IN THE COURT OF APPEAL

AT NAIROBI

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

ELECTION PETITION NO. 11 OF 2018

BETWEEN

HASSAN ADEN OSMAN.....APPELLANT

AND

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION (IEBC).....1ST RESPONDENT

THE MANDERA COUNTY RETURNING OFFICER

(DAVID MARO ADE).....2ND RESPONDENT

MAHAMED MAALIM MAHAMUD.....3RD RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (F. Tuiyott, J.) delivered on 26th February, 2018

in

Election Petition No. 6 of 2017)

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JUDGMENT OF THE COURT

In a petition filed before the election court, the appellant sought the following reliefs:

a) an order for the inspection of the ballot boxes, scrutiny, recount and re-tallying of the votes cast and recorded as having been cast in several polling stations in Mandera North Constituency.

b) the nullification of the results in Mandera North Constituency in the specified polling stations.

c) a declaration that the 3rd respondent was wrongfully returned by the 2nd respondent as the duly elected Mandera County Senator.

d) a declaration that the 3rd respondent was not validly elected.

e) an order be issued cancelling the certificate of declaration of results issued to the 3rd respondent.

f) the election of the 3rd respondent as the Senator of Mandera County be declared null and void.

g) a declaration to issue that the appellant was the duly elected Senator of Mandera County.

h) the Respondents be condemned to pay the appellant's costs.

i) an order do issue for the forthwith release of the deposit of security for costs paid into court by the appellant.

In the election giving rise to that petition, the 2nd respondent, on behalf of the 1st respondent had declared the 3rd respondent the winner of the senatorial contest with 71,633 votes against 63,621 votes received by the appellant.

Challenging those results, the appellant alleged that;

1) on the eve of the 8th August 2017 elections, a number of Presiding Officers and Deputy Presiding Officers were replaced by strangers who were known sympathizers of the 3rd respondent's sponsoring Jubilee Party.

2) the 1st respondent illegally changed the physical location of 10 polling stations without gazetting those changes.

3) the transportation and/or distribution of electoral materials was done by police officers from Rhamu Police station and not officials of the 1st respondent.

4) the appellant's agents were chased away from the polling stations and were not allowed to observe the voting, counting and tallying of votes.

5) in most polling stations the Kenya Integrated Election Management System (KIEMS) Kits were not used for purposes of voter identification and/or results transmission as required by the law; and that the 1st respondent resorted to the complimentary system so as to facilitate ballot stuffing and double voting in favour of the 3rd respondent.

6) there was an unrealistic voter turnout of between 80% and 100%.

7) the presiding officers and their deputies illegally marked the ballot papers for the assisted voters without filling in appropriate forms in the presence of party agents.

8) voting in 14 polling stations was allowed to continue beyond the stipulated time.

All these allegations were denied by the respondents who collectively maintained that the election was conducted in strict adherence to the Constitution, the Elections Act and the Regulations made thereunder; that the 2nd respondent was impartial and neutral in the contest; that the declared results reflected the will of the electorate; that the deployment of the presiding officers and deputy presiding officers was regular and complied with **Regulation 5** of the Elections (General) Regulations 2012; that the list of recruited presiding officers and deputy presiding officers was never changed; that the task of transporting ballots was not left to the police officers as alleged; that no polling station was moved from the gazetted locations; that Forms 38A were never altered; and that the corrections noted had no effect on the result of the election.

The respondents also denied the allegation by the appellant that his agents or those of his party were chased away from polling stations and in some instances assaulted. Similarly, they denied allegations of fraud in the use of the KIEMS Kit and averred that the Kit worked well in Mandera North Constituency; and that no person was allowed to vote more than once.

All the allegations of malpractices at the tallying centre were also denied. Instead, it was the respondents' case that the results declared at the tallying centre were in conformity with the requirements of the law.

At the close of the respondents' case, the court made an order for scrutiny and recount of the votes in 11 polling stations. After re-evaluating the evidence presented in proof and in rebuttal of the allegations, as well as the Deputy Registrar's report on the outcome of the scrutiny and recount exercise, the learned Judge (Tuiyott, J.) adopted the following issues as framed by the parties for determination of the petition:-

"(i) Whether the Elections of the Member of the Senate of Mandera County was conducted in accordance with the Constitution of Kenya, 2010, the Constitutional principles governing the conduct of elections, the Elections Act and the Regulations made thereunder.

(ii) Whether in the conduct of the election of Member of the Senate of Mandera County, there was a substantial and material non-compliance with the provisions of the Constitution, the Elections Act and the Regulations made thereunder and whether such non-compliance substantially and materially affected the results of the elections.

(iii) Whether any electoral malpractice of a criminal nature may have occurred during the election of the Member of the Senate of Mandera County worthy of being reported and transmitted to the Director of Public Prosecution.

(iv) Whether the 3rd Respondent was validly elected as the Member of the Senator of Mandera County.

(v) Which party should bear the costs".

The learned Judge considered **section 83** of the Elections Act which is to the effect that an election can only be declared to be void by reason of non-compliance with the Constitution or any written law relating to that election or if it appears that the non-compliance affected the result of the election. The learned Judge also addressed the question of standard and burden of proof in election disputes and, again properly

explained that the standard of proof

> **"should, in principle, be above the balance of probability, though not as high as beyond reasonable doubt save that this would not affect the normal standards where Criminal charges linked to an election are in question. In the latter, the threshold is proof beyond reasonable doubt"**; and that **"this burden is borne by the petitioner and is heavier than in ordinary civil litigation".**

In the end, the learned Judge found instances where the appellant had discharged the burden and others where he had failed to do so.

On the first issue, according to the learned Judge, the number of Presiding Officers (PO) said to have been replaced were no more than 26, as opposed to the 46 alleged by the appellant; and that out of the 46 of the allegedly replaced officials only two testified, PW12 and PW13. In relation to the latter (PW13), the Judge found that even though he testified that he was unlawfully removed from his assignment as the Presiding Officer for Guticha Primary School, the said Guticha Primary School was not one of the polling stations the appellant had alleged was manned by strangers; and that there was no proof of replacement of PW12. The Judge ultimately ruled on this point thus;

> **"This Court takes the view that the evidence put forward by the Petitioner was so underwhelming that no burden shifted to the respondents to disprove the allegations on this category of claim".**

The second issue was whether there was a "substantial" and material non-compliance with the provisions of the Constitution, the Elections Act and the Regulations made thereunder and whether such non-compliance substantially and materially affected the results of the elections. Under this head, it was argued that some polling stations were illegally relocated without following the law. The learned Judge determined this question stating;

> **"In respect to the other polling stations, no evidence was tendered. This Court must find that the allegation of unlawful relocation of polling stations collapses for lack of evidence".**

On whether the 1st respondent illegally distributed election materials, by permitting police officers to transport and distribute the same, the learned Judge expressed the view that the 1st respondent contracted transportation of election material to civilians; and that there was;

> **"No allegation, or at least no proof, that those who transported the materials in respect to Mandera North Constituency were allied to the 3rd Respondent. Neither is it proved or alleged that the transportation was not under the supervision and direction of the respective P.Os and D.P.Os. Crucial as well is that there is no complaint that the materials never reached the polling stations on time. In addition there is no allegation that there was tampering of election materials while on transit. Nothing can turn on the criticism made of the manner in which the materials were transported".**

Another aspect of this head of complaint was that there were irregularities during voting; that the use of KIEMS Kit in some polling stations was stopped without explanation by the poll officials, who resorted to the use of the complementary system without seeking prior approval from the 1st respondent. It was contended that the complementary system was deployed to facilitate fraud and ballot stuffing in favour of the 3rd respondent in 41 polling stations. For his part the learned Judge, once again, found no proof of this but found evidence that as a matter of fact many voters were identified using the kits.

Related to this complaint was also the allegation that the failure to use KIEMS Kit was intended to facilitate double voting and ballot stuffing. According to the appellant, the high voter turnout in some polling stations was evidence of double voting and ballot stuffing. Was there evidence of double voting and ballot stuffing? The learned Judge disposed of this claim as follows;

> **"While extremely high voter turnout may be suggestive of some malpractice that by itself without more, may not be proof of transgression"**.

Because no voter who was a victim of the alleged manipulation testified to confirm those allegations, the learned Judge rejected them.

Also dismissed for want of evidence was the claim that voting time was illegally extended beyond 5p.m. in 14 polling stations.

In addition the appellant claimed that his agents and those of his party were assaulted and chased away from the polling stations. The Judge found the evidence presented in support of this head not only deficient but also contradictory, and rejected it.

Further allegations were made to the effect that the presiding officers and the deputy presiding officers irregularly compelled agents to sign blank Forms 38A and 38B; that there was no announcement of results in several polling stations; that presiding officers refused to display the results of the elections on the doors of the polling stations; and that some Forms 38A were filled at the tallying centre. All these, the Judge found unproved.

The Court further found no evidence of alterations or overwriting on the declarations forms for Gofa Primary School (1) and Morothile Primary School (3).

Scrutiny was conducted in the following 11 stations;

i. Ado Saden (1)

ii. Lanquara (1)

iii. Al-Hidaya Primary School (4)

iv. Olla Primary School (3)

v. Kubi Primary School

vi. Olla Primary School (2)

vii. Garsey Primary School (1)

viii. Morothile Primary School (1)

ix. Kalicha Primary School (1)

x. Korma Adow Polling Station

xi. Sarman Primary School (1)

Before considering to the scrutiny report involving 11 stations listed above, the learned Judge first observed that the returning officer had nullified the results from Al-Hidaya Primary School (4) and Olla (3) polling stations because the "figures were not adding up" and agreed that from the scrutiny exercise the integrity of the ballot box and its contents was not certain; that the SD card was not available for scrutiny; and that it was not possible to ascertain the voter turnout.

Regarding Kubi polling station, the scrutiny exercise found that Form 38A returned a higher number of votes cast (194) than the voter turnout (191). The learned Judge held that in accordance with **Regulation 83(1)(d)** the county returning officer ought to have disregarded those results. The court proceeded to do so itself. Similarly in the case of Olla (2) the scrutiny showed that one (1) vote was added to the results of the 3rd respondent.

In Ado Saden and Lanquara (1) polling stations neither the presiding officer nor deputy presiding officer had signed the declaration form. The Judge in disregarding the results in Ado Saden polling station found them to be **"completely out of step with the number of persons who voted"** as 505 voters turned up to vote but the 3rd respondent is said to have garnered 511 votes.

The Judge found that in Lanquara (1) polling station where 398 voters were identified as having cast their ballots, the 3rd respondent is shown to have received 447 votes, in excess of those who voted. Those results were also disregarded.

Scrutiny and recount in respect of Garsey (1) polling station revealed that the 3rd respondent benefited by 3 extra votes while the appellant was denied one (1) vote.

The result at Morothile (1) polling station were disregarded as the votes attributed to the 3rd respondent in Form 38A (568) exceeded the voter turnout (203).

Although the votes recorded as cast in Form 38A at Kalicha (01) are consistent with the voter turnout, upon scrutiny only 168 ballots were found instead of 472 ballot papers which had been issued. Like Kalicha (01), in Korma Adow polling station out of 316 ballot papers issued only 60 were found in the ballot box during scrutiny. The total number of votes cast recorded in Form 38A

(376) exceeded the number of ballots issued to voters (316). For these reasons the learned Judge disregarded these results. The results from Sarman (1) were similarly disregarded.

In the end the learned Judge indicated that after the scrutiny exercise the votes of the 3rd respondent reduced by 2,165 while that of the appellant increased by 174. In the end the learned Judge concluded thus;

> **"The net advantage to the petitioner is therefore 2,339 votes. As the gap between the two in the declared Results was 8,372, the results on scrutiny of all material submitted to the Deputy Registrar reduces this gap to 6,033. Of significance is that the outcome of the scrutiny in the best possible scenario for the petitioner does not upset the victory of the 3rd respondent or affect the result of the election….**…….. **It would be reckless and irresponsible for this Court to upset the sovereign will of the people by holding that what happened in 9 or 10 polling stations must have happened in the entire Mandera North Constituency…In terms of the constitutional test, the court can only void an election if the election substantially violated the principles laid down in the Constitution as well as other written law on elections. A violation of the election law cannot be said to be substantial unless it is systemic, widespread and pervades a considerable part of or the entire election or a most critical component thereof……..The outcome is that the irregularities or illegalities that have been proved have neither affected the Results of the Election nor do they amount to a substantial violation of the Constitution and other Election Laws in respect to the entire Senatorial Election in Mandera North".**

For these reasons, the petition was dismissed with costs to the respondents as follows:-

"(i) Instruction fees for the 1st and 2nd Respondent are capped at Khs. 2,500,000 (Two million five hundred thousand).

(ii) Instruction fees for the 3rd Respondent is capped at Khs.2,500,000/- (Two million five Hundred Thousand)".

With the determination that the 3rd respondent was validly elected as the Member of the Senator of Mandera County, the stage was set for the next challenge. The appellant lodged this appeal contending on 50 odd grounds that the determination was erroneous and that the learned Judge ought to have nullified the declaration of the 3rd respondent as the duly elected Member of the Senate for Mandera County. Those grounds were collapsed and argued in the following clusters.

The appellant submitted that the learned Judge erred by failing to take into consideration the evidence on record that demonstrated that the presiding officers and deputy presiding officers were illegally replaced on the eve of the election; that the learned Judge declined to take into consideration the outright admissions by the 1st and 2nd respondents that there had indeed been illegal replacement of presiding officers and deputy presiding officers; that the moment the 1st and 2nd respondents conceded to have replaced the trained presiding officers and deputy presiding officers on the eve of the Election Day the burden shifted to them to explain that the replacements were done within the confines of the law; that those who replaced trained presiding officers and deputy presiding officers were not competent and could not return credible electoral results; and that all their returns were therefore null and void.

On the second cluster, it is the appellant's submission that the learned Judge erred in law by holding that the appellant's witnesses had not given sufficient evidence to establish that there were polling stations where KIEMS Kits were not used or were abandoned in violation of the law; that failure to provide SD cards for the polling stations concerned corroborated the appellant's contention that SD cards were not used or were abandoned; and that by failing to provide the SD cards, the 1st respondent conceded that the KIEMS Kits were not used in these polling stations.

On double voting and ballot stuffing it was contended that the learned Judge erred in law by disregarding the appellant's evidence to prove that there was double voting in many polling stations; that even after conceding that the 100% voter turn-out recorded in some polling stations led to a conclusion that there were malpractices, the learned Judge still went ahead to uphold those results; that a court cannot uphold the electoral results of a polling station in the absence of counterfoils; and that it was apparent that there was double voting and ballot stuffing.

The appellant has also submitted that the learned Judge summarily dismissed the uncontroverted contention that voting went on beyond 5p.m. when from the evidence on record the 1st respondent did everything to ensure that this contention could not be settled through scrutiny, as it declined to provide the SD cards for scrutiny or ensured that the dashboard of the KIEMS Kit did not show the opening and closing times of the polling stations where the SD cards had been provided; that the learned Judge erred by failing to take into consideration the fact that there were missing electoral materials, such as SD cards; that the presiding officers failed to sign statutory forms 38As; that the learned Judge therefore erred in law in holding that the forms 38A that had not been signed by the presiding officers were valid for the reason that they had been signed by the deputy presiding officers.

The appellant further submitted that the learned Judge erred gravely by misapplying the constitutional principles under **Article 86** of the Constitution and holding that the election was solely about the numbers and not about the process and by turning a blind eye to the massive irregularities that were proved through the scrutiny exercise of the 11 polling stations. He contended that the partial scrutiny revealed a process that was fundamentally flawed and could not pass the test of a free, fair, transparent, credible and verifiable election as enshrined under **Article 86** of the Constitution. The learned Judge, according to the appellant erred gravely in using the scrutiny results in computing the final tallies for these polling stations, because, and that immediately the irregularities were confirmed, the Judge was not at liberty to use unverifiable results of a flawed process in the computation of the Mandera senatorial results.

Finally, the appellant contended that by purporting to exclude from the final tally results from Kubi, Ado Saden, Morothile 1, Sarman and Lanquara polling stations, the learned Judge disenfranchised the voters in the affected polling stations and violated their rights as enshrined under **Article 38** of the Constitution.

For the 1st and 2nd respondents, it was argued that the appellant did not discharge the burden of proving that the election was either non-compliant with the electoral law, or that the non-compliance affected the results of the election; that the appellant did not present to the court clear, cogent and credible evidence that the process was fraught with malpractices and irregularities; and that the 1st respondent failed to discharge its constitutional and statutory mandate thereby rendering the election a nullity.

They contended that burden of proof rested with the appellant at the trial and the learned trial Judge correctly held that the circumstances of this case did not merit the shifting of the evidential burden of proof to the respondents. The same would fall shy of a fishing expedition and contrary to the principle that he who alleges must prove. The 1st and 2nd respondents and their officers could not be expected to answer a case whose basis had not even been proved to the requisite standard. An election petition cannot succeed merely because a respondent has not offered evidence in rebuttal to the allegations by the appellant, in the absence of probative evidence in proof of the allegations to the required standard, it was submitted. The appellant, according to the respondents, failed to prove his case to the required standard.

It is contended that by attacking the judgment for allegedly failing to take into consideration the evidence on record, the appellant was inviting the Court to re-examine the probative value of that evidence, an exercise that only a trial court can engage in; that the trial court correctly held that the evidence tendered by and for the appellant was not sufficient to prove the allegations contained in his petition.

The respondent further urged that the broad allegations of illegal replacement of presiding officers and deputy presiding officers in Mandera North Constituency were unfounded; that the 1st and 2nd respondents expressly denied in evidence that these officers were ever changed or replaced with strangers as alleged; and that the 1st respondent's process as far as the appointment and deployment of its officers was concerned was open, transparent and fully participatory; that the appellant neither pleaded the particulars of, nor produced in evidence proof

that the KIEMS Kits were not used in Morothile Ward, Ashabito Ward, parts of Rhamu Ward, Guticha Ward, and Rhamu-Dimtu Ward and that the complimentary system of voter identification was used illegally.

On the claims that there was double voting and ballot stuffing, the respondents submitted that in view of the confirmation that voter identification was done through the KIEMS kit, it ought to follow that the kit could not permit a voter to be identified twice, neither could it permit identification of more voters than those registered.

On the claims that voting went beyond 5p.m; it was submitted that all instances of voting beyond 5p.m. were properly documented in the polling station diaries and reasons given; that no evidence was led to demonstrate that any voters, other than those who were already on the queue, were permitted to vote after 5p.m. This was in respect of Guticha Ward, Morothile Ward and Rhamu-Dimtu Ward polling stations.

It was argued that the ground alleging that some SD cards and electoral materials were missing was not a ground in the petition and that in any case the trial Judge appropriately dealt with instances of missing SD cards by making a second qualitative analysis excluding results from polling stations where there might have been interference. In the end he arrived at the reasoned conclusion that the exclusion did not affect the ultimate result of the election for Senator of Mandera County.

The respondents maintained that it is settled that declaration forms may be signed by either the presiding officers or deputy presiding officers; and that there is no specific provision to the effect that the election should be voided because of lack of the signatures of the presiding officer or his deputy; and further that in the absence of any evidence that the omission by either the presiding officer or the deputy presiding officer, or both of them, to sign the declaration forms affected the election results in any manner.

Regarding the alleged disenfranchised of voters from five polling stations whose results were excluded, the respondents maintained that the court was entitled to do so when it was demonstrated that the total number of valid votes cast exceeded the number of registered voters in that polling station, or the total number of votes exceeded the total number of voters who turned out to vote.

Finally, it was submitted by the 1st and 2nd respondents that the learned Judge properly undertook both a qualitative and quantitative analysis of the evidence adduced before him and reached a just conclusion. He did not, contrary to the appellant's assertions, conclude that elections were only about numbers; that instead he was alive to the fact that in election matters, qualitative, quantitative and materiality tests are applied as a basis of establishing whether any errors materially affected the outcome; that both tests were properly applied by the trial Judge in arriving at the decision; that notwithstanding some errors in the election, those errors did not substantially affect the overall outcome of the elections.

The 3rd respondent insisted that all the fifty (50) grounds of appeal were not admissible for stating that the "learned trial Judge erred both in law and facts"; that **Section 85A** of the Elections Act does not permit an appeal to this Court on the issues of fact or of mixed fact and law.

The 3rd respondent went on to state that there was a factual finding that the seals to some of the ballot boxes were interfered with or tampered with after closure of the counting of votes hence there was no way of vouching for their integrity in the absence of entries in the polling stations diaries (PSD); that there was no doubt that the contents of the ballot boxes had been interfered with after closure and declaration of the election results; that those post-declaration of results events cannot be used by the appellant to impugn the integrity, verifiability, accuracy, efficiency, accountability and transparency of the challenged election; that the act of removing from the ballot boxes some votes, counterfoils, forms 38As and other electoral materials was intended to influence the outcome of the petition.

The 3rd respondent asserts that the trial Judge erred in disregarding results where the numbers of voters electronically captured by KIEMS Kit exceeded the number of votes found in the ballot boxes and thereby disenfranchised the voters of those polling stations.

The nullification test laid down by **Section 83** of the Elections Act, demands that the trial Judge must ascertain whether any non-compliance with electoral law did in fact affect the results of the elections.

The trial Judge was therefore entitled to isolate polling stations where there appeared to be non-compliance with regulations and test whether the non-compliance in those specific stations had an effect on the overall result. That exercise is a legitimate and lawful execution of the trial Judges' duty. The process of ascertaining the nullification test does not amount to disenfranchisement of the voters.

Indeed, the election regulations permit the constituency returning officer to disregard results where the total valid votes exceed the total number of registered voters.

Likewise, to disregard the results of the counts of a polling station where the total vote exceeds the total number of voters who turned out to vote, is not regarded in law as disenfranchisement of voters. Finally, for the 3rd respondent it was contended that considering that only eleven (11) out of 386 polling stations where scrutiny was undertaken were alleged to have had irregularities, that alone constitute only 2.77% of the polling stations and cannot be representative of the state of the rest of the constituencies. No evidence of non-compliance with any of the regulations was led in respect of the remainder 97.23% of the polling stations.

That, in summary is the totality of the dispute contained in several volumes of the record of appeal and submissions.

We start with the easier argument to the effect that the appeal is not admissible for challenging the impugned decision on matters of both "law and facts".

It is settled that a court can exercise jurisdiction only as conferred by the Constitution, written law, or both and that it cannot arrogate itself jurisdiction exceeding that which is conferred by the Constitution or law. It cannot expand its jurisdiction through judicial craft or innovation. See: **Samuel Kamau Macharia** & **Another V Kenya commercial Bank & 2 Others**, Application No. 2 of 2011. **Section 85A**

of the Elections Act confers on the Court of Appeal the power to hear appeals from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of county governor "on matters of law only". While it is common factor that 43 of the 50 grounds in the appellant's memorandum of appeal start with the statement; "The learned trial Judge erred both in law and fact", the question is whether that alone takes away this Court's jurisdiction as defined in **section 85A** aforesaid. Before we answer that question, we stress what courts have said many times in the past; that pleadings have an important part to play in litigation conducted within the adversarial system; that crafting a good pleading calls for precision in drafting, diligence in the identification of the material facts in support of each allegation, an understanding of the legal principles which are necessary to formulate complete cause or causes of action and the ability to discard what is unnecessary; that the primary function of a pleading is to alert the opposite party of the claim against him or her, and also to inform the court precisely what issues are before it for determination. See the Australian case of **SMEC Australia Pty Ltd V McConnell Dowell Constructors (Aust) Pty Ltd** (2011) VSC 492 which has been followed with approval in this jurisdiction. See for example, **Kenya Pharmaceutical Association & Another V. Nairobi City County & the 46 other County Governments & Another**, High Court Constitutional Petition No. 97 of 2016.

The manner in which the grounds were framed in this appeal is baffling and confounding in view, first, of the clear provisions of **section 85A**, and second of the professional standing of counsel for the appellant and the past decisions of this Court on this subject. For instance in the case of **Independent Electoral and Boundaries Commission and Another v. Stephen Mutinda Mule and Others,** Civil Application No. 219 of 2013, the Court made the point that;

> **"Those points in an appeal of the kind before us being from an election Court's decision is further circumscribed by Section 85A of the Elections Act which limits appeals to the Court of Appeal to matters of law only. It is therefore quite strange and improper that each of the seventeen grounds without exception commences with a standard expression, 'the Judge erred in fact and in law' or 'the learned Judge erred in law and in fact'. Clearly the drafters of the Memorandum did not have the legal provision in active contemplation. Had they done so, they would have found that by invoking factual errors, they were inviting jurisdictional objections to their entire appeal."**

Having so said, it bears repeating that elegance in a pleading is not a precondition to its legitimacy; that jurisdiction can only be conferred by the Constitution, or any written law, or both; and that no one, not even the court itself can, through judicial craft or innovation, arrogate to itself jurisdiction exceeding that which is conferred as aforesaid. Conversely, the jurisdiction of a court cannot be taken away merely by poor drafting of pleadings or even by the parties.

We think, though that, in situations of slip or poor drafting like this, the Court ought to be able to isolate conclusions of law from conclusions of facts guided by the following principles enunciated by the Supreme Court in **Gatirau Peter Munya V. Dickson Mwenda Kithinji & 2 Others** [2014] eKLR;

> **"[81] Now with specific reference to Section 85A of the Elections Act, it emerges that the phrase "matters of law only", means a question or an issue involving:**
>
> **(a) the interpretation, or construction of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, in an election petition in the High Court, concerning membership of the National Assembly, the Senate, or the office of County Governor;**
>
> **(b) the application of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, to a set of facts or evidence on record, by the trial Judge in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of County Governor;**
>
> **(c) the conclusions arrived at by the trial Judge in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of County Governor, where the appellant claims that such conclusions were based on "no evidence", or that the conclusions were not supported by the established facts or evidence on record, or that the conclusions were "so perverse", or so illegal, that no reasonable tribunal would arrive at the same; it is not enough for the appellant to contend that the trial Judge would probably have arrived at a different conclusion on the basis of the evidence".**

It is for this Court to determine whether the memorandum of appeal meets the strictures of the foregoing principles. Of course it is undesirable, indeed unacceptable to throw at the Court fifty (50) grounds of appeal and ask it to sieve and plough through them to identify what is a question of law and which one is one of fact. That is the duty of the appellant.

Giving further guidance in the above case the Supreme Court cautioned that;

> **"[82] Flowing from these guiding principles, it follows that 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. 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 Judge's commitment to the highest standards of knowledge, technical competence, and probity in electoral-dispute adjudication, on the other hand".**

See also **Wavinya Ndeti & Anor V. IEBC & 2 Others,** Election Petition Appeal No.8 of 2018 and **Sumra Irshadali Mohammed V. The Independent Electoral And Boundaries Commission & 2 Others**, Election Petition Appeal No. 22 of 2018.

From what we have said earlier regarding the jurisdiction of the Court and learned counsel having realized the absurdity of the approach has, in the written submissions correctly, but strangely from fifty (50) grounds identified only five grounds in the written submissions as raising questions of law. Talking of which, we must remind all counsel coming before this Court to bear in mind the provisions of **Rule 86(1)** of the

Court of Appeal Rules which requires in mandatory terms that;

> **"A Memorandum of Appeal shall set forth concisely and under distinct heads, without argument or narrative the grounds of objection to the decision appealed against, specifically the points which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the Court to make."**

The Court warned counsel in **Law Society of Kenya V. Centre For Human Rights And Democracy & 13 Others,** Civil Appeal No. 308 of 2012 that;

> **"…. it is quite astonishing that the LSK preferred some forty- one grounds of appeal out of that single issue. Some of the grounds have as many six sub-grounds and, running into eight typed pages, the document contains arguments more suitable for submissions.**
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> **Purported memoranda of appeal that are repetitive, argumentative and replete with such material as excerpts and quotations from books and judgments, as well as historical and political background, do no favours to counsel who prepare them. Moreover, they serve only to obfuscate issues".**

Having settled the preliminary issue, we now turn our attention to consider those five grounds upon which the appeal was argued.

In the first place, the appellant contends that the learned Judge reached erroneous conclusions regarding the illegal appointment and replacement of presiding officers and deputy presiding officers, the failure to use or the abandonment of KIEMS Kits, double voting and ballot stuffing, voting beyond 5p.m. and the missing SD cards and electoral materials.

Secondly, it is stated that the learned Judge misapplied the principles of standard and burden of proof in election petitions. Thirdly, that the learned Judge disregarded binding precedents to the effect that Form 38As must be signed by presiding officers. The fourth complaint is that the Judge erred in holding that the election in question was solely about numbers and not the process. Finally, that by disregarding votes in some polling stations, the Judge disenfranchised the voters in those stations.

The appellant's grievances before the High Court which are reflected in the five grounds set out above were specific. There is a rebuttable presumption in election matters that the results declared by the electoral body are correct until the contrary is proved. To invalidate an election therefore, is a weighty prospect and it requires compelling and credible evidence because invalidation of an election has wider implications beyond the contestants; the right of the voters to non-interference with their already cast votes without satisfactory reasons.

Section 107 of the Evidence Act stipulates that;

> **"(1) 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.**
>
> **(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person".**

Section 108 further emphasizes that;

> **"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side".**

On the other hand,

> **"…the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person".**

See **section 109.**

The Supreme Court confirmed whose burden it is in an election petition when it stated as follows in **Raila Odinga & Others V. The Independent Electoral And Boundaries Commission & Others**, Supreme Court Election Petition **No. 5 of 2013:**

> **"[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….**
>
> **[196] This emerges from a long-standing common law approach in respect of alleged irregularity in the acts of public bodies. *Omnia praesumuntur rite et solemniter esse acta:* all acts are presumed to have been done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescriptions of the law**."

In **Raila Odinga & Another V. Independent Electoral Boundaries Commission & Others**, Supreme Court Presidential Petition **No. 1 of 2017**, the Supreme Court reaffirmed the standard of proof 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 were introduced.

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

It is now established by a long line of judicial decisions that where no allegations of a criminal or quasi-criminal nature are made in an election petition, an 'intermediate standard of proof', one beyond the ordinary civil litigation standard of proof on a 'balance of probabilities', but below the criminal standard of 'beyond reasonable doubt', is applied. See **Raila Odinga** case 2013.

On the basis of **section 83** of the Elections Act, there is a rebuttable presumption in election matters that the results declared by the electoral body are correct until the contrary is proved. It states;

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

Section 83 is the legal threshold for invalidating any election. From its language, opening with a negative phrase, **section 83** is so worded to emphasize the rebuttable presumption of the validity of all elections; and that elections are conducted by fallible human beings, and errors are bound to occur; and consequently, that not all malpractices will lead to nullification of the result. In other words, only such irregularities, errors or mistakes or non-compliance with the law, or which in turn materially affects the outcome of the results will lead to the nullification of the election.

Considering all we have said regarding the burden and standard of proof as well as the application of **section 83** aforesaid, it was the appellant who bore the burden of proving to the required standard that, on account of non-conformity with the law or on the basis of commission of irregularities which affected the result of this election, the court below ought to have nullified the election of the 3rd respondent.

The first complaint is that the Judge reached erroneous conclusions which were not based on evidence regarding the illegal appointment and replacement of presiding officers and deputy presiding officers, the failure to use or the abandonment of KIEMS Kits, double voting and ballot stuffing, voting beyond 5p.m. and the missing SD cards and other electoral materials. As we consider this broad ground, we bear in mind the caution that we must not be engaged in the re-examination of the probative value of the evidence tendered at the trial, or be involved in the calibration of such evidence. We are concerned

here only with matters of law, as defined in **Munya** (supra), to mean, in the circumstances of this case:

"(d) the conclusions arrived at by the trial Judge in an election petition …….where the appellant claims that such conclusions were based on "no evidence", or that the conclusions were not supported by the established facts or evidence on record, or that the conclusions were "so perverse", or so illegal, that no reasonable tribunal would arrive at the same".

It was the appellant's case at trial that the presiding and deputy presiding officers were irregularly employed while others were improperly replaced by others a day before the election. The latter, according to the appellant were incompetent and therefore the results they returned were null and void; that the polling stations manned by these "strangers" had unimaginable electoral malpractices; that those "strangers" were well-known sympathizers and supporters of the 3rd respondent and his party, Jubilee. It was further contended that prior to the appointment of the presiding officers, the 1st respondent ought to have consulted political parties.

The 1st respondent denied those allegations but admitted that only 6 presiding officers were replaced during the training and roughly another 6 of those who had been trained.

These *ex facie* are matters of fact and evidence. The learned Judge, in some great detail, considered the complaint and dismissed it finding no proof. This is how he analyzed the evidence presented by the parties;

"62. What is the Court to make out of the Petitioner's grievance in the face of the evidence? It is common ground that by way of a Public advertisement, persons were invited to apply for the position. Those who applied were shortlisted. Common as well to both sides is that the list of those who were invited for training was the list on page 208 of the Petition……The evidence of RW2 is that he replaced persons during training. He could not recall their names and did not have their names in Court. This contrasts remarkably with the contention of the Petitioner that about 46 persons were replaced. In furtherance of that case the Court was told to look at a list found on page 224-227 of the Petition. This is said to have contained the list of the persons who were finally deployed to conduct and manage the Elections in Mandera North. While it was the evidence of the Petitioner that the disputed list was the one put out by the IEBC on the eve of the Election, it is disowned by RW2.

But let the Court accept, for a moment, that it was indeed an IEBC list. What does it reveal? The Court was asked to look at

the names of persons without folio numbers. Those would be the purported Strangers who were posted to man the Elections. Those are the persons who wreaked havoc to the election, it was asserted. It was said, on behalf of the Petitioner, that those without folio numbers neither applied, trained nor were they properly recruited because all those who applied were allocated a computer generated folio number.

On my count the names of the persons without folio numbers are 13. To this I could add 13 more. These are in respect to Polling stations in which the Officials deployed are not given. The information as to the Officials are completely blank….By the proposition of the Petitioner, as the Strangers are those who appear on the final list but do not have folio numbers, the Strangers would be a maximum of 26. This falls short of the 46 persons said to have been illegally replaced.

Out of the 46 persons said to have been illegally replaced only two testified. These are PW12 and PW13. But even then the evidence of PW13 is not without difficulty. While his evidence was that he was unlawfully removed from his assignment as P.O for Guticha Primary School, it is not one of the Polling stations which is said to have been manned by Strangers. As for PW12, it was his evidence that although appointed he was not given a letter of appointment. That may be so because even one witness of the Commission did not have a letter of appointment (RW6). But he also did not have a copy of the oath that he says was administered on him after appointment. No explanation is offered for this. In addition it was his evidence that he was one of the 4 who reported his removal to the police but again was unable to prove that he had done so. Ordinarily a report made to the police would be booked. When this not done then the witness should say so. Something else arises, why did only 4 out of 46 replaced persons deem it necessary to report the matter? This was not explained. Or is there some truth in the evidence of RW2 that he only replaced 6 people who did not attend training? ...This Court takes a view that the burden only shifted to the Commission if the Petitioner had placed some cogent evidence that some persons who had been lawfully recruited and trained were suddenly and without good cause replaced.

The Petitioner only called 2 of the 46 who had complained of being un-procedurally removed. Of these two, one turns out to be in respect to a polling station which is not listed as among those manned by strangers. And when presented with one of the alleged strangers (RW3), the petitioner's counsel chooses not to ask what would be decisive questions……This Court takes the view that the evidence put forward by the petitioner was so underwhelming that no burden shifted to the respondents to disprove the allegations on this category of claim".

For our part and with respect, we find no fault with this conclusion on the facts before the Judge, who had the advantage of seeing and hearing the witnesses. The grievance on this ground remains a matter of fact, in accordance with the holding in the **Munya** case. The conclusions arrived at by the trial Judge were based on evidence before him and his conclusions based on that evidence cannot be described as

"so perverse", or so illogical that no reasonable tribunal would arrive at the same"

The learned Judge properly evaluated the evidence by the appellant and the 1st and 2nd respondents and correctly applied the law on the standard and burden of proof and concluded ultimately that the burden of proof was not discharged. We, respectfully, agree. We may only add that even assuming 46 presiding and deputy presiding officers, whose particulars were not provided were irregularly deployed, it was not demonstrated that they were incompetent or biased. But more significantly, it was not shown that the alleged irregularities were of such magnitude and so systematic that they affected the overall election result; and that the alleged irregularities violated the principles of the Constitution and the law. The alleged irregularities related to only 25 polling stations in 5 wards of Ashabito, Rhamu, Rhamu-Dimtu, Morothile and Guticha in the county involving alleged 46 of 197 presiding officers.

The second complaint on the first ground is that the Judge reached erroneous conclusions regarding failure to use or the abandonment of KIEMS Kits. According to the appellant, KIEMS Kits were not used entirely in Lanquara polling station or were abandoned along the voting because out of 447 voters, only 398 were identified by KIEMS Kit; that no SD cards were availed by the 1st respondent for scrutiny in Al-Hidaya Primary School (4), Olla Primary School (3), Garsey, and Sarman Primary School (1) polling stations. Due to the alleged failure to present the SD cards for scrutiny, the appellant urged the trial court to draw an inference that KIEMS Kits were not used in the polls.

The appellant has contended that the learned Judge declined to consider the evidence on record regarding this specific complaint. While the 1st respondent conceded that there were very few instances where KIEMS Kit failed and complementary methods of identification used, he urged the trial court to find that the percentage of failure in the concerned constituency or the county was insignificant.

Again, whether or not KIEMS Kits were used or failed in the listed polling stations is a question of evidence that only the trial court could resolve. Depending on how it resolved it, it can either be a question of fact or one of law.

The Judge analyzed the evidence in respect of this complaint and noted that in respect of Korma Adow polling station, the scrutiny of the SD card showed that 316 Voters were 'authenticated' (identified) by the KIEMS Kit and none was authorized by the supervisor; the allegation that some voters used identification cards of others was not proved as no particulars were furnished. The appellant or his agents did not make any written complaint to IEBC or the police of such infraction; that the threshold of proving such a malpractice, which if established discloses a criminal offence, is proof beyond reasonable doubt.

At Olla Primary School (2) from the scrutiny of the SD card the Judge came to the conclusion that 428 voters were identified using the Kit and none by manual procedure. He also dismissed complaints regarding Yaqila Farm Polling

station where he found no evidence of malpractices, as the appellant's agent there signed the Declaration Form (Form 35A) without a protest.

For these reasons, we find no basis for us to disagree with the conclusion, that there was no evidence to demonstrate that failure to use KIEMS Kit was intended to fraudulently give advantage to the 3rd respondent and to disadvantage the appellant.

Secondly, it was not proved that the alleged irregularities were of such a nature, or such a magnitude to have either affected the result of the election, or to have so negatively impacted the integrity of the election, that the learned Judge was plainly wrong to have failed to invalidate the election on that ground.

The next set of complaints, still under ground 1, are that there were instances where people voted more than once; that there was stuffing of ballot papers, that voting went beyond 5p.m. and that SD cards and other electoral materials went missing.

On double voting, the appellant relied on the evidence of four witnesses, PW4, PW5, PW6 and PW7, all of whom alleged that they witnessed double voting. The appellant also pointed out that the scrutiny exercise revealed that there was double voting and ballot stuffing, a fact that led the Judge to question the results from Kubi, which appeared to the Judge to have been spiked; that the absence of counterfoils in all the stations where scrutiny was conducted was further evidence of double voting and ballot stuffing; and that the high voter turnout was equally suspicious. Before us it was submitted that had the learned

Judge analyzed the evidence of these witnesses he would have arrived at a different and correct determination. The learned Judge ought to have nullified the election on that ground alone, counsel argued.

The 1st and 2nd respondents have responded to these allegations insisting that no particulars or specifics were availed; and the fact that four witnesses said that there was double voting and ballot stuffing cannot be sufficient proof. The respondents have also questioned the sincerity of the appellant after he or his agents failed to report these alleged malpractices to the 1st respondent or the police.

The learned Judge, for his part, noted that the complaint about double voting and ballot stuffing was predicated on the theory that the use of the KIEMS Kit was avoided so as to facilitate this alleged malpractice and having found no proof of failure to use KIEMS Kits the Judge concluded that likewise allegations of double voting and ballot stuffing were not supported.

Regarding high voter turnout, while the learned Judge expressed the view that a turnout of between 80% and 100%, was statistically unrealistic, he asserted that the "Court is not one of suppositions and assumptions" and that it makes its findings on the basis of evidence and the law. He determined the issue thus;

> **"If the Petitioner alleges that the voter turnout was not statistically feasible then it was for him to lay out a basis of this argument by way of some evidence, perhaps expert evidence. Such evidence may comprise an historic analysis of past voter turnout, a comparison of Voter turnout between Mandera North Constituency and the other 5 constituencies of Mandera County, and plausible reasons as to why such a Voter turnout is impractical or impossible. To leave this to the assumption of the Court is to fail to lay a basis for a favourable finding……While extremely high voter turnout may be suggestive of some malpractice that by itself without more, may not be proof of transgression".**

The learned Judge also found no evidence from which he could nullify the election results from 14 polling stations on account of allegations that voting was extended beyond 5p.m.

He stated;

> **"Curiously in none of the 14 polling stations pleaded was evidence led. Instead, the petitioner sought to rely on the scrutiny report to prove one such instance. It was submitted that a scrutiny of the SD card for Korma Adow showed that the last voter was identified at 1.40 am on 9th August 2017. Yet even if this court were to accept that as proof it cannot aid the petitioner because it was not one of the 14 polling stations pleaded and reiterated in the petitioner's supporting affidavit where voting unlawfully went on past time".**

Apart from emphasizing the fact that this complaint too is one of fact, Regulation **66** of the Elections (General) Regulations, 2012 provides the answer.

It states;

> **"Notwithstanding sub-regulation (1), a person who is on a queue for the purposes of voting before 5 o'clock in the afternoon shall be allowed to vote despite the fact that the voting time may extend to after 5 o'clock."**

Unless voting beyond 5p.m. was so wide-spread and involved persons who were not on the queue at 5p.m. that it violated the principles of the Constitution and the Elections Act, then such election cannot be invalidated only because in one or two instances, voting went beyond 5p.m. The appellant did not show that the magnitude of voting after 5p.m. affected the election result.

Finally, still on ground 1, it was the appellant's case that it became apparent from the scrutiny exercise that some SD cards and other electoral material went missing; that that was in itself evidence of interference and tampering with the votes, which ought to have led the learned Judge to nullify the election; and that the learned Judge in error "chose to uphold the results of an election whose electoral materials integrity could not be vouched for in any way whatsoever".

In all fairness to the Judge, the matter of the missing SD cards was not raised before him and as a result he has not given his opinion on it. But the learned Judge concluded as a fact that there was interference with the seals of ballot boxes from 6 polling stations and possible interference with another 2; that,

> **"In respect to the scrutiny which this court has just analyzed it is not clear who is to benefit from the tempering. Neither is there evidence as to who interfered with the ballot boxes and very likely its contents….IEBC bears the responsibility of preserving the election material. ….Once a petition is filed in respect to a disputed election then, IEBC retains the responsibility of the custody of the ballot boxes and other election material for the disputed election but subject to the directions of the election court (Rule 16 of the Elections (Parliamentary and County Elections Petition Rules 2017)….. …..Interference of election material must not be countenanced. For this reason this court shall be directing IEBC to cause an investigation as to when, how and by whom the Ballot boxes were interfered, with a view to having the matter processed through the criminal justice system. This is the least the court can do for now".**

Although the Judge did not explicitly say so, but it was apparent that the interference came after the voting, counting and declaration of results. Secondly, that, such interference may impact on the investigation by an election court, but in the circumstances of this appeal, no such outcome was pleaded or proved to have affected the results of the election.

The second ground suggests that the learned Judge misapplied the principles of standard and burden of proof in election petition. In response to this ground we can do no better than to look at what the learned Judge himself said of the two principles. He first observed that in order to succeed in having an election declared void, the petition must be brought within **section 83** of the Elections Act; that an election court examines the conduct of an election as a whole and the intent of the voters in the context of what is pleaded in the petition. The examination is not open ended or unbounded. A party cannot ask an election court to undertake an examination of matters which are not pleaded and "to travel a rudderless journey"; and that**;**

> **"The standard of proof should, in principle, be above the balance of probability, though not as high as beyond reasonable doubt save that this would not affect the normal standards where criminal charges linked to an election are in question. In the latter, the threshold is proof beyond reasonable doubt (Raila Odinga and others v. Independent Electoral and Boundaries Commission and 3 others SCK Petition No.5 of 2013 [2013] eKLR). This burden is borne by the petitioner and is heavier than in ordinary civil litigation".**

That is the law. To support this the learned Judge made reference to the Evidence Act to illustrate that in certain circumstances, that burden can shift. At paragraph 70 he explained this issue as follows after setting out **section 112** of the Evidence Act;

> **"This Court takes a view that the burden only shifted to the Commission if the petitioner had placed some cogent evidence that some persons who had been lawfully recruited and trained were suddenly and without good cause replaced".**

In terms of this ground, and from the illustration above, it is not clear to us in what way the Judge misapplied the two principles. We have ourselves at the beginning of this judgment set out those principles in detail.

The third ground in this appeal is that Forms 38A were not signed by the presiding officer. The specific complaint is that the presiding officer must himself sign the statutory form; and that failure to do so is itself a criminal offence; that the presiding officer's mandatory obligation to sign the forms cannot be substituted by the signature of the deputy presiding officer; and that the deputy presiding officer can only perform the roles of the presiding officer if the latter is "legally not available". The learned Judge was said to have committed an error of law for holding that Forms 38A that had not been signed by the presiding officers were valid for the reason that they had been signed by the deputy presiding officers. **Regulations 5** and **79** of the Elections (General) Regulations, 2012 confirms this position.

The latter states that the presiding officer, the candidates or agents shall sign the declaration in respect of the elections for President (Form 34A), National Assembly, County women representatives, Senator, Governor and county assembly (Forms 35A, 36A, 37A, 38A and 39A), respectively.

Regulation 5(4) specifically provides for the relationship between the presiding and deputy presiding officer thus;

> **"(4) A deputy presiding officer may perform any act, including the asking of any question, which a presiding officer is required or authorized to perform by these Regulations".**

Submissions suggesting that declaration forms signed by a deputy presiding officer are null and void, or that the deputy presiding officer can only perform the roles of the presiding officer if the latter is "legally not available" cannot therefore, in view of the foregoing clear provision, be correct. The correct position was given in **John Murumba Chikati v Returning Officer Tongaren Constituency & 2 Others** (supra) where the High Court at Bungoma said as follows:-

> **"What about Forms 35A which had not been stamped? The court takes the view that affixing the official stamp is important, but, lack of it does not invalidate the Form. The requirement of the law under regulation 79 of the Elections (General) Regulations, 2012 is that the Presiding Officer signs the statutory Form. Under Regulation 5 of the General Regulations, Presiding Officer includes the Presiding officer and Deputy Presiding Officer duly appointed by IEBC. The statutory Form is valid once it has been signed by the Presiding officer; both the Presiding Officer and the Deputy Presiding Officer or by either of them. "**

The final ground is that the learned Judge erred in law by purporting to exclude some of the results from Kubi , Ado Saden , Morothile 1, Sarman and Lanqura polling stations from the final tally of the results; that by doing so, he disenfranchised the voters in the affected polling stations and violated their rights under **Article 38** of the Constitution.

In the judgment of the trial court, results from Kubi, Ado Saden, Lanquara, Morothile and Korma Adow polling stations were disregarded as they exceeded the number of people who voted. We illustrate that scenario below:

	POLLING STATION	REGISTERED VOTED	NO. OF PEOPLE WHO VOTED	RECOUNT/ SCRUTINY	DIFFERENCE
1.	Kubi	242	191	194	3
2.	Ado Saden	565	505	511	6
3.	Lanquara (1)	478	398	435	37
4.	Morothile (1)	588	203	568	365
5.	Korma Adow.	403	316	376	60
	Total:		**1,613**		**471**

Article 38(1) of the Constitution guarantees every citizen freedom to make political choices; to have free, fair and regular elections based on universal suffrage and the free expression of that citizen's will; and to vote by secret ballot in any election.

Rights and fundamental freedoms under **Article 38** are not any of those contemplated under **Article 25** which cannot be limited. There are many instances in the law where political right to vote in an election is limited. The Constitution itself in **Article 38(3)(b)** envisages that the right of every adult citizen to vote by secret ballot in any election may be limited by recognizing the citizen **"has the right, without unreasonable restrictions"**

Section 82 of the Election Act, on the other hand permits the court after scrutiny of votes to strike off—

> **"(a) the vote of a person whose name was not on the register or list of voters assigned to the polling station at which the vote was recorded or who had not been authorised to vote at that station;**
>
> **(b) the vote of a person whose vote was procured by bribery, treating or undue influence;**
>
> **(c) the vote of a person who committed or procured the commission of personation at the election;**
>
> **(d) the vote of a person proved to have voted in more than one constituency;**
>
> **(e) the vote of a person, who by reason of conviction for an election offence or by reason of the report of the election court, was disqualified from voting at the election; or**
>
> **(f) the vote cast for a disqualified candidate by a voter knowing that the candidate was disqualified or the facts causing the disqualification, or after sufficient public notice of the disqualification or when the facts causing it were notorious".**

Regulation 77 of the Elections (General) Regulations 2012, also allows a returning officer at the time of counting votes at an election, not to count any ballot paper—

> **"(a) which does not bear the security features determined by the Commission;**
>
> **(b) on which votes are marked, or appears to be marked against the names of, more than one candidate;**
>
> **(c) on which anything is written or so marked as to be uncertain for whom the vote has been cast;**
>
> **(e) which bears a serial number different from the serial number of the respective polling station and which cannot be verified from the counterfoil of ballot papers used at that polling station; or**
>
> **(f) ……"**

We have said these things to show that disregarding votes in certain circumstances will not necessarily disenfranchise those affected.

But of immediate relevance is **Regulation 83(1)** of the Elections (General) Regulations 2012, which permits the returning officer, after receiving the results of the poll from all polling stations in a constituency to, among other things,

> **"(b) disregard the results of the count of a polling station where the total valid votes exceeds the number of registered voters in that polling station;**
>
> **(c) disregard the results of the count of a polling station where the total votes exceeds the total number of voters who turned out to vote in that polling station….."**

Section 80 (1) (d) of the Election Act vests in the election court the power to

> **"decide all matters that come before it without undue regard to technicalities".**

What should happen when it is apparent from scrutiny exercise that the number of those alleged to have voted exceed the number of registered voters of those who actually voted in a polling station; can the election court disregard the excess number? On what basis will the court retain 100% voter turnout without proof that all voters registered in the polling station concerned turned up and indeed voted?

Whereas the returning officer at the polling station can ignore the results of the count of a polling station where the total valid votes cast exceeds the number of registered voters in that polling station or the results of the count of a polling station where the total votes exceeds the total number of voters who turned out to vote in that polling station, we think, pursuant to **section 80(1)(d)** aforesaid, the election court can likewise do so.

In **Albeity Hassan Abdalla V. The Independent Electoral and Boundaries Commission & 3 Others,** Election Petition Appeal No. 2 of 2018, the Court disregarded results from a polling station because of 58 excess votes noting that;

> **"Similarly, failure by the returning officer to disregard the results of Kiangwe Primary School polling station where the total valid votes exceeded the number of registered voters in that polling station as required by Regulation 83 (1) (a) was a serious flaw that ultimately affected the integrity of the impugned election. See also the Supreme Court in Gatirau Peter Munya (supra) ……**
>
> **We have not merely answered the said questions in the affirmative although it is quite obvious in view of the small margin of 58 votes that separated the appellant from the winner. …..**
>
> **It is very clear that taking away the entire results of Kiangwe Primary School polling station from the results of Lamu Senatorial seat, the difference of 58 votes disappears. The 3rd respondent therefore could not have been validly elected. There was substantial non-compliance with the law that rendered the elections not free and fair."**

The learned Judge in the instant appeal was justified in disregarding the votes in the five stations where evidence of excess votes was led because the entire results from those stations were not verifiable.

From what we have said in this judgment we do not think there is any justification in the accusation that the Judge intimated in any way that the election in question was solely about numbers and not the process.

The appellant has not demonstrated that with the disregarded votes, the results would have been in his favour. This ground must also fail.

With respect we agree that if discrepancies were found only in eleven (11) out of 386 polling stations constituting only 2.77% that alone without more would not be sufficient basis to invalidate the entire election as the figure is not representative of the state of the rest of the constituencies. No evidence of non- compliance with any of the regulations was led in respect of 97.23% of the polling stations. Mandera County consists of six (6) constituencies and the appellant's case was built on only one (1) constituency and specifically five (5) wards.

In his own admission the appellant stated on oath that his complaint was only in respect of only one constituency out of six (6) constituencies in Mandera North. He was emphatic that;

> **"I was happy with manner IEBC conducted elections in the 5 constituencies. No single complaint in the other constituencies."**

In conclusion, we reiterate by paraphrasing the Supreme Court in **Raila 2017** that it is not every irregularity, or every infraction of the law that will lead to the nullification of an election, because as their Lordships stated, if that the case, ***"..there would hardly be any election in this Country, if not the world, that would withstand judicial scrutiny"***; that the court must concern itself with the questions whether, **"the election was characterized by irregularities, and whether, those irregularities were of such a nature, or such a magnitude, as to have either affected the result of the election, or to have so negatively impacted the integrity of the election, that no reasonable tribunal would uphold it".**

The Supreme Court in **Munya,** (supra), stressed that in considering an election dispute the courts must be guided by the principles set out in **Articles 81(e)** and **86** as well as the Elections Act, specifically the disjunctive application

of **section 83** and the Regulations thereunder made; and further that if it be shown that an election was conducted substantially in accordance with the above said principles then such election is not to be invalidated only on ground of irregularities; and that an election will only be invalidated on account of irregularities where it is demonstrated that the irregularities were of such magnitude that they affected the election result. We are of the respectful view that the election giving rise to this appeal did not manifest such wide-spread irregularities to warrant interference with the declared results which were upheld by the election court.

In the result, we find no merit in this appeal. It is accordingly dismissed. We award the 1st and 2nd respondents costs in the High Court capped at Kshs. 500,000 each and Kshs. 1,500,000 to the 3rd respondents. The appellant shall pay to each of the respondents Kshs. 1,000,000 costs of this appeal.

Dated and delivered at Nairobi this 20th Day of July, 2018.

W. OUKO, (P)

.....

JUDGE OF APPEAL

ASIKE – MAKHANDIA

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR