REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A.)

ELECTION PETITION APPEAL NO. 2 OF 2018

IN THE MATTER OF THE ELECTION FOR THE MEMBER OF

SENATE OF LAMU

AND

IN THE MATTER OF THE HIGH COURT OF KENYA AT MALINDI ELECTION PETITION NO. 8 OF 2017

BETWEEN

ALBEITY HASSAN ABDALLA .....APPELLANT

VERSUS

THE INDEPENDENT ELECTORAL AND

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

MOHAMMED ADAN ALI .....2ND RESPONDENT

HON. ANUAR LOITIPTIP .....3RD RESPONDENT

WIPER DEMOCRATIC MOVEMENT PARTY.....4TH RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Malindi (Ongeri, J.) delivered on 9th February, 2018

in

Malindi Election Petition No. 8 of 2017.)

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JUDGMENT OF THE COURT

[**1**] It is imperative under the provisions of **Article 81** of the Constitution that the electoral system of Kenya shall comply with the principles of free and fair election; should be transparent and administered in an impartial, neutral, efficient accurate and accountable manner. Further under **Article 86;** the **Independent Electoral and Boundaries Commission (IEBC**) (1st respondent), is mandated to ensure that:-

"a) Whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;

b) The votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;

c) The results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and

d) Appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials."

On the other hand it is necessary to point out that a nullification of an election can only occur in circumstances contemplated under the **Section 83** of the Elections Act. The provision in question was amended by **Section 9** of the Election Laws (Amendment) Act, 2017 which came into force on 2nd November, 2017. Be that as it may, the election in issue occurred, and the petition challenging the same was filed prior to the said amendment, thus the applicable provision would be **Section 83** prior to its amendment which read:-

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.

[2] Another directive to bring to bear in determining an election dispute was a key holding by the Supreme Court in the case of **Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 4 Others & Attorney General & Another (2017) eKLR** thus:-

"It is clear to us that an election should be conducted substantially in accordance with the principles of the Constitution, as set out in Article 81(e). Voting is to be conducted in accordance with the principles set out in Article 86. The Elections Act, and the Regulations thereunder, constitute the substantive and procedural law for the conduct of elections… If it should be shown that an election was conducted substantially in accordance with the principles of the Constitution and the Election Act, then such election is not to be invalidated only on ground of irregularities. Where however, it is shown that the irregularities were of such magnitude that they affected the election result, then such an election stands to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection, are not enough, by and of themselves, to vitiate an election…Where an election is conducted in such a manner as demonstrably violates the principles of the Constitution and the law, such an election stands to be invalidated."

[3] It was against the aforesaid background that on 8th August, 2017 throughout the Republic of Kenya, General Elections were conducted including in Lamu County. **Albeity Hassan Abdalla** (appellant), was a contestant for the Senatorial Seat in Lamu County; the results or the outcome of the said elections is the subject matter of this appeal. There were seven other candidates that included **Loitiptip Annuar** (2rd respondent), who was declared the winner and consequently is the Senator the Lamu County. As the results below will show, this was a very closely contested seat where the margin between the appellant and the winner was only 58 votes. These are the results that were declared on the 11th August, 2017 by **IEBC** through the Returning Officer, **Mohamed Adan Ali** (2nd respondent) as contained in Form 38C, the declaration of results for Lamu County for the Senatorial seat were;-

1. Albbeity Hassan Abdalla	14,374
2. Lali Abdulrahman Aboud	2,123
3. Loitiptip Anuar	14,432
4. Mohamed Muhdhar Ali	3,360
5. Salim Mohamed Hashim	6,950
6. Sheelali Abdallah Athman	2,965
7. Waihiga David Mwaure	4,889

[4] The appellant was not satisfied with the said results; and on 6th September, 2017, he filed a Petition before the High Court at Malindi pursuant to the provisions of **Articles 38, 81(e), 86** and **88 (5) (h)** of the Constitution as well as **Sections 30** of the Elections Act No. 24 of 2011. The appellant made a retinue of allegations key among them that IEBC failed in its constitutional duty to conduct the aforesaid elections in a transparent, impartial and neutral manner. The appellant also cited the provisions of the Elections Act and the Elections (General) Regulations, 2017 that mandate the IEBC to conduct a free and fair election based on universal suffrage and that reflect the WILL of the electors free from improper influence or corruption which are transparent, accurate and accountable.

[**5**] The appellant's specific complaint was that he was denied an opportunity to appoint agents. Therefore his agents were denied access to the polling stations and elections went on without anybody observing for him. His dissatisfaction with the list of agents submitted by his party started way before the general elections as a dispute between him and Wiper Democratic Party (4th respondent). He complained that he and other candidates vying under the same ticket of Wiper Democratic Party in particular the Women Representative were not homogeneous in terms of their campaign strategies that created acrimony and a rift. He alleged that it was the Women Representative candidate who was single handedly authorized to select the agents who had no loyalty to him. This denial of an opportunity to appoint agents in his view was contrary to the election Regulations that provide candidates and authorized agents are not excluded from the Polling stations. Due to the acrimony in the appointment of agents, only agents by the Women Representative, who were hostile to the appellant were allowed and he together with his agents were denied access to the polling stations to witness, monitor and verify the voting, counting and declaration of results. He listed about 50 polling stations where he contended there were no party agents from the Wiper Democratic Party.

[**6**] The appellant went on to state that he was aware that counting of votes was concluded on the 9th August, 2017 when he visited the tallying Centre and the results that were displayed on the IEBC screen and the public portal indicated that he had won by 196 votes but the Returning officer delayed the announcement of the winner on the grounds that there were two polling stations that had not submitted their results. The appellant contends that the results were illegally tampered with by the 1st and 2nd respondents and their polling officials otherwise he was the winner of Lamu Senatorial seat. He alleged that there were a number of Polling stations which had pre marked ballot papers and he was unable to ascertain whether they were valid votes or not; many forms 38As were not signed by the Presiding Officers and their deputies nor were they stamped with the official IEBC stamp, in this regard, he named 10 polling stations that he alleged carried this anomally.

[**7**] The appellant also cited a Presiding officer at **Dide Wa Ride** one Daniel Kazungu Karisa whom he said he found filling such a form which he annexed to the petition; that at **Al Mbwajumwali** Polling station a clerk was arrested for allowing 16 people to vote without being verified by the **KIEMS KIT,** as a consequence he claimed that the 3rd respondent as Senator for Lamu County was not validly elected; a scrutiny and recount of votes in all Polling stations in Lamu County should have been conducted to ascertain the validity of the votes and ascertain the correct number of votes obtained by each candidate.

