IN THE COURT OF APPEAL

AT KISUMU

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

ELECTION PETITION APPEAL NO. 7 OF 2018)

BETWEEN

HON. SILVERSE LISAMULA ANAMI.....1ST APPELLANT

ADRIAN MAMBILI MEJA.....INTERESTED PARTY

AND

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

HENRY BAHATI LUMITI.....2ND RESPONDENT

JUSTUS GESITO MUGALI M'MBAYA.....3RD RESPONDENT

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

(Njagi, J.) dated 19th February, 2018,

in

Election Petition. No. 1 of 2017)

****

JUDGMENT OF THE COURT

On 8th August, 2017, Kenya held its general elections. Amongst the positions to vie for was membership of National Assembly for Shinyalu Constituency. There were 7 candidates competing for this position. The poll outcome was as follows:

1. Justus Gesito Mugali M'Mbaya - 20,572
2. Silverse Lisamula Anami - 16,402
3. Adrian Mambili Meja - 9,813
4. Patrick Kamuneko Chungani - 2,299
5. George Muteshi Muruli - 1,101
6. Babetuu Inyamah Amutavy - 904
7. Richard Nahonzo Muchesia - 382

The appellant, **SILVERSE LISAMULA ANAMI**, was dissatisfied with the poll outcome. He filed an Election Petition dated 4th September, 2017 at the High Court of Kenya at Kakamega. The **INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (IEBC), HENRY BAHATI LUMITI** and **JUSTUS GESITO** (herein the 1st, 2nd and 3rd respondents respectively), were the 1st, 2nd & 3rd respondents respectively in the petition. The hearing of the petition was conducted by Njagi, J. who in a judgment dated 19th February, 2018 dismissed the petition. On 23rd February, 2018 the appellant filed a Notice of Appeal thus paving the way for the appeal before us. In the memorandum of appeal dated 16th March, 2018 the appellant listed 10 grounds of appeal. In an abridged version, the learned judge was faulted for:-

1. Allowing the filing of fresh documents by the 1st respondent after the appellant had closed his case.

2. Dismissing the appellant's application for scrutiny.

3. Finding that Justus Kizito Mugali who was nominated by the Orange Democratic Movement (ODM) was one and the same person as Justus Gesito Mugali M'Mbaya.

4. Finding, *suo moto*, that ODM not being a party to the election petition filed by the appellant would be prejudiced if it was to consider the issue of whether the 3rd appellant was validly nominated by ODM.

5. In failing to find that election is a process and that the trial court had mandate to revisit the issue of the 3rd respondent's nomination inspite of the fact that it had been dealt with by the 1st respondent.

6. For failing to distinguish party nominations and the process under which the Returning Officer receives nomination papers.

7. Misapprehension of the law on bribery in election petitions.

8. Failing to find that unsigned forms do not carry valid results.

9. In failing to find that irregularities in an election process run contrary to the Constitution and have to be considered, irrespective of whether the irregularities arepleaded or not.

10. Exhibiting bias against the appellant.

On 9th May, 2018 the appeal came before us for plenary hearing. Learned counsel, **Mr. Lubulellah** and **Ms. Ngeresa** appeared for the appellant, learned counsel, **Mr. Donex Juma** and **Edwin Kubebea** appeared for the 1st and 2nd respondents, learned counsel **Dr. Ken Nyaundi** appeared for the 3rd respondent and Ms. Ngeresa held brief for **Mr. Khamati** for the interested party, **Adrian Mambili Meja.** A preliminary issue as to the appropriateness of the interested party in these proceedings was argued by respective counsel. There was no much contestation as regards the inappropriateness of the interested party being included in this appeal. Subsequently the court directed that the name of the interested party and his submissions filed on his behalf on the day of the hearing (9th May, 2018) be expunged from the record**.**

On behalf of appellant and whilst relying on the appellant's submissions filed on 2nd May, 2018, Mr. Lubullelah urged us to find that there is no registered voter in Shinyalu Constituency with the name **Justus Kizito Mugali** that the ODM nomination certificate was issued to **Justus Kizito Mugali** who is a different person from **Justus Gesito Mugali M'mbaya.** Further, that the Political Parties Disputes Tribunal **(PPDT)** had vide its order of 10th May, 2017 directed that fresh nominations be conducted but that this order was disobeyed as no nominations took place; that since the nomination certificate bore a different name from that of the 3rd respondent, the returning officer erred in accepting that the two names referred to one and the same person on the basis of an affidavit, which in any event was not tendered in evidence during the hearing of the petition. Further, that the Election Court has wide powers to enquire into the validity of a nomination of a candidate as an election court cannot overlook an invalid nomination. Counsel cited the decisions of ***Jared Odoyo Okello vs IEBC & 3 Others [2013] eKLR*** and ***Alphonse Mulandi Welandi Welile & Another vs Mutua Kilonzo Junior & 2 Others [2013] eKLR*** that favour the proposition that an election court has no jurisdiction to entertain a nomination dispute. He contrasted these with the decision of ***Ahmed Abdullahi Mohamed & Another vs Hon. Mohamed Abdi Mohamed & 2 Others NBI Election Petition No. 1 of 2017*** which favours the position that **"…an election court has jurisdiction to audit the entire electoral process as Article 88(4) does not preclude an election court from determining whether a person was validly nominated and elected.**" He urged us to find that an election is a process that goes beyond the Dispute Resolution Committee (DRC) of the 1st respondent and/or the PPDT; that the appellant was not a party in DRC's Complaint No. 155 of 2017 and thus he cannot be denied his right to question the decision of the DRC in an election court. Counsel cited the Supreme Court decision in ***Advisory Opinion No. 2 of 2012***, ***In the matter of Gender Representation in the National Assembly vs Senate [2012] eKLR*** wherein the Supreme Court acknowledged that an election is not an event but a process. The learned judge was faulted for *suo moto* introducing the issue of non-joinder of ODM in the proceedings in coming to the conclusion that it cannot delve into the complaint as to whether the 3rd respondent ought not to have been issued with a nomination certificate as ODM was not a party to the proceedings. According to counsel, the *suo moto* introduction of the issue of non-joinder of ODM as a party in the proceedings demonstrated bias against the appellant.

In urging grounds 7 & 10, Mr. Lubulellah submitted that the trial judge erred in coming to the conclusion that the appellant had not proved that the 3rd respondent bribed voters as there was overwhelming evidence to that effect. Counsel faulted the trial Judge for allowing himself to be persuaded by the holding in the Ugandan Case of ***Presidential Election Petition No. 1 of 2001, RTD. Col Dr. Kizza Besigye vs Yoweri Kaguta Museveni & Electoral Commission*** where Katurebe, JSC held.

"***It is therefore not enough for a petitioner or anyperson to merely allege that agents gave money to voters; a high degree of***

specificity is required; the agent must be named; the receiver of the money must be named and he/she must be a voter. The purpose of this money is to influence this voter."

Counsel distinguished the Ugandan decision on the basis that the Ugandan Constitution is dissimilar to the Kenyan one, and besides, he contended, the above decision was rendered within the context of a dictatorial democracy in Uganda. It was counsel's view that the trial Judge set an unattainable standard of proof in bribery allegations; that the 3rd respondent's alibi was dislodged by the appellant and that the 3rd respondent's statements on bribery were mere denials. The trial judge was further faulted in finding that failure to sign form 35As did not impact the outcome of the poll on the basis that the irregularity was not widespread.

Finally, the trial Judge was faulted for allowing the 1st respondent to file fresh election forms after the appellant and his witnesses had testified under the guise that they were replacing illegible documents with legible forms following an oral application contrary to ***rule 15 (2)*** of the Election (Parliamentary and County Elections) Petition Rules 2017 which provides as follows:-

"***An election court shall not allow any interlocutory applications to be made on conclusion of the pre-trial conference, if the interlocutory application could have by its nature been brought before the commencement of the hearing of petition***."

In opposing the appeal, **Mr. Juma** on behalf of 1st and the 2nd respondents, relied on their submissions dated 8th May, 2018 and filed on the same day. He contended that on 27th November, 2017 (before commencement of the trial) he undertook to file clearer copies of form 35As following the appellant's complaint that:-

"***I shall further be asking this court that the 2nd respondent be compelled to produce Form 35A for the afore going polling station he either deliberately or knowingly omitted and/or copies provided were not legible."*** *(Emphasis ours)*

He contended that on 30th November, 2017 he made an oral application and sought leave of the court to file clearer copies of form 35A. His application was opposed by the appellant. However, in a ruling delivered on 5th December, 2017 the court allowed the 1st and 2nd respondents to file the clearer copies. On the unsigned form 35As counsel conceded that there were only 4 forms from a total of 144 forms 35Asthat had not been signed by the presiding officers. These were for Muraka Primary School Polling Station, Mukhonje Primary School Polling Station 2, Itenji Primary School Polling Station and Vihulu Primary School Polling Station. However, it was the 1st and 2nd respondents' position that these did not disenfranchise the electorate in Shinyalu Constituency.

On the issue of non-compliance by ODM with the orders of the PPDT that directed the fresh nominations be held by ODM, it was counsel's view that ODM complied by giving the 3rd respondent a nomination certificate and further that since ODM was not a party in the election petition filed by the appellant, the election court could not delve into the issue; that had the appellant wanted to challenge the findings of the DRC then the appellant ought to have filed a judicial review or filed an appeal against the findings of the DRC. He placed reliance in this Court's decision of ***Speaker of the National Assembly vs James Njenga Karume Civil Application No. 92 of 1992 Nairobi 40 of 1992*** **(U.R.)** in which this Court stated:-

"***In our view there is considerable merit in the submissions that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.***"

On the allegation of the 3rd respondent bribing voters, counsel placed reliance in the Supreme Court decision of ***Fredreck Otieno Outa vs Jared Odoyo Okello & 4 Others S. C. Petition No. 6 of 2014*** that stated that an allegation of bribery which is quasi criminal in nature requires proof beyond the preponderance of probabilities.

On the appellant's complaint that the trial Judge erred in dismissing the appellant's application for scrutiny, counsel contended that the onus was on the appellant to establish the basis for scrutiny. Further, that the application for scrutiny was made after all the witnesses had testified and none of them in his/her testimony had demonstrated the need for scrutiny.

Dr. Nyaundi, on behalf of the 3rd respondent having filed grounds of affirmation under ***Rule 10 (2)*** of this Court's Rules and submissions on 7th May, 2018 contended that the documents filed by the 1st and 2nd respondents were not fresh documents but were clearer and legible copies of forms 35As; that these documents were filed on 6th December 2017 before the 1st, 2nd and 3rd respondents testified; that thereafter there was robust cross-examination of the witnesses. It was counsel's submissions that the application for scrutiny was canvassed after the evidence of the appellant had been tendered and none of his witnesses had alluded to the need for scrutiny. Further, that there was no basis for the disqualification of the 3rd respondent to viein the impugned election. It was his view that the election court was justified in rejecting the appellant's invitation to re-open issue/s before the PPDT and the DRC of the 1st respondent. He invited us to find that the trial Judge correctly applied the principles of law on the burden of proof in bribery allegations in election petitions.

In a brief rejoinder, Mr. Lubulellah maintained that the additional documents produced by the 1st respondent were new; that the appellant contrary to the respondent's assertion could not have challenged the decision by judicial review as he was not a party in the PPDT or in the DRC of the 1st respondent. As for the bribery, he pointed out that it is near an impossibility for one to get to know whom a voter has voted for in order to prove that the bribe influenced a voter, as voting is by secret ballot.

We have considered the record, the appellant's written submissions, the 1st and 2nd respondents' submissions, the 3rd appellant's written submissions, the rival oral highlights made before us, the authorities cited and the law.

The jurisdiction of this Court in respect of election petitions from the High Court is as set out in ***section 85 A*** of the Elections Act. It

provides:-

> ***"an appeal from the High Court in an Election Petition concerning membership of National Assembly, Senate or of the Office of the County Governor shall lie to the Court of Appeal <u>on matters of law only</u>*** *(emphasis ours)* ***and shall be:***
>
> ***(a) Filed within thirty days of the decision of the High Court.***
>
> ***(b) Heard and determined within six months of the filing of the appeal."***

The decision of ***<u>Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others</u> Petition No. 2B of 2014 (Nairobi)*** interpreted the scope of ***section 85 (A)*** of the Elections Act thus**:**

> ***"Now with specific reference to section 85 (A) 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 the 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 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."***

Having reminded ourselves of our mandate as an election appeal Court, we note that all counsel on record each filed their lists of issues. However, although no list of agreed issues was filed, the issues listed by each were not dissimilar. The broad issues as listed by the appellant were as follows:-

> ***1. "Whether the learned judge erred in unprocedurally ordering the filing of fresh documents by the 1st Respondent on the 4th of December, 2017 after the Appellant had closed his case.***
>
> ***2. Whether the learned Judge erred in dismissing the Appellant's application for scrutiny.***
>
> ***3. Whether the Learned Judge erred in determining the 3rd Respondent's nomination in isolation with the question of qualification under Article 99 (1) (a) of the Constitution.***
>
> ***4. Whether learned Judge the erroneously (sic) conceived and ruled that it would be in breach of natural justice to hear the legality of the 3rd Respondent's nomination in the absence of the ODM Party, a matter which had not been submitted by any of the parties.***
>
> ***5. Whether the Learned Judge erred in finding that the 1st Respondent had exclusive mandate to hear and determine disputes relating to nomination.***
>
> ***6. Whether the Learned Judge erred in not appreciating the difference between party nominations and the process under which the Returning Officer receives nomination papers from candidates.***
>
> ***7. Whether the Learned Judge erred in finding that allegations of bribery as against the 3rd Respondent had not been proved beyond reasonable doubt.***
>
> ***8. Whether the Learned Judge erred in finding that the declaration of Forms without the Presiding and/or Deputy Presiding Officers signature cannot attract any adverse comments from the Court.***
>
> ***9. Whether the Learned Judge in finding that the irregularities and contraventions of the Constitution and the law did not affect the overall result of the election.***
>
> ***10. Whether the Learned Judge was biased in favour of the Respondent(s) as against the Appellant.***
>
> ***11. Whether the Appellant is entitled to orders as sought".***

During the hearing of the appeal, however, the appellant clustered the contested issues which we shall proceed to analyze.

(i) <u>The filing of documents on 4th December, 2017</u>

The appellant who was a petitioner in Election Petition No. 1 of 2017 challenged the validity of the general elections held on 8th August, 2017 declaring the 3rd respondent as a member of the National Assembly for Shinyalu Constituency. The appellant's petition was consolidated with Petition No. 4 of 2017 and the two were heard on 27th November, 2017, 29th November, 2017, 30th November, 2017, 4th December, 2017, 5th December, 2017 and 7th December, 2017. A total of 48 witnesses testified. The appellant faulted the trial judge for permitting "…**the 1st respondent to file fresh election forms or materials after the appellant and his witnesses had given their evidence**." The appellant contended that the documents filed were **"…mostly fresh or totally new documents**." The appellant further contended that allowing the 1st respondent to do so ran afoul the provisions of ***Rule 15 (2)*** of the Election (Parliamentary and County Elections) Petition Rules 2017 which provide as follows:

> "***An election Court shall not allow any interlocutory application to be made on conclusion of the Pre-trial Conference, if the interlocutory application could have by its nature been brought before the commencement of the hearing of the Petition***."

Therefore the issue for our determination is whether there was flouting of ***Rule 15 (2)*** of the Election (Parliamentary and County Election) Petition Rules of 2017**.**

The 14 polling stations where it was complained that the forms were omitted or copies provided were not legible were:- Shianda Pre-primary School Polling Station, Liranda GB Primary School Polling Station 1, Shibuye Mixed Primary School Polling Station 3 and 4, Muleche Primary School Polling Station, Virembe Market Polling Station, Khayega Primary School Polling Station, Mukumu G. B. Primary School Polling Station, Sigalagala Primary School Polling Station, Kwirenyi Primary School Polling Station, Kisia Market Primary School Polling station, Mukhuru Primary School Polling Station, Musingu Primary School Polling Station 2 and Muraka Primary School Polling Station 1.

At page 37 of the record of appeal the appellant is on record as having stated.

> ***"I shall be further asking this court that the 2nd respondent be compelled to produce forms 35A for the foregoing polling station she either deliberately or knowingly omitted and/or the copies provided were not legible."***

On 27th November, 2017 before the commencement of the trial, Mr. Juma for the 1st and 2nd respondents informed the court of their intention to file clearer copies of forms 35As. The pertinent part of the proceedings of the day is recorded as follows:

> "***27/11/17***
>
> ***Court clerk George***
>
> ***Lubulellah for 1st Petitioner and Ngeresa, Khamati for 2nd petitioner.***
>
> ***Mr. Juma for 1st respondent together with Mr. Kubebea.***
>
> ***Mr. Nyaundi assisted by Anyuka for the 3rd and Kagimu for 3rd respondent.***
>
> ***Khamati: I am ready to proceed – we have 6 witnesses. The first petitioner is present.***
>
> ***Ngeresa: We are ready to proceed.***
>
> ***Juma: we are ready to proceed. <u>Some of the documents we filed are faint. We will make arrangements for clear ones</u>.*** *(Emphasis ours)*
>
> ***Mr. Nyakundi we are ready to proceed. We shall have 11 witnesses. 2nd Petitioner is present -***
>
> ***3rd respondent absent.***
>
> ***Ngeresa: We will call 27 witnesses. Four are present today.***
>
> ***J. Njagi***
>
> ***JUDGE."***

The above intimation by Mr. Juma was followed by an oral application made on 30th November, 2017 for leave of the court to file clearer copies of forms 35A. This application was strenuously opposed by the appellant. The learned trial Judge considered the appellant's contention that the forms were new and that the appellant disguised them as clearer copies.

On 5th December, 2017 the court allowed the 1st and 2nd respondents to file the said clearer copies. In his ruling the learned judge rendered himself as follows:

> ***"The results indicated in the two sets of forms filed by the IEBC were same though the serial numbers were different. There was no challenge on the said results. There was thereby no irregularity in the forms filed by IEBC on the 6th day of December, 2017."***

The 1st and 2nd respondents explained the illegibility as each booklet had 6 sets of Forms 35As and that due to carbonation the 6th Form's eligibility would diminish. It is indeed true that these copies were filed after the appellant and his witnesses testified. It is equally true that Mr. Lubulellah robustly cross examined the 1st, 2nd & 3rd respondents' witnesses after the documents had been produced. We also note that the appellant himself had asked that clearer copies be filed. It would appear that documents filed by the 1st respondent were clearer copies of form 35As earlier filed by the 1st respondent. We also find that although the appellant contended that these were fresh documents, none of the documents filed was singled out for being **"new".** We find no merit in this ground of appeal which we hereby dismiss.

(ii) <u>Scrutiny</u>

The appellant applied for scrutiny vide a motion dated 3rd October, 2017 pursuant to ***section 80 (3)*** of the Election Act number 24 of 2011 and ***Rule 28 (9)*** and ***29*** of the Elections (Parliamentary and County Elections) Petition Rules.

The appellant sought the following orders:

> ***1. "That this Honourable Court be pleased to order for scrutiny of all votes cast in Shinyalu Constituency, ballot papers, counter-foils, registers, KIEMS and Poll Day Diaries used in Shinyalu Constituency, Member of National Assembly Elections.***
>
> ***2. That this Honourable Court be pleased to Order a recount of all votes cast for Member of National Assembly in Shinyalu constituency.***
>
> ***3. That the costs of this Application be awarded to the Petitioner/Applicant."***

On 20th December, 2017 the election court disallowed the motion.

The appellant's grievance on the disallowance of the motion is contained in ground 2 of the memorandum of appeal which stated that:-

> ***"The Learned Judge erred in dismissing the Appellant's application for scrutiny and ignored the factual basis laid out in justification of the application and the law in support thereof."***

It was the appellant's case that the 1st and 2nd respondent having presented illegible Forms 35As was sufficient ground to order scrutiny.

In our view the legal basis for scrutiny and recount is stipulated in ***sections 80 (3), 82 (1)*** of the Elections Act 2011 and ***Rule 28*** and ***29*** of the Elections (Parliamentary and County Elections) Petition Rules.

Section 80 (3) of the Elections Act provides as follows:

> ***(3) Interlocutory matters in connection with a petition challenging results of presidential, parliamentary or county elections shall be heard and determined by the election court."***

Whilst ***section 82 (1)*** of the Elections Act provides as follows:

> ***"An election court may, on its own motion or on application by any party to the petition, during the hearing of an election petition, order for a scrutiny of votes to be carried out in such manner as the election court may determine."***

Further, ***Rules 28*** and ***29*** of the Elections Act provide as follows.

> ***"28 A petitioner may apply to an elections court for an order to -***
>
> **(a)** ***recount the votes; or***
>
> **(b)** ***examine the tallying, if the only issue for determination in the petition is the count or tallying of votes received by the candidate.***
>
> ***29. (1) The parties to the proceedings may apply for scrutiny of the votes for purposes of establishing the validity of the votes cast.***
>
> ***(2) On an application under sub-rule (1), an election court may, <u>if it is satisfied that there is sufficient reason</u>,*** *(emphasis ours)* ***order for scrutiny or recount of the votes.***
>
> ***(3) The scrutiny or recount of votes ordered under sub-rule (2) shall be carried out under the direct supervision of the Registrar or Magistrate and shall be subject to the directions the election court gives.***

(4) The scrutiny or recount of votes in accordance with sub-rule (2) shall be confined to the polling stations in which the results are disputed and may include the examination of -

(a) the written statements made by the returning officers under the Act;

(b) the printed copy of the Register of voters used during the elections sealed in a tamper proof envelope;

(c) the copies of the results of each polling station in which the results of the election are in dispute;

(d) The written complaint by the candidate and their representatives

(e) the packets of spoilt ballots;

(f) the marked copy register;

(g) the packets of counterfoils of used ballot papers;

(h) the packets of counted ballot papers;

(i) the packets of rejected ballot papers;

(j) the polling day diary; and

(k) the statements showing the number of rejected ballot papers."

In ***Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others*** ***(supra)*** the Supreme Court laid down the principles for consideration in an application for scrutiny. It stated:

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

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

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

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

The Supreme Court proceeds to observe thus at paragraph 163:-

"The authority granted to the election court is discretionary in nature. In this regard, the court may order for scrutiny on its own motion or upon application by a party to the election petition. This therefore follows that the court may decline to grant an order for scrutiny following an application seeking one."

From the above, it is clear that an application for scrutiny and recount must limit itself to specific polling stations in which the results are disputed. In his application, the appellant sought to have all the votes cast in Shinyalu Constituency scrutinized. However, he later zeroed down to 27 polling stations. Of these 27 stations, two witnesses testified in respect of Chirobani and Maluna Polling stations. A closer scrutiny of the record shows that none of the two witnesses testified on any allegations to warrant scrutiny. In Paragraph 37 of the ruling disallowing scrutiny the learned Judge stated:

"***In spite of the 1st petitioner making such serious allegations, he did not adduce evidence to prove them. The complaint was touching on about 27 polling stations. Among those ones he only managed to call two witnesses from two polling stations – Chirobani and Maluna. The two witnesses did not raise any issues touching on the complaints by the 1st petitioner. Both witnesses signed their respective forms 35A. Therefore the complaint relating to counting, collating and tabulation of votes contained in paragraph 3(j)-(o) of the 1st petitioner's Notice of Motion had not been proved."***

The two witnesses referred to were Maurine Khaemba Mushira (witness No. 7), the appellant's agent at Cherobani and Elisha Mudi his agent

at Muluna Polling Station. During the adduction of his evidence, witness No. 7 adopted his affidavit sworn on 4th September, 2017 as his testimony. In his affidavit, he deponed as follows:-

> ***"I Maurine Muchira, a resident of Shinyalu Constituency within the Republic of Kenya do hereby make oath and state as follows:-***
>
> ***1. That I am a female adult of sound mind hence competent to swear this affidavit. Annexed hereto and marked "MM1" is a copy of my National Identification Card.***
>
> ***2. That I reside in Isukha East Ward within Shinyalu Constituency. I was the Petitioners agent at Chirobani Primary Polling Station. Annexed hereto and marked "MM2" is a copy of my letter of Appointment.***
>
> ***3. That on 8th August 2017 I was in the Polling Station when one Mbima came in complaining someone was giving voters money at the gate. I went to the gate and found one Bernard Isindu Shitiabayi who is personally known to me giving people money and telling them to vote for the 3rd respondent. I also know he is the 3rd Respondent's agent. I reported the matter to the Presiding Officer who sent security officers. Ben was rude saying he was giving his own money.***
>
> ***4. That Shitekha (who was an observer) gave me a number 0722617189 to call. I called the number and whoever received said he was coming to the station. (I later learnt the number belonged to Job Kipchumba a Police Officer). I was informed Ben was sent away but he came back as he does not live far away from the Polling Station. He actually lives opposite the Polling Station.***
>
> ***5. That I also live close to the 3rd Respondent's home. On 7th August 2017 at about 3.00 p.m. the 3rd Respondent's vehicle came at Chirobani Market. There was a crowd of about 1000 people gathered at the market. The 3rd Respondent was giving people money KES 1,000 per 20 people***
>
> ***6. That I swear this affidavit in support of the Petition."***

As **Elisha Mudi,** he too adopted his affidavit sworn on 4th September, 2017 as his evidence. He deponed as follows:-

> ***"I Esha Mudi, a resident of Shinyalu Constituency within the Republic of Kenya do hereby make oath and states as follows:-***
>
> ***1. That I am male adult of sound mind hence competent to swear this affidavit. Annexed hereto and marked "EM 1" is a copy of my National Identification Card.***
>
> ***2. That I was the Petitioner's Agent at Maluna Primary School Polling Station. I also reside near the Polling Station. Annexed hereto and marked "EM2" is a copy of my Letter of Appointment.***
>
> ***3. That on 7/8/2017 at about 5.30 p.m. I saw the 3rd respondent and his wife giving people money at Kisia Market. I was waiting for our Chief Agent to give us allowances for the next day. Kizito proceeded further but his wife remained at Kisia Market. I was standing at a shop next to two other ladies. The 3rd respondent's wife gave the ladies Kes. 200. She told us "tomorrow is the D-day, you know Kizito" and proceeded to other shops.***
>
> ***4. That on 8/8/2017, assisted voters ranging between 200-300 were being assisted to vote by the Presiding Officer. As agents, we were not allowed to close to those voters or ascertain their wishes. The Presiding Officers signed Forms thereafter.***
>
> ***5. That on the same day, 8th August, 2017, I witnessed Mwanzi's driver Moi Lukongo was telling people who were already on the queue to vote for Mwanzi, Kizito and Oparanya, Mwanzi is the Former MCA and also contested in the elections.***
>
> ***6. That I informed Gilbert Mwagala who was the Deputy Presiding Officer about the aforegoing. However, Mr. Mwanzi's wife called him warning him of the arrest he ran away.***
>
> ***7. That I swear this affidavit in support of the petition."***

From the evidence of the two witnesses as shown by their affidavits, there was no evidence tendered that established the basis for scrutiny. It is therefore our considered view that the learned Judge was right when he concluded:

> ***"I am convinced that the application by the 1st petitioner is no more than a fishing expedition to see whether he could obtain evidence to support his case…."***

Accordingly, we reject this ground of appeal.

(iii) <u>Mandate of IEBC vis-à-vis the mandate of the Electoral Court an whether the 3rd respondent's nomination met the qualification under Article 99 (1) of the Constitution</u>

We intend to deal with the two issues as they are intertwined. The appellant argued that the nomination of the 3rd respondent was being

raised in the election Court in the context of ***Article 99 (1)*** and ***(c)*** of the Constitution which provides:-

> ***"99. (1) Unless disqualified under clause (2), a person is eligible for election as a member of Parliament if the person -***
>
> ***(a) is a registered as a voter.***
>
> ***(b) .....***
>
> ***(c) is nominated by a political party, or is an independent candidate who is supported...".***

The appellant questioned the eligibility for the 3rd respondent on the basis that:-

> 1. The ODM party nominated Justus Kizito Mugali through direct nomination in disobedience of the order of the PPDT of 10th May, 2017 directing that ODM conducts party nomination.
>
> 2. There is no registered voter in Shinyalu Constituency by the name Justus Kizito Mugali and that the 3rd respondent's identity card bears the name Justus Gesito Mugali M'Mbaya. It contended that the High Court is mandated to determine the issue of whether a person has been validly elected as a member of Parliament under ***Article 105*** of the Constitution and that an election court cannot overlook an invalid nomination in the determination of the petition. Counsel relied on the High Court decision of ***Kituo Cha Sheria vs John Ndirangu & Another [2013] eKLR*** where Mabeya, J. rendered himself as follows:
>
> "***That is not to say that the High Court is divested of jurisdiction in all matters relating to nomination. If for example by negligence or otherwise a non-citizen was nominated for election and elected, it would have to intervene.***"

Further, the appellant's counsel contended that ***Article 88 (4)*** of the Constitution does not exclude nomination disputes from an election Court, but that to the contrary, it excludes election petition and post-election disputes from the IEBC's election disputes settlement mechanism. It was the appellant's position that "**after all…an election is a process and nomination is only part of that process.**" Mr. Lubulellah referred two divergent opinions on the election's Court's jurisdiction and cited the cases of ***Jared Odoyo Okello vs IEBC & 3 Others (supra)*** and ***Alphonse Mulandi Welandi Welike & Another vs Mutula Kilonzo Junior & 2 Others (supra)*** that found that an election's Court's mandate does not include a nomination dispute. He contrasted this with the case of ***Ahmed Abdullahi Mohamed & Another vs Hon. Mohamed Abdi Mohamed & 2 Others (supra)*** which held that an election court has jurisdiction to "**audit the entire electoral process and *Article 88 (4)* does not preclude an election court from determining whether a person was validly nominated and elected"** and that an election Court cannot countenance IEBC'S decision if the decision contravenes the Constitution. He relied on the High Court decision of ***Karanja Kabage vs Joseph Kiuna Kariambegu Nganga & 2 Others*** in ***Nakuru Election Petition No. 12 of 2013 [2013] eKLR*** wherein Emukule, J. (as he then was) rendered himself as follows:-

> "***The concept of free and fair elections is expressed not only on the voting day but throughout the election process from the registration of voters, to the nomination of candidates, casting of the ballot papers and ultimate declaration of the winner. Any non-compliance with the law regulating to these processes would affect the validity of the election of Member of Parliament. Consequently the Court is not barred from determining all matters relating to nomination and qualification of candidates for election even though their determination is vested in other bodies where they failed to discharge their mandate as per the law.***
>
> ***Therefore in a case where there was clear breach of the law by contravention of the code of conduct or by failure to disqualify a candidate under Section 72 of the Elections Act, as a result of which the election was compromised, then the Court has to consider these processes in determining the validity of the election of the Candidate and in so doing it should not usurp the powers of the 2nd and 3rd respondents.***"

To bolster his argument counsel argued that the appellant was not the complainant before the DRC No. 155 of 2017 as the complainant was one Oscar Tsimbalaka Mwanzi. In his written submissions counsel paused the question. **"How then can we be blamed for not challenging the decision by Judicial review or by appeal when no such rights accrued to him**?" It was counsel's submissions that the appellant was entitled to fair administrative action as provided in ***Article 47 (1)*** of the Constitution which reads;-

> "***47(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair***."

and that the Election Court is obligated by ***Article 3 (1)*** of the Constitution to respect, uphold and defend the provisions of the Constitution. Further that in ***Advisory opinion No. 2 of 2012 In the Matter of Gender Representation in the National Assembly & Senate [2012] eKLR*** the Supreme Court acknowledged that an election is not an event but a process.

The 1st, 2nd and 3rd respondents countered the appellant's submissions by urging us to find that the power of the Elections Court is limited to questioning the validity of an election and the disputes on nominations are settled elsewhere. They relied on the following authorities:

> **a)** The Court of Appeal decision in ***The Speaker of the National Assembly vs Karume (2008) 1 KLR*** wherein we held that '**where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or any act of Parliament the procedure should be followed.**'
>
> **b)** ***Jared Odoyo Okello vs IEBC and 3 Others (2013) eKLR***.

c) ***Republic vs The National Alliance Party of Kenya and Another ex-parte Dr. Billy Elias Nyonge*** ***(2012) eKLR***.

d) ***Diana Kethi Kilonzo and Another vs IEBC and Others (Constitutional Petition No. 359 of 2013).***

In ***Jared Odoyo Okelo vs Independent Electoral and Boundaries Commission and 3 Others*** ***(supra)*** this Court stated:-

> ***"…we therefore concur with the learned judge that as an election court, he had no jurisdiction to entertain the appellant's nomination dispute. If the appellant was dissatisfied by the IEBC Dispute Resolution committee's decision dismissing his dispute, he should have filed a judicial review application before the High Court to determine the dispute under its supervisory jurisdiction."***

Similarly, in the persuasive decision of ***Diana Kilonzo and Another vs Independent Electoral and Boundaries Commission and 2 Others*** ***(supra)*** a 3 judge bench of the High Court observed thus at paragraph 109:-

> ***"We have already set out elsewhere in this judgment the provisions of Article 88 (4) (e). We take the view that in enacting the above provisions, the clear intention of the people of Kenya was that all disputes relating to elections, except election petitions and disputes arising after the declaration of results, and certainly all disputes involving or related to nomination of persons to contesting elections for various offices established under the Constitution, would fall within the exclusive mandate of the IEBC."***

It is our considered view that the election court was divested of considering matters that had been dealt with by the PPDT and/or the DRC of the 1st respondent. One may as well imagine that if this was not the case, then litigation would be open ended and time lines to file an appeal and/or judicial review would be of no consequence as matters determined by the PPDT and/or DRC would later be urged in an election court inspite of their determination in the PPDT and/or the DRC. Such a fluid situation will not augur well in the administration of justice. The issue that was before the 1st respondent's Disputes Resolution Committee was that the 3rd respondent was not a registered voter in Shinyalu Constituency. The DRC considered the complaint and dismissed it. No review or appeal was filed. The committee observed.

> "***Identification of a candidate is both by comparing the name appearing on the identity card with the name appearing in the voter register as against the candidate's name. It is equally by way of the biometric system***."

The appellant contended that the names appearing on the 3rd respondent's identity card are Justus Gesito Mugali M'mbaya and not Justus Kizito. The appellant further took issue that the 3rd respondent's action of swearing an affidavit that the names Gesito Mugali M'mbaya and Justus Kizito refer to one and the same person was not sufficient. The appellant's further complaint was that the said affidavit was not produced in the election court. In our view, the issue of proving that the names Gesito Mugali M'mbaya and Justus Kizito refer to one and the same person was settled by the DRC. It is also our position that the issue was the exclusive preserve of the DRC. It was therefore not in his place for the judge in the election court to revisit it but even assuming that he had jurisdiction to do so, we are of the view that it was an issue of splitting hairs for the sake of it. We find nothing wrong in the Returning Officer's action of accepting the nomination of the 3rd respondent who was a registered voter in Shinyalu Constituency.

The other complaint was that the election court had jurisdiction to supervise the decisions of the PPDT;- that on 10th May, 2017 it had ordered for fresh nomination to be carried out but ODM had refused to do so. On our part, we are persuaded that ODM did not disobey the orders of the PPDT, the appellant having moved to run as an independent candidate leaving the 3rd respondent as the sole candidate for ODM. We are in agreement with the respondents submissions that the ODM party had the power to offer a direct nomination to any of its candidates and that although this decision was challenged by Oscar Tsimbalaka Mwanzi and not the appellant, we find that the decision of the DRC was *in rem*, hence it was immaterial that the applicant therein was not the appellant. Further, we are in agreement with the trial judge's findings that the court could not delve into the issue as to why ODM gave the 3rd respondent a direct nomination as ODM was not a party to the proceedings before the election court and any orders issued in its absence would have been in vain. We reject the appellant's contention that the introductions *suo moto* of non-joinder of ODM in the proceedings demonstrated bias as it is a settled principle of law that a Court does not act in vain.

(iv) Standard of proof

The appellant contended that there was overwhelming evidence to the effect that the 3rd respondent and/or his agents bribed persons on or before the Election Day. The trial judge was faulted for placing the bar too high as to require those who were bribed to indicate as much and to go further to show that as a result of the bribery they voted for the candidate who bribed them; that it was near impossible to know the names of the persons who received bribes and that the judge rejected the evidence of the witnesses on the basis that they were the appellant's supporters and/or agents, hence not independent. The appellant faulted the trial judge for not applying the same test to the 3rd respondent's witnesses; that the defence of *alibi* raised by the 3rd respondent that he was away in Kakamega coordinating logistics for his agents did not raise any reasonable doubt in the appellant's assertion that he was in the *locus in quo* giving out bribes.

As submitted by the respondents, the standard of proof in an allegation of bribery is higher than the balance of probabilities but below 'beyond reasonable doubt'. In ***Musikari Nazi Kombo vs Moses Masika Wetangula & 2 Others*** ***[2013] eKLR*** it was held that**:**

> "***The standard of proof refers to the level or degree of proof demanded by law in a specific case in order for the party to succeed. It is now settled that in election petitions, the standard of proof in allegations other than those of commission of electoral criminal offences is higher than that of balance of probabilities required in civil case although it does not assume the standard of beyond-reasonable-doubt. However, where the petitioner alleges commission of criminal offences, the standard of proof on the criminal charges is beyond-reasonable-doubt. Judicial authorities on this subject are legion and I need not multiply them***."

In our view we could not agree more with the above summation of the law. An allegation of bribery is a serious matter and the standard of proof is between the balance of probabilities and proof beyond reasonable doubt. The learned trial judge did not err when he concluded that this standard was not met. Further, the learned judge was faulted for relying on the decision of ***Col Dr. Kizza Besigye vs Yoweri Kaguta Museveni & Electoral Commission*** ***(supra)*** on two fronts. Firstly, that the Ugandan Constitution is not similar to the Kenyan Constitution and secondly, that the situation obtaining in Uganda unlike Kenya is that of a dictatorial democracy. All we can say is that apart from the Ugandan decision the learned judge cited local decisions including ***Raila Odinga vs IEBC and 3 Others 2013*** which demand of a petitioner to adduce evidence to meet the intermediary standard stated above.

(v) Irregularities and contravention of the Constitution

The appellant contended that the trial Judge disregarded evidence showing that some of Forms 35As were unsigned either by the Presiding Officers or the Deputy Presiding Officers, yet unsigned forms are in law invalid. The appellant further submitted that to require a petitioner to prove the effect of unsigned Forms 35As on an election is to ask the obvious. Further, that the "**the learned Judge acknowledged that there were irregularities and contraventions of the Constitution which came to his attention but failed to consider the same in its final decision**". The question to be asked is whether the results in the unsigned forms had any effect on the outcome of the poll. In ***Masaka vs Kwalwale & 2 Others, [2011] 1 KLR 390*** it was expressed that the:

> "***Courts would strive to preserve an election as being in accordance with the law, even where there had been significant breaches of official duties and election rules, provided the results of the election were unaffected by those breaches. This is because where possible, the Courts should give effect to the will of the electorate."***

It is important to state that the trial judge found that only 4 out of total of 144 Forms 35As, had not been signed. These were for Muraka Primary School polling station, Mukonge Primary school polling station, Itengi Primary school polling station and Vihulu Primary School Polling Station. The judge considered the non-signing of those forms and found that nothing turned on them.

In ***Nadhif Jama Adan vs AbdiKhaim Osman Mohamed and 3 Others*** with respect to unsigned forms by a presiding officer, the Supreme Court stated (Petition No. 13 of 2014):

> ***"From the foregoing passage, and from the record, we find that the authenticity of the results on the unsigned and unstamped Forms 35, had not been the subject of challenge. But there had been an irregularity in the handling of statutory forms from the polling station. There was no explanation of how that irregularity affected the results of the election. This, clearly is a censurable condition. But in a dutiful resolution of a legal and electoral dispute, the fundamental question is the constitutional franchise-right of the people inhabiting the electoral area. It is this, to be protected, in circumstances such as those unfolding in this instance – the default in view being, that of election presiding officers failing to have forms duly signed and stamped."***

The leaned judge considered the contention of irregularities and more so the non-signing of Forms 35A by the Presiding and the Deputy Presiding officers. He concluded:-

> ***"… I find that the proven irregularities had no effect on the votes outcome of the election. The said irregularities were not of such a magnitude that they called into question the integrity of the election conducted in Shinyalu Constituency. I hold that the election for Shinyalu Constituency was conducted substantially in conformity with the Constitution, the Elections Act, 2011 and rules and regulations made thereunder. The petitioners did not discharge the burden placed on them to establish the allegations that they made against the respondents. The constituents of Shinyalu were given an opportunity to elect a representative of their choice in a free, fair and transparent election. They elected the 3rd respondent. The court cannot interfere with the free will of the people of Shinyalu in the absence of credible and cogent evidence that the election was marred with malpractices and nonconformity with the law."***

We agree.

The upshot of the above is that we find no merit in this appeal and it is hereby dismissed with costs.

Dated and delivered at Kisumu this 19th day of July, 2018.

P. N. WAKI

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR