IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, JJ.A)

ELECTION PETITION APPEAL NO. 15 OF 2018

BETWEEN

BOWEN DAVID KANGOGO ..... APPELLANT

AND

SAMMY KEMBOI KIPKEU .....1ST RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION .....2ND RESPONDENT

MARTIN KITUYI WEKESA - RETURNING OFFICER,

MARAKWET EAST CONSTITUTUENCY.....3RD RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Eldoret, **(Honorable K. Kimondo, J)** delivered on the 27th of February, 2018 **in Election Petition No. 2 of 2017)**

****

JUDGMENT OF THE COURT

[1] The electoral process in Kenya is anchored on **Article 81** of the Constitution which states that citizens have a right to exercise their political rights by voting through a secret ballot in a free and fair election which ought to be administered in an impartial, neutral, efficient, accurate and accountable manner. This is one of the principles that an election court determining a petition questioning the propriety of the electoral process is required to apply.

[2] Following general elections held on the 8th August, 2017, Bowen David Kangogo (appellant) was declared the duly elected member of National Assembly for Marakwet East Constituency with 14,812 votes. His closest rival was Linah Jebii Kilimo who had 13,845 votes. Three other candidates, Mark Bowen, John Kiptoo Marimoi and Jonah Amatui Cherotich lagged behind with 1,116 votes, 387 votes, and 54 votes respectively.

[3] Sammy Kemboi Kipkeu (the 1st respondent herein), who was a registered voter in Marakwet East Constituency during the General Elections, was dissatisfied with the conduct and outcome of the elections. He filed a petition dated 6th September, 2017 seeking, *inter alia*, a declaration that the elections held on the 8th August, 2017 in Marakwet East Constituency for member of the National Assembly was not free, fair and credible; and that the appellant was not duly and validly elected. The 1st respondent named the appellant, the Independent Electoral & Boundaries Commission (now 2nd respondent) and Martin Kituyi Wekesa who was the Returning Officer (now 3rd respondent) as respondents in the petition. Each of the respondent's to the petition, filed responses denying the 1st respondent's allegations.

[4] On 27th February, 2018, the election court (Kimondo, J.) having heard the petition, delivered a judgment in which it granted the petition; declared that the elections held on 8th August, 2017 for the member of the National Assembly for Marakwet East Constituency was not free, fair, credible or verifiable; and that the appellant was not validly elected as the member of National Assembly for Marakwet East Constituency.

[5] The appellant being aggrieved by the judgment of the election court lodged an appeal before us in which he raised 26 grounds urging us to set aside the judgment of the election court. The 2nd and 3rd respondents also cross-appealed and raised 5 grounds urging the court to allow the appeal and set aside the judgment of the election court. Following directions given by the Court, the appellant filed a list of contested and uncontested issues. Each party also duly filed written submissions together with list of authorities and accompanying digest. These documents were duly exchanged between the parties before the hearing of the appeal.

[6] During the hearing of the appeal, advocates for each party were given opportunity to highlight the submissions. Mr. Kivuva and Mr. Malanga represented the appellant, Mr. Magare and Mr. Nyambegera the 1st respondent, and Mr Nyamodi the 2nd and 3rd respondents.

[7] In arguing the appeal, counsel for the appellant compressed the 26 grounds into 6 clusters. These were that the election court erred: in nullifying the election when the evidence on record did not satisfy the nullification test set out in section 83 of the Elections Act; in applying the wrong standard of proof before nullifying the election; in drawing a wrong inference in relation to the seals found in the ballot boxes; in denying the appellant the right to a fair hearing contrary to Articles 25(c), 27(1) and 50(1) of the Constitution, by extending the facts supporting the petition to issues which were not pleaded in the petition and making adverse findings in regard to polling stations Nos. 76, 74, 36, 093 and 124; and in exercising its discretion un-judicially by condemning the appellant to pay costs to the respondents after finding the appellant not guilty of any malpractices in the elections.

Submissions

Submissions for Appellant

[8] In arguing the first cluster of his grounds, the appellant contended that the election court erred in nullifying the election, as the evidence on record did not satisfy the nullification test set out in **Section 83** of the **Elections Act**. In this regard, the appellant relied on the disjunctive test in **Section 83** of the **Elections Act,** as expounded in the Supreme Court decision in ***Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 4 others & Attorney General & another, [2017] eKLR*** **(Raila 2017)**. The disjunctive test provides for nullification of elections if any of the two circumstances indicated in section 83 of the Elections Act is established.

[9] The election court was faulted for having departed from the classification adverted to in the Raila decision, and adopting a new classification of excusable and inexcusable irregularities or omissions that had no impact on the elections; and irregularities and illegalities that went to the root of the elections. It was argued that the two classifications created by the election court all fall under the second limb of the classification in the ***Raila [2017] decision***, and that this improper approach clogged the sight of the election court in the interpretation of **Section 83** of the **Elections Act.** Further, that this approach resulted in the election court flouting the principle of precedent and *stare decisis,* resulting in the court overruling the Supreme Court decision.

[10] In addition, the appellant submitted that there were no allegations pleaded in the Petition of conduct amounting to breach of the Constitution or election laws. Instead, minor errors like the failure of presiding officers or their deputies to execute form 35A in some polling stations were pleaded without demonstrating how these alleged irregularities violated specific provisions of the Constitution, or the Elections Act 2012, or how these failures affected the outcome of the elections.

[11] It was pointed out that Regulation 79(1) of the Election (General) Regulations 2012 (herein Regulations), require the presiding officer, and the candidates or agents present to sign the declaration in Form 35(A) but does not specifically state that failure to sign that form makes the form irregular. Relying on **IEBC vs Stephen Mutinda Mule & 3 Others [2014]** eKLR, it was argued that the requirement for signature is fulfilled when at least a candidate, an agent or the presiding officer at the polling station authenticates the form. The court was faulted for holding that the results of Bororwo Nursery polling station were illegal due to the failure of the presiding officer to execute the forms as this was visiting the sins of the presiding officer on the innocent voters of Bororwo who had exercised their constitutional franchise right to vote.

[12] In regard to the election court's finding on transposition errors that were found in Form 35B in 3 out of the 142 polling stations in the constituency, that **'a sizeable number of votes were unaccounted for in the process'** it was submitted that that finding was not supported by the evidence; that the court was unduly persuaded by an alleged announcement on total valid votes at the tallying center and the declaration in Form 35B, while Regulation 83(1)(e)(iii) require declaration of votes cast per candidate, and there is no provision for the announcement of total valid votes. In addition, Regulation 83(1)(d) require announcement of results from each polling station, while Regulation 83(1)(f) provides for the final declaration by the returning officer through Form 35B followed by issuance of Form 35C to the winning candidate and not oral statements like announcements.

[13] The appellant complained that contrary to the rules of pleadings, the election court improperly expanded the scope of the Petition by including evidence regarding Bororwo Nursery polling station, Mogil Primary School polling station, Kachemwang Nursery polling station and Tot Catholic Church polling station none of which were pleaded in the petition.

[14] In regard to the second cluster of grounds of appeal, concerning the standard of proof, the appellant submitted that although the election court was alive to the burden of proof and the standard of proof, it erred in applying the two evidential principle by holding that the petitioner had "partially" proved his case to the required standard, as the holding implied that the petitioner had not completely proved his case.

[15] It was noted that the election court had in fact dismissed several allegations that were raised in the petition. This coupled with the credibility of the petitioner and his witnesses, ought not to have led to the findings that were made by the election court, or the conclusion that there were serious irregularities and anomalies which cast doubt on the integrity of the results such as to justify the nullification of the elections.

[16] In regard to the drawing of wrong inference, it was pointed out that under Regulation 67, the seals affixed on the ballot boxes at the commencement of the voting, are required to be broken to facilitate vote counting, but the Regulations are silent on where the broken seals should be kept; that the scrutiny was conducted after the recording of the evidence which was detrimental to the appellant's constitutional

right for a fair hearing; that the order of scrutiny only related to recount of votes in four polling stations and did not include scrutiny of materials used in the elections that were in the ballot boxes.

[17] Further, the appellant contended that the election court did not properly exercise its discretion in awarding costs of Kshs.2,000,000/= against him in view of the fact that the only two allegations that were made against him in the petition were dismissed by the election court, and the appellant was not guilty of any malpractice in the elections. The election court was faulted for not being guided by the principle of fairness, justice and access to justice that requires that an innocent party, who is enjoined in public litigation as a matter of statutory demand and is not found at fault, should not be condemned to pay costs.

Submissions for 2nd and 3rd respondents

[18] The 2nd and 3rd respondents supported the appeal and also filed a cross appeal, seeking to have the judgment of the election court set aside and the elections held on 8th August, 2017 declared to have been valid. It is therefore appropriate that we consider these submissions before addressing the 1st respondent's submissions.

[19] The 2nd and 3rd respondents submitted on both the main appeal and the cross appeal. The submissions were in five clusters. The first cluster was whether the election court erred in basing its decision on matters not pleaded in the petition. It was submitted that the judgment of the election court clearly showed that the court expanded the scope of the petition as it made findings on matters that had not been pleaded.

[20] It was contended that the irregularities relied upon by the election court to nullify the elections were in three broad categories which concerned broken seals found in two ballot boxes; results from ungazetted polling stations; and Form 35A from Bororwa Nursery polling station that was not signed. It was noted that all these issues were not pleaded in the petition.

[21] In particular, it was observed that the issue of the broken seals in ballot boxes was neither pleaded nor proved, but was picked up by the election court from the scrutiny exercise after the close of evidence, that according to the order of scrutiny made by the court, the scrutiny was limited to recount and ascertainment of the number of votes for each candidate and therefore the election court ought not to have delved into the issue of broken seals which was not pleaded.

[22] As regards Bororwa Nursery School, it was submitted that the findings relating to this polling station was not pleaded in the petition, and that if the same was pleaded the anomaly regarding the non-signing of Form 35A could have been explained. Similarly, the finding of the election court in regard to Form 35B concerning results from ungazetted polling stations Embokala primary school and Kitmekinget health centre, and excluding gazetted polling stations Tot Catholic Church and Macron were not pleaded.

[23] It was argued that the 1st respondent was required by law to plead his case with reasonable precision by supplying full and complete particulars, so that the respondents to the petition would have sufficient notice of the dispute that they are confronted with. In support of this proposition, this Court's decision in **Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others [2013]** eKLR was relied upon. Further, it was posited that the purpose of an election is to turn the will of the people into a result, and that under Article 88(4) and Article 38 of the Constitution, it was the responsibility of the 2nd respondent to facilitate the right to vote and give directions on how the election should be done; that in this regard gazettement of polling stations is an administrative arrangement to notify voters where they can vote; and that there was no complaint in the petition that the ungazetted polling stations resulted in citizens being disenfranchised.

[24] In addition, it was submitted that in order to succeed in annulling an election, a petitioner must establish that there was non-compliance with the provisions of the Constitution or other written law or that irregularities or illegalities complained of affected the results of an election. It was argued that the 1st respondent did not adduce sufficient evidence to prove that the elections in Marakwet East Constituency was not conducted in accordance with the Constitution or any other written law nor did the 1st respondent demonstrate how the alleged irregularities or illegalities substantially affected the results of elections in Marakwet East Constituency.

[25] Further, it was pointed out that the only candidate whose votes were affected by the alleged irregularity was John Kiptoo Marimoi who came fourth in the election. The votes of the appellant and Linah Jebii Kilimo who came in second were not affected and therefore the alleged irregularity if any did not affect the final tallying of the results of the leading candidates.

[26] In regard to the burden and standard of proof, the decision in **Raila [2017]** decision was relied upon for the proposition that the standard of proof was beyond a balance of probabilities but below the standard of proof in criminal cases of beyond reasonable doubt. It was noted that the 1st respondent failed to discharge the burden of proof in regard to the irregularities listed in the petition which were: voting without use of KIEMS kit, delivery of unsealed ballot boxes by one Beatrice and others to the tallying centre; violence at the tallying centre; and irregularities in Forms 35A and 35B.

[27] The 2nd and 3rd respondents reiterated that the irregularities in Forms 35As highlighted in the judgment in respect of Bororwa Nursery polling station, Mogil Primary school, Tot Catholic polling station, Kachemwang nursery polling station, Embokala nursery polling station and Kitmekinget health centre polling station all of which formed the basis for nullifying of the elections were neither pleaded nor mentioned in the petition nor subject of the scrutiny order made by the court, and could not therefore count towards proof of the petition.

1st Respondents Submissions

[28] The 1st respondent opposed both the appeal and the cross appeal**.** In the first instance, the 1st respondent challenged some grounds in the appeal and cross appeal as raising issues of fact, which the Court had no jurisdiction under **section 85A** of the **Elections Act** to entertain. This included the issues: whether the election court analyzed the evidence properly; whether the evidence tendered was credible; and whether

the election court should have believed one witness or another. Thus, it was argued that grounds (I), (III), (IV), (VIII), (XII) of the Notice of Appeal; and ground 12, 13, 15, 21 and 25 of the Memorandum of Appeal, and grounds 4, 5, 6, 7 and 8 of the cross appeal that raises such issues should fail.

