



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT MOMBASA**  
**(CORAM: VISRAM, KARANJA & KOOME, J.J.A)**  
**ELECTION PETITION APPEAL NO. 7 OF 2018**

**IN THE MATTER OF THE ELECTION FOR THE MEMBER OF  
NATIONAL ASSEMBLY OF CHANGAMWE**

**AND**

**IN THE MATTER OF THE HIGH COURT OF KENYA AT MOMBASA ELECTION PETITION NO. 7 O 2017**

**BETWEEN**

**MOHAMED MAHAMUD ALI.....APPELLANT**

**AND**

**THE INDEPENDENT ELECTORAL &**

**BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT**

**AISHA ABUBAKAR, CHANGAMWE**

**CONSTITUENCY RETURNING OFFICER.....2<sup>ND</sup> RESPONDENT**

**OMAR MWINYI SHIMBWA .....3<sup>RD</sup> RESPONDENT**

*(Being an Appeal from the Judgment of the Election Court at Mombasa (Njoki Mwangi J.) dated 28<sup>th</sup> February, 2018)*

*in*

*Mombasa High Court Election Petition No. 7 of 2017*

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**JUDGMENT OF THE COURT**

**Background**

1. The race for Member of National Assembly Changamwe Constituency in the 8<sup>th</sup> August 2017 general elections attracted six contenders. After the people of Changamwe cast their votes and the exercise came to an end, they must have, like many other voters, waited with bated breath to see how their preferred candidate had fared. When the results were announced by the 2<sup>nd</sup> respondent on behalf of the 1<sup>st</sup> respondent on 10<sup>th</sup> August, 2017 the votes for each contestant were as follows:-

(i) Shimbwa Omar Mwinyi garnered 31584

(ii) Daib Abdi Mohamed.....	9769
(iii) Muange Daniel.....	6657
(iv) Mittau Peterson.....	478
(v) Mpapale Godfrey Imbili.....	196
(vi) Ngugi Patrick .....	181

2. From the above results it was evident that Shimba Omar Mwinyi (“the 3<sup>rd</sup> respondent”) had garnered the highest number of votes. He was consequently declared the winner and his name was subsequently published in the Kenya **Gazette No. 121** of 22<sup>nd</sup> August, 2017 as the duly elected Member of Parliament for Changamwe constituency. A voter registered in St. Lwanga Primary School polling station in the said constituency, Mohamed Mahamoud Ali (“the appellant”), was not satisfied with the election. He filed an election petition on 6<sup>th</sup> September, 2017 in the Election Court at Mombasa contending that the said election was marred with serious illegalities; egregious irregularities; electoral malpractices and was in contravention of various constitutional and statutory provisions. Aisha Abubakar (“the 2<sup>nd</sup> respondent”) was the Returning Officer of the Independent Electoral and Boundaries Commission (“the 1<sup>st</sup> respondent”) in Changamwe Constituency.

3. In a nutshell, the gist of the appellant’s complaints before the trial court were that:-

***a) The election for Member of Parliament for Changamwe Constituency was not conducted in accordance with Articles 81 and 86 of the Constitution of Kenya that set out the framework for a proper electoral system and voting process;***

***b) The 1<sup>st</sup> respondent failed to carry out a transparent, verifiable, accurate and accountable electoral process as required by Articles 81, 83 and 88 of the Constitution of Kenya;***

***c) The 1<sup>st</sup> and 2<sup>nd</sup> Respondents failed to adhere to the provisions on voting, counting of votes and declaration of results with regard to voting, sealing of ballot boxes, admission of the results and tallying as laid down by the Elections Act, the Election Laws (Amendment Act No. 1 of 2017 and the Election Offences Act).***

4. Reliefs sought by the appellant before the trial court encompassed immediate orders for preservation of election materials, scrutiny of elections materials, declaratory orders of violation of **Articles 81** and **86** of the constitution by the 1<sup>st</sup> and 2<sup>nd</sup> respondents, a declaration that the 3<sup>rd</sup> respondent was not validly elected, an order for fresh elections in the subject constituency, and an award of costs of the petition to the appellant. In the course of the proceedings before the Election court, the order for scrutiny was granted and there emanated a scrutiny report. There were 13 issues for determination as summarized by the trial court.

5. Upon deliberation on the said issues, consideration of the evidence tendered and the scrutiny report, the Election Court (**Njoki Mwangi J**), in a judgement dated 28<sup>th</sup> February, 2018 came to the conclusion that the irregularities occasioned by the 1<sup>st</sup> and 2<sup>nd</sup> respondents were not of such a magnitude as to justify the annulment of the impugned election results and found the petitioner had failed to prove his petition to the required standard. The learned Judge however found that 3 polling clerks at Chaani Primary School polling station might have been involved in electoral malpractice and therefore made a recommendation to the Director of Public Prosecutions (“DPP”) to institute investigations and make a determination on whether or not the said polling clerks should be charged with electoral offences. She awarded costs to the respondents capped at KShs. 8,000,000.00.

### **The appeal**

6. Being aggrieved by that decision, the appellant moved to this Court on appeal vide the Memorandum of Appeal filed on 27<sup>th</sup> March, 2018, in which he has proffered 31 grounds of appeal which we have encapsulated as follows:-

***1. The trial court erred in law by failing to appreciate the grave constitutional and statutory breaches occasioned by the 1<sup>st</sup> and 2<sup>nd</sup> respondents;***

***2. The trial court erred in law by asserting that the burden of proof in an election petition lies squarely on the petitioner;***

***3. The trial court erred in law by failing to determine the effect of the variance between the online portal results and the results as declared in Form 35B relating to the elections in issue.***

***4. The trial court misdirected itself in law by holding that the illegalities and irregularities were not of such a magnitude as to justify the invalidation of the disputed elections;***

***5. The trial court erred in law by failing to critically evaluate the evidence and thus rendering a judgment that is against the evidence;***

***6. The trial court erred in law by condemning the appellant to pay costs of up to KShs.8,000,000.00 despite its finding that the appellant had proved a number of allegations raised in the petition.***

7. The appellant therefore prays that this court:-

*a. Makes a declaration that Section 83 of the Elections Act No. 24 of 2011 is null and void as it is in contrast with Articles 10, 38, 47, 81, 82, and 86 of the Constitution of Kenya, 2010 as the second limb of the said section is unconstitutional to the extent that it offers excuses to illegalities and irregularities contrary to the laid down principles of the constitution that set out a hard and fast rule for compliance absent of any excuses;*

*b. Allows the appeal by setting aside the election court judgment dated and delivered by Hon. Justice Njoki Mwangi at Mombasa on 28<sup>th</sup> February, 2018 and in lieu thereof the prayers in the petition dated 5<sup>th</sup> September, 2017 filed in Mombasa Election Petition No. 7 of 2017 be allowed by declaring the said election null and void;*

*c. Orders the 1<sup>st</sup> and 2<sup>nd</sup> respondents to pay the costs of this appeal and of the trial court irrespective of the outcome of this appeal; and*

*d. Grants any other relief it may deem fit.*

#### **Appellant's submissions**

8. The appellant filed his submissions on 7<sup>th</sup> June, 2018 through the firm of Gikandi and Company Advocates. In the submissions, learned counsel urged that the petition is substantially based on infringements of relevant provision of the Constitution and statute. He cited **Article 2 (4)** of the Constitution of Kenya 2010 which decrees the Constitution as the supreme law of the land. He urged that even a single violation of the provisions of the Constitution would warrant an automatic nullification of an election. According to learned counsel, **Articles 38, 81, 82 and 86** of the constitution were all flouted. Counsel posited that there was multiple balloting, which was established before the election court by way of evidence and that was a clear violation of the principle of free and fair election under **Article 81 (e)** of the Constitution of Kenya, 2010. He further stated that as the learned trial Judge had found evidence of "**improper influence**" by undisclosed officials to have people vote for the 3<sup>rd</sup> respondent, the learned Judge ought to have nullified the election.

9. The submissions also cite several Form 35 As which had not been signed, saying that the non signing would render the voting inaccurate, unverifiable and unaccountable. He also stated that some officials of the 1<sup>st</sup> respondent namely **Faith Kinyua - Jubilee, Zipporah Ngunge - ODM and Agnes M. Mugambi - Jubilee** acted as agents for their party candidates; and that some officials of the 1<sup>st</sup> respondent had actually conceded that some Form 35 As were forgeries. The election court had actually censured the 3 officials and recommended to the Director of Public Prosecution that they be investigated for electoral offences.

10. The other submission was that there was a variance of 4,595 votes between the President and Member of County Assembly while the variance between the Member of Parliament and the Member of County Assembly was 2,586 votes. In learned counsel's view, such variance can only demonstrate that the 1<sup>st</sup> and 2<sup>nd</sup> respondents did not conduct a proper election in accordance with the principles laid down by the Constitution. From the contents of the submissions, which include claims on differences in the votes cast and the diary; serial numbers of the ballot boxes; broken seals etc; it is clear to us that a large part of the appellants submissions are on analysis of facts and credibility of witnesses which we are nonetheless estopped from delving into by virtue of **section 83 A** of the Elections Act. We must eschew any invitation to delve into those factual issues. We shall revert to that point later in our analysis and determination. We may also point out that these issues were considered by the learned Judge when considering the scrutiny report and findings of fact made on the same.

11. Learned counsel also posited that as there were differences in the number of votes declared *vis a vis* the online Portal Results and the differences could not be explained, then the results were not credible as it could not be ascertained exactly how many votes the 3<sup>rd</sup> respondent garnered at the end of the day. It was learned counsel's contention that taking into account all the circumstances of the trial and evidence adduced before the trial court, the "*trial court's judgment simply does not add up.*", and as per the House of Lords decision in **Flannery and Another vs. Halifax Estate Agents Ltd, the weekly law reports 21<sup>st</sup> February, 2000**, where a judgment of any court does not add up; is not properly reasoned, where the flow from one point to another is lacking, such judgment is unreliable. In counsel's view, from the flow of the impugned judgment the analysis was in favour of the appellant but the conclusion at the tail end changed. In the later part of his submissions, counsel invited us to assess the credibility of some of the witnesses who he said were dishonest and unreliable. We however resist the invitation to do so as that would in our view be delving into matters of fact.

12. We were urged to allow the appeal on those grounds and hold that the appellant presented a strong case for the nullification of the Changamwe Constituency elections. We were also urged to interfere with the award of costs in the event the appeal is not allowed given the many confirmed irregularities committed by 1<sup>st</sup> and 2<sup>nd</sup> respondents during the conduct of the election, as confirmed by the Election court. In the event the appeal succeeds counsel asked for costs for two counsel.

#### **1<sup>st</sup> & 2<sup>nd</sup> Respondents' submissions**

13. The firm of Kioko, Munyithya, Ngugi & Company Advocates filed submissions on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> respondents on 19<sup>th</sup> June, 2018. They opposed the appeal and maintained that the learned Judge had properly addressed her mind to all the issues raised in the petition and evaluated and properly analysed the evidence placed before the Court. She had also applied the law and precedents set in other election petitions before arriving at her judgment which they submitted was sound and should be upheld by this Court. Counsel submitted that the learned Judge had properly applied the principles pertaining to burden of proof and applied the standard set in the **Raila Odinga & 5 Others v. IEBC & 3 others [2013] eKLR (the Raila Odinga 2013 case)** decision. According to counsel, contrary to the appellant's assertions **Articles 10, 81, 86** of the Constitution or indeed any provisions of the Elections Act had not been violated, no such violations had been proved and the learned Judge was right in arriving at her conclusion.

14. On the issue of undue influence, counsel submitted that although the court had found there was undue influence in respect of a few

voters, that cannot warrant the nullification of the will of the people of Changamwe. On the Judge's finding that some people were unlawfully denied the right to vote, that too was not sufficient reason to nullify the election. The same argument was advanced in respect of the learned Judge's finding that in some stations the number of cast votes exceeded the number of the registered voters. In brief, while seemingly conceding that such malpractices had been proved and the learned Judge had so found, such malpractices were not sufficient to upset the elections.

15. On the issue of alleged commission of electoral offences by some IEBC officials, counsel opined that they remained innocent until proven guilty and the election should not therefore be nullified for the simple reason that the court had recommended further investigations in respect of those officers.

Overall, counsel reiterated that the proven irregularities and/or illegalities were merely procedural or administrative errors caused by human imperfections and noncompliance with any electoral laws did not affect the results of Changamwe Constituency and this Court should so find. He called in aid the Supreme Court decision of **Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 others** [2014] eKLR and the recent decisions of this Court in **Owino Babu Ongili v. Francis Wambugu Muriithi & 2 Others** – (Election Appeal Petition No.18 of 2018). They urged this Court to dismiss the petition and uphold the decision of the High Court.

### **Submissions of 3<sup>rd</sup> Respondent**

16. The 3<sup>rd</sup> respondent, through Balala and Abed Advocates filed his submissions on 25<sup>th</sup> June, 2018. Most of his submissions mirror those of the 1<sup>st</sup> and 2<sup>nd</sup> respondents, which is not surprising given that their goal is the same i.e. the dismissal of the petition. According to the 3<sup>rd</sup> respondent, although the appellant claims that there were monumental or grave irregularities, they have not supported these claims with evidence. In respect of the 3 polling clerks who were recommended for investigations to the Director of Public Prosecutions, learned counsel submitted that even if the results in the polling stations they presided over were to be excluded from the final tally, the final result would not be affected. He urged us to dismiss the appeal and uphold the decision of the Election Court including the order on costs.

### **Oral submissions by counsel**

17. When the appeal came up for highlighting of the submissions, learned counsel **Dr Khaminwa** led **Mr. Gikandi** for the appellant, while **Mr. Munyithya** appeared for the 1<sup>st</sup> and 2<sup>nd</sup> respondents and **Mr. Mohammed** appeared for the 3<sup>rd</sup> respondent. Emphasising the uniqueness of election petitions, Dr Khaminwa posited that unlike civil matters based on tort or contract, elections petitions are matters of public interest as they touch on governance of a country.

18. In order to avoid unnecessary repetition, we shall only highlight with brevity the oral submissions of counsel. Dr. Khaminwa's thrust was that the issues dismissed by the learned Judge as mere procedural irregularities were actually constitutional violations and not merely procedural or administrative issues. Counsel submitted that there is nothing like an insignificant breach of the Constitution and any breach however small cannot be ignored. In his view the learned Judge was 'simply overwhelmed' by the numbers of the votes garnered by the 3<sup>rd</sup> respondent vis a vis the appellant. He maintained that there were '*glaring anomalies, irregularities and malpractices*' in the disputed election and the same ought to have been invalidated. On the issue of enormity of the votes cast in favour of 3<sup>rd</sup> respondent vis a vis those attributed to the runner up, counsel cited the High Court case of **William Gitau Kabogo vs George Thuo & 2 others**, [2010]eKLR. We shall deal with the specific breaches/irregularities later. Mr. Gikandi on the other hand dealt with the issue of improper influence of some voters who he said were influenced to vote for the 3<sup>rd</sup> respondent; multiple balloting; irregularities in respect of Forms 35A and 35B; dishonesty of witnesses; and urged the Court to nullify the petition as doing otherwise would be condoning impunity.

19. On his part, Mr. Munyithya reiterated his submissions and stated that the election was conducted in accordance to the provisions of the Constitution and whatever irregularities there could have been, the same were just procedural and isolated and should not nullify an election. Moreover, all the irregularities noted had been sufficiently explained after the scrutiny report. He urged us to dismiss this petition with costs.

20. Mr. Mohamed also reiterated his written submissions and urged us not to delve into issues of fact which in his view is what the appellant's counsel is inviting us to do. He also urged the Court to dismiss this appeal with costs.

### **Analysis and determination**

We shall now consider the record along with these submissions vis a vis the grounds of appeal and make a determination as to how this appeal should go.

### **Jurisdiction of the court of appeal to determine an election appeal**

21. Before we delve into the analysis of the appeal and give a determination, it behooves us to restate the precincts of our deliberations as a Court. In his submissions, the appellant urges us to evaluate the evidence tendered afresh and make our own independent conclusions. This submission is pegged on the dictum that this is a first appeal. It is supported by the case of **Timamy Issa Abdalla v. Swaleh Salim Swaleh Imu & 3 others** (2014) eKLR ("the Timamy Issa case") in which the court of appeal stated:-

*"In determining whether the election court properly performed its duty, this court must be satisfied that the court acted judiciously and correctly applied the law. The conclusions of law drawn from the facts must also be reasonable and in accordance with the spirit and purpose of the constitution of Kenya. This calls for examination of the findings of the election court and conclusions on primary facts in totality, taking into account the constitution and the electoral laws, with a view to determining whether any conclusions of law arising therefrom have been properly arrived at."*

22. The 1<sup>st</sup> and 2<sup>nd</sup> respondents at paragraph 63 of their written submissions posit that factual issues are a preserve of the trial court and not of this Court. In support of this position, they rely on section 83A of the Elections Act and cited the decisions in **John Munuve Mati v Returning Officer, Mwingi North Constituency & 2 others (2018) eKLR** (“the John Munuve case”) and **Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 others (2014) eKLR**. The relevant quoted part of the John Munuve case (*supra*) states that:-

*“... We remind ourselves that by dint of section 85A of the Elections Act, appeals to this court in election petitions are confined to matters of law only, meaning the interpretation or construction of the constitution, statute or regulations made thereunder or their application to the sets of facts established by the trial court. As far as facts are concerned, our engagement with them is limited to background and context and to satisfy ourselves, when the issue is raised, whether the conclusions of the trial judge are based on the evidence on record or whether they are so perverse that no reasonable tribunal would have arrived at them.”*

23. In the view of the 1<sup>st</sup> and 2<sup>nd</sup> respondents, the appeal is bad in law and an abuse of court process in as much as it invites the Court to intrude on factual issues which are the domain of the trial court. The 3<sup>rd</sup> respondent also relies on the **John Munuve case** (*supra*) to highlight the duty and jurisdiction of this court when it comes to election petition appeals.

As stated earlier, we do not think we have the latitude to heed the invitation of the appellant to wade into the labyrinth of the evidence presented before the trial court and make our own determination on facts. Section 85A (1) of the Elections Act is succinct. It states:-

*“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.”*

This Court’s consideration of the facts and evidence before the trial court would be, as correctly observed by the court in the **Timamy Issa and John Munuve** cases, “to gauge whether the conclusions of the trial judge are based on the evidence on record”, but not to reach our own determination as proposed by the appellant. We are further guided by the pronouncement of the Supreme Court in **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others [2014] eKLR** voiced thus:

*“[82] ....a petition which requires the appellate Court to re-examine the probative value of the evidence tendered at the trial Court, or invites the Court to calibrate any such evidence, especially calling into question the credibility of witnesses, ought not to be admitted.”*

24. On the face of it, the Memorandum of Appeal as drafted and the grounds as raised by the appellant state outrightly that the trial court erred *in fact* and *in law*. This is an outright invitation to this Court to deliberate on matters of fact. However, the invitation by the appellant to this court to consider errors of fact is not enough ground for this Court to presumably conclude that the appeal as drafted is bad in law and an abuse of court process. We reiterate the position of this Court in **Wavinya Ndeti & another v. IEBC & 2 others (2018) eKLR** where it was stated that:-

*“[50] The Court has to ensure that justice prevails at all times and that Section 85A is not used as a roadblock to shut out genuine grounds of appeal on account of poor drafting of the grounds of appeal. (See also this Court’s decision in Stanley Muiruri Muthama vs Rishad Hamid Ahmed and 2 others.*

25. Having perused the record of appeal, we are convinced that there are matters of law raised in the appeal that require this Court’s consideration. Based on established jurisprudence and the unequivocal statutory provisions, we are inclined to agree with the respondents that appeals to this court are confined to matters of law only and we will endeavor to restrict our deliberations accordingly.

### **Burden of Proof**

26. The trial court is cudgeled at ground 2 of the appellant’s Memorandum of appeal for its finding that the burden of proof rested squarely on the petitioner. The trial court dealt with the burden of proof at paragraph 63 of its judgment by quoting the Supreme Court case of **Raila Amollo Odinga & another v. IEBC & 2 others (2017) eKLR** (the Raila Odinga 2017 case) where the Court reiterated its position in **Raila Odinga & 5 Others v. IEBC & 3 others [2013] eKLR** (the Raila Odinga 2013 case) where the court stated:-

*“[130] The law places the common law principle of onus probandi on the person who asserts a fact to prove it. Section 107 of the Evidence Act, Cap 80 of the Laws of Kenya, legislates this principle in the words: “Whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” In election disputes, as was stated by the Canadian Supreme Court in the case of Opitz v. Wrzesnewsky (2012) SCC 55, an applicant who seeks to annul an election bears the legal burden of proof throughout. This Court reiterated that position in the 2013 Raila Odinga case, thus:*

*[195] There is, apparently, a common thread in...comparative jurisprudence on burden of proof in election cases...that an electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner...” [Emphasis added].*

The above quoted dicta by the apex Court is binding precedent to other courts in Kenya. Indeed, the same has been followed incontrovertibly by this Court including in the recently decided appeal of **Jackton Nyanungo Ranguma v IEBC and 2 others (2018) eKLR** where the Court stated:-

*“[80] In considering this issue, we are alive to the legal principle that in an election petition, the legal burden of proof remains with the Petitioner at all times.”*

In both the Memorandum of appeal and the submissions, the appellant has alluded to the trial court's failure to make negative inferences in relation to the 1<sup>st</sup> and 2<sup>nd</sup> respondents' failure to call certain witnesses to disprove allegations made by the appellant. It would therefore be remiss for us to ignore consideration of evidential burden of proof which is brought to the fore by the appellant.

27. We start by quoting this court's pronouncement in **John Munuve Mati v. Returning Officer Mwingi North Constituency & others (2018) eKLR**, where it was observed that failure by a respondent to call a witness does not mean that the petition must be allowed. The petitioner is required to present evidence of the nature that would entitle him to judgment if the respondent did not adduce any evidence at all in rebuttal. We are also guided by this Court's observation in **Jackton Nyanungo Ranguma v IEBC (supra)** in which the Court opined thus:-

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

The Court went further to pronounce itself on shifting evidential burden of proof and opined that the law casts no onus on the respondent to prove, in the event of a breach, that an election was nevertheless conducted substantially in accordance with the election law. From the foregoing, we find no fault in the trial court's holding that the burden of proof lies on the appellant who was under a duty to present cogent evidence to establish a prima facie case that the election was not conducted in accordance with the law.

#### **Trial court's appreciation of the alleged constitutional and statutory breaches occasioned by the 1<sup>st</sup> and 2<sup>nd</sup> respondents**

28. The provisions of the Constitution which the appellant avers were breached by the trial court in its judgment and/or by the 1<sup>st</sup> and 2<sup>nd</sup> respondents as outlined in the Memorandum of Appeal are **Article 10** on national values and principles of governance, **Article 22(3) (d)** on enforcement of the Bill of Rights, **Article 38** on the right to vote, **Article 47** on the right to fair administrative action, **Article 73** on responsibilities of state officers, and **Articles 81, 82 and 86** that govern the conduct of elections. In his written submissions, the appellant also alludes to the supremacy of the constitution as specified under **Article 2 (4)** of the Constitution.

29. The specific statutory provisions alleged to have been breached as outlined by the appellant in the Memorandum of appeal include:-

- i. The Election Offences Act No. 37 of 2016 ("the Election Offences Act") sections 5(f) & (n), 44(3), 6(a), (d), (j), (k) and (l);
- ii. The Elections Act No. 24 of 2011 sections 3 and 10(1);
- iii. The Evidence Act chapter 80 Laws of Kenya sections 33(h), 35(1), 48(1) (a), 66 and 84; and
- iv. The Independent Electoral and Boundaries Commission Act No. 9 of 2011 section 16 (1).

In relation to subsidiary legislation, the specific provisions of the Elections (General) Regulations 2012 whose contravention is complained of by the appellant in his Memorandum of Appeal include regulations **5 (5), 69 (2), 74 (2), 79 (4) (5) & (6), 83 (1) (c), and 86 (1) & (2)**.

30. In a bid to synchronize the purported contravention of the afore mentioned legal provisions with the issues raised in the appeal, the appellant outlined specific findings of the trial court, the scrutiny report, and other evidence presented before the trial court. The alleged irregularities and/malpractices linked to the constitutional and statutory malpractice include:- issuance of multiple ballot papers; improper voter influence; denial of voter's right to vote; discrepancies in number of votes cast with number of voters who turned up to vote in several polling stations; variations in the number of votes cast for different electoral seats when compared; involvement in electoral malpractice by 3 polling clerks; failure by returning officers to give reasons for unsigned Form 35 A; failure by respondents to avail 2 Form 35 B and unused Form 35 A booklets for scrutiny; existence of 2 Form 35B; formatting of KIEMS Kits and the Court's opinion on KIEMS kits; failure by respondents to produce polling station diaries/producing polling station diaries that were tampered with; alleged failure by Presiding Officers to swear Oath of Secrecy and alterations that were not countersigned.

31. Quoting Article 2 on the supremacy of the Constitution, the appellant submitted that proof of an infringement of a constitutional provision in the manner in which the election was conducted would automatically lead to nullification of the election. Before we start pondering on the above outlined irregularities, their legal ramifications and their effect on the election, we note that there has to be a nexus between the alleged constitutional violations and the result of the impugned election. We are guided by the Supreme Court's observation in the **Raila Odinga 2013** case that:-

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

#### **Issuance of multiple ballot papers**

32. The appellant hinges his case on the trial court's observation at paragraph 69 of the judgment that the respondents did not call the Returning Officer to controvert the evidence of PW 23 relating to issuance of multiple ballot papers at Chaani Social Hall Polling station No. 5 and thus the same remained firm. He submits that this was a clear violation of the constitutional principle of free and fair elections under

Article 81. We note that there was a similar observation by the trial court in relation to Al-Irshad Nursery polling station No. 6 on the evidence of PW 10.

33. On his part, the 3<sup>rd</sup> respondent submitted that failure by the 1<sup>st</sup> and 2<sup>nd</sup> respondents to call witnesses to controvert the evidence of PW10 and PW23 does not mean that the said evidence meets the required threshold. He submitted further that in any event, the said extra ballot papers (if any) were intercepted before they could be cast and thus no candidate benefited from their use. The 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that the trial Judge properly addressed her mind on the issue and even observed that at the time of highlighting of submissions, the case of two polling clerks that had been charged for issuing extra ballot papers was still pending and unproved.

34. Regarding the invitation to draw negative inferences on the 1<sup>st</sup> and 2<sup>nd</sup> respondent's failure to call the Returning Officer, we reiterate our position as outlined earlier. The trial court observed that PW23 could not tell if the extra ballot papers issued were for the presidential or parliamentary seat. It is therefore difficult to establish a direct link between that occurrence and the validity of the specific election of Member of National Assembly. In our view this is a finding of fact made by the learned Judge after evaluating the evidence adduced before the court. We are disinclined to interfere with the same.

#### **Improper influence of assisted voter**

35. At ground 4 of the Memorandum of Appeal, the appellant stated that the court ought to have found that the election was not conducted in accordance with the Elections Act and the Election Offences Act since it found that the 1<sup>st</sup> and 2<sup>nd</sup> respondents improperly influenced voters to vote in favour of the 3<sup>rd</sup> respondent. He further submitted that the same was in violation of **Article 81 (e) (ii)** of the constitution that requires the electoral system to be free of improper influence. The 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted in opposition that only one voter's evidence was admitted and thus the fact that one voter was improperly influenced cannot warrant the nullification of the will of the constituents of Changamwe. Likewise, the 3<sup>rd</sup> respondent submitted that the incident was an isolated case that had no bearing on the final outcome of the election. He quoted the case of **Khatib Abdalla Mwashetani v. Gideon Mwangangi Wambua & others** (eKLR) to support the proposition that improper influence was not proved to the threshold that would warrant nullification of the election.

36. In **Nuh Nassir Abdi v Ali Wario & 2 others [2013]** eKLR, Odunga J. observed:-

*“[121] There were, however three witnesses who testified that the mark was placed in favour of a candidate who they did not intend to vote for. One of them however admitted that she identified the person she intended to vote for by his photograph and after the mark was placed thereat it was dropped in the box. Taking into account the number of those who claimed that their ballot papers were not cast in favour of their candidates of choice in comparison to the margin between the petitioner and the 1<sup>st</sup> respondent I am unable to hold that the said allegation even if true did affect the result of the election.”*

We appreciate this is a decision of the High Court, but we acknowledge that it sets out the correct position in law. Whereas the trial court stated its belief that there was improper influence by undisclosed IEBC officials to have PW22's sister vote in favour of the 3<sup>rd</sup> Respondent, it is doubtful whether such a single incident would lead to nullification of the result of an entire election. We are inclined to reiterate Odunga J's view that the result of the election ought to be affected for the same to be unsettled. The running thread in the foregoing allegations is the lack of a link between the irregularity or breach of electoral law and the substantive effect on the result of the election to warrant nullification.

#### **Denial of voter's right to vote**

37. The appellant asserted that the trial court should have found that there was a violation of **Article 38** of the Constitution and Election Offences Act on the ground that some voters were unlawfully denied the right to vote. In his written submissions at paragraphs 90 to 93, the appellant goes on a trajectory of challenging the trial court's assessment of witnesses and the probative value to be placed on their evidence. The appellant submitted that the court ought to have made negative inferences on the 1<sup>st</sup> and 2<sup>nd</sup> respondent's failure to call witnesses to controvert the evidence of his witnesses. The appellant submitted further that the evidence of his witnesses was unchallenged as the court found the presiding officer who gave evidence on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> respondents to be evasive.

38. On their part, 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that the trial Judge analyzed the evidence in relation to the allegation of denial of voter's right to vote and concluded that the same was never proved. The 3<sup>rd</sup> respondent submitted that the trial Judge never made a finding that a voter was denied the right to vote. In his view, the trial court was satisfied with the explanation given by the Returning Officers that all those voters who were identified by the KIEMS kit, alpha numeric mode or manual register were allowed to vote.

39. Indeed, having perused the record and the judgment of the trial court, it is apparent that the trial court analyzed the evidence of the witnesses who testified on behalf of the parties and was satisfied that denial of the right to vote was not proved. Furthermore, calling upon this Court to reconsider factual findings of the trial court on the assessment of witnesses and the probative value of their evidence is to invite it to make a factual finding. The same cannot be allowed.

#### **Discrepancies in number of votes cast with number of voters who turned up to vote in several polling stations.**

40. At ground 8 of the Memorandum of Appeal, the appellant states that the trial court ought to have found that the election was not conducted in accordance with the principles of the Constitution and **Regulation 83 (1)** of the Regulations upon finding that the number of votes cast in 12 polling stations exceeded the registered voters. In its judgment, the trial court observed that votes that exceeded the number of voters that voted should have been disregarded. The appellant submitted that the court ought to have disregarded the total result from the said polling stations which would in turn have had a huge effect on the results declared by the 1<sup>st</sup> and 2<sup>nd</sup> respondents thus vitiating the result of the election.

41. The trial court dealt with this issue under paragraph 188 of its judgment where it observed:-

***“[188] The Petitioner in his submissions indicated that in 12 polling stations, the valid votes declared surpassed the number of voters that voted. The said votes amount to 287. In coming up with the said foregoing, the Petitioner took into account the number of voters that turned out to vote on 8th August, 2017 recorded in the polling station diaries and those recorded on Forms 35A. Any votes that surpassed the number of voters that voted using the KIEMS kit or manual register should have been disregarded in line with the provisions of Regulation 83(1) (c) of the Elections (General) Regulations.”***

42. **Regulation 83 (1) (c)** requires the returning officer to disregard the results of the count of a polling station where the number of votes cast exceeds the number of voters who turned up to vote. As correctly put by the appellant, the votes of the entire polling station ought to have been disregarded and not merely the number of votes that exceeded the number of voters. We therefore find that the trial court misdirected itself on this issue. As to whether the results of the election would be affected if the votes from the entire polling station were disregarded as to vitiate the election, we shall revert to this issue while dealing with the effect of irregularities.

#### **Variations in the number of votes cast for different electoral seats**

43. The appellant also raised the issue of variations in the number of votes cast in different electoral seats at paragraph 9 of his Memorandum of Appeal and submitted that the trial court abdicated its duty to explain the effect of the variance. In support of the proposition that the variations were so huge as to cast doubt on the viability of the election, the appellant quoted the case of **William Kabogo v. George Thuo & others (2010) eKLR** where the court held:-

***“This court takes judicial notice of the fact that in normal circumstances, the tally of the total number of votes cast in the presidential, parliamentary and civic elections is expected to be more or less the same. There may be instances where a voter makes a conscious choice to vote in a particular election and not in the other election. Such instances are, however, few. The difference of over 5,000 votes between the parliamentary vote on the one hand and the presidential and civic vote on the other, in the circumstances of this petition, is evidence of serious electoral malpractice that was apparent during the elections at Juja constituency.”***

44. In opposition, the 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that the appellant has not demonstrated how the trial Judge erred as alleged. The court at paragraph 181 of its judgment observed that a variance in the number of votes cast for different elections is not on the face of it evidence of malpractice unless cogent evidence is proved to the contrary.

In **Jackton Nyanungo Ranguma v IEBC (supra)** this Court observed:-

***“56. Whereas comparison of votes cast in one election with another is informative, such comparison per se cannot be a ground to nullify the results of one election as against the other. Each election result must be challenged on its own ground. Each election petition is a stand-alone petition and any allegation contained therein must be proved. It is the result of a specific election that is being challenged and not the results of all other elections. It is impermissible to use the results of one elective position to challenge or prove that the result of another elective post is vitiated. If one were allowed to do so, this would be speculative and extrapolation of evidence which is impermissible. We find that it is inappropriate without cogent evidence to draw an inference that mere difference in votes cast between the various electoral seats is proof of electoral malpractice or irregularity. Accordingly, we find that the trial court did not err in its finding that the appellant had not laid out a factual basis for the alleged malpractices or irregularities in each polling station which led to the difference or variation in the number of votes cast in the Presidential, Senatorial and the gubernatorial elections. This ground of appeal fails. (Emphasis added)***

In the same vein, we have not seen, on the record, a position where the appellant has led evidence or laid out a basis for the alleged malpractices in each polling station which led to the difference in the number of votes cast for the different elective positions. We agree with the position taken by this Court in the Ranguma case (supra) and consequently find this ground unmerited.

#### **Analysis on specific malpractices highlighted by the appellant**

45. Electoral malpractices by 3 polling clerks, unsigned Form 35 A, failure by respondents to avail material for scrutiny, existence of 2 Form 35B, formatting of KIEMS Kits, Oath of Secrecy, and alterations that were not countersigned were some of the malpractices cited by the appellant as having compromised the constitutional parameters expected to be met for an election to qualify to be deemed free and fair. Although the court made a recommendation to the DPP to institute investigations and make a determination on whether or not the 3 polling clerks should be charged with an election offence, according to the appellant, the court should have found that there was a violation of Articles **10, 81 & 86** of the Constitution and **section 6 (a)** of the Election Offences.

46. The trial court made a recommendation to the DPP to investigate the 3 polling clerks for possible electoral malpractice. Those clerks remain innocent until proven guilty. The appellant needed to go a step further and demonstrate how the conduct of these clerks affected the final election result for Changamwe constituency. Failure by Returning officers to give reasons for some Form 35A that were not signed by agents was also a point of contention by the appellant. The requirement to give reasons for refusal or failure by an agent to sign the statutory forms is outlined under **Regulation 79(3)** of the Regulations. The obligation is placed on the agent or candidate to give the reasons for failure to sign the declaration form and not on the Presiding Officer. **Regulation 79(3)** provides:-

***“Where any candidate or agent refuses or otherwise fails to sign the declaration form, the candidate or agents shall be required to record the reasons for the refusal or failure to sign.”***

Furthermore, **Regulation 79 (6)** provides that failure of a candidate or agent to sign a declaration form does not invalidate the announced

results. This ground therefore fails.

47. Regarding existence of 2 Form 35B the appellant contended that failure by the 1<sup>st</sup> and 2<sup>nd</sup> respondents to avail one of the forms for scrutiny despite the order of the trial court should have raised a red flag. He submitted that a negative inference ought to have been made that the same if produced would have been prejudicial to the respondent's case. The trial court in its judgment found the explanation for the existence of 2 Form 35 plausible and accepted the same. It further observed that the results in the said forms were similar and thus no prejudice was suffered by any party. Again, we cannot interfere with that finding of fact by the trial court.

48. In relation to formatting of KIEMS Kits, we do not see how the same would have affected the election results given that all information required for verification would be available on SD cards which ought to be availed by the 1<sup>st</sup> respondent upon application by a party. We do not find any error in the trial court's opinion on KIEMS kits either. As a court of law, it has jurisdiction to pronounce itself on all matters raised before it concerning the impugned elections.

49. On alleged failure by Presiding Officers to swear oath of secrecy, the appellant submitted that the 2<sup>nd</sup> respondent failed to submit oaths of secrecy sworn by presiding officers for 69 polling stations; and that those supplied were not properly executed. To him, this was a grave anomaly as it would not be verified on which authority the presiding officers were acting. The trial court did not find the contentions of the appellant on failure to avail unsigned oaths of secrecy by presiding officers to be of importance on the bearing of the petition. The court was satisfied with the explanation that the oath was taken at a ceremony officiated by Hon. Makori, Chief Magistrate, Mombasa and originals submitted for signing to the said Magistrate.

50. Concerning alterations that were not countersigned, the trial court securitized the Form 35A and observed that only one alteration relating to the number of spoilt ballots in Cape Town Ground polling station No.3 was not counter signed. All the others were either counter signed or had no alterations. The number of votes garnered by the 3<sup>rd</sup> respondent in the affected polling station was 117. Even if the same were to be excluded from the count, the effect on the result would be insignificant.

**Effect of the variance between the online portal results and the results as declared in Form 35B relating to the elections in issue**

51. The appellant was aggrieved by what he terms the trial court's failure to determine the effect of the variance between the online portal results and the results as declared in Form 35B relating to the election in issue. He submitted that the difference in the online portal results and the results as declared in Form 35B is a clear admission that the election was not done in compliance with the principles laid down in the Constitution. The 3<sup>rd</sup> respondent opposed this ground of appeal in his submissions by pointing out that electronic transmission of results is only mandatory for presidential election. Furthermore, he submitted that contrary to the appellant's submission that the term provisional results does not exist under law, the same is provided for under Regulation 82 which provides:

***“82. Provisional results to be transmitted electronically***

***(1) 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 manner as the commission may direct.***

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

For purposes of clarity, it is imperative to emphasise that in ordinary English parlance, the word 'provisional' simply means existing for the present, or for now, possibly to be changed later, or to be confirmed. Provisional results cannot be relied on until confirmed. The final results can reflect the provisional results but they can also vary. There is nothing untoward about that. The 3<sup>rd</sup> respondent quoted the persuasive High Court cases of **Jackton Nyanungo Ranguma v. IEBC & 2 others (2018) eKLR** and **Ahmed Abdullahi Mohamad & another v. Mohamed Abdi Mohamed & 2 others (2018) eKLR** to support the proposition that results contained in the physical Form 35B are final. In the trial court's deliberations, the reasons given for the variance between the online portal results and those declared was that some presiding officers were sending multiple results to the portal as explained by the IEBC chair. We hold the view that the final results as reflected in Forms 35B supersede any provisional electronic results.

**Whether the illegalities and irregularities above referenced were of such a magnitude as to justify the invalidation of the disputed elections**

52. In totality, the appellant sums up the irregularities at paragraph 82 of his submissions thus:-

***“Bearing in mind that the trial court agreed that the votes in at least 12 polling stations should have been disregarded; also the Form 35A in Chaani Primary Polling Station No. 3 was invalid as it was fraudulently signed by the election officials pretending to be agents of parties; also bearing in mind the monumental variances between the votes cast for the president viz a viz MCA's in the said constituency; bearing in mind also the apparent huge discrepancy in the PSD forms; bearing in mind further the abnormalities that were brought out in scrutiny report; taking into account the missing Form 35A booklets which made the court comment that the Returning Officer was dishonest; bearing in mind the two different Form 35B's relating to the election in question; bearing in mind the apparent anomalies in the Form 35B and also bearing in mind that the Trial Court agreed that the Form 35A in respect of Gome Polling Station No. 1 should have been disregarded, can it be said that those irregularities were such a frivolous type as not to have an effect on the outcome of the said election?”***

The respondents in their submissions simply say that the trial court correctly applied the law and reached the correct conclusion.

53. The trial court in its decision held that the irregularities occasioned by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were not of such magnitude as would justify the annulment of the election results for Changamwe constituency for the elections held on 8<sup>th</sup> August, 2017. The court added that even if the disputed votes were to be collated and added onto those garnered by Mr. Abdi Daib, the runners up, the margin of votes would still be wide. This conclusion was reached after the court considered the Supreme Court cases of Raila Odinga 2017; and Gatirau Peter Munya, 2014. The court placed emphasis on the Gatirau Peter Munya where it was stated:-

***“[219] By way of example, if there would be counting or tallying errors which after scrutiny and recount do not change the result of an election, then a trial Court would not be justified, merely on account of such shortfalls, to nullify such an election. However, a scrutiny and recount that reverses an election result against the candidate who had been declared a winner, would occasion the annulment of an election. Examples of irregularities of a magnitude such as to affect the result of an election, are not however, closed.”***

In the Raila Odinga 2013 case, the Supreme Court held:-

***“[196] We find merit in such a judicial approach, as is well exemplified in the several cases from Nigeria. Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondent bears the burden of proving the contrary.”*** (Emphasis added)

See also the recent decision of this Court in **Owino Paul Ongili v. Francis Wambugu Mureithi & 2 others** (2018) eKLR on the issue of irregularities and/or breaches of the law and when they can vitiate an election.

54. On the issue that the trial court failed to consider the totality of the evidence, the record indicates that the learned Judge considered and evaluated the evidence presented by all parties and the scrutiny report and made cogent findings on the same. Save for the erroneous conclusion on the exclusion of votes from the entire polling station where the number of votes cast exceeded the number of voters who turned up to vote, we are of the view that the trial Judge’s findings were sound.

55. Ultimately, we echo the sentiments of this Court in **James Omingo Magara vs. Manson Onyongo Nyamweya & 2 others** (2010) eKLR where it was stated that courts will endeavor to preserve an election as being in accordance with the law, even where there have been significant breaches of official duties and election rules, providing the results of the election was unaffected by those breaches. In the present case, we are inclined to agree with the trial court’s assessment and holding that the irregularities would not affect or alter the results of the 3<sup>rd</sup> respondent. All the appellant has achieved is to show that there would be an alteration in the number of votes given to the candidates but not to show the 3<sup>rd</sup> respondent as the winner of the election would be affected. In that regard, we find no basis to upset the trial court’s finding and thus this ground of appeal also fails.

### **Costs**

56. The appellant was aggrieved by the trial court’s award of costs to the respondents capped at KShs.8,000,000.00. In his view, having unearthed the irregularities committed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents, and having proved some of the allegations raised in the petition, it was wrong to be condemned to pay costs. He submitted that the court should have exercised its discretionary power and ordered each party to pay their own costs or that the costs should have been borne by the respondents irrespective of the outcome as the said respondents were more to blame in the unlawful manner that elections were conducted. The appellant asserts further that the trial court should have left the costs to be taxed by the taxing officer since it did not have the capacity to determine the quantum of costs to be paid.

57. The 1<sup>st</sup> and 2<sup>nd</sup> respondents in response submit that the trial court properly upheld the provisions of section 84 of the Elections Act and Rule 30 of the Elections (Parliamentary and County) Petition Rules which provide that costs shall follow the event. The 3<sup>rd</sup> respondent was also in support of the trial court’s award of costs submitting that section 84 of the Elections Act mandates the trial court to award costs which automatically follow the event. He went further to submit that rule 36 of the Elections (Parliamentary and County) Election Petition Rules 2017 empowers the Election Court to make an order specifying the total amount of costs payable. As such, the appellant’s contention that costs should be left to the taxing master to determine the quantum has no legal basis.

58. In **Albeity Hassan Abdalla v. IEBC & 3 others** (2018) eKLR, this Court observed that there is no reason to depart from the general principle that costs follow the event. The Court however observed further that costs should not be used as a scarecrow to chase away deserving litigants who have grievances from seeking justice or to impede access to justice. The Court awarded costs for the proceedings in the High Court which the High Court had not awarded. In **Philip Kyalo Kituti Kaloki v. IEBC & 2 others**, [2018] eKLR, this Court in interfering with the costs awarded by the High Court in a parliamentary election held the view that total costs of 4 million in parliamentary election was excessive. Accordingly, the award made by the trial court was reduced and capped at 2 million in the High Court to be paid by the appellant equally to the respondents. The costs at the Court of Appeal was capped at Kshs.500,000/= to be paid equally by the appellant to the respondents.

59. Similarly, in **Owino Paul Ongili Babu v. Francis Wambugu Mureithi & 2 others** (2018) eKLR quoted by the 3<sup>rd</sup> respondent, the Court of appeal held:-

***“As costs follow the event, the appellant is awarded the costs of the petition in the High Court as against the 1st respondent, which are capped at Kshs.3,000,000/=. The appellant is also awarded the costs of this appeal as against the 1st respondent which are capped at Kshs.1,000,000/=.”***

Additionally, in **Wavinya Ndeti and Peter Mathuki v. IEBC & 2 others**, this Court also held:-

*“As regards costs, we have no reason to depart from the general principle that costs follow the event. Consequently, the appellants shall have the costs of the appeal as well as the costs of the proceedings in the High Court, which shall be taxed. The appellants costs in the High Court shall not exceed and are capped at Kshs. 1,500,000.00 as against the 1st and 2nd respondents and Kshs. 1,500,000.00 as against the 3rd respondent. The appellants costs of the appeal shall not exceed and are capped at Kshs. 1,000,000.00 as against 1st and 2nd respondents and at Kshs. 1,000,000.00 as against the 3rd respondent.”*

From the foregoing, it becomes apparent that costs of KShs. 8,000,000.00 in the present case are simply astronomical. Whereas costs are at the discretion of the court, our interference with the order on costs in this appeal is inevitable.

**Conclusion/Final orders**

60. The first prayer by the appellant is that the Court declares **Section 83** of the **Elections Act No. 24 of 2011** null and void as it is in contrast with **Articles 10, 38, 47, 81, 82, and 86** of the Constitution of Kenya, 2010. This is a prayer on an issue that has sprung out of the blues. There was no deliberation on the same before the trial court and thus the Court of Appeal can neither entertain nor make a pronouncement on it. We do not harbor any doubt that the issue is a serious one that ought to be canvassed fully and not be sprung to the Court at this point. The High Court as the first port of call in interpreting the Constitution ought to have been accorded opportunity to pronounce itself on the issue.

61. In the final analysis, we make the following orders:-

**a. The appellant’s appeal fails and is hereby dismissed, and the judgment of the High Court dated 28<sup>th</sup> February, 2018 is hereby upheld.**

**b. The appellant shall bear the costs of the 3<sup>rd</sup> respondent incurred before the election court, to be taxed, but not to exceed Kshs.1,500,000.**

**The appellant shall bear the costs of the 3<sup>rd</sup> respondent in this appeal, to be taxed, but not to exceed Kshs.500,000.**

**c. In view of the 1<sup>st</sup> and 2<sup>nd</sup> respondents conduct in the challenged elections which left a lot to be desired, and which necessitated the filing of the election petition giving rise to this appeal, we are inclined to agree with counsel for the appellant that they should not be rewarded with an award for costs of any amount. The order we make is that they are not entitled to any costs.**

**These shall be the Orders of the Court.**

**Dated and delivered at Mombasa this 26<sup>th</sup> day of July, 2018.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**M. K. KOOME**

.....

**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**