IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MAKHANDIA, GATEMBU & M'INOTI, JJ.A)

ELECTION PETITION APPEAL NO. 16 OF 2018

BETWEEN

ZEBEDEO JOHN OPORE.....APPELLANT

AND

THE INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....1ST RESPONDENT

DAVID K. CHEROP

(RETURNING OFFICER - BONCHARI).....2ND RESPONDENT

JOHN OROO OYIOKA.....3RD RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Kisii

(Anthony K. Ndung'u, J) dated the 2nd day of February, 2018

in

High Court Election Petition No. 2 of 2017)

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JUDGMENT OF THE COURT

Zebedeo John Opore "***the appellant***" was among the 11 contestants for the seat of Member of the National Assembly for Bonchari Constituency in the national elections held on the 8th of August, 2017. When the results were tallied, counted and announced, each of the 11 candidates who participated garnered the following votes;

(i) Omwanwa Dennis Mogire - 75

(ii) Mogaka Charles Ndege - 226

(iii) Atancha Jeremiah - 256

(iv) Ratemo Mary Kemunto - 350

(v) Kiari Asiago Samwel - 425

(vi) Oyugi David Ogega - 1,327

(vii) Nyagaga John Moenga - 1,443

(viii) Onyancha Charles - 6,035

(ix) Momanyi John Billy - 7,028

(x) Opore Zebedeo John - 9,281

(xi) **Oyioka John Oroo - 11,934**

Accordingly, **John Oroo Oyioka** "***the 3rd respondent***" was declared the duly elected member of the National Assembly for Bonchari Constituency and was subsequently gazetted as such vide Kenya Gazette Notice No. 8239 published on 22nd August 2017. Convinced that he had not properly and lawfully lost the election to the 3rd respondent, the appellant challenged the results by mounting an election petition in the High Court of Kenya at Kisii on the grounds that the results were announced prematurely before tallying of final results for each polling station; that violence and intimidation were visited upon his secretariat; that members of the community policing were attacked; that his agents were denied entry into some polling stations; that there was bribery, improper sorting of votes and campaigning at polling stations; that voters were denied their right to vote purportedly because their fingerprints could not be detected in the electronic voter identification devices; that voters who needed assistance were assisted in the absence of his agents; that ballot boxes were left open after counting; that the results recorded in form 35As did not match or tally with those in form 35Bs; that presiding officers influenced voters as to whom to vote for; that ballot boxes were stuffed with votes and the other candidates conspired to make him lose the election; and finally that despite his written protest, the Independent Election and Boundaries Commission "the 1st respondent" deployed persons who were employees or members of the secretariat of the 3rd respondent as election officials.

The 1st respondent and David K. Cherop, "the 2nd respondent" who was the Constituency Returning Officer did not take the accusations lying down. They were vehement that the election was conducted in a free, fair, transparent and verifiable manner; the results were announced procedurally; police officers provided security at all polling stations and the allegations of violence and intimidation were false as they could not have happened in such a guarded place; they acted on the complaint over appointment of election officials by dismissing one of the designated presiding officers and redeploying 5 others as deputy presiding officers, the Kiems kits used could not allow double voting; no agents were denied access and that assisted voters were helped in the presence of agents.

The 3rd respondent on his part maintained that the elections conducted by the 1st and 2nd respondents were credible, free, fair, and in accordance with the Constitution, the Elections Act and the regulations made thereunder. He further averred that the counting and tallying of votes was carried out in an open and transparent manner and in compliance with the law, save for a few arithmetical and clerical errors that affected all the candidates but not the final result. He denied knowledge or involvement of any of his authorised agents in bribery, violence, intimidation or any of the malpractices alleged. Finally, he pleaded that he was not privy to the appointment of election officials by the 1st and 2nd respondents and neither did he influence such appointments.

After a marathon hearing in which the appellant called 34 witnesses, the 1st and 2nd respondents, 6 witnesses and the 3rd respondent, 5 witnesses, the election court "**the court**" reached a determination thus:

> **"Having considered the pleadings herein and the available evidence as presented by the parties as well as the learned submissions by counsel, I come to the inevitable conclusion that the election for member of National Assembly for Bonchari constituency was conducted within the Constitution and Electoral law. There is no prove (sic) of irregularities and where minor errors have been shown to exist and where acts of violence are shown to have occurred, the same did not affect the conduct and results of the election."**

The final orders that commended themselves to the court were that the petition be dismissed; that the 3rd respondent was validly elected as member of the National Assembly for Bonchari Constituency, and that the respondents be awarded costs in the following terms; instructions fee at Kshs. 2,500,000/- for the 3rd respondent, and a global sum of Kshs. 2,500,000/- as instruction fees for the 1st and 2nd respondent who mounted a joint defence.

Dissatisfied with the judgment and decree aforesaid, the appellant moved to this Court by way of appeal seeking to have the decision set aside. The grounds in support of the appeal are that the court erred in law by finding: that the 1st respondent conducted a credible and accountable election within the Constitution and electoral law; that the identified non-compliance with the law and irregularities were insignificant and not substantial to affect the integrity and quality of the general election; that there was proper declaration of results according to the Constitution and electoral law and failing to hold that the purported declaration was null and void; by allowing the respondents to defend the petition on time barred responses filed irregularly and or extending time for filing the same; by raising the burden of proof extremely high on matters that had been proved; by limiting the extent, nature and scope of scrutiny and recount and by refusing to allow the application for scrutiny and recount in totality; by failing to take into account and or to place sufficient weight on the results of the scrutiny inspection in the context of the issues raised during the trial; by dismissing solid and unchallenged evidence on violence and setting unreasonably high standard of proof; by failing to appreciate the overall effect of the violence on the election; by unjustifiably dismissing wholesale the appellant's concrete and largely unchallenged evidence of electoral offences, illegalities, irregularities and malpractices; and finally by casting doubt on clear, cogent and concrete evidence of disenfranchising of registered voters and prevention of voters from voting.

The appeal was canversed by way of written submissions with limited oral highlights. The appellant submitted that the election court erred in law in failing to properly interpret and apply the electoral principles provided for in the Constitution and in particular Articles 81 and 86 of the Constitution as well as other electoral laws. It was submitted that in the architecture of these principles, both quantitative and qualitative aspects of the election must meet the constitutional standard and that if elections are not conducted in accordance with the Constitution, the court has no discretion to look into whether the results were affected. Accordingly, the appellant posited that the court failed to consider these judicious principles. He buttressed these submissions with reference to the case of **Raila Amolo Odinga & Another v. Independent Electoral and Boundaries Commission & 2 Others [2017] eKLR "Raila 2017"**. In his view, the Supreme Court was emphatic that a

petitioner who is able to prove that the conduct of the election substantially violated the principles laid down in the Constitution as well as other written laws on elections, will on that ground alone, void an election. He added that an election will also be nullified if it was fraught with irregularities or illegalities that affected the overall result.

It was further submitted that in Raila 2017, the Supreme Court reiterated that the principles cutting across the Constitution on elections include integrity, transparency, accuracy, accountability, impartiality, simplicity, verifiability, security, free from violence, intimidation, improper influence or corruption and the conduct of the election by an independent body in a transparent, impartial, neutral, efficient, accurate and accountable manner. To the appellant, the impugned election as conducted by the 1st and 2nd respondents did not meet the aforesaid constitutional standards. For instance, he contended, the 2nd respondent appointed Presiding and Deputy Presiding Officers who were not neutral and impartial. The appellant went on to submit that the issue of lack of neutrality and impartiality stood uncontroverted and an election conducted by associates of the 3rd respondent could not therefore be deemed to be free and fair. Still on the question of these appointments, the appellant submitted that the 1st and 2nd respondents failed in their constitutional and statutory obligation to provide to political parties and independent candidates the list of persons proposed for appointment at least 14 days prior to the date of appointment to enable him make any representations. It was therefore urged that the totality of the foregoing juxtaposed against the requirements of the Constitution confirmed that the election could not in law be found to have been credible, transparent, accountable, free and fair. For this submission the appellant relied on the persuasive High Court case of **Republic v IEBC & Another (2017) eKLR**.

The appellant then turned to the question as to whether the declaration of results was proper and not irregular, null and void. He submitted that there were different forms purported to be the declaration of result forms which bore a date well before the tallying of the results had been finalized. Relying on **Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others (2014) eKLR** where the Supreme Court emphasised the non-derogable nature of regulation 83 of the Elections (General) Regulations and that a Returning Officer must tally the results from polling stations for each candidate, publicly announce the total number of valid votes cast for each candidate and thereafter complete form 35A through which he or she declares the result, in line with Article 86(b) and (c) of the Constitution, the appellant submitted that in this case, the 1st and 2nd respondents violated these requirements by proceeding to declare the 3rd respondent as the winner long before tallying was completed.

The appellant further submitted that it was common ground that the respondents filed their responses to the petition way out of the stipulated 7 days from the date of service of the petition, as per rule 11 of the Elections (Parliamentary and County Elections) Petition rules. He therefore submitted that the court erred in purporting to waive this requirement and proceeded to extend time *ex-post facto*, which it had no jurisdiction to do.

On standard of proof, the appellant contended that the court misdirected itself and unreasonably kept raising the standard of proof beyond the legal standard. He maintained that while his petition challenged both the quantitative and qualitative aspects of the election, the responses to the petition and the respondents' conduct of the matter focused on the quantitative aspects only. The court was therefore faulted for proceeding on the basis that even where irregularities were proved, they had to be shown to have tilted the results in favour of the appellant and for failing to appreciate the overall effect of proved illegalities, irregularities and violation of the Constitution, on the integrity of the election.

On violence and intimidation of voters, the appellant submitted that there was unchallenged evidence of violence which marred the election, consequently vitiating its fairness which evidence the court disregarded. Where such evidence is placed before court, it was submitted, it cannot be disregarded on the basis that the perpetrators were not pursued within the law. The 3rd respondent and his associates, according to the appellant, reigned violence and terror upon persons perceived to be his supporters. To the appellant therefore, these actions created indisputable impression in the minds of voters that adverse consequences would ensue as a result of their exercise of political choices.

In his petition, the appellant sought an order of scrutiny and recount which he followed up with a substantive motion on notice. According to the appellant, in a subsequent ruling the court allowed scrutiny and recount only in 12 polling stations and limited the same to ascertainment of the number of valid votes cast, despite the appellant having laid the basis for a full scrutiny in the entire constituency. It was further submitted that while giving evidence the 2nd respondent conceded that there were errors in form 35 that had been the basis of declaration of result. Therefore, there was no way of authenticating the results of the election by the use of the said form. Relying once more on Raila 2017 the appellant reiterated that the election was not only about numbers, but also the integrity of the election. In any event, the appellant submitted, scrutiny confirmed serious irregularities including stuffing of ballot boxes, recording of wrong votes for the appellant and tampering with ballot boxes and votes. He added that there were also instances where the number of votes found in the ballot boxes were more than the number of voters who showed up to vote.

The appellant further submitted that he had adduced evidence which related to the contravention of Article 38(b) of the Constitution. The court however misdirected itself at the outset by purporting to raise the standard of proof as relates to violation of the Constitution to one where the degree is beyond reasonable doubt. The appellant submitted that though the court noted and was satisfied that indeed some voters had been turned away, it however erroneously found that they did not submit evidence of their status as registered voters.

Relying on Article 38(3) of the Constitution which recognizes the right of every adult citizen, without unreasonable restrictions, to vote by secret ballot in any election or referendum and buttressed by section 3 of the Elections Act, the appellant submitted that a substantial number of voters were turned away. This was the trend, it was contended, and the witnesses called before court, were just a reflection of the broader and widespread disenfranchising of voters. The appellant relied on the case of **New Vision Kenya (NRK Mageuzi) & 3 Others v IEBC & 5 Others** [2014] eKLR where the court held that the right to vote is essential to Kenya's democracy, and is protected under Article 38 of the Constitution as a fundamental right.

Then there was the question of the appellant's agents not being allowed to access polling stations. The appellant submitted that section 30(2) of the Elections Act expressly reserves the right of a candidate to appoint his own individual agents. He argued that it was therefore erroneous on the part of the court to hold that the issue could not be countenanced because it was not pleaded whilst the same was indeed pleaded and the necessary evidence and documentation availed. He contended that he was not represented during the voting and subsequent counting of ballots in many polling stations and was thus greatly prejudiced due to stuffing of ballot boxes, improper sorting of votes, and

interference with voters at polling stations, amongst others, all of which affected the integrity of the election. Further, some of the appellant's agents were denied access to forms 35As leading to the results being altered, which showed a flawed electoral process that the court closed its eyes to.

It was the appellant's further submission that the court disregarded or ignored the evidence of bribery as well as evidence that the 3rd respondent directly and or through his agents conducted election campaigns outside the stipulated campaign period. The said evidence, it was argued, was never controverted at all.

It was the appellant's final submission that the court failed to uphold the principles governing elections; to protect the will of the people of Bonchari Constituency and appreciate that for the right to vote to have any value, the outcome of an election must be the result of the exercise of the sovereign will of the voters as encapsulated in Article 38(2) of the Constitution which provides for the right to free, fair and regular elections which was lacking in this election.

In his oral highlights, **Mr. Otachi**, learned counsel for the appellant maintained that what was pleaded in the petition and proved in court were massive irregularities and illegalities which started with recruitment of polling officers all the way to the declaration of results. He contended that the presiding officers were not appointed according to law and though the appellant protested by writing a letter to that effect, it was all in vain.

With regard to the declaration of results, counsel reiterated that the law set out a clear process of tallying before declaration of results. In this case, he submitted the declaration was on 8th August 2017 though tallying was not completed until 9th August 2017. In his view the declaration was therefore irregular and proof that the result was predetermined in favour of the 3rd respondent. On violence, counsel submitted that there was unchallenged evidence of violence, involving even the head of the community policing in the area, which made some voters to abstain from voting. He added that there was also evidence of several voters being turned away on account of their names not appearing in the Kiems kits and though there was a manual register to fall back to, it was never utilized. It was his further submission that though the court concluded that such voters had not proved that indeed they were registered voters, the said evidence was annexed in their respective affidavits, which the court ignored.

Finally, counsel submitted that where there was a margin of 2,600 votes between the winning candidate and the runner-up, the number of votes should not be a consideration. In his view this was not a huge margin and considering the irregularities pointed out, he added, the election suffered serious integrity test and should not have been allowed to stand.

On the part of the 1st and 2nd respondents, it was submitted that the jurisdiction of this court in election petition appeals is statutorily prescribed and that the Court can only entertain appeals on matters of law. In support of this proposition, the respondents referred to section 85A(1) of the Elections Act and the cases of **Zachary Okoth Obado v Edward Akongo Oyugi & 2 Others [2014] eKLR** and **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR "the Munya case"**. These respondents also addressed the burden and standard of proof in election petitions and reiterated that the legal burden of proof lies with the petitioner throughout and that the standard of proof required is above the balance or probability though not as high as beyond reasonable doubt. They relied on **Raila Odinga & 5 Others v IEBC & 3 Others [2013] eKLR "Raila 2013**" as well as **Raila 2017**. Besides the foregoing, it was the submission of these respondents that by dint of section 83 of the Elections Act, the appellant was further required to demonstrate that any irregularities or non-compliance with the law in the conduct of the election affected the result or outcome of the election thus warranting interference by this Court.

Dealing with the grounds of appeal, the respondents submitted that the judgment of the court was well reasoned and all the applicable legal principles and laws were considered. In their view the evidence adduced showed that the election was properly conducted and that the majority of the registered voters exercised their free will. They submitted further relying on Raila 2017 that the court noted minor infractions as expected, but the same did not affect the overall results.

These respondents submitted further that though the appellant accused their officers of bias, he led no evidence to show how the officers were biased and how this translated into or affected the results of the election. They maintained that, first, the appointment of polling officials was in accordance with the law and secondly, the appellant did not inquire from his political party whether it had been supplied with the list of presiding officers within the prescribed statutory timelines.

The issue of declaration of results, according the respondents, was hotly contested by the appellant during the hearing of the petition. The contest was whether the results were declared on 8th or 9th August 2017 and in their view it was established that the there was an inadvertent error in the dating of the declaration form, making the issue one of fact rather than of law.

Regarding the responses to the petition that were filed out of time, these respondents submitted that the learned judge cannot be faulted in the manner in which he exercised his discretion and refused to strike out their responses. They relied on the proviso to rule 5(1) of the Election (Parliamentary and County Election) Petition Rules as well as the case of **Martha Wangari Karua v IEBC & 3 Others [2018] eKLR** in support of their view that the court was obliged to do substantive justice.

On the issue of violence, intimidation of voters, undue influence and bribery, these respondents denied that the court disregarded the evidence that was adduced. They maintained that the appellant failed to adduce evidence to the standard of proof required in allegations of criminal or quasi-criminal nature, namely proof beyond reasonable doubt. They relied on Raila 2017 and **Mercy Kirito Mutegi v Beatrice Nkatha Nyaga & 2 Others [2013] eKLR** and added that the appellant also failed to prove that the acts complained of were by the respondents or attributable to them.

Turning to scrutiny and recount, it was submitted that the Munya case laid down the guiding principles in scrutiny and recount which the court faithfully abided with and that in limiting the scope of scrutiny and recount, the court was seeking to avoid fishing expedition by the appellant. On consideration of the scrutiny report, it was contended that the court properly considered the report and noted small errors

whose effect would not have vitiated the election.

Turning to the alleged prevention of voters from voting and disenfranchisement of voters it was submitted that the witnesses who testified did not prove to the required standard that they were indeed registered voters at the identified polling stations. Apart from this, there was no witness who testified that he or she was turned away after presenting himself or herself to vote.

Orally highlighting the written submissions, **Mr. Odhiambo**, learned counsel for the respondents reiterated that the jurisdiction of this Court on election appeals is only confined to matters of law and that from the evidence presented and conclusions reached by the court, there was no perversity at all. He added that the appellant did not discharge the burden of proof so as to enable the court to grant the prayers sought in the petition. Counsel further submitted that section 83 of the Elections Act recognizes that no election is perfect and that even if there were errors in the election, they were minimal and did not affect the eventual outcome. On the appointment of Presiding Officers, counsel submitted that the appellant did not present any evidence that the respondents failed to forward the names of the prospective Presiding Officers to his party headquarters as required by the regulations and that no officer from the appellant's political party testify that they did not receive such lists on time.

Regarding declaration of the results, counsel conceded to the errors in forms 35B in terms of transfer of results from form 35A, which affected only 8 polling stations and all the candidates. He contended that the errors were not deliberate or designed to prejudice the appellant and that a re-tallying of the votes undertaken on the application of the appellant resulted in the conclusion that the errors were attributable to fatigue due to the officers working continuously for 36 hours and that they did not affect the overall results.

With regard to violence, it was counsel's submission that although there was violence, there was however no evidence to show that the perpetrators were agents of any of the respondents or that the acts of violence in any way affected the voter turnout, which was over 70%. As for scrutiny, it was counsel's submission that the appellant specified the polling stations that required scrutiny, which the court granted. In his view the appellant therefore cannot be heard to blame the court for limiting the scrutiny to those polling stations.

