IN THE COURT OF APPEAL

AT NAIROBI

ELECTION PETITION APPEAL NO. 12 of 2018

(CORAM: MUSINGA, MURGOR & OTIENO-ODEK, JJA)

BETWEEN

NDWIGA STEVE MBOGO.....APPELLANT

AND

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION..... .....1st RESPONDENT

STAREHE CONSTITUENCY RETURNING OFFICER.....2nd RESPONDENT

NJAGUA CHARLES KANYI.....3rd RESPONDENT

(Being an appeal from the entire judgment of the High Court at Nairobi (Ochieng, J.) dated 26th February 2018

in

Nairobi Election Petition NO. 10 of 2017)

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JUDGMENT OF THE COURT

1. On 8th August 2017, the people of Starehe Constituency in Nairobi County held election for the position of member of the National Assembly. The 3rd respondent ***(Njagua Charles Kanyi)*** was declared the winner, having garnered 61,266 votes against the appellant's ***(Ndwiga Steve Mbogo)*** 38,292votes. Dissatisfied with the declared results, the appellant filed an election petition challenging the results. Numerous grounds were urged in support of the petition. These included lack of official IEBC stamp on some statutory forms; lack of signatures of presiding and or deputy presiding officers electoral forms; lack of signature of agents; errors in tallying of votes; variances in result declaration forms 35A and 35B; violence in the conduct of the election; bribery and treating; vote stuffing; denial of entry into polling stations and failure to conduct the elections in accordance with the principles laid down in the Constitution, the Elections Act and Regulations thereunder.

GROUNDS OF APPEAL

2. Upon hearing the parties, by a judgment dated 26th February 2018, the election court dismissed the petition and upheld the election of the 3rd respondent as member of the National Assembly for Starehe Constituency. Aggrieved by the outcome, the appellant lodged the instant appeal citing the following abridged grounds:

> ***"(1) That the learned judge erred in law and fact in dismissing the petition.***
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> ***(2) The judge erred in law and fact by failing to appreciate the evidence adduced in relation to Form 35As and disregarding crucial evidence and exhibits tendered in support of the petition.***
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> ***(3) The judge erred in law and fact by failing to appreciate the magnitude of the omissions by the 1st and 2nd Respondents and***

the impact of the same on the integrity and validity of the impugned elections.

(4) The judge erred in law and fact in finding that the appellant had affirmed the finality of results when he failed to seek recount of the votes casts on the material poll day.

(5) The judge erred in law and fact by reaching a conclusion that the discovery of ballot boxes whose source and origin could not be explained did not impact the impugned election.

(6) The judge erred in fact and law in holding that the failure of a presiding officer to sign a statutory form does not affect the validity of the results.

(7) The judge erred in law and in fact in holding that the appellant did not lead evidence to demonstrate that the KIEMS Kits were not used in the elections.

(8) The judge erred in law and fact in holding that the appellant had not satisfied the evidentiary and legal burden of proof.

(9) The judge erred in holding that the Starehe elections was conducted in a free and fair manner thus failing to appreciate the principles in Articles 81 and 86 of the Constitution.

(10) The judge erred in law and fact by picking and choosing only those facts that would lead him to making findings in favour of the respondents and ignored facts that would lead him to allowing the petition thereby violating the appellant's right to fair hearing and access to justice as guaranteed by Articles 50 and 48 of the Constitution.

(11) The judge erred in law and fact in refusing to allow the appellant to lead evidence on the basis of information obtained from the read only access of the SD Cards.

(12) The judge erred in law and fact by dismissing the appellant's application for access and scrutiny of election materials.

(13) The judge erred in law and fact in awarding exorbitant, punitive and outrageous costs.

(14) That on the whole, the decision of the election court is unreasonable, irrational, contrary to law governing elections and in particular it is contrary to the overriding objectives of Petition Rules, pleadings, oral submissions, evidence and precedent."

3. In this appeal, learned counsel Ms. Velma Maumo and Mr. Ochieng Oginga represented the appellant. Learned counsel Mr. T.T. Tiego represented the 1st and 2nd respondents, while learned counsel Mr. Okatch Duncan appeared for the 3rd respondent. All counsel filed written submissions, list of authorities and case digest.

APPELLANT'S SUBMISSIONS

4. Counsel for the appellant urged us to note that the jurisdiction of this Court is confined to matters of law by dint of ***Section 85A*** of the **Elections Act** as expounded by the Supreme Court in **Gatirau Peter Munya -v- Dickson Kithinji, SC Petition No. 2B of 2014**and in **Zachariah Okoth Obado -v-Edward Okongo Oyug i& 2 Others [2014] eKLR.** Counsel submitted that the trial court erred in disallowing the appellant's reliance on evidence adduced, elicited and revealed pursuant to the court order permitting supervised access to information contained in the KIEMS Kits used in the Starehe Constituency election; that a consent order was recorded allowing supervised read only access to the KIEMS Kits; that as per the consent order, the appellant extracted relevant data from the SD cards which data the appellant was ready to reveal to the election court to prove that irregularities and anomalies occurred in the conduct of the elections; that during cross-examination of the 2nd Respondent on the contents of the data extracted from the KIEMS Kits, the trial court disallowed the use of information obtained from the Kit and similarly dismissed an application for scrutiny. It was submitted that in dismissing the application, the trial court erroneously held that any information that the appellant wished to extract from the KIEMS Kits were already available and there was no basis in law or fact in seeking an order for scrutiny of the KIEMS Kits; that the trial court erred in directing its mind to information extracted from the SD cards used in the KIEMS Kits but which information the same court restricted the appellant from utilizing during the hearing; and that ***Section 44***of the **Elections Act** underscores the importance of technology in elections and it was thus important for the trial court to allow use of information obtained in the SD cards.

5. In relation to Forms 35A, the appellant submitted that it was erroneous for the trial court to disregard and refuse to attach weight to the evidence adduced by the appellant on the basis that the said Forms were obtained from unidentified agents, yet the said Forms bore signatures of representatives of the 1st, 2nd and 3rd respondents who did not deny the authenticity of the Forms. It was further submitted that the judge failed to address his mind to ***Regulation 79*** of the **Elections (General) Regulations, 2012**. Under the said Regulation, the law imposes an obligation on the Presiding Officer to immediately announce the results at the polling station; request each candidate or their agent to append their signatures on the said forms; provide each political party, candidate or agent with a copy of the Form and affix a copy of the Form at the public entrance to the polling station or at any place convenient and accessible to the public at the polling station. Counsel submitted that the learned judge blatantly disregarded the provisions of **Regulation 79**; that he further disregarded the evidence and Forms tendered by the appellant and yet the same had been provided by the electoral body; and that it was a fundamental error for the judge to discount the appellant's evidence.

6. It was further submitted that the judge erred in finding that the appellant had affirmed the finality of the results when he failed to seek recount of the votes cast on the material poll day; that the judge misapprehended the law and placed a cumbersome and unreasonable burden upon the appellant by imposing that he ought to have sought a recount at the polling station; that the requirement for recount is discretionary

under ***Regulation 80*** of the **Elections (General) Regulations, 2012** and the judge misapprehended the law in finding that it was mandatory for the appellant to demand a recount; and that in this regard, the judge erred and abrogated the role of an election court in determining election disputes.

7. The appellant faulted the trial court in reaching a conclusion that the discovery of ballot boxes whose sources could not be explained did not impact on the impugned Starehe Constituency election; that in this context, the judge erred and failed to appreciate the impact of violation or contravention of the principle of safekeeping of electoral material as outlined in ***Article 86*** of the **Constitution**.

8. Next, the appellant contended that the judge erred in holding that failure of a Presiding Officer to sign a statutory election Form did not affect the validity of the results. In so holding, the judge erred and substituted the role of Presiding Officer with the role of an agent. Counsel cited dictum in **Raila Amolo Odinga another -v- IEBC & others, SC Election Petition No. 1 of 2017** to support the proposition that it is the appending of a signature by the Presiding or Returning Officer to a Form bearing the tabulated results that is the last solemn act of assurance to the voter by such officer that he stands by the numbers on the Form. Counsel further cited dictum from the case of **James Omingo Magara -v- Manson Oyongo Nyamweya & 2 Others, Civil Appeal No. 8 of 2010** where it was held that it was irregular and illegal for a presiding officer to fail to append his signature in the statutory Form.

9. The appellant further contended that the election court erred in disregarding the discrepancies in the conduct of the election at Moi Avenue Primary School Polling Station 9; that the trial court accepted that the Polling Station Diary for the School was not signed in a logical manner and no explanation was given; that it was erroneous for the judge to fail to give due weight to the appellant's complaint on the illogical manner in which the polling station diary was filled.

10. A further ground urged is that the trial judge erred in holding that the appellant did not lead evidence to demonstrate that KIEMS Kits were not used in the elections; that the judge erred as he had already denied the appellant the chance to adduce evidence from the SD cards; that in this context, the judge erred by imposing an unreasonable burden of proof on the appellant by denying the appellant the opportunity to adduce SD card evidence and then holding that the burden of proof had not been discharged.

11. In relation to the contestation that the Starehe election was not free and fair, the appellant faults the judge for disregarding various electoral malpractices and only picking and choosing evidence that was favourable to the respondents.

12. On costs, it is contended that the capping of costs in the sum of Ksh. 10 million was excessive, exorbitant and contrary to judicial precedent. In support counsel cited this Court's decision in **Martha Wangari Karua -v- IEBC & Others, Nyeri Election Petition Appeal Bo. 1 of 2017.**Other cases cited included **Mark Nkonana Supeyo -v- IEBC & 2 Others, Kajiado Election Petition Appeal No. 1 of 2017** and **Jack Ranguma -v-IEBC & Others, Kisumu Election Petition No. 1 of 2017.**

1st and 2nd RESPONDENT'S SUBMISSIONS

13. The 1st and 2nd respondents by way of written submissions and oral highlight opposed the appeal. In the first instance, the respondents contend that the Notice of Appeal dated 28th February 2018 filed in this matter is incompetent, null and void and that the said Notice was not filed at the Court of Appeal Registry within 7 days as required by ***Rule 2*** of the **Court of Appeal (Election Petition) Rules, 2017** as read with ***Rule 6 (1) and (2)***.

14. Submitting on the ground that the trial judge ignored crucial evidence, the respondents submitted that the appellant had not identified with specificity "the crucial evidence" allegedly disregarded by the election court; that on the contrary, in the entire judgment, the trial court analyzed each and every allegation upon which the petition was premised and all the evidence adduced by the appellant and his witnesses.

15. On the contention that the trial court erred and failed to consider the SD card evidence sought to be adduced by the appellant, it was submitted that the appellant failed to place before the trial court the report containing information extracted by his expert from the SD cards; that by failing to tender in evidence the report, the trial court was correct in law in holding that**,** ***Philice Kayiemba,*** (**R1-RW1)** the Returning Officer for Starehe Constituency, should not be cross-examined on a report which was not tendered in evidence and to answer hypothetical questions; that the learned judge's mind was clearly directed to the provisions of ***Rule 12***of the **Election (Parliamentary and County Elections) Petition Rules, 2017** the purport of which is that cross-examination is only permissible on contested issues and documents or affidavit filed before court; that the trial judge could not in law be expected to consider matters or "evidence and a report" which was not before the court.

16. On the holding by the trial court that the appellant affirmed the results at the polling station by failing to ask for recount, the respondents submitted that in as much as **Regulation 80 of the Elections (General) Regulations, 2012** makes it optional to request for a recount, once a party consciously opts not to seek recount, he is estopped from challenging the validity or outcome of the vote count at the polling station and of the aggregate results subsequently declared. Counsel cited dicta in **Raila Odinga & another -v- IEBC & others, SC Election Petition No. 1 of 2017** and submitted that the statutory declaration Form at the polling station containing results is a primary document and all other Forms subsequent to it are only tallies of the original and final results. In further support, counsel cited **Henry O. Nadimo -v- IEBC & 2 Others, (2013) eKLR, Joseph Amisi Omukanda -v- IEBC & 2 Others [2013] eKLR** and **Sammy Kipkemboi Kipkeu -v- IEBC [2017] eKLR** which, according to counsel, are all to the effect that a petitioner who fails to seek recount of votes at the polling stations confirms that the elections were properly conducted. Citing these cases, the respondents submitted that the appellant is estopped from challenging the declared results of Starehe Constituency.

17. Responding to the allegation that the trial judge erred and ignored evidence on recovery of counterfoil material, it was submitted that the evidence tendered was hearsay and the identity of the person who recovered them was in issue and the person was not called to testify; that the burden was on the appellant to demonstrate how such recovery impacted on the electoral process and the final declared results; that the

appellant failed to discharge this burden.

18. The respondents further submitted that the appellant failed to impeach the integrity of any Form 35As as containing different results; he never challenged any single vote count in any polling station and did not prove that any Form 35A was not signed by both agents and the presiding officers as required by law; that neither the appellant nor any of his witnesses cogently contested or gave different version of results for any polling station.

19. On the contestation that some presiding officers did not sign some result declaration Forms, the respondents submitted that failure to sign a statutory Form is a mere irregularity that is curable by ***Section 83***of the **Elections Act** which recognizes that unless non-compliance deliberately and materially affected the results, the same cannot be a basis for nullification of an election. The Section provides that:

> ***"83. 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."***

20. On KIEMS Kits, the respondents submitted that the burden to prove that KIEMS Kits was not used was on the appellant; that the appellant had a further burden to determine the manner of producing his alleged evidence on the SD cards; that in both instances, the appellant did not discharge the legal and evidential burden of proof. Further, it was submitted that the appellant had not identified with specificity and particularity his evidence that he alleges was erroneously struck off by the trial court.

21. Counsel submitted that on the whole, in this appeal, there is no cogent and credible evidence to show how the respondents did not comply with ***Articles 81*** and ***86*** of the Constitution and the Elections Act; that the appellant has not identified with particularity the specific facts that the trial judge picked to lead him to a decision in favour of the respondents and those specific facts that he ignored which would have led to allowing the petition.

22. On the issue of costs, counsel cited the case of **Mercy Kirito Mutegi -v- Beatrice NkathaNyaga, [2013] eKLR, Nyeri Civil Appeal No. 48 of 2013** in support of the proposition that award of costs is at the discretion of the trial judge and this Court can only interfere if there is some misdirection in some matter and as a result the judge arrived at a wrong decision. It was submitted that there were numerous court attendances from as early as 7.00 am to 4.00 pm; that the petition presented very complex issues coupled with the testimony of ***Dr. Nyangasi Oduwo (***PW***1),*** as an expert analyst and that the record of appeal comprises seven volumes which demonstrates the magnitude of issues raised in the petition.

3rd RESPONDENT'S SUBMISSIONS

23. The 3rd respondent in opposing the appeal observed that the jurisdiction of this Court is confined to matters of law by dint of ***Section 85A***of the **Elections Act** and the Supreme Court decision in **Gatirau Peter Munya-v-Dickson Mwendwa Kithinji & 2 Others**, **Supreme Court Petition No.2B of 2014**.

24. Submitting on the contestation on the information contained in the KIEMS Kits, counsel submitted that the information was extracted on 6th November 2017 by the appellant's expert and it was to be shared with the respondents' experts; that after the appellant closed his case and during cross-examination of the Returning Officer, counsel for the appellant tried to use the contents of an unknown report purporting it to be a report from the SD cards yet, the same had neither been filed in court nor supplied to the respondents; that the respondent's objected to the use of this unknown report and the trial court correctly upheld the objection; and that the appellant opted not to file his expert's report on the SD cards and is estopped from relying on the same. In any event, the report is from an unknown source and lacked credibility. By trying to use an unfiled report, the appellant was seeking to introduce new facts that were neither in the petition nor in the affidavits supporting the petition. In effect, it was submitted, the appellant was attempting to unprocedurally amend the petition, counsel submitted.

25. On the appellant's contention that the trial court erred in dismissing the application for scrutiny, the respondents submitted that the judge did not err and correctly held that no basis had been laid in law and fact for seeking scrutiny of the KIEMS Kits; that the appellant's allegations for scrutiny were not specific to any polling station.

26. On the issue that the trial court erred and ignored ***Dr. Nyangasi Oduwo (PW1's)*** evidence, the respondent submitted that the appellant's analyst, was a medical doctor by profession and no credentials were submitted to prove his expertise as an analyst; that although ***PW1*** said that 160 Forms had anomalies, he only made available 93 Forms and even out of the 93 Forms, the witness conceded that many were duly stamped. ***PW1's*** analysis report had some 16 polling stations which were not mentioned in his affidavit and this implied that the exhibit went beyond the scope of the evidence tendered by the witness. It was submitted that the trial court properly disregarded the evidence adduced by ***PW1*** because the analysis was based on material not made available to court and other parties and it was thus impossible for the court to verify the accuracy of the analysis; and that ***PW1***could not vouch for the authenticity of Forms 35A upon which he based his analysis.

27. Regarding the contention that the appellant did not seek recount of the votes cast on the poll day, it was submitted that the trial court did not err because the appellant made a conscious decision not to seek recount of votes; that due to this, the finality of results which were announced immediately after the conclusion of the process of counting was affirmed. Counsel submitted that neither the appellant nor his witnesses gave evidence that any presiding officer did not immediately announce the results at the polling station or that any agent was denied an opportunity to sign any Form 35A or 35B was not complied with; and that to this end, there was no failure by the 1st and 2nd respondent to comply with the provisions of **Regulation 79 of the Elections (General) Regulations 2012.**

28. The 3rd respondent submitted that the trial judge did not err in discounting and dismissing the appellant's evidence; that the appellant's evidence particularly the testimony of ***PW1*** was considered by the judge who correctly found that ***PW1's*** testimony had a multitude of errors;

that the judge correctly held that ***PW1's*** evidence and analysis was worthless; that the appellant did not lead any evidence to show in which specific polling station the Presiding Officer had not signed Form 35A.

29. On the issue of costs, it was submitted that the total costs capped at Ksh. 10 million was neither excessive nor exorbitant; that court attendance by counsel was for more than fifteen days stretching from as early as 7.00 am to 5.00 pm; that the trial court was faced with a record five applications, four of which the appellant lost and was ordered to pay costs. Counsel urged us not to interfere with the costs as capped by the trial court.

ANALYSIS AND DETERMINATION

30. We have considered the judgment of the High Court, grounds of appeal, submissions by counsel, authorities cited and the law.

31. At the outset, the 1st and 2nd respondents in their submissions urged that the Notice of Appeal filed in this matter is incompetent, null and void. The argument and submission by the respondents simply regurgitated provisions of the **Court of Appeal Election Petition Rules** without demonstrating the factual basis upon which the Notice of Appeal is being challenged. The submission was vague and without specificity as to what aspect of the Notice of Appeal was being impugned. We find that this submission was not substantiated and must fail. We are persuaded and reminded of dictum by Ouko, J.A in **Nicholas Kiptoo Arap Korir Salat-v- Independent Electoral and Boundaries Commission & 6 others [2013] eKLR** where the learned Judge stated:

> ***"Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness."***
> [Emphasis added]

32. The Supreme Court in **Odinga& another -v- Independent Electoral and Boundaries Commission & 2 others [2017] eKLR** considered an application to strike out documents served out of time. In dismissing the application, by a Ruling dated 27th August 2017, the Court expressed itself as follows:

> **We have considered the application, the affidavit in support thereof, and submissions of counsel. The nature of this application is such that were it to be granted, it would dispose of the entire case of the 1st, 2nd and 3rd respondents at this preliminary stage. Such a drastic consequence in our view cannot be justified if the scales of justice are weighed in favour of all the parties to this petition."**

33. Turning to the merits of the instant appeal, by dint of **Section 85A** of the **Elections Act,** the jurisdiction of this Court is limited to matters of law only. The section provides as follows:

> **"85A Appeals to the Court of Appeal**
>
> **(1) An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or office of County Governor shall lie to the Court of Appeal on matters of law only and shall be-** (Emphasis supplied)
>
> **(i) filed within thirty days of the decision of the High Court; and**
>
> **(ii) heard and determined within six months of the filing of the appeal."**

34. The Supreme Court in **Gatirau Peter Munya -v- Dickson Mwenda Kithinji, Supreme Court Petition No. 2B of 2014 at paragraph 93** held that "much as an appellate 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 appellate court must also maintain fidelity to the trial record. The evaluation of the evidence on record is only to enable an appellate 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."

35. In the same appeal, the Supreme Court then set out the duty of this Court in hearing an appeal under ***Section 85A*** as follows:

> **"[82] Flowing from these guiding principles, it follows that a petition which requires the appellate Court to re-examine the probative value of the evidence tendered at the trial Court, or invites the Court to calibrate any such evidence, especially calling into question the credibility of witnesses, ought not to be admitted. We believe that these principles strike a balance between the need for an appellate Court to proceed from a position of deference to the trial Judge and the trial record, on the one hand, and the trial Judge's commitment to the highest standards of knowledge, technical competence, and probity in electoral-dispute adjudication, on the other hand."**

36. ***Section 85A*** enjoins this Court to entertain election petition appeals only on matters of law. In **Pius Yattani Wario -v- Independent Electoral Boundaries Commission & Another, Election Petition No. 10 of 2018**, this Court stated:

"As we have already noted, many of the grounds of appeal and of the cross-appeal are prefixed by the assertion that the learned judge "erred in law and in fact" in arriving at various determinations. Of late, we have encountered two strands of response from appellants when we query why they have framed their grounds of appeal in an election petition to include invitations to the Court to determine issues of fact. The first is denial that the appeal indeed raises issues of fact, notwithstanding how the grounds of appeal are framed. In this response, the matter is reduced to an issue of semantics, raising the question why a party who seeks determination of issues of law only is not able to say so in a straightforward manner. The second, a more honest, if lazy approach, is to admit that the appeal indeed raises issues of fact and throw back the problem to the Court to sort out matters of fact from matters of law, before making its determination. We think both approaches are to be deprecated. It is not the business of the Court in each and every appeal to jump into the haystack to look for the needle. It is for the appellant to frame the issues that aggrieve him or her with precision and clarity. Encouraging that kind of practice will ultimately make nonsense of the rules of pleadings and encourage parties to present to the Court a potpourri of myths, rumours, allegations, facts, and so on, in the mistaken belief that it is the business of the Court to sort out the relevant from the irrelevant, as it strives to sustain all and sundry claims, however presented."

37. In other instances, this Court has taken a more liberal interpretation of the guiding principles to ***section 85A***. In **Wavinya Ndeti & Another -v- Independent Electoral and Boundaries Commission & Another [2018] eKLR**, this Court delivered itself thus:

"We are aware and appreciate that an appellate court like ours would rarely interfere with a factual determination of a trial judge unless the trial judge has clearly failed on some material point, to take into account particular circumstances, probabilities material to an estimate of the evidence tendered before it, or that the judge failed to appreciate an important and relevant point in the case, or that he misapprehended or misapplied the law on the facts thereby arriving at an outrageous conclusion which is inconsistent or a departure from the evidence adduced by the parties. Section 85A is not a blanket 'no entry zone' for this Court not to consider and address its mind on grounds of appeal simply on account of a plea in the memorandum of appeal that the trial judge "erred on facts and law."

38. In **Stanley Muiruri Muthama -v- Rishad Hamid Ahmed & 2 others [2018] eKLR** this Court in considering its jurisdiction under ***Section 85A*** expressed that it is mindful that drafting of pleadings is a technical matter. If the judge had deduced an unknown legal principle from the facts of the case to arrive at his decision, it would be preposterous to shut out a litigant simply on account of inelegance in drafting. The Court has to ensure that justice prevails at all times and that ***Section 85A*** is not used as a roadblock to shut out genuine grounds of appeal on account of poor drafting of the grounds of appeal.

39. In **Hon. Mohamed Abdi Mohamud -v- Ahmed Abdullahi Mohamad & 3 others, Nairobi Election Petition Appeal No. 2 of 2018**, this Court observed that a memorandum of appeal must be compliant with ***Section 85***A and must raise only questions of law which must be distinct, concise and precisely set forth. Anything short of this is deserving of dismissal. Neither verbal sophistry nor artful misinterpretation of supposed facts can compel the Court to re-examine findings of fact which were made by the trial court – absent any showing that there are significant issues involving questions of law. The Court reiterated that at the appellate level, there is no such thing as "questions of mixed law and fact" and grounds of appeal that are a composite of both are clearly inappropriate and probably incompetent. In **IEBC & another -v- Stephen Mutinda Mule & 3 others, 2014 eKLR,** this Court deprecated the filing of memorandum of appeal with grounds purporting to complain that the High Court erred "in law and fact" and warned that such grounds of appeal invited jurisdictional objection. (See also the Philippine case of **New Rural Bank of Gumba -v- Fermina S. Abad and Rafael Susan G.R., No.16818 (2008).**

40. In the instant appeal, the memorandum of appeal cites various grounds to wit; that the "learned judge erred in law and in fact" in making various findings. In light of the provisions of ***Section 85A*** of the Elections Act and the judicial decisions cited above, we abhor such practice and urge counsel to concisely and precisely indicate the errors of law or matters of law in which the trial court erred.

41. In this appeal, it has been urged that the trial court erred in its evaluation of the evidence on record, disregarded crucial evidence tendered by the appellant, the judge only identified facts that would lead him to make findings in favour of the respondents and that on the whole the decision of the judge was irrational and unreasonable. Some of these contestations are matters of fact. In addition, the contestation alleged bias on the part of the trial court.

42. In **Idris Abdi Abdullahi -v- Ahmed Bashane & 2 Others, Nairobi Election Petition Appeal No. 19 of 2018**, this Court expressed the view that it can re-evaluate the evidence on record to determine if the decision and conclusions arrived at by the trial court was so unreasonable or perverse that a reasonable tribunal cannot arrive at the same conclusion. It is an issue of law whether, in light of the evidence on record, the decision of the trial court is unreasonable or perverse. This Court citing dictum from **t**he Supreme Court of India in **Damodar Lal v. Sohan Devi & Others, CA No. 231 of 2015** explained that a wrong reading of evidence alone does not render a decision perverse and that if there is some evidence on record which is acceptable and which could be relied upon, the conclusions of the trial court cannot be treated as perverse and its findings cannot be interfered with. This Court explained:

"Even if the finding of fact is wrong, that by itself will not constitute a question of law. The wrong finding should stem out on a complete misreading of evidence or it should be based only on conjectures and surmises. Safest approach on perversity is the classic approach on the reasonable man's inference on the facts. To him, if the conclusion on the facts in evidence made by the court below is possible, there is no perversity. If not, the finding is perverse. Inadequacy of evidence or a different reading of evidence is not perversity." (Emphasis supplied)

43. Bearing in mind the foregoing, a contestation urged in this appeal is that the trial court erred in holding that the appellant did not lead evidence to demonstrate that KIEMS Kits were not used in the election. In considering this ground, we pose the question: who has the burden to prove any technology related issues? In a persuasive dictum in **Francis Mwangangi Kilonzo -v- IEBC & 2 others, Machakos Election Petition No. 2 of 2017**, Muchelule, J. of the High Court considered the burden of proof in relation to KIEMS Kits in an election petition and correctly expressed himself as follows:

> ***"[31] …. To start with, the petitioner, in the petition and supporting affidavit, did not indicate in which polling stations there was failure of the KIEMS Kits. In evidence he did not indicate the stations. …. The petitioner sought the production of KIEMS Kits and stated that the kits were critical in showing what had transpired throughout the polling day, and how people had voted. Now that the 1st and 2nd respondents did not produce the kits, it was contended, an adverse inference should be drawn. It was the petitioner who claimed that KIEMS Kits had failed in various polling stations. He was required to name the polling stations, and call evidence to establish the claim. Now that the 2nd respondent stated the failure was in 6, he was required, if he disputed, to show that they were more. The KIEMS Kits were not supposed to be produced for a fishing exercise.*** (Emphasis supplied)

44. We have examined the evidence on record. In our considered view, the evidential burden to demonstrate that the KIEMS Kits was not used in the Starehe Consistency elections lay with the appellant. The record shows that indeed the KIEMS Kits was used, otherwise how did the appellant's expert, **Dr. Nyangasi Oduwo (PW1),** access the SD cards? This is proof that the KIEMS Kits were used during the Starehe Constituency elections. From the facts and evidence on record, this ground of appeal has no merit.

45. A related contestation is that the trial court erred in preventing the appellant from adducing evidence extracted from the read only access to the SD cards. This ground also raises the issue of legal and evidential burden of proof. The trial court in its analysis of the evidence expressed itself as follows:

> **"184. As regards the use of KIEMS Kits, the petitioner submitted that some voters cast their votes without using the said KIEMS Kits.**
>
> **185. The Returning Officer had testified that all voters in Starehe Constituency used the KIEMS Kits.**
>
> **186. However, the Presiding Officer at Polling Station No. 4 of the NSSF Grounds (opposite KCB Kipande House) had, in the Form 35A commented thus;**
>
> **"When we started voting in the morning KIEMS machine was still in Training Mode and some two voters voted which was not captured by the machine".**
>
> **187. The evidence disproved the testimony of the Returning Officer, to the extent that 2 persons voted without having their particulars captured by the KIEMS Kits.**
>
> **188. The petitioner did not lead evidence to show that, other than those 2 people, there were voters who were not captured on the KIEMS Kits, even though they voted.**
>
> **189. Therefore, I find that the returning officer was generally correct when she testified that in Starehe Constituency, voters used the KIEMS Kits. I so find because if only 2 persons did not utilize the KIEMS Kits, that would have no more than a nominal impact, if any, on the final results of the elections for that constituency.**

46. We have considered the ground of appeal, the evidence on record and the trial court evaluation of the evidence. In **Francis Mwangangi Kilonzo -v-IEBC & 2 others, Machakos Election Petition No. 2 of 2017**, it was correctly held that scrutiny of the KIEMS Kits is not supposed to be done for a fishing exercise. By a Ruling dated 28th October 2017, the Supreme Court in **Raila Amolo Odinga& another -v-Independent Electoral and Boundaries Commission & 2 others No. 1 of [2017] eKLR** stated that any scrutiny of technology equipment must be made for a sufficient reason. Any prayer in the application that would seem to be an extension of the case for the petitioners or which would in effect be a fishing exercise to procure fresh evidence not already contained in the petition would and must be rejected. In **Apungu Arthur Kibira -v- Independent Electoral & Boundaries Commission & 2 others [2018] eKLR**, on the allegation that there was failure of the KIEMS Kits, the trial court, Janet Mulwa, J. expressed herself as follows:

> ***"This is an allegation coached in a very generalized manner, that in many polling stations, the KIEMS Kits failed causing many voters to leave without voting. The petitioner did not state any of the polling stations nor any voter who failed to vote due to the alleged failure….***
>
> ***None of the petitioner's witnesses testified, and none was identified as having failed to vote due to failure of the KIEMS Kits…"***

47. In **Hezbon Omondi -v- Independent Electoral and Boundaries Commission & 2 others [2018] eKLR,** Onguto, J. correctly expressed himself as follows:

> ***"144. Actual malfunctioning or tampering with the KIEMS Kits is a question of fact to be decided based upon an appreciation of the facts and the technology involved itself. There is thus need in the petition to contain proper pleadings with material particulars in respect of malfunctioning or intentional tampering with the KIEMS Kits. The court should not be quick to draw conclusions only on the expert opinion or conjectures as regards tampering or corruptibility of the KIEMS Kits.***
>
> ***145. In my view, a petitioner with questions on the KIEMS Kits ought to plead, with reasonable particularity, that the returned candidate or the officers of the 1st Respondent commission have done acts of rigging or manipulation with KIEMS Kits(s) and that the results have been materially affected as far as the returned candidate is concerned. The petitioner also ought to plead that due to fault or interference with the KIEMS Kits(s), the result of the election has been materially affected as far as the returned candidate is concerned.*** *(Emphasis supplied)*

146. In the instant Petition, both the pleadings and the evidence are scarce in so far as manipulation, interference and problems with the KIEMS Kits(s) are concerned."

48. Guided by the foregoing persuasive decisions, we are satisfied that the trial court considered and evaluated the appellant's evidence in relation to the KIEMS Kits and correctly held that the appellant did not lead sufficient evidence to demonstrate that the KIEMS Kits were not used in the election. The trial judge also correctly declined to consider a report extracted from the SD card as this would amount to expanding the scope of the petition and unprocedurally amending the petition. It was incumbent upon the appellant to tender in evidence any report by his expert witnesses on any matter relating to the KIEMS Kits or SD cards. Such a report must be grounded on specific pleadings in the petition and which is not the case in this matter. In this context, we are satisfied that the appellant did not lead evidence to discharge the legal and evidential burden of proof in relation to allegations on the KIEMS Kits.

49. The appellant also contended that the trial court erred in failing to find that some Form 35As were not signed by presiding officers. It was further contended that the trial court having found that the Polling Station Diary at Moi Primary School was signed in an illogical manner, the judge ought to have nullified the election.

50. The trial court in its consideration and evaluation of evidence on Forms 35As and the illogical manner of filing the Polling Station Diary expressed itself as follows:

"190. R1-RW2, FRANKLINE GATHUITA KONDO, was the Presiding Officer at the Polling Station No. 9, at the Moi Avenue Primary School.

191. He confirmed that when IEBC trained the presiding officers, they were told that they should sign all the Forms 35A. He also confirmed that the Presiding Officers were supposed to stamp and to date the Forms.

192. However, R1-RW2 signed the Form 35A and stamped it, but he did not date it.

193. Of course, the failure to date the Form was an omission on the part of the presiding officer.

194. However, it is noted that the Form 35A in issue, was duly signed by the NASA Agent, the Jubilee Agent and the Agent for Maendeleo Chap Chap.

195. In the circumstances, I find that the failure to date the Form 35A was a minor infraction of the Regulations governing elections. It did not have any impact on the results which had been written in the form. (Emphasis supplied)

196. On the issue of the Polling Day Diaries, R1-RW2 conceded that the Agents of the parties and the candidates did not sign the same in a logical manner, in terms of time.

197. In other words, if the Agent who signed the diary first, indicated that he signed at 6.00 a.m, it would be logical for the Agent who signed after him to sign after 6.00 a.m.

198. However, in this instance the times written by Agents who were lower on the Form, were earlier than that of Agents who were higher up on the Form.

199. The presiding officer did not explain why the Agents entered the seemingly illogical sequence of the timings when each signed the diary. The presiding officer said that his role was simply to direct the Agents to the page on which the Agents were to sign. In effect, the presiding officer was not responsible for ensuring that the Agent indicated the exact time when the Agent arrived at the polling station; that is his view.

200. However, I think that that is not entirely correct. I say so because the Polling Day Diary is supposed to be a true record of what transpires at the polling station. Therefore, if it is to be a legitimate record of the happenings at the polling station, it should reflect the actual times when things did take place. For example, the time when the polling station opens and the time when it closes, are important.

201. Therefore, when the Agents do sign the Diary, it is necessary for the presiding officer to take an interest in ensuring that the information about such an issue as to the time when the Agent arrived, is recorded accurately.

202. In this case the presiding officer said that he had left the responsibility to his deputy, to handle the Agents upon their arrival. Even when the responsibility was delegated, the presiding officer remained ultimately responsible, but in this case he did not discharge that responsibility.

203. Nonetheless, the order in which the Agents arrived at the particular polling station (No. 9 at Moi Avenue Primary School), has not been shown to have had any impact on the results." (Emphasis supplied)

51. On our part, we have considered the ground that the presiding officer failed to sign Form 35As and that the trial court erred by disregarding discrepancies in regard to the conduct of elections at Moi Primary School Polling Station 9. The jurisprudence on this ground of appeal is elaborate and settled. **Regulation 79(1) of Elections (General Regulations) of 2012** requires only a presiding officer to sign the declaration in respect of the elections. The Supreme Court in **Raila Amolo Odinga and another -vs -IEBC & Others 2017** held that failure to sign the results declaration form by the presiding or returning officer vitiates the results of the elections. The Court at paragraph 377 of its

judgment expressed itself as follows:

> **"……. why would a returning officer, or for that matter a presiding officer fail or neglect to append his signature to a document whose contents he/she has generated? Isn't the appending of signature to a form bearing the tabulated results the last solemn act of assurance to the voter by such officer, that he stands by the "numbers" on that form."**

52. In **Josiah Tarayia Kipelian Kores & another -v- Joseph Jama Ole Lenku & 4 others [2018] eKLR** the trial court stated that it is therefore clear from the Supreme Court decision that, failure to sign the requisite statutory forms by a returning or presiding officer will render them *null and void ab initio.* As regards signing of the statutory forms by candidates or agents, in **John Murumba Chikati -v- Returning Officer Tongaren Constituency & 2 others (2013) eKLR EP No. 4 of 2013**it was held statutory forms by agents or candidates is crucial, alone vitiate an election unless there are other that although signing of failure to do so cannot reasons or factors. In **Abdikam Osman Mohamed & Another -v- Independent Electoral Boundaries Commission & 2 Other [2013] eKLR** the learned judge was confronted with Form 35 which was not signed. The judge stated as follows:

> ***"Where there is failure to do so, the Election Court should resolve the issue in favour of preserving the voter's inalienable right to vote particularly when there is no proof that failure of presiding officer to sign or stamp the Form 35 was willful or affected the election results in any manner."***

53. In **Chikati -v- Returning Officers Tongaren Constituency** (supra) it was held that ***Regulation 79*** does not require that statutory forms must be signed by agents. ***Regulations 79 (6)*** and ***(7)*** are emphatic that absence of candidates or agents or failure to sign the forms by candidates or agents does not invalidate the results declared in the Form. Further, failure by candidates' agents to sign the statutory form and failure to record the reasons for the failure does not in and of itself result in invalidation of the results announced. The agents' signature without the signature of presiding officers and deputy presiding officers whether challenged or not, do not authenticate the results. The signature of the presiding officer/deputing presiding officer is mandatory and failure of presiding officer/deputy presiding officer to sign the statutory form would result to invalidation of results announced in the respective statutory form.

54. In the instant case, there is no evidence on record to show which specific statutory forms were not signed by the presiding officer. The evidence on record shows that one Form was not dated. The trial court held that failure to date this single Form was a minor error that did not affect the result of the election.

55. Guided by the various judicial decisions that we have cited, and taking into account the provisions of ***Section 83*** of the **Elections Act**, we are of the considered view that the trial court did not err in finding that the failure to date Form 35A was a minor infraction of the Regulations. We are also satisfied that failure to date the form did not affect any of the figures or entries made on the said Form 35A. Further, we are convinced that the election court did not err in holding that the illogical order in which the Agents arrived at the particular polling station (No. 9 at Moi Avenue Primary School), has not been shown to have had any impact on the results. This ground of appeal also fails.

56. Another contestation is that the trial court erred in reaching the conclusion that the discovery of ballot boxes and or counterfoils whose sources could not be explained could not be said to have impacted on the impugned elections. On this issue, the trial court expressed itself as follows:

> **"67. In this case, the petitioner said that some counter-foils of ballot papers were recovered at the Globe Cinema round-about.**
>
> **68. A gentleman named MICHAEL MUTUA is the person who provided information to the petitioner, concerning the counter-foils. Mutua told the petitioner that the counterfoils were collected by street-children.**
>
> **69. According to the petitioner, the counter-foils were recovered on 9th August 2017.**
>
> **70. Meanwhile, the petitioner's Chief Agent (PW3) said that the counter-foils were recovered on 8th August 2017. His affidavit mentioned that it was a member of the public who tipped him off about the counter-foils. But in his oral testimony, he said that he was tipped-off by MICHAEL MUTISO, who was one of the petitioner's agents.**
>
> **71. It is thus not clear about who recovered the counter-foils or the date when they were recovered.**
>
> **72. And it is clear that whoever recovered the counter-foils did not testify in court. Accordingly, the evidence on the recovery of the counter-foils is not only disjointed, but it is also hearsay."**

57. We have considered this ground of appeal. Even if it were proved that counterfoils were recovered, there is no evidence on record to demonstrate how such discovery affected the result of the election. There is no evidence on record to demonstrate that the discovery of the counterfoils affected the integrity of the declared results. The burden to prove the effect of the discovery on the declared results lay with the appellant and he did not discharge this burden. Discovery of counterfoils *per se* is not proof that the integrity of the results is affected or that the will of the people is not accurately reflected in the declared results. It is incumbent upon the petitioner to go further and prove the effect of such discovery on the integrity of the declared results and demonstrate how such discovery affected the result. This, the appellant failed to do and this ground must accordingly fail.

58. A further ground of appeal is that the trial court erred in failing to consider and analyze crucial evidence tendered by the appellant in

support of the petition. We have considered this ground of appeal against the judgment of the trial court. We are satisfied that the trial court considered and evaluated the evidence tendered by all the appellant's witnesses. For example, the evaluation and analysis of the appellant's witnesses is done in paragraphs 37 to 95 of the trial court's judgment.

59. The foregoing paragraphs of the trial court's judgment aptly demonstrate that the court considered, analyzed and evaluated the testimony of ***PW1***, *PW2* and *PW3*. A reading of the judgment by the trial court also demonstrates that the testimony of ***Michael Nyamweya Makori (PW4)*** **(PW4),** ***James Muhia Nduati (PW5)*** and ***John Mwaniki Kwenya (PW6)*** and all other witnesses called by the appellant were considered, analyzed, weighted and evaluated with all other evidence on record. Accordingly, the ground of appeal that the learned judge did not consider "crucial evidence" tendered by the appellant has no merit.

60. A constitutional ground urged by the appellant is that the trial court erred in finding that the Starehe Constituency elections were free and fair and thus failed to appreciate the principles under **Articles 81** and **86** of the **Constitution**. We have considered this ground of appeal in light of the provisions of ***Section 83***of the **Elections Act**. The appellant has neither pointed out nor demonstrated to our satisfaction any evidence on record that proves that the Starehe Constituency elections was conducted in a manner that violated the principles in ***Articles 81*** and ***86*** of the Constitution. General allegations without specificity and particularity cannot suffice.

61. In considering this ground of appeal, we are persuaded and bound by the reasoning of the Supreme Court in **Raila Amolo Odinga & Another v. IEBC & Others, SC Election Petition No. 1 of 2017** where the Court considered the kind of breaches of the Constitution or the law which would justify nullification of an election. Due to the use of the word ***"or"*** rather than ***"and"***, in ***Section 83*** of the Elections Act, the Supreme Court concluded that the section must be read disjunctively rather than conjunctively. However as regards the kind of violation of the Constitution or the law that would vitiate an election, the Supreme Court expressed itself as follows:

> **"[209] Therefore, while we agree with the two Lord Justices in the Morgan v. Simpson case that the two limbs should be applied disjunctively, we would, on our part, not take Lord Stephenson's route that even trivial breaches of the law should void an election. That is not realistic. 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. Ekirikubinza refers to as 'a spurious imitation of what elections should be'."** (Emphasis added).

62. Accordingly, in the instant appeal, contrary to the appellant's submissions, it is not each and every breach of the Constitution or of the law which would justify nullification of an election. It must be a breach, which, when the conduct of the election as a whole is considered, satisfies the court that it has affected the result. We are therefore not persuaded that the learned judge erred in finding that the Starehe Constituency elections was conducted in a free and fair manner. (See also **Idris Abdi Abdullahi -v- Ahmed Bashane & 2 Others, Nairobi Election Petition Appeal No. 19 of 2018**).

63. Another ground of appeal is that the trial court erred in holding that the appellant affirmed the finality of the results when he failed to seek a recount of the votes casts on the material polling day. The trial judge expressed himself as follows:

> ***"73. As regards the process of voting, the petitioner boldly declared that he did not have any problem with it.***
>
> ***74. And as regards the alleged duplication of Forms used by theIEBC, the petitioner withdrew the allegation.***
>
> ***75. Finally, the petitioner said that he was aware that if he or any of his agents desired the recount of votes, he or his said agents could have asked for the same. However, he made it clear that neither he nor his agents asked for the recount of votes at any polling station.***
>
> ***76. When the petitioner made a conscious decision not to seek the recount of votes, the finality of the results which were announced immediately after the conclusion of the process of counting, was affirmed. (Emphasis supplied)***

64. We have considered the ground that the trial court erred in holding that when the appellant made a conscious decision not to seek the recount of votes, the finality of the results which were announced immediately after the conclusion of the process of counting, was affirmed. This ground of appeal has merit and we find that the trial court erred. In our considered view, the trial court statement is a misstatement of law. The trial court misapplied the concept of finality of results announced at the polling station as stated in **Independent Electoral and Boundaries Commission -v- Maina Kiai & 5 Others, Civil Appeal No. 105 of 2017 (*Maina Kiai case*)**. In the Maina Kiai case, this Court expressed itself as follows:

> **"It is clear...that the polling station is the true locus for the free exercise of the voters' will. The counting of the votes as elaborately set out in the Act and the Regulations, with its open, transparent and participatory character using the ballot as the primary material, means, as it must, that the count there is clothed with a finality not to be exposed to any risk of variation or subversion."**

65. In our view, the trial court misapplied the dictum in the ***Maina Kiai case***. Finality of results announced at the polling station is in context of the number of votes garnered by a candidate. Such finality cannot oust the jurisdiction of an election court to inquire into and determine if the election was conducted in accordance with the principles laid down in the Constitution, the Elections Act and Regulations made thereunder. Finality of the results announced at the polling station does not oust the right of access to justice and the right to challenge the declared results. **Article 87 (1)** of the **Constitution** enjoins Parliament to enact legislation to establish mechanisms for timely settling of

electoral disputes. Parliament has enacted the Elections Act for this purpose. Subject to any relevant express statutory provisions and the doctrine of precedent, the statutory right to challenge the results declared in an election cannot be taken away by the doctrine of estoppel or acquiescence. There can be no estoppel or acquiescence to violation of a constitutional right. It is our finding that the trial court erred in law in holding that failure to demand a recount of votes at the polling station is an affirmation of the results. Further, **Regulation 80** of the **Elections (General) Regulations** is not mandatory in its requirement that a candidate must seek recount of votes at the polling station. Notwithstanding our finding that the trial court erred on this ground of appeal, we are satisfied that this error of law does not affect the merits of the evaluation and analysis of the evidence on record and conclusions of fact made by the trial judge.

66. In penultimate, we consider the allegation that the trial court was biased and only 'picked' items of evidence favourable to the respondents and ignored evidence in support of the petition. In **Re Pinochet [1999] UKHL 52, Metropolitan Properties Co (FGC) Ltd -v- Lannon [1968] 3 WLR 694**and**Tumaini-v- Republic [1972] EA 441,** it was stated that the test of bias is not whether the judge was indeed biased, but whether a reasonable person seized of the facts would be assured that the applicant would get justice before the judge. The East African Court of Justice in**Attorney General of Kenya -v- Prof Anyang' Nyong'o & 10 Others, EACJ Application No. 5 of 2007** stated that to prove bias one of the issues for consideration is whether the circumstances give rise to a reasonable apprehension, in the mind of the reasonable, fair minded and informed member of the public that the judge did not apply his mind to the case impartially**.**

67. In the instant case, we have read the entire evidence on record and analyzed the judgment of the trial court. We are unable to decipher any pointer towards bias on the part of the trial court. The testimony of all the witnesses called to give evidence by all the parties was considered, evaluated and weighted. The credibility of the witnesses and the probative value of their testimony was considered. In his submission, the appellant did not point us the aspects of the judgment of the trial court that invite an inference of bias. In the absence of any scintilla of evidence demonstrating bias on the part of the election court, this ground of appeal must fail.

68. On the issue of costs, the appellant contended that the global sum of costs capped at Ksh. 10 million was excessive and exorbitant and not in line with existing judicial precedents. The trial court in capping costs expressed itself as follows:

> **"247. The petition is dismissed in its entirety, and the petitioner is ordered to pay costs to all the Respondents.**
>
> **248. The costs to the 1st and 2nd Respondents are capped at Kshs. 5.0 (Five) Million; and the costs to the 3rd Respondent are also capped at Kshs. 5.0 (Five) Million."**

69. We note that the impugned election in this appeal is for membership to the National Assembly. The purpose of awarding costs is to compensate a successful party for the expenses incurred in the litigation and not to unjustly enrich him or her. ***Section 84*** of the **Elections Act** reproduces the general principle that costs follow the event unless the trial judge decides otherwise for good reasons. ***Rule 30*** of the **Election Petition (Parliamentary & County Elections) Petition Rules 2017**, empowers the trial judge to, among, other things, set the total amount of costs payable, which the learned judge capped at a total of Ksh. 10 million. We are alive to the principle that the award of costs is at the discretion of the trial court. We are also alive to the principle that costs should neither be excessive nor exorbitant.

70. In **Martha Wangari Karua -v- Independent Electoral & Boundaries Commission & 3 others [2018] eKLR**, this Court expressed itself as follows:

> **"Section 84 of the Election Act provides that it is within the discretion of the election court to award costs and that costs shall follow the cause. Again as stated, Rule 30 of the Election Petition Rules gives the court unfettered discretion which means that the discretion exercisable by the taxing master under paragraph 16 of the Advocates Remuneration Order 2009 has been circumscribed. It is up to the election court to determine whether a party would be awarded costs or not and in doing so the court must be guided by the principles of fairness, justice and access to justice. It is meant to compensate a successful litigant. It is not a punishment or a deterrent measure to scare away litigants from the doors of justice."**

71. This appeal relates to membership to the National Assembly. Whereas there are no fixed costs that are applicable to all election petitions, in **Ismail Suleman and Others -v- Returning Officer, Isiolo County and Others Meru EP No. 2 of 2011 (Unreported)** and in **Mohamed Ali Mursal -v- Saadia Mohamed & 2 others [2013] eKLR,** the costs were capped at Ksh. 2 million and Ksh. 1 million for each respondent respectively. Both cases involved the gubernatorial elections.In **Ferdinard Ndungu Waititu -v- Independent Electoral & Boundaries Commission (IEBC) & 8 others [2013] eKLR** the court capped the total costs at Kshs.5 million.

72. Guided by the above cited comparable judicial awards in gubernatorial elections and considering that this is a National Assembly contestation, we are of the considered view that in the instant case, the costs as capped at Ksh. 10 million are excessive and we hereby set aside the order. We are inclined to interfere with the capped costs and hereby award the respondents total costs capped at Ksh. 4 million as follows: the appellant is to pay the 1st and 2nd respondents costs capped at Ksh. 2.5 million. The appellant is to pay the 3rd respondent costs capped at Ksh. 1.5 million.

73. Having considered the grounds of appeal as well as submission by parties, the final orders of this Court are as follows:

> ***(a) Theappeal has no merit and is hereby dismissed with costs.***
>
> ***(b) The appellant shall pay costs to the respondents at the trial court capped at a total of Ksh. 4 million as follows:***
>
> > ***(i) the appellant to pay the 1st and 2nd respondent costs before the trial court capped at Ksh. 2.5 million (Two Million Five Hundred Thousand Shillings only);***

(ii) the appellant to pay 3rd respondent costs at the trial court capped at Ksh. 1.5 million. (One Million Five Hundred Thousand Shillings Only).

(c) The Starehe Constituency elections for member of the National Assembly held on held on 8th August 2017 was conducted in accordance with the constitutional and legal principles and the 3rd Respondent was validly elected as member of the National Assembly for Starehe Constituency.

(d) The appellant shall pay costs of the respondents in this appeal capped at Ksh.1million.

Dated and delivered at Nairobi this 17th day of August, 2018.

D.K. MUSINGA

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JUDGE OF APPEAL

A. K. MURGOR

……

JUDGE OF APPEAL

J. OTIENO-ODEK

……

JUDGE OF APPEAL

I certify that this

is a true copy of the original.

DEPUTY REGISTRAR