voter in the presence of party agents. The voter register has to be marked to that effect. Where an assistant other than the presiding officer assists a voter, then a Form 32 ought to be filled. The appellant alleges that this procedure was not followed but did not adduce evidence in the form of an affidavit and oral evidence by any voter who was assisted deponing that they were coerced in any way by any polling officer. The appellant did not in his submissions demonstrate that the election court erred in its assessment of any evidence presented before it showing that the process of assisting voters was not followed evidencing the committal of an election offence. What the appellant has done is to merely allege. The onus to discharge the burden lay on him.

66. The Supreme Court in ***Raila Odinga, 2017*** was categorical in its pronouncement that a petitioner who seeks 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. The Supreme Court stated:

“[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.”

“[133] It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce 'factual' evidence to prove his/her allegations of breach, then the burden shifts and it behoves the respondent to adduce evidence to prove compliance with the law.”

67. The burden of proof rested with the appellant as the petitioner before the High Court, and this legal burden never shifted. The evidential burden only shifts to the respondent after the petitioner adduces necessary evidence that would require the respondents to counter it. In an election petition, the legal burden of proof remains with the Petitioner. This was also the principle laid down in ***Raila Odinga, 2013***.

68. The appellant did not adduce credible evidence that the named eight persons in his petition were impartial and biased, or that there was bribery or that there was manipulation of the Forms 35A used to declare results. The burden never shifted to the respondents to prove non-compliance of the electoral laws or committal of election offences. The learned Judge cannot be faulted for finding that the appellant did not discharge the burden of proof. The appellant did not establish a *prima facie* case on the alleged non-validity of the election or on the allegations of non-conformity with the election principles. Thus, the evidential burden did not shift to the respondents for them to discharge it. The learned Judge maintained that the burden of proof remained with the appellant, and no basis was established for the evidential burden to shift to the appellant. This Court stated in the ***Jackton Nyanungo Ranguma v Independent Electoral and Boundaries Commission & 2 others case (supra)*** that:-

“We have considered the law on shifting evidential burden of proof and we are satisfied that it is the law that there is no onus

cast on the respondent to prove, in the event of a breach, that an election was nevertheless conducted substantially in accordance with the election law. The submission by the respondent goes against the tenet of this legal principle as it invites the court to find that if breach has been proved, the legal and evidentiary burden is on the respondent IEBC, to prove that the election was conducted substantially in accordance with the law. In our considered view, this is not the law. The appellant failed to prima facie produce cogent and credible evidence to prove the allegation that he had won the Kisumu County gubernatorial election or that the result of the election was affected by any irregularity. In this regard, there was no prima facie evidence on record that could warrant the evidentiary burden to shift to the respondents. Accordingly, we find that the trial judge did not err in the application of the legal and evidentiary burden of proof.”

69. We agree with this formulation, and are fortified in this by the holding of this Court in *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others* [2018] eKLR where the persuasive authority of the High Court in *Moses Wanjala Lukoye v Bernard Alfred Wekesa Sambu & 3 Others* [2013] eKLR was cited with approval.

70. We agree with the pronouncements of the election Court, and find that in the context of this appeal, the appellant did not lay any basis upon which the burden of proof would have shifted to the respondents. As such, we find that there is no reason upon which we can interfere with the findings of the election court.

71. We turn to the issue whether or not there was non compliance with any written law relating to the election; whether the election was conducted in accordance with the principles laid down in the Constitution and in particular whether the election court was right to sustain the 3rd respondent’s election on the basis of **section 83** of the Elections Act. That section reads as follows:

“Non-compliance with the law –

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.”

72. The appellant has urged us to find that, in view of the errors that took place during the conduct of the election, it was not conducted in accordance with the principles laid down in the Constitution, and that the non-compliance substantially affected the result of the elections. We do not agree. We find, like the election court did, that in the circumstances of this case there was no material upon which we could properly find that the election substantially departed from the principles laid down in the Constitution and the electoral laws. With respect to the minor errors that were conceded by the 1st and 2nd respondents to have occurred, we echo the words of this Court in *Philip Kyalo Kituti Kaloki v Independent Electoral and Boundaries Commission & 2 others* (supra) where it expressed itself thus:

“Elections are conducted by humans of whom none are infallible. As such, errors will always occur in the course of the election and the question that an election court must ask itself is not whether these errors and mistakes would occur. The proper question is how the same affected the outcome in a substantial, material and decisive manner. Where the errors are in the nature and scope of matters which cannot change the final result, the same cannot lead to a nullification of the election.”

73. The appellant did not present any evidence to the effect that the conduct of the election violated any of the provisions of the Constitution based on the above. For this reason, we find that this appeal must fail.

74. This leads us to the final issue in this appeal that is the issue of costs. The election court awarded costs to the respondent upon dismissing the petition. The appellant decried these costs, urging us to find that they were inordinately high. The law gives discretion to the election court on the award of costs, and these costs are meant to compensate a successful litigant for his labour. We reiterate the holding of this Court in the case of *Martha Wangari Karua v Independent Electoral & Boundaries Commission & 3 others* [2018] eKLR which 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.”

75. In the circumstances of this case, we are satisfied that the costs of Kshs.2,500,000.00 awarded are not inordinately high

such as to entitle us to interfere with the discretion of the election court. We therefore dismiss this ground of appeal.

76. Having carefully considered the issues raised by the appellant, the responses by the respondents and their rival submissions, we make the following orders:

a. The 3rd respondent’s Notice of Motion dated 13th April, 2018 is dismissed with no orders as to costs;

b. The appeal is dismissed with costs to the respondents;

c. If the parties do not agree on the quantum of costs, the same shall be taxed by the Deputy Registrar of this Court.

Those shall be the orders of this Court.

Dated and Delivered at Eldoret this 26th day of July, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH 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