



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: WAKI, SICHALE & OTIENO-ODEK, JJ.A)

ELECTION PETITION APPEAL NO. 2 OF 2018

BETWEEN

BUTICHI KHAMISI.....APPELLANT

AND

INDEPENDENT ELECTORAL AND

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

SHINALI BERNARD MASAHA.....2<sup>ND</sup> RESPONDENT

HUDSON SALENOI.....3<sup>RD</sup> RESPONDENT

*(An appeal from the Judgment of the High Court of Kenya at Kakamega*

*(Ruth N. Sitati, J) dated 1<sup>st</sup> February, 2018*

*in*

*Election Petition No. 2 of 2017)*

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JUDGMENT OF THE COURT

When the curtains fell after the elections for Member of the National Assembly for Ikolomani Constituency in Kakamega District on 8<sup>th</sup> August, 2017, Shinali Bernard Masaka (**Masaka**), the 2<sup>nd</sup> respondent, was declared the winner after garnering 15,731 votes. There were four other candidates but Butichi Khamisi (**Khamisi**), the appellant, came a close second having garnered 14,600 votes.

For several reasons, Khamisi was not satisfied with the result and challenged it before the High Court in Kakamega, sitting as an Election Court. His petition filed on 5<sup>th</sup> September, 2017 which enjoined, the Independent Electoral and Boundaries Commission (**IEBC**), the 1<sup>st</sup> respondent, Hudson Salenoi (**Returning Officer**), 3<sup>rd</sup> respondent, and Masaka, listed the transgressions as '*widespread use of force or violence by Masaka during election; undue influence and misuse of state resources by Masaka; election malpractices - including bias, discrimination, and special treatment of agents - on the part of IEBC*'.

Such transgressions, it was pleaded, were contrary to various Articles of the Constitution and other provisions of electoral law and regulations which require that elections be free and fair, transparent, and administered in an impartial, neutral, efficient, accurate and accountable manner.

All the parties were heard before **Ruth Sitati, J.** who in a judgment delivered on 1<sup>st</sup> February, 2018, rejected the petition and reached the following conclusion after considering each of the issues raised therein:

*"Finally, having considered all the evidence and circumstances of the election for Member of the National Assembly of Ikolomani Constituency, it is clear to me that this was a very tight race between the 2<sup>nd</sup> Respondent and the Petitioner. The difference in votes between the two is evidence of the tight race, and that difference of less than 1,500 votes in the final result could make any loser salivate for a rematch, and show that the petitioner fought a good fight. The court afforded all the parties engaged in the combat an opportunity to ventilate their grievances to enable the court see if indeed a rematch was justified. The result of the hearing and after due consideration of the law and the rival submissions is that the petitioner totally failed to adduce tangible evidence in support of the allegations against all the three respondents, and especially against the 2<sup>nd</sup> Respondent. The petitioner's pleadings remained in the realm of mere allegations and conjecture because there was no evidence to support or substantiate them. The petitioner's case is a typical case of searching for a grain of wheat in a bag of chaff. The petitioner's allegations therefore failed the test of veracity, thereby rendering the petition untenable. It is impossible for this court to conclude that there were any breaches of the law that affected the result in this election."*

Khamisi was once again aggrieved by that decision and is now before us raising six grounds in his memorandum of appeal to challenge it, as follows:

*"1. THAT the Learned Judge of the High Court erred in law by totally failing to correctly appreciate, apply and observe the provision of Article 81 (e) (v) of the Constitution in determining whether the elections of Member of National Assembly in Ikolomani was held in accordance in strict conformity the Constitution and the provisions of Elections Act.*

*2. THAT the Learned Judge of the High Court erred in law by failing to appreciate Rule 8 (1) of the Elections Petition Rules by shifting the burden of proof to the petitioner to confirm what the correct, verifiable and accurate result were as declared.*

*3. THAT the learned Judge erred in law in applying the principles set out in the following case laws:*

- a) Paul Gitenyi Mochara Vs. Timothy Mosei E. Bosire and 2 others [2013] eKLR*
- b) Joho Vs. Nyange & another (2008) 3KLR (EP)*
- c) Henry Okello Nadimo Vs. IEBC & 2 Others [2013] eKLR:*

*to wit:*

- i) The error should be simply arithmetical mistake,*
- ii) The error should not be deliberate:*
- iii) There should be a means of verification of the errors to test their accuracy:*
- iv) The error should be a human error and not a fundamental breach of statutory provision.*

4. **THAT the Learned Judge of the High Court erred in law by totally failing to appreciate Rule 83 (a) & (e) of the Elections (General) Regulations, 2012 read together with Rule 3 (3) (c) & Rule 3 (5) of the Elections (General) Regulations, 2012. To wit: it is the mandatory responsibility of the Returning Officer or his/her deputy to tally and fill Form 35B; and finding that the copied and pasted results of Ikhulili 2 of 2 did not affect the accuracy and verifiability of the results.**

5. **THAT the learned Judge erred in law by totally failing to appreciate the principle advanced and set in the case of Raila Odinga & another Vs. independent Electoral Boundaries Commission and 2 others- presidential Election Petition No. 1 of 2017 [2017] eKLR that a petitioner need to prove only one of the two limbs outlined in Section 83 of the Elections Act.**

6. **THAT the learned judge erred in law by totally misinterpreting and failed to appreciate the principle laid down in the case of Zacharia Okoth Ovado Vs. Edward Akong'o Oyugi [2014] eKLR that parties are bound by their pleadings and thus should not have made a determination on a possible election malpractice perpetrated by Thomas Mukabwa and should also not have inferred that 3rd Respondent was tired."**

At the pre-hearing conference, the parties recorded a consent reducing the grounds of appeal to "agreed and contested issues" as follows:

**"LIST OF AGREED ISSUES**

1. **Whether the error in relation to Ikhulili Polling Station 2 was so substantial as to warrant nullification of the election in question.**

2. **Whether the learned judge misinterpreted and failed to appreciate the principle laid down in the case of Zacharia Okoth Obado Vs. Edward Akong'o Oyugi (2014) eKLR that parties are bound by their pleadings and whether she could thus make a determination on a possible election malpractice perpetuated by Thomas Mukabwa and whether the judge could also make an inference that the 3rd Respondent was tired.**

**LIST OF CONTESTED ISSUES**

1. **Whether the Memorandum of Appeal meets the threshold of Sec.85A of the Elections Act?**

2. **Whether the learned judge failed to appreciate the provisions of Rule 8 (1) of the Elections (Parliamentary and County Elections) Petition Rules, 2017?**

3. **Whether the Learned Judge erred in totally failing to appreciate the principle advanced and set in the case of Raila Odinga & Another v Independent Electoral and Boundaries Commission and 2 Others Presidential Election Petition No. 1 of 2017 [2017] eKLR that a petitioner need to prove only one of the two limbs outlined in section 83 of the Elections Act; and**

4. **Whether the learned judge failed to appreciate the test set out in the cases of Paul Gitenyi Mochara Vs. Timothy Mosei E. Bosire and 2 others [2013] eKLR and Joho Vs. Nyange & another (2008) 3KLR (EP) and Henry Okello Nadimo Vs. IEBC & 2 others [2013] eKLR in evaluating the electoral irregularities?"**

The parties further informed us on the hearing date that the appellant had withdrawn or abandoned ground 2 in the memorandum of appeal which is also issue No.2 of the 'contested issues'. **Rule 8 (1) of the Elections (Parliamentary and County Elections) Petition Rules, 2017**, which is the subject of that ground of appeal, relates to the 'contents and form of a petition'. The appellant had also conceded ground 6 of the memorandum which is also issue No. 2 of the 'Agreed Issues'. The order made by the election court in respect of one **Thomas Mukabwa** would thus remain unchallenged. It follows that those matters will not feature in this judgment. The parties further agreed to have the rest of the appeal determined

through written submissions, which were filed, and brief oral highlights, which were made. We now proceed to examine the appeal in the manner preferred and urged by the parties.

The first contested issue is that the appeal was filed in contravention of **section 85 A** of the **Elections Act** as it does not raise any issues of law. We must therefore deal with that issue *in limine* as it speaks to the jurisdiction of the Court. The Supreme Court, in **Samuel Kamau Macharia and Another vs Kenya Commercial Bank and 2 Others [2012] eKLR**, stated that "**a court's jurisdiction flows from either the Constitution or legislation or both**" and that a court "**cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.**" The jurisdiction of this Court in election matters flows from **Article 164 (3)** of the **Constitution** as operationalized by **section 85 A** of the **Elections Act** which commands, in mandatory tone, that appeals "**shall lie to the Court of Appeal on matters of law only..**"

**There is little difficulty, if any, in construing that provision as the Supreme Court has laid out the parameters of what amounts to issues of law and issues of fact. After careful comparative analysis of 'The Rationale and Constitutional basis' of section 85 A in the case of Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others [2014] eKLR (the Munya case), the Court stated as follows:**

***"[80] From the foregoing review of the comparative judicial experience, we would characterize the three elements of the phrase "matters of law" as follows:***

- a. the technical element: involving the interpretation of a constitutional or statutory provision;***
- b. the practical element: involving the application of the Constitution and the law to a set of facts or evidence on record;***
- c. the evidentiary element: involving the evaluation of the conclusions of a trial Court on the basis of the evidence on record.***

***[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."***

Learned counsel for Khamisi, **Mr. A. S. Masika** (holding brief for **Mr. G. M. King'ori**), assisted by **Mr. Alex Simiyu**, cited those principles, as well as the Supreme Court decision in **Zacharia Okoth Obado vs Edward Akong'o Oyugi & 2 Others [2014] eKLR**, among other authorities, and submitted that the appellant was relying on all the elements and especially the evidentiary element in proposition (c) of the **Munya case**. All the grounds of appeal, he asserted, related to issues of law only. At all events, he further submitted, the respondents did not invoke the provisions of **Rule 19 (1)** of the **Court of Appeal (Election Petition) Rules, 2017** to have the record of appeal struck out within seven days of service, as stipulated under that rule and, therefore, they were awfully out of time in raising the issue at the hearing

stage.

On the other hand, learned counsel for IEBC and the Returning Officer, **Mr. N. M. Maramba**, assisted by **Ms. Kahiti**, contended that the appellant was asking the court to examine matters of fact regarding alleged irregularities in Forms 35A and 35B which are matters of fact. So too **Mr. S. Luseno** who appeared with **Mr. D. Anzala** for Masaka. He submitted that **Rule 19** was about taking essential steps prior to institution of the appeal and was not applicable to the appeal itself; that an election court was special in that intervention of an appellate court was limited by statute; that the appellate court must show fidelity to findings of fact made by the election court; that there was no issue of law raised in the appeal; and that the issues agreed by the parties for determination before the election court did not raise any constitutional moment to warrant an appeal.

We have considered those submissions and it is our view, firstly, that **Rule 19 (1)** of the **Court of Appeal (Election Petition) Rules, 2017** is confined to non-compliance with the preliminaries of filing an appeal and cannot be invoked to deflect the raising of a jurisdictional issue relating to the main appeal. It has been stated, times without number, that jurisdiction is everything and without it the court has no power to make any further step and must down its tools. See **The Owners of the Motor Vessel Lilian 'S' vs Caltex Kenya Ltd [1989] KLR 1**. It can therefore be raised at any time. The Nigerian Court in **All Progressive Grand Alliance (APGA) vs Senator Christiana N. D. Anyanwu & 2 Others LER [2014] SC. 20/2013** approached it thus:

***"..the issue of jurisdiction is so fundamental to adjudication, that it can be raised at any time, and in any manner, even for the first time on appeal, or even viva voce."***

See also the Supreme Court case of **Anami Silverse Lisamula vs Independent Electoral & Boundaries Commission & 3 Others [2014] eKLR**.

Secondly, it is our view that in the context of the remaining issues which the parties have framed for our decision in the appeal, none can be said to rest on facts only, as we shall demonstrate in the course of examining those issues. As this Court recently stated in the case of **Wavinya Ndeti & Another vs Independent Electoral and Boundaries Commission & 2 Others [2018] eKLR**:

***"..to the extent that this appeal raises questions whether the election court properly considered whether the principles laid down in the Constitution were violated during the impugned election; whether there were illegalities and irregularities in the conduct of the election and if so whether the results were affected; whether the declaration of results is itself constitutional and valid; and whether election offences were committed and the impact on the validity of the election, these issues are in our view within the province of "matters of law" under Section 85A of the Elections Act and in compliance with the pronouncements by the Supreme Court in Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others".***

In so holding, the court was guided by an earlier decision of this Court in **John Munuve Mati vs Returning Officer Mwingi North Constituency & 2 Others [2018] eKLR** where "matters of law" were construed to 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 conclusions of the trial judge are based on the evidence on record or whether they are so perverse that no reasonable tribunal would have arrived at them. 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."***

We defer to the reasoning in those authorities and find and hold that the appeal before us is compliant with **section 85 A (1)** of the Elections Act.

The second issue was raised by the appellant and is whether the error in Ikhulili polling station 2 of 2 (**Ikhulili 2**) was so substantial that it nullified the entire election. The issue was not specifically pleaded in the petition but it was presented in evidence as an issue of malpractice, which was pleaded. Ikhulili Polling station had two streams -- Ikhulili 1 of 2 and Ikhulili 2 of 2. The specific complaint raised by Khamisi when he was cross examined in his evidence was this:

***"I have specified malpractices in the petition. With regard to malpractices, is that some of the results in Form 35A did not agree with Form 35B. The specifics are at page 38 of vol.1 of our documents polling station No. 47-Ikhulili Primary School Code 1047 station 2 of 2. Total number of votes obtained by 2<sup>nd</sup> respondent (Masaka) is 79 votes but Form 35B shows 89 votes. That is malpractice".***

The response by IEBC to the difference between the results in Form 35A and 35B was an admission, but an explanation was offered. The Returning Officer in his evidence confirmed that the results in the primary document, Form 35A, recorded at Ikhulili 2 were correct and showed that Masaka received 79 votes. However, in the process of generating Form 35B, the data entry clerk assisting the Returning Officer made an error and transposed the results of Ikhulili polling station 1 of 1 where Masaka had received 89 votes to Ikhulili 2. In other words, the results of Ikhulili 1 of 1 were copy pasted to Ikhulili 2. That was the only mistake made by the data entry clerk and the Returning Officer explained why it amounted to an innocent human error.

After assessing the evidence on both sides and considering the relevant law, the election court concluded as follows:

***"There is no dispute that the results at Ikhulili polling station 2 of 2 were duplicated with the result that the 2<sup>nd</sup> Respondent had 10 more votes than his rightful entitlement. From the evidence by the 3<sup>rd</sup> Respondent, the 2<sup>nd</sup> Respondent got 15,731 votes, as opposed to the petitioner's 14,600. If the 10 "extra" votes were to be deducted from the 2<sup>nd</sup> Respondent's tally his votes would be 15,721. The petitioner also got 2 "extra" votes during the commission of this admitted error and if those votes were to be subtracted from his tally of 14,600, he would end up with 14,598 votes. So, if the 3<sup>rd</sup> Respondent had declared the final results without considering the Ikhulili 2 of 2 results, the 2<sup>nd</sup> Respondent would still have had an edge over the petitioner with 15,721 votes for the 2<sup>nd</sup> Respondent as compared to 14,598 votes for the petitioner. After considering the provisions of Article 86(b) and all the relevant authorities, I am satisfied that the error committed in transposing the votes for the 2<sup>nd</sup> Respondent at Ikhulili polling station 2 of 2 was an innocent human error and not a deliberate error committed to benefit the 2<sup>nd</sup> Respondent and prejudice the petitioner. I appreciate the evidence given by the 3<sup>rd</sup> Respondent that together with his team, he had worked for 4 consecutive days and nights from 05.08.2017 to 09.08.2017 when the results were announced. Just like it was during the General Elections of 2013, there were six elections in one during the General Elections of 2017. The 3<sup>rd</sup> Respondent was the one responsible for the smooth running of all the elections comprising the six elective positions for President, Governor, Senator, Member of the National Assembly Women representative and member of the County Assembly within Ikolomani Constituency. Having worked through four consecutive days and nights under extreme pressure, I am unable to find as the petitioner would want me to find that the error was either deliberate, or intended to benefit the 2<sup>nd</sup> Respondent or prejudice the petitioner. In any event, this error occurred only at one polling station out of the entire Ikolomani Constituency comprising 103 polling stations. In any event, the evidence clearly shows that the error was not fraudulent and that it affected all the candidates. As no fraud was either pleaded or proved against any of the respondents, I will let the matter of Ikhulili Polling station 2 of 2 rest with the conclusion that that single mistake, committed under the circumstances alluded to by the 3<sup>rd</sup> Respondent cannot possibly be a basis for nullifying a whole election for Member of the National Assembly for Ikolomani constituency."***

That finding is faulted by learned counsel Mr. Masika on the basis that despite having found that the error was an irregularity, the election court failed to go further and hold, as it should have, that the irregularity was so substantial that it amounted to non compliance with Constitutional and statutory requirements of elections which cast doubts on the accuracy of the entire election rendering it unverifiable. Counsel further faulted the election court for making the finding that the irregularity was an innocent clerical mistake. In his view, it was a deliberate failure amounting to deceit, on the part of IEBC, in copy pasting instead of accurately transposing results from one form to the other, contrary to the law, which error ought to impeach the entire election.

Learned counsel **Mr. Maramba** for IEBC on the other hand, submitted that the integrity of an entire election in a constituency cannot be affected by a solitary irregularity in a single polling station out of 103 others. At all events, he contended, Form 35A, which is the primary document in an election, as pronounced by this Court in the case of **Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR**, was not questioned. The primary document was available to test the accuracy of the results and it cannot, in counsel's view, be asserted that the election results were not verifiable. In any case, he submitted, the mistake made in respect of transposition of the results of Ikhulili 2 affected all candidates and did not shift the final result in favour of Khamisi. Furthermore, no fraud was pleaded or proved and the finding by the election court that the error was an innocent human error and not a fundamental statutory breach cannot be faulted. The **Munya case (supra)** on the legal effect of administrative and procedural irregularities was relied on.

Those submissions found support from **Mr. Luseno**, learned counsel for Masaka. He observed that there was neither a specific pleading on the issue nor did it feature in any affidavit or statements made by witnesses, and that it arose tangentially during the trial. In his view, all that the court could do in the circumstances, was to investigate whether the error affected the will of the voters, and not to re-examine the factual findings made by the election court. According to counsel, it was a non-issue.

We have carefully considered the issue and need not belabor it. This Court has pronounced itself clearly on the law on pleadings in election matters. In the recent case of **Jackton Nyanungo Ranguma vs Independent Electoral and Boundaries Commission & 2 Others [2018] eKLR**, (the **Ranguma case**), the Court stated as follows:

*"The parties to an election petition are bound by their pleadings.... In **Raila Odinga & Another vs IEBC & 2 Others**, S C Election Petition No. 1 of 2017 case, the Supreme Court quoted with approval the Supreme Court of India in **Arikala Narasa Reddy vs Verikala Ram Reddy Reddygari and Another** Civil Appeals Nos. 5710 – 5711 of 2012 [2014] 2 SCR where it was stated that:*

*"In absence of pleadings, evidence if any, produced by the parties cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and that they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a Court to frame an issue not arising on the pleadings..."*

The only well known exception was identified in the case of **Odd Jobs vs Mubia [1970] EA 476** where **Law, J. A** (as he then was), at page 478 paragraph 9-11 had this to say:-

*"On the point that a court has no jurisdiction to decree on an issue which has not been pleaded, the attitude adopted by this Court is not as strict as appears to be that of Courts in India. In East Africa the position is that a Court may allow evidence to be called and may base its decision on an unpleaded issue if it appears from the cause followed at the trial that the unpleaded issue has in fact been left to the court for decision..."*

In this case, the issue was evidently not specifically pleaded in so many words. As stated earlier, however, it arose as an illustration of the issue of malpractices allegedly committed by IEBC, which was a matter pleaded in the petition. It is not a clear case of an unpleaded issue which an election court is not at liberty to consider. Furthermore, evidence was led on the matter and the trial court was at liberty to consider and determine the issue, as it indeed did. We find no merit in the argument that the issue should be ignored. The issue of law is whether the admitted irregularity in transposition of the results of Ikhulili 2 from Form 35A to 35B was an administrative or procedural one or it amounted to a fundamental breach of the Constitution and statutory law, thus invalidating the entire election in Ikolomani constituency. Put differently, whether the one error committed in the polling station infected the entire process.

In our view, the notion that a proved error in one polling station is capable, without more, of invalidating an entire election is based on the erroneous view that such limited-scale irregularity is capable of extrapolation. But as this Court clearly stated in the *Ranguma case* (supra):

***"It is impermissible to use the results of one elective position to challenge or prove that the result of another elective post is vitiated. If one were allowed to do so, this would be speculative and extrapolation of evidence which is impermissible. We find that it is inappropriate without cogent evidence to draw an inference that mere difference in votes cast between the various electoral seats is proof of electoral malpractice or irregularity."***

The Court applied with approval the High Court decision in *Mohamed Tubi Bidu vs IEBC & Others, Meru Election Petition No. 3 of 2017*, which held that:

***"Votes cast for all positions need not necessarily be uniform. There could be various reasons which would account for any difference that may be realized. Therefore, unless cogent evidence is adduced, mere difference of numbers in votes cast in various positions is not per se proof of electoral malpractice. Except, where the difference is so huge that it cannot be said to be a result of a mistake or error, or it is incapable of any explanation, questions abound and backed with other evidence it may be a profitable argument in an election petition.....Another consideration; recording of votes in the statutory forms may be erroneous....These errors may occur in any or some or all of the elective positions. When that happens, there will be no uniformity in numbers of votes cast. I should also state that the other elections are not part or subject of this petition. Therefore, it will be a wrong assumption or unfair inference that difference in number of votes cast among the three elections per se amounts to electoral malpractice. Cogent evidence is needed to prove the particular malpractice. I am however aware that it is a red flag if the difference is so huge that it cannot be a result of a simple mistake or error, or it is incapable of any explanation."***

We respectfully approve of the reasoning in those cases and accordingly find and hold that without the appellant establishing a factual basis for alleged malpractices or irregularities in each polling station, or a critical number of them, there would be no basis for concluding that the declared results for the entire Ikolomani Constituency were neither accurate, verifiable or were lacking in credibility.

As for the error made in Ikhulili 2, there was sufficient factual basis for the finding made by the trial court that it was an irregularity attributable to human error which was not deliberate, and that the non-compliance did not affect the result of the election. That ground of appeal fails.

The third issue, which is a contested one, relates to the construction of **section 83** of the Elections Act as at August 2017, before amendment, which provided thus:

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

The majority decision of the Supreme Court in *Raila Amolo Odinga & Another vs Independent*

**Electoral and Boundaries Commission & 2 Others [2017] eKLR, (Raila 2017)** on the construction of the section was as follows:

***"In our respectful view, the two limbs of Section 83 of the Elections Act should be applied disjunctively. In the circumstances, a petitioner who is able to satisfactorily prove either of the two limbs of the Section can void an election. In other words, a petitioner who is able to prove that the conduct of the election in question substantially violated the principles laid down in our Constitution as well as other written law on elections, will on that ground alone, void an election. He will also be able to void an election if he is able to prove that although the election was conducted substantially in accordance with the principles laid down in our Constitution as well as other written law on elections, it was fraught with irregularities or illegalities that affected the result of the election."***

In his submissions on behalf the appellant, learned counsel Mr. Masika sought to persuade us that the election court totally misunderstood the appellant's case which was based on the first limb of **section 83**. He had pleaded and proved breach of constitutional as well as statutory provisions which was enough to nullify the election. It was also counsel's case that the difference of 1,131 votes between Masaka and Khamisi translated into 0.0310552% of the total votes cast. The difference was not statistically big as erroneously surmised by the election court. For that reason, in counsel's view, the irregularities proved materially affected the qualitative aspects of the elections.

For his part, learned counsel for IEBC Mr. Maramba, while accepting the construction given by the Supreme Court to **section 83** that a petitioner need only prove one of the two limbs of the section, emphasized that the operative word was "**prove**". But the appellant never proved either that the conduct of the election substantially violated the principles of the Constitution or other written law or that although the election was substantially in accordance with the Constitution and the law, it was fraught with irregularities and illegalities that affected the result. In his view, the appellant's case was based on one polling station only out of 103, and even then, the irregularity was verifiable from the primary documents which had the correct information. There was no demonstration of any substantial violation of the law.

Mr. Luseno for Masaka reinforced those arguments, submitting that the appellant did not discharge the non-delegable burden of proof reposed on him by the law to the required standard. He observed that the election court was fully conscious of **section 83** and articulated its application. He further observed that the election court considered every single allegation put forward by the appellant before coming to the conclusion that they were not meritorious.

We have considered the issue and the submissions of counsel. It is trite that the legal burden of proof of any or both limbs of **section 83** lies with the petitioner in an election petition and never shifts. Only the evidential burden shifts. The Supreme Court made this, as well as the standard of proof, clear in **Raila Odinga & 5 Others vs Independent Electoral and Boundaries Commission & 3 Others [2013] eKLR (Raila 2013)**, thus:

***"...a petitioner should be under obligation to discharge the initial burden of proof before the respondents are invited to bear the evidential burden. The threshold of proof should in principle, be above the balance of probabilities, though not as high as beyond-reasonable-doubt. Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondents bear the burden of proving the contrary."***

In this case, the appellant pleaded infraction of the constitutional imperatives set out in **Articles 2, 38, 81 and 86**. As surmised by the Supreme Court in **Raila 2017**:

***"The principles cutting across all these Articles include integrity; transparency; accuracy; accountability; impartiality; simplicity; verifiability; security; and efficiency as well as those of a free and fair election which are by secret ballot, free from violence, intimidation, improper***

***influence or corruption, and the conduct of an election by an independent body in transparent, impartial, neutral, efficient, accurate and accountable manner."***

As earlier stated, the specific grievances put forward for investigation by the election court were: widespread use of force or violence by Masaka during election; undue influence and misuse of state resources by Masaka; election malpractices - including bias, discrimination, and special treatment of agents - on the part of IEBC. We have re-examined the judgment of the election court and it is clear that each of those allegations as well as the evidence tendered on them was considered and factual findings made that they were wanting. We have neither the reason nor the jurisdiction to go behind those findings. As the Supreme Court cautioned in the Munya case:

***"..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."***

We are of the view that the appellant did not prove the first limb of **section 83** on the constitutional infractions pleaded and has no basis for faulting the election court. The principle of electoral law as stated by the Supreme Court is that an election is not to be annulled except on cogent and ascertained factual premises. This principle flows from the recurrent democratic theme of the Constitution, which safeguards for citizens the freedom "to make political choices". See Munya case. In this case, the court held, correctly in our view, that there was no demonstrable violation of the principles of the Constitution and the law which could lead to invalidation of the election. Reliance was only made by the appellant on the Ikhulili 2 error which, as correctly found by the court, was not so substantial as to affect the result.

Which leads us to the final issue which logically flows from the previous one, and that is, the evaluation of electoral irregularities. As a matter of principle where an election was conducted substantially in accordance with the principles of the Constitution and the Election Act, it ought not to be invalidated only on ground of irregularities. Simply put, the appellant in this matter faults the election court for the finding that the error committed in Ikhulili 2 was an irregularity which was attributable to innocent human error. In making that finding, the election court relied on persuasive dicta from the High Court cases of:-

**Gitenyi Mochara vs Timothy Mosei E. Bosire and 2 Others [2013] eKLR** where Muriithi, J. observed that:-

***"There is no requirement that entries on form 35 or any other form be without alteration. The Constitutional requirement for accuracy in election system cannot be construed to mean that the statutory forms for the recording of the results of an election, must never have errors corrections or alterations. Accuracy does not mean free from error. Which has been corrected, an impossibility in all human endeavor. Accuracy will be served, if there exists a means of verification of the entries to test their accuracy and it necessarily imparts corrections by alterations whether countersigned or not."***

**Joho vs. Nyange & Another [2008] 3KLR (EP)** where Maraga, J. (as he then was) stated:

***"Irregularities which can be attributed to an innocent mistake or an obvious human error cannot constitute a reason for impeaching an election result. This court is mindful of the fact that at the stage where election officials are required to tally the results, some of them would have stayed awake for more than thirty six (36) hours and therefore simple arithmetical mistakes are bound to happen."***

and **Henry Okello Nadimo vs IEBC & 2 Others [2013] eKLR** by Tuiyot, J., stating:

***“The anomalies do not seem designed to benefit or prejudice any candidate. More importantly, the variations make a minute difference to the outcome of the results. Even if the errors were to be corrected, it would fail to significantly close the big gap between the winner and the runners – up. It also needs to be noted that the mistakes were in the results of 4 out of 64 polling stations. The errors were neither systemic nor pervasive. I accept the explanation by the Commission that the mistakes were not deliberate or intended to advantage the 3<sup>rd</sup> Respondent. In this regard, I recall the words of Justice Majanja [in] Machakos High Court Petition No. 4 of 2013 – WAVINYA NDETI – VS – IEBC & 4 OTHERS (Ruling No. 3):***

*“An election is a human endeavor and is not carried out by programmed machines. Perfection is an aspiration but allowance must be made for human error. Indeed the evidence is clear that the counting and tallying was being done at night and in less than ideal conditions hence errors, which were admitted, were bound to occur particularly in the tallying of the results. What is paramount is that even in the face of such errors, whether advertent or otherwise is that the ultimate will of the electorate is ascertained and upheld at all costs.”*

In counsel's view, the election court did not properly construe those decisions as they laid out the principles that the errors should be simply arithmetical mistakes; not deliberate; verifiable in order to test their accuracy; and should be human errors and not fundamental breaches of statutory provisions.

With respect, we cannot find any fault with the approach adopted by the election court. It was indeed endorsed by the Supreme Court in ***Raila 2017*** stating that errors in the recording of results in an election, especially where human beings are used to do the recording, cannot be avoided. The same Court in the ***Munya case*** defined the place of winning margins in elections as follows:

***"The issue of margins in an election other than a Presidential election, can bear only transient relevance and only where it is alleged that there were counting, and tallying errors or other irregularities that affected the final result. A narrow margin between the declared winner and the runner-up beckons as a red flag where the results are contested on allegations of counting and tallying errors at specified polling stations. Where a re-count, re-tally or scrutiny does not change the final result as to the gaining of votes by candidates, the percentage or margin of victory however narrow, is immaterial as a factor in the proper election-outcome. To nullify an election in such a context would fly in the face of Article 180 (4) of the Constitution.... In the circumstances, the mere description of a percentage or margin as “small” or “wide” is of no legal import, unless it is inextricably linked to a definite uncertainty, an unresolved doubt, as to who won an election.***

The winning margin here was not determinant of the substantiality of the irregularity complained about. There was simply no evidence of the pervasive nature of any irregularities. There was no scrutiny sought or granted and therefore no issues of errors in counting, tallying or other irregularities are apparent. We are only left to contend with the Ikhulili 2 saga which we have adequately covered in the 2<sup>nd</sup> issue above. Overall, we are persuaded that it was not shown to the required standard of proof or at all, that the irregularity was of such magnitude that it *affected the election result*. We say with the Supreme Court that "procedural or administrative irregularities and other errors occasioned by human imperfection, are not enough, by and of themselves, to vitiate an election".

Being of that view, we find no merit in this appeal and we order that it be and is hereby dismissed with costs.

**Dated and delivered at Kisumu this 19<sup>th</sup> day of July, 2018.**

**P. N. WAKI**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

**J. OTIENO-ODEK**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**