Lastly, on the question of the extension of time, the respondents submitted that the trial court had discretion to extend time having regard to rule 4 of the Election Petition Rules and that the exercise of discretion was judicial rather than capricious.

For the 3rd respondent, it was submitted that the judgment of the court correctly analyzed the applicable constitutional principles enshrined in Articles 1(2), 38(2), 81(e) and 86 of the Constitution as well as section 83 of the Election Act and paid due regard to the Munya, Raila 2013 and Raila 2017 cases. It was further submitted that the 1st respondent interviewed applicants for the positions of Presiding and Deputy Presiding Officers and forwarded the names of the successful candidates to the political parties and independent candidates for objections, if any, and that after the expiry of the statutory 14 days with no objection, the 2nd respondent published the names on the notice board to notify the candidates and the general public of those duly appointed Presiding and Deputy Presiding Officers.

In response to the appellant's late and irregular objection to the list of Presiding Officers and their deputies, it was submitted, the 2nd respondent exercised his discretion and dismissed one such Presiding Officer and re-designated the remaining to Deputy Presiding Officers in a bid to arrest any semblance of bias. On the basis of the foregoing, the 3rd respondent submitted that the appellant's complaint on this score was not only unfounded but stemmed from lack of understanding as to how the 1st and 2nd respondents functioned. Relying on Regulation 5(2) of the Elections (General) Regulations, the 3rd respondent submitted that the list of proposed Presiding Officers was to be availed to political parties and independent candidates 14 days before the election date, for any representations, which was duly done. In the premises, it was submitted, there was no basis to fault the finding by the court that it was incumbent upon the appellant to show that the respondents had not supplied the list to his political party before the burden shifted to them to disapprove the claim. Further, it was submitted that in any event the issue was never pleaded and therefore ought not to have been considered. For this proposition, the 3rd respondent relied on the persuasive authority of **Benjamin Ogunyo Andama v. Benjamin Andola Andanyi & 2 Others (2013) eKLR**.

As to whether the court erred in finding that the declaration of the results was proper and not irregular, null and void, the 3rd respondent submitted that regulation 83(1)(d) of the Elections (General) Regulations provide that form 35B must be signed by the Returning Officer and dated, which was duly done in this case. Regarding differences in the dates, it was the 3rd respondent's submission that the 2nd respondent candidly explained the error to the satisfaction of the court.

With regard to the extension of time for the filing and service of the answer to the petition and affidavits, it was the contention of the 3rd respondent that his application dated 26th September 2017 seeking extension of time was not on record and for that reason this ground of appeal ought to fail because the Court has been denied the opportunity to see the supporting affidavit on which the application was based. It was further submitted that the court properly exercised its discretion in allowing the application and that in any event it exercised similar discretion and granted the appellant leave to lodge supplementary affidavit out of time in the interest of doing justice to both parties.

On the standard of proof and whether the court raised it beyond the accepted threshold, it was submitted that the court correctly and properly analyzed the standard of proof in election disputes as provided for under section 83 of the Elections Act. Citing the **Munya** and **Raila 2013** cases, the respondent maintained that while there may have been imperfections in the conduct of the elections, they did not impeach or affect the overall outcome of the results. Turning to the allegations of violence and intimidation of voters, the respondent submitted that the court carefully addressed the allegations and came up with sound legal finding that the allegations were not proved. On the limiting of the scope and extent of scrutiny and recount, it was the 3rdrespondent's submission that the court properly exercised its discretion in limiting the extent, nature and scope of scrutiny and recount. He maintained that scrutiny and recount was not intended to be a roving inquiry with a view to fishing evidence to invalidate the election and relied on the Munya case in support of this proposition. He also contended that the appellant referred to 16 polling stations in the application where he alleged irregularities, vote discrepancy, improper sorting of votes during counting, and denial of his agent the opportunity to sign form 35A. In the circumstances, the respondent submitted, the court was right in limiting the scope of scrutiny and recount to those polling stations.

On disenfranchisement of registered voters and prevention of voters from voting, the respondent submitted that the appellant filed an application to compel the 1st respondent to supply him with the record of the voters identified by the electronic voter identification devices at every polling station, which he subsequently abandoned. In the premises, the 3rd respondent submitted that without proof that one was a registered voter, it was impossible to prove the allegation of voters being turned away.

Turning to election offences, illegality, malpractices and irregularities alleged by the appellant, the 3rd respondent submitted that under regulation 62(1) (c) only authorised agents appointed by political parties or independent candidates are admitted in polling stations. There was no evidence that the individuals who were allegedly chased from polling stations were such authorized agents and the appellant did not produce in evidence any appointment documents. In any case, the 3rd respondent submitted, there were agents of the appellant's political party, Jubilee Party, in all the polling stations where the appellant alleged that his agents were denied access, as evidenced by the Form 35As

Mr. Marara, learned counsel for the 3rd respondent in his oral highlights reiterated that in the appointment of Presiding and Deputy Presiding Officers only the political parties and independent candidates are required to be consulted and that in the circumstances of this case, the list could only have been provided to Jubilee party which sponsored the appellant. Counsel submitted that the 2nd respondent had no legal obligation to avail the list to the appellant, nor did the appellant prove that the list was not shared with his political party.

Regarding form 35B, counsel submitted that under regulation 83(1)(2), form 35B could only be signed and dated by the Returning Officer, which was duly done and that the only error was with the date. The error, he added was accepted and candidly explained to the satisfaction of the court. On the allegations of violence, disenfranchisement and chasing away of the appellant's agents, counsel submitted that the court properly rejected the claims because there was no credible evidence to support the allegations.

On scrutiny and recount, counsel submitted that when the scrutiny report was availed, it proved that the elections were conducted freely and fairly. As to extension of time to file the impugned pleadings, counsel submitted that rule 19(1) of Parliamentary Elections Rules gave the court discretion to extend time and the court cannot be blamed for exercising its discretion in that regard. In any event, counsel contended, the discretion was exercised in favour of both parties.

We have carefully considered the grounds of appeal, the rival submissions by counsel and the authorities they referred to. We have also considered the agreed issues for determination in this appeal as framed by the parties. Though the framed issues are eleven, we are convinced that those issues can be collapsed in two broad issues, to wit; whether the appeal is properly before us in the light of the pre-emptory provisions of section 85A of the Elections Act which limits the jurisdiction of this Court in election petition appeals to matters of law only and, secondly, whether the court erred in up holding the 3rd respondent's election. Within the latter issue, we shall interrogate whether the court properly interpreted and applied the electoral principles provided in the Constitution and other electoral laws; whether the elections were credible, transparent, accountable, free and fair within the meaning of the Constitution and electoral law; whether the declaration of the results was irregular, null and void; whether the court erred in extending time for filing and serving the answer to the petition and affidavits; whether the court misconstrued the law on standard of proof as regards violence and its overall effect on the election; whether the court erred in limiting the scope, extent and nature of scrutiny and recount and in considering the report of the scrutiny; in holding that voters were not disenfranchised or prevented from voting; and lastly, whether the appellant proved commission of election offences and other illegalities, malpractices and irregularities that justified nullification of the election.

We begin with the question whether this appeal is properly before us. The appellant contends on the authorities of the **Munya case** and **Abdikhaim Osman Mohammed & Another v IEBC & 2 Others (2014) eKLR** that if the election court erred in the interpretation of the facts as tendered in evidence, that becomes a question of law and that whether the trial court properly evaluated the evidence and arrived at the right conclusion is a matter of law. The respondents, on the other hand contend that the appellant is inviting this Court to re-look at and re-evaluate the evidence with the aim of holding an inquiry into the probative value of the evidence that the trial court relied on, which is outside the jurisdiction of the Court.

Before we determine the issue, we think that it is pertinent that we restate what our jurisdiction in this kind of appeal entails. Appeals to this Court on electoral disputes are limited, restricted and confined to "*matters of law only*". Section 85A of the Elections Act is to the effect that: -

"85A. Appeals to the Court of Appeal-

> (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….."**

The Supreme Court after exhaustive review of international comparative jurisprudence laid down what the phrase "*matters of law only*" entails in the Munya case as follows:

"(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 issues 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, 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, of the Office of County Governor, where the appellant claims that such conclusions were based on "no evidence", or that the conclusion were not supported by the established fact or evidence on record, or that the conclusion 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.

(81A) It is for the appellate court to determine whether the petition and memorandum of appeal lodged before it by the appellant conform to the foregoing principles, before admitting the same for hearing and determination."

The Supreme Court reiterated the above principles in **Fredrick Otieno Outa v Jared Odoyo Okello & 4 Others (2014) eKLR** when, quoting from the Munya case, it emphasized:

"Flowing from these guiding principles, it follows that a petition which requires the appellate court to re-examine the probative value of the evidence entered 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. We believe that these principles strike a balance between the need for an appellate court to proceed from a position of deference to the trial judge and the trial record, on the one hand, and the trial judges commitment to the highest standards of knowledge, technical competence and probity in electoral dispute adjudication on the other hand…"

Recently, this Court considered the same issue in the case of **John Munuve Mati v Returning Officer Mwingi North Constituency & 2 Others (2018) eKLR** where it stated that "**matters of law**" mean;

"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 conclusion 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. We cannot be drawn into considerations of the credibility of witnesses or which witnesses are more believable than others; by law that is the province of the trial court (emphasis)**."**

Accordingly, although this is a first appeal, this Court does not have the latitude or the luxury of re-evaluating, re-examining and re-assessing the evidence so as to reach its own independent conclusion, as would be the case in other ordinary civil appeals on first appeal. We are of course aware that many a time, points of law may inescapably be difficult to discern from factual and evidential determination. It is in this regard that circumspection becomes necessary as the line between the facts, evidence and the law may be blurred. If the complaint by the appellant is that the trial court's assessment and evaluation of the evidence was wrong and led to a perverse conclusion, that might invite this Court to look at such evidence. Accordingly, the question of "*matters of law only*" does not bar this Court from looking at the facts and evidence before the trial court to determine whether its conclusion and findings are perverse. To the extent that this appeal questions the interpretation and application of electoral principles and laws; whether on the evidence on record the elections were credible, transparent, accountable free and fair, whether the results were properly declared, exercise of discretion to extend time, standard of proof, scrutiny and recount, disenfranchisement of registered voters and commission of electoral offences, and the effect of illegalities and irregularities in the impugned election, those are issues of law that we are bound to entertain and determine.

Starting with whether the trial court erred in interpretation and application of the electoral principles laid out in the Constitution and other electoral laws, the appellants contends that it did by misconstruing section 83 of the Elections Act and holding that:

"This section insulates the outcome of an election from nullification on the basis of errors or irregularities or non-compliance with the law which do not affect the results…."

The appellant submits that in so holding, the court deviated from the interpretation of the said provision by the Supreme Court in Raila 2017. The respondents on the other hand hold a contrary view; contending that the above holding by the court was in consonance with the Supreme Court's decision in Raila 2017.

We have perused the judgment of the trial court, which in our view was well reasoned. There is no doubt that all applicable constitutional principles and other electoral laws were taken into account by the court. On the evidence on record, the majority of the registered voters exercised their free will. The appellant did not persuade the court that indeed there were substantial breaches of the Constitution and other electoral laws as would have warranted the nullification of the election. In its consideration of the evidence the court came across some infractions in the conduct of the elections but the question that the court put to itself was whether the said infractions were deliberate, orchestrated or substantial so as to deny the appellant victory. The court also considered, and rightly so in our view, whether the said infractions were so massive and widespread as to affect the overall result of the election. It went further and considered the quantitative and qualitative aspect of the election as it was entitled to.

In Raila 2017 the Supreme Court observed as follows regarding the application of section 83:

"Therefore, while we agree with the two Lord Justices in Morgan v Simpson case that the two limbs should be applied disjunctively, we would, on our part, not take Lord Stephenson's route that even trivial breaches of the law should void an election. That is not realistic. It is a global truism that no conduct of any election can be perfect. We will also go a step further and add that even though the word "*substantially*" is not in our section, we would infer it in the words "*if it appears*" in that section. That expression in our view requires that before vitiating it, the court should, looking at the conduct of the whole election, be satisfied that it substantially breached the principles in the constitution, the Elections Act and other electoral law. To be voided under the first limb, the election should be what Lord Stephenson called "*a sham or travesty of an election*" or what Prof. Eriri Kubinza refers to as "*a spurious imitation of what elections should be*."

We are therefore unable to accept the appellant's submission that the trial court wrongly understood the fundamental principles applicable in elections or that it misconstrued those principles.

We turn our consideration to the question whether the 1st respondent conducted credible, transparent, accountable, free and fair elections within the Constitution and other electoral laws. Here the appellant's complaint is that the impugned election failed to meet the prescribed constitutional standards of a fair, transparent and verifiable election administered in an impartial, neutral, efficient, accurate and accountable manner. He relied on the alleged appointment of Presiding and Deputy Presiding Officers who were not neutral and impartial by reason of being supporters of the 3rd respondent. Relying on the persuasive High Court decision (Odunga, J.) in **Republic v. Independent Electoral and Boundaries Commission *ex parte* Khelef Khalif & Anor (2017) eKLR** where he held that regulations and appointments are meant to achieve the principles of transparency, impartiality, neutrality and accountability entrenched in Article 81 of the Constitution, the appellant was of the view that the totality of the foregoing juxtaposed against the requirements of the Constitution confirmed that the elections could not in law be found to have been credible, transparent, accountable, free and fair.

The answer by the respondents was that without a shadow of doubt, the 1st and 2nd respondents conducted credible, transparent, accountable, free and fair elections in terms of Article 86 of the Constitution. They maintained that the appointment of the Presiding and Deputy Presiding officers was in accordance with law and that the appellant's concerns were addressed when one Presiding Officer was dismissed and remaining five designated Deputy Presiding Officers.

On the evidence available, we have no doubt at all that the appointment of these officers was in compliance with the law. Pursuant to Regulation 3(3) of the Elections (General) Regulations, the 1st respondent assigned to the 2nd respondent, the responsibility of short listing and interviewing the applicants for those positions. That done, the 2nd respondent forwarded the names of successful candidates to the 1st respondent for onward transmission to the political parties and independent candidates for any objections as required by law. After the lapse of 14 days and there being no objections, he notified the candidates and the general public of the list of the duly appointed Presiding and Deputy Presiding Officers by placing their names on the notice board. It is also on record that in response to the appellant's objection to the list of appointed officers, the 2nd respondent exercised his discretion and dismissed one Presiding Officer and re-designated the five remaining officers to Deputy Presiding Officers in a bid to address the allegation of bias raised by the appellant. Thereafter, there were no more complaints raised by the appellant until they resurfaced in the petition. Accordingly, the appellant's submission that the presiding officers were appointed illegally by the 2nd respondent cannot hold. Further the complaint that the 2nd respondent had no authority to appoint those officers has no legal basis. The 2nd respondent acted on the basis of delegated authority. Obviously, the appellant misinterpreted the provision of the law by regarding the role of commissioners and his insistence that the Presiding and Deputy Presiding Officers could only be appointed by the Chairman and Commissioners of the 1st respondent. This wrong interpretation can only lead to an absurd conclusion that all the Presiding Officers and their Deputies had to be personally interviewed and appointed by the Chair or Commissioners of the 1st respondent and nobody else. Such an interpretation is untenable as it would be impracticable. It is also evident that the appellant did not inquire from his political party whether it had been supplied with the list of presiding officers and their deputies. At the hearing the appellant conceded that he could not tell whether or not the list was forwarded to his political party.

In the premises, the appellant's argument that the appointment of the Presiding and Deputy Presiding Officers by the 2nd respondent was un-procedural and unlawful and in violation of the Elections (General) Regulations; that such appointment could only be made by the Commission, meaning Chairperson and Commissioners; that the appointments were made by a person who had no such powers; that the 1st and 2nd respondents failed in their constitutional and statutory obligation to provide the list of persons proposed for appointment to political parties and independent candidates at least 14 days prior to the proposed appointment to make any representation, are not sustainable or tenable at all. Proper and legal approach was undertaken by the 1st respondent in the exercise through delegated powers by the Chairman and or the Commission. In that sense, it was not the 2nd respondent who appointed the presiding officers and their deputies as claimed by the appellant. Accordingly, we are unable to agree with the appellant that the court erred in law in finding that the 1st and 2nd respondents conducted credible, transparent, accountable, free and fair elections within the Constitution and other electoral laws.

On whether the court erred in finding that the declaration of results was proper and not irregular, the appellant wanted the court to declare the whole election a nullity because of result declaration forms that bore a date before the date when the tallying of the results was completed. The form 35B used to declare the results, was dated 8th August, 2017 but in fact the winner was declared on the 9th August 2017 which is the date when the tallying was completed. Due to that discrepancy, the appellant contends that there was no official declaration of the results in the Constituency which puts the integrity, transparency, impartiality, neutrality and accuracy of the electoral process into question. In the appellant's view, wrong date was evidence that the results were in fact predetermined in favour of the 3rd respondent. The respondents, in response explain that there was an error in entering the date in form 35B which error was candidly explained by the 2nd respondent to the satisfaction of the court.

From the judgment, it is discernible that the court agreed with the appellant that he had discharged the evidential burden of proving that form 35B was dated 8th August 2017 while the results were in fact announced on 9th August 2017. The burden then shifted to the 1st and 2nd respondents to disapprove or explain the discrepancy, which in our view they did. From the record, the results from polling stations started streaming in at 11 p.m. on 8th August 2017. The winner was declared on 9th August 2017 after the 2nd respondent had received the results from all the polling stations and had completed the tallying of forms 35As. The entries in form 35B were transpositions from form 35As save for a few errors, which were acknowledged and rectified in the re-tally. It is also apparent that the date in form 35B was pre-printed. However, due to human error attributed to fatigue, the 2nd respondent forgot to alter the date from 8th to 9th August 2017. The court made a factual finding that the date of 8th August 2017 was entered by mistake, rather than in a predetermined strategy to rig the election. We cannot interfere with that finding of fact because it is a conclusion that can reasonably be made on the evidence. By dint of section 83 of the Elections Act, the error was relatively minor, honest and could not be the sole basis for voiding the election. There was no suggestion that the results transposed from form 35A were different from those entered in form 35B dated 8th August 2017 after tallying. In any case a re-tallying of votes on the appellant's application was undertaken, which did not unearth any anomalies. We have therefore no reason to depart from that finding by the trial court.

This now brings us to the appellant's complaint that the court erred in extending time for filing and serving the answer to the petition and supporting affidavits. He argues that he filed the petition on 5th September 2017 and served the same on the respondents on 8th September 2017 but the respondents filed their responses on 19th and 21st September 2017 respectively, which was way outside the mandatory 7 days period provided by Rule 11 of the Elections (Parliamentary and County Elections) Petition Rules. He therefore submits that the court erred in extending time *ex posto facto.*

The 1st and 2nd respondents respond that in refusing to strike out the responses and the supporting affidavits for late filing, the court was exercising discretion to extend time, which is conferred by the proviso to Rule 5(1) of the Election (Parliamentary and County Election) Petition Rules. For the 3rd respondent, it was submitted that although election courts do not have jurisdiction to extend the timelines set by the Constitution or the Elections Act, they do have jurisdiction to extend timelines set by the Rules in the context of Article 159(2) of the Constitution and Rule 19(1) of the Elections (Parliamentary and County Elections), Rules. Further, that the court equally exercised its discretion in favour of the appellant by granting him leave to lodge supplementary affidavit out of time in the interest of doing justice to both parties.

We note that the appellant lodged a formal application to strike out the responses and affidavits that were filed out of time. The application was heard *inter partes* and the court made a finding that for the sake of justice and determining the issues raised in the petition properly and on merit, it would deem the documents as properly filed and served. In so holding, the learned judge was exercising discretion. While the Election (Parliamentary and County Election) Petition Rules provide for strict timelines for filing of responses they at the same time confer discretion in rule 5(1), which provides;

> **"The effect of any failure to comply with these rules shall be determined at the court's discretion in accordance with the provisions of Article 159(2)(d) of the Constitution."**

Further, ***rule 19*** of the same Rules provide for extension and reduction of time as follows:

> ***"(1) Where any act or omission is to be done within such time as may be prescribed in these Rules or ordered by the election court, the election court may, for the purposes of ensuring that injustice is not done to any party extend time within which the act or omission shall be done with such conditions as may be necessary even where the period prescribed or ordered by the Court has expired***.
>
> ***(2) Sub-rule (1) shall not apply in relation to the period within which a petition is required to be filed, heard or determined."***

In view of the above express discretion, we cannot interfere with the decision of the trial judge unless it be shown that his exercise of discretion was clearly wrong because he misdirected himself or because he acted on matters which he should not have acted on or because he failed to take into consideration matters which he should have and thereby arrived at a wrong decision. (See ***Matiba v. Moi & 2 Others [2008] 1 KLR 670).***

Moreover, it is trite that where appropriate, courts will not apply the rules of procedure so as to hinder the dispensation of justice but will instead deal with the matter in a manner that will advance the cause of justice. (See **Martha Wangari Kamau v IEBC & 3 Others (2018) eKLR).** In our view, the court properly weighed all the relevant issues and concluded that given the serious issues raised in the petition, it was prudent to accept the responses and the supporting affidavits, even though they were filed out to time. It also extended the same benefit to the appellant to file any replies out of time. By that decision, the court ensured that no party was prejudiced and that all the issues raised in pleadings would be adequately interrogated, addressed and determined.

Next is the complaint by the appellant that the court misconstrued the law on standard of proof and its application before effectively raising it beyond the legal standard. The appellant took the view that the court misdirected itself and unreasonably raised the standard of proof beyond the legal standard and that it focused more on the standard of proof in election offences and treated all violations of the Constitution and the electoral laws as offences, thus completely disregarding the effects of the proved violations of the Constitution and the law on the integrity and credibility of the election. He adds that the court was more inclined towards quantitative as opposed to both qualitative and quantitative aspects of the election and that it erroneously proceeded on the basis that even where irregularities were proved, they must be shown to tilt the results in favour of the appellant. The respondents counter by submitting that the court properly addressed itself to the standard and burden of proof and that it considered extensively the decision of the Supreme Court in Raila 2017. They added that most of the allegations in the petition bordered on criminal acts whose standard of proof was beyond reasonable doubt.

We think that this ground of appeal can conveniently be addressed alongside that of whether the court erred by disregarding evidence on violence and its overall effect on the election.

The Supreme Court in Raila 2017 was categorical in its pronouncement that a petitioner who seeks to annul an election on account of nonconformity with the Constitution and other electoral law, on account of irregularities, must adduce cogent and credible evidence to prove those grounds. It delivered itself thus:

> **"(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 was 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 evidentially 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 irregularity, that they did not affect the results of the election. In other words, while the petitioner bears the evidentially burden to adduce 'factual' evidence to prove his/her allegations of breach, then the burden shifts and it behooves the respondent to adduce evidence to prove compliance with the law…"

As already pointed out by the respondents, the court was alive to the two standards of proof which the appellant was expected to discharge as expounded in the Supreme Court decision above. The court was alive to the fact that in electoral disputes, the standard of proof remains higher than the balance of probability but lower than beyond reasonable doubt and that where allegations are criminal or quasi criminal, the standard of proof is proof beyond reasonable doubt.

There is no doubt that most of the complaints in the petition were of criminal or quasi-criminal nature, such as resort to violence, undue influence, voter bribery, prevention of voters from voting, vote stuffing, etc. The appellant and his witnesses testified on the above complaints and the court, quite correctly in our view, held that if the above acts were proved, they would constitute criminal offences. It further held that the issues were not about the acts alone but also their impact on the elections and whether they could be attributed to the respondents. In that regard, the court expressed itself thus:

"..where an election offence is alleged, the petitioner must show that the offence was committed and secondly that it is the returned (elected) candidate or his agents under his instructions who committed the offence. The allegations being of a criminal nature, the degree of proof is beyond reasonable doubt."

We do not see any misdirection in that reasoning by the court. The court too was aware of the holding by the Supreme Court in the Munya case that:

"the practical reality that imperfection in the electoral process are expected that the court should not lightly overturn an election if it is shown that the election was conducted substantially in accordance with the principles of the Constitution and the Elections Act. Where it is shown that the irregularities were of such magnitude that they affected the results, then such an election stands invalidated. Procedural and administrative irregularities and other errors occasioned by human imperfection are not enough by themselves to vitiate an election."

We are accordingly satisfied that the court correctly analyzed the standard, the legal and evidentiary burden of proof and cannot therefore be faulted. We are unable to discern any instance when the court raised the burden of proof beyond the legal standard as claimed by the appellant. Neither is there any evidence on record that the court leaned more towards the quantitative aspects of the election as opposed to both quantitative and qualitative aspects. We are satisfied that the appellant failed to prove to the required standard that the criminal and quasi-criminal acts complained of were attributable to any of the respondents. Further, the alleged violence and intimidation was an isolated incident on the eve of the elections. No evidence was tendered to demonstrate a low voter turn out due to the violence. If anything, the voter turn out was in excess of 74% of the registered voters.

On the claim that the court disregarded unchallenged evidence on violence and its overall effect on the election, it is clear to us beyond peradventure that the appellant is inviting us to relook at the evidence, re-evaluate it so as to reach a different conclusion from that of the trial court. This will be in contravention of section 85A of the Election Act. As we have already stated, an appeal to this Court on election disputes lies on points of law only.

On scrutiny and recount, the appellant's complaint is that the court did not properly exercise its discretion when it limited the extent, nature and scope of scrutiny and the recount and denied the application for scrutiny and recount for the entire Constituency. The respondents answer that the court properly exercised its unfettered discretion to limit the exercise as aforesaid, the aim being to avoid a fishing expedition for evidence by the appellant and also to allow for an efficient and timely disposal of the petition.

In the Munya case, the Supreme Court set out the following guiding principles with respect to scrutiny and recount of votes in an election petition:

a) The right to scrutiny and recount of votes in an election petition is anchored in Section 82(1) of the Elections Act and rule 33 of the Elections (Parliamentary and County Elections) Petitions Rules, 2013. Consequently, any party to an election petition is entitled to make a request for a recount and/or scrutiny of votes, at any stage after filing of petition, and before the determination of the petition.

b) The trial court is vested with discretion under section 82(1) of the Elections Act to make an order on its own motion for recount or scrutiny of votes as it may specify if it considers that such scrutiny or recount is necessary to enable it arrive at a just and fair determination of the Petition. In exercising this discretion, the court is to have sufficient reasons in the context of the pleadings or the evidence or both. It is appropriate that the court should record the reason for the order of scrutiny or recount.

c) The right to scrutiny and recount does not lie as a matter of course. The party seeking a recount or scrutiny of votes in an election petition is to establish the basis for such request to the satisfaction of the trial Judge or magistrate. Such a basis may be established by way of pleadings and affidavits, or by way of evidence adduced during the hearing of the petition.

d) Where a party makes a request for scrutiny and recount of votes, such scrutiny or recount if granted, is to be conducted in specific polling stations in respect of which the results are disputed, or where the validity of the vote is called into question in terms of Rule 33(4) of the Elections (Parliamentary and County Elections) Petition Rules.

Thus scrutiny and recount is not a roving inquiry undertaken with a view to fishing materials to invalidate the election. It is also not an open thoroughfare. Limitation and determination of the extent of scrutiny and recount is permissible. Accordingly, there was nothing wrong with

the limits that the court imposed. The appellant's main grounds for seeking scrutiny and recount was the alleged irregularities and vote discrepancy due to repeated voting, stuffing of votes in the ballot boxes, improper sorting of votes during the counting exercise, exclusion of agents from polling stations and their denial of the opportunity to sign form 35As. In his application, the appellant relied on discrepancies between forms 35As and Bs in 12 polling stations. He further relied on polling station diaries without any reference to the register of voters. As correctly submitted by the 3rd respondent, in the absence of the register of voters to show any discrepancy with forms 35As and Bs, the court was justified to allow recount and scrutiny where there were differences in the figures in form 35As and form 35Bs. The scrutiny and recount report confirmed the credibility of the election and supported the court's finding that the magnitude of the errors complained of were negligible and did not affect the overall result. We reiterate that mere detection of an error however minor, cannot by itself justify an automatic order for scrutiny and recount of all polling stations. Some errors are administrative and it would serve no purpose to undertake scrutiny and recount to confirm what is already not in dispute.

This determination leads us to the appellant's complaint that the court did not place much premium on the results of the scrutiny and recount. According to the appellant, the scrutiny confirmed serious irregularities including stuffing of ballot papers, recording of wrong votes for the appellant and tampering with the ballot boxes and votes. The appellant further submitted that the result of the recount was not an end in itself because the process by which the votes ended up in the ballot boxes was also important, thus implicating both the quantitative and qualitative aspect of the election, which the court failed to consider. For the respondents, it was submitted that scrutiny disclosed only minor errors, which did not affect the results. Further, that from the exercise, no single candidate was disadvantaged or benefitted from the errors, and even if the same were to be corrected, they would not affect margin of votes between the appellant and the 3rd respondent.

We are satisfied that the scrutiny and recount exercise unearthed only minor errors which had no effect at all on the final result and could not therefore vitiate the results declared by the 1st and 2nd respondents. Having made reference to the report at length, the trial court concluded:

> **"The report from the scrutiny and recount from 12 polling stations requested by the petitioner confirms the accuracy of the results in those polling stations and clears questions arising from polling stations diaries. I make the inevitable conclusion that the magnitude of the errors complained of is negligible and one that does not affect the results.."**

We are therefore not satisfied, as claimed by the appellant, that the court gave the report of the scrutiny and recount short shrift. The errors that were brought to light were neither systemic, pervasive or calculated to benefit the 3rd respondent at the expense of the appellant.

We next turn to consider the complaint that the court ignored clear and uncontroverted evidence of disenfranchisement of registered voters and prevention of voters from voting. The appellant contended that a substantial number of voters were turned away who were a mere sample of the broader and widespread disenfranchisement of voters in the election. He added that under Article 38(2) of the Constitution, the right to vote is not cosmetic but is essential to Kenya's democracy and the exercise of sovereignty. For the respondents, it was contended that the appellant did not prove that any registered voter was denied the right to vote and did not call even a single witness to testify that he or she was a registered voter but was turned away from the polling stations.

We are satisfied on the evidence on record, that the appellant did not prove to the required standard this serious allegation. No witness testified to being a registered voter, turning up to vote, and being turned away. In those circumstances, the court had no basis to conclude that voters had been disenfranchised. The Elections Act defines a "voter" as a person whose name is included in the current register of voters. The Elections Act further defines the principal register as the current register of persons entitled to vote at an election and includes a register that is compiled electronically. Section 4 of the Elections Act provide that an adult citizen shall exercise the right to vote specified under Article 38(3) of the Constitution if registered in the principal register of voters. It is common ground that at some point the appellant filed an application to compel the 1st respondent to supply him with the record of the voters identified by electronic voter identification devices at every polling station in the Constituency but abandoned the said application midstream.

It is trite law that "whoever alleges must prove" and that section 107(1) of the Evidence Act provides:

> **"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."**

Finally, Section 108 of the Evidence Act provides that the burden of proof is on the person who would fail if no evidence at all were given on either side. Clearly the appellant did not discharge this burden and the court was right in rejecting his allegations.

We think that we have said enough to demonstrate that this appeal is destined for dismissal. Accordingly, the same lacks merit and is hereby dismissed with costs to the respondents. The costs are capped at Kshs.1,500,000/- jointly for 1st and 2nd respondents and a similar amount payable to the 3rd respondent by the appellant. It is so ordered.

Dated and delivered at Kisumu this 25th day of July, 2018.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb.

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a truecopy of the original.

DEPUTY REGISTRAR