



IN THE COURT OF APPEAL

AT ELDORET

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

J. MOHAMMED, JJA)

ELECTION PETITION APPEAL NO. 31 OF 2018

BETWEEN

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1<sup>ST</sup> APPELLANT

OYUGI GEORGE.....2<sup>ND</sup> APPELLANT

AND

PAULINE AKAI LOKURUKA.....1<sup>ST</sup> RESPONDENT

JOYCE EKAI EMANIKOR.....2<sup>ND</sup> RESPONDENT

*(An appeal from the judgment, order and decree of the High Court of Kenya at Lodwar (Ogembo, J.) delivered on 2<sup>nd</sup> March 2018*

*in*

*Election Petition No. 5 of 2017)*

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JUDGMENT OF THE COURT

Introduction & Background

[1] The election for the position of Women Representative for Turkana County was held alongside other elections on 8<sup>th</sup> August 2017. This election attracted six candidates including **Pauline Akai Lokuruka (1<sup>st</sup> respondent)**, and **Joyce Ekai Emanikor (2<sup>nd</sup> respondent)**. On 11<sup>th</sup> August 2017, the 2<sup>nd</sup> respondent was declared as the duly elected Women Representative for Turkana County with 53,131 votes. The 1<sup>st</sup> respondent was the closest contender having garnered 49,670 votes. The Independent and Electoral Boundaries Commission (IEBC) who is the 1<sup>st</sup> appellant, is the constitutional authority that was in charge of the management of the elections, and **George Oyugi (2<sup>nd</sup> appellant)**, was at the material time the Returning Officer for Turkana County.

[2] The 1<sup>st</sup> respondent was dissatisfied with the outcome of the elections for Women Representative for Turkana County. She filed a petition challenging the outcome of the elections on the grounds that the elections did not comply with the principles governing the conduct of elections under the Constitution, Elections Act and Election Regulations. In particular, the 1<sup>st</sup> respondent alleged that there were several irregularities including: intimidation of voters; party agents being denied access to polling stations; bribery of voters and party agents; misleading of illiterate voters; late opening of polling stations without compensation for time lost; influencing of voters by using government relief food; misrepresentation to the public on the date of elections; unauthorized access to and control of KIEMS kits and ballot boxes; irregularities in the statutory forms used; and improper returns of election results in Forms 39A and 39B.

[3] During the hearing of the petition, the 1<sup>st</sup> respondent called a total of ten (10) witnesses in support of his petition, while the 2<sup>nd</sup> respondent denied the allegations relying on the evidence of six (6) witnesses. The appellants similarly opposed the petition, and depended

on the evidence of three (3) witnesses, including the 2<sup>nd</sup> appellant. In determining the petition the election court addressed the following three broad issues:

- a) Whether the elections were held in accordance with the Constitution and electoral laws.
- b) Whether there were irregularities and if so, whether such irregularities affected the outcome of the elections.
- c) Whether the 2<sup>nd</sup> respondent was validly elected.

[4] In its judgment delivered on 2<sup>nd</sup> March 2018, the election court found that the 1<sup>st</sup> respondent had established in part, the allegations of discrepancies in the statutory forms, and that there were three sets of election results. On this basis, the court allowed the petition, holding that the election for Women Representative for Turkana County was not held in accordance with the Constitution and was therefore, null and void.

### **Appeal and Cross-Appeals**

[5] The appellants who were dissatisfied with the judgment of the election court instituted this appeal. The Notice of Appeal was filed on 9<sup>th</sup> March 2018, the Record of Appeal on 29<sup>th</sup> March 2018, and a Supplementary Record of Appeal on 4<sup>th</sup> April 2018. In the Memorandum of Appeal dated 29<sup>th</sup> March 2018, the appellants raised 16 grounds of appeal in support of the prayers for allowing the appeal and having the judgment and decree of the election court set aside.

[6] The grounds of appeal faulted the election court for holding: that stamping of Forms 39A is mandatory and crucial for authenticity; that failure by both the presiding officer and deputy presiding officer to sign the results declaration forms and failure by agents to sign results declaration forms amounted to an irregularity that could invalidate the results; that there were massive irregularities in the results from polling stations when the alleged irregularities related to only 5 polling stations which were not pleaded in the petition.

[7] In addition, the grounds questioned the nullification of the 2<sup>nd</sup> respondent's election on account of minor allegations, which did not affect the results; finding without any supporting evidence that there were three different sets of results, and failing to appreciate that the valid results were those stated on Forms 39C as required under Regulation 83 of the **Election (General) Regulations 2012** (herein **Regulations**). The appellants also contested the order condemning them to pay costs of the petition and assessing the costs at Ksh. 4 million.

[8] The respondents also each filed respective Notices of Cross Appeal challenging the findings of the election court. In her Notice of Cross-Appeal dated and filed on 9<sup>th</sup> April 2018, the 2<sup>nd</sup> respondent cited 19 grounds. We have condensed the grounds as follows: that the finding on three sets of results was not proved, and lacked a basis in law as the valid results are those captured on Form 39C; that the finding that there were irregularities in the statutory forms and that the irregularities affected the results was without supporting evidence, and in disregard of the margin between the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

[9] Other clusters of the ground included that the election court erred: in nullifying the elections on the basis of minor and un-pleaded allegations in failing to apply the presumption of validity of elections as prescribed under section 83 of the Elections Act; in making a finding contrary to Regulations 62(3) Regulation 79(6) and Regulation 97(2), that failure by agents, the presiding and deputy presiding officers to sign the forms amounted to an irregularity that could invalidate results; in taking into account irrelevant matters as well as disregarding relevant issues; and in being biased in favour of the 1<sup>st</sup> respondent.

[10] Similarly, the 1<sup>st</sup> respondent's Notice of Cross Appeal dated 10<sup>th</sup> April 2018 and filed on 11<sup>th</sup> April 2018, challenged the judgment of the election court on the grounds that the trial court erred in disregarding applicable circumstantial evidence of photographs and audio recordings, that were produced in support of her case; in applying a higher standard of proof in respect of the irregularities cited; and in disregarding amendments effected by the **Election Laws (Amendment) Act, 2017** which repealed **section 87(1)** of the **Elections Act**. The 1<sup>st</sup> respondent prayed for the setting aside of the findings of the election court that there were no irregularities cited on the part of the 2<sup>nd</sup> respondent; and the order of the election court nullifying the elections.

[11] The appellants were represented by Mr. Yego, while Mr. Nyachoti and Mr. Manduku appeared for the 1<sup>st</sup> respondent, and Mr. Katwa Kigen for the 2<sup>nd</sup> respondent. In directions issued by this Court on 17<sup>th</sup> May 2018, parties were directed to file the list of agreed, contested and uncontested issues; and their respective written submissions on both the appeal and cross-appeals. On this date, the Court also heard and determined two applications. The court allowed the 1<sup>st</sup> respondent's application for the admission of the Supplementary Record of Appeal, but declined the application to admit the Notice of Motion dated 18<sup>th</sup> October 2018 that had been filed in the concluded petition. Parties relied on their respective written submissions, which were also highlighted on this date.

[12] The appellants filed two sets of submissions: one set was submissions to the main appeal, and the second one in response to the 1<sup>st</sup> respondent's cross-appeal. The 1<sup>st</sup> respondent similarly filed two sets of submissions, one set in respect of the main appeal and the 2<sup>nd</sup> respondent's cross appeal; and the second set in respect to her own cross-appeal; while the 2<sup>nd</sup> respondent addressed both the appeal and cross-appeals in a single set of submissions.

### **Submissions by the Appellants**

[13] The appellants first challenged the competence of the 1<sup>st</sup> respondent's cross-appeal for late filing in disregard of **Rule 10(3)** of the **Court of Appeal (Election Petition) Rules 2017**, (hereinafter the '**2017 Rules**) and for raising matters of fact for which this court lacks jurisdiction to entertain as held in the case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR, (Peter Munya**

**Decision).** The appellants faulted the 1<sup>st</sup> respondent's attempt to shift the burden of proof to the appellants, contrary to settled principles of law set out in **section 107** of the **Evidence Act**, and the **Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others Presidential Petition NO 1 of 2017 (Raila Odinga 2017)**.

[14] On the main appeal, the appellants submitted that the court's finding on the existence of three sets of results was not established. The appellants cited **section 39** of the **Elections Act**, **Regulation 82**, and the case of **Jackton Nyanungo Ranguma v Independent Electoral and Boundaries Commission & 2 Others [2018] eKLR** in support of the view that electronic transmission and publication of results was only a mandatory requirement for the presidential election.

[15] The appellants also pointed out that the election court relied on evidence that was introduced during cross-examination, which was beyond the scope of pleadings. In support, the appellants relied on various authorities including the **House of Lord's Decision in Morgan vs Simpson [1974] 3 All ER**, **Raila 2017** and the **Peter Munya Decision**. The appellants submitted that the election court erred by nullifying the elections on the basis of trivial allegations, adding that the irregularities were not pleaded in the petition, and the findings on the irregularities did not show how such irregularities affected the results.

#### **Submissions by 2<sup>nd</sup> Respondent**

[16] The 2<sup>nd</sup> respondent submitted in support of the appeal arguing; that the 1<sup>st</sup> respondent did not adduce evidence, which supported the allegations made in the petition; that in the absence of evidence showing that there was violation of the law governing elections, the election court had a duty to apply the presumption of validity of elections; that the court failed to satisfy itself of the existence of the alleged three sets of results, nor take into account that according to **Regulation 82** and **Regulation 83**, the results in the IEBC portal were only provisional results.

[17] Furthermore, the 2<sup>nd</sup> respondent contended that no evidence was advanced to support the allegations pleaded, or to support the findings of massive discrepancy or questions of authenticity of the results; that the election court did not consider the allegations in regard to the original Form 39C which was produced by the appellants; and that the election court erred in relying on photocopies of forms which were unclear without calling for production of original documents or scrutiny.

[18] It was submitted that 39 polling stations considered by the court were beyond the 5 polling stations that had been pleaded; that the election court contradicted itself in its findings on massive irregularities as it acknowledged that many of the forms were stamped, and that it was not mandatory for both the presiding officer and the deputy presiding officer to sign Forms 39A.

[19] The case of **John Murumba Chikati v Returning Officer Tongaren Constituency & 2 Others [2013] eKLR**, was referred to for the proposition that signing of the forms by party agents was not a requirement. Similarly, **Regulation 83** and the case of **Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others [2014] eKLR**, was referred to for the proposition that lack of IEBC stamps do not render the forms invalid.

[20] The 2<sup>nd</sup> respondent maintained that only mere administrative shortcomings were demonstrated, and no significant irregularities that affected the outcome of the elections, nor justify the nullification of the elections were demonstrated. She urged the Court to consider the parameters set out in section 83 of the Elections Act that should guide a court before annulling an election, and the **Raila 2017 decision** among other cases. In response to the 1<sup>st</sup> respondent's cross-appeal, the 2<sup>nd</sup> respondent was in agreement with the appellants that it contravened **section 85A** of the **Elections Act** for raising questions of facts and urged for its dismissal.

#### **Submissions of the 1<sup>st</sup> Respondent**

[21] The 1<sup>st</sup> respondent urged, firstly, that the Record of Appeal should be struck out for non-compliance with **Rule 8** of the **2017 Rules**; that in regard to pleadings an election court's jurisdiction is partly inquisitorial in nature as held in **Hassan Abdalla Albeity v Abu Mohamrd Abu Chiaba & Another [2013] eKLR**; that the petitioner's affidavit and accompanying annexures formed part of pleadings as held in **Peter Munya Decision** and **Ferdinand Ndung'u Waititu v Independent Electoral and Boundaries Commission & 8 Others [2013] eKLR**; that the election court properly relied on Forms 39A that were produced in evidence; and that the Affidavits complained of in the 2<sup>nd</sup> respondent's cross appeal were admitted with the consent of all parties.

[22] The 1<sup>st</sup> respondent maintained that the discrepancies in the forms had been pleaded in the petition as well as the prayer for scrutiny; and that the appellants had attached all Forms 39A to their response to the petition, thereby opening the door for the 1<sup>st</sup> respondent to make all the forms a subject of cross-examination and for the court to inquire into the same. In addition, the 1<sup>st</sup> respondent maintained that she had severally sought for scrutiny of the forms, but this was objected to, and that parties had eventually consented to the photocopies being relied upon.

[23] The 1<sup>st</sup> respondent submitted that Form 39C could not be relied upon as it was generated from defective Forms 39A and bore the same deficiencies that were on Forms 39A, and this pointed to a flawed process. In this regard, the 2<sup>nd</sup> respondent relied on **Raila Odinga 2017**, **James Omingo Magara v Manson Onyongo Nyamweya & 2 Others [2010] eKLR**, and **Hassan Ali Joho & another v Suleiman Said Shahbal & 2 Others [2014] eKLR**. She further submitted that the evidential burden was upon the appellant and that since the irregularities were not explained the court could rightly invoke adverse inference as enunciated in **Bukenya v Republic [1972] EA 549**. The 1<sup>st</sup> respondent maintained that the different set of results were an indication of tampering with the primary source of the results. In support of this proposition the 1<sup>st</sup> respondent cited **the Raila Odinga 2017** and **Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others, [2017] eKLR**.

#### **The Issues**

[24] Upon considering the memorandum of appeal, the cross appeals, the record of appeal, the parties' submissions, and the authorities cited, we find three main issues that arise for determination:

- a) Whether the appeal and 1<sup>st</sup> respondent's cross-appeal are competent
- b) Whether the court erred in making its findings on issues not pleaded in the petition
- c) Whether there were irregularities in the election for Women Representative for Turkana County and if so whether the irregularities affected the results.
- d) Whether the order made by the election court on costs was proper.

### Competence of the Appeal and Cross Appeal

[25] We were urged by the 1<sup>st</sup> respondent to strike out the appellants' record of appeal for failing to comply with **Rule 8** of the **2017 Rules**, which provides in part that:

**“(1) The record of appeal shall contain copies of the following documents –**

- (a) an index of all the documents in the record with the numbers of the pages at which they appear**
- (b) a statement showing the address for service of the appellant and the address for service of the respondent being his last known address and proof of service on the respondent of the**
- (c) the pleadings;**
- (d) the trial judge's notes of the hearing;**
- (e) the transcript of any shorthand notes taken at the trial;**
- (f) the affidavits read and all documents put in evidence at the hearing, or, if such documents are not in the English language, certified translations thereof;**
- (g) the judgment;**
- (h) certified copy of the decree or order;**
- (i) the notice of appeal; and**
- (j) such other documents, if any, as may be necessary for the proper determination of the appeal, including any interlocutory proceedings which may be directly relevant...”**

[26] The complaint raised regarding the record of appeal relates to improper indexing of the documents. It is true that the record as filed, has not been elegantly packaged for ease of this Court's reference. However, all the necessary documents are in the record. The infraction is in our view, only a matter of form, which does not go to the substance of the appeal. We are ready to excuse the infraction in the interests of substantive justice as we are enjoined to do by **Article 159(2)** of the **Constitution** and **Rule 5** of the **2017 Rules**. Accordingly, we hold that the appeal is competent.

[27] As regards the 1<sup>st</sup> respondent's cross-appeal, the appellants challenged it on two fronts: late filing and raising matters of fact. On her part the 1<sup>st</sup> respondent maintained that the appeal was served on 3<sup>rd</sup> April 2018, and 8<sup>th</sup> April 2018 having been a Sunday the cross appeal, which was filed on 11<sup>th</sup> April 2018 was filed on time. The filing of a notice of appeal is provided for under **Rule 10 (3)** of the **2017 Rules** that states as follows:

**(3) A notice given by a respondent under this rule shall state the names and addresses of any persons intended to be served with copies of the notice and shall be lodged in quadruplicate with the Registrar within seven days after service on the respondent of the record of appeal.** (Emphasis added).

[28] Since the appeal was served on the 1<sup>st</sup> respondent on 3<sup>rd</sup> April 2018, seven days of lodging the appeal lapsed on 10<sup>th</sup> April 2018. Therefore, the filing of the notice of cross appeal on 11<sup>th</sup> April 2018 was a day out of time. We note that the **2017 Rules** do not make provision in regard to computation of time, and in accordance with **Rule 4** of the **2017 Rules** that allows this Court to apply the **Court of Appeal Rules 2010 (2010 Rules)**, where there is no applicable provision in relation to election petition appeals, we take recourse in **Rule 3** of the **2010 Rules** which provides the following provisions for computation of time:

- a) a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day in which the event happens or that act or thing is done;**

b) if the last day of the period is a Sunday or a public holiday (which days are in this rule referred to as excluded days) the period shall include the next following day, not being an excluded day;

c) where any act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;

d) where any act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of time; or unless the Court otherwise directs, the period of the Christmas vacation shall not be reckoned in the computation of time

[29] In this case, the filing of the cross-appeal ought to have been done within seven days of service of the record of appeal. Therefore, in accordance with **Rule 3(d)** of the **2010 Rules** the filing of the notice of cross-appeal should have been filed by 10<sup>th</sup> April 2018, which was a Tuesday. This day was neither a Sunday nor a public holiday and therefore was not an excluded day. In our view Sunday would only be excluded if the last day of the act to be done falls on a Sunday. Thus the 8<sup>th</sup> April 2018 must count in the computation of time, which leads to 10<sup>th</sup> April 2018 as the last date when the notice of cross-appeal could have been lodged. That said, considering that the cross-appeal was filed only a day out of time, we are minded to exercise our discretion under **Rule 5** of the **2017 Rules**, that states as follows:

**The effect of any failure to comply with these Rules shall be a matter for determination at the Court's discretion subject to the provisions of Article 159 (2) (d) of the Constitution and the need to observe the timelines set by the Constitution or any other electoral law.**

[30] The cross-appeal was filed only a day out of time, and all parties had sufficient notice of and responded to the issues raised in the cross-appeal. Therefore, no prejudice was occasioned to any party. Furthermore, the prescription of 7 days timeline is one provided for under the **2017 Rules**. It is not therefore, a constitutional or statutory timeline that is a strictly binding timeline. Indeed, **Rule 14(1)** of the **2017 Rules** gives this Court power to extend timelines prescribed by the Rules. In addition, **Article 159(2)** of the **Constitution** enjoins us to ensure that justice is done to all, is not delayed, and is administered without undue regard to procedural technicalities.

[31] Accordingly, in the interest of substantive justice and in accordance with our duty under **Rule 3** of the **2017 Rules** to facilitate the just, expeditious and impartial determination of election petition appeals, we invoke our power under **Rule 14(1)** of the 2017 Rules to extend time and deem the cross appeal as properly filed. Consequently we decline the appellants' prayer to strike out the 1<sup>st</sup> respondent's cross -appeal for late filing.

[32] Another issue raised by the appellant and the 2<sup>nd</sup> respondent in regard to the competence of the 1<sup>st</sup> respondent's cross-appeal, was the contention that the cross appeal raised issues of fact that this Court has no jurisdiction to entertain as the jurisdiction of the Court is restricted to hearing the appeal on matters of law. In response, the 1<sup>st</sup> respondent submitted that since the issue questioned the circumstantial evidence that was relied upon, the law does not exclude consideration of circumstantial evidence in electoral disputes.

[33] Under **section 85A** of the **Elections Act**, an appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or office of the County Governor lies to the Court of Appeal on matters of law only. The question as to whether an issue is a matter of law or fact has been addressed in several decided cases. In **Timamy Issa Abdalla v Swaleh Salim Swaleh Imu & 3 Others [2014] eKLR**, this Court expressed itself thus:

*"[50]...We must therefore be careful to isolate conclusions of law from conclusions of facts, and only interfere if two conditions are met. Firstly, that the conclusions are conclusions of law; and secondly, that the conclusions of law arrived at cannot reasonably be drawn from the findings of the lower court on the facts.*

*[51] That having been said, 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".*

[34] The Supreme Court addressed this issue comprehensively in the **Peter Munya** decision and unpacked the meaning of the phrase "matters of law" with reference to **section 85A** as 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.*

[35] In the same **Peter Munya decision** the Supreme Court appreciated that, even where the appellate court is restricted to determining matters of law, it is not expected to shut its mind to the evidence on record. The Court set out the limits of that consideration in the following terms:

***“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.”***

[36] Following the decisions cited above, this Court is not precluded from examining facts for the limited purpose of examining the conclusion arrived at by the election court. That examination would not be limited by the fact of whether the evidence in question is direct or circumstantial. We find that the reference to circumstantial evidence does not limit the cross appeal to raising issues of fact only. We therefore find no merit in this objection, and rule that the cross-appeal is competent.

### **Three sets of results**

[37] Coming back to the main appeal, both the appellants and the 2<sup>nd</sup> respondent faulted the court for its findings that there were different results that were declared in the impugned elections. In their view, the court erred for the reason that its finding was neither based on the law nor supported by evidence, since none of the alleged results were produced in court. The three sets in question are: results declared by IEBC, results displayed in the IEBC web portal and results published in the Kenya Gazette. Counsel for the 1<sup>st</sup> respondent urged the Court to find that the results were presented in the election court and that the election court also took judicial notice of the Gazette Notice, as it is an official document. Counsel for the appellant disagreed with the 1<sup>st</sup> respondent’s line of argument submitting that before a court can take judicial notice of a document, its existence and content must first be established.

[38] **Section 39** of the **Elections Act** gives guidance on the process of determination and declaration of results. The relevant provision reads as follows:

**(1) The Commission shall determine, declare and publish the results of an election immediately after close of polling.**

**(1A) The Commission shall appoint constituency returning officers to be responsible for- (ii) collating and announcing the results from each polling station in the constituency for the election of the President, county Governor, Senator and county women representative to the National Assembly; and ....**

**(1B) The Commission shall appoint county returning officers to be responsible for tallying, announcement and declaration, in the prescribed form, of final results from constituencies in the county for purposes of the election of the county Governor, Senator and county women representative to the National Assembly**

[39] In *Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others* (supra), the Supreme Court settled the question of declaration of results as follows:

[72] ***“Declaration” takes place at every stage of tallying. For example, the first declaration takes place at the polling station; the second declaration at the Constituency tallying centre; and the third declaration at the County returning centre. Thus the declaration of election results is the aggregate of the requirements set out in the various forms, involving a plurality of officers. The finality of the set of stages of declaration is depicted in the issuance of the certificate in Form 38 to the winner of the election. This marks the end of the electoral process by affirming and declaring the election results which could not be altered or disturbed by any authority.*** (emphasis added)

[40] Thus, it is evident that, ***‘the final declaration of election results is by the issuance of the certificate in Form 38 to the winner of the election. This certificate is issued by the returning officer.’*** In the afore cited decision, the Supreme Court was categorical that the Gazette Notice did not constitute declaration of results, but simply served the purpose of informing the public on the persons who have been elected. Consequently, the Elections Act was amended under **section 76(1)** to reflect the correct legal position that a petition seeking to challenge the validity of an election ought to be filed within twenty-eight days after the date of declaration of results of the election. At the polling station level, declaration of results is, in line with **Regulation 79(2) (b)**, to be done in Form 39A.

[41] The other alleged set of results were the results posted on the IEBC’s portal. **Regulation 82** directs the presiding officer to submit to the returning officer the results in electronic form, before ferrying the actual results of the election to the returning officer at the tallying venue. These results are provisional and subject to confirmation after the procedure provided for under **Regulation 76**.

[42] **Regulation 83** directs the returning officer, upon receiving the results from polling stations to:

***‘(d) collate and publicly announce to the persons present the results from each polling station in the constituency for the election of the .... county women representative to the National Assembly...and (h) deliver to the county returning officer the collated results for the election of the.... county women representative to the National Assembly.’***

[43] Under **Regulation 87** the constituency returning officer is required to ***‘(a) deliver to the county returning officer all Forms 37B, 38B and 39B from the respective constituencies and the collated results.’*** The county returning officer is in turn required to tally and announce the results and in the case of election of county women representative, **(b) complete Form 39C** and thereafter, ***‘(c) sign and date the relevant forms publicly and declare the results for the position of (iii) county women representative to the National Assembly’*** and eventually issue

the certificate to the declared winner.

[44] *It therefore, follows that the declaration of results of the election of county women representative is what the constituency returning officer announces in the prescribed form. The relevant prescribed form in this case is Form 39C- Declaration of County Woman Representative to the National Assembly Election Results at the County Tallying Centre as provided for under Regulation 87(2)(b).*

[45] Having considered the provisions of the law, we now turn to the question at hand. The election court agreed with the 1<sup>st</sup> respondent that there were indeed three sets of results. In making this finding the election court reasoned as follows:

*‘It was the petitioner’s evidence that there were 3 different results as follows:-*

*(i) Declared Results*

*1<sup>st</sup> Respondent - 53,731*

*Petitioner - 49,433*

*(ii) Gazetted Results*

*1<sup>st</sup> Respondent - 49,670*

*Petitioner - 49,670*

*(iii) On IEBC Portal*

*1<sup>st</sup> Respondent - 53,758*

*Petitioner - Note Sure*

*‘Whereas the 2<sup>nd</sup> and 3<sup>rd</sup> respondents have not responded to the differences in the figures between the declared results and the gazetted results, (official gazette) the ones on the portal have been explained to have been provisional results. How is it possible to have three different results if the sources of information (figures) is one? This could mean that someone could have been manipulating the figures, clearly going against Article 86(2) on ‘Simple, Accurate, Secure, Accountable and Transparent.’ It totally makes it impossible to know which is the correct one ....With this massive discrepancy, there is serious issue of how authentic the results announced were. On my part, I am not convinced they were.’*

[46] The law, as we have set out above is clear on the position of the declaration of the results. We find no basis for the court’s finding on the results that were alleged to have been published in the portal. In the election of county women representative, declaration of results is contained in Form 39C. This is the final outcome after recording of results by the presiding officer at polling station level in Form 39A; tallying and collation by the constituency returning officer of results received from all polling stations through Forms 39A and compiling the results into one Form 39B at the constituency level; and finally tallying of the results by the county returning officer and completion of Form 39C declaring the name and results of the winner; and this is followed by a certificate in Form 39D issued to the winner.

[47] The results in the IEBC’s portal are not the final results, neither is there a legal requirement on the IEBC to publish such results. Electronic transmission and publication of results in an online portal is only a requirement in respect of presidential elections under **section 39(IC)** of the **Elections Act** and **Regulation 5(b)**. **Section 39(1B)** only places an obligation on the county returning officers to collate, tally and declare results of the county women representative in the prescribed form, which is therefore, the primary evidence of the declared results.

[48] The 1<sup>st</sup> respondent admitted that the Gazette Notice was not produced in court, but nevertheless urged us to find that the election court, rightly took judicial notice of the Gazette Notice. **Section 59** of the **Evidence Act** as read with **Section 60** of the Same Act, recognizes that the court may take judicial notice of certain kind of documents. However, the admission in evidence of the Kenya Gazette, is covered under **section 85** of the **Evidence Act** which provides as follows:

**The production of a copy of any written law, or of a copy of the Gazette containing any written law or any notice purporting to be made in pursuance of a written law, where such law or notice (as the case may be) purports to be printed by the Government Printer, shall be prima facie evidence in all courts and for all purposes whatsoever of the due making and tenor of such written law or notice.** (Emphasis added).

[49] The Gazette in this respect does not fall under the facts set out under **section 60** of which the court should take judicial notice, and which, as provided by **section 59** need not be proved. **Section 85** requires the production of the gazette in question, and it is only after such production that the gazette can be taken as providing evidence of the due making of the notice. That said, it is clear that publication of results in the Kenya Gazette, does not provide evidence of the accuracy or proof of the results that are declared, but merely provides information.

[50] In light of the above, we find that the election court was wrong in arriving at the conclusion that there were three different sets of results in respect to the election of the Turkana county woman representative. That conclusion had no evidentiary basis and was not supported by the law.

## Issues not pleaded in the petition

[51] The next issue we address is the question whether the court made conclusions on matters not pleaded in the petition. One of the grounds of the 2<sup>nd</sup> respondent's cross-appeal concerned the election court's order granting leave to the 1<sup>st</sup> respondent to introduce new evidence. The 2<sup>nd</sup> respondent maintained that the allegations in the petition only concerned 5 polling stations, but that the leave expanded the scope of the petition to cover complaints that had not been brought within the prescribed timelines. To this, the 1<sup>st</sup> respondent countered that the affidavits in question were admitted by consent of all parties, and that that the discrepancies in Forms 39A had been pleaded in the petition.

[52] Without conceding to the 2<sup>nd</sup> respondent's contention, the 1<sup>st</sup> respondent persuaded us to adopt a similar approach as that taken by the High Court in *Hassan Abdalla Albeity v Abu Mohamrd Abu Chiaba & another* (supra), that:

*“... ordinarily parties in civil suits are bound by their pleadings and the court ought not to entertain or make determinations on matters not covered by the party's pleadings, I am of the view that an election court enjoys a special jurisdiction which is inquisitorial in nature.*

*An election court and indeed this court has a clear mandate to inquire into and determine whether a disputed election was conducted in accordance with the law, whether it was free, fair and transparent and lastly whether the winning candidate was validly elected. It therefore follows that any ground which is relevant to a determination concerning the validity of results whether or not pleaded in the petition ought to be considered by the court, off course after ensuring that no prejudice would be occasioned to the opposing parties”.*

[53] It is a basic principle in law that a party is bound by its own pleadings. This principle was recently restated by this Court in *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 Others* (supra), that *‘parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce.’* The Supreme Court has explained the rationale in *Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others* [2014] eKLR as follows:

[153]... **It is vital, in election disputes, 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...**

[54] It is true that the Petition raises complaints of irregularities including forms lacking security features, signature of agents, and IEBC stamp; forms being signed by persons who were not authorized agents; alterations on forms, which were not countersigned; and forms without number of registered voters. In some instances, the Petition indicates that these irregularities affected a substantial number of Forms 39A. In paragraph 30, some of the affected polling stations are indicated as: Kaeris Primary School, Kangakipur Primary School, Kokisilei Primary School, Lotongororuk Water Point, Pirikang Nursery, Kataboi Primary School, Naduat Primary School, Katiede Mobile, Karubangoro, Natar Water Point, Kariworeng, Ekicheles and Kaaleng, Manalongoria Water Point, Ateriak Water Point with specific allegations. Thus, contrary to the contentions of the appellants and the 2<sup>nd</sup> respondent, there were more than 5 polling stations in regard to which irregularities were alleged.

[55] In regard to the allegations concerning irregularities from additional polling stations introduced by a further affidavit after close of pleadings, the record shows that a consent agreed upon by the parties was recorded in court on 21<sup>st</sup> November 2017. While this Court is not privy to the particulars of the specific applications resulting in the consent, as the same was not availed, it is evident that one of the orders given by the election court allowed some prayers in the 1<sup>st</sup> respondent's application, and corresponding leave to the 2<sup>nd</sup> respondent and appellants to file further affidavits.

[56] That said, our assessment of the Further Affidavit in question shows that it introduced new allegations as follows: discrepancies in the number of votes for the election of Member of National Assembly in comparison to the numbers of votes for the position of County Women Representative in respect of 70 listed polling stations; failure to produce Form 39A in respect to 7 polling stations; filing a wrong Form 39A in one polling station; and form not filled by party agents in one polling station.

[57] It seems that at the time of recording the consent, neither the appellants, nor the 2<sup>nd</sup> respondent nor the court, appreciated the full import of allowing the introduction of the further affidavit. None of the parties sought at any opportune time during the proceedings to have the consent order set aside in regard to the affidavit. Nor was any question raised during proceedings when this affidavit was referred to particularly during the examination of the 1<sup>st</sup> respondent who cited it as part of her evidence in support of the petition.

[58] Other complaints of irregularities in the statutory forms were made in the submissions that were made by the 1<sup>st</sup> respondent in the election court. In those submissions the 1<sup>st</sup> respondent tabulated 39 polling stations where there were various irregularities, including: forms signed by the agents of opponents' party only and lacking presiding officers' remarks in one polling station; forms lacking IEBC stamp in 30 polling stations; forms containing alterations that were not countersigned in 8 polling stations; and forms not signed by presiding officers in one polling station. A number of complaints were also referred to especially in the cross-examination of the 2<sup>nd</sup> appellant and the 2<sup>nd</sup> respondent, in regard to polling stations that had not been pleaded in the petition. In re-examination of the 2<sup>nd</sup> respondent, it was pointed out that some of the polling stations that Mr. Manduku had cross-examined her on were not raised in the petition.

[59] We draw attention to **Rules 8 and 12 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 (Election Petition Rules)** which require a petitioner to set out the grounds on which the petition is based, and **Rule 11(5) of the same Rules**, which requires a respondent to an election petition to file a response to the petition within 7 days of service of the petition, responding to each allegation made in the petition. Allowing new issues that are introduced outside these confines offends the law, and puts the respondent in an awkward position as he has no opportunity to file a response to the new allegations.

[60] We reiterate that a petition ought to be drafted with precision clearly bringing out the infractions that a petitioner alleges against the respondent. This is particularly crucial in election petitions where the strict timelines do not accommodate pleas for amendment outside the prescribed timelines. Thus, couching allegations in general or open-ended terms has no room in pleadings concerning election petitions. This particularity is necessary in citing the alleged infractions and the particular polling station where the alleged infraction occurred.

[61] As submitted by the 1<sup>st</sup> respondent, an election court is concerned with inquiring into the conduct of an impugned election in order to determine whether such election was conducted in accordance with the law and principles governing the conduct of elections. However, in light of what we have stated in paragraph 54 and 55 herein, such an inquiry cannot go outside the boundaries of the petition. The fact that the bundles of statutory forms submitted by the appellants are part of the record is not a basis for an election court to traverse the annexures beyond what was pleaded. An inquisition into the conduct of an election court is not a borderless foray. The allegations pleaded or issues that arise following a process of scrutiny and recount limit it. These are the issues that all parties have had notice of and anticipate to respond to.

[62] In this case we are unable to tell from which polling stations the 39 incidences referred to in the judgment of the election court arose, as there was no specific pleading in that regard. The only reference to the specific 39 polling stations is the tabulation in the 1<sup>st</sup> respondent's written submissions. However, the election court could only make findings corresponding to the specific allegations pleaded as against the evidence and the law. Moreover, where an election court nullifies an election on account of irregularities, it is incumbent upon the election court to particularize in its decision regarding the specific allegations made and its findings on the same. In the circumstances, we find that the 39 incidences were not only not pleaded but also the finding of the election court on the incidences was not supported by evidence as there is no evidence on record showing from which polling stations the incidences arose.

#### **Irregularities in the statutory forms and effect on the election**

[63] In the petition, the 1<sup>st</sup> respondent had also questioned the election on the basis of irregularities in the forms used to declare the results. The particulars alleged were that the forms were not signed by agents or were signed by unauthorized agents; the forms lacked necessary security features; the forms contained cancellations and alterations that were not countersigned; and the forms lacked the IEBC official stamp. The principle of law that guides us in determination of this question is **section 107** of the **Evidence Act** that a party who alleges a fact must prove it. Therefore the 1<sup>st</sup> respondent had the obligation to prove her allegations that there were irregularities in the election process and to demonstrate how those irregularities impacted on the results.

[64] Of importance is **Section 83** of the **Elections Act** that provides 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 noncompliance did not affect the result of the election**

[65] The foundation for the principle in the above quoted section 83 is that elections are not perfect, and should not be vitiated simply on an allegation of an irregularity. This approach is rooted in the right of the people under **Article 38** of the **Constitution** to free, fair and regular elections based on the universal suffrage and the free expression of the will of the electors.

[66] The above position was affirmed in *Raila Odinga 2017* where the Supreme Court held as follows:

*“[209] It is a global truism that no conduct of any election can be perfect. We will also go a step further and add that even though the word “substantially” is not in our section, we would infer it in the words “if it appears” in that section. That expression in our view requires that, before vitiating it, the court should, looking at the conduct of the whole election, be satisfied that it substantially breached the principles in the Constitution, the Elections Act and other electoral law. To be voided under the first limb, the election should be what Lord Stephenson called “a sham or travesty of an election” or what Prof. Ekirikubinja refers to as “a spurious imitation of what elections should be.*

*[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.”*

[67] In its judgment, the election court found that the 1<sup>st</sup> respondent had established discrepancies in statutory forms, which when weighed against the margin of votes between the winner and the closest contender, could have affected the results. The court observed as follows:

*“The petitioner (sic) as to the effect that in numerous polling stations, there are discrepancies on the statutory forms especially form 39A, the results declaration form. That whereas some are cancelled and not countersigned, others have no IEBC stamps on them. Others are not signed by the presiding officer or his deputy. Agents have not signed some while in others, it is claimed the signatures appear similar in more than one. A total of 39 incidences have been listed. The IEBC has maintained that stamping is not a requirement and that these irregularities are minor.*

...

*So, where does our petition lie on this? Though not a statutory requirement, stamping of the statutory form (form 39A) is*

*obviously crucial. This explains why many others are stamped. It gives the form authenticity. The authenticity is lowered when so many lack the stamp. The cancellations (also many) were not counter-signed. It is therefore not certain when they were done, leaving a possibility it could be after agents had signed off (sic).*

*With such massive alterations and with the margin of only about 4,000 votes, one can safely conclude that this could easily have swayed the results one way or the other.”*

[68] One of the irregularities alleged concerned stamping of Forms 39As. This was a common allegation raised in the petition as well as in the disputed further affidavit and list of polling stations in the 1<sup>st</sup> respondent’s submissions before the election court. It also partly forms part of the court’s finding of irregularities. With respect we do not agree with the court’s finding that failure to stamp Form 39 with the IEBC stamp was a serious discrepancy. There is no legal requirement for stamping of statutory forms.

[69] **Regulation 69** only makes this demand in respect of ballot papers, while **Regulation 79** requires presiding officers to sign the forms. As rightly held in *Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 others* (supra):

*There is no stamping requirement in the case of the Form 35. All that is required with regard to Form 35 as provided for in Regulation 79 is the signature of the presiding officer and the agents of the candidates. We agree with the submission on behalf of the appellant that it is the signatures of the presiding officers and the agents that authenticate the Form 35. If any such forms were stamped, it was a gratuitous and superfluous discretionary or administrative act incapable of creating a statutory obligation, less still the invalidation of the Forms 35 that did not contain the stamp*

[70] The above position was recently upheld by this Court in *Owino Paul Ongili Babu v Francis Wamugu Mureithi & 2 Others* [2018] eKLR, where the court, agreeing with its earlier position, stated that while it was administratively wise to do so, there is no requirement for stamping of the forms. Furthermore, as we have pointed out, it is not enough for the party to allege irregularities; the party must go further and demonstrate to the court that the irregularities affected the results. In addition, considering our earlier observations on the pleaded issues, we note that in the petition the issue of unstamped forms was only alleged in regard to four polling stations, while thirty additional ones were listed in the submissions. Clearly, the additional allegations went beyond what was pleaded and it was not open to the court to entertain them.

[71] Alterations of forms which were not countersigned also formed part of the 1<sup>st</sup> respondent’s complaint against the election and the court’s findings. A perusal of the record of appeal reveals that, this complaint was alleged in the petition in regard to 5 polling stations only, but an additional 8 polling stations were listed in the submissions of the 1<sup>st</sup> respondent, and more polling stations were referred to during the proceedings. Again, the court relied on new claims made in the submissions and during the trial that went beyond the scope of the petition.

[72] Furthermore, the respondent did not demonstrate, how such irregularities impacted on the results, nor did the court make any clear finding in this regard. In *Nathif Jama Adam v Abdikhaim Osman Mohammed & 3 Others* [2014] the Supreme Court stated the importance of this requirement as follows:

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

*The respondents had an obligation, in the circumstances, to show that the irregularities were of such a gravity as to vitiate the results, and the winner is no longer, in real terms, the winner.”*

[73] Other statutory forms were indicted for lacking the signatures of the presiding officer or the deputy presiding officer. **Regulation 79(1)** requires the presiding officer, candidates and agents to sign the results declaration of results in the prescribed forms. While lack of signatures of agents and candidates ought not to be by itself basis for invalidating results (**Regulation 79(6)**), the same cannot be said of absence of a presiding officer’s or deputy presiding officer’s signature. This position has been reinforced in this court’s past decisions.

[74] In *Abdikhaim Osman Mohammed & Another v Independent Electoral and Boundaries Commission & 2 Others* [2014] eKLR this Court emphasized that:

*“... the results in respect of twelve forms 35 which had neither the seal of the 2<sup>nd</sup> Respondent nor the presiding officer’s signatures should have been excluded on the ground that their authenticity could not be vouchsafed. In James Omingo Magara v. Manson Nyamweya & 2 Others, Civil Appeal No. 8 of 2010, this Court held that when a document is not signed by its author, it means that the author does not own it. It follows therefore that in this case the forms 35 with no presiding officer’s signature were worthless and their results should have been excluded from the final tally. In the same vein, the absence of countersignatures against alterations, especially where such alterations related to votes garnered by the candidates, the result of the election on those forms were unverifiable.”*

[75] From the record, lack of presiding officers’ signatures was alleged in a few polling stations, 2 polling stations were listed in the tabulation of irregularities in the submissions. However, **Regulation 5(4)** authorizes a deputy presiding officer to perform any act, which a presiding officer is required or authorized to perform by the Regulations. This means that it is not mandatory for both the presiding and deputy presiding officer to sign, as a signature by any of the two is sufficient. The 1<sup>st</sup> respondent also complained of forms not signed by the

agents. In the petition, 2 polling stations were cited, while the 1<sup>st</sup> respondent's affidavit indicates one polling station, and some others were pointed out during proceedings in the examination of the 1<sup>st</sup> respondent and the 2<sup>nd</sup> appellant. Nevertheless, failure by agents to sign the forms does not of itself invalidate the results.

[76] More importantly, the 1<sup>st</sup> respondent relied on photocopies of statutory forms to prove all forms of the alleged irregularities. By Rule 16 of the Election Petition Rules, the custody of election materials pending the determination of a petition are within the jurisdiction of election court and therefore the court has access to them. By section 65 as read with section 67 and 68 of the Evidence Act, the existence or content of documents must be proved by primary evidence, the document itself or by secondary evidence where applicable. By section 79(1) as read with section 81 of the Evidence Act, the statutory forms are public documents whose existence or contents may be proved by certified copies. The election court misdirected itself in law by admitting photocopies of statutory forms which were not certified and by basing its decision on the existence of irregularities on such photocopies.

### **Electoral malpractices**

[77] In her cross appeal the 1<sup>st</sup> respondent took issue with the election court's failure to take into account the circumstantial evidence that was tendered by her in proof of electoral malpractices. The 1<sup>st</sup> respondent's argument was that there was sufficient circumstantial evidence leading to the conclusion that there was discrimination, intimidation and violence, misleading of voters, and campaigning outside the prescribed period; and that from these circumstances a well calculated move to frustrate voters with the aim of discouraging them from voting could be inferred.

[78] We take note that previously **section 87 (1)** of the Elections Act provided as follows:

**(1) An election court shall, at the conclusion of the hearing of a petition, in addition to any other orders, send to the Director of Public Prosecutions, the Commission and the relevant Speaker a report in writing indicating whether an election offence has been committed by any person in connection with the election, and the names and descriptions of the persons, if any, who have been proved at the hearing to have been guilty of an election offence.**

[79] This provision was applied in several electoral disputes, most notably in the case of *Moses Masika Wetangula v Musikari Nazi Kombo & 2 Others [2015] eKLR* where the Supreme Court recounted the attendant difficulties encountered in the interpretation and application of this provision. Subsequent to this decision, **section 87 of the Elections Act** was repealed and replaced through Act 36 of 2016 with a new section 87.

[80] The new section 87 of the elections Act provides as follows:

**(1) An election court may, at the conclusion of the hearing of a petition, in addition to any other orders, make a determination on whether an electoral malpractice of a criminal nature may have occurred.**

**(2) Where the election court determines that an electoral malpractice of a criminal nature may have occurred, the court shall direct that the order be transmitted to the Director of Public Prosecutions.**

**(3) Upon receipt of the order under subsection (2), the Director of Public Prosecutions shall —**

**(a) direct an investigation to be carried out by such State agency as it considers appropriate; and**

**(b) based on the outcome of the investigations, commence prosecution or close the matter.**

[81] The above amendment has now removed an election court's power to make a finding on the guilt of individuals alleged to be involved in the commission of an election malpractice of a criminal nature. That realm is left to the Office of the Director of Public Prosecutions to pursue. The election court must however make a determination regarding proof of allegations of electoral malpractice that have been alleged and using the evidence before it can make a determination regarding the possibility of an electoral malpractice of a criminal nature having occurred. The use of the word "may" in section 87(1) of the Elections Act implies that with regard to the commission of an election malpractice of a criminal nature, the court must not make a finding that would preempt the criminal court that has jurisdiction to make a conclusive finding with regard to the guilt of any person in the commission of the election offence.

[82] In *Raila 2017* the Supreme Court asserted as follows:

***"[152] We maintain that, 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"***

[83] The *Raila [2017]* decision, affirms that the standard of proof of electoral malpractices of a criminal nature remains proof beyond reasonable doubt, which is the same standard of proof adopted in criminal cases. This means that a petitioner asserting the commission of an electoral malpractice of a criminal nature must prove the commission of the allegations of electoral malpractice on this higher standard. However, the election court will only make a finding on proof of the allegations of the electoral malpractice without making any conclusive finding on the guilt of any individual for an election offence.

[84] In regard to the 1<sup>st</sup> respondents allegations regarding the use of relief food to influence voters the election court rejected these allegation on the following premises:

***“The evidence on record is that the petitioner did not witness a single incident of food distribution on 6<sup>th</sup> or 7<sup>th</sup>. It is PW8, Paul Juma, who testified as to seeing the chief distributing maize and money to voters on 6<sup>th</sup> and 7<sup>th</sup>. From his uncorroborating (sic) evidence, it is not clear where the distribution was done or even who the beneficiaries were. No proof was shown at all that the food being distributed (if at all) was relief food.***

***The 2<sup>nd</sup> witness for 1<sup>st</sup> respondent David Akolom gave a detailed analogy of how relief food is received and distributed starting with the County Commissioner, D.Os, Chiefs, Assistant Chiefs and to village committees. I am convinced that this is the correct procedure. And if this is so there must be some paper trail or record of the food received and distributed. None was produced in court to show that indeed relief food was distributed in July or August, 2017, a fact the respondents have denied”.***

[85] In regard to bribery of voters, the election court stated:

***“The petitioner testified as to receiving information about voter bribery. She did not witness any herself. P W 5 Mana Lopeto Eliud also gave evidence only as to receiving the same information. He did not witness any. P W 7 Dickson Mzee Nata also stated he saw the Chief bribe voters with food and money. He is probably the only witness to a bribery incident. But the evidence on record clearly shows his testimony was not corroborated and remains mere allegation. He did not record same on the polling diary. Neither, did he note it in any statutory form. He also never reported the incident to either the police or even to IEBC officials.***

***Voter bribery is a serious criminal and electoral offence. ...***

***Bribery must be proved beyond any reasonable doubt....***

***The ground therefore fails, ...”***

[86] As an appellate court our jurisdiction is restricted to matters of law only, and as already cited in **Peter Munya** decision (paragraph 34 herein), 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.”***

[87] We note that the 1<sup>st</sup> respondent relied on the evidence of 10 witnesses (including herself), in proof of the allegations made in her petition. In her evidence, the 1<sup>st</sup> respondent testified that her agents were bribed and intimidated. Nevertheless, she did not have any first hand information regarding these allegations. The evidence of Peter Nangolol Edapan (PW 4) was heavily relied upon in support of the allegations of bribery and influencing of voters through distribution of relief food. However, this witness relied on hearsay information from persons who were not called as witnesses. It is instructive that even the audio recording that PW4 purported to have made, recorded allegations being made by one Festus, a person who was not called as a witness, to substantiate these allegations.

[88] Likewise, several other witnesses also relied on hearsay information, or generalized statements from other persons who allegedly witnessed bribery, intimidation or the distribution of relief food, but were not called to testify. The learned judge appears to have misconstrued the evidence of Dickson Mzee Nata as he never testified to have personally witnessed any bribery. It is Paul Juma Lenok and Julias Chilas Ekutan (PW 8 and 9) who both claimed to have seen Chiefs distributing maize, but as observed by the election court, the credibility of these witnesses was rather doubtful as none of them reported the incidents to the police or recorded the same in any statutory form. Moreover, PW9 testified that no Jubilee politician was involved in the distribution of the maize and this contradicted the 1<sup>st</sup> respondent’s contention. The evidence of PW10 that related to a recording of a conversation between a Chief and his sons was also not sufficient to establish any involvement of the 2<sup>nd</sup> respondent in the distribution of the relief food.

[89] In regard to the photographic evidence, the court dismissed the same as follows:

***“An attempt was made by way of certain 3 photographs of the 1<sup>st</sup> respondent and Hon. Munyes photographed distributing relief food. Unfortunately same were not produced in evidence as exhibits. It is unknown where or when they were taken or even who took them. I do not find any probative value in these 3 photos. I therefore do not find merit in this ground. Neither am I convinced that it was sufficiently proved”.***

[90] It is evident that the conclusion of the election court that the alleged malpractices were not established was based on the credibility of the witnesses and the court’s assessment of the probative value of the evidence. We cannot fault the conclusions made by the election court that no election malpractices of a criminal nature was established. The conclusions were neither perverse nor unreasonable, as proof of election malpractices of a criminal nature required a higher standard of proof that could not be attained through hearsay evidence, generalized allegations or evidence lacking probative value.

## **Conclusion**

[91] We come to the conclusion that new issues were introduced in the Petition by way of a further affidavit, which was admitted by consent. However, this was done outside the period allowed for amendment of petitions, an issue that the appellants and the 2<sup>nd</sup> respondent challenged in the first instance, in this appeal. We reiterate that an act that was done outside the law cannot be sanctified by the fact that it was done with the consent of parties. In regard to reference made during the examination of witnesses, to irregularities in additional polling stations that had not been pleaded, and the tabulation in the 1<sup>st</sup> respondent’s written submissions of additional irregularities not pleaded in the petition, we

note that the election court made a finding that there were 39 incidences of irregularities, but failed to identify the evidence upon which it reached such conclusion. In addition, the election court failed to particularize the alleged irregularities against specific polling stations where there were complaints, nor consider the impact of such irregularities on the election process, and therefore failed to properly apply the disjunctive test as was provided in section 83 of the Elections Act before the amendment; or to properly address itself to the confines of the evidence and the law in finding that the irregularities were sufficiently established to justify nullification of the election.

**Final Orders**

**[92]** For the reasons stated herein, we allow the appeal and the 2<sup>nd</sup> respondent’s cross-appeal and make orders that:

- (i) the judgment of the election court and the order of the court nullifying the election of Women Representative for Turkana County is hereby set aside;
- (ii) the election of the 2<sup>nd</sup> respondent as the Women Representative for Turkana County is hereby upheld and confirmed;
- (iii) the 1<sup>st</sup> respondent’s cross-appeal is dismissed with costs;
- (iv) the 1<sup>st</sup> respondent shall pay costs of the appeal and the 2<sup>nd</sup> respondent’s cross-appeal as taxed and costs in the election court to the appellant, and the 2<sup>nd</sup> respondent as taxed subject to capping of Kshs Two million.

**[93]** We end by expressing our sincere gratitude to all the counsel who participated in this matter. Their research, industry and co-operation made our work all the more easier. Equally, we thank Patricia Joseph for her assistance in research work and Emily Isiaho for the secretarial work.

**Dated and delivered at Eldoret this 12<sup>th</sup> 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**