[8] Soon after the lodging of the Petition, the appellant also filed three applications by way of notices of motion all bearing the date of 27th September, 2017. In the first application, the appellant sought orders compelling the 1st respondent to avail the following materials:

i. The polling station diaries for all the polling stations in Lamu County.

ii. Both the electronic and hard copy of the register of voters as contains the biometric and alpha numerical details of the voters entitled to vote at all the polling stations in Lamu County.

iii. The Kenya Integrated Machine System (KIEMS) used in Lamu County for purposes of accessing the information stored therein.

iv. All declaration of results forms 38A's used in the declaration of results for the election of the Senator in Lamu County.

v. All declaration of results forms 38B's used in the declaration of results for the election of the Senator Lamu County.

vi. The declaration of results form 38C used in the declaration of results for the election of the Senator in Lamu County.

[9] Perhaps banking on the strength of information that was to be garnered if the aforesaid orders were granted, the appellant sought the following orders in the second application which we think it is imperative to reproduce verbatim;-

1. ….

2. This Honourable court do order a scrutiny (sic) and recount of votes in all polling stations in Lamu county in respect of the election of the Senator of Lamu County held on 8th August, 2017.

3. In the alternative to prayer 2 above, this Honourable court do order scrutiny and recount of the polling stations referred to in paragraph 27(b) (g) and (l) of the Petition herein.

4. This Honourable court upon granting of prayer 2 or the alternative prayer 3 hereinabove to direct that the scrutiny do include the examination of the following:

a) The written statements made by the Returning Officers.

b) The examination of the written statements made by the Presiding Officers in the polling station diaries.

c) Both the electronic and hard copy of the Register of voters as contains the biometric data and alpha numerical details of the voters entitled to vote at the stated polling stations.

d) The Kenya Integrated Electronic Machine System (KIEMS) and the information stored by it.

e) The Declaration forms 38A stored in the ballot boxes of all the named polling stations.

f) The packets of spoilt ballots.

g) The marked copy registers.

h) The packets of counterfoils of used ballot papers.

i) The packets of counted ballot papers.

j) The packets of rejected ballot papers.

5. This Honourable Court do order costs of the application to be paid by the respondents.

[10] The third application sought orders similar to those in the second application, save that under the third application, the scrutiny and recount sought was expressly indicated to be directed to some 50 polling stations listed therein. Not relenting, the appellant filed yet another application, dated 9th October, 2017 in which he sought to be granted leave to adduce additional evidence in support of the petition.

[11] Upon being served with the pleadings aforesaid, the 1st and 2nd respondents filed a joint response to the petition dated 19th September, 2017 as well as two replying affidavits sworn by the 2nd respondent on 3rd October, 2017 and 30th November, 2017. Basically, they contended that the election was free and fair as per the law; that the petitioner had not proved that he was deprived of any votes in the tallying process; that under regulation 62 of the Elections (General) Regulations 2012, the 1st respondent's Presiding officers had the discretion to regulate the number of persons to be admitted at the polling stations; and that even though **Section 30 (1**) of the Elections Act No. 24 of 2011 as read with regulation 62 aforesaid, allows a political party to appoint one agent for its candidates, that right is limited to political parties and does not extend to individual candidates. Overall, that the appellant had failed to establish his case to warrant the orders sought and consequently, the court was urged to dismiss the petition with costs for want of merit.

[12] On his part, the 3rd respondent's opposition to the applications came by way of a Notice of Preliminary Objection dated 12th October, 2017 and replying affidavits sworn on 3rd October, 2017 and 30th November, 2017; in which he contended that by its nature, the dispute herein primarily pitted the appellant against his political party *(the 4th respondent)* and as such, the same ought to have been referred to the Political Parties' Disputes Tribunal **(PPDT)** as per **Section 40 (1) (b)** of the Political Parties Act; consequently, that the trial court lacked jurisdiction to determine the petition; and on the whole, that the appellant had failed to plead or provide any material facts that would warrant scrutiny and recount of the votes. The 3rd respondent added that contrary to the appellant's allegations, all forms 38As were duly signed by the Presiding officers and issued to the party agents who were available at the time. The 3rd respondent asserted that given the insufficient evidence presented, the applications for scrutiny and recount of the votes cast is unwarranted and should be dismissed with costs.

[13] The matter was heard by **Ongeri, J.,** and by a judgment delivered on 9th February, 2018, the learned Judge pronounced herself on two key issues; that is whether the High Court had jurisdiction to determine a dispute between a member and his political party on the nomination of party agents. On this issue the Judge held that the appellant ought to have raised this issue with the Wiper Democratic Party and not with the 1st, 2nd and 3rd respondents; that he ought to have taken the dispute to the Political party's dispute resolution Tribunal since the said issue arose prior to the date slated for the General Elections. This is what the Judge posited in her own words;

> ***"On the issue as to whether this court has jurisdiction to hear or determine a dispute between a member of a political party and a political party, I find the mandate of the 1st and 2nd respondents does not include appointment of the agents. The Petitioner did not present any list of agents who were rejected by the 1st and 2nd respondents and I find that an issue between a candidate and his political party cannot be classified as an election petition. I find that this is not the right forum for the dispute between the petitioner and the 4th respondent. I find that Section 30 of the Elections Act, 2017 is very clear that it is only a political party that may appoint an agent for its candidates and that a candidate can only be allowed to nominate one where the party fails to do so. The petitioner was not an independent candidate and therefore he was required to nominate his agents through the 4th respondent."***

[14] On the broader issue of whether the elections held on 8th August, 2017 for Lamu County senatorial seat were free, fair and credible, the Judge held there was no evidence to support the said allegations; firstly she held that the issues submitted on were at variance with the matters that were pleaded especially the allegation that the declared results found in Form 38C for **Kiangwe Primary School** Polling station exceeded the number of voters was not found in the pleadings or evidence by the appellant. Secondly, the allegations raised by the appellant were unsupported by evidence. Consequently, the petition and all the attendant applications were dismissed, with each party being ordered to bear their own costs.

[15] Aggrieved by the said outcome, the appellant filed the instant appeal, which is predicated on the following grounds of appeal to wit;-that the learned Judge erred by:

i. Dismissing the application for scrutiny by failing to apply the provisions of Section 82 of the Elections Act and rule 29 of the Elections (Parliamentary and County elections) Petitions Rules 2017;

ii. Failing to grant the application made under rule 15 (1) (h) of the Elections (Parliamentary and County elections) Petitions Rules 2017; despite having granted leave for the same and despite the appellant having established sufficient grounds for the grant thereof;

iii. Failing to analyze the evidence and thereby reaching erroneous conclusions;

iv. Failure to hold that the 1st and 2nd respondents violated the appellant's right to appoint agents as per Section 30 of the Elections Act, 2011 and the regulations there under;

v. Disregarding evidence that proved that at Kiangwe Primary School polling station, the valid votes cast were 216, a number which exceeded the number of registered voters who were 213 and consequently those results ought to have been disregarded under regulation 83(1) (b) of the Elections (General) Regulations, 2012 as amended in 2017;

vi. Disregarding the differences between the valid votes as indicated in forms 38B and 38C, which ought to have resulted in the nullification of the election;

vii. Failing to hold that the Presiding Officer at Hongwe Primary School polling station number 2 did not sign the form 38A in breach of Regulation 79(1) of the Election (General) Regulations 2012 as amended in 2017 which rendered the results null and void;

viii. Failure to find that the 1st and 2nd respondents failed to explain the variance of the valid votes cast between the elections for President, Senator, Member of National Assembly, Women Representative and Member of County Assembly, which variance is proof of invalid votes cast, thereby affecting the results contrary to the provisions of Regulation 59(3);

ix. Failing to apply the provisions of Section 112 of the Evidence Act Cap. 80 and in particular, the doctrine of adverse inference against the respondents;

x. Failing to nullify the results from Mbwajumwali Nursery Polling station despite proof that 16 people voted without being verified using the KIEMS kit;

xi. Failing to nullify the results from Lamu East and West Constituencies and to hold that the forms 38B used to declare the results therein were not the prescribed forms and were thus a forgery;

xii. Failing to declare the form 38C used to declare the results was not the prescribed form and was a forgery and;

xiii. Failing to hold that the elections were not conducted in accordance with Articles 38, 81, 86 and 88 of the Constitution of Kenya and Sections 30, 39 and 74 of the Elections Act 2011 and were therefore null and void.

[16] The 1st and 2nd respondents, responded to this appeal by filing a joint cross appeal dated 21st March, 2018; in it they sought variation of the impugned judgment on two grounds; firstly, that **Section 84** of the Elections Act is couched in mandatory terms, in that the costs of a petition must follow the cause; and secondly, having found the petition devoid of merit, the learned Judge should have awarded costs to the respondents. A similar position was adopted by the 3rd respondent in his cross appeal dated 16th March, 2018. Further to this, vide a Notice of even date as the cross appeal, the 3rd respondent also filed some grounds for affirming the decision (of the trial court); in which he contended that a party filing an election petition is from the outset presumed to be seized of the grounds and evidence in support of the petition. Secondly, that the appellant had 28 days within which to gather this evidence and thirdly, that no provision of the law avails extension of the timelines set under the Constitution and the Elections Act 2011.

[17] This appeal was canvassed through written submissions, with oral highlights at the hearing hereof. Appearing for the appellant, learned counsel **Mr. Aboubakar** submitted that though the appellant had adduced sufficient evidence to prove there were clear grounds to warrant an order for scrutiny and recount of the votes, the Judge nonetheless dismissed the application without giving any cogent reasons thereof. This application was repeated at the close of the hearing and therefore it remained an issue throughout the petition. The Judge was faulted for dismissing the prayer for recount and scrutiny as not been supported despite the fact that it was part of the main petition. According to the appellant, even though the applications dated 27th November, 2017 elucidated why it was imperative for the court to make an order of scrutiny of the results from some 56 polling stations and there was sufficient justification supporting the said request, the Judge nonetheless disregarded that evidence and dismissed the applications. In particular, the appellant took issue with the finding by the trial court that the applications bore general orders that were incapable of being granted. According to the appellant, nothing could be further from the truth, given that both the petition and the third application had clearly outlined the polling stations to which the orders sought were targeted.

[**18]** To reinforce the above argument, counsel cited the Supreme Court's decision in **Gatiraru Peter Munya v. Dickson Menga Githinji & 2 Others, Petition No. 2B of 2014**; The guiding principles in an application for scrutiny and recount of votes are well established; firstly, any party to an election petition is entitled to make a request for recount and scrutiny of votes; secondly, a court is vested with discretion to decide the matter but in so doing, must give reasons for its decision based on the evidence; thirdly, a party seeking scrutiny and/ or recount must establish the basis for such a prayer and lastly, where scrutiny and/ or recount has been sought, the same should be conducted at the respective polling stations whose results are disputed or if the validity of the entire election has been put to question, according to **Rule 33 (4)** of the Election (Parliamentary and County Election) Petition Rules.

[19] Pursuant to the foregoing, counsel contended, the appellant had not only specified the disputed polling stations, he had also contested the entire outcome of the election and as such, it was the duty of the Judge to consider the allegations made in regard to the specified polling stations and bring them to bear in the judgement, or at the very least, the Judge ought to have determined the dispute in accordance with **Rule 33** aforesaid. According to the appellant therefore, the decision by the trial Judge that the appellant's prayers were too general to be granted, was wholly erroneous. With regard to the finding that what was pleaded was at variance with the evidence and submissions, counsel asserted that in election matters, issues that may emerge in the course of trial may be addressed in court even though they never formed part of the pleadings. On this note, the decision in the case of; - ***Abdulkarim Mohammed v. Independent Electoral and Boundaries Commission (IEBC) & 2 others*** **[2014] eKLR** was relied on. In the same breath, the appellant contended that issues of irregularities and illegalities can be construed as having been pleaded in a generic way where the election has been alleged to have failed to comply with the law. Consequently, the appellant was adamant that as per the annexures in his affidavits, the irregularities in the Forms 38C and 38B were readily apparent and should have been given due consideration.

[**20**] Turning to the application dated 9th October, 2017, counsel submitted that in disallowing the same, the learned Judge failed to pay due regard to the principles applicable in determining such applications as stated by the Supreme Court in ***Evans Odhiambo Kidero & 4 others v. Ferdinand Ndungu Waititu & 4 others [2014] eKLR*.** On failure by the trial court to analyze and evaluate the evidence, counsel pointed out that the Judge turned a blind eye to the fact that the returning officers were unlawfully gazetted to serve the respondent's ulterior purpose of rigging the outcome in favour of the 3rd respondent. As per counsel, this information had been captured in the appellant's submissions before the trial court. As regards the proper forum for resolving the dispute regarding the agents for the appellant, counsel submitted that the Judge misdirected herself by holding that the trial court was not the proper forum. This is because in the petition, the appellant's grievance was not limited to the issue of appointment of agents. Rather, it also required the determination of the question of the integrity of the electoral

process, which had also been raised by the appellant. Further, that even if the issue may not have been specifically pleaded, the court was duty bound to consider it if it emerged in the course of hearing. In this regard, the case of ***Odd Jobs v. Mubia [1970] EA 476*** was relied upon. The appellant reiterated that the elections were fraught with grave irregularities which even resulted in the arrest of a polling clerk, but since the application dated 9th October, 2017 was dismissed, the appellant was denied the opportunity to table evidence in this regard.

[21] Opposing the appeal, the 1st and 2nd respondents filed joint submissions and began by stating that the appellant had failed to prove any malpractices to warrant the orders sought. In addition, that the application dated 9th October, 2017 was dismissed by the trial court vide a ruling delivered on 3rd November, 2017. Further, that even the application dated 27th November, 2017 which sought scrutiny and recount of votes was also dismissed vide a ruling delivered on 15th November, 2017. In any event, they contended that under **Rule 29** of the Elections (Parliamentary and County elections) Petition Rules, a party can only be allowed scrutiny or recount but not both and the trial court was thus right in holding that the applications for recount and scrutiny lacked specificity. Counsel pointed out that according to the decision in the **Gatirau Peter Munya case** *(supra),* a request for scrutiny must always be clear, concise and specific. Counsel also cited a plethora of cases in support of the proposition that the second application for recount was also rightly dismissed on account of its introduction of new polling stations, which had hitherto not been mentioned in the Petition. In addition, counsel submitted that as per the holding in **Raila Amolo Odinga v. IEBC & 3 Others SC Pet. No 5 (2013) eKLR,** orders of scrutiny or recount of votes are premised on the discretionary power of the court; that in this case, that discretion was properly exercised and nothing was demonstrated to warrant this court's interference with the discretion.

[22] Notwithstanding the foregoing, under **Section 76(4)** of the Elections Act as read with **Rule 15 (1) (h)** of the Elections (Parliamentary and County Election) Petition Rules 2017, the application for scrutiny or recount of votes must in any event be filed within 28 days from the date of declaration of the election results. As a result, a petitioner who files his petition at the tail end of the 28 day period, cannot later on file an interlocutory application outside the 28 day window and more so, when the said application seeks to introduce new matters that were not contained in the petition. On that note, it was submitted that the issues of tallying of votes as well as the contestation that returning officers had served beyond their gazette areas; were alien to the petition and thus offended the rules of pleadings. Consequently, that the learned Judge was right in finding as much.

[23] The 1st and 2nd respondents also reiterated that this was a dispute which ought to have been referred to PPDT and that the trial court had no jurisdiction in the matter. Further, it was contended, that the Judge also rightly appreciated the crux of the appellant's complaint was that though he was contesting on the 4th respondent's ticket, the agents appointed by the 4th respondent failed to protect his interests and that since he had not been allowed (by the 2nd respondent) to appoint his own agents, he had no idea what transpired in the rest of the county and to him, this formed a basis upon which he disputed the declared results. They submitted that this finding could not be faulted, for indeed this was essentially a dispute between a candidate and his political party, thus not within the jurisdiction of the trial court. In conclusion, it was submitted that the appellant's case was devoid of merit and for that reason, rightly dismissed. With regard to the cross appeal, counsel drew our attention to the provisions of **Section 84** of the Elections Act to bolster the proposition that costs incidental to a petition must follow the cause. As such, the 1st and 2nd respondents contended, the costs in the Petition should have been awarded in their favour.

[**24**] On his part, the 3rd respondent reiterated his submissions before the trial court and associated himself with the position taken by the 1st and 2nd respondents. On jurisdiction, he submitted that the appellant's grievances on appointment of agents clearly lay against the 4th respondent; and any complaints should have been lodged with the 4th respondent at first instance and dissatisfied with the decision to appeal before PPDT. Consequently, the trial court lacked jurisdiction to hear and determine the matter. The case of ***Harun Meitamei Lempaka v. Lemanken Aramat & 2 others*** **[2013] eKLR** was cited in support of this contention. The 3rd respondent added that following the amendment of **Section 30** of the Elections Act, candidates no longer have the right to appoint their own agents, rather, the right to appoint agents exclusively vests in the candidate's respective political party. On the same note, the 3rd respondent also stated that, whereas the High Court has original jurisdiction over electoral disputes overseen by the 1st respondent, this jurisdiction over decisions made by the PPDT is an appellate one. Consequently, the court cannot usurp the role of the PPDT by entertaining a matter which rightly falls within the realm of the PPDT. All in all, that the appellant's case was without merit as the allegations made had neither a legal basis nor were they proven in court. In conclusion, the 3rd respondent echoed the 1st and 2nd respondents' sentiments that the costs of the petition ought to have been awarded to the respondents as per **Section 84** of the Elections Act.

[25] Having considered the grounds of appeal, the record and the submissions of the parties herein, it is pertinent to rehash the jurisdiction of this Court in an appeal such as this. **Section 85A** of the Elections Act states as follows;

> ***"(1) An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of county governor shall lie to the Court of Appeal on matters of law only and shall be-***

It therefore follows only points of law shall fall for determination in this appeal. The Supreme Court in the ***MUNYA vs. KITHINJI*** case (supra), very succinctly and authoritatively pronounced itself on what constitutes ***"questions of law only"*** as used in **Section 85A** of the Elections Act apropos the jurisdiction of this Court. That judicial distillate was arrived at after a comprehensive comparative analysis of the law on the distinction between ***'questions of law'*** and ***'questions of fact'*** from jurisdictions as varied as Canada, England, India, South Africa and the Philippines, as well as pronouncements of this Court. A question of law was captured at paragraph 81 of that court's judgment as meaning; 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 the 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 Country 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 the a different conclusion on the basis of the evidence.

[26] We also need to mention this position was expounded by this Court recently in the case of ***John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others [2018] eKLR*** where it stated that "***matters of law***" mean:

> ***"… the interpretation or construction of the Constitution, statute or regulations made thereunder or their application to the sets of facts established by the trial Court. As far as facts are concerned, our engagement with them is limited to background and context and to satisfy ourselves, when the issue is raised, whether the conclusions of the trial judge are based on the evidence on record or whether they are so perverse that no reasonable tribunal would have arrived at them. We cannot be drawn into considerations of the credibility of witnesses or which witnesses are more believable than others; by law that is the province of the trial court."*** [Emphasis added]

[27] That said, the issues of law that we filter for determination are basically four in total, to wit;-

> **i. Whether the trial Judge sitting as an Election court had jurisdiction to hear and determine the petition concerning allegations that the appellant was denied an opportunity to appoint agents;**
>
> **ii. Whether the learned Judge misdirected herself and failed to appreciate the appellant had demonstrated sufficient grounds in his pleadings, supporting affidavits and annexed documents to warrant granting of an order of scrutiny, recount, and /production of documents requested also considering the small margin of 58 votes difference between the appellant and the 3rd respondent;**
>
> **iii. Whether the Judges' conclusion that the submission by the appellant that the cast votes in respect of Kiangwe polling station that exceeded the number of registered voters was not pleaded and could not be considered in the evidence was so erroneous and perverse an indication that the 1st and 2nd respondents failed in their constitutional mandate to conduct fair, free and verifiable elections;**
>
> **iv. Whether the trial Judge exercised her discretion judiciously by declining to award costs.**

[28] In considering those four issues which we have framed and in terms of the provisions of **Sections 107** and **108** of the Evidence Act, we need to remind ourselves that it was the duty of the appellant to establish that the Lamu Senatorial election was not conducted according to the Constitution and the Elections Law. The threshold of the burden of proof has been restated in many decisions and affirmed by the Supreme Court in the **Raila Odinga case** (supra) to the effect 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"***

[**29**] Bearing in mind the above principles, we will deal with the first issue that is whether the court had jurisdiction to deal with the appointment of agents for a candidate. It is trite that a court's jurisdiction is established by the Constitution and statutes, the question as to whether that jurisdiction may be exercised with regard to a particular dispute is determined by the nature of the dispute, which is in turn informed by the pleadings. In this case, the bulk of the appellant's petition was concerned with the issue of appointment of agents; and what he perceived as the failure by the 1st respondent to allow him appoint an agent on each of the polling stations to monitor the election.

[30] This is how the grounds touching on the agents were pleaded in the petition:-

> ***(i) THAT Section 30 of the Elections Act, No. 24 of 2011 entitles a candidate to appoint one agent per polling station but the 1st Respondent denied the petitioner that entitlement thereby breaching article 38, 81 and 86 of the Constitution of Kenya, 2010.***
>
> ***(ii) THAT failure by the 1st Respondent to allow the petitioner to appoint an agent as per Section 30 of the Elections Act, No. 24 of 2011 breached the Petitioner's right to an impartial, transparent, efficient and accountable electoral system as per Article 81 (e) of the Constitution of Kenya, 2010.***
>
> ***(iii) THAT the conduct of the Senatorial Elections in Lamu County by the 1st and 2nd respondents was contrary to Article 88(h) and (5) of the Constitution of Kenya, 2010.***
>
> ***(iv) THAT therefore, the 1st and or 2nd Respondents conduct of the Senatorial Elections in Lamu County was wrong, unprocedural, unfair and or unjust to the Petitioner as it has denied him the right to fully participate, through a party agent, in the monitoring of the voting process therein.***

[31] The respondents have contended and rightly so, that the issue of appointment of agents was a question to be determined by the PPDT and not by the trial court and as such, the trial court lacked jurisdiction to determine the petition. Appointment of party agents is provided

under **Section 30** of the Elections Act which states as follows:-

> ***"(1) A political party may appoint one agent for its candidates at each polling station.***
>
> ***(2) Where a political party does not nominate an agent under subsection (1), a candidate nominated by a political party may appoint an agent of the candidate's choice.***
>
> ***(3) An independent candidate may appoint his own agent."***

[32] To our minds the law is clear, the right to nominate an agent primarily vests on a political party. It is only upon failure by the political party to appoint such agent, that the candidate is granted an opportunity to appoint his or her own agent. The disagreement was basically between the appellant, and his Political Party that gave the candidate vying for the seat of Women Representative an upper hand in the appointment of agents. In that case the appellant alleged that he was shortchanged because they were not "*seeing eye to eye*" with the Women Representative who allegedly appointed agents that were hostile; that she did not appoint agents in some stations at all or the said agents did not represent the appellant. That notwithstanding, there is no evidence to show the appellant made an attempt to present a list of his own agents to IEBC and that the same was rejected. Moreover, absence of a candidate's agents alone without more cannot invalidate an otherwise well conducted election. This is as restated by this Court in ***Mercy Kirito Mutegi v Beatrice Nkatha Nyaga & 2 Others [2013] eKLR*;**

> ***"These provisions speak for themselves. It is not a must that every candidate must have an Agent in every polling station relevant to their election. That is why failure to have any Agent cannot be a ground to nullify an election."***

[33] Further to this, there was no dispute in this case that the 4th respondent duly exercised its right and appointed a party agent. What the appellant contended was that the agents so appointed were favorable to the candidate vying for the County Women representative's seat; who during the electioneering period, was at loggerheads with the appellant. Clearly and as rightly submitted by the 1st and 2nd respondents, this aspect of the dispute pitted the appellant against the 4th respondent. Under **Section 39** of the Political Parties Act, the PPDT as established and under **Section 40** of the Act, the jurisdiction of the tribunal is expressed *inter alia* as follows:

> ***"(1) The Tribunal shall determine-***
>
> ***(a) disputes between the members of a political party;***
>
> ***(b) disputes between a member of a political party and a political party."***

Consequently, in so far as the grievance regarding the appointment of the party agent is concerned, given that party agents were indeed appointed by the 4th respondent in terms of **subsection (1)** of **Section 30** of the Elections Act, the subsequent internal wrangles pertaining to that appointment were between the appellant and his political party (the 4th respondent) and ought to have been referred to the PPDT for resolution. As we dispose of this issue we also point out that it is trite law that where the law provides a resolution mechanism, the same should be strictly adhered to (see. ***Speaker of National Assembly v Njenga Karume [2008] 1 KLR 425***, where it held that:-

> ***"In our view there is considerable merit.....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."***

Finally on this issue of appointment of agents we find ourselves agreeing with the Judge that the matter ought to have followed the statutorily laid down procedure; the issue was prematurely presented before the High Court and the court lacked jurisdiction to hear and determine that aspect.

[34] As it will become clear from the subsequent paragraphs of this judgement this perhaps marks the point at which we part company with the conclusions drawn by the Judge on the other grounds. As issues identified above and also the grounds of appeal reveal, there were other allegations of tampering with the results, improper tallying of votes, failure to sign forms 38 by the Presiding officers and discrepancies among votes cast for various candidates and the registered voters; and generally noncompliance with the law and regulations by the 1st and 2nd respondents. It was perhaps with a view to proving the aforesaid irregularities that the appellant lodged the various applications seeking orders of scrutiny and recount as well as production of various documents which were in the custody of the 1st respondent as the duty bearer of the mandate of conducting elections. In dealing with this issue we shall be addressing largely whether the Judge erred by failing to allow scrutiny and recount at least in some of the stations that were identified. In doing so, we need to clarify that we will not concern ourselves with any allegations that touch on the appointment of agents as we have already ruled on that matter. Therefore, we shall ignore the 50 or so identified polling stations under paragraph 27 (b) of the petition. We however find there is merit to consider the allegations stated under paragraphs 27 (g) regarding the unsigned forms 38 'As' by the Presiding officers or their deputies. We think this is necessary in view of the thin margin of a difference of 58 votes that separated the appellant and the 3rd respondent. To appreciate this, we will restate verbatim what the Judge posited in the judgment in this regard;

> ***"I find that apart from the said assertions in the supporting affidavit, the petitioner did not call any witnesses in support of the petition. I also find that the petitioner did not challenge any results and neither did he adduce any evidence that any witness was denied an opportunity to vote for him.***
>
> ***(x) In the circumstances I find that the petitioner has not adduced evidence in support of this petition and his prayers herein including an order seeking "scrutiny and recount of all the Polling Stations in Lamu County in order to determine the valid votes cast and therefore who was validly elected as the Senator for Lamu County" amount to a fishing expedition and cannot be***

granted as the petitioner is not specific in his prayers and neither did he point out specific irregularities or specific polling stations where he was disputing the results…"

[35] Was this reasoning erroneous to the extent that no reasonable Tribunal considering the evidence that was before Court would have arrived at the same conclusion? This question can only be answered by briefly delving into the evidence that was presented by the appellant. This was how the appellant's case was presented. In doing so we wish to throw caution that this is not to extrapolate what the Judge had already gone through and analyzed, but because it is important to establish whether the appellant had pleaded the allegations. Again we need to state that a party is bound to prove his or her case according to the pleadings. A party is not permitted to make a case outside the pleadings, the supporting affidavits and the testimony must be consistent with the case pleaded. See the Supreme Court decision in **Raila Odinga (Petition No 1 of 2017) eKLR**. The Supreme Court quoted with approval the Supreme Court of India in **Arikala Narasa Reddy V Venkata Ram Reddy Reddygari and Another,** Civil Appeal Nos 5710 – 5711 of 2012 [2014] 2 SCR where it stated that;-

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

[36] Looking at the matters pleaded in the petition, which the appellant basically regurgitated in the supporting affidavits, he contended that counting, declaration and transmission of the senatorial elections were completed at the polling stations on 9th August, 2017. He went on to state that when he went to the tallying centre where IEBC was screening results on a public portal, it reflected that he had won by 196 votes. However, the 2nd respondent delayed the announcement of the winner on the grounds that there were two polling stations that had not submitted their results although he did not name them. That is why he claimed he is the one who won the election for Lamu Senator but the results were tampered with; that the 1st and 2nd respondents failed or neglected to ensure the electoral and the voting process was free and fair. Further he contended that many forms 38 'As' were not signed by the Presiding officers or their deputies nor were they stamped and he named some 9 polling stations as;

1. Witu Primary School (1)

2. Witu Primary School (2)

3. Witu Primary School (3)

4. Hongwe Primary School (02)

5. Lake Kenyatta School (02)

6. Lake Kenyatta School (05)

7. Kizingitini Primary School (02)

8. Kizingitini Secondary School (02)

9. Kiunga Primary School (02)

[37] The appellant further stated that he witnessed a presiding officer from Dide Wa Ride, one Daniel Kazungu Karisa filling a form 38A at that tallying Centre. He annexed the said form to the affidavit. He went on to state that a polling clerk at Mbwajumawali Polling Station was arrested for allowing 16 people to vote without being verified by KIEMS KIT which was against the election laws and regulations. In a further affidavit in support of the myriad applications for scrutiny sworn on 5th October, 2017 this is what the appellant deposes in some pertinent paragraphs:-

"4. That a comparison of the said Forms show that the results for the said station show that the total valid votes were, in Form 38 A; 397, in 38B 388 and in Form 38C 408 which gives a difference of 20 votes or given the smallest and the largest figure.

5. That in Form 38A the results reflect that Lali Abdurahman Aboud obtained eight (8) votes while Forms 38B and 38C he obtained 28 vote an increase of 20 votes.

6. That in Form 38A the rejected votes are six (6) while in Form 38B and C the rejected votes are nine (9).

7. That I believe those twenty votes added to Lali Abdulrahman Aboud are actually my votes which were illegally and or wrongly given to him.

8. That I also obtained Form 38A for Lamu Youth Polytechnic polling station which indicated that the total valid votes were 342 similar as in Form 38B and 38C.

9. That Form 38A showed that Sheelali Abdalla Athman obtained 36 votes while Form 38B and C showed he obtained 33 votes.

Annexed hereto and marked "AHH 5" is a copy of the said Form 38A.

10. That I have also obtained a number of Form 38As which have anomalies and which were used in the declaration of results.

Annexed hereto and marked "AHH 5 are a bundle of the said Forms 38As.

11.That the Forms 38As Bs and C used in declaration of results are forgery and or fake and are therefore illegal null and void for the following reasons;

a) They either lack the IEBC water mark or

b) Are materially different from the prescribed

Forms or

c) Not signed by the Presiding Officers or

d) not stamped with the IEBC stamp or

e) have different serial numbers, or

f) Omit an essential part or

g) add an immaterial part

12. That I have also noticed that the total number of valid votes in Form 38B for Lamu East Constituency is 13,524 while in Form 38C the total number of valid votes for Lamu East Constituency is 13,591 which has an increase of 67 votes."

It was for those reasons that the appellant made several spirited but unsuccessful attempts seeking an order of scrutiny or recount and production of documents by the 1st respondent. Which prayer was also generally repeated in the petition as follows:-

"4) A scrutiny and recount of votes in all Polling stations in Lamu County be conducted to ascertain the validity of the votes and ascertain the correct number of votes each candidate obtained thereat."

[38] In response to the aforesaid allegations the 1st and 2nd respondents stated the following under certain pertinent paragraphs of their reply to the petition;-

"19. The statistics entered into the KIEMs kits by the respective Presiding Officers and transmitted to the 1st Respondent's online portal were not the results and therefore may not have not been comparable to the primary results recorded in the Forms 38As. If there were any discrepancies in the transmitted figures which is denied these would be as a result of inadvertent human error during the transfer of the figures from Form 38As to the KIEMs Kit and cannot be a basis for invalidation of the declaration of the 3rd Respondent as the winner of the elections as the same did not materially affect the outcome of the said election.

20. The 1st and 2nd Respondents reiterate that the declaration of the results of the Member of the Senate for Lamu County was on the basis of results of the elections contained in the Form 38As from the various polling stations in both Lamu West and Lamu East Constituencies verified, collated and aggregated in Form 38 C pursuant to which the declaration of the results were made by the 2nd Respondent.

21. Consequently the 1st and 2nd Respondents aver that it is not the statistics that allegedly appeared on the IEBC screen or public portal that were used in the declaration of the results but the aggregated entries in the Form 38C for the Senatorial elections.

22. In response to paragraph 25 of the Petition, the 1st and 2nd Respondents aver that the Petitioner's allegation that he is the one who won the elections for Lamu County Senate seat and that the results were tampered with in favour of the 1st and 2nd Respondents is far-fetched and equally not substantiated.

23. The 1st and 2nd Respondents in response to paragraph 26 of the Petition aver that the Petitioner has not laid a basis on which this Honourable Court can exercise its discretion to grant the orders for scrutiny and recount of all the polling stations in Lamu County in order to determine the valid votes case.

...

g) The allegation that many forms 38As were not signed by the Presiding Officers and their deputies and equally not stamped is merely generalized and not particularized and in any event not true as there is no requirement under the Regulations for

stamping of the said Forms.

h) further, it is a statutory requirement that results from all polling stations be entered in Form 38As and the outcome be announced thereat and it is not true that Form 35As for Witu Primary School (01), Witu Primary School (02), Witu Primary school (04), Hongwe Primary School (02, Lake Kenyatta Primary School (02), Lake Kenyatta Primary School (05), Kizingitini primary School (02), Kizingitini Secondary School (02) and Kiunga Primary School (02) and or that a presiding officer filled such a Form at the tallying centre and the allegations have been made in bad faith, are misrepresentation of facts, reckless and tailored to mislead this Honourable Court.

i) the allegation that votes cast for the different elections do not tally has merely been generalized and not been substantiated and in any event the law does not require that the votes for the different elections for the President, Senator, Member of National Assembly, Women Representative and Member of the County Assembly all tally.

j) the total votes cast and the rejected votes for the different elections are verified from the various Form 34As, 35As, 36As, 37As, 38As and 39As which were duly signed by the agents after the announcements and the same are verified, tallied and aggregated in the 34Bs, 35Bs, 36Bs, 37Bs, 38Bs and 39Bs taking into consideration the rejected votes and the allegation being generalized and not particularized to the contrary is misconceived, reckless and intended to mislead this Court.

[39] The Returning officer also supported the above pleadings with his replying affidavit sworn on the 19th September, 2017. It is in that affidavit that he denied all the allegations and attached copies of all the declared results. Of particular interest to note are the following averments:-

"30. That copies of Form 38A's of the polling station enumerated at para 21 are annexed hereto and marked as exhibit "MAA4"and contrary to the allegations by the petitioner there were agents present before and even at the announcement of the results.

31. That I am a stranger to the allegations contained at para. 22 VIII of the petitioner's affidavit and am further informed by our advocates which I verily believe to be true that the annexture has no evidentiary value or at all.

32. That whatever the variances that might exist in the results of the other positions have no effect or at all in the results declared and annexed hereto and marked as MAAS."

[40] It appears to us out of the said forms 38 C's that were annexed to the 2nd respondents replying affidavit, that contained the results for the Lamu Senatorial seat, the appellant was able to identify in his closing submissions the results declared for **KIANGWE PRIMARY SCHOOL** that had a total of **213** registered voters but the number of voters exceeded the register as it showed **216** voters turned up. We shall advert to this particular issue of **"over voting"** later in this judgement as we do not wish to mix it with the issue of whether the appellant made a case for scrutiny or recount.

[41] During the pretrial conference before the High Court, the record shows that all parties agreed to call one witness each and that is what happened as the appellant was the only witness. He adopted the averments in his supporting affidavits and he was cross- examined at length on all the allegations. It is also apparent from the record that at the close of hearing, the appellant's counsel renewed the application for scrutiny and recount. This is because this time the said application was spurred by certain matters that were revealed during the hearing. The question that therefore follows is whether in the face of all those allegations of irregularities and malpractices against the 1st and 2nd respondents, the appellant made a case for scrutiny. In the Supreme Court decision of; **Peter Gatirau Munya** (supra) it was stated that:-

"… the right to scrutiny and recount do not lie as a matter of course. The party seeking a recount or scrutiny of votes in an election petition is to establish a basis for such a request, to the satisfaction of the trial judge or magistrate …"

[42] A party seeking scrutiny must establish a basis for it by way pleadings affidavits or by way of evidence adduced during the hearing of the petition. The party making the request must specify the polling stations where the exercise is impugned. Of course this position is amplified by the exposition made by the Supreme Court of India on the question of recount of votes that noted; scrutiny does not mean recount – as it is wider and involves examination of electoral materials but may include recount in the case of **ARIKALA NARASA** (supra) which held that the process is not a roving exercise and the court must be satisfied that:-

> *"**A prima facie case has been established; the material facts and** full particulars have been pleaded stating the irregularities."*

[43] From the foregoing we recognize that scrutiny is intended to assist the court in investigating allegations of irregularities and breaches of the law. It also assists the court in determining the valid votes cast in favour of each candidate and helps the court to understand the details of the electoral process and gain impressions on the integrity thereof. At the end of the scrutiny the actual votes garnered by each candidate is established. See also a persuasive authority of the High Court in ***Phillip Mukwe Wasike vs James Lusweti Mukuwe & Others (Bungoma) Election Petition No.5 of 2013*** where there were several errors, alterations and/or omissions on the Forms 35A and 35B – and which errors/omissions or alteration cannot be explained then scrutiny will be desirable. We think it is also opportune to make a verbatim reference to the provisions of **Rule 29** of the **Election Petition Rules** which sets out the broad criteria upon which an order for scrutiny can be made and sets out what material can be scrutinized to:-

i. **The written statements made by the returning officers.**

ii. **Printed copy of Register of voters used during the election sealed in a tamper proof envelope.**

iii. **Copies of the results of each polling station in which the results of the election are in dispute.**

iv. **Written complaints of the candidates and their representatives.**

v. **The packets of spoilt votes.**

vi. **The marked copy register.**

vii. **The packets of counterfoils of used ballot papers.**

viii**The packets of counted ballot papers.**

ix. **The packets of rejected ballot papers.**

x. **The polling day diary.**

xi. **The statements showing the number of rejected ballots.**

[44] Upon consideration of the pleadings and affidavits by the appellant and the responses given by the 1st and 2nd respondents and considering the circumstances of this election that was won on a very slim margin of 58 votes that made the 3rd respondent be declared a winner, we are satisfied that the appellant had placed sufficient material before court to support a conclusion that there was need to conduct a scrutiny in regard to the 9 polling stations named. There was also an allegation that was not controverted by the 1st and 2nd respondents to the effect that IEBC caused the arrest of a polling clerk who had allowed 16 voters to proceed to cast their votes without properly identifying them as was required by the law. **Regulation 69 (d)** of the Election Regulations requires a voter to place his or her fingers on the finger print scanner after which the name is crossed out from the printed copy. In case the electronic scanner failed to identify the voter, there was a procedure provided for identification. Since this was not denied by 1st and 2nd respondents this taken with the myriad of allegations of the forms that were not signed by the election officials and the results that were not tallying, clearly show the learned Judge failed to consider very crucial material which when taken into account casts a heavy doubt as to whether the 2017 Lamu Senatorial election was conducted in accordance with the principles laid down in the Constitution and the written law. This coupled with the slim margin of 58 votes between the declared winner and the appellant; the cited non- compliance cannot be said that it **did not** substantively affect the overall results. All these could have been sorted out by scrutinizing the materials that were used for voting.

[45] The 3rd issue is perhaps the one that presents a complete watershed in this appeal. This is in regard to the results attached by the 2nd respondent in Form 38C that showed voters at **Kiangwe Primary School** Polling station exceeded the registered voters by 3 voters. We agree this particular ground was not pleaded by the appellant although it was generalized in his pleadings within the alleged malpractices and non- compliance with the law and regulations by the 1st and 2nd respondents. Nonetheless, in our considered view the evidence in this particular Form 38C was pleaded by the 1st and 2nd respondents who attached it to the reply to the petition. A pleading either by the petitioner or respondent is a pleading, it was pleaded in reply and nothing would stop any party from relying on it. The fact that no cross-examination was conducted on it did not make it any less of the matters pleaded. It was on record, and it was incumbent upon the 1st and 2nd respondents to offer an explanation why voters at **Kiangwe Polling station** exceeded the registered voters. Or why those results were not disregarded from the final tally. We therefore find the learned Judge's conclusion that the issue was not pleaded plainly wrong and therefore a matter of law for our consideration.

[46] **Regulation 83 (1) (b)** of the Elections (General) Regulations 2012 ("**the regulations**") requires the returning officer to *disregard the results of a polling station where the total valid votes exceeds the number of registered voters in that polling station*. In ***Dickson Daniel Karaba v John Ngata Kariuki & 2 others*** **[2010] eKLR, Warsame, J.** (as he then was) held the view that:-

> ***"It is essential that persons entrusted to conduct and carry a democratic election ensure strict compliance with the law. As stated earlier a person cannot be allowed to derive a benefit from a flawed process. In my view a process is flawed when a matter which ought to be taken into consideration is not taken into consideration or when the person takes into consideration issues which are not necessary for determination of matters in issue or he introduces extraneous matters."***

[47] The Court of Appeal echoed **Warsame, J's** position when rendering itself on breach of **Regulation 83 (1) (a)** of the Regulations in ***Dickson Mwenda Githinji v Gatirau Peter Munya & 2 others*** **[2014] eKLR** where it held:-

> ***"Regulation 83 (1) (a) requires that before declaring the results, the returning officer must take into account the results of all polling stations. This did not happen in respect of Mwichune Primary School Stream 1."***

In ***Dickson Daniel Karaba – v- John Ngata Kariuki & 2 others, Election Petition No. 2 of 2009***, it was stated that an election becomes a flawed process when a matter which ought to be taken into consideration is not taken into consideration. It was mandatory for the returning officer to take into consideration the results from all polling stations as captured in Form 35 before he announced the final results to the candidates. This was the legitimate expectation of the electorate and all candidates who participated in the elections. The results declared by the returning officer did not take into account the results from Mwichune Primary polling station and the results as declared was inaccurate.

Similarly, failure by the returning officer to disregard the results of Kiangwe Primary School polling station where the total valid votes

exceeded the number of registered voters in that polling station as required by Regulation 83 (1)(a) was a serious flaw that ultimately affected the integrity of the impugned election. See also the Supreme Court in ***Gatirau Peter Munya*** (supra):-

> ***"[T]he allegation that the total number of votes cast exceeds the number of registered voters is such a serious one, that an election court would not treat it lightly. If proved, such an occurrence would call into question the integrity of the electoral process."***

[48] We have consequently asked the following questions:-

> ***a) Did the disclosed errors and irregularities affect the credibility and integrity of the results that were declared?***
>
> ***b) Are the errors and irregularities of such a nature or magnitude as to qualitatively and quantitatively affect the outcome of the results of the Lamu Senatorial elections?***
>
> ***c) Cumulatively, do the errors and irregularities affect the quantitative margin between the winner and runner up?***

We have not merely answered the said questions in the affirmative although it is quite obvious in view of the small margin of 58 votes that separated the appellant from the winner. We find it necessary to consider the position that was taken by the Supreme Court in interpreting **Section 83** of the Elections Act in **Gatirau Peter Munya (*supra)*** and reiterated by the same Court in **Raila Amolo Odinga** as thus:-

> ***" It is clear to us that an election should be conducted substantially in accordance with the principles of the Constitution, as set out in Article 81(e). Voting is to be conducted in accordance with the principles set out in Article 86. The Elections Act, and the Regulations thereunder, constitute the substantive and procedural law for the conduct of elections… If it should be shown that an election was conducted substantially in accordance with the principles of the Constitution and the Election Act, then such election is not to be invalidated only on ground of irregularities. Where however, it is shown that the irregularities were of such magnitude that they affected the election result, then such an election stands to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection, are not enough, by and of themselves, to vitiate an election…Where an election is conducted in such a manner as demonstrably violates the principles of the Constitution and the law, such an election stands to be invalidated."***

[49] It is very clear that taking away the entire results of **Kiangwe Primary School polling station** from the results of Lamu Senatorial seat, the difference of 58 votes disappears. The 3rd respondent therefore could not have been validly elected. There was substantial non-compliance with the law that rendered the elections not free and fair. Consequently the appeal is allowed, the judgment and decree by **Ongeri J.,** given on the 9th February, 2018 dismissing the petition is set aside.

[50] As regards costs, we have no reason to depart from the general principle that costs follow the event. However, costs should not be used as a scarecrow to chase away deserving litigants who have grievances from seeking justice or to impede access to justice for that matter. Consequently, the appellant shall have the costs of the appeal as well as the costs of the proceedings in the High Court, which shall be taxed. The appellant's costs in the High Court shall not exceed and are capped at Kshs.1,500,000 as against the 1st and 2nd respondents. As against the 3rd respondent we cap costs at Ksh.500,000.

The appellants costs of the appeal shall not exceed and are capped at Kshs.1,000,000.00 as against 1st and 2nd respondents and Ksh.500,000 as against the 3rd respondent.

FINAL ORDERS

> **A. The appellant's appeal is allowed and the judgment and order of the High Court given on 9th February 2018 is hereby set aside.**
>
> **B. It is hereby declared that the 3rd respondent was not validly declared as Senator for Lamu County.**
>
> **C. IEBC is hereby directed to organize and conduct a fresh election for the position of Senator Lamu County in conformity with the Constitution the Elections Act and the relevant Regulations.**
>
> **D. The certificate issued by the Election Court pursuant to Section 86 of the Elections Act is hereby set aside and substituted with a Certificate that the 3rd respondent was not validly declared as having been elected as senator during the elections held on the 8th August 2017.**
>
> **E. The 1st and 2nd respondents shall pay the appellants costs incurred before the election court, to be taxed, but not to exceed Kshs.1,500,000.**
>
> **F. The 3rd respondent shall pay the appellants costs incurred before the election court, to be taxed, but not to exceed Kshs.500,000.**

G. The 1st and 2nd respondents shall pay the appellants costs of this appeal to be taxed, but not to exceed Kshs.1,000,000.

H. The 3rd respondent shall pay the appellants costs of this appeal, to be taxed, but not to exceed Kshs.500,000.

Orders accordingly.

Dated and delivered at Mombasa this 12th day of July, 2018

ALNASHIR VISRAM

…….

JUDGE OF APPEAL

W. KARANJA

…….

JUDGE OF APPEAL

M.K. KOOME

…….

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR