



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: GITHINJI, H. OKWENGU & J. MOHAMMED, J.J.A)

ELECTION PETITION APPEAL NO. 21 OF 2018

**IN THE MATTER OF ELECTION FOR THE MEMBER OF
NATIONAL ASSEMBLY – NANDI HILLS CONSTITUENCY**

BETWEEN

ALFRED KIPTOO KETER.....APPELLANT

AND

BERNARD KIBOR KITUR.....1ST RESPONDENT

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....2ND RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Eldoret (**Kimondo, J.**))

delivered on the 1st of March, 2018 **IN THE MATTER OF HIGH COURT OF**

KENYA AT ELDORET in Election Petition No. 1 of 2017)

JUDGMENT OF THE COURT

[1] This is an appeal from the judgment of the election court (**Kanyi Kimondo, J**) dated 1st March, 2018 essentially invalidating the election of **Alfred Kiptoo Keter (the appellant)** as a member of the National Assembly for Nandi Hills Constituency.

[2] The appellant, **Bernard Kibor Kitur (the 1st respondent herein)** and **Isaac Kirwa Leting** vied for the election for member of the National Assembly for Nandi Hills Constituency in the elections held on 8th August 2017. On 9th August, 2017 Peter Resa, the Constituency Returning Officer, declared the appellant as validly elected as member of the National Assembly for Nandi Hills Constituency having garnered 23,923 votes. Bernard Kibor Kitur and Isaac Kirwa Leting were declared to have garnered 13,872 and 863 votes respectively.

[3] On 5th September 2017, Robert Kibet Kemei who described himself as a farmer, businessman and chairman of Citizen Voice and Action – a community based organisation, filed a petition against the appellant as the 1st respondent and the Independent Electoral and Boundaries Commission (IEBC) as the 2nd respondent seeking the following prayers:

(i) a declaration that the conduct of 2nd respondent was in breach of the Elections Act and Election (General) Regulations, 2012.

(ii) a declaration that fresh elections be conducted in Nandi Hills Constituency,

(iii) court do find that the 1st respondent has committed serious electoral offences and order him barred from participating in subsequent elections for a period of at least 5 years or as the court may deem fit and just.

(iv) the court direct the police and the Director of Criminal Investigations to commence criminal action on 1st respondent and officers of the 2nd respondent.

(v) the respondents jointly and severally be condemned to pay the petitioner's costs and the incidentals to this petition.

[4] The petition was supported by the affidavit of the petitioner sworn on 5th September 2017. The appellant filed a response, a replying affidavit and four witness' affidavits. Similarly, IEBC filed a replying affidavit sworn by Peter Resa the Constituency Returning Officer. On 8th September 2017 the petitioner filed four petitioner's witnesses' affidavits all sworn on 6th September, 2017 by the witnesses Bernard Kibor Kitur, Richard Sitienei, Gilbert Kipngetich Kemboi and Henry Kipkurui Yegon respectively.

[5] By an application dated 14th September, 2017, the petitioner, Robert Kibet Kemei applied for leave to withdraw the petition on the ground that he was no longer interested in pursuing the petition. By a notice dated 21st September 2017, Bernard Kibor Kitur sought leave of the court to be substituted as a petitioner on the grounds that he was a candidate in the election, that he was a key witness and that he supported the petitioner by providing the mandatory deposit for security for costs.

By a ruling dated 23rd November, 2017, the election court granted leave to the Petitioner to withdraw from the petition and at the same time granted leave to Bernard Kibor Kitur to be substituted as a petitioner. The court further directed that the substituted petitioner:

“shall stand in the same position, to the extent possible, and shall be subject to the same liabilities as the original petitioner.”

[6] Subsequently, by an application dated 29th November, 2017, the substituted petitioner herein referred to as the 1st respondent or original petitioner sought leave to adduce further or additional evidence by filing a supplementary affidavit and, in addition, affidavits of more witnesses in support of the petition particularly to introduce:

(a) audio recordings of the appellant campaigning beyond the official campaign period.

(b) photographs of the appellant campaigning beyond the official campaign period.

(c) Evidence of bribery and treating voters.

The 1st respondent further sought orders against Safaricom Company Limited to supply the identity of registered holders of three mobile phone numbers and M-Pesa Money transfer transactions; an order against IEBC to supply certified copies of official campaign schedules, an order to compel production of Occurrence Book entries of two police stations and order to compel Abraham Kipkoiri Kemboi to give evidence regarding his role in the campaigns.

On his part the appellant filed an application also dated 29th November, 2017 for striking out the petition for non compliance with provisions of Election (Parliamentary and County Elections) Petition Rules, 2017 or alternatively for striking of the four witness' affidavits filed on 8th September 2017. Further, IEBC filed a preliminary objection dated 27th November 2017 to the petition alleging that the petition was filed in contravention of the rules and was an abuse of the court process.

[7] The election court heard and considered the three applications together and by a ruling delivered on 19th December, 2017, the court:

(i) dismissed the application for adduction of additional evidence on the ground that additional evidence would buttress the petition and alter the character of the original petition.

(ii) Nevertheless, the election court gave leave to the 1st respondent to file a supplementary affidavit which will to the “*greatest extent possible be word for word, without any additional facts or evidence as the affidavit of the petitioner sworn on 5th September, 2017*”.

(iii) dismissed the application to strike out the petition and the preliminary objection.

(iv) struck out the four witness' affidavits on the grounds that they were not filed together with the petition, they were filed outside the 28 days of the declaration of results and no leave was sought to admit the affidavits out of time.

(v) rejected the submission that the affidavit of the original petitioner in support of the petition stood withdrawn upon leave being granted to withdraw from the petition and held that the subsequent petitioner inherited the petition in the condition it was presented and the mere withdrawal of the original petitioner did not invalidate the supporting affidavit.

The 1st respondent duly filed a supplementary affidavits sworn on 22nd December, 2017.

[8] The original petitioner had averred in the petition that:

(i) By Gazette Notice no. 2693 published by the IEBC on 17th March 2017, the campaign period for purposes of the election was to commence on 1st June 2017 and cease on 5th August, 2017 at 6.00 p.m.

(ii) On 6th August, 2017 the appellant held campaign meetings at, amongst other places, Ainapngeny Centre, Lubuiwo Trading Centre, View Point trading centre and Kapkoros primary school in Kapchorwa ward.

(iii) Later in the day the appellant went to Stima primary school at 5.00 p.m. in Ol Lessos ward.

(iv) On 7th August, 2017 the appellant went to Tartar Sub location in Chepkunyuk Ward at a place called Simalwet Trading Centre.

(v) During the meeting, the appellant addressed members of public and treated voters to hand outs by paying cash to members of the public.

(vi) At Labuiywa Trading Centre the appellant had a meeting with members of the Public where approximately 200 people attended; that at the meeting the people in attendance were grouped in ten members and each group given shs. 1000 which was handed over by the appellant and members of his entourage.

(vii) These breaches were reported to IEBC and to Nandi Hills Police Station

(viii) On 7th August, 2017 the appellant and his agent went to some of the tea estates in the constituency giving out bar soaps, sugar and other items with a view to induce voters to vote in his favour.

(ix) On 9th August 2017, IEBC announced wrong results in Form 35B not based on aggregated form 35A's for Nandi Hills Constituency.

[9] At the hearing of the petition, the 1st respondent gave evidence and did not call any witnesses. The appellant gave evidence and called two witnesses, Lilckon Kipkurui Ngetich and Thomas Kimanyo Kiyeng. The IEBC called one witness Peter Resa.

[10] Five issues were framed at the pre-trial conference, the main three issues being whether IEBC conducted the elections in accordance with the Constitution, Election Act and Regulations; whether the appellant committed election offences that warrant the prayers in the petition; and whether the appellant was validly elected as member of the National Assembly for Nandi Hills Constituency. The election court in its judgment addressed three underlying complaints arising from the issues framed. Firstly, the anomalies in forms 35A and 35B in three polling stations of Ng'ame Nursery School; Lelwak Primary School and Nduruto primary school. The court made a finding that the irregularities did not materially affect the results. Secondly, the alleged election offences of bribery and treating of voters at Labuiywa Trading Centre. The court made a finding that there was no cogent or credible evidence to back the allegations and that the allegations were largely on hearsay. Thirdly, the conduct of unlawful campaign between 6th and 8th August 2017.

The court made a finding that there was no credible evidence that the appellant continued with the campaigns on 7th August 2017 at Simatwet Trading Centre in Tartar sub-location, Chepkunyuk Ward and that there was paucity of evidence that the appellant campaigned at View Point Trading Centre and at Kapkoros primary school.

[11] However, the court made a finding thus:

“I am however satisfied on preponderance of evidence that on 6th August 2017, the 1st respondent addressed a gathering of not less than ten people at Ainapngeny shopping centre. He addressed another gathering at Labuiwo. He also inspected a school project at Stima School in Ol'lessos ward where he addressed yet another group of between 10 to 16 people.”

The election court made further findings, *inter alia*, that the absence of public address systems or materials did not prevent the appellant from addressing the three gatherings, that he did not need to expressly ask for votes, that by addressing the public gathering, he created a spectacle and kept his brand alive, that the appellant as a sitting member of the National Assembly visited those places as a politician in a poorly disguised campaign; that the appellant breached the electoral code of conduct; that the appellant's conduct tainted the fairness and integrity of the poll and that whether or not the unlawful campaigns had an impact on the number of votes is academic.

Lastly, the election court made a finding that the returning officer was informed that the appellant was campaigning out of time but played impotent despite his extensive powers under the Elections Act.

[12] From the foregoing findings, the election court concluded that IEBC did not conduct the elections in accordance with the Constitution, the Elections Act and Regulations; that the appellant committed election offences and that the appellant was not validly elected as he engaged in unlawful campaigns which tainted the fairness and integrity of the poll.

[13] The appeal is based on 20 grounds of appeal which have been categorized into several clusters namely, misdirection on the application of Rule 24(5) of the Elections (Parliamentary and County Elections) Petition Rules, 2017 by allowing the 1st respondent to adopt the original petitioner's affidavit and thereby admitting inadmissible evidence; considering and relying on hearsay evidence on allegations of illegal campaigns, failing to give due credibility and weight to the evidence of the appellant and his witnesses that no campaigns were held; lowering the standard of burden of proof; placing evidential weight to and relying on the contested evidence of the original petitioner; admitting the 1st respondent's supplementary affidavit which was filed out of time and which introduced new facts and allegations; failing to find that the irregularities complained of were incapable of affecting results, failing to find that the photographic evidence was inadmissible.

[14] The 1st respondent filed a cross-appeal impugning the ruling of 19th December, 2017. He averred that the learned Judge erred in law by denying the 1st respondent an opportunity to adduce additional evidence; striking out the affidavits and by finding that bribery was not

proved. In addition, the 1st respondent filed notice of grounds of affirming the decision of the election court on grounds, *inter alia*, that there was cogent evidence of bribery and treatment of voters and that illegal campaigns had a massive impact on the votes garnered by the appellant.

[15] The 2nd respondent (IEBC) filed a notice of cross-appeal on the grounds, amongst others, that the learned judge erred in law by shifting the evidentiary burden of proof to the respondents before the initial burden was discharged; by faulting the 2nd respondent for failing to take action regarding allegations of breach of campaign rules on the basis of a phone call and Whatsapp messages while the procedure for lodging complaints was not followed; by nullifying the election on the basis of hearsay evidence and lastly, by disregarding or failing to properly interpret and apply the provisions of section 83 of the Elections Act.

[16] It is convenient to deal at the outset with the submissions by **Amos Magut**, learned counsel for the 1st respondent that the appeal raises matters of fact and therefore there is no valid appeal. Counsel submitted that the questions the appellant is asking the court to re-examine and determine their probative value relates to the weight to be given to the affidavit of the original petitioner; the weight to be given to the photograph printed by the petitioner; the determination that the appellant's appearance after close of official campaign period at the specified areas amounted to illegal or unlawful campaign; whether addressing a crowd of about 25 people would be said to affect the overall outcome of the disputed elections; and, whether depositions on oath can be said to amount to hearsay even after admission by the appellant.

Dr. Otiende Amollo, learned counsel for the appellant submitted that the appeal raises issues of law including the interpretation and application of Rule 24(5) of the Elections (Parliamentary and County Election) Petition Rules 2017, the fate of the affidavit of the original petitioner; what the supplementary affidavit should contain, shifting of burden of proof, the learned judge's conclusion on evidence, hearsay evidence, interpretation of the law on electronic evidence and the application of section 83 of the Elections Act.

[17] As section 85A (1) of Elections Act provides, an appeal from the High Court concerning membership of the National Assembly lies to this Court on matters of law only. In **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR**, the Supreme Court of Kenya said at Para 81:

“Now with specific reference to section 85A of the Election Act, it emerges that the phrase “matters of law only” means a question or an issue involving

a. the interpretation or construction of provisions of the Constitution, an Act of Parliament, subsidiary legislation, or any legal doctrine, to set of facts or evidence on record by a trial judge in an election petition in the High Court concerning membership of National Assembly, the Senate or Office of County Governor;

b. the application of a provision of the Constitution, 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, Senate or the office of the County Governor, where the appellant claims that such conclusion were based on “no evidence” or that the conclusions were not supported by 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.”

The Supreme Court re-affirmed those guiding principles in paragraph 103 of **Zacharia Okoth Obado v. Edward Akongo Oyugi & 2 Others [2014] eKLR**.

[18] The first and second principles are easy to discern and apply in any particular set of circumstances. The third principle is more often than not problematic as it involves the examination of evidence and a decision on the sufficiency or otherwise of the evidence as a matter of degree.

The election of the appellant was invalidated on the ground that he engaged in illegal and unlawful campaign which tainted the fairness and integrity of the poll.

In broad terms, the decision of the learned Judge is impugned on the grounds that the evidence of the 1st respondent relied upon was hearsay; that the 1st respondent did not discharge the burden of proof; that the burden of proof was shifted; that the conduct of the appellant did not amount to a campaign; and that the Judge did not apply section 83 of the Elections Act. Those grounds are more clearly articulated in the submissions of the 2nd respondent in support of the cross-appeal.

[19] As we understand the appeal, the appellant is essentially inviting the Court to find that the election court did not correctly apply the law in arriving at its decision. The appeal does not require the court to review the evidence, make independent findings of fact and arrive at different findings based on the evidence. Thus, we are satisfied that the appeal is based on matters of law and therefore, competent.

[20] The first broad issue raised in the appeal is the status of the affidavit of the original petitioner and the supplementary affidavit of the 1st respondent and their respective evidential value. The original petitioner who had filed an affidavit to support the petition applied to withdraw the petition whereupon the 1st respondent applied for leave to be substituted as a petitioner. The original petitioner was given leave to withdraw from the petition and the 1st respondent to be substituted as the petitioner. The 1st respondent subsequently applied for leave to file a supplementary affidavit and to adduce additional evidence. He was allowed to file a supplementary affidavit on terms that:

“save for his name and particulars the affidavit will to the greatest extent possible be word for word, without any additional facts or evidence as the affidavit of original petitioner sworn on 5th September, 2017.”

At para 16 of the supplementary affidavit, the 1st respondent deponed:

“I am informed by the original petitioner ROBERT KIBET KIMEI, which information I verily believe to be true, that...”

He then referred to twenty-five (25) sets of facts that he was informed about by the original petitioner. These facts relate to what the judge referred to as unlawful or illegal campaign, taking of photographs and bribery.

[21] Rule 4(b) of the Election (Parliamentary and County Elections) Petition Rules, 2017 requires that a petition be supported by an affidavit sworn by the petitioner containing particulars set out under Rule 12.

Rule 12(1)(b) stipulates that the affidavit to support the petition shall be sworn personally by the petitioner or at least one of the petitioners if there is more than one petitioner.

Rule 12(2) stipulates the matters which should be stated in an affidavit in support of the petition and includes the grounds on which the petition is presented. Rule 12(3) stipulates that each person that the petitioner intends to call as a witness at the hearing shall swear an affidavit. Under Rule 12(4) the petitioner is required to file the affidavit of a person to be called as a witness at the time of filing the petition and under rule 12(8) a witness cannot be allowed to give evidence unless an affidavit sworn by the witness is filed as required by the rules.

By rule 12(9), the court can direct a party or witness to file a supplementary affidavit. The contents of an affidavit are stipulated and include the substance of the evidence.

By Rule 12(12):

“an affidavit shall form part of the record of the hearing and may be deemed to be the deponents evidence for purposes of an examination in-chief.”

Rule 12(13) provides:

“Every deponent shall, subject to the election court’s direction, be examined in-chief and cross-examined;

provided that parties may by consent, accept not to cross-examine the deponents but shall have the deponents evidence admitted as presented in the affidavits.”

Lastly, Rule 12(14) states that the Oaths and Statutory Declarations Act and Order 19 of Civil Procedure Rules, shall apply to the affidavits under the rules.

Rule 24(5) is also relevant: It provides:

“Subject to sub-rules (3) and (4), a substituted petitioner shall stand in the same position, to the extent possible, and shall be subject to the same liabilities as the original petitioner.”

[22] From a study of the above rules, we find that:

(i) Since a petition must be supported by an affidavit sworn personally by the petitioner, a supporting affidavit of a petitioner is an integral part of the petition.

(ii) Although an affidavit of a person that the petitioner intends to call as a witness must be filed at the time of filing the petition, such an affidavit is merely evidence in support of the petition and is not part of the petition.

(iii) An affidavit including a supplementary affidavit must state the substance of the evidence and must be confined to facts that the deponent is able of his own knowledge to prove provided that in an interlocutory application or with the leave of the court, an affidavit may contain statements of information and belief showing the source and grounds thereof.

(iv) An affidavit forms part of the hearing of the petition and subject to the discretion of the court or consent of the parties, every deponent should attend the hearing of the petition and be examined in chief and cross-examined.

[23] The petitioner’s counsel submitted that the learned Judge grossly misapprehended the law by allowing the 1st respondent to adopt the affidavit of the original petitioner, word for word, thereby allowing the 1st respondent to testify on facts within the knowledge of the original petitioner, which was tantamount to defective depositions based on hearsay. Counsel further submitted that the affidavit of the original petitioner could not be adopted since upon his withdrawing from the proceedings, the evidence he had sought to introduce went with him.

[24] On the other hand, counsel for the 1st respondent submitted, *inter alia*, that the court was correct in holding that the affidavit of the

original petitioner remained intact; that the 1st respondent distinguished between facts within his own knowledge and facts based on information and belief; that the 1st respondent took the position of the original petitioner in all respects and adopted his depositions wholesome, and that the appellant failed to apply to have the original petitioner summoned for cross-examination on the contents of his affidavit.

[25] Having found that an affidavit of a petitioner in support of a petition is an integral part of the petition, it follows that the finding of the learned Judge that upon the withdrawal of the original petitioner from the proceedings, the petition and the supporting affidavit remained intact, is the correct position in law. However, having regard to the importance of a supporting affidavit in an election petition, if the original petitioner fails to appear for examination in-chief and cross-examination at the trial and is not excused by court in its discretion or by consent of parties, his evidence, as stated in **Moses Wanjala Lukonye v Bernard Alfred Wekesa Sambu & 3 others [2013] eKLR** and other authorities, is of no probative value and the court should not consider it.

Further, the supplementary affidavit of the 1st respondent which was filed more than three months after the petition was filed has the character of a witness affidavit and could not be lawfully elevated to the pedestal of a petitioner's affidavit in support of the petition. It follows that the learned judge misdirected himself in law by requiring the 1st respondent to adopt, word for word, the original petitioner's supporting affidavit. The result of the judge's order is that the 1st respondent was allowed to adopt facts which he was not able of his own knowledge to prove contrary to the law on affidavits. Such evidence was hearsay and of no probative value.

[26] The second broad ground of appeal which is also raised by the 2nd respondent in the cross-appeal relates to the shifting of the burden of proof. This is in respect to proof of unlawful campaigns. The original appellant in the affidavit to support the petition referred to facts on which he relied to prove unlawful campaigns. He withdrew from the petition, and no party applied that he be summoned to give evidence at the trial. The 1st respondent in his supplementary affidavit relied on the information given to him by the original petitioner. At the trial, the 1st respondent gave evidence and did not call any witnesses. The 1st respondent admitted that he was not present at the campaigns, did not witness the campaigns and did not himself take the photograph relied upon by the original petitioner.

The appellant in his replying affidavit denied that he conducted campaigns as alleged but that he exercised his constitutional right of freedom of association and movement despite the close of the campaign period, without conducting political campaigns. He gave oral evidence at the trial giving account of, and the reason for his movements and called witnesses.

At para 102 of the judgment, the learned Judge said:

“The petitioner’s supplementary affidavit was built atop the original deposition by the initial petitioner. I accordingly find that the evidential burden shifted to the 1st respondent.”

The learned Judge then considered the rebuttal evidence and arrived at the conclusions already adverted to.

[27] The respective counsel cited several authorities on burden of proof and standard of proof. It is sufficient to refer to only two. In **Raila Odinga and 5 Others v Independent Electoral and Boundaries Commission & 3 Others [2013] eKLR**, the Supreme Court said in part at para 203;

“...a petitioner should be under obligation to discharge the initial burden of proof, before the respondent’s are invited to bear the evidential burden. The threshold of proof should in principle, be above the balance of probability, though not as high as beyond reasonable doubt – save that this would not affect the normal standards where criminal charges linked to an election are in question.”

In **Raila Omolo Odinga & Another v Independent Boundaries Commission & 4 Others and Attorney General & Anor**, - Presidential Petition No. 1 of 2017, the Supreme Court said in part at para 131;

“..a petitioner who seeks nullification of an election on account of non-conformity with the law or on the basis of irregularities must adduce cogent and credible evidence to prove those grounds to the satisfaction of the court...”

The appellant urged the court to find that the legal burden of proof could not have been discharged as the same was based on hearsay and the evidential burden of proof could not have possibly shifted to the appellant. In his view, allegations of commission of a criminal offence must be proved beyond reasonable doubt.

Ken Melly, learned counsel for the 2nd respondent submitted at length along the same lines. He contended that the learned Judge erred by prematurely shifting the evidential burden before the initial burden was sufficiently discharged using cogent and credible evidence. Counsel referred to section 63(1) of the Evidence Act which provides that oral evidence must be direct in all cases. He also referred to the definition of direct evidence in section 63(2) which includes:

“(a) with reference to a fact which could be seen, evidence of a witness who says he saw it.

(b) with reference to a fact which could be heard, the evidence of a witness who says he heard it.”

The 1st respondent's counsel contended that the learned Judge considered the law on the burden of proof and rejected the contention that the evidence of the 1st respondent was hearsay; that the appellant admitted being present in the areas mentioned and that although the breach of

the Electoral Code of Conduct was quasi-criminal in nature, the appellant was not facing a criminal trial.

[28] The learned Judge was aware that the illegal or unlawful campaigns were a breach of the Electoral Code of Conduct and a criminal offence under section 20(2) of the Election Offences Act. Indeed, the learned Judge made a finding that an electoral malpractice of a criminal nature may have been committed and directed that the judgment be transmitted to the Director of Public Prosecution for further investigations. It is evident that with regard to malpractices of a criminal nature, the 1st respondent was required to discharge a high legal burden of proof before the evidential burden could be shifted to the appellant.

[29] As we have endeavoured to demonstrate in para. 25 above, the finding that the 1st respondent discharged the legal burden warranting the shifting of the evidential burden was based on a misapprehension of the law that the supporting affidavit of the original petitioner was cogent and credible evidence. Both the affidavit and oral evidence of the 1st respondent was not direct evidence. It was hearsay.

If the affidavit of the original petitioner and the facts stated therein are discounted, then there was absolutely no evidence to support illegal or unlawful campaigns.

It is thus evident that the 1st respondent did not prove that the appellant engaged in illegal or unlawful campaigns and that the evidential burden was erroneously shifted to the appellant.

[30] In addition, the learned Judge gave a very broad meaning to the word “*campaign*” which would impinge on a candidate’s freedom of movement and association during the 48 hours before an election and unnecessarily expose candidates to criminal sanctions. According to the learned judge, a political campaign is simply an organized and active programme geared towards winning an election. The learned Judge stated that the appellant did not need to ask for votes or have a public address system or materials. The appellant’s conduct was construed a campaign because he addressed the members of public thereby creating a spectacle which kept his brand alive.

The word “*campaign*” is defined in section 2 of the Elections (General) Regulations 2012 as “*the promotion of a candidate or political party for purposes of an election during the campaign period*”. As correctly submitted by counsel for the 2nd respondent, the essential elements of that definition were not established. It is apparent from the judgment that the appellant was found to have addressed a very small number of people in the three places – a group of less than 25 people at each of three places. The constituency has more than 51,000 registered voters. We are not satisfied that the conduct of the appellant amounted to a campaign in law.

[31] The last ground of appeal faults the learned judge for failing to consider the provisions of section 83 of the Elections Act and appreciate that addressing the approximately 25 people post the campaign period had no substantial effect on the overall outcome of the disputed election.

The 2nd respondent has also raised similar grounds in the cross-appeal. The 1st respondent seeks to have the decision of the learned judge affirmed on the ground that the illegal campaigns had massive impact on the votes garnered by the appellant. Before the amendment, section 83 of the Elections Act provided:

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

[32] In *Raila Odinga’s 2013 decision* (supra), the Supreme Court said in part at para 196

“where a party alleges non-compliance with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections.”

At para 139 of *Zacharia Okoth Obado’s case* (supra), the Supreme Court said:

“Although the Court of Appeal cited the decision of this Court in the Raila Odinga case, it did not apply the principle that a court should consider the effect of the irregularity on the contested results. This principle holds that irregularities in the conduct of an election should not lead to annulment where the election substantially complied with the applicable law, and the results of the election are unaffected”

[33] Peter Resa, the Constituency Returning Officer testified that there are 121 polling stations in the constituency. The alleged campaigns were conducted in the precincts of one polling station. The 1st respondent testified that there are 2,251 registered voters in the four centres visited by the appellant.

The learned Judge made a finding that three centres were affected. The margin of votes between the appellant and the 1st respondent was 10,051. Neither the original petitioner, nor the 1st respondent, in their respective affidavits stated that the illegal campaigns affected the results.

[34] It is apparent that even if the appellant’s votes are reduced by 2,251 which is the number of registered voters in the four affected areas, the appellant would still have a wide winning margin. It follows, that the unlawful campaigns, if proved, could not have affected the results. Thus, the learned Judge erred in law in failing to consider and apply the provisions of section 83 of the Elections Act. Had he done so, he would have found that the alleged unlawful campaign could not have been a ground for invalidating the election of the appellant.

[35] The 2nd ground of the 2nd respondent's cross-appeal faults the court for finding that the 2nd respondent did not conduct the election in accordance with the Constitution, the Elections Act and regulations. The basis of that finding was that the 2nd respondent did not use its powers under the law to address the 1st respondent's complaint of unlawful campaign. There was overwhelming evidence from the Constituency Returning Officer that the elections in the constituency were conducted in accordance with the law, save for few administrative errors relating to tallying. The court found that those errors did not affect the results. The 1st respondent admitted in his oral evidence that the elections were properly conducted, save for the tallying errors. The 1st respondent admitted that he did not make an official complaint to the 2nd respondent in accordance with the provisions of the Settlement of Disputes Rules. The 1st respondent further admitted that the Returning Officer asked him to report to the police which he did. The conduct complained of was of a criminal nature committed two days before the elections. There was no evidence that an unlawful campaign was conducted with the tacit approval of the 2nd respondent. In the circumstances, a finding that the 2nd respondent did not conduct elections in accordance with the law for the mere failure to enforce the Electoral Code of Conduct was neither proportional nor rational. In any case, we are not satisfied that the ground of unlawful campaigns was proved.

[36] The 1st respondent's cross-appeal relates to the ruling of the electoral court dated 19th December, 2017 where the application for leave to adduce additional evidence was dismissed and the affidavits of four witnesses struck out. The learned Judge gave reasons for the decision including that the additional evidence would enlarge the boundaries of the petition and alter the character of the petition and that the affidavits were not filed together with the petition. The court also found that the 1st respondent had not applied for leave to file the affidavits out of time.

By rule 5(1) of the Elections (Parliamentary and County Elections) Petition Rules, 2017 the effect of failure to comply with the rules are to be determined by the court at its discretion. The 1st respondent's counsel did not make any submissions in support of the cross-appeal. The cross-appeal is against a discretionary order.

The 1st respondent has failed to demonstrate that the learned Judge did not exercise his discretion judicially having regard to the objective of the rules which is to facilitate, a just, expeditious, proportionate and affordable resolution of election petitions. We find no merit in the 1st respondent's cross-appeal.

[37] The election court granted three main prayers viz;

(a) a declaration that the election held on 8th August, 2017 for member of National Assembly for Nandi Hills constituency were not free and fair.

(b) the 1st respondent (now appellant) Alfred Kiptoo Keter was not validly elected as a member of National Assembly for Nandi Hills Constituency;

(c) the IEBC shall hold fresh elections for the member of the National Assembly for Nandi Hills Constituency in accordance with the Constitution, the Elections Act and the Regulations thereunder.

The court also granted the 1st respondent the costs of the petition.

[38] Rule 25(1) of the Court of Appeal (Election Petition) Rules 2017 gives the Court power, *inter alia*, to make an order dismissing the appeal, declaring the elections to be valid or invalid, invalidating the declaration made by the Commission, and on payment of costs.

[39] For the reasons contained in this judgment, it is ordered that:

1. The appeal is allowed.

2. The judgment of the Election Court dated 1st March, 2018 including the final orders at paragraph 37 above is set aside in its entirety.

3. The Election Petition No. 1 of 2017 is dismissed with costs to the appellant to be paid by the 1st respondent.

4. The 2nd respondent's cross-appeal is allowed with costs to be paid by the 1st respondent.

5. The 1st respondent's cross-appeal and notice of affirming the decision are dismissed with costs to the appellant to be paid by the 1st respondent.

6. A declaration is hereby issued that the appellant Alfred Kiptoo Keter was validly elected as member of National Assembly for Nandi Hills Constituency in the election held on 8th August 2017.

7. The declaration by the 2nd respondent that the appellant was validly elected is upheld.

Dated and delivered at Eldoret this 11th day of July, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR