IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, JJ.A)

ELECTION PETITION APPEAL NO. 28 OF 2018

BETWEEN

NIXON NGIKOR NICHOLAS.....APPELLANT

AND

THE INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION.....1ST RESPONDENT

ALFRED K. RONOH,

THE RETURNING OFFICER

TURKANA EAST CONSTITUENCY.....2ND RESPONDENT

ALI LOKIRU MOHAMMED.....3RD RESPONDENT

(An appeal from the judgment of the High Court of Kenya

at Lodwar,(Ogembo, J.) made on 23rd February 2018

in

Election Petition No 6 of 2017)

****

JUDGMENT OF THE COURT

Introduction and background

1. The election of the position of Member of Parliament for Turkana East Constituency, Turkana County was held alongside other elections in the General Elections on 8th August, 2017. Four candidates contested for the seat. These are **Ali Lokiru Mohammed** (the 3rd respondent), **Nixon Ngikor Nicholas** (the appellant), **Robert Kamaro Atuko** and **Nasia Toney Ewaton**. The Independent Electoral Commission (IEBC), (the 1st respondent) declared the 3rd respondent, **Ali Lokiru Mohammed** as the duly elected Member of Parliament for Turkana East Constituency with 5,528 votes. The appellant was the closest contestant having garnered 4,437 votes. **Robert Kamaro Atuko** and **Nasia Toney Ewaton** garnered 652 votes and 170 votes respectively. The IEBC (1st respondent) is the Constitutional Authority mandated to manage the elections. **Alfred K. Ronoh** (the 2nd respondent) was at the material time the Returning Officer for Turkana East Constituency.

2. The appellant, **Nixon Ngikor Nicholas**, was aggrieved with the declaration and filed a petition dated 6th September 2017. During the hearing of the Petition, the appellant who was the petitioner called a total of nine (9) witnesses in support of his petition. The 3rd respondent opposed the Petition and relied on the evidence of seven (7) witnesses, including himself. The 1st and 2nd respondents relied on the evidence of five (5) witnesses.

3. The appellant sought inter alia the nullification of the election. He cited various grounds upon which he based his petition. First, that the election as conducted did not conform to the precepts of the Constitution and the statutory framework for conducting elections as the presiding officers and the deputy presiding officers were not competitively appointed which compromised the integrity of the election. The appellant faulted the 1st respondent for acting in a biased manner and causing a conflict of interest by appointing presiding officers and deputy presiding officers who were, in some instances, related to some of the aspirants, and in other instances under the employ of the Turkana County Government. According to the appellant, the 1st respondent also appointed some Orange Democratic Movement (ODM) party bloggers as presiding officers, which compromised the integrity of the election.

4. Secondly, the appellant alleged that there were various illegalities that occurred on the voting day. These included voters being turned away at the polling stations, and others being threatened and intimidated into not voting for the appellant. In addition, the Kenya Integrated Elections Management System (KIEMS) kits were not used in compliance with the law.

5. The appellant also questioned the manner in which the election was conducted, arguing that two polling stations, located at **Lomerao** and **Silale** Primary schools were moved from their gazetted areas to non-gazetted areas, which had a detrimental effect on the voter turnout; that there were many voters who required assistance from the presiding officers, but the manner in which this happened was in contravention of the law; that there was intimidation of voters and violence meted out against the appellant's agents and campaigners especially at the Lokori RCEA Boys Secondary School and at Lomunyenakwan Primary School polling stations, all of which was perpetrated by the 3rd respondent, his agents and his campaigners. As a result of these infractions, the appellant ``averred that the election conducted by the 1st respondent undermined the will of the constituents of Turkana East Constituency, and were of such a magnitude as to affect the outcome of the election.

6. The petition was opposed by the 1st and 2nd respondents who alleged that the election was conducted in strict compliance with the legal framework for elections. With respect to the allegations on bias and improper hiring of presiding officers, the 2nd respondent submitted that prior to the election, he had informed all the candidates the personnel who had been shortlisted to conduct the election, and invited their input, and that thereafter, training was conducted for the personnel in a transparent manner. The 1st and 2nd respondents further urged that even in the two instances where the presiding officers were relatives of the aspirants, this did not have any negative impact on the voting process or on the final results.

7. The 1st and 2nd respondents conceded that in some polling stations the KIEMS kit failed to work, but submitted that at the start of voting, where the KIEMS kit did not work, all the agents present agreed that the manual register would be used in the interim; that accordingly, the manual register was used until the KIEMS kits started to work; and that those who voted were all identified, and there was no instance of unidentified people voting.

8. The 2nd respondent admitted that he created a WhatsApp group, but asserted that he included all the aspirants in it, and duly informed them of the dates of the training; that on the date of the training, the appellant's agents failed to turn up; that he informed the appellant that he would be willing to conduct training for those agents who did not attend training, but the appellant did not avail his agents for training.

9. The 1st and 2nd respondents further submitted that all complaints that were raised by the candidates with respect to the election personnel were dealt with fairly and that amicable solutions were agreed upon by all the parties.

10. The 3rd respondent denied the assertions made by the appellant. He claimed that the election was conducted in full compliance with the law, and that where there were minor infractions with respect to the conduct of the election they had no bearing whatsoever on the outcome of the election. He denied that any election offences were committed in any of the polling stations, and further denied that any of the voters in the Constituency were disenfranchised and urged the Court to find that the election was conducted in a free and fair manner and that the 3rd respondent had been properly declared as the winner of the election.

11. After considering the issues raised by the appellant, the election court in its judgment delivered on 23rd February, 2018 found no merit in any of the grounds raised by the appellant, dismissed the petition finding that the election for member of Parliament of Turkana East Constituency conducted on 8th August, 2017 was free and fair, and a true reflection of the will of the voters of **Turkana East**, and that there was no election offence committed.

The appeal

12. Aggrieved by that finding, the appellant filed this appeal in which he raised eight (8) grounds of appeal. These grounds include that the learned judge erred in fact and in law in failing to: find that the election conducted in **Turkana East** did not meet the qualitative test for a free and fair election; that the results of the election were affected by the respondents' acts of bias and other procedural infractions; that the appellant was unfairly and deliberately disadvantaged as he was excluded from the WhatsApp group and the accreditation of his agents; that the failure to use the KIEMS kits significantly affected the transparency of the election, that the use of the manual register as opposed to the KIEMS kit significantly affected the transparency of the election and that the swapping of the 2 polling stations **Lomelo** and **Silale** relatively affected the election.

The Application to strike out the appeal

13. The 3rd respondent filed an application dated 3rd April 2018 seeking for an order, *inter alia*, that the record of appeal filed on 23rd March 2018, be struck out, and in the circumstances the appeal be dismissed. The grounds upon which the 3rd respondent seeks these orders include that: the appeal is grossly misconceived, incurably defective, incompetent, frivolous, vexatious and therefore an abuse of the process of the Court and that the appeal cannot lie as it raises matters of fact and not matters of law in contravention of **section 85A of the Elections Act, 2011.**

14. The application is supported by an affidavit sworn by the 3rd respondent on 3rd April 2018. In this affidavit, the 3rd respondent assails each of the grounds of appeal, in turn, and alleges that they call upon the Court to determine contested issues of fact. In his view, the grounds as presented in the Memorandum of Appeal expressly raise issues of fact, and that the grounds if admitted, would require this Court to act in excess of its jurisdiction and re-examine the probative value of the evidence tendered at the trial court as well as to calibrate any such evidence by calling into question the credibility of witnesses and their respective testimonies.

15. The Court held the pre-hearing conference pursuant to Rule 20 of the **Court of Appeal (Election Petition) Rules, 2017** on 18th April 2018. The Court directed that the 3rd respondent's application be heard contemporaneously with the appeal; that the parties file a list of issues for determination in the appeal; and that each party should file and exchange written submissions that would be highlighted orally at the hearing.

The appellant's submissions

16. The appellant's appeal was argued by learned counsel **Mr Katwa Kigen** and **Ms Ruth Emanikor**. The appellant submitted that his appeal is competent as it only raises issues of law; that the appeal reveals that the elections did not meet the qualitative test outlined in Article 86 of the Constitution; that the 1st and 2nd respondents failed to properly interpret and apply the provisions of the law relating to the use of KIEMS Kit, and the role of form 32A; that the trial judge failed to appreciate that where a voter is not identified using the KIEMS kit, then form 32A must be used to identify the voter; and that the learned judge wrongly interpreted the law in his findings.

17. On the substance of the appeal, the appellant took issue with the findings of the election court on the failure of the KIEMS Kits as well as the failure to follow the requisite procedures on the use of the manual register. According to the appellant, the use of the KIEMS kit is obligatory, and should the KIEMS kit fail, then there is a mandatory procedure that must be followed before resorting to the use of the manual register. This procedure is set out in **Regulation 26** of the **Elections (Technology) Regulations 2017**; as well as **Regulation 69(e)** of the **Elections (General) Regulations, 2012**, (herein **the Regulations**) and the 1st respondent's guidelines to Presiding Officers and the wording on Form 32A.

18. The appellant's counsel submitted that, identification of the voters was to be purely by way of the biometric identification kits, as required in **section 44 of the Elections Act**; that **section 44A** was introduced to cater for a situation where the complementary mechanism, that is the manual register, would be used only if the biometric identification system failed in which case, the procedure described under Regulation 26 would come into play; that this procedure was so important that the 1st respondent put in place guidelines that Presiding Officers were to follow should the electronic identification kits fail. The appellant drew the court's attention to guideline 5 which requires that should the KIEMS kit fail to function completely, the officials of the 1st respondent could identify the voter by crossing out his name from the manual register and have the voter fill in form 32A before being issued with the ballot paper for the purpose of voting.

19. The appellant further submitted that the failure to fill in form 32A was a breach of regulation 69 of the **Regulations 2017**, and that this breach goes to the root of the election; that the election held in 2017 was to be primarily electronic, as was noted by this Court, differently constituted in ***National Super Alliance (NASA) Kenya v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR (Civil Appeal No. 258 of 2017)*** where it was stated that:

> ***"[27] Moving away from the experiences of 2013 general election and in order to improve on electoral process, the Legislature directed under Section 44A of the Elections Act, that IEBC do develop a 'complementary mechanism'. This came in the form of the enactment of Regulations 69, 82, and 83 so as to operationalize the provisions of the said Section 44A which in turn is supposed to give full effect to the provisions of Article 38 (2) (3) and 81, 86 (a) and 87 (1) of the Constitution."***

20. The appellant faulted the 1st and 2nd respondents for failing to explain why the KIEMS kit failed, even after they conceded that the kit failed to work for approximately 30 minutes and that the presiding officers reverted to the use of the printed register and failed to facilitate the filling of form 32A. The appellant argued that the 1st and 2nd respondents were under an obligation, under Article 86 of the Constitution, to prove that the election was verifiable, but this was not the case as it was not possible to prove how many voters were identified electronically and how many were identified using the KIEMS kit.

21. The appellant further urged that once it was proved that a breach occurred, as had been done in the petition, the appellant did not require to quantify any prejudice that he suffered as a result of this breach, as it amounted to substantially violating the principles laid down in the Constitution as well as other written law. For these reasons, the appellant submitted that the 1st respondent was unable to prove that the election was verifiable, since it was impossible to tell how many voters were identified electronically.

22. In regard to the ground relating to bias by the staff of the 1st respondent, the appellant submitted that the 1st respondent made a deliberate choice to employ persons who were openly biased against him. He cited the fact that in two instances, the presiding officers were related to candidates in the election, which was a breach of **Articles 81, 86 and 87 of the Constitution** that require the 1st respondent to carry out an election that is neutral, transparent and fair.

23. The appellant further alleged that the 1st and 2nd respondents openly discriminated against the appellant with respect to the communication and dissemination of information to the candidates. He noted that the 2nd respondent had conceded that he created a WhatsApp group through which he disseminated information on the recruitment of the 1st respondent's staff, the training of candidates' agents and the availability of accreditation documents for agents.

24. The appellant challenged the formation of the WhatsApp group on three fronts: first, that the 2nd respondent did not prove that he had indeed created this group so as to disseminate information to the candidates and their agents; second, that WhatsApp is not an official means

of communication that is either known or recognised in law, and it is not a 'transparent', 'simple' or 'appropriate mechanism' as contemplated under Article 86(a) and 86(b) of the Constitution, and neither was it simple, transparent or accountable; and thirdly, neither the appellant nor his agents were included in the Whatsup group and therefore he was prejudiced as he did not receive information concerning the recruitment of staff, the training of agents and the availability of accreditation documents for the party agents. The appellant contended that it was unfair for the 2nd respondent to form a group which excluded the appellant as this amounted to discrimination, and was therefore contrary to the law.

25. The last issue upon which the appellant submitted is the finding of the election court regarding voting at Lomelo Primary School polling station and Silale Primary School polling station. He pointed out that there was ample evidence that these two polling stations in Kapedo/Napeiton Ward were swapped and that owing to this swap, none of the Jubilee Party agents could go to the polling stations in the entire ward.

26. The appellant argued that the breaches of the law were so widespread, that they did not meet the requisite qualitative test to satisfy that the election was free, fair and transparent. For this proposition, learned counsel for the appellant relied on the decision of ***Musikari Nazi Kombo v Moses Masika Wetangula & 2 others [2013] eKLR (Election Petition No.3 of 2013)*** where the High Court stated that:

> ***"[168] In BGM HC EP NO 2 OF 2013 the court rendered itself as follows:***
>
> ***The expression ''non-compliance affected the results of the election'' has received sufficient interpretation by courts of law. Contemporary jurisprudence from Uganda in the case of BISIGYE V MUSEVENI ELECTION PETITION NO 1 OF 2001 offered guidance and was adopted with approval by election courts in Kenya. In the Uganda case the Supreme Court of Uganda held that:***
>
> ***''...the expression ''non-compliance affected the results of the election in a substantial manner''...can only mean that the votes candidate obtained would have been different in a substantial manner, if it were not for the non-compliance substantially. That means that, to succeed, the Petitioner does not have to prove that the declared candidate would have lost. It is sufficient to prove that his winning majority would have been reduced. Such reduction however would have to be such as would have put the victory in doubt…***
>
> ***The overarching approach which guides this court is summarized in the words of Lord Denning in MORGAN VS SIMPSON [1974] 3ALL ER 722 where he said at page 728-***
>
> ***"Collating all these cases together, I suggest that the law can be stated in these propositions (1) If the Election was conducted so badly that it was not substantially in accordance with the law as to Elections, the Election is vitiated, irrespective of whether the result is affected, or not … (2) If the Election was so conducted that it was substantially in accordance with the law as to Elections, it is not vitiated by a breach of the rules or a mistake at the polls-provided that it did not affect the result of the Election. (3) But, even though the Election was conducted substantially in accordance with the law as to Elections, nevertheless if there was a breach of the rules or mistake at the polls and it did affect the result then the Election is vitiated."***

27. The appellant further relied on the decision of the Supreme Court in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR (Petition No. 2B Of 2014). (Munya Decision)**

28. The appellant submitted that the elections were not conducted in accordance with the Constitution or the requisite elections law, and that there were several breaches of the law which fatally affected the integrity of the result of the election. The appellant contended that the election court made an error of law by arriving at conclusions that could not be reasonably arrived at on the face of the record and could not be supported by the evidence on record, and therefore urged us to allow the appeal as prayed.

The 3rd Respondent's Submissions

29. he 3rd respondent urged us to dismiss the appeal on the basis of lack of jurisdiction. He submitted that the jurisdiction of this Court is limited by **section 85A** of the **Elections Act** to only matters of law, yet the appellant had set out grounds of appeal which were largely on matters of fact.

30.The 3rd respondent further submitted that the appeal is totally misdirected as regards the issues that fall within this court's jurisdiction since the matters raised by the appellant do not relate to the interpretation of the Constitution, any statute or indeed, any legal doctrine. He urged the Court to reject the appellant's submission that the election court reached conclusions that were not supported by facts, or that they were perverse or illegal.

31. The 3rd respondent relied on the **Munya decision** of the Supreme Court **for the proposition that this Court does not have jurisdiction to handle the issues raised by the appellant.**

32. On the KIEMS kits, the 3rd respondent submitted that this is a pure matter of fact that was properly addressed by the election court. He submitted that in any event, the appellant only challenged the failure of the KIEMS kit in three polling stations that is Lomunyenawkan Primary School, Nakotongwa Primary School and Lokorkor Primary School polling stations where it was conceded that the KIEMS kits failed in the morning for a duration of about 30 minutes. He urged that this failure was not fatal; that the appellant had failed to show how the decision to resort to the manual registers was an irregularity that affected the outcome of the election. For this proposition, the 3rd respondent relied on the decision of the Supreme Court in ***Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission & 3 others***

[2013] eKLR (Petition 5, 4 & 3 of 2013) **(Raila Odinga, 2013)** where the Supreme Court stated that:

> *"all acts are presumed to be done rightly and regularly, so the petitioner must set out by raising firm and credible evidence of the public authority departures from the prescriptions of the law"*

The 3rd respondent submitted that the appellant did not discharge the burden of proof with regard to the allegations made on the conduct of the 1st and 2nd respondent; that even in those polling stations that the appellant had named in his petition, he did not adduce any evidence to prove that the KIEMS kit had completely failed so as to convince the election court that the decision to resort to manual register was not justifiable.

33.Secondly, the 3rd respondent urged that while the presiding officers did not follow the exact procedure outlined in law with respect to informing the 1st respondent on their decision to rely on the manual register, the decision to revert to the manual register was ratified as soon as was practicable by both the 1st and 2nd respondents; that the appellant was not in any way prejudiced by this decision since he had a number of agents who witnessed voters who proceeded to vote after being identified in the manual register; and that in the circumstances, the election court was right in granting some latitude to the 1st and 2nd respondents. To buttress this submission, the 3rd respondent referred to ***Raila Odinga, 2013*** where the Supreme Court stated that:

> *"[233] we take judicial notice that, as with all technologies, so it is with electoral technology: it is rarely perfect, and those employing it must remain open to the coming of new and improved technologies. Analogy may be drawn with the traditional refereeing methods in football which, as their defects became apparent, were not altogether abandoned, but were complemented with television-monitoring, which enabled watchers to detect errors in the pitch which had occurred too fast for the referees and linesmen and lineswomen to notice."*

34. The 3rd respondent's next submission was on the alleged non-adherence to **Regulation 69(1)** of the **Regulations**. The 3rd respondent submitted that the appellant's understanding of this regulation was erroneous. In his view, **Regulation 69(1)(e)** only applies where the KIEMS kit is working but fails to identify one particular voter. It is only in that instance that the said voter would be allowed to vote after being identified in the manual register and filing of form 32A; that form 32A is to be distinguished from form 32, which is provided for under **Regulation 72(5)(a) of the Regulations,** which applies to assisted voters.

35. With regards to the filling in of Form 32A, the 3rd respondent submitted that **Regulation 69(a) of the Regulations**, was to be followed only in the event that the electronic voter identification failed to identify a voter. For this reason, the 3rd respondent submitted that this ground of appeal was misplaced and misconceived and urged that it be dismissed.

36. The 3rd respondent urged this Court not to reject the ground of alleged bias and discrimination that he claimed to suffer, as these are not matters of interpretation or application of the law but are questions which would require the Court to look into the facts of the petition as well as the evidence tendered before the election court. In any event, the 3rd respondent contended, firstly, that there was clear evidence from the 2nd respondent that the appellant and his agent were members of the WhatsApp group, secondly, the setting up of the WhatsApp group to which the appellant was a member had no correlation with Article 86 of the Constitution since the latter relates to the voting methods. He urged that the fact that the 2nd respondent formed a WhatsApp group was an innovation to aid him enhance the efficiency of all the processes that lead to voting; that contrary to the appellant's assertions, he was not prejudiced with respect to training as his own evidence showed that his Chief agent attended the training.

37. On the allegation of the conduct of the election in areas that were ungazetted, the 3rd respondent contended that the election court did not err in finding that the two stations were properly gazetted and that voting took place in those polling stations.

38. For these reasons, counsel maintained that the election for member of National Assembly for Turkana East Constituency was properly conducted, that the non-compliance with the regulations was minor and had no bearing on the credibility of the election or the results that were announced; that the elections met the qualitative test; that in determining whether non-compliance with or contravention of electoral laws affected the results of the election in a substantial manner, the court has to apply either the quantitative or the qualitative tests, or both depending on the circumstances and facts of the case. In these circumstances, neither of the aspects were compromised at all so as to go to the root of the election. For these reasons, the 3rd respondent urged us to dismiss the appeal with costs capped at Kshs. 8,000,000.00.

The 1st and 2nd Respondent's submissions

39. The 1st and 2nd respondents did not file any submissions with respect to the application to strike out the appeal, and instead associated themselves with the submissions of the 3rd respondent. They urged us to restrict our evaluation of the appeal to determining whether or not the conclusions arrived at by the trial court were supported by the evidence on record.

40. With regard to the failure of the KIEMS kit, the 1st and 2nd respondents urged this Court to adopt the finding of the election court that despite the failure of the KIEMS kits, the election was conducted smoothly and as such, this failure was a minor error which did not impact on the outcome of the election. The 1st and 2nd respondents urged that since the appellant failed to prove that failure of the KIEMS kits amounts to substantial non-compliance with the law, this ground of appeal has no merit and must therefore fail.

41. With respect to the allegations of bias and discrimination that were levelled against them, the 1st and 2nd respondents submitted that the appellant was under an obligation to prove these assertions to the required standard. In support of this submission reliance was placed on the

decision of ***Raila Odinga, 2013*** at paragraph 195 wherein it was held that:

> *"the legal burden rests on the petitioner, but, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting. Ultimately, of course, it falls to the Court to determine whether a firm and unanswered case has been made."*

42. The 1st and 2nd respondent's also drew our attention to the persuasive authority of the High Court of ***Abdinasir Yasin Ahmed & 2 others v Ahmed Ibrahim Abass & 2 others [2013] eKLR (Petition 9 of 2013)*** in support of their proposition that employment of a close relative does not conclusively establish bias. In that decision, the High Court observed that;

> ***"To my mind, although having polling officials from a candidate's family or immediate clan can on the face of it, infer bias, actual bias is a matter of proof. The Petitioners having failed to prove with cogent evidence that the 3rd Respondent was actually biased and partial in the way he recruited the polling officials, I will dismiss the claim as unsubstantiated."***

43. In addition the 1st and 2nd respondent relied on the decision of the court in **Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others (2013) eKLR (Election Petition No 5 of 2013)** where the High Court considered the import of relatives of the candidates being employed to conduct the election and held that:

> ***"I would be the first to concede that close relatives of candidates present a serious conflict of interest. But they are Kenyans entitled to work for national institutions. In cross examination, the petitioner himself conceded that his relatives were also employed by IEBC. This is then a classic case of the kettle calling the pot black. There was also a complaint that another sister of the petitioner was working for IEBC in another constituency in Limuru. Regarding the latter, the possibility of interference in Kajiado East was far-fetched and quite remote. Rispah Makui (DW 2) a chief agent at St Monica nursery school polling centre was also a relative of the 1st respondent. On the face of it bias may be inferred of such officials. But whether or not there is actual bias is a matter of proof. From what I have stated, there is no such evidence. But it paints a poor portrait of IEBC as an impartial arbiter. The situation could have been easily cured by requiring such officials to make an early disclosure and to be employed in other areas."***

44. Relying on these persuasive decisions, the 1st and 2nd respondents urged that the appellant's allegations on bias were not proved to the required standard, and therefore, the election court was right to dismiss them.

45. Similarly, the 1st and 2nd respondents called on us to find the allegation that voting took place in ungazetted locations as unproven. For this proposition, they relied on the judgment of **Mohamed Tubi Bidu v Independent Electoral and Boundaries Commission & 2 others [2018] eKLR (Election Petition 3 of 2017)** where the High Court was faced with a similar complaint, but found that there had been no evidence to support the allegation and therefore rejected it.

46. The respondents urged us to dismiss the appeal with costs as the appellant did not prove how any irregularities committed prevented the election from being valid.

Analysis and Determination

47. The first issue that we must consider is on the jurisdiction of this Court to handle the appeal, as well as the competency of the appeal. Referring to the decision of the court in ***Samuel Kamau Macharia & Another v KCB & 2 Others (2012) eKLR (Supreme Court Civil Application No 2 of 2011),*** the 3rd respondent submitted that this Court does not have jurisdiction to consider the appeal. In that matter, the Supreme Court, addressing itself on the source of a court's jurisdiction expressed itself as follows:

> ***"A court's jurisdiction flows from either the Constitution or legislation as conferred by the Constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by written law… [the issue of whether] a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings."***

48. We agree. The issue of jurisdiction, being the source from which this court derives its authority must first be settled. In the words of this Court in ***Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others [2013] eKLR (Civil Appeal No. 154 of 2013):***

> ***"So central and determinative is the question of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceeding is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain."***

49. It is beyond argument that the jurisdiction of this Court is limited to only issues of law by section 85A of the Elections Act. That section provides in part that:

> ***"(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..."***

50. The 3rd respondent urged that the appeal is defective because all the issues that have been raised by the appellant are all issues of fact, and would require that this Court revisit the evidence tendered before the election court. The appellant opposes this proposition, arguing that the appeal raises several issues of law which warrant the attention of this Court.

51. Do the appellant's issues raise pure questions of law in the appeal? To determine this, we revisit the judgment of the Supreme Court in the **Munya Decision**. In this case, the Supreme Court was tasked with considering what the jurisdiction of this court is under section 85A of the Elections Act. The Supreme Court analysed the rationale and constitutional basis of this section, and noted that section 85A ***"restricts the number, length and cost of petitions and, by so doing, meets the constitutional command in Article 87 [of the Constitution] for timely resolution of electoral disputes."*** Thus, the command that an appeal to this Court would lie only on a matter of law is a deliberate prescription of the law, "*a product of a constitutional scheme requiring electoral disputes to be settled in a timely fashion. The Section is directed at litigants who may be dissatisfied with the judgment of the High Court in an election petition."*

52.The Supreme Court continued and reviewed several decisions made in comparative jurisdictions, and thereafter set out the elements of a matter of law. The Supreme Court stated:-

> ***[80] We would characterize the three elements of the phrase "matters of law" as follows:***
>
> > ***a) The technical element involving the interpretation of a constitutional statutory provision;***
> >
> > ***b) The practical element: involving the application of the Constitution and the law to a set of facts or evidence on record;***
> >
> > ***c) the evidentiary element: involving the evaluation of the conclusions of a trial Court on the basis of the evidence on record.***

53. Applying these elements to **section 85A of the Elections Act**, the Supreme Court rendered itself as follows:

> ***"[81] Now with specific reference to Section 85A of the Elections Act, it emerges that the phrase "matters of law only", means a question or an issue involving:***
>
> > ***a) the interpretation, or construction of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, in an election petition in the High Court, concerning membership of the National Assembly, the Senate, or the office of County Governor;***
> >
> > ***b) the application of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, to a set of facts or evidence on record, by the trial Judge in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of County Governor;***
> >
> > ***c) the conclusions arrived at by the trial Judge in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of County Governor, where the appellant claims that such conclusions were based on "no evidence", or that the conclusions were not supported by the established facts or evidence on record, or that the conclusions were "so perverse", or so illegal, that no reasonable tribunal would arrive at the same; it is not enough for the appellant to contend that the trial Judge would probably have arrived at a different conclusion on the basis of the evidence."***

54. These then are the parameters that guide this Court when determining an appeal from an election court. In particular, the Supreme Court has outlined the duty of the Court as follows:

> ***"[81A] It is for the appellate Court to determine whether the petition and memorandum of appeal lodged before it by the appellant conform to the foregoing principles, before admitting the same for hearing and determination.***
>
> ***[82] Flowing from these guiding principles, it follows that a petition which requires the appellate Court to re-examine the probative value of the evidence tendered at the trial Court, or invites the Court to calibrate any such evidence, especially calling into question the credibility of witnesses, ought not to be admitted. We believe that these principles strike a balance between the need for an appellate Court to proceed from a position of deference to the trial Judge and the trial record, on the one hand, and the trial Judge's commitment to the highest standards of knowledge, technical competence, and probity in electoral-dispute adjudication, on the other hand. (Emphasis in original)"***

55. Applying these binding principles to the appeal before us, we turn to consider whether the appellant's assertions raise pure points of law, or if, in the words of the 3rd respondent, are totally misguided and therefore do not merit our consideration.

56. As we have stated earlier, each party filed issues for determination in addition to their various pleadings. The appellant listed, very broadly, the matters for determination by this Court. We have carefully considered those issues identified for determination, the memorandum of appeal, the record of appeal, and the rival submissions of the parties.

57. Furthermore, we are guided by the Supreme Court decisions in the Munya Decision and **Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others [2014] eKLR (Petition No. 4 Of 2014).** At paragraph 107, of the latter decision the Supreme Court interpreting the jurisdiction given under section 85A of the Elections Act delivered itself as follows:

"The critical question is whether the Court of Appeal in making such an inquiry, exceeded its powers to review only matters of law, under Section 85A of the Elections Act. Was the Court cautious enough to limit itself to issues regarding the interpretation and application of the law by the trial Judge, in relation to the petition at the High Court? Did the Judges of Appeal limit themselves to evaluating the conclusions of the trial Judge on the basis of the evidence on record; and to determining whether such conclusions were not supported by the evidence; or to ascertaining that the conclusions were not so perverse that no reasonable tribunal could arrive at the same?"

58. It is clear to us, that the appellant took issue with the election court's application of the law to the facts before it. In addition, the appellant calls upon this Court to make a determination on the interpretation of section 44A of the Elections Act, Regulations 69(e) of the Regulations, as well as the application of Regulation

26 of the Elections (Technology) Regulations, 2017. We do not find any substance in the 3rd respondent's complaint that the appeal is defective and the application by the 3rd respondent to strike out the appeal on this ground must fail.

59. We have identified various issues of law for our determination in the appeal and shall set each out as we proceed to make our determinations. Subsequently, we shall determine whether or not the election was conducted substantially in compliance with the Constitution and **section 83** of the Elections Act.

60. The submissions made by the parties revolve around **Articles 81** and **86 of the Constitution**, as well as **Section 83** of the **Elections Act. Article 81** sets out the general principles, with **Article 81(e)(v)** specifically requiring election administration to be impartial, neutral, efficient, accurate and accountable. **Article 86** of the Constitution relates to the vital processes of voting, counting and tallying, and requires their conduct be in conformity with the prescribed standards. **Section 83 of the Elections Act** is the definitive statement of the standard that an election court must apply, in verifying the election results. That section is, at the same time, a statement of the burden of proof resting upon the petitioner, in an election petition.

61. As to the effect of irregularities, and the point at which a Court should overturn an election, the Supreme Court stated that Courts must only act on ascertained facts, not conjecture, and must demonstrate how the final statistical outcome has been compromised. In the **Munya Decision** the Supreme Court elaborated the foregoing principles in specific terms at (paras 205 – 206).

"We would state as a principle of electoral law, that an election is not to be annulled except on cogent and ascertained factual premises. This principle flows from the recurrent democratic theme of the Constitution, which safeguards for citizens the freedom 'to make political choices' [Article 38 (1)].

We consequently hold that the learned Judges of Appeal erred in questioning the credibility of the election on the basis of the percentage or margin of victory, without demonstrating how the final statistical vote-outcome had been compromised."

62. The first issue of law that has been raised by the appellant is in respect to the fact that the 1st and 2nd respondents did not use the KIEMS kits for a period of time on the voting day, and instead opted to use the manual register to identify voters. According to the appellant, the use of the KIEMS kit is obligatory, and should the KIEMS kit *fail*, then there is a mandatory procedure that must be followed before resorting to the use of the manual register. The appellant urged this Court to find that the 1st and 2nd respondents were in direct violation of **section 44A** of the **Elections Act, Regulation 26 of the Elections (Technology) Regulations 2017, Regulation 69(e)** of the **Regulations**, as well as the 1st respondent's guidelines to Presiding Officers and the wording on Form 32A.

63. To determine whether this complaint has any merit, we consider what the law on the KIEMS kit is. It was not disputed that KIEMS kits for some polling stations failed for a period of about 30 minutes at certain polling stations. What ought to have happened at that stage? First, the appellant submits that in 2017, the election was to include, primarily, electronic identification of voters through the KIEMS kits. We agree. **Section 44(1) of the Elections Act** provides that:

"Subject to this section, there is established an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results."

64. It was pursuant to this section that the KIEMS kit that this Court referred to in ***John Munuve Mati v Returning Officer Mwingi North Constitutency, Independent Electoral & Boundaries Commission & Paul Musyimi Nzengu [2018] eKLR (Election Petition Appeal No. 5 of 2018)*** was put in place. This Court noted that:

"Section 44 of the Elections Act establishes an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results. This is what is referred to as the Kenya Integrated Election Management System (KIEMS). On the other hand section 44A requires the IEBC to establish a complementary mechanism for identification of voters and transmission of election results as a fall back in the event of failure of the electronic system.

41. The KIEMS kit is a gadget that is used to biometrically identify persons for purposes of registration as voters, voting during the elections, and transmission of the election results. For purposes of voting, the kit is in the form of a laptop tablet with a fingerprint reader, which biometrically identifies the voter to confirm that he is in the register and to avoid impersonation."

65. In the course of the election, should the KIEMS kit fail to work as envisaged, then the 1st respondent would follow the provisions of **section 44A of the Elections Act** which provide for a complementary mechanism This section provides that:

"44A. Complementary mechanism for identification of voters -

Notwithstanding the provisions of section 44, the Commission shall put in place a complementary mechanism for identification of voters that is simple, accurate, verifiable, secure, accountable and transparent to ensure that the Commission complies with the provisions of Article 38 of the Constitution."

66. The need for this complementary system was a matter of judicial consideration by this Court in ***National Super Alliance (NASA) Kenya v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR (Civil Appeal No. 258 of 2017*****) wherein the Court observed that:**

"….in order to improve on electoral process, the Legislature directed under* Section 44A *of the Elections Act, that IEBC do develop a 'complementary mechanism'. This came in the form of the enactment of Regulations 69, 82, and 83 so as to operationalize the provisions of the said* Section 44A *which in turn is supposed to give full effect to the provisions of* Article 38 (2) (3) *and* 81, 86 (a) and 87 (1) *of the Constitution. There was no allegation that the complementary procedure in the aforesaid regulations contradicted the provisions of the Constitution. Therefore, just like the learned trial judges of the High Court, we dispose of the grounds of appeal challenging the provisions of the aforesaid regulations as a non-starter as the greatest danger lies in withdrawing those regulations that are supposed to back the electronic voter identification and result transmission and thereby leaving IEBC with no alternative fall back system of ensuring the dictates of the Constitution are fulfilled in the discharge of its mandate. In so doing, we underscore the fact that the IEBC has a constitutional duty of balancing all the rights and ensuring all voters, especially those whose biometrics are not be picked by KIEMS are accorded an opportunity to vote if they are genuinely registered voters who can be traced from the register of voters and who can be identified by their identification card or passport."

67. The appellant invites us to find that once the electronic voter identification mechanism established pursuant to section 44 of the Elections Act failed, that the procedure contained in the regulations must be followed before the complementary mechanism is activated. In particular, the appellant submitted that the procedures provided under **Regulation 69** and **Regulation 72(5)** of the **Regulations** as well as **Regulation 26 of the Elections (Technology) Regulations** is mandatory. For ease of reference we reproduce those regulations respectively as follows:

Regulation 69 (e) provides:-

"(e) in case the electronic voter identification device fails to identify a voter the presiding officer shall—

(i) invite the agents and candidates in the station to witness that the voter cannot be identified using the device;

(ii) complete verification Form 32A in the presence of agents and candidates;

(iii) identify the voter using the printed Register of voters; and

(iv) once identified proceed to issue the voter with the ballot paper to vote;"

Regulation 72(5) provides:

"(5) The following shall apply with respect to a person who assists a voter under this regulation -

(a) the person shall, before assisting or supporting the voter, make a declaration of secrecy before the presiding officer in Form 32 set out in the Schedule;

(b) a person who breaches his or her declaration commits an offence under the Act;

(c) the person shall assist or support only one voter at that election and have a mark as proof of assisting or supporting a voter."

Regulation 26(2) of Election (Technology) regulations, 2012 provides:

"2) Before suspending or terminating the use of election technology under sub-regulation (1),

(a) the clerk at the polling station shall inform the presiding officer of the failure of the technology;

(b) the presiding officer at the polling station shall retry the system to confirm the failure of the technology;

(c) the presiding officer at the polling station shall document the incident on an incident report in the polling station diary which shall be signed by all the agents;

(d) the presiding officer shall notify the returning officer of the failure and submit a copy of the incident report;

(e) the returning officer shall inform the director in charge of information communication and technology of the

incident and the director shall investigate the incident and advise on the suspension or termination of the use of the election technology;

(f) the returning officer shall approve the request for suspension of the use of technology based on the advice under paragraph (e) and invoke the

complementary mechanism."

68. The appellant submitted that whenever a voter was not identified by means of the KIEMS kit, then if the complementary mechanism, being the manual printed out register, is used, then a form 32A must be filled with respect to that voter. In support of his position, he drew the attention of the Court to the wording of form 32A, which states that:

> ***"This is to confirm that the voter whose particulars are indicated below was not identified by the electronic voter identification device but was identified in the print out of the register of voters in respect of the above Polling Station."***

69. The election court dealt with this issue as follows:

> ***"And must form 32A be filled when the manual register is used for failure of KIEMS? The answer to this is at Regulation 69 (i) (e) (ii) and 72 (5) (a) of the elections (General) Regulations, 2012. Under these regulations, only 2 scenarios are envisaged. First, where the kiems fails to identify a voter. This means the kiems would be working, but has failed to identify the voter. The 2nd instance is for voters who are assisted.***
>
> ***I am unable to see any legal requirement that this form 32A must be filled when a voter uses the manual register to vote. And none was referred to this court."***

70. We do not find that this was a misapprehension of the law by the election court. It is clear that **Regulation 69** would apply in the instance that a voter presents himself to the polling station and then not identified by the KIEMS kit. It is for that reason that the voter would require to first place their finger on the finger print scanner, and then, where the kit fails to identify them, then the presiding officer would ***"(ii) complete verification Form 32A in the presence of agents and candidates;"*** The election court did not err in finding that regulation 69 applies to instances where a voter is for whatever reason, not identified. Similarly, the application of regulation 72 would not be appropriate here. **Regulation 72(5)** gives the procedure that would apply to a person who is assisting a voter. In that case, it is the person assisting the voter who would fill in the form, and not the voter himself.

71. The appropriate regulation that applies in the instant appeal is **regulation 26 of the Election (Technology) Rules**. That regulation stipulates the procedure for the suspension or the termination of the electronic system. The 3rd respondent submitted to us that even though the regulation was not strictly adhered to, the 1st and 2nd respondent made a decision to continue with the manual print out register after balancing the rights of the voters, and to ensure that all the voters, as far as they were genuinely registered had an opportunity to vote under **Regulation 26(2)(f)** the Returning Officer has power to approve the suspension of use of technology and to invoke the complimentary mechanism which was done. We are guided by the caution of the Supreme Court in the **Munya decision** that this Court cannot re-examine the probative value of the evidence tendered before the election court. In this case, the election court found as follows on this complaint:

> ***"The question therefore is whether those irregularities regarding the KIEMS were of such a manner that they affected the outcome. I answer in the negative. In all those polling stations mentioned, the petitioner had at least 2 agents. These agents had been trained by the party and even mock elections held for them. They were familiar with their work and I do not believe they would have ignored any a massive irregularities. They would have recorded the same on the station diary, filled every 3 hours. None of them did this. And at the end of the voting exercise, all of them signed the statutory forms with not a single adverse comment.***
>
> ***In RAILA ODINGA –VS- IEBC AND OTHERS, PETITION NO. 5 OF 2013, the Supreme Court held;***
>
> ***"Where a party alleges no-conformity with the electoral law, the petitioner must only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections"***

72. We find no misdirection in law upon which we can interfere with the findings of fact of the election court that the evidence adduced did not prove the extent to which the failure to strictly adhere to **regulation 26 of the Election (Technology) Regulations, 2012** in respect of three polling stations for 30 minutes was an irregularity that manifestly affected the outcome of the election. We find this ground of appeal to be without merit and dismiss the same.

Allegations of bias and discrimination against the appellant

73. The second issue of law that we must deal with is with respect to the allegations of bias on the part of the 1st and 2nd respondents against the appellant. The appellant alleged bias for two reasons: The first was that the 1st respondent engaged employees of the County Government as employees to conduct the election and; second because two people, apparently relatives of candidates in the election, were employed to serve as officials in the election. With respect to these allegations, the election court considered the evidence and found that it could not have affected the result of the election in the following terms:

> ***"The parties raised issue with the alleged employment of county staff by the IEBC. Though not on record, the fear in this, is***

probably possibility of bias. Names of such employees were given. From the onset, I must say that no law or directions were referred to this court that would bar county employees from being employed on temporary basis on the elections. It happens with teachers and other civil servants. I see no wrong in county personnel being such engaged. A letter was produced from the county executives' office advising county workers not to engage in partisan politics. Is the temporary IEBC engagement partisan politics [?] I think not…

The other issue of employment of relatives, only 2 cases were cited. First, was of one Selina Ewoton, a sister to one of the MP candidates (Tony Nasia Ewoton). Of course no law bars a relative from being employed by the IEBC where a relative is standing. The only issue again that would be of concern is the possibility of bias. Apart from the petitioner alleging the existence of the relationship, the evidence on record in fact disapproves any possibility of bias. Where she worked, her own brother got 0 votes!

The other relatives mentioned was, the son of the then sitting MCA. It is not stated (sic) the position he held or how he could have influenced the elections. And at the end of the process his father also lost the elections.

Lastly, were the so-called known ODM bloggers. The petitioner's side had raised this issue with the IEBC. Action was taken and between 30-40 persons relieved (a fact acknowledged by the petitioner). This issue was therefore spent and could not have affected the process in any way."

74. We now turn to consider if there was even an apprehension of bias against the appellant and whether the fact that there were two employees of the 1st respondent would negate the legal requirement that the elections must be conducted transparently and impartially.

75. We are mindful that the correct test to apply in this case is whether there is an apprehension of bias, and not necessarily whether there is actual bias. This Court in ***Kimani v Kimani (1995-1998) 1 EA 134*** stated as follows on the test of likelihood of bias:

"the correct test to apply is whether there is the appearance of bias, rather than whether there is actual bias."

In dissent, Gicheru JA (as he was then) stated that:

"...the court hearing the matter is not, indeed it cannot, go into the question of whether the officer is or will be actually biased. All the court can do is carefully examine the facts which are alleged to show bias and from those facts draw an inference, as any reasonable and fair minded person would , that the judge is biased or is likely to be biased"

76. In determining if there was apprehended bias, this Court in ***Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others [2017] eKLR (Civil Appeal No. 224 of 2017),*** **stated that:**

"61. A claim of apprehended bias requires a finding that a fair minded and reasonably well informed observer might conclude that the decision-maker did not approach the issue with an open mind. (Apprehended bias has been variously referred to as "apparent", "imputed", "suspected" or "presumptive" bias: "

77. The test of reasonable apprehension of bias, was found to be good law in the persuasive authority of the The East African Court of Justice in ***Attorney General of the Republic of Kenya v Prof Anyang Nyongo and others (5/2007) [2007] EACJ 1 (6 February 2007)*** where it was stated that:

"…the objective test of "reasonable apprehension of bias" is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the mind of the reasonable, fair-minded and informed member of the public…"

See also Financial Services Ltd and 2 others -v- Manchester Outfitters Civil Application No. Nai. 224 of 2006."

78. In ***Judicial Service Commission v Gladys Boss Shollei & another [2014] eKLR (Civil Appeal 50 of 2014)*** this Court held that an impression or perception of bias has to be evaluated with reference to a reasonable person who is fair minded and informed about all the circumstances of the case.

79. Applying these principles to the case before us, we are aware that the legal requirement is that elections must be carried out in an impartial manner. However, the burden to prove that the recruitment of certain select officials was calculated to put the appellant at a disadvantage lay solely on him. The trial court itself noted that there may have been apprehension of bias, but was mindful that only two polling stations were affected. In one case, the officer was a family member of a candidate who contested against the appellant and the 3rd respondent, and in the second instance the officer was a relative of a candidate of a person who was contesting for the position of Member of County Assembly. It is unclear to us how the employment would lead a reasonable person, to irresistibly conclude that these two officials were working in concert with the 3rd respondent to the disadvantage of the appellant. In our view, the election court properly considered the facts on this point, and finding no evidence led by the appellant to prove the allegations of bias, dismissed this ground of the petition. We too, find no reason upon which we can fault the conclusion of the trial court that there was no bias and we are constrained to dismiss this ground of appeal.

80. Related to this is whether there was overt discrimination by the 1st and 2nd respondents, for the benefit of the 3rd respondent. The appellant submitted on the formation of the WhatsApp group, which he claimed infringed on **Articles 81, 86 and 87** of the Constitution in as far as it is not fair, transparent, accountable, verifiable, neutral, secure, accurate and auditable. **Article 81** of the Constitution deals, generally,

with the principles for the electoral system, which are the core principles with which any election in a democratic system must conform. These principles include inter alia, the freedom of citizens to exercise their political rights, universal suffrage, free and fair elections and which are by secret ballot that are conducted by an independent body, are transparent and administered in an impartial, neutral, efficient, accurate and accountable manner.

81. WhatsApp is a messaging service that was available to the officials of the 1st respondent to use for communication. The election court was of the view that the 2nd respondent was being innovative and accepted the evidence that all the candidates had been included in the group. On our part, we find no misdirection in law to warrant our interference with the conclusions made by the court on the facts before it.

82. The appellant claimed that results from some of the two polling stations were swapped around in a bid to confuse voters and deny him votes. Our consideration of the judgment of the election court indicates that the learned judge considered this complaint by the appellant, but found that it was unsupported by the evidence led by the appellant. Thus, we have no basis upon which we can disturb this finding by the election court.

Did the Election Comply with the Constitution

83. The final issue of law that we must consider is whether, overall, the election court was wrong in its application of section 83 of the Elections Act, and erred in its finding that the elections met the qualitative test. The Supreme Court in ***Raila Odinga, 2017*** observed that there are two limbs in Section 83 of the Elections Act, thus:

> ***"[192] There are clearly two limbs to all the above quoted provisions: compliance with the law on elections, and irregularities that may affect the result of the election. The issue in the interpretation of the provisions is whether or not the two limbs are conjunctive or disjunctive...***
>
> ***[211] In our respectful view, the two limbs of Section 83 of the Elections Act should be applied disjunctively. In the circumstances, a petitioner who is able to satisfactorily prove either of the two limbs of the Section can void an election. In other words, a petitioner who is able to prove that the conduct of the election in question substantially violated the principles laid down in our Constitution as well as other written law on elections, will on that ground alone, void an election. He will also be able to void an election if he is able to prove that although the election was conducted substantially in accordance with the principles laid down in our Constitution as well as other written law on elections, it was fraught with irregularities or illegalities that affected the result of the election."***

84. We have carefully considered the judgment of the election court as well as the rival submissions made by counsel before us. Our examination reveals that the election court properly addressed itself to the specific issues raised by the appellant. Where the election court found, as we also have, that there was an instance of failure to comply with **regulation 26** of the **Elections (Technology) Regulations, 2017**, this minor infraction did not affect the outcome of the election. For this reason, we find that this ground of appeal too, must fail.

Costs

85. The final issue that we must address ourselves to is on the costs awarded both in the High court and those to be awarded in this appeal. The appellant decried the amount of costs awarded to the respondents where after the trial, the election court awarded costs in the amount of Kshs 3 million, to be paid in equal shares to the 1st and 2nd respondent on the one hand and to the 3rd respondent on the other hand.

86. It has been said time and again that costs are meant to compensate a successful litigant for his labour. We reiterate the holding of this Court in the case of ***Martha Wangari Karua v Independent Electoral & Boundaries Commission & 3 others*** ***[2018] eKLR (Election Petition Appeal No. 1 Of 2017 (Nyeri)*** **which rendered itself on this point as follows:**

> ***"It is up to the election court to determine whether a party would be awarded costs or not and in doing so the court must be guided by the principles of fairness, justice and access to justice. It is meant to compensate a successful litigant. It is not a punishment or a deterrent measure to scare away litigants from the doors of justice."***

87. In the circumstances of this case, we do not find the costs awarded to be manifestly excessive, and we therefore decline to interfere with the award made by the election court.

Disposition

88. Having carefully considered the issues raised by the appellant, the responses by the respondents and their rival submissions, we make the following orders:

> **a)** ***The 3rd respondent's Notice of Motion dated 3rd April, 2018 is dismissed with no order as to costs;***
>
> **b)** ***The appeal is dismissed with costs to the respondents;***
>
> **c)** ***In the event that the parties do not agree on the quantum of costs, the same shall be taxed by the Deputy Registrar 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