IN THE COURT OF APPEAL

AT KISUMU

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

ELECTION PETITION APPEAL NO. 5 OF 2018

BETWEEN

CYPRIAN AWITI.....1ST APPELLANT

HAMILTON ORATA.....2ND APPELLANT

AND

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSIO.....1ST RESPONDENT

THE RETURNING OFFICER

HOMA-BAY COUNTY.....2ND RESPONDENT

JOSEPH OYUGI MAGWANGA.....3RD RESPONDENT

JOSHUA ORERO.....4TH RESPONDENT

(Appeal from the judgment of the High Court of Kenya

at Homa-Bay, (Karanja J.) dated 20th February 2018

in Election Petition 1 of 2017)

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JUDGMENT OF THE COURT

1. This election petition invokes the appellate jurisdiction of this Court on practical and evidentiary matters of law. The dispute is on probative value of documentary evidence and the binding nature of scrutiny and recount report of the Deputy Registrar prepared pursuant to a court order. In this appeal, the contestation is not about events occurring on the polling day but alleged happenings between the close of the polling stations and the declaration of final results. Of significance are the alleged irregularities and illegalities between the declaration of final result and security of election material. The contestations revolve on collation, tallying and verification of the election result and whether the declared result is what was captured and reflected at the polling station. The dispute also turns on security of the contents of the ballot boxes between declaration of results and recount and scrutiny as ordered by the trial court.

2. This appeal brings into sharp focus ***Section 85A***of the **Elections Act** which limits the appellate jurisdiction of this Court to matters of law. The Supreme Court in **Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 others [2014] eKLR** in defining matters of law envisaged under **Section 85A** of the **Election Act** 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.

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

3. As we consider the practical and evidentiary jurisdiction of this Court, we are mindful of the dictum in **Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 others [2014] eKLR** where it was stated that a petition which requires the appellate Court to re-examine the *probative value of the evidence* tendered at the trial court, or invites this Court to *calibrate any such evidence,* especially calling into question the *credibility of witnesses,* ought *not* to be admitted.The test of whether a question is one of law or of fact is not the appellation given to such question by the party raising the same; rather, it is whether the appellate court can determine the issue raised without reviewing or evaluating the evidence, in which case, it is a question of law; otherwise it is a question of fact.

BACKGROUND FACTS.

4. On 8th August 2017, an election was held for the position of Governor of Homa Bay County. The 1st and 2ndrespondents declared the 1st appellant as the duly elected Governor for the County. The 3rd respondent was a candidate in the elections. The results as declared were as follows:

a. Cyprian Awiti ……..…….. 210,173

b. Joseph Magwanga ……..…… 189,060

c. Tom Onyango ……..…..……. 1,432

d. Medo Misama ……..…… 668

5. The difference in votes between the 1st appellant and the 3rd respondent was 21,113 votes.

6. Aggrieved by the declaration that the 1stappellant was the duly elected Governor, the 3rd and 4th respondents lodged an election petition. In their petition, they alleged various irregularities, illegalities and malpractices and violation of constitutional and electoral principles *inter alia*:

a. That the appointment of County Deputy Returning Officers and Presiding Officers was illegal.

b. That there were legal and procedural flaws, illegalities and/or irregularities in the collation, tallying, verification and transmission of the election results.

c. That there was voter suppression invalidating the electoral outcome.

d. That there was variance between the declared results and the actual results as tallied by the petitioners. That the irregularities included votes being deducted from the 3rd respondent and added to the 1stappellant. That the act of illegally transferring or adding votes to the 1stappellant and deducting from the 3rd respondent was a violation of Article 86 of the Constitution as it is imperative that the tally of results be accurate.

e. That the number of votes cast in the gubernatorial elections was way more than the number of votes cast in the presidential elections and other electoral seats.

f. That there were alterations of entries in the statutory result declaration Form 37As. That the alterations were done without counter signing by the presiding officers. That there was re-writing of entries in the counterfoils across all the eight (8) constituencies in the County.

g. That there were irregularities in the transmission of results.

h. That there was bribery and flagrant commission of electoral offences by the appellants.

i. That the 1st and 2nd respondents did not conduct the gubernatorial elections in a free and fair manner contrary to Articles 81 and 86 of the Constitution as read with Section 39 of the Elections Act.

j. That the counting of ballot was marred with irregularities which taken singularly or collectively rendered the gubernatorial elections process and the purported result unfair and should be subjected to scrutiny of votes or nullification in accordance with the law.

k. That from a basic review of the results as declared vis-à-vis Form 37As, 37B and 37C obtained from the 1st respondent, the petitioners discovered substantial, systemic and glaring qualitative anomalies that put to question the credibility of the gubernatorial election.

l. That the petitioners' chief agent at the County tallying centre noticed that some of the results that were being announced at the constituency tallying centers were not as announced at the polling stations.

7. In the petition, the 3rd and 4th respondents contended and submitted that their own tally showed that the "true result" was as follows:

a. Cyprian Awiti ……. 179,551 votes

b. Joseph Oyugi Magwanga ……... 223,311 votes

c. Miasma Medo ……..... 668 votes

d. Tom Otieno …….. 1432 votes

8. An interesting observation is that the votes garnered by the other two candidates, except the 1st appellant and 3rd respondent, is the same as per the tally of the 2nd and 3rd respondents as tendered in evidence.

9. The factual issue that faced the trial court was to determine the legal, accurate and verifiable result of the Homa Bay gubernatorial election and the winner of the election. The 3rd respondent alleged that as per his own tally, the true result is that he won the election. The 1st and 2ndrespondents contend that IEBC is the only person with constitutional and legal authority to declare election result; that the 1stappellant was the winner of the election; and that the 3rd respondent has no legal authority to tally and declare any result.

10. Upon hearing the parties, the trial court by a judgment dated 20th February 2018 nullified the declaration of the 1stappellant as the Governor-elect for Homa Bay County.

11. Aggrieved by the judgment, the appellants lodged the instant appeal. The 1st and 2nd respondents filed a cross-appeal. On their part, the 3rd and 4th respondents filed a cross-appeal on costs.

APPELLANTS' GROUNDS OF APPEAL.

12. The appellants in their memorandum of appeal urge the following abridged grounds:

a. That the learned judge gravely erred in law and fact in disregarding the terms and contents of his own orders issued on 7th and 15th November 2017.

b. The judge gravely erred in law and fact by ignoring the Deputy Registrar's Report dated 21st November 2017 where the Deputy Registrar made a finding that there were no obvious defects in all inspected ballot boxes that would lead to an irrefutable presumption that there was interference after sealing of the boxes subsequent to the election.

c. The judge gravely erred in law and fact by ignoring the Deputy Registrar's Report dated 24th January 2018 on scrutiny and recount that confirmed that the appellants had been duly declared as the governor and deputy governor of Homa-Bay County thus rendering the entire exercise of recount and scrutiny a mockery, futile and useless.

d. The judge erred in law and fact in finding and holding generally and stating that there were several alterations in Form 37 As

based on alleged Form 37As that were supplied by the petitioner and not the ones supplied by IEBC.

e. The judge erred in law and fact in finding and holding generally that there were several Form 37As that were not signed by respective presiding officers and deputy presiding officers based on the alleged Form 37As that were supplied by the petitioner and not the ones supplied by IEBC.

f. The judge erred in law and fact by nullifying the election of the appellants based on generalized allegations of failure to sign Forms 37As and alterations of the said Forms by presiding and deputy presiding officers without specifying the polling stations that he was referring to and how the alleged failures affected the result in violation of Section 83 of the Elections Act. In this context, the judge ignored the findings of the recount and scrutiny exercise.

g. The judge erred in law and in fact by departing from several precedents on the burden of proof in election petitions.

h. The judge erred in law and in fact in finding and holding that the presiding officers who conducted the elections on behalf of IEBC must have been called to testify in relation to the disputed polling stations.

i. The judge erred in law and fact in finding and holding that the presiding officers ought to have been called to testify as a matter of course to rebut the 3rd and 4threspondents' allegation of electoral malpractices thus erroneously shifting the burden of proof to the 1st an 2nd respondents.

j. The judge erred in law and fact in holding that the appellants should have called to testify all their agents in the disputed polling stations.

k. The judge erred in law and fact by showing open bias and applied different standards in terms of analysis of the evidence tendered by witnesses for the appellants and 1st and 2ndrespondents on one hand and witnesses of the 3rd and 4th respondents on the other hand.

l. The judge gravely erred in law and fact by disregarding all the affidavit evidence by the appellants and IEBC agents and yet there was no application on behalf of the 3rd and 4th respondents to cross-examine them against their affidavits.

m. The judge gravely erred in law and fact by misunderstanding and therefore misapplying the concept and meaning of "irregularities affecting the result" and wholly misinterpreted Section 83 of the Elections Act.

n. The judge erred in law and fact by finding and holding that the IEBC had failed to prove that the 3rd and 4th respondents had forged statutory Forms by not providing originals and yet subject to the trial court orders of 7th and 15th November 2017, all original Forms were accessed and a report thereto generated by the Deputy Registrar dated 21st November 2017 prepared.

o. The judge erred in law and fact by totally ignoring to address the preliminary point of law raised by the appellants which intended to dismiss the petition to wit failure by the 3rd and 4th respondents to comply with the mandatory salient provisions of Rules 8 (4) (b) and 12 (1) (b) of the Elections (Parliamentary and County Elections) Petition Rules, 2017.

p. The judge gravely erred in law and fact by holding that all the appellants' witnesses never disputed the results variance between their documents and those of the 3rd and 4th respondents herein.

q. The judge erred in law and fact by subjecting the appellants to pay excessive costs.

13. Based on the above grounds, the appellants urged us to set aside the judgment of the trial court. The appellants also seek a declaration that the 3rd and 4th Respondents and ***Geoffrey Ombogo Makworo*** **(PW13)** committed electoral offences under ***Sections 13 (j)*** and ***19*** of the **Election Offences Act**. We were urged to grant such further orders as may seem just.

CROSS-APPEAL BY 1st and 2nd RESPONDENTS.

14. The 1stand 2nd respondents urge the following compressed grounds in cross-appeal:

1. That the judge erred in law and fact in allowing the 3rd and 4th respondents' petition in utter disregard of cogent, credible and uncontroverted evidence.

2. The judge erred in law and fact in failing to address the issues mutually expressed to be in contention between the parties to the petition and instead considered irrelevant matters including those that were not pleaded by the 3rd and 4th respondents.

3. The judge erred in law and fact in holding that there were two different sets of Forms 37As originating from the 1 st respondent in respect of the impugned elections.

4. The judge erred in law and fact in utterly ignoring uncontroverted evidence led by the witnesses of the 1 st and 2nd respondents by finding that the 1st and 2nd respondents failed to prove that the 3rd and 4th respondents had presented forged and or altered Forms

37As in support of the petition.

5. The judge erred in law and facts in holding that the Forms 37As annexed to the 3rd and 4th respondents' documents as Exhibit GO4 were documents originating from the 1st respondent and which fact the witnesses for the 1stand 2nd respondents disproved at the hearing of the petition.

6. The judge erred in law in shifting the burden of proof from the 3rd and 4th respondents on allegations which are criminal in nature as to alteration and or forgery of Forms 37As and which initial burden the 3rd and 4th respondents did not discharge.

7. The judge erred in law and in fact in laying credence to the Forms 37As presented by the 3rd and 4th respondents whose source none of the witnesses for the 3rd and 4th respondents could ascertain.

8. The judge erred in law and fact in finding that several Forms 37As were not signed by the presiding officers in utter disregard of express provisions of law and well established judicial precedents.

9. The judge erred in law and fact in finding and holding that several Form 37As had alterations and over-writings without specifying any of the affected polling stations and how such alterations of Form 37As would affect the results of the elections.

10. The judge erred in law and fact in failing to consider the Deputy Registrar's Report dated 24th January 2018.

11. The judge erred in law and fact in finding that the 3rd and 4th respondents' evidence on alleged irregularities and or discrepancies in respect of Form 37As had been corroborated by the Deputy Registrar's Report dated 21st November 2017.

12. The judge erred in law and fact in finding and holding that the burden to prove the authenticity or otherwise of Form 37As produced in court by the 3rd and 4th Respondents lay with the 1st and 2nd respondents.

13. The judge erred in law and fact in nullifying the declared results without indicating how the irregularities affected the result of the election and in disregard of the Deputy Registrar's Report on Scrutiny and Recount.

14. The judge erred in fact and law in failing to find that the 3rd and 4th Respondents together with their witness, Mr. Geoffrey Ombogo (PW13) had deliberately forged and or altered Forms 37As on the face of cogent and uncontroverted evidence led for the 1st and 2nd respondents and the Report by the Deputy Registrar on Scrutiny and Recount dated 24th January 2018.

15. The judge erred in law and fact in subjecting the 1st and 2nd respondents to paying excessive costs.

15. The 3rd and 4th Respondents filed a Notice of Affirmation of the judgment of the trail court and additional grounds to support the judgment. They filed a cross-appeal on costs.

16. At the hearing of this appeal, several counsel appeared for the parties. Senior Counsel James Orengo teaming up with Senior Counsel Tom Ojienda and learned Counsel Otiende Amollo appeared for the appellants. Learned Counsel Fredrick Orego appeared for the 1st and 2ndrespondents. Learned Counsel Charles Kanjama, A. Mumma and H. Obach appeared for the 3rd and 4th respondents. All parties filed written submissions and lists of authorities. We take this early opportunity to acknowledge counsel and appreciate the authorities cited and the submissions made orally and in writing.

SUBMISSION BY THE APPELLANTS.

17. The appellants filed written submissions and made oral highlights. Senior Counsel Tom Ojienda submitted that the 3rd and 4th respondents in their petition alleged that the appellants had colluded with the 1st and 2nd respondents to alter Form 37As by systematically deducting a variance of between 100 to 200 votes from the 3rd respondent and adding the same to the 1st appellant. He submitted that the appellants produced Form 37As with respect to the results impugned by the 3rd and 4th respondents to prove that the alleged Form 37As produced by the 3rd and 4th respondents were not the results as declared at the respective polling stations.

18. It was submitted that the trial court, faced with alleged different sets of Form 37As (from the 3rd and 4th respondents and another from the 1st and 2nd respondents) and the allegations of alterations, made a Ruling dated 7th November 2017 and stated that all these could be cured by scrutiny and recount of all the votes. Counsel submitted that pursuant to the Ruling of 7th November 2017, a scrutiny and recount exercise was conducted under the supervision of the Deputy Registrar, Hon. L. Simiyu, in the presence of all parties; that the Deputy Registrar prepared a report dated 24th January 2018; that none of the parties contested the contents of the report; that the scrutiny exercise proved that the IEBC results were authentic and not altered as suggested by the 3rd and 4th respondents; and that despite the uncontested findings of the scrutiny exercise and the Ruling dated 7th November 2017, the trial judge nullified the election result.

19. The appellants contend that the trial court was bound by the Deputy Registrar's scrutiny and recount report dated 24th January 2018; that from the scrutiny report, it is manifest that the allegation and narrative of deliberate alterations of Form 37As with a variance of 100 to 200 votes was a lie; and that there was no iota of evidence revealed by the scrutiny exercise of any systematic alteration, addition or subtraction of votes. It was further submitted that the learned judge erred in law and fact in finding and holding that the scrutiny report corroborated the petitioners' allegation of vote addition and subtractions. Counsel cited the case of **Esther Waithira Chege -v- Manoah Karega Mboku & 2**

others (2014) eKLR Civil Appeal No. 4 of 2013 in submitting that the trial court erred in finding that there were two sets of results. In that case, this Court affirmed that discrepancies in statutory result declaration Forms were either resolved by the scrutiny or by explanation given by the election management body. It was also submitted that the 3rd and 4th respondents were very categorical that should the trial court grant an order for scrutiny and recount, it will be revealed that they had won the election by over 50,000 votes. The appellants submitted that it is a mystery that the learned judge chose to conduct scrutiny and recount and then ignore the Deputy Registrar's Report dated 24th January 2018.

20. Citing the case of **Musikari Nazi Kombo - v- Moses Masika Wetangula & 2 others, Civil Appeal No. 43 of 2013**, Counsel submitted that so long as the scrutiny exercise was carried out in the presence of the parties' representatives and in accordance with the directions and under superintendence of the election court, such an exercise was as good as one carried out by the election court itself. Counsel further cited the case of **Esther Waithira Chege -v- Manoah Karega Mboku & 2 others (2014) eKLR Civil Appeal No. 4 of 2013**, in which the binding nature of the findings of a scrutiny exercise was considered by this Court and it was observed that "once the appellant successfully applies for scrutiny and recount of votes to be done, the appellant cannot turn around and claim that the findings made by the court in regard to the results of the scrutiny has no basis in law. The appellant must have been aware that once she made an application for scrutiny, she would be bound by the findings established in that scrutiny." It was submitted that the **Esther Waithira case (supra)** is instructive in that it not only estops a party from contesting the outcome of scrutiny but also provides that the findings made in a scrutiny exercise are findings of the court. It therefore follows that a court cannot depart from the findings of a scrutiny exercise.

21. The appellant's further fault the trial court in departing from the Deputy Registrar's Reports dated 24th January 2018 and 21st November 2017. It was submitted that at paragraph 31 of the Ruling of the trial court dated 7thNovember 2017, the judge stated that *"Not even a scintilla of evidence has been tendered by the petitioners to establish the alleged tampering with the electoral materials by the IEBC in concert with the third and fourth respondents. No evidence of untoward or overt activity towards that end has been demonstrated against the respondents by the petitioners."* The appellants submitted that from the foregoing paragraph, it is apparent that not only did the trial judge contradict himself in so far as concerns the status of the ballot boxes, but also contradicted his own findings on untoward activity by the respondents. For the foregoing reasons, it was submitted, the judgment by the trial court is not supported by the evidence on record. The judge erred in law by making conclusions that out rightly contradicted the Deputy Registrar's Report dated 21st November 2017 and 24th January 2018 and his own Ruling dated 7th November 2017 without offering any explanation whatsoever for such contradiction.

22. Submitting that the trial court applied different standards, Counsel urged that whereas the 1st and 2nd respondents and the appellant were reprimanded for failing to call their agents to testify, the 3rd and 4th respondents were not reprimanded for not calling any of their agents as a witnesses even after ***Geoffrey Ombogo Makworo* (PW13)** testified that he had received the alleged true results from agents and he did not enter any polling station. The 3rd respondent also testified that he got the results from agents. From the foregoing testimony, the appellants submitted that the trial judge applied different standards in evaluating the evidence of the appellants and 3rd and 4threspondents' witnesses. It was contended that the judge in applying different standards solely relied on the Form 37As provided by the 3rd and 4th respondents and failed to consider Form 37As provided by the appellants and the 1st and 2nd respondents.

23. On burden of proof, the appellants submitted that the judge erred in shifting the burden to the appellants and 1st and 2nd respondents before establishment of a *prima facie* case by the 3rd and 4th respondents.

24. The appellants urged that parties are bound by their pleadings. They observed that in the petition filed by the 3rd and 4th respondents, the pleading was that they won the elections with over 50,000 votes. That specific pleading was the issue in contestation and the scrutiny exercise resolved the matter. It was contended that after the scrutiny report, 3rd and 4th respondents shifted their pleadings and resorted to generalized allegations on alleged failures by the 1st and 2ndrespondents. In the context of these generalized allegations, it was submitted, the learned judge delivered a judgment without specifying the polling stations in which failures had been established and how the alleged failures affected the results of the election in violation of ***Section 83*** of the **Elections Act**.

25. Counsel submitted that the learned judge held that there were several Form 37As that were not signed by the presiding officers and deputy presiding officers. But the record shows that out of all the 91 polling stations that were scrutinized, it is only in ONE polling station that the presiding officer did not sign the Form 37A.That ONE Form is not several Forms; and therefore the judge erred when he held that there were several Form 37As that were not stamped and used it as a basis for the impugned nullification and thereby departing from the binding precedent in **IEBC -v- Stephen Mutinda Mule & 3 Others [2014] eKLR** where it was held that there was no statutory requirement for stamping of Forms.

26. In rehashing the appellants' case, Counsel submitted that the gravamen of the appeal is that the trial judge erred and failed to show which Form 37As he was referring to; that the Deputy Registrar Reports dated 21st November 2017 and 24th January 2018 revealed that there were only few isolated variances of one or two votes due to human error; that by ignoring the Deputy Registrar's Report, the trial court fundamentally erred and made findings and conclusions not supported by the evidence on record; and that the trial Judge having dispelled notions of collusion in his ruling dated 7th November 2017, he gravely erred in nullifying the election on disproved administrative errors.

27. On the preliminary issues of law urged by the appellants, it was submitted that the judge erred by ignoring the point of law that the petition violated mandatory provisions of **Rules 8 (4) (b) and 12 (1) (b) of the Elections (Parliamentary and Country Elections) Petition Rules, 2017** in that the 3rd and 4th respondents swore affidavits dated 6th September 2017 both of which were expressed to have been sworn at Nairobi before a Commissioner for Oaths called J. M. Ogutu. In cross-examination, the 3rd respondent admitted that he signed the affidavit in Nairobi on 6th September 2017 although the same was commissioned in Kisii where the said Commissioner of Oaths is based. It was submitted that the affidavit by the 3rd respondent violates the mandatory provisions of **Section 5 of the Oaths and Statutory Declarations Act** which provides in mandatory terms that *"Every Commissioner for Oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is take or made."* A reading of ***Section 5*** reveals that the failure to state the place and date in an affidavit renders the affidavit fatally defective, concluded counsel.

28. Learned Counsel Otiende Amollo for the appellants submitted that the trial judge erred in law and misapprehended the import and purport of amendment to ***Section 83*** of the **Elections Act vide Elections Laws (Amendment) Act No. 34 of 2017.** He submitted that the trial court applied the disjunctive interpretation of ***Section 83*** of the Act instead of applying conjunctive interpretation as required by the amendment to ***Section 83*** of the **Elections Act**. He submitted that ***Section 83*** as amended in November 2017 was the relevant and applicable law as at the date of the judgment by the trial court. It was further submitted that the judge erred in misapprehending the interpretation of the phrase "affect the result" in ***Section 83*** and he instead adopted "effect on the result" In counsel's view, these two phrases mean different things.

29. Senior Counsel James Orengo submitted that in totality, the judge erred and failed to appreciate the principles on legal and evidentiary burden of proof. He contended that the findings and conclusions by the trial court are not supported by evidence. Focusing his submissions on the Deputy Registrar's scrutiny and recount report dated 24th January 2018, he submitted that the process of scrutiny and recount established the will of the voters and the trial judge erred in failing to use the Deputy Registrar's Report. He emphasized that the right to vote and the voters will as reflected in the scrutiny and recount report cannot be overturned and taken away simply by looking at Forms 37A when recount has been done.

30. On the issue of costs, it was submitted that the trial judge erred in subjecting the appellants to pay costs of Ksh. 2 million when the court had exonerated the appellants from any wrong doing. Counsel wondered why the appellants should be punished for something that was not proved but for something that the learned judge had exonerated them from. On the basis of the foregoing submissions, the appellants urged us to allow the appeal and grant the orders prayed for in the memorandum of appeal.

1st and 2nd RESPONDENTS SUBMISSION ON CROSS-APPEAL

31. The 1st and 2nd respondents filed a cross-appeal urging the following grounds:

> **"a) Did the judge misapprehend the law on evidentiary burden of proof?**
>
> **b) Did the judge correctly hold that there were irregularities in the counting, tallying and declaration of results in the impugned elections, and if so, did the irregularities fundamentally affect the results?**
>
> **c) What is the effect of the judge ignoring the Deputy Registrar's Report on Scrutiny and Recount?**
>
> **d) Did the judge err in finding that the 3rd and 4th respondents and Geoffrey Ombogo (PW13) did not commit an election offence?**
>
> **e) Did the judge err in finding and holding that the 1st respondent was liable to pay hefty costs of the petition?"**

32. Citing the case of **Ramadhan Seif Kajembe -v- Returning Officer,Jomvu Constituency & 3 others, [2013] eKLR** it was submitted that it is inappropriate for the court to declare that an election should be avoided where breaches of the Rules at the counting stage have not affected the result; that the petition was grounded on alleged criminal acts of alteration of Forms 37As and the standard of proof should be beyond reasonable doubt; that the judge erred at paragraph 180 of the judgment in holding that the burden of proof lay with the 1st and 2nd Respondents; the judge failed to consider that the allegations of alteration of Form 37As were criminal in nature and the burden to prove the allegations lay squarely with the 3rd and 4th respondents. It was further submitted that the trial judge erred in law when he expressed himself as follows:

> **"180. However, the Petitioners having discharged their legal burden in proving that the results documents in their possession and those in the possession of the Respondents originated from the first Respondent [I.E.B.C] contrary to the suggestion that their (Petitioners) documents came from elsewhere or through criminal conduct, the evidential burden regarding the forms and the results contained therein lay with the first and second Respondents but, it was never discharged. They failed to prove that the Petitioners documents are forged. They never even availed the original documents to establish any suspicion of forgery."**

33. Counsel submitted that there was no evidence to prove that any of the officers or agents of the 1st respondent altered any Form 37A; that the 3rd and 4th respondents did not call any witness who was present at any polling station to prove that the results that were announced at the polling station were altered or different from the results declared at the tallying centre; and that the judge erred in making several findings that were not supported by the evidence on record. For instance, it was pointed out, the judge erred in setting out irregularities that were never proved; erred in finding that a number of Form 37As lacked security features and serial numbers; erred in finding that several boxes were found open and or broken; erred in stating that a number of boxes were not sealed with IEBC seals; erred in finding that the Forms presented by the 1st respondent and those presented by the 3rd and 4th respondents contained significant errors and further erred in finding that all Form 37As presented by the 3rd and 4th respondents originated from the 1st respondent. Counsel submitted that these findings of fact by the trial court are not supported by the evidence on record. He emphasized that during the hearing of the petition, the question of absence of security features did not arise and the judge erred to conclude, without evidence, that any Form 37As lacked any security feature.

34. The 1st and 2nd respondents further submitted that the finding by the judge at paragraph 178 of his judgment that some ballot boxes had broken seals is not supported by evidence. It was observed that in the scrutiny report by the Deputy Registrar dated 21st November 2017, it is clearly stated that "there were no obvious defects in all the inspected ballot boxes that would lead to an irrefutable assumption that there was interference after sealing of ballot boxes after the election." The Deputy Registrar's Report also states that all the ballot boxes presented for scrutiny and recount exercises were intact. It was submitted that the trial judge fell in error by reaching conclusions on alleged conditions of ballot boxes for unspecified polling stations without any evidence.

35. Counsel submitted that at paragraph 178 of its judgment, the trial court erred in finding that some ballot boxes lacked IEBC seals. That despite the scrutiny report showing that all the 91 ballot boxes subjected to scrutiny had seals that had been correctly entered in the polling station diaries.

36. The 1st and 2nd respondents emphasized that they are aggrieved with the finding that there were two sets of results. In their view, this was a finding and conclusion of fact made without any evidence to support it. It was submitted that the 1st and 2nd respondents presented to court all Form 37As, 37Bs and 37C that were used to declare the results, and the results tallied. All the witnesses presented by the 3rd and 4th respondents could not state where they obtained the Forms contained in Volume 4 of their exhibits.

37. Of significance and contradictory, the 1st and 2nd respondents in their written submissions at paragraph 59 (i) state that all Forms annexed in Volume 4 of the 3rd and 4th Respondents originated from the polling stations and have all the requisite features; that the said Forms were later altered by the 3rd and 4th respondents.

38. Counsel for the 1st and 2nd respondents urged us to find that the testimony of ***Geoffrey Ombogo Makworo's*** **(PW13) which** was described by the trial judge at paragraph 113 as an "afterthought, outright lies, sensational and a comedy of sorts" should be contrasted with paragraph 160 of the judgment where the judge finds (**PW13)** to be credible. It was submitted that the learned judge having found (**PW 13)** not a credible witness, the court could not turn around and find the witness credible in respect to certain limbs of allegations.

39. On this issue, in passing, we have examined the Record of Appeal and analyzed the judgment of the trial court. The relevant paragraphs are 106 to 113 of the judgment. The conclusion at paragraph 113 refers to witnesses who testified on the allegations of bribery or corruption, undue influence and intimidation. These witnesses are ***Mr. Osutwa*** **(PW3)**; ***Mr. Esau*** (**PW7)**; ***Mr. Meshack*** (**PW8)**; ***Mr. James***(**PW9)**; ***Mr. Evans*** **(PW10)**; ***Mr. Wilson*****(PW 11);*****Mr. Gordon*** **(PW12)** and ***Mr. Maddo Owino*** **(PW14)**. It is these witnesses whose credibility was found wanting by the trial judge. ***Mr. Geoffrey Ombogo*** **(PW 13)** is not among the list of witnesses alluded to in paragraph 113 of the judgment. He is not amongst witnesses whose testimony is described as an afterthought.

40. On the scrutiny and recount report, the 1st and 2nd respondents submitted that the Deputy Registrar's Report indicated without doubt that the allegations of alteration of results in paragraphs 33 and 34 of the Petition were not true. The Report confirmed that the declared results conform to those announced by the 1st respondent's presiding officers at the polling stations. It was submitted that had the learned judge considered the scrutiny and recount report, he would not have come into the grave error of finding irregularities that are not supported by evidence. It was further urged that the judge erred on the second limb of ***Section 83*** of the **Elections Act** and failed to determine if any irregularity affected the result of the election. Counsel urged us to find that ***Geoffrey Ombogo*** **(PW13)** committed an election offence of altering statutory forms or tendering into evidence altered forms with the intention that they should be believed and acted upon. He urged us to allow the cross-appeal with costs.

3rd and 4th RESPONDENTS SUBMISSIONS.

41. Whereas the 1st and 2nd respondents support the appeal and filed a cross-appeal, the 3rd and 4th respondents oppose the appeal. Learned counsel Mr. Kanjama submitted that this Court has no jurisdiction to entertain the instant appeal and cross-appeal. In his view, ***Section 85A*** of the **Elections Act** restricts appeals to this Court to matters of law. He cited the Supreme Court dicta in **Frederick Otieno Outa -v - Jared Odoyo Okello & 4 others [2014] eKLR** and**Gatirau Peter Munya -v- Dickson Mwenda Kithinji, Supreme Court Petition No. 2B of 2014** in support. He further submitted that there are over Thirty (30) grounds of appeal which have been deliberately interwoven in a manner that invites this Court to delve into both issues of fact and law; especially in the cross-appeal that raises 27 grounds. Counsel cited this Court's decision in **Hon. Mohamed Abdi Mohamud -v- Ahmed Abdullahi Mohamad & 3 others, Nairobi Election Petition Appeal No. 2 of 2018**, to support his submission that in election petition appeals, a memorandum of appeal that avers that the trial court erred 'in fact and law' may be illegal.

42. On the merits of the appeal and cross-appeal, Counsel submitted that the appellants did not have a competent response to the petition. He asserted that the respondents discharged their legal and evidential burden of proof to the required standard on the basis of a petition grounded on precise factual and legal issues and demonstrated irregularities and illegalities committed by the 1st and 2nd respondents in conducting the impugned elections. Counsel referred to the various annexures to the supporting affidavits of the 3rd and 4th respondents to prove the irregularities and illegalities; and all carbon copy statutory result declaration Forms issued to the 3rdand 4th respondents by the presiding officers of the 1st respondent which were produced and presented to the trial court for extensive cross-examination and judicial scrutiny. He further referred to about 300 Form 37As that fell under the contentious results under Vol. 4 of the Record of Appeal (pages 1224 to 1503) deposited in court to aid in judicial scrutiny.

43. On the issue as to how the 3rd and 4th respondents obtained Form 37As, counsel referred us to the testimony of **PW13** ***(Geoffrey Ombogo Makworo)*** where he stated (at page 5153 of the record and page 97 of the High Court proceedings) that:

> **"I was the head of our secretariat…. For that purpose, we set up a secretariat and set up a tallying centre. We then deployed all our agents after recruiting and vetting them. We trained 1200 agents but deployed 1062. There were 1062 polling stations… They were also required to transmit the results to our tallying centre through phone messages i.e. SMS. The agents thereafter were to hand over the result forms to our coordinators at the counties for onward transmission to the county tallying centre. The forms being transmitted were forms 37As which they were issued and the polling day forms prepared by ourselves. I received results from my agents from almost 1022 polling stations. These were sent by SMS to our election tallying centre. We received about 900 forms 37As from our agents. We received results from 1060 polling stations and they all had results. We had contacts in all stations." (See page 5153 of the Record of Appeal).**

44. Learned counsel Mr. Kanjama submitted that the 3rd and 4threspondents' evidence was that there was a total of 392 Form 37As that had

various issues which quantitatively translated into a variance of over 70,000 votes in favour of the appellants as against the 3rd and 4th respondents. He observed that amongst the Form 37As, a total of **284** contained changed results (Annexure GO-10), **299** of them contained results that had been altered without countersigning (Annexure GO- 11); **95** of them were never signed by either the presiding or deputy presiding officers (Annexure GO-14); **16** of them were not signed by agents (Annexure GO-9); and **39** of them were signed by different presiding officers other than the ones gazetted for the respective polling stations (Annexure GO-12). Furthermore, a total of **311** were never stamped (Annexure GO-13). (See pages 56 to 106 of the Record of Appeal).

45. Counsel submitted that the evidence of (**R1W1)**, (**R1W2)**, (**R1W3)**, (**R1W4)**, (**R1W5)** and (**R1W6)** during cross-examination confirmed these irregularities (**See pages 5191-5250 of Vol. 11 of the Record of Appeal).**

46. The 3rd and 4th respondents submitted that the IEBC having failed to produce their original Form 37As from four constituencies, original carbon copies of Form 37A produced by the 3rd and 4th respondents for the four constituencies, constituted the best evidence. It was submitted that in the absence of the original Form 37As from the four constituencies, the declared results were unverifiable.

47. Counsel submitted that the trial court on 7th and 15thNovember 2017 ordered access to electoral materials and sealing of ballot boxes. After completion of the exercise, the Deputy Registrar filed Reports dated 21st November and 21st December 2017 respectively which reports corroborated the petitioners' evidence. In summary, the blank forms were **affecting 14,495 votes**; unstamped forms were **77 affecting 29,961 votes**, forms without signatures of the respective presiding officers and deputy presiding officers were **157 affecting 61,458 votes**, forms with altered results without countersigning were **91 translating into 37,610 affected votes,** ineligible Forms were **158 affecting 60,686 votes,** carbon copies Forms whose original handwritten copies were untraceable even after opening the Ballot Boxes were **383 affecting 149,323 votes**, and forms not signed by any agent were **94 affecting 37,359 votes**. The cumulative effect of the above improprieties, according to counsel, affected about **390,000 votes.** (See **Deputy Registrars Report at pages 4723-4738).**

48. On our part, and in passing, we quickly ask ourselves who generated these figures that "demonstrate results or votes are being affected? Are these figures in the Record of Appeal? Are these figures in the Deputy Registrar's Reports dated 21st November and 21st December 2017? No. The Deputy Registrar's Report does not contain these figures.

49. It was further submitted for the 3rd and 4th respondents that more than 400 Form 32As? used did not have the prescribed security features; that after analysis of KIEMS Logs from few polling stations, it was established that there were 3352 more votes than the ones actually transmitted; that **98 boxes** had missing seals while **330 ballot boxes** had unofficial IEBC seals. (See Deputy Registrar's Report at pages 4723-4749 of Vol 10 of the Record of Appeal); that neither the appellants nor the 1st and 2nd respondents challenged these findings. Once again, we ask ourselves whether these figures and numbers are in the Deputy Registrar's Report and the answer is in the negative. The figures are not expressly mentioned in the Deputy Registrar's Report.

50. In further submissions, the 3rd and 4threspondents urged that the trial court correctly made a finding that the petitioners had discharged both the legal and evidential burden of proof. It was submitted that the 3rd and 4th Respondents not only adduced evidence but their evidence was cogent and credible. They produced original carbon copies as supplied by the 1st and 2nd respondents, their evidence was not shaken in cross-examination, it was corroborated by the Deputy Registrar's Report dated 21st November 2017 and the Petitioner's Report on access dated 21st December 2017, none of which were challenged. According to counsel, it was on this basis that the trial court correctly made a finding and held at paragraph 160 that the credibility of the petitioner's witnesses was established.

51. At this stage, it is important not to lose sight of the appellants' case in this appeal that the findings by the trial court are not supported by the Deputy Registrar's report on scrutiny and recount dated 21st November 2017 and 24th January 2018. The contention is that the petitioners' observation report filed on 21st December 2017 has no probative value.

52. The 3rd and 4th Respondents, on the other hand, urged us to find that the Report by the Deputy Registrar contained findings that had a negative bearing on the integrity of the Homa Bay gubernatorial elections.

53. Counsel submitted that the Deputy Registrar's Report dated 24th January 2018 made a finding that more than 95% of the ballot boxes had no integrity issues. In his view, in making this finding of fact, the Deputy Registrar exceeded her mandate and usurped the powers of an election court. Counsel cited the case of **Dickson Mwenda Kithinji -v- Gatirau Peter Munya & 2 others, [2013] eKLR** where it was stated that "the conclusion arrived at by the Deputy Registrar amounts to usurping the role of this Court in arriving at conclusions on the basis of fact and law and when his duties were only to examine and ascertain the number of votes cast and avail them to this Court. The conclusions arrived at was contrary to the rules of natural justice in that it was arrived at without giving parties chance to be heard on that issue."Counsel further cited the Supreme Court dicta in **Moses Masika Wetangula -v- Musikari Nazi Kombo & 2 others [2015] eKLR** where it was stated that "We are in agreement with the appellate court. The appellant had urged that delegation of the powers for scrutiny and re-count by itself is entirely proper: but that when the Deputy Registrar engages in an inquiry, then he or she lacks jurisdiction."

54. The 3rd and 4th Respondents urged us to disregard the Deputy Registrar's Report dated 24th January 2018 because the Deputy Registrar exceeded her mandate thereby rendering the report incurably defective; that she made findings on integrity of the election materials and she had no jurisdiction to do the same; that the Deputy Registrar's Report was contested. It was submitted that the Deputy Registrar's Report dated 24th January 2018 was made without jurisdiction.

55. On the issue that the appellants as well as the 1st and 2nd Respondents did not call their witnesses, the 3rd and 4th respondents referred this Court to the "empty-chair doctrine". Counsel submitted that the 3rd and 4th respondents having discharged their legal and evidential burden, the 1st and 2nd Respondents were obligated by law to discharge their evidential burden by demonstrating that the impugned elections were conducted in compliance with the law. They were to call witnesses but instead choose to have an empty chair for their witnesses. He submitted that the empty chair defense refers to a tactical choice adopted by a defendant. Under empty chair defense, a defendant attempts to

put the entire fault on a person who was not named or called to give evidence. (See **Griffin -v- Montana Rail Link, 2000 ML 4155, 7 (Mont. Dist. Ct. 2000).**

56. On authenticity of Form 37As, Counsel submitted that IEBC through their own witnesses owned up to the 3rd and 4th respondents' Forms as being IEBC Forms. However, IEBC made generalized allegations that the 3rd and 4th respondents Form 37As had been altered. He added that when faced with their own Forms which were similarly altered, the IEBC's only defence was to the effect "we know our own Forms". (See testimonies of **R1W3** and **R1W4** at pages 171 -185 in Vol. 11 pages 5227-5241 of the Record of Appeal).

57. It was submitted that having failed to produce the original Form 37As, it was incumbent on the IEBC to call the presiding officers for purposes of cross-examination. The presiding officers were the originators of Form 37As and it is only they who could positively speak on the issues in those Forms but were not called. Failure to call the presiding officers, it was surmised, was incurably detrimental to IEBC's case as the polling station was the locus of the results.

58. Counsel further observed that neither the 1st nor 2nd appellants who were the respondents in the petition testified before the trial court contrary to ***rule 12 (13)*** of the Election Petition Rules Counsel cited the case of **Ahmed Abdullahi Mohamad & another -v- Mohamed Abdi Mohamed & 2 others (2018) eKLR** in support of the submission that an adverse inference can be drawn against a witness who fails to testify.

59. The 3rd and 4th respondents submitted that they are entitled to be declared as the duly elected Governor and Deputy Governor respectively because they submitted authentic original Form 37As which were not sufficiently challenged.

60. On the issue of costs, the 3rd and 4th respondents cross-appealed and urged us to find that the costs awarded by the trial court was on the lower side. We were urged to increase the capping of the costs.

APPELLANTS REPLY TO SUBMISSIONS.

61. Senior Counsel Tom Ojienda in response to the 3rd and 4th respondents' submissions urged us to note that the 3rd and 4th respondents' documents were not subjected to cross-examination and are hearsay documents. He observed that ***Mr. Ombogo*** **(PW13)** was never present in any polling station. The finding that there were two sets of results is negated by the legal position that there is only one legal source of results. It was submitted that the instant appeal is supported by the case of **Mercy Kirito Mutegi -v- Beatrice Nkatha Nyaga & 2 others [2013] eKLR**where this Court observed that the issue as to who was to complete Forms 35 between the Returning Officer and the Presiding Officer are minor infractions that do not affect the overall results.

ISSUES FOR DETERMINATION

62. We have considered the record of appeal, submissions by parties and the authorities cited. An Appeal to this Court is guided by ***Section 85A****of the* ***Elections Act*** which provides:

> **"An appeal from the High Court in an Election Petition concerning Membership of the National Assembly, Senators or the Office of the County Governor, shall lie to the Court of Appeal on matters of law only".**

63. We observe that in the memorandum of appeal and cross-appeal, it is alleged that the trial judge "erred in law and in fact." In **Gatirau Peter Munya -v- Dickson Mwenda Kithinji, Supreme Court Petition No. 2B of 2014 at paragraph 93**it was observed that:

> **"much as an appellate court is free to navigate the evidential landscape on appeal, it must, in a distinct measure, show deference to the trial judge: regarding issues such as the credibility of witnesses and the probative value of evidence. The appellate court must also maintain fidelity to the trial record. The evaluation of the evidence on record is only to enable an appellate court to determine whether the conclusions of the trial judge were supported by such evidence, or whether such conclusions were so perverse, that no reasonable tribunal would have arrived at the same."**

64. In **Hon. Mohamed Abdi Mohamud -v- Ahmed Abdullahi Mohamad & 3 others, Nairobi Election Petition Appeal No. 2 of 2018**,this Court stated that:

> **"a memorandum of appeal must be compliant with Section 85A and must raise only questions of law which must be distinct, concise and precisely set forth. Anything short is deserving dismissal. Neither verbal sophistry nor artful misinterpretation of supposed facts can compel the Court to re-examine findings of fact which were made by the trial court – absent any showing that there are significant issues involving questions of law."**

This Court reiterated that at the appellate level, there is no such thing as "questions of mixed law and fact" and grounds of appeal that are a composite of both are clearly inappropriate and probably incompetent. In **IEBC & another -v- Stephen Mutinda Mule & 3 others, 2014 eKLR,** this Court deprecated the filing of memorandums of appeal with grounds purporting to complain that the High Court erred "in law and fact" and warned that such grounds of appeal invited jurisdictional objection. (See also the Philippine case of **New Rural Bank of Gumba -v- Fermina S. Abad and Rafael Susan G.R., No.16818 (2008).**

65. This appeal is premised on findings of fact and conclusions drawn by the trial court. The basic question in this appeal can be posited as follows:

a. Are the conclusions arrived at by the trial court based on "no evidence" or

b. Are the conclusions arrived at supported by established facts or evidence on record, or

c. Are the conclusions "so perverse", or "so illegal", that no reasonable tribunal would arrive at the same*?*

66. With the foregoing caveat, guided by the memorandum of appeal and cross-appeal and submissions made by the parties, we have identified issues for determination in this appeal as follows:

a. Whether the trial court properly interpreted and applied Section 83 of the Elections Act as read with the November 2017 amendment vide Election Laws (Amendment) Act No. 34 of 2017.

b. Did the trial court err by not laying down its tools when the court made a finding that the Homa Bay gubernatorial election was conducted substantially in accordance with the Constitution and Electoral Laws?

c. Did the trial court err in using the phrase "irregularities must have effect on the results" instead of "affect the results?"

d. Whether the trial court erred in failing to consider the Deputy Registrar's Scrutiny and Recount report dated 24th January 2018.

e. Did the trial court err in its findings on failure by the appellants as well as the 1st and 2nd Respondents to call witnesses?

f. Is the judgment by the trial court inconsistent in light of Articles 81 and 86 of the Constitution as read with Section 83 of the Elections Act?

g. Whether the trial court erred in finding that the declared results were not accurate, credible and verifiable. Tied to this issue is whether this Court can re-evaluate the evidence to determine if the declared results were accurate, credible and verifiable?

h. Whether the trial court erred in relying on documents tendered by the 3rd and 4th Respondents as "true" results for the Homa-Bay gubernatorial elections.

i. Whether the trial court erred in nullifying the declaration of the 1st Appellant as the Governor-elect for Homa Bay County.

j. Whether the 3rd and 4th Respondents are entitled to relief to be declared the duly elected Governor and Deputy Governor respectively of Homa Bay County following the gubernatorial elections held on 8th August 2017.

k. Whether the costs awarded by the trial judge are excessive or on the lower side.

67. In analyzing the foregoing issues, we shall answer the critical questions in this appeal namely:

1. Whether the conclusions arrived at by the trial court is based on "no evidence" or

2. Whether the conclusions arrived at by the trial judge is supported by established facts or evidence on record, or

3. Whether the conclusions arrived at by the trial judge is "so perverse" or "so illegal" that no reasonable tribunal would arrive at the same?

ANALYSIS AND DETERMINATION.

Whether the trial court properly interpreted and applied Section 83 of the Elections Act as read with the Election Laws (Amendment) Act No. 34 of 2017

68. On 8th August 2017 when the Homa Bay gubernatorial elections were held, ***Section 83*** of the **Elections Act** read as follows:

"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."

68. By virtue of the **Elections Laws (Amendment) Act No. 34 of 2017**, ***Section 83*** of the **Elections Act** was amended to read as follows:

"The Elections Act, 2011 is amended by deleting section 83 and substituting therefor the following section:

83. (1) A Court shall not declare an election void for non-compliance with any written law relating to that election if it

appears that:

> **(a) the election was conducted in accordance with the principles laid down in the Constitution and in that written law; and**
>
> **(b) the non-compliance did not substantially affect the result of the election.**
>
> **(2) Pursuant to section 12 of the Interpretation and General Provisions Act, a form prescribed by this Act or the regulations made thereunder shall not be void by reason of a deviation from the requirements of that form, as long as the deviation is not calculated to mislead."**

70. The effective date of the **Election Laws (Amendment) Act** is 2nd November 2017.

71. At the time the trial court heard and determined the election petition in this matter, and more particularly on the date of delivery of judgment on 20th February 2018, ***Section 83*** of the **Elections Act** stood as amended.

72. By its judgment delivered on20th September2017, the Supreme Court in **Raila Odinga & another -v- IEBC & 2 others, SC Election Petition No. 1 of 2017** interpreted ***Section 83*** of the **Election Act** to means as follows:

> **"*[203]* Guided by these principles, and given the use of the word "or" in Section 83 of the Elections Act as well as some of our previous decisions, we cannot see how we can conjunctively apply the two limbs of that section and demand that to succeed, a petitioner must not only prove that the conduct of the election violated the principles in our Constitution as well as other written law on elections but that he must also prove that the irregularities or illegalities complained of affected the result of the election as counsel for the respondents assert. In our view, such an approach would be tantamount to a misreading of the provision.**
>
> ***[207]* Be that as it may, the issue as to how Section 83 of the Elections Act ought to be interpreted by a court of law in determining the validity or otherwise of an election, was later authoritatively settled by this Court in *Gatirau Peter Munya v. Dickson Mwenda Githinji and 2 Others (2014) eKLR.***
>
> ***[211]* 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."**

73. In this appeal, learned Counsel Tom Otiende Amollo for the appellant submitted that the trial court erred in interpreting ***Section 83*** of the Elections Act in a disjunctive manner as held in ***Raila Odinga & another -v- IEBC & 2 others*** **(supra).**That the trial court should have interpreted and applied the Section in a conjunctive manner as per the amendment to ***Section 83*** by the **Elections Laws (Amendment) Act No. 34 of 2017**. Counsel submitted that although the petition in this matter was filed prior to the **Election Laws (Amendment) Act**, as at the date of judgment, *to wit* 20th February 2018, ***Section 83*** of the **Elections Act** had been amendment and the trial court should have applied the new ***Section 83*** and used a conjunctive interpretation of the Section; that the trial court should also have applied the new ***Section 83 (2)*** of the **Elections Act**; that the trial judge erred in not following the legislative intendment that ***Section 83*** of the **Elections Act** should be interpreted in a conjunctive and not disjunctive manner; that the legislative intendment in the new ***Section 83 (2)*** is to ensure that no irregularity in any statutory electoral form can vitiate an election unless the irregularity was intended to mislead.

74. We have examined the judgment of the trial court in relation to application of ***Section 83*** of the **Elections Act**. The court upon review of case law expressed itself as follows in salient paragraphs of its judgment:

> **"118. Be that as it may, it is an accepted truism that imperfections in the electoral process are inevitable and mistakes or errors will always be made in the administration of elections, which is an elaborate task performed by human beings of different strengths and weaknesses.**
>
> **Thus, not every irregularity or procedural infraction is enough to invalidate an election. The irregularities must be of such a profound nature as to affect the actual result or the integrity of an election for a court to nullify the election. (See, Raila Odinga & Another –vs- IEBC & Others Presidential Petition No. 1 of 2017 and the Raila Case 2013)**
>
> **119. So, where an election is substantially conducted in accordance with the law, it may nonetheless be nullified if procedural/administrative errors/mistakes or irregularities are material or fundamental or serious enough to affect its validity in any manner. In the English case of John Fitch -vs- Tom Stephenson & Others [2008] EWMC 501, it was held that where possible the courts seek to give effect to the will of the electorate even where there have been significant breaches of official duty or election rules.**
>
> **121. The cases aforementioned, affirmed the solid legal proposition that if the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls provided that it did not affect the results of the election. In the present context, the proposition attracts the application of Section 83 of the Elections Act, 2011, with its "clarion call" that an election is not to be upset on account of any informality**

or minor irregularities.

122. The provision prior to the recent amendment provided that: -

> **"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."**
>
> **Clearly, the objective of the provision is to prevent an election from becoming void on ground of insignificant informality/error or irregularity.**
>
> **123.The aforementioned test of irregularity was actually laid down in the celebrated English case of Morgan -vs-Simpson [1975] 1QB 151**, …
>
> **125. Therefore, a court would have to look to the substance of a case to determine whether the infraction complained of is, of such a nature, as to be fairly calculated in a reasonable mind to produce a substantial effect upon the election and the results thereof. Most importantly, it is the irregularities of substantial degree or magnitude which would lead to a reasonable person to conclude that the election was not free and fair and thus, an affront to the right to vote and the will of the electorate and/or beg the question whether the infractions compromised the process so much that an ordinary "Mwanainchi" (citizen) cannot say that the win as declared was a valid one."**

75. Our analysis and review of the trial court's judgment has not revealed any part thereof where the trial court interpreted ***Section 83*** of the **Elections Act** in a conjunctive manner. The tone, intonation and case law cited by the trial court shows that he applied ***Section 83*** in a disjunctive manner and considered the two limbs of the Section. To this extent, we agree with the appellant that the trial court interpreted **Section 83** of the **Elections Act** in a disjunctive manner.

76. However, we disagree with the appellants' submission that the trial court should have interpreted ***Section 83*** of the **Elections Act** in a conjunctive manner as per the amendments to ***Section 83*** by the **Election Laws (Amendment) Act No. 34 of 2017**. The appellants' submission invokes the question of retroactivity of legislative amendments. In **Samuel Kamau Macharia & Another -v- Kenya Commercial Bank and Two Others, Sup. Ct. Civil Application No. 2 of 2011**, the Supreme Court stated:

> **"….in interpreting the Constitution to determine whether it permits retrospective application of any of its provisions, a Court of law must pay due regard to the language of the Constitution. If the words used in a particular provision are forward-looking, and do not contain even a whiff of retrospectivity, the Court ought not to impart it into the language of the Constitution. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of his rights legitimately [accrued] before the commencement of the Constitution."**

77. The issue of retroactivity and application of the new amended ***Section 83*** vide the **Election Laws (Amendment) Act No. 34** of 2017 was considered and determined by the Supreme Court in **Harun Mwau & another -v- IEBC & 2 Others, Consolidated Presidential Election Petition Nos. 2 & 4 of 2017**. The Supreme Court in relevant excerpts of its judgment expressed itself as follows:

> **"[377] The 2nd and 3rd petitioners plead in paragraphs 74 and 75 of their petition, *inter alia*, that the Elections Laws (Amendments) Bill, 2017 was intended to diminish the role of technology in elections, open election results to manipulation, and signal to voters that it would not be possible to successfully challenge the results of the fresh Presidential election, even if the same were to be unconstitutional, unlawful or irregular. They state that the said Bill has since become law, with the overt approval of the 3rd respondent, and has been gazetted as Election Laws (Amendments) Act, Number 34 of 2017. Consequent upon that pleading, the petitioners raise, for determination by this Court (at paragraph 140 of the Petition), the issue that, in light of the amendment of Section 83 of the Elections Act by the Election Laws (Amendment) Act, 2017 after the conduct of the fresh Election, the question: which law is applicable for purposes of determining the present dispute? and, whether Section 83 of the Elections Act as amended is unconstitutional and invalid.**
>
> **[383] The issue in this petition, however, is that the amended law was not made retroactive by Parliament, and should, therefore, be read prospectively. It is noteworthy that, in addressing the same issue in Moses Masika Wetangula v. Musikari Nazi Kombo [2014] eKLR, the Court of Appeal adopted the dicta in Morgan v. Simpson [1974] 3 All ER 722, and took the position that an election must be guided by the law as it was on the date of the election. The Court thus stated the rationale:**
>
> > **"This was a reiteration of the globally established principle that the validity and integrity of any election is gauged upon the conduct of that election being in substantial compliance with the electoral law of that election."**
> >
> > **(See also Lon L Fuller "Eight Ways to Fail to Make Law" in Feinberg and Coleman (eds) Philosophy of Law (Thompson Learning, 2000) 91-94.)**
>
> **[384] From the foregoing, we find that the applicable election law, in respect of the conduct of the 26thOctober, 2017 election was the Elections Act, 2011, the Elections Laws (Amendments) Act, 2017 (Act No. 34 of 2017) not having come into effect as at the time of that election, and the same not having had retrospective application."**

78. Guided by the Supreme Court dicta, we find that election petition disputes must be resolved by the election law that existed on the date of the elections. The appellants' submission that it is the amended ***Section 83*** that the trial court ought to have applied in its judgment has no

merit. The trial judge did not err in applying ***Section 83*** of the **Elections Act** as it existed on the date of the Homa Bay gubernatorial elections on 8th August 2017.

Did the trial court err by not laying down its tools upon finding that the election was conducted substantially in accordance with the constitution and Electoral Laws?

79. Learned Counsel Otiende Amollo submitted that the trial court's judgment is written in two parts. That the first part is correct where the judge finds that the gubernatorial elections were substantially conducted in accordance with the constitutional principles. The second part is erroneous where the judge finds that there were irregularities that vitiated the elections. It was submitted that this dual approach is wrong in law. That once the trial judge held that the election was conducted in compliance with constitutional principles and electoral law, it was not open to the court to prevaricate and make an about turn and find that there were illegalities and irregularities in the conduct of the election.

80. We disagree with the appellants' submission that the judge erred in adopting a dual approach in arriving at his determination. An inquiry about the effect of electoral irregularities and other malpractices is necessary where an election court has concluded that the non-compliance with the law relating to that election, did not offend the principles laid down in the Constitution or in that law. When a trial court has made a determination that the election was substantially conducted in accordance with the principles in the Constitution and electoral law, it is incumbent upon the court to inquire into the how any proven irregularity affect the result of the election. In this regard, we are guided by the Supreme Court dicta in **Raila Amolo Odinga & another -v- Independent Electoral and Boundaries Commission & 2 others, (supra)** where it was stated:

> **"[374] In view of the interpretation of Section 83 of the Elections Act that we have rendered, this inquiry about the effect of electoral irregularities and other malpractices, becomes only necessary where an election court has concluded that the non-compliance with the law relating to that election, did not offend the principles laid down in the Constitution or in that law. But even where a Court has concluded that the election was not conducted in accordance with the principles laid down in the Constitution and the applicable electoral laws, it is good judicial practice for the Court to still inquire into the potential effect of any irregularities that may have been noted upon an election. This helps to put the agencies charged with the responsibility of conducting elections on notice."**

Did the trial court err in using the phrase "irregularities must have effect on the result" instead of "affect the result?

81. Learned counsel for the appellant, Otiende Amollo, submitted that the trial court erred in law when considering the legal effect of irregularities. That the court considered whether the irregularities had "effect on the result" instead of whether the irregularities "affected the result." That the proper test is whether the irregularities "affected the result." It was urged that the phrase "effect on the result" and "affect the result" have completely different meaning in English language and in law. By adopting the test of "effect on the result", it was contended, the trial court erred and arrived at a wrong conclusion. In counsel's view, an irregularity can have effect on the results without affecting the result.

82. The trial court in dealing with irregularities expressed itself as follows at paragraphs 126 and 172 of its judgment:

> **[126] The effect of the alleged irregularities must be calculated to really influence the result in a significant manner. Whereas the word "effect" in ordinary English means consequence of something, the word "affect "means to impact or cause or change in some way. The two words are most times used interchangeably as they more or less mean the same thing <u>but in election matters the word "affect" is dominantly used.</u>**
>
> **[172] In the Ugandan case of <u>Katwiremu Bategama -vs- Musheneza EP No. 1 of 1996</u>, it was held that: -**
>
> > **"Although the Petitioner has in many instances proved to the satisfaction of the court that there were irregularities in the process of conducting the parliamentary election, he has not gone beyond that as the law requires. He had to show that these irregularities affected the result of the election in a substantial manner".**
> >
> > **"To affect the results" or "effect on the results" as noted hereinabove do not necessarily relate to numbers as figures alone if the process is flawed are worthless. Sometimes, it is difficult to ascertain the winner on account of errors in tallying and in the transposition of the results (see, the Court of Appeal decision in <u>Oyugi -vs- Obado case</u>).**
>
> **173. Evidence be it affidavit or oral evidence is the key factor in any trial and for it to be of cogent value it must meet the demands of proof. Herein, this court is satisfied that the Petitioners' evidence have met the demands of proof by establishing to the required standard not only that the irregularities in the statutory forms were substantial <u>but also that they affected or had an effect on the results in a substantial manner</u> such that what was declared by the first and second Respondents as the result may not have actually been the correct result.**

83. In considering the appellants' submission, we keenly note that the trial court explained that in election matters the word **"affect"** is predominantly used. The trial court in citing a persuasive Ugandan case noted that it must be shown that irregularities affected the result of the election in a substantial manner. However, at paragraph 173 of its judgment, the trial court in alternate uses "affect or had effect on results."

84. The explicit wordings in ***Section 83*** of the **Elections Act** are "***affect the result of the election***." It is latent and plain that the phrase "effect on the result" and "affect the result" has different meaning. A hypothetical example would suffice. For instance, assume that the margin between a winner of election and the runner up is 5,000 votes. Upon recount, the margin reduces by 1,000. It is clear that the results of the recount had effect on the results but did not affect the result. This example suffices to demonstrate that in determining the effect of any

irregularities, a court must confine itself to the explicit words in ***Section 83*** of the **Elections Act** and determine if the irregularities "affected the result." We reiterate that the correct test is "affect the result" and not "effect on the result."

85. In **Mbowe -v-Eliufoo [1967] EA 240, at page 242**, Georges J in the Court of Appeal of Tanzania stated:

> **"In my view in the phrase "affected the result" the word "results" means not only the result in the sense that a certain candidate won and another lost. The result may be said to be affected if after making adjustments for the effect of proved irregularities the contest seems much closer than it appeared to be when first determined. But when the winning majority is so large that even a substantial reduction still leaves the successful candidate a wide margin, then it cannot be said that the result of the election would be affected by any particular noncompliance of the rules."**

86. We have reviewed the judgment of the trial court to determine if in totality the use of the phrase "effect on the result" led to a wrong conclusion and determination by the trial court. We find that the trial court in evaluating the evidence correctly laid emphasis on whether the irregularities were substantial but also that they affected or had an effect on the results in a substantial manner. By adopting the substantial approach, no error of law was committed by the trial judge in stating that the irregularities should affect or have effect on the result in a substantial manner. This ground of appeal has no merit.

Binding nature of judicial scrutiny report and whether the trial court erred in failing to consider the scrutiny and recount report dated 24th January 2018 by Deputy Registrar.

87. During hearing, the trial judge directed the Deputy Registrar to supervise access to election material and conduct scrutiny and recount of votes. The Deputy Registrar prepared two reports which were filed in court. The reports are:

a. Deputy Registrar's Report dated 21st November 2017 on access and sealing of election material. In regard to this report, the 3rd and 4th respondents filed their observations on 21st December 2017.

b. Deputy Registrar's Report dated 24th January 2018 on scrutiny and recount of votes. The 3rd and 4th Respondents disagreed with the contents of the Deputy Registrars report and filed their observations in court dated 31st January 2018.

88. The content and findings in the two Deputy Registrar's Reports and the probative value of the reports are matters of contestation. The 3rd and 4th respondents filed their own observations which in material aspects are contradictory to the Deputy Registrar's reports. Neither the appellants nor the 1st and 2nd respondents filed observations to any of the Deputy Registrar's Reports. The observations filed by the 3rd and 4th respondents are what the trial court refers to as the Petitioner's Report. In this appeal, the appellants refer to the 3rd and 4threspondents' observations as the "Kanjama and Mumma Reports."

89. The appellants submitted that the critical finding in the Deputy Registrar's Scrutiny and Recount Report dated 24th January 2018 is that upon recount, the 1st appellant not only remained the winner of the Homa Bay gubernatorial elections, but his vote tally increased by 14 votes. The appellants' major contestation is that the trial court erred by ignoring the Deputy Registrar's Scrutiny and Recount Report particularly the finding that the 1stappellant had garnered the greatest number of votes and his vote tally had increased. The appellants contend that the trial court erred in failing completely to refer to the Scrutiny and Recount Report of the Deputy Registrar dated 24th January 2018 and instead relied on the "Kanjama & Mumma Report" filed on 31st January 2018. They observe that the "Kanjama & Mumma Report" was not subjected to cross-examination and the author, learned counsel Mr. Kanjama, was not called to testify. They submit therefore that the probative value of the "Kanjama & Mumma Report" is zero when compared to the judicial Scrutiny and Recount Report dated 24th January 2018 prepared by the Deputy Registrar since the Deputy Registrar is an officer of the court and the Report was prepared after a physical examination of the ballot boxes and recount of votes.

90. Senior Counsel Tom Ojienda vehemently submitted that the findings in a Scrutiny and Recount report undertaken pursuant to and under the supervision of a court order bind the trial court. That in the instant matter, the trial court was bound to take into account the findings of the scrutiny and recount report which indicated that the 1st appellant was the winner of the Homa Bay gubernatorial elections. That the Deputy Registrar's findings of fact bind the trial court and it was a fundamental error to ignore, fail to consider and even fail to refer to the findings of fact made by the Deputy Registrar who physically saw the ballot boxes, the seals on the boxes and supervised the physical recount of the ballots. That the Deputy Registrar's Report is direct evidence with a high probative value.

91. In rebuttal, the 3rd and 4th Respondents urged that the trial court neither ignored nor failed to consider the Scrutiny and Recount Report dated 24th January 2018 and prepared by the Deputy Registrar; that the court considered and weighted the Report when evaluating the totality of the evidence on record; and that paragraph 160 of the judgment is proof that the trial court considered the Report by the Deputy Registrar.

92. The appellants contend that by a ruling delivered on 7th November 2017, the trial court indicated that scrutiny and recount exercise was to determine the votes garnered by each candidate. That the court erred in failing to take into consideration the votes garnered by each candidate as determined by the scrutiny and recount report thereby erroneously departing from its ruling where the judge stated:

> **"54. In that regard, and in terms of Section 29(4) of the Elections Petitions Rules 2017, the scrutiny of the votes garnered by each candidate shall include recount and ascertainment of votes garnered by each candidate in each of the polling stations specified in paragraph 33 or 34 of the Petition and any other polling station that the court may in the course of taking evidence deem fit.**

55. The exercise shall be undertaken under the supervision of the Deputy Registrar of this court but both the Petitioners and Respondents shall each be allowed to have three (3) agents present. Further, the exercise shall commence on a date that the court may direct or be agreed by the parties. The costs shall abide the outcome of the Petition.

93. In considering the Deputy Registrar's Report dated 21st November 2017, the trial court observed as follows:

"160. Some forms were altered in ink and did not reflect the originals and some did not have visible or clearly visible entries. Some of the forms were photocopies. As for ballot boxes, some were broken and a considerable number were secured with unofficial seals.

All the foregoing irregularities and/or discrepancies were established with abundant credibility by the Petitioners through their witnesses, Osutwa (PW3), Jalango (PW4), Ondigo (PW5), Nyabwana (PW6) and Ombogo (PW13) as corroborated by the report of the deputy registrar dated 21st November 2017 on the access orders made by this court on 7th and 15th November 2017, as well as the report of the Petitioners' agents in the exercise filed herein on 21st December 2017." (Emphasis supplied)

94. A reading of paragraph 160 of the trial court's judgment clearly shows that the Deputy Registrar's Scrutiny and Recount Report dated 24th January 2018 was not referred to. Scrutiny and Recount pursuant to court orders are important in three situations: where it is the only plea in the petition; whereupon recount of the ballots cast, the winner is apparent; and, lastly, where the margin of victory is narrow. Recounts not only assist in the expeditious disposal of election petitions but they also enhance transparency and public confidence in the electoral dispute adjudication.

95. The contestations around the Deputy Registrar's Scrutiny and Recount Report dated 24th January 2018 leads us to examine the emerging jurisprudence on the probative value and binding nature of judicial scrutiny and recount reports. At this stage, we are not considering the contents of the Deputy Registrars Reports filed in this matter. We consider only the probative value and the binding nature of such reports.

96. Emerging jurisprudence shows that trial courts have considered and evaluated scrutiny and recount reports filed by Deputy Registrars. For instance, in **Lenny Maxwell Kivuti -v - The Independent Electoral and Boundaries Commission (IEBC) & 3 others [2018] eKLR,** the High Court in considering and evaluating the Registrar's Report stated as follows at paragraphs 24 and 55 of its judgment:

"24. Upon receipt of the report of the Deputy Registrar on 7th February 2018, I directed the parties to file and serve their respective final submissions to be highlighted on 13th February 2018. There was compliance with the directions as all the parties filed their respective written submissions complete with the authorities that they relied on. The submissions were highlighted on 13th February 2018. I have noted the arguments advanced in the written submissions as well as in the highlights. I have also perused through the authorities filed and cited and noted the legal points in each one of them.

32. I have seen from the petitioner's written submissions that issues have been raised that the totals in the Deputy Registrar's report are not correct.

55. According to the report of the Deputy Registrar, the final tally of the results shows that the difference between the votes garnered by the petitioner and the 3rd respondent is between 700 and 800 votes. The petitioner claims that that tally was erroneous and according to his own tally the margin is a little narrower and should be in the region of 500 votes. Are the irregularities identified through the scrutiny likely to affect the result? I have noted that the non-compliance with regard to the unaccounted ballots affects ballots in the region of 566 votes, while that relating to missing counterfoils affects ballots in the region of 4000 votes, while those relating to missing or illegible Forms 37A are in excess of 10 000 votes. The excess votes amount to 111. Looking at all these figures globally there is no doubt that the irregularities would affect the final results of the election.

97. In **Raila Odigna & another -v- IEBC & 2 others, SC Election Petition No. 1 of 2017,** the Supreme Court ordered judicial scrutiny conducted by the Court's Registrar. In considering and evaluating the Registrar's Report, the Court in relevant excerpts of its judgment stated as follows:

"[345] Based on that process, the Registrar's report can be summarized as follows; On Form 34C, the petitioners noted that the Form 34C presented did not have a watermark and serial number and it looked like a photocopy. On the other hand, the 3rd respondent observed that the form was a copy of the original duly certified by an advocate of the High Court. Clearly, therefore the IEBC did not avail to parties and the Court the original Form 34C but a copy certified by an advocate."

98. The emerging jurisprudence emphatically shows that a judicial scrutiny and recount report must be considered and evaluated by the trial court. Case law reveals that whereas the judicial scrutiny and recount report is not binding on the trial court, it must be considered, evaluated and weighted with all other evidence on record. The trial court cannot ignore, overlook and fail to refer to the report. The court must analyze the report and either adopt its findings or discount the Registrar's findings. Whichever way, the trial court must give reasons for adopting or discounting the report. It is noteworthy that in the 2013 Presidential election petition, one of the key criticisms of the judgment of the Supreme Court is that it ordered a *suo motu* judicial scrutiny and not only failed to make reference to the Report but also totally ignored the findings in the Report. (See Maraga J. "Scrutiny in Electoral Disputes: A Kenyan Judicial Perspective", in "Balancing the Scales of Electoral Justice: 2013 Kenyan Election Disputes Resolution and Emerging Jurisprudence").

99. In the instant appeal, a question that arises is whether the trial court ignored and failed to consider the Deputy Registrar's scrutiny and recount report dated 24th January 2018 and thereby arrived at a wrong conclusion based on the evidence on record. Did the trial court

consider and evaluate the Deputy Registrar's Report?

100. At paragraph 160 of the judgment, the trial court held that *irregularities and/or discrepancies established by the petitioners was corroborated by the report of the deputy registrar dated **21st November 2017** on the access orders made by this court on 7th and 15th November 2017.*Our plain reading of paragraph 160 of the trial court's judgment shows that the court did not consider and evaluate the Deputy Registrar's scrutiny and recount report dated 24th January 2018. It is manifest, that the trial court neither considered, nor evaluated this report. The court never adopted or discounted the contents of the report. Is the failure by the trial court to mention, refer to, consider or adopt or discount or evaluate the Deputy Registrar's scrutiny and recount report a fundamental error of law?

101. At this stage, we must make a clear distinction between the Deputy Registrar's Report dated 21st November 2017 and the scrutiny and recount report dated 24th January 2018. As regards the report dated 21st November 2017, the trial court found that the petitioners' evidence was corroborated by the Deputy Registrar's Report dated 21st November 2017. We shall revert to consider if this holding is supported by the evidence on record. We note that the Supreme Court in **Nicholas Kiptoo Arap Korir Salat -v- Independent Electoral and Boundaries Commission & 7 others [2015] eKLR** affirmed that **t**he determination of *sufficiency* of evidence is a task reserved to the *discretion of the election Court.*

102. In our view, evaluation of contents of a document can be either verbose or succinct. It may be a rehashing and reproduction of excerpts of the content or a synopsis of content. It is all a question of style. In the instant case, the trial court neither mentioned nor alluded to the existence of the Deputy Registrar's Scrutiny and Recount report dated 24th January 2018. Emerging jurisprudence shows that a judicial scrutiny and recount report must be considered, evaluated and weighted with all other evidence on record. Guided by the emerging jurisprudence, we find that the trial court erred in law in failing to mention, considered and evaluate the Deputy Registrar's scrutiny and recount report dated 24th January 2018.

103. As regards the Deputy Registrar's Report dated 21st November 2017, we find that the trial judge, brief as he was, did not ignore the Deputy Registrar's Report. He considered it and evaluated it against the entire evidence on record and arrived at a determination that the Deputy Registrar's Report was corroborative evidence. We shall determine if this holding is supported by the evidence on record. Accordingly, we find the contestation by the appellant that the trial court erred in ignoring and not considering the Deputy Registrar's scrutiny and recount report dated 24th January 2018 has merit.

104. In weighting and determining the probative value of a judicial scrutiny and recount report, a trial court must bear in mind that such the report is akin to direct evidence; it emanates from factual and physical observations made by a judicial officer in the presence of all parties. The trial court must determine whether any irregularities identified through the scrutiny report affect the results; the court must make a determination whether the report is a fairly accurate reflection of what the scrutiny exercise has unearthed; the court must determine if the report raise issues of accountability and transparency of electoral forms. Any inferences and conclusions to be drawn from the findings in the scrutiny report are to be made by the trial court. Conjecture and extrapolation of findings is not permissible. A trial court cannot ignore or simply gloss over a scrutiny and recount report. There must be demonstration of convincing analysis, evaluation and findings of fact.

Burden of proof and did the trial court err in its findings on failure by the appellant, 1st and 2nd Respondents to call witnesses?

105. The appellants content in grounds 16, 17, 18, 19, 21 and 22 of the memorandum of appeal that the trial court erred in holding that the presiding officers who conducted elections on behalf of IEBC must have been called to testify in relation to the disputed polling stations. The 1st and 2nd respondents in their cross-appeal also contend that the trial court erred in drawing an adverse inference that they did not call presiding officers and the IEBC polling station agents to testify. The appellants contend that Deputy Registrar' scrutiny and recount report dated 24th January 2018 and the Report dated 21st November 2017 show that the results by IEBC were authentic and there was no interference with the ballot boxes and the contents thereof. That even if there are any irregularities as to the signing of any statutory form, the scrutiny and recount report cures and obliterates such irregularities as the will of the voters is determined through scrutiny and recount of ballots. It was submitted that the trial judge erred in law in holding that the presiding officers ought to have called to rebut the evidence of the 3rd and 4th Respondents. That the judge erred in holding that the appellants should have called as witnesses their agents at the disputed polling stations. That in so holding, the trial court erred and shifted the burden of proof to IEBC and the appellants.

106. The appellants' submissions remind us of the dicta by the Supreme Court in **Raila Odinga & another -v- IEBC & 2 others** (supra), as follows:

> **"[276] In these circumstances, bearing in mind that IEBC had the custody of the record of elections, the burden of proof shifted to it to prove that it had complied with the law in the conduct of the presidential election especially on the transmission of the presidential election results and it failed to discharge that burden."**

107. This Court is alive to the fact there is no legal requirement in law on the number of witnesses to prove or disprove a fact. ***Section 143*of Evidence Act (Cap 80) Laws of Kenya** provides: -

> **"143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact".**

108. When a person fails to call a relevant witness to prove or disprove a fact in issue, a trial court may draw an adverse inference from the failure to call such a witness. In ***GIBBS vs. REA* [1998] AC 786,** it was held that when a defendant elects to give no evidence such a choice "carries the risk that should it transpire that there was some evidence tending to establish the plaintiffs case, albeit slender evidence, their silence in circumstances in which they would be expected to answer might convert that evidence into proof."

109. ThisCourt in **Mohamed Abdi Mahamud -v- Ahmed Abdullahi Mohamad & 3 others [2018] eKLR** in affirming the trial court's decision drawing an adverse inference for failing to testify and shifting of evidential burden of proof expressed itself as follows:

> **"The cavalier attitude evinced by the appellant in the face of serious questions about his eligibility to vie for the seat of governor was compounded and rendered tragic by his choice to stay away from the proceedings and therefore not only fail to present his side of the story, but also keep himself from being cross-examined on his replying affidavit thereby robbing it of any probative value. The learned Judge in his analysis of the evidence and the appellant's failure to present himself in court expressed himself thus at paragraph 192;**
>
> **"I have taken note of the fact that although the 1st respondent had the opportunity to either deny or challenge all these facts, he did not do so in his replying affidavit. He also failed to appear in court and shed light on this issue. The petitioners? evidence therefore remained uncontroverted. The petitioners had therefore succeeded in shifting the evidentiary burden of proof to the 1st respondent. The moment they produced the graduation list and the alleged admission made before the Committee of the House of not having had a degree by 2014, the burden shifted to the 1st respondent to prove that the Bachelor's degree dated 1stMarch 2012, had been genuinely issued to him by Kampala University. This he failed to."**
>
> **With respect … the learned Judge's reasoning cannot be faulted. Nor can he be blamed for stating that what was placed before him by the petitioners did establish a prima facie case about the invalidity of the degree dated 1st March 2012, which therefore shifted the evidential burden of proof to the appellant to discharge. The learned Judge remained faithful to the law on burden of proof in that the legal burden remained with the 1st and 2nd respondents but a basis had been established for the evidentiary burden to shift to the appellant."**

110. In the instant case, did the trial court err in drawing an adverse inference against the appellants and the 1st and 2nd respondents for failing to call their agents and presiding officers respectively? Did the burden of proof shift? The provision of ***Section 143*** of the **Evidence Act** is useful but must be read together with the other relevant provisions of the **Evidence Act**. ***Section 108*** of the Evidence Act states that, *"the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side."* While ***Section 109*** of the **Evidence Act** states that,*" 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."*

111. In **Jacinta Wanjala Mwatela -v- IEBC & 3 Others, (2013) eKLR** it was expressed as follows:

> **"I do agree with Counsel for the petitioner that the court will eventually be at liberty to draw an adverse inference from the failure of these witnesses to avail themselves for cross-examination. In the United Kingdom case of Wisniewski vs Central Manchester Health Authority 1997 PIQR 324, the Court of Appeal held as follows:**
>
> **"In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in any action."**

112. In **John Munuve Mati -v- Returning Officer Mwingi North Constitutency, Independent Electoral & Boundaries Commission & Paul Musyimi Nzengu [2018] eKLR**, on the alleged failure by the Returning Officers to testify, the court observed that it does not invariably follow that failure by a respondent to call a witness means that the petition must be allowed. The petitioner must first adduce evidence of the nature that would entitle him to judgment if the respondent did not adduce any evidence at all in rebuttal. **Justice Kihara Kariuki in Election Petition No. 1 of 2013 Peter Leo Agweli Onalo vs Eliakim Lindeki and 2 Others [2000] eKLR the High Court** held that it would be in bad taste to compel witnesses to attend court if it is not confirmed they are willing to do so.

113. An adverse inference ordinarily should not be drawn simply because a respondent has chosen not to call any or some witnesses. The legal burden of proof always remains with the petitioner and a court should be careful not to draw an adverse inference when a respondent who has no legal burden to prove any fact fails to call a witness or witnesses. In the instant case, the critical issue is whether from the evidence tendered before the trial court the evidentiary burden had shifted to the 1st and 2nd Respondents to warrant that they disprove facts *prima facie* established by the 3rd and 4th Respondents in the petition before the trial court.

114. In the Petition, the 3rd and 4th Respondents named the following presiding officers as having colluded with the appellants and the 1st and 2nd respondents. The presiding officers named included ***Mr. Patrick Onyango Were, Jacob Nyakinda, Kennedy Ogaye, Chrispine Ouma*** and ***Enoth Owenga*** all in Karachuonyo Constituency**.** In Kabondo-Kasipul Constituency, the presiding officers named were ***Mr. Tobias Ondiege Othuro*** and ***Hastings Ochieng Jared. Humphrey Odhiambo*** and ***Dave Okoth*** were named in ***Rangwe Constituency*** while ***Alphine Okoth, Paul Oulo Onyone, Sheila Akoth and Samuel Ouma Okoth*** were named in Ndhiwa Constituency.

115. It was contended by the 3rd and 4th Respondents that all these presiding officials were involved in electoral fraud, malpractices and electoral offences in their respective polling stations and ought to have been called by the 1st respondent to testify. In analyzing the evidence on record and failure to call the presiding officers to testify, the trial court stated that:

> **"164. The absence of the presiding officers in the polling stations with disputed results was also curious and quite telling. These were the most important people in the dispute. They were responsible for the entries in the all-important Forms 37A and all that appertained to the forms yet the first and second Respondents did not deem it fit to obtain witness affidavits from them or even call them to testify in court. Only one presiding officer i.e. Charles Otieno ogunde (DW6) was availed in court but by default, since he had not deponed an affidavit in support of the Respondents (first and second) case.**
>
> **165. None of the eight Constituency returning officers were at the polling stations where the profound irregularities**

occurred and then carried over to the Constituencies and eventually to the County tallying centre. The only way of ascertaining the extent or otherwise of the proper conduct of an election is by going to the primary source of the results and this is Form 37A. It was therefore ill-informed for the first and second Respondents to fail to call at least some of the presiding officers to provide some evidence in this matter, particularly the presiding officers whose polling stations were negatively mentioned."

116. The question whether the trial court erred in holding that the presiding officers who conducted elections on behalf of IEBC should have been called to testify depends on whether the 3rd and 4th respondents had laid *prima facie* evidence that required IEBC to explain. If *prima facie* evidence was laid, then the evidential burden of proof shifted to IEBC. The trial court held that the evidential burden had shifted and expressed as follows:

"180. However, the Petitioners having discharged their legal burden in proving that the results documents in their possession and those in the possession of the Respondents originated from the first Respondent [I.E.B.C] contrary to the suggestion that their (Petitioners') documents came from elsewhere or through criminal conduct, the evidential burden regarding the forms and the results contained therein lay with the first and second Respondents but, it was never discharged."

117. The Supreme Court in **Raila Odinga & Others -v- Independent Electoral & Boundaries Commission & Others, Petition No. 5 of 2013**, stated that:

"…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". (See also, Gatirau Peter Munya –vs- Dickson Mwenda Kithinji & Others [2014] eKLR)"

118. On our part, having examined the record, we are satisfied that the evidential burden of proof had shifted to IEBC for the following reasons. First, the trial court established as a fact at paragraph 180 of its judgment that the documents put in evidence by the 3rd and 4th Respondents originated from IEBC. Second, the trial court established as fact at paragraph 178 of its judgment that there were some irregularities in the documents tendered in evidence by IEBC. Third, the trial court noted at paragraph 176 of its judgment that there was prima facie evidence that the results declared at the polling station were different from those declared at the constituency tallying centers and at the County tallying centre. Fourth, there is *prima facie* evidence on record that some statutory declaration Forms were not signed by presiding officers and that some Forms had no stamps.

119. Based on the findings of fact as established by the trial court, whereas we find that the trial court did not err in holding that the evidential burden of proof had shifted to IEBC, we find that the court erred in drawing an adverse inference that failure to call agents and presiding officers is fatal. At a *prima facie* level, some evidence had been laid before the trial court that required explanation or clarification by the IEBC. It is not the law that such explanations or clarification can and must only be given by agents or presiding officers. Other cogent, convincing and corroborative evidence to explain or clarify any irregularity can be led by the IEBC. We remind ourselves and restate that IEBC as a respondent in election petitions has no legal burden to prove that an election was conducted substantially in compliance with constitutional principles and election law. However, just as any Respondent, if a *prima facie* case has been laid against the IEBC, the evidential burden shifts and failure to discharge this burden may convert the *prima facie* evidence into evidence proving the disputed fact. We find that trial court erred in holding that the presiding officers who conducted elections on behalf of IEBC must have been called to testify on results in disputed polling stations. There is no legal obligation on the part of a respondent to call any witness to testify. In this context, we affirm the dictum in **John Munuve Mati vs Returning Officer Mwingi North Constitutency, Independent Electoral & Boundaries Commission & Paul Musyimi Nzengu [2018]*eKLR***, where it was held that it does not invariably follow that failure by a respondent to call a witness means that the petition must be allowed.

Is the judgment by the trial court inconsistent in light of Articles 81 and 86 of the Constitution as read with Section 83 of the Elections Act?

120. The appellants, through learned counsel Dr. Otiende Amollo, submitted that the judgment of the trial court was inconsistent and should be set aside. It was submitted that at paragraphs 83, 97, 98 and 99 of the judgment, the trial court gave a clean bill of health to the gubernatorial elections. That surprisingly, at paragraphs 179, 184 and 185, the trial court makes an about turn and finds that the conduct of elections was not free and fair. Based on these observations, the appellants urge us to find that the trial court erred in nullifying the election as its conclusions are contradictory and are not based on the evidence on record. At the centre of this contestation are the following paragraphs from the judgment of the trial court:

"83. Our main concern on this first issue would be the political rights guaranteed under Article 38 of the Constitution and on the periphery the principles set out in Articles 81 and 86 of the Constitution. It is these Articles together with Article 87 which establish the frameworks for elections in Kenya. While Article 38 guarantees the right to vote and the right to free and fair elections, Article 81 sets out the general principles including that the election administration be impartial, neutral, efficient, accurate and accountable. On the other hand, Article 86 relates to the vital process of voting, counting and tallying and requires the conduct thereof be in conformity with the prescribed standard.

97. Relating all the foregoing provisions to the evidence adduced herein, it is clear that the impugned gubernatorial election was largely conducted in a manner which was proper, peaceful and free from violence, intimidation and any other breaches of the law. All those who turned out to vote were not encumbered to do so in any manner. They individually proceeded to the various polling stations to cast their respective vote in direct exercise of their sovereign power under Article 1(1) of the

Constitution by electing leaders of their choice. Thereafter, they retreated to their respective fixed abode to await the results and confirm that their sovereign will was actually put into effect....(Emphasis supplied)

98. The process and events complained of by the Petitioners before or during the voting was most essential for reason that any transgression thereof would have negatively impacted on the rights guaranteed under Article 38 of the Constitution and bring into serious doubt the credibility of the election with regard to whether it was conducted in accordance with the Constitution and the electoral laws. <u>This is where the qualitative test in the determination of the Petition aptly applied and since an election which is largely free, fair, credible and peaceful upto the point of voting cannot possibly endear itself to nullification for violation of the law, this court must now find with regard to the first issue that the impugned election was indeed conducted in accordance with the law</u>.(Emphasis supplied)

99. <u>In any event, the allegations by the Petitioners suggesting otherwise were not credibly established and proved</u>. These related to the process and events before or during the voting day and included that the Petitioners' voters' right to freely vote was unduly influenced by the third respondent without any reprimand from the first and second Respondents…..."(Emphasis supplied.)

121. The appellants cite the following paragraphs 179, 184 and 185 of the trial court's judgment to demonstrate the alleged unexplained about turn by the judge.

"179. The irregularities occasioned by the first and second Respondents in the impugned gubernatorial election were of substantial degree and magnitude which would lead to a reasonable man to conclude that the election was not free and fair.

184. Suffice to hold that, on this one, the I.E.B.C blundered, blundered and blundered some more and is now paying the price for the inefficiency, carelessness, recklessness and negligence of some of their electoral officials.

185. For all the foregoing reasons, the answer to the second issue for determination in this matter must be in the affirmative with the resultant effect of providing the answer to the third issue for determination and that is to say, that the third Respondent was not validly declared as the duly elected governor for the County of Homa-Bay and that, the first Petitioner ought not have been declared as validly elected from a flawed process for which he has now benefitted."

122. The appellants and the 1st and 2nd respondents contend that the trial court's judgment is inconsistent. Conversely, the 3rd and 4thRespondents assert that the judgment is not inconsistent. To understand the context in which the trial judge made the holding and findings in the contested paragraphs, we reproduce herein the issues for determination as stated by the judge.

"76. It was the pleadings and the affidavits in support thereof that the four (4) points or issues for determination in this Petition arose. These are as follows: -

1) Whether the gubernatorial election for the County of Homa-Bay was conducted in accordance with the Constitution and Electoral Laws.

2) Whether there was non-compliance with the law by the first and second Respondents in the conduct of the said elections or if so, whether such nonconformity materially or fundamentally affect the results.

3) Whether the third Respondent was validly declared by the first and second Respondents as the duly elected governor for the county of Homa-Bay and if not, whether the Petitioners should have been declared as validly elected.

4) Whether the Petitioners are entitled to the orders sought in the Petition."

123. In making the contested remarks, the trial judge was considering the second issue for determination as identified by the court. In our view, in considering the second issue, the trial court was faced with qualitative and quantitative aspects of the conduct of elections. Qualitative and quantitative aspects of the electoral process have four distinct stages:

a. The qualitative or quantitative aspects of nomination, eligibility and qualification of candidates to vie for elections – these are pre-election nomination disputes.

b. The qualitative or quantitative aspects of the conduct of the election on the polling day from the opening of the polling station to the close of the polling station – the quantitative aspects include voter turnout;

c. The qualitative or quantitative aspects of post-polling activities up to the formal declaration of results. Activities at this stage include the collation, tallying, verification, transposition and transmission of results. It also includes the filling and signing of statutory forms containing the results of the election at each polling station, constituency and county levels and at the national level and

d. The qualitative or quantitative aspects post-declaration of results relating to custody and integrity of election materials until hearing of an election petition, if any. Tampering with election material may affect the quantitative and qualitative aspects of the election and vitiate the integrity of the declared results.

124. In any election petition alleging or founded on qualitative or quantitative violation of ***Articles 81***and ***86*** of the **Constitution,** for the petition to succeed, a petitioner must demonstrate that in any of the four qualitative or quantitative stages, there was substantial or material non-compliance with the constitutional and electoral laws governing the elections. Substantial non-compliance with constitutional and electoral principles in any of the four stages may affect the results of the election and void the declared results.

125. In the instant case, there was no issue urged in the petition relating to pre-election nomination disputes. The trial court in analyzing the evidence in relation to the first issue for determination considered whether the conduct of the elections on the polling day from the opening of the polling station to the close of the station was free and fair. Upon evaluating the evidence, the trial court established as a matter of fact and held at paragraph 97 of the judgment that the balloting process was free and fair. It is in this context that the court expressed that *"it is clear that the impugned gubernatorial election was largely conducted in a manner which was proper, peaceful and free from violence, intimidation and any other breaches of the law."* In further support of its finding that the polling/balloting and voting process did not violate any constitutional principles, the trial court held:

> **"98. The process and events complained of by the Petitioners before or during the voting was most essential for reason that any transgression thereof would have negatively impacted on the rights guaranteed under Article 38 of the Constitution and bring into serious doubt the credibility of the election with regard to whether it was conducted in accordance with the Constitution and the electoral laws. This is where the qualitative test in the determination of the Petition aptly applied and since an election which is largely free, fair, credible and peaceful up to the point of voting cannot possibly endear itself to nullification for violation of the law, this court must now find with regard to the first issue that the impugned election was indeed conducted in accordance with the law."**
>
> **"It was evidently clear that up to and during the voting, the process was conducted reasonably well and in accordance with the law. It would however, appear that things started "going south" during the process of counting, tallying, collating and declaring the results, a duty which was of course in the hands of the first and second Respondents and which was to be conducted in accordance with statutory law and the principles set out in *Articles 81* and *86* of the Constitution."**

126. After finding that the conduct of the election on the polling/balloting or voting day was free and fair, the trial court embarked on determining whether the post-poll process of collating, tallying, transposition, signing of the statutory forms and final declaration of results was free and fair. In its judgment, the trial court correctly observes that this is one of the issues to be determined. The court stated:

> **"114. With regard to the second issue for determination i.e. whether there was non-compliance with the law by the first and second Respondents or if so, whether such non-conformity materially or fundamentally affected the results. In the pleadings, the issue is addressed by the Petitioners under four headings or pillars to wit; [i] illegal/procedural flaws [ii] variance between the declared results and the actual results as tallied by the Petitioners [iii] alterations of various Forms 37A and [iv] transmission of results. Apparently, these factors revolve around the electoral process of counting, tallying, collating or tabulation and declaring the results.**
>
> **116. …. It is clear in this case that Article 81 (e) (iv) and (v) and Article 86 of the Constitution are the basis of the bone of contention arising between the Petitioners and the Respondents. It is thus the Petitioners contention that the electoral process as conducted by the first and second Respondents after the voting exercise was tainted with illegalities and procedural technicalities which were serious enough to affect the validity of the election and its outcome.**
>
> **117. The focus is largely on the alleged acts or omissions of the first and second Respondents during the conduct of the election in the crucial stages of counting, tallying, collating and declaring the results. The Petitioners contend that the first and second Respondents were careless and negligent in that regard. The contention is however, denied by the first and second Respondents as well as the third and fourth Respondents. Indeed, the Respondents have taken a common stand in calling for the dismissal of the Petitioners allegations in support of the Petition."**

127. In our considered view, the submission by the appellants that the judgment of the trial court is inconsistent has no merit. The judgment by the trial court is not inconsistent. The appellants' contestation does not take into account that there are four distinct stages in determining the qualitative aspects of the conduct of election. In its judgment, the trial court properly considered the qualitative aspects of the conduct of election to determine if the post-balloting process of collation, tallying, transposition and declaration of results substantially complied with Articles 81 and 86 of the Constitution. It is in this context that we adopt the Supreme Court dictum in **Raila Amolo Odinga & another -v- Independent Electoral and Boundaries Commission & 2 others (supra)** where it was stated:

> **"[[374]…. inquiry about the effect of electoral irregularities and other malpractices, becomes only necessary where an election court has concluded that the non-compliance with the law relating to that election, did not offend the principles laid down in the Constitution or in that law. But even where a Court has concluded that the election was not conducted in accordance with the principles laid down in the Constitution and the applicable electoral laws, it is good judicial practice for the Court to still inquire into the potential effect of any irregularities that may have been noted upon an election. This helps to put the agencies charged with the responsibility of conducting elections on notice."**(Emphasis supplied).

Whether the trial court erred in relying on documents tendered by the 3rd and 4th Respondents as "true" results and ignored documents tendered by the 1st and 2nd respondents?

128. The appellants contend that the trial court erred in relying on documents tendered in evidence by the 3rd and 4th Respondents as the "true" results for the gubernatorial elections and ignored documents that are statutory forms containing the "official results" declared by the IEBC. What are the documents tendered in evidence by the parties? The documents are Forms 37As that are filled at the polling station.

129. The 3rd and 4th respondents tendered in evidence original carbon copies of Form 37As which they claim were given to their agents at the polling station by the IEBC officials. On the other hand, the 1st and 2nd respondents produced during scrutiny and recount Form 37As which they assert were the original Form 37As retained by the presiding officer at each polling station. There were 1062 polling stations in the gubernatorial elections. This means that there were 1062 Form 37As. The issue in contention in this appeal is that there is allegation that some of the contents and entries in Form 37As tendered in evidence by the 3rd and 4th respondents are different from the content and entries in Form 37As tendered in evidence by the 1st and 2nd respondents. It is also alleged that there are alterations in figures without countersigning and that some of the Forms are not signed by presiding officers. In order to resolve this dispute, the trial court ordered scrutiny and recount.

130. The 1st and 2nd appellants contend that Form 37As tendered in evidence by the 3rd and 4th respondents are forgeries. On the other hand, the 3rd and 4th respondents contend that the Form 37As tendered in evidence by the 1st and 2nd appellants contain entries that have been altered and are thus not a true and accurate reflection of the result of the election.

131. Information relevant to this contestation is glimpsed from the testimony of ***Jacklyn Osiemo*** **(DW1)** who was the Returning Officer for Karachounyo Constituency. She testified that at each polling station, the presiding officer is given two booklets to fill and enter the results at the polling station. The booklets contain Form 37As. Each booklet has a Form to be filled in a set of six (sextuplicates) captured in carbon copies. The top Form is signed upon being filled and it is expected all carbon copies will have the impression of the signature and entries in the top Form. A stamp is affixed after the results are filled. Each carbon copy is stamped. Because there are two booklets, there would be two originals and ten original carbon copies all containing the same information. She testified that she was aware that if a pen is not pressed properly, it would not reflect on the carbon copy. Once the Forms are filled by the presiding officers, the first original copy did not have the specific form destination. It mattered not whether a Form was or was not a carbon copy. They were treated equally and are valid result declaration. All sets of the booklets are valid declaration of results. A copy would be placed on the ballot box, a second inside the ballot box; third copy for Returning Officer and fourth copy for pasting outside a polling station. Four copies were reserved for official purposes. After filling the booklets, the presiding officer discharges his obligation. Ideally, three copies are handed to the Returning Officer one for him/her, another for the file and one to be forwarded to Nairobi Headquarters.

132. Geoffrey Ombogo (PW13) who was the Chief Campaign agent of the 3rdRespondent testified that through his agents, he was given one set of the carbon copy Forms duly filled at each polling station. In his affidavit, he annexed original carbon copies of Form 37As allegedly given to their agents at the polling stations. He contended that Form 37As given to their agents were the original carbon copies of the sextuplicate Forms and these Forms contained entries indicating results at each specific polling station.

133. On their part, the 1st Respondent, IEBC did not tender in evidence the Original Form 37As that contained the results at each polling station. Instead, they put in evidence some original and others photocopy Form 37As. However, IEBC contends that during the scrutiny and recount exercise, the original Form 37As were produced. It was alleged by the 3rd and 4th respondents that some of the entries in the Forms tendered in evidence by the 1st and 2nd respondents were different from the entries in Form 37As tendered by the 3rd and 4th respondents.

134. Our reading of the judgment of the trial court shows that the judge compared and contrasted the Form 37As tendered in evidence by the 3rd and 4th respondents and Form 37As put in evidence by the 1st and 2nd respondents. This is clear from paragraph 157 of the judgment where the trial court states that all the statutory documents separately exhibited by both the petitioners and respondents confirmed that there was serious breach of fundamental provisions of the electoral laws and in particular, the **Elections (General) Regulations, 2012**, which was most operative during the electoral process which followed the voting exercise.

134. In this context, it is not correct to allege that the trial court only considered the 3rd and 4threspondents' Form 37As. It is manifest that the trial court compared and contrasted the entries in the Forms submitted by the 3rd and 4threspondents with entries in Form 37As put in evidence by 1st and 2nd respondents. This is clear from paragraphs 159, 160 and 161 of the judgment.

136. From analysis of the Form 37As tendered in evidence by both parties, the trial court made findings of fact (at paragraphs 159 and 160), findings on credibility of witnesses (at paragraph 160), findings on credibility of the statutory Forms tendered in evidence by IEBC (at paragraph 161), findings on evidential burden of proof (at paragraph162) and drawing of inferences in relation to the Forms (at paragraph 164 and 165).

137. We have agonized if we have jurisdiction to disturb and interfere with the findings of fact and credibility of witnesses as determined by the trial court in relation to Form 37As.In principle, this Court cannot interfere with findings on credibility of witnesses. However, we can interfere with findings of fact made by the trial court if any of the following conditions are fulfilled:

a. If the conclusion arrived at by the trial court is based on "no evidence" or

b. If the conclusion arrived at by the trial court is not supported by established facts or evidence on record, or

c. If the conclusions are "so perverse", or "so illegal", that no reasonable tribunal would arrive at the same.

138. In this context, we remind ourselves of dicta from the Supreme Court in **Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 others [2014] eKLR** which enjoins this Court to show deference to the trial court on the findings of fact and credibility of witnesses. The contestation on the source, content, authenticity and probative value of Form 37As tendered in evidence by the 3rd and 4th respondents' vis-à-vis Form 37As tendered in evidence by the 1st and 2nd appellants lead us to appraise the law on documentary evidence on authenticity and proof of documents.

Documentary evidence and proof of authenticity of Forms 37As tendered in evidence by the 3rd and 4th respondents.

139. The appellants and the 1st and 2nd respondents contend that Form 37As tendered in evidence by the 3rd and 4th respondents are hearsay documents; that they are forgeries and the trial court erred in fact and law in relying on forged documents. Conversely, the 3rd and 4th respondents contend that Form 37As they tendered in evidence are not hearsay documents because they are true carbon copy originals given to their agents at the polling stations by the presiding officers of the IEBC.

140. Sections 64, 65 and 67 of the **Evidence Act** are relevant to this contestation. Contents of documents may be proved by either primary or secondary evidence. Primary evidence means the document itself produced for inspection of the court. Where a document is executed in several parts, each part is primary evidence of the document. Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it. Where a number of documents are all made by one uniform process, as in the case of printing, lithography or photography, each is primary evidence of the contents of the rest but where they are all copies of a common original, they are not primary evidence of the contents of the original.

141. In the instant case, the 3rd and 4th respondents tendered in evidence statutory Form 37As that were alleged to be original carbon copies of the sextuplicate. The 1st Respondent, IEBC, tendered statutory Form 37As that were photocopies of the sextuplicate. IEBC also produced some original Form 37As during scrutiny and recount exercise. However, entries in the two sets of documents were different.

142. It is trite that entries in a copy of a document must be the same as entries in the original. When the two differ, the copy cannot be said to be a copy of the original. In case of conflict in content, the original document carries more weight, credibility and it prevails.

143. The trial court at paragraph 180 of its judgment made a finding of fact on the source and authenticity of the documents tendered in evidence by the 3rd and 4th respondents. It was held that these documents originated from the 1st and 2ndrespondents.Critical to the issue of source and authenticity of the 3rd and 4threspondents' documents, the 1st and 2nd respondents in their written submissions filed in this appeal at paragraph 59 (i) thereof state that all Forms annexed in Volume 4 of the 3rd and 4th Respondents originated from the polling stations and have all the requisite features; that the said Forms were later altered by the 3rd and 4th respondents. This submission by the 1st and 2nd respondents confirms the trial court's finding that the 3rd and 4th respondents documents are authentic and came from the legal source, namely they came from the IEBC. Accordingly, we find that the trial court did not err in finding that the documents tendered in evidence by the 3rd and 4th respondents were authentic and came from IEBC.

144. In our analysis of the record, having found that the documents put in evidence by the 3rd and 4th respondents were authentic, we note that pursuant to **Section 64** and **65 (1) of the Evidence Act**, the original statutory Forms ought to have been produced in court by IEBC to establish the contents of the statutory Forms used to declare results and to ascertain the accuracy and verifiability of the results at each polling station. It is in this context that the trial court correctly observed as follows on shifting evidentiary burden of proof:

> **"180. However, the Petitioners having discharged their legal burden in proving that the results in documents in their possession and those in the possession of the Respondents originated from the first Respondent [I.E.B.C] contrary to the suggestion that their (Petitioners) documents came from elsewhere or through criminal conduct, the evidential burden regarding the forms and the results contained therein lay with the first and second Respondents but, it was never discharged. They failed to prove that the Petitioners documents are forged. They never even availed the original documents to establish any suspicion of forgery.**
>
> **181. None of the returning officers (DW1, 2, 3, 4 and 5) had any evidence of forgery other than merely stating that the documents were altered without identifying the culprit or culprits who may as well have been themselves or their own presiding officers at the polling stations. The witnesses availed by the third/fourth Respondents i.e. Francis Ogolla Kagoro (DW7), Bernard Oduor Onyango (DW8), Lazaro Oketch Okombo (DW9), Narkiso Ochieng Tuko (DW10) and Marilyn Namenyero Juma (DW11) did not dispute the result variance between their documents and those of the Petitioners. Not even one of them established that the Petitioners' documents were forged.**
>
> **182. Such an attempt was made by Marilyn (DW11) despite the fact that the third/fourth Respondents had almost thirty (30) witness who deponed affidavits in support of their case. Needless to say that the attempt by Marilyn (DW11) was a flop for want of necessary qualification. She is not a qualified handwriting expert of document examiner. She only succeeded as a "data expert" in showing the variance in results between the different sets of documents produced by the Petitioners and the Respondents."**

145. We note that Senior Counsel Tom Ojienda for the appellant submitted that the documents tendered in evidence by the 3rd and 4threspondents were hearsay documents. The trial court noted this submission at paragraph 67 of its judgment where the judge stated that "the third and fourth Respondents contend that the Petitioners relied on hearsay evidence from their so called undocumented chief agent and have not shown any proof of their documented agents who allegedly collected the Form 37As from the polling stations." The trial court further noted the contention by the appellants and 1st and 2nd respondents that the Form 37As put in evidence by the 3rd and 4th respondents were forgeries. At paragraph 68 of the judgment, the trial court observes that "it is contended that the origin and authenticity of the purported Form 37As as provided by the 3rd and 4th respondents are suspect."

146. On a comparative basis, it has been recognized that "duplicate originals" have the same evidentiary status as an original. The duplicate in legal conception is an original instrument repeated. This is illustrated in the cases where a carbon impression is simultaneously produced by the same stroke that creates the original. In such cases, the legal act embraces all the writings and the courts have received each writing as the original. (See **Schroer -v- Schroer, 248, S.W.2d.716 (S.Ct. Mo. 1952);** see also**Wurlitzer Co. -v-Dickinson, 247 Ill. 27, 93 N.E. 132 (1910); International Harvester Co. - v- Elfstrom, 101 Minn. 263, 112 N.W. 252 (1907).**Whenever carbon copies are involved, the approach to determine whether a document is a duplicate is to examine whether the writing was created simultaneously with the original. If the reproduction is complete, there is no practical reason why all products of the single act of writing the document and affixing the signature thereto should not be regarded as of equal value. This is because the same stroke produced the written text and both signatures. Any writing

created subsequent to the original are secondary evidence and are inadmissible. They can only be admitted if the original is available and can be produced. (See **Wharton Joanne, "Duplicate Originals and the Best Evidence Rule", Ohio State Law Journal,** Vol. 19 No. 3 (1958) 520-524).

147. On our part, we disagree with the contention that the documents tendered in evidence by the 3rd and 4th Respondents were hearsay. First, there is nothing on the record to show that the appellant objected to admissibility of these documents. Second, the 1st and 2nd appellants have through their submissions in this appeal confirmed that the documents originated from them. Third, the 1st and 2nd appellants having accepted in this appeal that the documents originated from them, the issue of authenticity of the documents is closed. Fourth, under ***Section 65 (2)*** and ***(3)*** of the **Evidence Act**, the documents tendered in evidence by the 3rd and 4th respondents were executed in several parts or in counterpart and they *prima facie* qualify to be primary documents. Finally, the documents are relevant and admissible pursuant to the provisions *of* ***Section 6***of the **Evidence Act** through the doctrine of *res gestae*. They are also relevant vide **Section 11** of the **Evidence Act** as being facts inconsistent with or affecting probability of other facts. The same documents are also relevant pursuant to **Section 15** of the **Evidence Act** being documents prepared in the course of business of IEBC. In our considered view, for the foregoing reasons, the documents tendered by the 3rd and 4th respondents were not only relevant but are not hearsay documents.

Preliminary Objection on Rules 8 (4) (b) and 12 (1) (b) of the Elections (Parliamentary and County elections) Petition Rules, 2017.

148. In ground 28 of the memorandum of appeal, the appellants contend that the trial court erred in law by ignoring the preliminary objection raised to dismiss the petition for failure to comply with the mandatory requirements of ***Rules 8 (4) (b)*** and ***12 (1) (b)***of the **Elections (Parliamentary and County elections) Petition Rules, 2017.**This ground of appeal is water under the bridge and it would be an exercise in futility for us to consider the same. In this matter, the election petition has been heard and determined by the trial court. This Court cannot make an order in vain. (See **Eric V. J. Makokha & Others -v- Lawrence Sagini & Others Civil Application No. Nai. 20 of 1994 (12/94 UR).** We are further persuaded by dicta in**Rosslyn Estate Ltd -v- Underword 22 EALR Page 196** where it was stated that a relief which a Court can grant is to be considered on the basis of the facts as they are at the date of judgment, not as they were at the date of the filing of the suit. Comparatively, in **Henry Kyarimpa -v- AG Uganda, EACJ Appeal No. 6 of 2014** it was held that a court cannot be engaged in a futile academic exercise. We are inclined not to consider this ground as it has been overtaken by events. We are guided by the Supreme Court dicta in **IEBC – v- Jane Cheperenger & 2 others, SC Petition No. 5 of 2016** where the court observed that it was constrained to make any order which would defeat a concluded process.

Did the trial court err in nullifying the election based on generalized findings?

149. In grounds 11, 12 and 13 of the memorandum of appeal, it is contended that the trial court erred in nullifying the Homa Bay gubernatorial election based on generalized allegations on alleged failure to sign some Form 37As by some presiding and deputy presiding officers without specifying the exact polling stations and how the alleged failures affected the results in violation of ***Section 83***of the **Elections Act.** That the judge erred in holding generally that there were several alterations in Form 37As without specifying the alterations and the exact polling stations and how the alleged alterations affected the results in violation of ***Section 83*** of the **Elections Act**. That the judge erred in law in holding generally that there were several alterations of the results in Form 37As without specifying the polling stations which he was referring to while at the same time ignoring the results of scrutiny and recount.

150. The trial court *in extenso* while considering the evidence relating to Forms 37As observed as follows:

> **"150. Ombogo produced Annexture marked "G0-2" in Vol. 4 of the Petitioners' bundle of documents and Annexture marked "G0-7" in the bundle marked Vol.7 to establish the variance in the said forms. He also deponed that out of eight (8) Forms 37B, only those from Kasipul, Homa-Bay town and Suba North were in the prescribed form. That, in some Forms 37B submitted at the County tallying centre, the figures varied significantly with the figures in Forms 37A issued to their agent. He relied on Annexture "G0-7" in Vol.7 of the bundles and Annextures marked "G0-1" and "G0-2" respectively in Vols. 2, 3 and 4 of the bundles to show the variation in figures between the said Forms 37B and Forms 37A.**
>
> **151. It was further deponed by Ombogo (PW13) that in some polling stations agents were not allowed to sign Forms 37A (Annexture marked "G0-6" in Vol.6 and "G0-9" in Vol.7) and in about 311 Forms 37A were not stamped with the first Respondent's stamp (Annexture "G0-6" in Vol.6 and Annexture "G0-13" in Vol.7). That about 299 Forms 37A issued by various presiding officers contained alterations which were not countersigned (Annexture marked "G0-6" in Vol.6 and Annexture marked "G0-9" in Vol. 7). That, about 95 Forms 37A submitted at the County tallying centre were not signed by presiding officers or deputies (Annexture "G0-12" in Vol.7) and that presiding officers or deputies did not sign Forms 37A (Annexture marked "G0-14" in Vol.7).**
>
> **152. Ombogo's evidence further indicated that the results submitted at the County tallying centre showed that in a number of polling stations in some of the altered Forms 37As votes were deducted from the first Petitioner and the same added to the third Respondent (Annexture marked "G0-10" in Vol.7). The tables in paragraph 33 of the affidavit demonstrates the fact in all the eight Constituencies.**
>
> **153. It is also indicated that in some polling stations, the figures in Forms 37B and Form 37C were different from those announced and entered in Forms 37A in that votes garnered by the first Petitioner were completely omitted in Forms 37B and 37C. The table in paragraph 34 of the affidavit establishes as much. That, in some polling stations, the number of voters who voted in the presidential election were more than those who voted in the impugned gubernatorial election. The table in paragraph 35 of the affidavit demonstrates the difference.**
>
> **154. It was further deponed by Ombogo (PW13) that in Sindo Main Beach Banda - Kaksingiri, West, Suba-South Constituency there are only two gazetted polling stations, yet the results transmitted indicated a third polling station - Sindo Main Beach - 3 which was non-existent and was not gazetted but its results were indicated in Form 37C used to declare the**

results at the County tallying centre (Annexture marked "G0-4" in Vol.4).

155. Ombogo (PW13) also deponed that the results announced showed that the votes cast for gubernatorial elections differed from votes cast for other elective petitions in the County. The table in paragraph 38 demonstrates as much.

All in all, the witness (PW13) readily stood by the contents of his affidavit and his testimony in cross-examination. The sum total of his evidence is a clear and terse statement that there was substantial non-compliance with the electoral laws by the first and second Respondents in the counting, tallying and declaration of the results in that the process was marred with substantial irregularities which affected the validity or credibility of the election and its outcome.

159. There were several alterations in the result Forms 37As and most were not countersigned despite the fact that the alterations were on figures or results. In some forms, no entries were recorded and instead blank forms were submitted to be used in the tallying process. There was rewriting and overwriting of the counterfoils in all the eight Constituencies and most did not tally with the originals.

160. Some forms were altered in ink and did not reflect the originals and some did not have visible or clearly visible entries. Some of the forms were photocopies. As for ballot boxes, some were broken and a considerable number were secured with unofficial seals.

All the foregoing irregularities and/or discrepancies were established with abundant credibility by the Petitioners through their witnesses, Osutwa (PW3), Jalango (PW4), Ondigo (PW5), Nyabwana (PW6) and Ombogo (PW13) as corroborated by the report of the deputy registrar dated 21st November 2017 on the access orders made by this court on 7th and 15th November 2017, as well as the report of the Petitioners' agents in the exercise filed herein on 21st December 2017.

151. Our reading of the paragraphs 151 to 159 of the trial court's judgment shows clearly that the specific Form 37As in issue were identified and are contained in annexures to **PW 13's** affidavit. Paragraphs 150, 151 and 154 of the judgment clearly specify the polling stations where irregularities in statutory forms were detected. The trial court refers to the various annexures in PW13's affidavit which in our view are incorporated and are an integral part of the trial court's judgment. The annexures which are incorporated in the trial court's judgment and which in detail specify the polling stations with irregularities are GO-2, GO–3, GO –4, GO–6, GO-9, GO-12, GO-13 and GO-14.

152. We do appreciate that the annexures are bulky and it is a question of style and we cannot fault the trial court for incorporating these annexures into his judgment by way of reference. We are satisfied that the trial court identified the Form 37As that had irregularities and the identified Form 37As are part of the record. This ground of appeal has no merit.

153. The appellants further contend that the trial judge erred to the extent that he did not state how the identified irregularities affected the result of the election in violation of ***Section 83*** of the **Elections Act**. We have analyzed the judgment of the trial court. We find that the judge did indicate how the identified irregularities affected the result of the election. The judge made express findings of fact that the irregularities were qualitative in nature and they affected the credibility of the process of tallying and declaration of the results. The trial court stated as follows:

"178. It was also credibly shown by the Petitioners that some of the Forms 37A were blank while others had no security features nor serial numbers. That, some ballot boxes were open or broken and most did not have the official I.E.B.C seals coloured green, blue or red with the letters *"I.E.B.C" inscribed on them. All these factors created serious doubt on whether the final result declared by the first and second Respondents in favour of the third/fourth Respondents was a true reflection of the will of the people of Homa-Bay County. More so, considering that the entire process of counting, tallying and declaring the results was seriously flawed.*

179. The irregularities occasioned by the first and second Respondents in the impugned gubernatorial election were of substantial degree and magnitude which would lead to a reasonable man to conclude that the election was not free and fair. It is utterly shocking that the Forms 37A exhibited herein by both the Petitioners and the Respondents contained significant errors and irregularities. The result contained therein differed, yet all the documents originated from the I.E.B.C, a fact undisputed by all parties. Each party is blaming the other for altering or forging their respective documents.

183. It is beyond peradventure that what *"broke the camel's back" in this matter is the existence of two sets of result forms originating from the first Respondent. In one set of results, the third Respondent emerged as the "winner" and in the other set, the first Petitioner emerged as "winner". This simply meant that the gubernatorial election in the County of Homa-Bay was indeterminate and that the entire process of counting, tallying and declaring the result as conducted by the first and second Respondents was a sham."*

154. In our considered view, at paragraphs 178, 179 and 183 of the judgment, the trial court repeatedly finds and holds that the irregularities affected the integrity and credibility of the results. The judge concluded that due to the established irregularities, the gubernatorial election in the County of Homa-Bay was indeterminate and that the entire process of counting, tallying and declaring the result as conducted by the first and second Respondents was a sham. We find the ground of appeal that the judge did not show how the irregularities affected the result has no merit. The determination by the trial court is qualitative in nature. The credibility and integrity of the declared results was found wanting.

Alleged Forgery of the documents tendered in evidence by the 3rd and 4th Respondents and evidentiary burden of proof.

155. An aspect relevant to the determination of this appeal and cross-appeal is the probative value of the documents tendered in evidence by the 3rd and 4threspondents. The appellants contend that the trial court erred in failing to find that these documents were forgeries and that the

IEBC had failed to prove that the Forms were forged. That the court erred in holding that the Forms were forgeries because IEBC did not provide the originals and yet going by the court orders of 7th and 15th November 2017, all the originals forms were accessed and a report thereto dated 23rd November 2017 was prepared by the Deputy Registrar and filed in court.

156. The trial court in considering the allegation of forgery of the documents tendered in evidence by the 3rd and 4th respondents expressed stated as follows:

> **"180. However, the Petitioners having discharged their legal burden in proving that the results documents in their possession and those in the possession of the Respondents originated from the first Respondent [I.E.B.C] contrary to the suggestion that their (Petitioners) documents came from elsewhere or through criminal conduct, the evidential burden regarding the forms and the results contained therein lay with the first and second Respondents but, it was never discharged. <u>They failed to prove that the Petitioners documents are forged. They never even availed the original documents to establish any suspicion of forgery.</u>**
>
> **181. None of the returning officers (DW1, 2, 3, 4 and 5) had any evidence of forgery other than merely stating that the documents were altered without identifying the culprit or culprits who may as well have been themselves or their own presiding officers at the polling stations……...<u>Not even one of them established that the Petitioners' documents were forged.</u>**
>
> **182. Such an attempt was made by Marilyn (DW11) despite the fact that the third/fourth Respondents had almost thirty (30) witnesses who deponed affidavits in support of their case. Needless to say that the attempt by Marilyn (DW11) was a flop for want of necessary qualification. She is not a qualified handwriting expert of document examiner. She only succeeded as a "data expert" in showing the variance in results between the different sets of documents produced by the Petitioners and the Respondents."**

157. In the cross-appeal, it was submitted that the gist of the 3rd and 4th respondents' petition before the trial court was that Form 37As had been altered. That allegation of alteration of statutory forms is a criminal offence pursuant to ***Section 13 (j)*** of the **Election Offences Act**. That the 3rd and 4th respondents based their petition on allegations of alterations and this being a criminal allegation, the standard of proof is beyond reasonable doubt. That the trial court failed to consider that the allegations of alteration were criminal in nature and both the burden and standard of proof lay with the 3rd and 4th respondents. That the 3rd and 4th respondents did not adduce any direct or circumstantial evidence to prove that any of the officers or agents of the 1st respondent altered any Form 37As. That the judge erred and shifted the burden to the 1st and 2nd respondents to disprove the allegations of alteration of Forms 37As.

158. In their submissions, the appellants as well as the 1st respondent rely on two items of evidence to demonstrate that the documents tendered by the 3rd and 4th respondents were forgeries. First, the Deputy Registrar's Report dated 21st November 2017 is cited wherein it is stated that all original statutory Forms prepared by IEBC were accessed by the court. The second item of evidence relied upon is the testimony of ***MarilynNamaleroJuma*** **(DW11).**

159. The trial court considered and discounted these two items and made findings at paragraphs 180 and 181 of its judgment.

160. On our part, we have examined the Deputy Registrar's Report dated 21st November 2017. The following is discernible from the report in relation to Form 37As:

a. In respect of Ndhiwa constituency, 185 forms were provided and all were carbon copies.

b. In respect to Kasipul constituencies, 133 forms were provided from which from? 4 polling stations the forms provided were copies.

c. In respect to Suba South Constituency one form 2 of 2 for Kikubi polling station was not provided.

161. The legal issue confronting this Court is whether we have jurisdiction to re-evaluate the entire evidence on record and compare the trial court's findings on forgery with the Deputy Registrar's Report. In **<u>Frederick Otieno Outa -v - Jared Odoyo Okello & 4 others</u> [2014] eKLR**, this Court evaluated the evidence on record and compared the same with the Deputy Registrar's Report. The Supreme Court in reversing this Court stated that the appellate Court had exceeded its jurisdiction and delved on matters of fact. In *extenso,* the Supreme Court expressed itself as follows:

> **"[89] The learned Judges of Appeal decided that they could examine and re-evaluate the evidence on record. They did so by examining and re-evaluating the witness account of the 1st respondent's witnesses PW7, PW10, PW13 and PW14 against the appellant's DW8 and DW9….**
>
> **[93] We cannot overemphasize the commonplace that the trial Court is alone the custodian of true knowledge of witnesses and their quirks, and can pronounce on issues of credibility. Short of an appraisal of witness account appearing as absurd, or decidedly irrational, it behoves the Court sitting on appeal to respect the trial Judge's appraisal of primary fact."**

162. We note that both in **<u>Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 others</u> [2014] eKLR** and **<u>Frederick Otieno Outa -v- Jared OdoyoOkello & 4 others</u> [2014] eKLR**, , the Supreme Court stressed that an appellate court can only reverse findings of fact by the trial court if the trial Court's 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.

163. Guided by the dicta that this Court can reverse findings of fact by the trial court if the conclusions are not supported by evidence, we have examined the record and established that the Deputy Registrar's Report dated 21st November 2017 did not address the issue of forgery of any document; the Report does not state whether the documents perused and accessed by the parties were the documents tendered in evidence by the 3rd and 4th respondents. We have appraised the testimony of (**DW11)**, ***Merylin NamaleroJuma***, at page 5274 of the Record. At the time of giving evidence, she was a Diploma holder undertaking a master's degree in data management. At page 5278 of the Record she testified that she had never undertaken a formal course as a handwriting expert. At page 5279 she testified that the documents she used in her analysis were provided by the appellants; that she never saw the originals. She received the copies from agents; she did not meet the agents. She did not procure the forms she analyzed. At page 5280 she testified that the documents presented to court for purposes of the petition were at variance; that she did a comparison of Form 37As from the appellants with documents from the 3rd and 4th respondents and found that the Forms from the 3rd and 4th respondents did not come from a bundle *(sic)*.

164. Our appraisal of the testimony of ***Merylin NamaleroJuma***, (**DW11)**, points to one clear and established fact - that she never saw any original document. She never compared documents submitted by IEBC with documents tendered in evidence by the 3rd and 4th respondents. She compared the appellants' documents with the 3rd and 4th respondents' documents. She never saw Form 37As produced by IEBC and used in the scrutiny and recount exercise. A document examiner cannot give a credible opinion when there are no original documents which form the basis of any comparison. **(DW11)** not having seen any original document, there is no cogent evidence supporting any of her conclusions. Accordingly, we agree with the finding of fact made by the trial court that the attempt by Marilyn (DW11) was a flop not only for want of necessary qualification but more importantly, she never saw an original document.

165. Having discounted the testimony of **(DW11),** we are convinced that the Deputy Registrar's Report cannot be a basis to claim that forgery was proved or disproved. The Deputy Registrar's mandate did not extend to preparing a Report to prove or disprove allegations of forgery of documents by any party. The appellants' contention that the Deputy Registrar's report proved that documents tendered in evidence by the 3rd and 4th respondents are forgeries has no merit.

166. Tied to the issue of forgery are the allegations of alteration of statutory Form 37As. We have agonized over this allegation. Which Form 37As were altered and by whom? Was it the 1st respondents' Form 37As or was it the 3rd and 4th respondents Form 37As? There is evidence on record that Forms 37As originated from the 1st respondent. There is evidence on record that carbon copies of the sextuplicate Form 37As were tendered in evidence. There is evidence on record that original Form 37As were produced and accessed by the trial court during the scrutiny exercise. There is evidence on record that the entries in some Form 37As produced by the 1st respondent and the 3rd and 4th respondents were different yet the Forms were meant to be original carbon copies. Although the trial court established that the evidence also reveals the differences in entries, it is not established which Forms were altered whether it was the 1st respondent's Forms or the 3rd and 4th respondents Forms. All that the record shows are that in some Forms the entries were different. In the absence of a finding of fact as to whose Form was altered, we find that the trial court did not err in failing to find that the 3rd and 4th respondents and PW 13 had committed an electoral offence. In any event, pursuant to **Section 87A of the Elections Act,** the trial court has no jurisdiction to make a determination that an election offence has been committed. The court can only make a recommendation that an electoral malpractice may have been committed and refer the matter to the Director of Public Prosecutions of further investigation.

ARE THE CONCLUSIONS BY THE TRIAL COURT SUPPORTED BY THE EVIDENCE ON RECORD?

167. We now consider the final issue pivotal to the outcome of this appeal. The appellants invoked the evidentiary and practical appellate jurisdiction of this court on matters of law. In exercise of the evidentiary jurisdiction, this Court can consider and evaluate the evidence on record to determine if the conclusions arrived at by the trial court is:

a. based on "no evidence" or

b. supported by established facts or evidence on record, or

c. "so perverse", or "so illegal", that no reasonable tribunal would arrive at the same.

168. We must first identify the conclusions of fact made by the trial court to determine if such conclusions are supported by the evidence on record or if they are so perverse that no reasonable tribunal can come to those conclusions. We have identified the following salient conclusions which are part of *the ratio-decidendi* of the trial court's judgment.

a. The trial court at paragraphs 179 and 180 of its judgment made a finding of fact that the documents tendered in evidence by the 3rd and 4th respondents originated from the 1st respondent.

b. The court at paragraph 150 of its judgment made a finding of fact that there were alterations in Form 37As and which alterations were not countersigned by the presiding officers. Is this finding of fact supported by the evidence on record?

c. The court at paragraph 150 of its judgment made a finding that some Form 37As produced by the IEBC did not have signatures of presiding officers. Is this finding supported by evidence?

d. At paragraph 150 of its judgment the court made a finding that some Form 37As produced by the IEBC did not have IEBC stamps. Is this finding supported by the evidence on record

e. The trial court at paragraph 160 of its judgment made a finding that some Form 37As produced by the IEBC were photocopies and not originals. Is this finding supported by the evidence on record?

f. The trial court made a finding at paragraph 153 of its judgment that entries and figures in Form 37 B and Form 37C differ from figures in Form 37As. Is this finding supported by the evidence on record?

g. The trial court made a finding at paragraph 159 of the judgment that some Form 37As produced by IEBC were blank. Is this finding supported by the evidence on record?

h. The trial court at paragraph 160 of its judgment made a finding that the Deputy Registrar's Report dated 21st November 2017 corroborates irregularities in Form37As. Is this finding supported by the evidence on record?

i. At paragraph 160 of its judgment, the trial court makes a finding of fact that some ballot boxes were broken and a considerable number were secured with unofficial seals. Is this finding supported by the evidence on record?

j. The trial judge at paragraph 183 of its judgment made a finding of fact that there were two sets of results. Is this finding supported by the evidence on record?

k. The trial court at paragraph 183 of the judgment made a finding that the Homa Bay gubernatorial election result was indeterminate and that the entire process of counting, tallying and declaring the result as conducted by the first and second respondents was a sham. Is this qualitative finding on the integrity and credibility of the declared results supported by the evidence on record?

l. Is there cogent evidence that the declared results were affected by the identified irregularities?

m. Is there evidence that the tallying process was flawed?

ANALYSIS OF FINDINGS OF FACT TO DETERMINE IF THEY ARE SUPPORTED BY EVIDENCE ON RECORD.

169. The trial court at paragraphs 179 and 180 of its judgment made a finding of fact that the documents tendered in evidence by the 3rd and 4th respondents originated from the 1st respondent. Is this finding supported by evidence? YES. What is the evidence on record? First, ***Mr. Kipruto Kibos Yegon*** **(DW2)** testified in cross-examination that the Forms on Volume 3 tendered in evidence by the 3rd and 4th respondent/ petitioners were obtained from the I.E.B.C. He further testified that at page 168 of the record of proceedings that the 3rd and 4th respondent/petitioners had all Form 37As from the IEBC. Second, ***Mr. Michael Ngeno Kosgei,*** (**DW5)**, the County Returning Officer at page 190 of the record of proceedings testified that the Forms in Volume 4 are from the IEBC but they were altered in content. Third and surprisingly, 1st and 2nd respondents in their written submissions in this appeal at paragraph 59 (i) thereof states that all Forms annexed in Volume 4 of the 3rd and 4th respondents' affidavits originated from the polling stations and have all the requisite features. Based on this evidence on record, we find that the trial court did not err in arriving at the conclusion that Form 37As tendered in evidence by the 3rd and 4th respondents originated from the IEBC.

170. The trial court at paragraphs 150 of its judgment made a finding of fact that there were differences in the results in Form 37As when comparing entries in the Forms tendered in evidence by the 1st and 2nd respondent (IEBC) and the Forms put in evidence by the 3rd and 4th respondents. Is this finding supported by evidence? YES. What is the evidence on record?

171. The excerpts of the testimony of ***Jacklyn Osiemo*** **(DW1)**, the Constituency Election Coordinator for IEBC, are relevant. She testified that the annexure by the petitioner contained in the bundle marked Vol. 4 at page 55 is from Keya Primary School Polling Station. It shows that ***Awiti*** got 069 votes, ***Magwanga*** 150 votes, ***Misana*** 0 vote and ***Onyango*** 0 vote. A similar copy in the IEBC bundles marked "JO" at page 92 shows that ***Awiti*** got 169 votes, ***Magwanga*** 50 votes, ***Misana*** 0 votes and ***Onyango*** 4 votes. The two forms differ in result save the votes for ***Misana***. The document in Vol. 4 is altered. In the IEBC Form (JO 1993) ***Awiti*** got 217 votes and ***Magwanga*** 94. She testified that in this polling station, the votes appeared to have been swapped in favour of ***Magwanga***. She further testified that Form 37A in Vol. 4 is altered and so is the annexure "GO 7" at page 4. At page 58 Vol. 4, the results therein do not differ from those indicated in annexure "GO 7" but they differ from the results captured in the IEBC Form at page 99 (JO). At page 76 of Vol. 4 is Miyinga Primary School in Wang Chieng Ward. IEBC copy at page 148 (JO) shows different results. It would appear results were altered in the Form in annexure G0& and the Vol. 4 bundle. She testified that the original forms are those annexed in IEBC bundle "JO". The documents in Vol. 4 and the analysis on annexure "GO 7" are not true. They are altered. There are variances in results between IEBC Forms and those produced by the petitioner.

172. Mr. Kipruto Kibos Yegon (DW2) the Constituency Returning Officer for Homa Bay Town Constituency testified as follows: "My original Form 37As and Form 37B are here with me. I produce them as Exhibit D.Ex.1. I did get all the Form 37A from the polling stations. I used them to complete Form 37B. The first polling station on the table is Oyunge Primary School. This Form 37A at page 111 of the document marker Vol. 4 for the petitioner is clearly legible. The petitioners' Form 37A is different from mine. I do not know where the petitioners got their Form 37As. At St. Patrick Makongeni Primary School, the form is reflected in my bundle "KY" at page 11 and at page 114 of the petitioners Vol. 4. Again there is a difference between the Forms. There is a consistent alteration of figures by 100. For Pundo Kolenya Primary School the result is indicated in my bundle "KY" at page 35 and in the petitioners bundle Vol. 4 at page 126. There is a consistent subtraction of 100." It is my opinion that the results provided by the petitioners are altered. At page 19 of the document marked "MK" is a Form 37B for Homa Bay Town Constituency. The whole bundle "MK" is our bundle. It contains Form 37B. The results are 19,095 for ***Awiti*** and 22, 774 for ***Magwanga***. The Form is my copy and I confirm the results. The original Form (D.Ex.1) shows that ***Awiti*** got 19,095 and ***Magwanga*** 23,180. This is different from my own copy. In my annexture "KY" at page 19 is a form for Asego Nursery School. The school is reflected on annexure "MK". The results reflected in both documents are different. The votes for ***Magwanga*** have been affected. Wiga Primay School is reflected at page 30 of "KY" and at page 19 "MK". The results in the two forms differ. 200 votes for ***Magwanga*** are lost. The original Form (D.Ex.1) also has different results in totality. At page 59 of "KY" is Magare Primary School. There is an alteration but without a counter signature. At page 26 of my "KY" there is an ink overwriting on the carbonation for Rodi Primary School. At page 64 of my "KY" is Rabour Primary School. It contains an overwriting on the carbonation." At page 84 of "KY" (Majiwa Primary School" has the name of the presiding officer but he did not sign. The deputy did not sign nor put his name. At page 76 of "KY" (Ogande

Primary School) is not signed by the Deputy Presiding Officer.

173. Mr. Ezekiel Juma Otieno, **(DW3)** the Returning Officer for Rangwe Constituency testified as follows in relevant excerpts of his testimony. "I hereby produce the original Forms 37As (D.Ex.2). The results in Vol. 4 at page 98 for Sinogo are given as ***Awiti 076*** votes, ***Magwanga 238***, ***Misiana*** O and ***Onyango*** O votes. The original Form 37As for ***Sinogo*** are ***Awiti*** 176 votes, ***Magwanga*** 138 votes, ***Misiana*** 0 votes and ***Onyango*** 0 votes. The Form 37A of the petitioner in Vol. 4 is altered. Our annexutre "EJ" at page 76 is an original carbon copy of Form 37A. The results are overwritten in order to make the carbon copy clearer. An overwriting is not an alteration as the results remain the same in all other Forms. Wikoteng Primary School Form 37A is overwritten. There is a variance of the total number of votes cast between our Form 37B and that annexed by the petitioner."

174. Shaolin Meiguran (DW4) was the Returning Officer for Suba South Constituency. She testified that her Form 37B shows an extra polling station for Sindo Main Beach. There were only two polling stations. That the inclusion of a third polling station was an error by the clerk. That annexure in Vol. 4 at page 205 contains results that have been altered. That the Form produced by the petitioner is not signed. The Form she produced is signed by the agents as well as the presiding officer and deputy presiding officer. That at page 203 in Vol. 4, the results for ***Mukanda*** as per IEBC Form is ***Awiti*** 94, ***Magwanga*** 125. The results annexed by the petitioner show a reduction of ***Awiti*** votes in favour of the petitioner. The Form is not signed by agents or presiding officers. At page 238 of Vol. 4, the petitioner has removed his votes in favour of the 3rd respondents. The petitioners form is not signed by the agents or presiding officers. At Gendo polling station there was alteration of results and these were countersigned. The Form 37A from Mwirenda polling station is overwritten to make it clear. It was signed by all agents.

175 Mr. Michael Ngeno Kosgei, **(DW5)** was the IEBC County Returning Officer for Homa Bay. He produced Form 37C which he used to declare the results showing ***Awiti*** 210,173 votes; ***Magwanga*** 189,060 votes; ***Misama*** 668 votes and Onyango 1,432 votes. He stated "that the declaration of results was made in public and was signed by one G. Ombogo for the petitioner. That we have looked at all the Forms produced by the petitioners as Vol. 4 and proved them to be altered. Our Forms are the correct Forms. That there were errors of transportation of results from Asego Nursery, Wiga Primary and Marindi Primary all in Homa Bay Town Constituency. That the results for these stations in Form 37As are not those reflected in Form 37B. That the Forms presented by the petitioners in Vol. 4 are altered Forms. They do not tally with all the results on our Forms. The variation in the Forms discloses an offence against the petitioners.

176. DW5 further testified that the analysis given by the petitioners in paragraph 40 of the Petition is not correct. It shows the 3rd respondent got 174,635 votes and the Petitioner got 224,863 votes. In the altered results, 343 polling stations were altered by the Petitioner who gave himself 49,218 votes to what was officially declared. For the 3rd respondent it was negative 21,345 votes, 238,978 votes were the total results for the Petitioner and 188,828 votes for the 3rd respondent. There are three different results given by the petitioner in his petition based on his analysis. We produce the 37 C (D.Ex.4). The Petitioner has three sets of results on which he bases the petition. On pg. 8,9,10 and 11 of the petition are results based on the Forms produced by the petitioner. They are based on alterations made by the petitioner. They all arise from alteration of Forms by the Petitioner. In total, the petitioner added himself 49,218 votes to file the petition. About 21,345 were stolen from the 3rd respondent. The inclusion of Sindo Beach No. 3 did not affect the ultimate result.

177. Mr. Francis Ogallo Kagoro (DW7) testified as the Chief Agent for the 1st appellant in this matter. He observed that at page 287 of the 3rd and 4th respondents' response to petition, the result Form for Migwar Primay School, Kochienge Primary School and Lwala Primary School were blank.

178. A very interesting comment made from the Bar throws a spin into authenticity of all documents produced by the IEBC. At page 197 of the record of proceedings, the following is recorded:

> "**Mr. Kanjama**: I apologize for coming late today. I was delayed by the flight. We had expected that the 1st and 2nd respondents would produce the original results from all eight constituencies. This has not been done. We want to know whether the IEBC will produce the original Forms.
>
> **Mr. Orego:** We have produced all the Forms required.
>
> **Mr. (Prof.) Ojienda:** The petitioner was supposed to bring all the documents they believe that would make a case out of it. If the petitioners have produced their documents which we think were altered, they must have the originals."

179. Our reading of the foregoing witnesses' testimony leads us to find that there is evidence on record to support the trial judge's finding of fact that there were differences in figures and results in Form 37As tendered by the 1st and 2nd respondent (IEBC) compared to entries in Form 37As put in evidence by the 3rd and 4th respondents.

180. The trial court at paragraph 150 of its judgment made a finding of fact that some Form 37As produced by the IEBC did not have signatures of presiding officers. Is this finding supported by evidence? YES. What is the evidence on record? The observations made by the petitioners' agents on the Report on Access Orders dated 7th and 15th November 2017 revealed that 67 original Form 37As were not signed by either the presiding officer or deputy presiding officer. (See page 4739 at 4740 item (v) of the Record). The Deputy Registrar in her report noted that this issue was outside the scope of the scrutiny exercise and it was for the trial court to determine. ***Mr. Kipruto Kibos Yegon*****(DW 2)** the Constituency Returning Officer for Homa Bay Town Constituency testified that at page 84 of annexure "KY" (Majiwa Primary School" has the name of the presiding officer but he did not sign. The deputy did not sign nor put his name. At page 76 of "KY" (Ogande Primary School) the Form is not signed by the Deputy Presiding Officer.

181. The requirement for signing of Forms is provided for in the Regulations. This requirement is couched in mandatory terms. Underpinning the importance of presiding officer's signature, the Supreme Court in ***Raila Amolo Case (2017)*** **(Supra)** had this to say at Para 377:

"…..why could a returning officer, or for that matter a presiding officer, fail or neglect to append his signature to a document whose contents, he/she has generated? Isn't the appending of a signature to a form bearing the tabulated results, the last solemn act of assurance to the voter by such officer, that he stands by the "numbers'' on that form.''

182. The burden to successfully challenge non-existence of a signature in form 37A and its authenticity if any, purely lies on the person alleging such omission. Regarding Deputy returning officers' signature, the same is not mandatory as long as the Presiding officer has signed. There is no law requiring both of them to sign concurrently. A deputy can sign in the absence of a presiding officer for good reason or both can sign if present hence no harm. In the instant case, other than the 3rd and 4th respondents Observation Report on Access Orders, it is not manifestly clear how the failure to sign the Forms would quantitatively affect the result of the election. Whereas there is evidence on record that some Form 37As did not have signatures of presiding officers, how absence of such signatures affect the results of the election must be demonstrated. The trial court did not consider this aspect and there is no specific finding how absence of some presiding officer's signature affected the result of the election. *Prima facie*, a statutory Form that is neither signed by the presiding officer nor deputy presiding officer cannot authenticate results of the election at the specific polling station.

183. The trial court at paragraph 150 of its judgment made a finding of fact that some Form 37As produced by the IEBC did not have IEBC stamps. Is this finding supported by the evidence on record? PW 13 testified that about **311** Form 37As were not stamped with IEBC stamp. The evidence on record shows that each of the sextuplicate Form 37As was to be stamped individually and the stamp need not be at the same place. The petitioners' observation report dated 20th December 2017 shows that only 8 of the original Form 37As did not have IEBC stamp. The testimony of **PW13** and the petitioner's observation report reveals contradictory evidence on the number of Form 37As that were not stamped. This apparent contradiction enjoined the trial court to evaluate and determine if failure to stamp the Forms affected the result.

184. In the persuasive case of **Kalla Jackson Musyoka -v- Independent Electoral &Boundaries; Commission (I.E.B.C) & another [2018] eKLR,** the trial court correctly held that the lack of stamp on the statutory forms did not create a problem as long as the forms had the requisite security features; that in principle, lack of stamp on the documents does not affect the results of the elections. In **Mark Nkonana Supeyo & another -v- Independent Electoral and Boundaries Commission & 2 others [2018] eKLR** the trial court correctly held that in the absence of proof of any prejudice suffered by failure to stamp the requisite form, the omission cannot *perse* stand on the way of the electorate to frustrate the will of the people especially when the result in the specific polling station including the votes garnered by each candidate is not in question. Likewise, in **IEBC -v- Stephen Mutinda Mule & 3 Others [2014] eKLR** it was held that there was no statutory requirement for stamping of Forms. In **Kakuta Maimai Hamisi -v- Peris Pesi Tobiko and others Nairobi High Court E.P. 5 of 2013 [2013] eKLR**, the trial court correctly stated:

"I am not trivializing the matter. Obviously, the stamp creates the aura of an *official* document. But it would be a fallacy to throw out a form for want of a stamp when the maker (the Presiding Officer or Deputy) have *signed* it." See generally Regulation 79; See also *IEBC & another -v- Stephen Mutinda Mule* & 3 others, Nairobi, Court of Appeal, Civil Appeal 219 of 2013[2013] eKLR.

185. On the issue of failure to stamp, we find that the trial court erred in failure to determine the specific number of Form 37As that were not stamped and further erred in not determining how failure to stamp Form 37As affected the result.

186. The trial court at paragraph 160 of its judgment made a finding of fact that some Form 37As produced by the IEBC were photocopies and not originals. Is this finding supported by the evidence on record? YES. The Deputy Registrar's Report dated 21st November 2017 reveals that a total of 50 Form 37As out of 1062 were photocopies. The photocopies were 46 from Suba North Constituency and 4 from Kasipul Constituency. This observation is in sync with the Petitioners Observation report dated 20th December 2017. We find that the trial court holding is supported by the evidence on record. However, we note that the trial court ought to have determined how production of photocopy Forms affected the result.

187. The trial court made a finding at paragraph 153 of its judgment that figures in Form 37 B and Form 37C differ from figures in Form 37A. Is this finding supported by the evidence on record? YES. The evidence on record is the testimony of **DW5*(Michael Ngeno Kosgei)*** who testified at page 188 of the record of proceedings that what is in Form 37As and 37Bs is what is in Form 37C except errors in transposition? For Asego Nursery, Wiga Primary and Marindi Primary. However, he observed that any rectification of the errors would still return the appellant as the winner of the election.

188. Taking into account the testimony of **(DW5)**, we find that the trial court's holding that the entry in Form 37C differs from entries in Form 37As is supported by the evidence on record. However, there is no specific finding on how the difference affects the result of the election.

189. The trial court made a finding at paragraph 159 of the judgment that some Form 37As produced by IEBC were blank. Is this finding supported by the evidence on record? YES. ***Mr. Francis Ogallo Kagoro* (DW7)** testified as the Chief Agent for the 1st appellant in this matter. He observed that at page 287 of the 3rd and 4th respondents' response to petition, the result Form for Migwar Primay School, Kochienge Primary School and Lwala Primary School were blank. The petitioners report shows that 8 original Form 37As were blank. We find that there is evidence on record to support the trial court's finding that some Form 37As were blank. However, there is no finding how the blank Forms affect the result of the election.

190. The trial court at paragraph 160 of its judgment made a finding that the Deputy Registrar's Report dated 21st November 2017 corroborates irregularities in Form 37As. At paragraph 160 of its judgment, the trial court makes a finding of fact that some ballot boxes were broken and a considerable number were secured with unofficial seals. Are these two findings supported by the evidence on record? We will consider this question in the analysis below.

191. A major contestation in this appeal is that the trial judge erred in holding and finding that the Deputy Registrar's Report dated 21st

November 2017 corroborated the findings of irregularities. We have read and analyzed the Report. The major observations by the Deputy Registrar as regards condition of the ballot boxes are as follows:

a. The court was availed 1063 ballot boxes.

b. In Rangwe Constituency – ballot boxes appeared intact though some had cracked lids. One ballot box had a cream yellow lid as opposed to all others that had blue lids.

c. In Ndhiwa Constituency – ballot boxes appeared intact though some had cracked lids. One ballot box had a cream/yellow lid as opposed to all others that had blue lids.

d. In Kasipul Constituency – all ballot boxes had green lids and the ballot box was in perfect condition.

e. In Kabondo Kasipul Constituency - all ballot boxes inspected.

f. In Karachounyo Constituency, Mbita Warehouse – a negligible number of boxes had broken seals or seals that had not been properly affixed and or were not intact. All ballot boxes were transparent and intact with blue lids and in perfect condition.

g. In Karachounyo Constituency, Magunga Warehouse –a negligible number of boxes had broken seals or seals that had not been properly affixed and or were not intact. All boxes were transparent, intact with blue lids and in perfect condition.

h. There were no obvious defects in all inspected ballot boxes that would lead to an irrefutable assumption that there was interference after sealing of the boxes after election.

i. Though some boxes had defects such as missing seals, cracking of leads or broken seals, none of the boxes apparently exposed contents or were in a state that could obviously permit interference with the contents.

192. On the issue of Form 37As, the Deputy Registrar's Report dated 21st November 2017 make the following findings:

a. The agents of the parties were given two box files that had Form 37As for scrutiny. The Deputy Registrar personally perused all copies and compared them with the ones availed by IEBC.

b. The Deputy Registrar's Report shows that **614** Original Forms 37As filled by pen were supplied. A total of **393** and carbon copies were also supplied and a total of **50** photocopies were supplied. The photocopies were 46 from Suba North and 4 from Kasipul making a total of 50. It is worth noting that in Suba North, 93 Original Forms 37As, no carbon copies and 46 photocopies were supplied. In Kasipul 94 Originals, 15 carbon copies and 4 photocopies were supplied for scrutiny.

c. As regards Forms 37B, the Deputy Registrar notes that the petitioner raised concern that some of the Form 37Bs had no security features.

d. The Deputy Registrar made an observation that some of the concerns raised by the petitioner were beyond the scope and mandate of scrutiny.

193. The Petitioner (3rd and 4th respondents) made the following observations ensuing from the scrutiny exercise. These observations are what the appellant calls the "Mumma & Kanjama Report" dated 20th December 2017:-

i. A total of 663 original Form 37As were availed.

ii. 8 original Form 37As were blank.

iii. 8 original Form 37As were not stamped.

iv. 67 original Form 37As were not signed by either the presiding officer or deputy presiding officer.

v. 112 original Form 37As had alterations on entries.

vi. 383 original Form 37As were carbon copies.12 original Form 37As agents did not sign.

vii. 50 original Forms 37As were photocopies.

194. We have examined and analyzed the trial courts findings in paragraph 160 of its judgment to determine if the court's findings *that some ballot boxes were broken and a considerable number were secured with unofficial seals* are corroborated by the Deputy Registrar's Report dated 21st November 2017. On the issue broken ballot boxes, we find that the trial courts' finding in paragraph 160 of the judgment is not corroborated by the Deputy Registrar's Report dated 21st November 2017. In the report, there is observation that the ballot boxes appeared intact though some had cracked lids. The Deputy Registrar's Report reveals that there is no evidence of interference with the contents of the ballot boxes. On the issue that there were unofficial IEBC seals on the ballot boxes, there is no evidence on record that the results of the

election were affected by the presence of unofficial seals, cracks in the lids of the ballot boxes or different colours of the lid of ballot boxes. The Deputy Registrar observes that there were a negligible number of boxes that had broken seals or seals that had not been properly affixed and or were not intact. The Report shows that there were no obvious defects in all inspected ballot boxes that would lead to an inference of interference with contents. In our view, whereas there is evidence of suspicion of interference or attempted interference with the contents of the ballot boxes, suspicion is not enough to vitiate an election.

195. The trial judge at paragraph 183 of its judgment made a finding of fact that there were two sets of results. Is this finding supported by the evidence on record? In our view, the trial court erred in law in holding that there were two sets of results. The law neither allows nor recognizes two sets of results. There can only be one result that can be challenged or impugned in an election petition. This is the officially declared result. The officially declared result is the result declared by the IEBC which is the only competent and lawful authority to declare results. To this extent, the trial court erred in law when it held that there were two sets of results. In this matter, the IEBC declared only one result for the Homa Bay gubernatorial election. The declared result was as follows:

1. Cyprian Awiti ……..…….. 210,173

2. Joseph Magwanga ……..…… 189,060

3. Tom Onyango ……..……. 1,432

4. Medo Misama ……..…… 668

196. Before the trial court, the petitioners (3rd and 4th Respondents) tendered in evidence what they claimed to be the **"true results"** of the election. According to their own tally, the "**true results"** were:

(1) Cyprian Awiti - 179,551 votes

(2) Joseph Oyugi Magwanga - 223,311 votes

(3) Miasma Medo - 668 votes

(4) Tom Otieno - 1432 votes

197. In our view, any result tabulated, tallied or tendered before the trial court by a party other than IEBC is not the official declared result and cannot be considered even remotely to be one set of election result. Electoral law does not recognize the concept of "true results". What the law recognizes is the declared result.

198. In this appeal, the contestation is between what the appellants and 1st respondent refer to as the "declared result" and what the 3rd and 4th Respondent refer to as the "true result." The evidentiary element in this appeal is which of "the two results" should an election court uphold? It is at this stage that we once again remind ourselves that the jurisdiction of this Court is confined to matters of law.

199. What is the evidence to support the trial court's finding that there were "two sets of results?" The trial judge correctly cited the case of **Obado -vs- Oyugi and Others SC Pet 4 of 2014**, where the Supreme Court stated that "the Constitution gives exclusive jurisdiction and mandate to the IEBC to hold election for all elective positions in the Country. The role cannot be transferred to other persons so that results generated by the Petitioners' campaign secretariat cannot be given undue consideration given that it lacked legal sanction under the election law." Further, the trial court correctly observed that the polling station is where the people cast their vote and it is where the vote is counted and the results declared at the polling station are final (see, **IEBC -v- Maina Kiai & Others [2014] eKLR**). The trial court properly appreciated that the Petitioners' case was centered on alleged irregularities which occurred mostly at the polling stations and the Constituencies tallying centres during the process of counting, tallying, collating, tabulating and declaring of the results. The court aptly stated that interference with the electoral process at any stage in any untoward manner such as manipulation, rigging or tampering with statutory forms would amount to a serious illegality and compromise the integrity of the entire process. The court correctly noted that ***Mr. Geoffrey Ombogo Makworo*** **(PW13)** was the key witness with regard to the irregularities in the statutory forms and the effect thereof on the final result and the credibility of the process leading to the result.

200. Of particular relevance to the quantitative integrity of the declared results, the trial court observed that ***Mr.Geoffrey Ombogo Makworo*** **(PW13)** also deponed that the results announced showed that the votes cast for gubernatorial elections differed from votes cast for other elective petitions in the County. That Mr. Ombogo's evidence further indicated that the results submitted at the County tallying centre showed that in a number of polling stations, in some of the altered Form 37A votes were deducted from the 3rd respondent and added to the appellant. *In extenso*, the trial court made findings of fact and determinations on the credibility of Mr. Ombogo as follows:

> **"155. …. All in all, the witness (PW13) readily stood by the contents of his affidavit and his testimony in cross-examination. The sum total of his evidence is a clear and terse statement that there was substantial non-compliance with the electoral laws by the first and second Respondents in the counting, tallying and declaration of the results in that the process was marred with substantial irregularities which affected the validity or credibility of the election and its outcome."**

201. In the instant appeal, the appellants urge us to re-evaluate the evidence of Mr. Ombogo and determine as a matter of law whether the trial court erred in relying on Mr. Ombogo's testimony. We have been urged to determine whether the trial court erred in ignoring the statutory forms tendered in evidence by the IEBC. We are further urged to determine if the court erred in disregarding the results officially declared by the IEBC and instead adopted the self-declared "true results" of the 3rd and 4th respondents. The appellants' further urge us to

find and hold that the trial court erred in ignoring the Deputy Registrar Scrutiny and Recount Report dated 24th January 2018 that showed quantitatively, the 1st appellant had won the gubernatorial elections and his vote tally upon recount had increased by 14 votes. In effect, the appellants are urging this Court to re-evaluate the evidence on record, make its own observations and arrive at independent conclusions and if the trial court's conclusions are not based on evidence on record, this Court should set aside the judgment of the trial court.

202. Do we have jurisdiction to do what the appellants have urged us to do? We note that at paragraph 155 of its judgment, the trial court observed that "all in all, the witness **(PW13)** readily stood by the contents of his affidavit and his testimony in cross-examination." This is a finding on credibility of Mr.***Geoffrey Ombogo Makworo*** **(PW13)** and the probative value of his testimony.

203. In **Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 others [2014] eKLR,** the Supreme Court expressed that a question to be one of law, the same must not involve an examination of the probative value of the evidence presented by the litigants or any of them and 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.*

204. As to whether we can re-evaluate the witnesses' testimony and scrutinize the Deputy Registrar's Report, we are compelled by the doctrine of precedent to cite and rely on the case of **ZachariaOkoth Obado -v- Edward Akong'o Oyugi & 2 others [2014] eKLR,** where the Supreme Court in its judgement extensively stated:

> **"*[104]* Counsel for the appellant contended that the Court of Appeal delved into questions of fact by relying on the report of the Deputy Registrar prepared after the re-tally, to find that *"it was difficult... [outright] [to] determine the victor."* He urged that the appellate Court wrongly nullified the gubernatorial election for Migori County, after making conclusions from disputed facts *raised for the first time by the Judges themselves, in their Judgement.***
>
> ***[108]* The Court of Appeal observed that the issues summarized for determination were issues of law. The Court restated the findings of the High Court on the evidence adduced before it, and took note of the content of the report of the Deputy Registrar on the re-tally conducted pursuant to the order of the trial Judge. The Court of Appeal, however (pages 45-46 of its Judgement), came to make the observation that the election "was conducted in a manner that [made it] difficult to determine the winner [outright].…"**
>
> **[109] The *Court of Appeal reinforced the foregoing statement by its observation that the irregularities vitiated the election:***
>
> > **"Due to widespread errors of tallying, transposition and entry of data … in many instances, votes in Form 35 were different from those in Form 36; votes of candidates were interchanged in some cases, while votes were either understated or overstated. … figures publicly announced were recorded into separate Form 36 as distinct figures; … there were differences between the manually tabulated figures and those generated electronically; original votes record in respect of three polling stations (Kosodo, Siala and Marera Primary Schools) were altered by hand in such a way that the original recorded votes could not be ascertained; … although Nyamaharaga ACK Nursery School had only one stream an additional non-existent stream II was created and votes which the candidates did not deserve awarded to them; … the examination and re-tallying by the Deputy Registrar revealed irregularities and mistakes in all the eight constituencies in Migori County and some 5,226 votes questioned…".**
>
> ***[110]* In making these observations, as we find, the appellate Court exceeded its mandate, by its conclusions of fact, thus contravening Section 85A of the Elections Act. The Court of Appeal accorded no deference to the High Court's findings on facts; and the claims made by the petitioner were on the accuracy of the tallying of the results, rather than on what occurred at the polling station, *with the exception of two polling stations, namely, Kengariso Primary School, and Ombo Primary School. On this matter, the findings of the trial Court are clearly recorded, as follows:***
>
> > **"The pleadings and evidence only pointed out to problems in those 2 stations. Issues arising in other polling stations were only raised in the submission and the Respondents were not therefore in a position to call evidence on those. Many of the issues raised touched on tallying of results, not what transpired at the polling stations. If the Petitioner wanted he could have asked for a scrutiny and recount of all the votes. …The scrutiny and recount ordered by this Court was never intended to be a fishing expedition and any effort to treat it as such must be resisted."**
>
> **[111] The Court of Appeal overlooked these vital observations of the trial Court, and made findings of fact regarding the Kosodo, Siala and Marera Primary School polling stations, as well as Nyamaharaga ACK Nursery School which had not been pleaded as an item of dispute. The Court of Appeal, as we hold, ought not to have overstepped the evidentiary bounds marked out by the trial Court, whether on the basis of pleaded or unpleaded issues. By making findings regarding irregularities in those polling stations, which the trial Judge discounted on the ground that the petitioner had not pleaded them – and thus denying the respondents the right of reply – the Court of Appeal made plain findings of fact, and in this way misdirected itself. Parties, as is well recognized, are bound by their pleadings. The Court of Appeal also erred, with much respect, by failing to restrict their observations to the limit of the findings of fact by the High Court; the appellate Court extended the scope of such observations – avowing that the irregularities appeared to have been widespread, and of a greater magnitude than was observed by the High Court.**
>
> ***[112] The position is well illustrated in the appellate Court's avowal that "figures publicly announced were recorded in two separate Form 36 as distinct figures". This creates the impression that the irregularity in question was rampant, during the entire election process; yet the High Court found that such anomaly only related to Rongo Constituency – one of the eight Constituencies of the County. The Court of Appeal, relying on the report of the Deputy Registrar, deduced a figure of 5,226 votes, which it apprehended came into question after re-tally was conducted. This, with respect, would be a determination of primary fact by the Court of Appeal, in contravention of Section 85A of the Elections Act. The Court of Appeal misdirected itself,***

in basing its decision to annul the election upon its own findings of fact. (Emphasis supplied)

205. In **Frederick Otieno Outa -v - Jared Odoyo Okello & 4 others [2014] eKLR**, the following excerpts are from the judgment of the Supreme Court:

> **"[89] The learned Judges of Appeal decided that they could examine and re-evaluate the *evidence on record*. They did so by examining and re-evaluating the *witness account of the 1st respondent's witnesses PW7, PW10, PW13 and PW14 against the appellant's DW8 and DW9.* Paragraph 24 of the Judgment is instructive, with regard to the complaint of bribery to voters:**
>
> **"Having re-evaluated this evidence and counsel's rival submission on this complaint,we find that the learned Judge had no basis for disbelieving the evidence of PW7, PW10, PW13 and PW14 and instead preferring that of DW8 and DW9. This is because DW8 and DW9 were members of the Nyando Constituency Development Fund Committee which was accused of having used CDF money to assist the 3rd respondent's supporter in the nomination to contest the Nyando Parliamentary seat and had campaigned for him. The two therefore had every reason to lie, first and foremost to cover themselves and their friend and benefactor, the 3rd respondent" [emphasis supplied].**
>
> **[90] This conclusion by the Court of Appeal, with much respect, is disturbing. It is disturbing because the learned Judges of Appeal dislodged the *trial Judge's finding on the credibility of one set of witnesses*, a matter of fact that they were precluded from engaging in unless it could be shown that the trial Judge *had no evidential basis* for such a conclusion, or made a conclusion *unsupported by the evidence on record*, or that the conclusion was *perverse or illegal*.**
>
> **[91] The issue of credibility or implausibility of witness testimony is a *question of fact* and was not open to the Court of Appeal to consider….**
>
> **[93] We cannot overemphasize the commonplace that the trial Court is alone the custodian of true knowledge of witnesses and their quirks, and can pronounce on issues of credibility. *Short of an appraisal of witness account appearing as absurd, or decidedly irrational, it behoves the Court sitting on appeal to respect the trial Judge's appraisal of primary fact.***
>
> **[94]The Court of Appeal's conclusion that the appellant's witnesses (DW8 and DW9) had "all the reasons to lie," on grounds of friendship and beneficial relationships with the appellant, with respect, not only departs from the foregoing principle, but errs by constructing the scaffolding of an important decision upon mere suppositions of fact, instead of the evidentiary fact professionally arrived at by the trial Court. We hold such a position to have been misdirection, under the terms of Section 85A of the Elections Act."**

206. Guided and bound by the Supreme Court dicta in **Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 others [2014] eKLR**; **Frederick Otieno Outa -v - Jared Odoyo Okello & 4 others [2014] eKLR**, and **Zacharia Okoth Obado -v- Edward Akong'o Oyugi & 2 others [2014] eKLR**, we are constrained not to disturb the findings of fact by the trial court on the credibility of PW 13. We are fortified in our decision and follow the case of ***Hahn -v- Singh (1985) KLR 716,*** *where it was held* that the appellate Court will hardly interfere with the conclusions made by a trial Court after weighing the credibility of the witnesses in cases where there is a conflict of primary facts between witnesses and where the credibility of the witnesses is crucial.

207. In the instant case, there is conflict of primary facts as ascertained by the trial court as follows at paragraph 179 of its judgment:

> **"179. The irregularities occasioned by the first and second Respondents in the impugned gubernatorial election were of substantial degree and magnitude which would lead to a reasonable man to conclude that the election was not free and fair. It is utterly shocking that the Forms 37A exhibited herein by both the Petitioners and the Respondents contained significant errors and irregularities. The result contained therein differed, yet all the documents originated from the I.E.B.C, a fact undisputed by all parties. Each party is blaming the other for altering or forging their respective documents."**

208. The trial court at paragraph 183 of the judgment made a finding that the Homa Bay gubernatorial election result was indeterminate and that the entire process of counting, tallying and declaring the result as conducted by the first and second Respondents was a sham. Is this qualitative finding on the integrity and credibility of the declared results supported by the evidence on record? Is there cogent evidence that the declared results were affected by the identified irregularities? Is there evidence that the tallying process was flawed? The answers to these questions are contestations of primary facts and we have no jurisdiction to delve into these issues and interfere with the trial court's findings of fact. We hereby find that all grounds in the memorandum of appeal and cross-appeal inviting us to re-evaluate the evidence on record and determine credibility of witnesses have no merit as they are outside the jurisdiction of this Court. To enable us make a final determination on the contestations in this appeal, it is imperative that we consider the probative value of comments and observations made by counsel or parties in relation to a judicial scrutiny report.

Probative value of observations made by counsel in relation to Scrutiny Reports.

209. Invariably, when a court makes an order for scrutiny or recount, the exercise is conducted by the Deputy Registrar in the presence of counsel or agent for the parties. Upon the Deputy Registrar filing a Report on the exercise, parties have opportunity to make their submissions or comments on the same. A legal question that arises is the probative value of submissions and comments by counsel on the Deputy Registrar's Report. Are such observations and submissions items of evidence?

210. In the instant case, at page 31 of the Record of Proceedings, the trial court allowed all parties to file further affidavits to address the issues emerging from the scrutiny and recount exercise. The appellants as well as the 1st and 2nd respondents did not file any further

affidavits on the emerging issues. The 3rd and 4th respondents filed their observation reports which the appellant has christened the "Kanjama & Mumma Reports." The trial court in allowing the parties to file their observations stated that such observations may be considered as part of the petition. What is the probative value of the observations filed by any party?

211. Strictly speaking, the observations and reports filed by parties are not evidence *per se.* The author has not been subjected to cross-examination and the observations are individual opinions of the author. A trial court is not bound by the report or observations made by counsel or agents who take part in the scrutiny exercise. However, it is worth noting that their observations are factual impressions made in the course of scrutiny. Though such observations do not bind the trial court, they ought to be considered and weighted against all other evidence on record. The trial court is obligated to give reasons why the observation report is accepted or rejected. At best, the observation reports have a corroborative probative value. By itself, the observations by counsel or parties do not prove or disprove a fact in issue because the veracity of the observations has not been tested in cross-examination. If observations made by parties or counsel are in conflict, it is the duty of the trial court to make findings and conclusions of fact arising from the scrutiny exercise.

Whether 3rd and 4th Respondents are entitled to relief to be declared winner of the Homa-Bay gubernatorial election held on 8th August 2017.

212. One of the prayers made by the 3rd and 4th Respondents is for a declaration that they were duly elected Governor and Deputy Governor for Homa Bay County respectively. ***Section 80(4)***of the **Elections Act** provides:

> **"(4) An election court may by order direct the Commission to issue a certificate of election to a President, a member of Parliament or a member of a county assembly if:**
>
> **(a) Upon recount of the ballots cast, the winner is apparent; and**
>
> **(b) That winner is found not to have committed an election offence."**

213. In **James Omingo Magara -v- Manson Oyongo Nyamweya & 2 others – Civil Appeal No.8 of 2010** and in **Richard Kalembe Ndile & another v Patrick Musimba Mweu & 2 others [2013]eKLR**, despite a recount establishing the petitioner to have garnered the highest number of votes, they were not declared duly elected. In these cases, the trial court was of the view that a scrutiny and recount was not an end in themselves. This Court in **John Oroo Oyioka -v- IEBC & Others**, held that even where the criteria in the ***Section 80 (4)*** are met, a winner cannot be declared if the impugned election was fundamentally flawed.

214. In the instant case, there are good reasons for this Court not to declare the 3rd and 4th Respondents as duly elected. First, the scrutiny and recount exercise conducted by the Deputy Registrar did not show the 3rd and 4th respondents as apparent winners of the election. Second, the 3rd and 4th respondents urge us to declare them winners based on "results" presented to this Court by their own witness, **(PW13)** ***Mr. Geoffery Ombogo***. In our considered view, PW 13 or any other person except the IEBC, cannot provide and produce any electoral results that an election court can use to declare any person a returned candidate. Third, we are persuaded by the dictum in **John Oroo Oyioka -v- IEBC & Others**, where it was stated that even where the criteria in the ***Section 80 (4)*** are met, a winner cannot be declared if the impugned election was fundamentally flawed. In this appeal the trial court made findings of fact (that we have no jurisdiction to delve into) that there are other flaws and irregularities disclosed in the tallying process that make the declared results indeterminate as to who the winner is. For these reasons, we decline to grant an order declaring the 3rd and 4th respondents as having been duly elected in the Homa Bay gubernatorial elections.

Whether the appellants are entitled to a declaration that the 3rd and 4th Respondents and PW13 (Gordon Ombogo) committed an electoral offence.

215. One of the prayers in the memorandum of appeal and in cross-appeal is for this Court to declare that the 3rd and 4th respondents and **(PW13)** committed electoral offences under ***Sections 13 (j)*** and ***19*** of **the Election Offences Act**.

216. Section 87 of the Elections Act provides that:

> **"87 (1) An election court may, at the conclusion of the hearing of a petition, in addition to any other orders, make a determination on whether an electoral malpractice of a criminal nature may have occurred.**
>
> **(2) Where the election court determines that an electoral malpractice of a criminal nature may have occurred, the court shall direct that the order be transmitted to the Director of Public Prosecutions.**
>
> **(3) Upon receipt of the order under subsection (2), the Director of Public Prosecutions shall — (a) direct an investigation to be carried out by such State agency as it considers appropriate; and (b) based on the outcome of the investigations, commence prosecution or close the matter."**

217. Pursuant to ***Section 87*** of the **Elections Act**, the jurisdiction of an election court is to determine if an electoral malpractice may have been committed. An election court has no jurisdiction to determine if an election offence has been committed. It follows that an appellate court likewise has no jurisdiction to determine and make a finding or declaration that an election offence has been committed. Accordingly, we have no jurisdiction to grant the prayer sought by the appellants and 1st and 2nd respondents.

Costs at the High Court.

218. The appellants in ground 30 of the memorandum of appeal contend that the trial judge erred in law and fact by subjecting the appellants to paying excessive costs. The 1st and 2nd respondents in cross-appeal also urge that the trial court awarded excessive costs. The trial court awarded costs as follows:

> **"86. In sum, this Petition is allowed with orders that a fresh gubernatorial election for the County of Homa-Bay be held and that the Petitioners cost pegged at Kshs.6Million subject to taxation be borne by the first Respondent in the sum of kshs.4Million and the third/fourth Respondents in the sum of Kshs.2 Million.**

219. In this matter, we note that the capping of costs at Ksh. 6 million is simply a maximum. The costs are subject to taxation and it may well be that the costs will be taxed at less than the maximum of Ksh. 6 million. We have considered other cases where the High Court has capped costs. In **Ismail Suleman and Others -v- Returning Officer, Isiolo County and Others Meru EP No. 2 of 2011 (Unreported)** and in **Mohamed Ali Mursal -v- Saadia Mohamed & 2 others [2013] eKLR,** the amount was capped at Ksh. 2 million and Ksh. 1 million for each respondent respectively. Both cases involved the gubernatorial elections. In **Ferdinard Ndungu Waititu -v- Independent Electoral &Boundaries Commission (IEBC) & 8 others [2013] eKLR** the court capped the total costs at Kshs.5 million, capping the costs payable to the 1st to 3rd respondents jointly at Kshs. 2,500,000/= and to both the 4th and 5th respondents jointly at Kshs. 2,500,000/=. This Court in**Martha Wangari Karua -v- Independent Electoral & Boundaries Commission & 3 others [2018] eKLR**, capped costs for gubernatorial elections at Ksh. 2 million. We observe that this matter had not gone to full hearing on the merits.

220. We are cognizant that no two cases are similar and there is no one straight jacket figure of costs to be awarded in gubernatorial elections or any elections for that matter. Each case is to be looked at individually. However, having examined comparative judicial decisions emanating from the 2013 and 2017 election petitions, it is our view that the capping of total costs at Ksh. 6,000,000/= by the trial court is on the excessive side. We note that the trial court awarded costs against the appellants in the sum of Ksh. 2 million. This sum compares favourably with costs awarded at the High Court in other gubernatorial election petitions. For this reason, the contention that the costs awarded against the appellants are excessive has no merit.

221. Costs awarded against the 1st respondent is Ksh. 4 million. Compared to the total costs awarded in other gubernatorial elections, this sum is on the higher side and we reduce it to Ksh. 3 million. We order that costs at the High Court be and are hereby capped as follows:

> **a. The appellants shall pay costs at the High Court to the 3rd and 4th respondents herein and the cost is capped at Ksh. 2 million as ordered by the trial court.**
>
> **b. The 1st Respondent shall pay costs to the 3rd and 4th respondents at the High Court and the costs is capped at the sum of Ksh. 3 (Three) million only.**
>
> **c. For avoidance of doubt, the total costs awarded to the 3rd and 4th Respondent at the High Court be and is hereby reduced from Ksh. 6 million to Ksh. 5 million (Five million only).**

222. No order as to costs at the High Court and in this appeal is made against the 2nd respondent because of employer-employee relationship with the 1st respondent.

223. Finally, subject to the order on costs, we are convinced that this appeal and cross-appeal have no merit.

224. The final orders of this Court are:

> **a. Subject to the order on costs, the appeal and cross-appeal by the appellants and the 1st and 2nd respondents respectively have no merit and are hereby dismissed.**
>
> **b. The appeal on costs is dismissed and the cross-appeal on costs is allowed.**
>
> **c. Subject to the variation on order for costs made here above, the judgment delivered on 20th February 2018 in Homa-Bay High Court Election Petition No 1 of 2017 be and is hereby confirmed and upheld in its entirety.**

Dated and delivered at Kisumu this 19th 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