[29] The 1st respondent conceded that the appeal and cross-appeal raised the following issues of law: whether the 1st respondent discharged his burden of proof in regard to illegalities and irregularities; whether the illegalities and irregularities affected the results; whether the integrity of the election was negatively impacted; whether the court decided the case on new issues, and, who is to bear costs.

[30] The 1st respondent pointed out that the petition was mainly anchored on the ground that the results were systematically changed and manipulated in favour of the appellant through Form 35B which did not reflect the results from a majority of the polling stations. He argued that contrary to the submissions of the appellant, the election court correctly interpreted **section 83** of the **Elections Act** by appropriately applying the two limbs as described in the aforementioned ***Raila [2017] Decision***.

[31] On whether the irregularities affected the outcome of the results, the 1st respondent maintained that the election court made sound findings on the issues including; that there were broken seals found in some ballot boxes from Mungwa Dispensary Hall and Mungwa Primary; that the presence of the broken seals was contrary to Regulation 67 and Regulation 73; that in his submissions the appellant misconstrued the finding of the election court regarding the signature as the election court held that the signature of either the presiding officer or his deputy was sufficient to authenticate the forms, but that the forms were not verifiable if none of the two signed the forms; that in the case of Bororwo nursery school polling station neither the presiding officer nor the deputy presiding officer signed form 35A and therefore the results were not verifiable.

[32] The 1st respondent argued that Form 35B did not show the figure of the valid votes cast; that the total number of all the votes garnered by the individual candidates was 30,214; that the 2nd respondent stated in evidence that the total number of votes cast was 30,020; that the contradiction revealed inaccuracy that cast doubt on the numbers; and that Form 35B that was used to announce votes in *Iten* was not the same one that was presented to the election court; and that there was a difference of 641 unaccounted for increase in votes between what was garnered by the candidates and what was announced and therefore Form 35B appears to have been tampered with as the figure was not the one announced. In addition, the procedure adopted was contrary to Regulation 84 and Regulation 87, which provides that results and certificate ought to be issued at the tallying centre.

[33] On the issue of verifiability, the existence of polling stations that had not been gazetted such as Embokala and Kitmekinget were highlighted, it being noted that results from gazetted polling stations such as Tot Catholic and Maron Health Centre polling stations that had a total number of 414 registered voters were omitted from the results contained in Form 35B; It was argued that the circumstances were such that a reasonable tribunal could not have reached a different conclusion. The irregularities are to be looked at as a totality not in isolation.

[34] With regard to the scrutiny report, the 1st respondent argued that the scrutiny was done pursuant to an application argued and granted by the court; that the court having ordered a recount, scrutiny regarding every aspect of the vote was necessary to determine the authenticity; and that the appellant, 2nd and 3rd respondents did not object to the scrutiny report. The 1st respondent dismissed as baseless the appellant's complaints of denial of right to fair hearing, pointing out that the appellant never opposed the scrutiny report nor did he make any adverse submissions on the same.

[35] As regards pleadings, it was submitted that the 1st respondent pleaded in his petition that there were massive irregularities; that it was clear from the petition and the supporting affidavits that all Form 35 had been systematically changed; and that paragraph 38 of the 1st respondent's affidavit was adverted to wherein he averred that all Form 35A had anomalies. It was maintained that the pleadings were wide enough to cover the issues dealt with by the election court. Relying on **Zachary Obado Okoth vs Edward Akong'o Oyugi & 2 Others [2014]** eKLR, the 1st respondent asserted that the election court did not extend the pleadings and as its decision was within the four corners of the petition.

[36] Further, the 1st respondent relied on Article 86(c) and 81(e) of the Constitution maintaining that the election was not purely about numbers but an expression of the sovereign will of the people, and that the nature of the irregularities noted in the election of the member of National Assembly for Marakwet East Constituency were such that they negatively impacted the integrity of the election and therefore affected the results. In this regard, **Raila [2017]** was relied upon.

[37] On the standard of proof, 1st respondent submitted that although he did not succeed on all the grounds that he set out in the petition, he succeeded on some of the grounds, and the standard and burden of proof was correctly applied in regard to the grounds proved.

[38] Finally, on the issue of costs, the 1st respondent urged the court to find that the election court made a factual finding that costs followed the event, and this was consistent with section 84 of the Elections Act. The 1st respondent therefore urged the court to dismiss the appeal and the cross appeal with costs.

Analysis and Determination

[39] We have considered this appeal, the cross-appeal, the submissions made by the parties, and the authorities cited. From the list of contested issues that was filed by the appellant, and the issues identified by the 1st respondent, 2nd and 3rd respondents, we have identified the following issues for our consideration:

1. Whether the appeal and cross-appeal raise issues of fact that this Court has no jurisdiction to deal with.

2. Whether the election court applied the proper burden and standard of proof, and whether the 1st respondent discharged that burden

and standard of proof in regard to the alleged illegalities and irregularities in the election process.

3. Whether the election court properly applied the nullification test provided in section 83 of the Election Act to the facts before him.

4. Whether the election court relied on unpleaded issues to determine the petition.

5. Whether the election court properly exercised its discretion in condemning the appellant to pay costs.

[40] As an issue was raised regarding the jurisdiction of this Court to hear this appeal and the cross appeal, this is an appropriate place to begin our analysis. Section 85A (1) of the Election Act that gives this Court jurisdiction to handle election petition appeals concerning membership of the National Assembly, restricts the jurisdiction of the Court to hearing appeals on matters of law only. This means that the court has no jurisdiction to hear an appeal that is anchored on matters of fact.

[41] The question on what is "matter of law" in reference to section 85A of the Elections Act, has been addressed and settled by the Supreme Court in ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*** **[2014] eKLR, (Peter Munya Decision),** where the Supreme Court provided guidance that a matter of law is a question or an issue involving:

> **a. the interpretation, or construction of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, in an election petition in the High Court, concerning membership of the National Assembly, the Senate, or the office of County Governor;**
>
> **b. the application of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine to a set of facts or evidence on record, by the trial Judge in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of County Governor;**
>
> **c. the conclusions arrived at by the trial Judge in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of County Governor, where the appellant claims that such conclusions were based on "no evidence", or that the conclusions were not supported by the established facts or evidence on record, or that the conclusions were "so perverse", or so illegal, that no reasonable tribunal would arrive at the same; it is not enough for the appellant to contend that the trial Judge would probably have arrived at a different conclusion on the basis of the evidence.**

[42] The above means that where the appeal questions the basis of the conclusions arrived at by the election court, it is open to the court to consider the facts. However, such consideration is limited and again we can do no better than reproduce the Supreme Court's further elaboration in the **Peter Munya** decision as follows:

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

[43] The Supreme Court's guidance is in accord with what this Court stated in **Timamy Issa Abdalla v Swaleh Salim Swaleh Imu & 3 Others [2014] eKLR as follows:**

> **"… it is evident that in determining whether the election court properly performed its duty, this court must be satisfied that the court acted judiciously and correctly applied the law. The conclusions of law drawn from the facts must also be reasonable and in accordance with the spirit and purpose of the Constitution of Kenya. This calls for examination of the findings of the election court and conclusions on primary facts in totality, taking into account the Constitution and the electoral laws, with a view to determining whether any conclusions of law arising therefrom have been properly arrived at. Thus the objection taken that the appeal is incompetent because the grounds of appeal raise issues of facts, was wrongly brought as a preliminary issue, as there is need to evaluate the conclusions arising from the primary facts."**

[44] From the above analysis it is evident that the Court has jurisdiction to consider facts in determining an appeal questioning the election court's conclusions in order to determine whether the evidence that was before the court supports the conclusions arrived at, provided that such consideration does not extend to questioning credibility or probative value of the evidence. Besides, we have considered the grounds of appeal that are said to be anchored on facts, in the main appeal and the cross appeal, and we find that the grounds question the findings of the election court as either not supported by the evidence or based on a wrong application of the law. Thus, the grounds fall squarely within our jurisdiction and we decline to strike out these grounds.

[45] The next issue we wish to address is the burden and standard of proof. The learned judge addressed the issue of burden and standard of proof referring to appropriate authorities such as the **Raila 2013** decision and concluded as follows:

> **"104. I remain alive that the evidential burden keeps shifting in the course of the trial. This was succinctly captured by the Supreme Court in Raila Odinga and others v Independent Electoral and Boundaries Commission and 3 others, Nairobi, Supreme Court, election petition 5 of 2013 [2013] e KLR:**
>
> 'The petitioner should be under obligation to discharge the initial burden of proof before the respondents are invited to bear the evidential burden'.

105. The standard of proof in election petitions is higher than a balance of probabilities in ordinary civil cases but not beyond reasonable doubt as required in criminal cases. See Mbowe v Eliufoo [1967] E. A. 240, Raila Odinga and others v Independent Electoral and Boundaries Commission and 3 others, Nairobi, Supreme Court, election petition 5 of 2013 [2013] e KLR, Muliro v Musonye (2008) 2 KLR (E.P.) 52, Rishad Amana v Independent Electoral and Boundaries Commission and 2 others, Malindi, High Court election petition 6 of 2013 [2013] eKLR."

[46] The learned judge was on the right track as the Supreme Court has reiterated in the **Raila 2017** decision, as follows:

"[131] Thus a petitioner who seeks the nullification of an election on account of non-conformity with the law or on the basis of irregularities must adduce cogent and credible evidence to prove those grounds *to the satisfaction of the court. That is fixed at the onset of the trial and unless circumstances change, it remains unchanged*…

…….

….in electoral disputes, the standard of proof remains higher than the balance of probabilities but lower than beyond reasonable doubt and where allegations of criminal or quasi criminal nature are made, it is proof beyond reasonable doubt."

[47] It is therefore clear that the 1st respondent had the obligation to adduce cogent evidence in support of the alleged electoral irregularities in order to discharge the legal and evidential burden. In addition, the 1st respondent was required to meet the standard of proof, which is higher than the balance of probability but lower than beyond reasonable doubt.

[48] What appears to be in dispute is the election court's interpretation and application of section 83 of the Elections Act. That section has now been amended through the Election Law Amendment Act No. 34 of 2017, section 9 of which deleted and substituted the former section with a new section. The Amendment Act was assented to on 28th October 2017, and came into effect on 2nd November, 2017 when it was published. However, the petition was filed on 5th September, 2017 before the amendment came into effect. This means that the election court had to apply the law as it was at the time of filing the petition, which was before the amendment came into effect.

[49] Before the amendment, section 83 stated as follows:

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

[50] It is this original section that the Supreme Court considered in **Raila 2017** and gave the following interpretation:

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

[51] In applying the standard of proof, the election court was faulted for departing from the interpretation of the Supreme Court by classifying the alleged irregularities into excusable or minor omissions or mistakes which had no impact on the polls; and irregularities or illegalities that went into the root of the results. In our view, this criticism is unfounded.

[52] The interpretation of the Supreme Court of the disjunctive test in the then section 83 of the Elections Act, provided for two situations in which elections could be nullified. In this case, it is clear that the election court was dealing with a situation where the election was alleged to be fraught with irregularities or illegalities that affected the results of the election. In classifying the irregularities, the election court was addressing the second limb of the **Raila 2017** classification in regard to the aspect of the disjunctive test concerning election results being affected.

[53] The election court found some of the irregularities being minor omissions that had no impact on the polls, while others were serious enough to affect the results of the election. That classification was consistent with the interpretation in the **Raila 2017** decision on the disjunctive test in section 83 of the Election Act, as it was prior to the amendment.

[54] As regards the application of the disjunctive test, it is noteworthy that the learned judge found a number of the alleged irregularities that were pleaded by the 1st respondent in the petition such as Forms 35A that were only signed by the presiding officer or his deputy; Forms that did not have the signatures of agents; and forms that did not have the official IEBC stamp, to be minor excusable mistakes or omissions that had no impact on the polls. In our view, the election court cannot be faulted in this regard.

[55] An issue of concern that arose from the scrutiny exercise was broken seals that were found inside sealed ballot boxes at Mungwa primary school polling station and Mungwa dispensary hall polling station. The election court found the presence of the broken seals inside the sealed ballot boxes casting doubt on the integrity of the materials inside the ballot boxes. We note that there were no complaints pleaded regarding the broken seals. Secondly, it was not disputed that the ballot boxes from which the broken seals were found were all properly sealed and that nothing untoward arose from the documents, which were inside the ballot boxes.

[56] In our view, the presence of the broken seals inside the ballot boxes that had been sealed after the voting exercise, was not an irregularity, nor was there any evidence that the ballot boxes had been tampered with. The election court drew an adverse inference from the failure of the appellant and the 2nd and 3rd respondents to offer any explanation for the presence of the broken seals. This was an inappropriate inference considering that the broken seals were only discovered inside the sealed ballot boxes during the scrutiny exercise that was conducted after all the parties had called their evidence, and therefore the 2nd and 3rd respondent had no opportunity to offer any explanation. In addition, submissions made by parties are intended to be forums for addressing the law and the evidence that is already before the court and not to offer further evidence to explain or counteract such evidence. The speculative conclusion made by the election court regarding the broken seals was therefore without substance.

[57] Another major issue of contention was the finding of the election court regarding what it considered serious irregularities. The court identified such irregularities as Forms 35A that were not signed by either the presiding officer or the deputy presiding officer; errors in transposing the results from Form 35A to Form 35B; the accuracy of the declared results; and the irregular inclusion of two ungazetted polling stations and exclusion of two gazetted polling stations.

[58] The finding in regard to Form 35A related to Bororwa Nursery School polling station which the court found not to have been authenticated by either the signature of the presiding officer or his deputy. At paragraph 136 of his judgment, the election court found that although the 1st respondent had pleaded that a large number of Forms 35A were not signed as required under the law and Regulations, the 1st respondent failed to prove the large number. In actual fact, the only proof offered was in regard to Bororwa Nursery School polling station.

[59] In our view, although the failure to sign Form 35A was an irregularity and breach of the Regulations, given that it was only one Form, the magnitude of the breach was not such as could be said to have had any impact on the elections. Indeed, this was one polling station in a constituency having 142 polling stations. In addition, the unsigned Form indicated that there were 321 valid votes cast, and that the appellant was ahead of his closest rival by 54 votes. As the appellant emerged the winner, the conclusion that this irregularity affected the results is not supported by the facts.

[60] As regards errors in transposing results from Form 35A to Form 35B, five polling stations Sewerwa Nursery School polling station, Mogil Primary School polling station, Tot Catholic Church polling station and Kachemwang Nursery polling station were identified as polling stations in which there were errors in transposing results. It was conceded that there were errors or anomalies, but these errors appear to have been insignificant in that the results of Sererwa nursery school polling station as indicated in Form 35A were confirmed through the scrutiny conducted, and the number of votes for each candidate was found not to have been affected as the errors related to the transposition only.

[61] In the case of Mogil primary school, there was a difference of 7 votes between what was on Form 35B and Form 35A while Kachemwang Nursery school had a difference of 1 vote between Form 35B and Form 35A and Tot Catholic Church had Mr. Marimoi who had garnered no vote in that polling station being given some votes. These figures do not justify the finding made by the election court that "a sizeable number of votes were unaccounted for."

[62] As concerns the declaration of results, it was noted that Form 35B that was used to declare the results was inaccurate. This was because Form 35B that the returning officer purported to have been reading had a different figure of 30,214 valid votes as against the figure of 29,573 that he is captured on a video clip announcing, and the figure of 30,020 that he conceded was the correct figure. We note however, that the figures cast for the winning candidate and the run up did not change.

[63] Regulation 83(1)(e) requires the returning officer to declare the winning candidate by giving the total number of registered voters, and the votes cast for each candidate in each polling station. Although there was an issue regarding the accuracy of the aggregate number of the votes cast, it is clear that the issue was basically an arithmetical issue which was not addressed by the election court.

[64] In **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others [2014]** eKLR, the Supreme Court stated as follows:

> **"The appellate Court had been content to conclude that the "statistically small margin" would have been "significantly impacted", but without taking into account the numerical alignment of votes. It would have been necessary for the appellate court to demonstrate how a figure of 3,436 win-votes would have so diminished as to reverse the victory-outcome in favour of the petitioner. Without such a demonstration, the scenario is one in which an election was annulled on the ground of "what might have been" and not necessarily, "what was". This, in truth, amounts to invalidating an election on speculative grounds, rather than proven facts."**

[65] As stated in the above case, the election court could not reach a conclusion that the results were opaque and unverifiable without undertaking a quantitative analysis particularly in light of the view that the results of the two leading candidates appeared unaffected.

[66] The other issue that the election court found vitiated the elections was the ungazetted polling stations and excluded gazetted polling stations. We note that ***Section 2*** of the ***Elections Act*** defines a polling station as ***''any room, place, vehicle or vessel set apart and equipped for the casting of votes by voters at an election.''*** Therefore, nothing stopped the 2nd and 3rd respondents from using Embokala Nursery School and Ketmekinget Health Centre as polling stations provided that they were set apart for this purpose. Besides, from the evidence it was apparent that the so-called ungazetted polling stations were actually polling stations that were interchanged with gazetted polling stations for reasons that were explained.

[67] We concur that **Regulation 7(3)** requiring gazettment of changes was not complied with by the 2nd respondent in relation to changing the name of the polling station. However, the learned judge failed to address how the breach of this Regulation substantially affected the outcome of the results as no evidence was tendered to show that there was confusion or that any voter failed to vote on account of the change of the polling stations.

[68] The general principle of pleadings is that parties are bound by their pleadings. This was reiterated by this Court in **Independent Electoral and Boundaries Commission & another vs Stephen Mutinda Mule & 3 others** (supra) In **Zachary Okoth Obado vs Edward Okong'o Oyugi & 2 others** (supra) the Supreme Court asserted that:

> **"… it is vital in election dispute, that the respondent should know the case that faces him or her. Hence the petitioner ought to have indicated in his or her pleadings the disputed matters, with clarity and specificity, as a basis for being allowed to urge that there were irregularities in those spheres … ."**

[69] At paragraph 150 and 151 of the judgment, the election court stated as follows:

> **"True the complaints at Embokala and Kitmenget are not expressly mentioned in the tables at paragraph 38 of the petition; or, paragraph 37 of the supporting affidavit. However, paragraph 11 of the petition states: "That the elections in Marakwet East were marred by irregularities … the first and 2nd respondent's systematically changed results in the 3rd respondent." Paragraph 17 of the petition pleads that "the results as announced were not supported by the results from polling stations" Paragraph 21 adds that "the returning officer hurriedly announced results without correcting any anomalies. Lastly, paragraph 23 makes a general allegation, that the elections were not conducted in compliance with Article 81(e) of the Constitution.**
>
> **151 I thus find that the complaints relating to Embokala and Kitmenginget were sufficiently pleaded at paragraphs 11, 17, 21 and 23 of the petition. Considering the entire petition and supporting affidavits, the respondents cannot be heard to say that they did not know the case they were confronting in this petition"**

[70] It is apparent from the above that although the election court adverted to the general principle of pleadings referred to earlier, it nevertheless went out of its way to have the complaints relating to Embokala and Kitmekinget, the ungazetted polling stations that were not expressly mentioned in the petition, or the supporting affidavit, based on the general complaints pleaded in the petition. This was not proper as the general allegations made in the paragraph referred to in the pleadings were not sufficient to show the specific complaints that the respondents were required to address in regard to the two polling stations.

[71] Besides, the evidence adduced in regard to the two polling stations was not sufficient to prove to the required standard, the allegations that the elections in Marakwet East were marred by irregularities or that the results as announced were not supported by the results from the polling stations or that the results were hurriedly announced.

[72] We reiterate that a party must plead his allegations regarding irregularities or violation of the Constitution or other laws, with precision to enable the respondent address those allegations. Without such specific and clear pleadings, the respondents will be denied a right to fair hearing by being taken by surprise through allegations that he had no prior warning. To allow such an approach would be prejudicial to the respondent as the generalizations give an opportunity for the petitioner's claim to mutate during the proceedings by bringing in new issues. Thus, it was improper for the election court to base its judgment on matters that were not specifically pleaded.

[73] We come to the conclusion that the 1st respondent failed to discharge the burden of proof in regard to the allegations of irregularities that were made in the petition; that the election court improperly extended the scope of the petition by determining the petition on allegations of irregularities that had not been pleaded; that the conclusion of the election court on the un-pleaded allegations was not supported by the evidence; and that in any case, the un-pleaded irregularities were not established to have had any significant effect on the outcome of the elections as to justify the nullification of the elections. In the circumstances, the judgment of the election court cannot stand. The appeal, and the 2nd and 3rd appellant's cross appeal are accordingly allowed; and the judgment of the election court together with all consequential orders are hereby set aside.

[74] In regard to costs, the election court properly held that the costs should follow the event and having found that the appellant was not validly elected as a member of National Assembly of Marakwet constituency condemned him to pay the costs of the 1st and 2nd respondents' capped at Kshs. Two million. As we have found that the learned judge erred in finding that the appellant was not validly elected as member of the National Assembly for Marakwet constituency, it follows that with the setting aside of the judgment of the election court, the order made by the election court for costs must also go. Consequently we set aside the order on costs and substitute thereto an order for costs in favour of the appellant and the 2nd and 3rd respondents as against the 1st respondent in the election court with the capping of costs at Kshs Two million. We award costs of the appeal and the 2nd and 3rd respondents cross appeal to the appellant, and 2nd and 3rd respondents respectively as against the 1st respondent.

[75] The upshot of the above is that this appeal is hereby allowed; the orders made by the election court are hereby set aside and substituted with an order dismissing the petition and confirming the election of the appellant Bowen David Kangogo as Member of National Assembly for Marakwet East Constituency. We award costs in favour of the appellant and the 2nd and 3rd respondents as aforestated.

Those shall be the orders of this Court

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

E. M. GITHINJI

……..……

JUDGE OF APPEAL

HANNAH OKWENGU

……

JUDGE OF APPEAL

J. MOHAMMED

……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR