THE COURT OF APPEAL

AT NYERI

ELECTION PETITION APPEAL NUMBER 12 OF 2018 NYERI

(CORAM: NAMBUYE, OKWENGU, GATEMBU, JJA)

CIVIL APPEAL NO. 12 OF 2018

HON. MARTHA WANGARI KARUA .....APPELLANT

AND

THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....1ST RESPONDENT

MR. SEKI LEMPAKA.....2ND RESPONDENT

HON. ANNE WAIGURU.....3RD RESPONDENT

HON. PETER NDAMBIRI.....4TH RESPONDENT

(Being an appeal from the judgement and Decree of the high court of Kenya

at Kerugoya (Gitari, J.) dated 14th *June, 2018*

in

H.C. Election Petition No. 2 of 2017)

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JUDGEMENT OF THE COURT

Introduction

1. This is an appeal from the judgement of the High Court of Kenya (Gitari, J) sitting at Kerugoya delivered on 14th June 2018 dismissing the appellant's election petition. In that petition, the appellant sought a declaration that the election for the position of Governor, Kirinyaga County held on 8th August 2017 was not free, fair and verifiable and is therefore void and invalid; a declaration that the 3rd respondent was not duly elected as the Governor of Kirinyaga County and that the declaration by the 1st respondent to that effect is null and void; an order for fresh election of Governor of Kirinyaga County to be held; and for a declaration that the 3rd respondent is not fit to contest in that election.

2. The 3rd and 4th respondents have cross appealed. They contend that the judgment appealed from is a nullity because the election court lacked jurisdiction to hear and determine the appellant's election petition after the expiry of the 6 months period provided for under Section 75(2) of the Elections Act.

Background

3. The appellant was a candidate, sponsored by the political party, Narc-Kenya, for the position of Governor, Kirinyaga County during the general elections held on 8th August 2017. Her running mate for the position of Deputy Governor was Hon. Joseph Gachoki Gitari who was the 2nd petitioner before the election court but is not a party to this appeal. The other candidates for the position of Governor were the 3rd respondent, under the sponsorship of Jubilee Party; Bedan Muriithi Kagai, an independent candidate; Joseph Kathuri Ndathi, an independent candidate; and Kennedy Karani Macharai, sponsored by MCCP party.

4. After the tallying of the votes cast, the 2nd respondent (referred to in his replying affidavit as Samuel Seki Lepati) who was the County Returning Officer for Kirinyaga County, declared results as follows:\

> 3rd respondent, 161,343 votes; appellant, 122,067 votes; Bedan Muriithi Kagai, 9,806; Joseph Kathuri Ndathi 4,663; and Kennedy Karani Macharai 899 votes. The 3rd respondent was accordingly declared as the duly elected Governor, Kirinyaga County.

5. Dissatisfied with those results, the appellant lodged an election petition before the High Court at Kerugoya on 5th September 2017 complaining that the election was not free, fair and verifiable and urged the election court to nullify the same. The petition was based on three principal grounds. The first was that by dint of the Supreme Court of Kenya having nullified the presidential election held on the same day, the gubernatorial election stood impeached for the reasons given by the Supreme Court in its judgment in the presidential election petition.

6. The second ground for challenging the results was that the appellant's agents were locked out of the polling stations. It was averred that the appellant's agents were denied entry in many polling stations and deprived of the opportunity to witness the voting and the counting of ballots at the polling stations under the pretext that they did not have the relevant documents.

7. The third ground was that the election was marred by voter bribery, canvassing and other electoral offences and malpractices.

In that regard it was averred that in addition to bribery, there was cheating, intimidation, use of unauthorized persons to man the polling stations, tampering with ballot papers and forgery of ballot papers. Specifically, it was asserted that the Deputy Chairman of the Jubilee Party, one Muriithi Kangaru was canvassing and bribing voters at Kangaru Primary School and other areas with the facilitation of the OCPD Mwea West, one Suarey Kiptoo and two of his officers; that the head teacher at Mutithi Primary School was intercepting voters, checking their names on a printed voters list, canvassing and bribing them before they entered the polling station; and that the 4th respondent and the Returning Officer for Mwea sub-county locked themselves up in the hospitality room at Wanguru Girls tallying centre.

8. Other claims were that ballot boxes from some areas such as Ciagini Primary School were tampered with before tallying; that the Presiding Officer at Ciagini Polling station was caught red-handed at the polling station opening a sealed ballot box; that at Thiba polling station, one Mr. Juma, who was not the presiding officer, took over control of the station with the assistance of the Returning Officer ; that at Ngurubani Primary School one Hon. Alfred Nderitu took over control of the polling station and issued orders to the presiding officer; that the 3rd respondent's votes were inflated by over 48,000 votes distributed in the majority of the polling stations throughout the county; and that the presiding officers colluded and allowed voters to breach "*secrecy of the ballot by checking on each other's choice to merit being paid for voting for the competition*". The appellant swore an affidavit in support of the petition in which she amplified those complaints. In addition, several other affidavits were filed in support of the petition.

9. The 1st and 2nd respondents (hereafter referred to as "IEBC") filed a response to the petition on 14th September 2017 denying the complaints. It maintained that the elections were credible, free, fair and verifiable and that there was no cheating, intimidation, voter bribery, exclusion of agents, use of unauthorized persons, tampering of ballot boxes or forgery. It averred that it complied with the constitutional and statutory requirements regarding voting counting tallying and transmission of votes.

10. The 2nd respondent, who as indicated was the County Returning Officer, Kirinyaga County during the elections filed a replying affidavit in which he deposed that if any of the appellant's agents were barred from the polling stations, it must have been for lack of the required identification documents. He also denied the other complaints. IEBC also filed other replying affidavits sworn by its officers in response to the claims made by the appellant.

11. The 3rd and 4th respondents also filed a response to the petition as well as replying affidavits in which they denied the appellant's claims. They asserted that the elections were conducted in accordance with the constitutional and statutory demands and that they were validly declared as the duly elected Governor and Deputy Governor, respectively, of Kirinyaga County. Their response was also supported by numerous other affidavits.

12. Before the petition could be heard on merits, the 3rd and 4th respondents filed an application before the election court on 17th October 2017. In that application they sought an order to have the petition struck out on grounds that it was not compliant with "the mandatory provisions of Rule 8(1) of the Elections (Parliamentary and County Elections) Petition Rules, 2017" that prescribes the content and the form of an election petition. The application was also based on the further grounds that the petition did not meet the requirements set by the Court in ***Anarita Karimi Njeru vs. Republic (1976-1980) 1 KLR 1272*** and in ***Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 others [2013] eKLR***. That is, the petition did not set out with a reasonable degree of precision the complaint, the provisions alleged to have been infringed and the manner in which they were infringed.

13. The appellant opposed that application. After hearing the parties on the same, the learned Judge delivered a ruling dated 15th November, 2017. She found that there was an admission that the petition did not comply with Rule 8(1) of the Elections (Parliamentary and County Elections) Petition Rules, 2017; that a petition in election disputes is a special pleading that requires certain components absent which "*there is no petition*"; and that the failure by the appellant to comply with rules was fatal. The Judge concluded that:

> "**The requirement under rule 8(1) of the Rules are not mere technical requirements, they are substantive as they go to the root of the issue before an election court. A petition which has failed to state the date of declaration, the results of the election and how declared is fatally defective and beyond salvage. The consequence is that it must be struck out**."

14. The petition was accordingly struck out with costs to the respondents. The appellant was aggrieved by that decision and appealed this Court. The Court delivered judgment on 2nd March 2018 in ***Martha Wangari Karua v IEBC & 3 Others [2018] eKLR (EPA 1 of 2017 Nyeri)*** (hereafter referred to as the appellant's first appeal) and allowed the appeal with costs; set aside the ruling of the trial court given on 15th November, 2017 and further directed, "**the parties to appear before Gitari, J on 5th March 2018 for directions on hearing and**

disposal of the Petition."

15. Following that order, the petition was again placed before Gitari, J. where the appellant promptly made an application dated 8th March 2018 and filed on 9th March 2018 for orders that Gitari, J "*do recuse/disqualify herself from further hearing and/or participation in these proceedings*"; that the matter be referred to the Honourable the Chief Justice to constitute "*a fresh election court*". That application was based on the grounds that Gitari, J had in her ruling striking out the petition expressed strong and disparaging remarks in relation to the appellant. It was urged that a fair hearing could not take place before the Judge and the continuation of the hearing before her would result in a miscarriage of justice in light of the judgment of this Court in the appellant's first appeal.

16. The respondents opposed that application. In their grounds of opposition to the application, they contended, among other things, that the Election Court did not have jurisdiction to entertain the application for recusal since, according to them, the stipulated 6 months period provided for hearing and determination of election petitions under Section 75(2) of the Elections Act had already lapsed.

17. In her ruling delivered on 6th April, 2018 Gitari J dismissed that application for recusal. In the same ruling the Judge also rejected the contention that the court had no jurisdiction over the matter on account of expiry to the 6 months' time limit prescribed for hearing and determining the matter. In doing so, the Judge stated:

> ***"77. In view of the reasons given, I hold that this Court has jurisdiction to hear and dispose off the petition. Since the petition was filed on 5th September, 2017 and the ruling was delivered on 15th November, 2017, a period of two months and ten days, there were still three months and twenty days within which this Court has jurisdiction to hear and determine the matter. This time starts running from 5th March, 2018 when the parties were ordered to appear before this Court by the Court of Appeal***.
>
> ***78.*. I will therefore proceed to give directions as ordered by the Court of Appeal**."

18. Thereafter, the trial proceeded before Judge in what appears from the record to be a less than friendly or cordial atmosphere as between counsel characterized as it was by frequent objections and counter objections. The appellant testified at length in support of the petition and called 8 other witnesses. For IEBC, evidence was led by the testimony of 2nd respondent who indicated that his correct name is Samuel Seki Liampati (and not Lempaka as indicated in the pleadings) in addition to whom 9 other witnesses testified. On behalf of the 3rd and 4th respondents, 5 witnesses testified including the testimony of the 4th respondent. The 3rd respondent did not testify.

19. After the conclusion of the hearing, the learned Judge delivered the impugned judgment on 14th June 2018 dismissing the petition with costs. The Judge held that the appellant had "*failed to proof the allegations pleaded in the petition to the required threshold"*. The Judge capped the instructions fee at Kshs. 2,000,000.00 for the 1st and 2nd respondents and Kshs. 3,000,000.00 for the 3rd and 4th respondents.

20. The appellant has in this appeal, challenged that judgment on 31 grounds set out in the memorandum of appeal. She seeks an order to set aside the judgment of the election court and for judgment in terms of her prayers in the petition.

21. The 3rd and 4th respondents have, as already noted, cross appealed in terms of a notice of cross appeal filed on 17th July 2018 in which they contend that the learned Judge erred in finding that she had jurisdiction to hear the petition after 4th March 2018, that is, after the 6 months period had lapsed since the filing of the petition. The 3rd and 4th respondents accordingly seek a declaration of this Court that all proceedings conducted by the election court subsequent to the ruling of that court given on 6th April 2018 are a nullity.

22. Pending the hearing of the appeal, the appellant presented to the Court an application dated 19th July 2018, seeking leave "*to adduce additional evidence by way of an affidavit (and/or) as may be found suitable"*. That application was based on the grounds the appellant had made certain allegations against the respondents "*contained in a flash disk which had been wrongly and unlawfully removed from the pleadings prior to or during the hearing*" and that the Judge had "*wrongfully and unlawfully disallowed the* [appellant's] *attempts to refer to copies in her pleadings*" which then obligated "*her to adduce the said evidence contained in the said flash disk to corroborate her evidence"* in relation to claims of bribery and canvassing, tampering with ballot boxes and other unlawful acts that affected the conduct of the gubernatorial elections in Kirinyaga County. That application was opposed by the respondents in terms of grounds of opposition filed on 27th and 31st July 2018.

23. We heard that application on 13th August 2018 and by an order issued the same day, we dismissed it on grounds that it was premature to conclusively determine, vide that application, the matters complained of at that stage as the same issues were the subject of the complaints in the memorandum of appeal.

24. Thereafter, pursuant to directions given by the Court, counsel exchanged written submission on the appeal and on the cross appeal which they highlighted during a hearing before us on 1st October 2018.

25. During the hearing, the parties were represented by learned counsel. The appellant, an advocate, appeared with Mr. C. N. Kihara holding brief for Mr. G. Imanyara. Mr. Joe Kathungu appeared with Ms. Betty Kiai for IEBC. Mr. Paul Nyamodi appeared with Mr. Kamotho Waiganjo, Mr. Andrew Muchigi and Mr. Patrick Baraza for the 3rd and 4th respondents. Counsel relied on their written submissions which they highlighted.

<u>The appeal and submissions by counsel</u>

26. As already indicated, the appellant put forth 31 grounds of appeal in the memorandum of appeal. Those grounds were however condensed during the hearing into two broad complaints: The first being that the election court conducted the proceedings in violation of the appellant's right to fair trial under Articles 50 and 159 of the Constitution. The second ground is that the election court should have found that the elections were not conducted in accordance with constitutional and statutory dictates on elections; that the appellant established to the required standard that the election was marred by bribery and canvassing and widespread unlawful barring of the appellant's agents and

the Judge misdirected herself in her evaluation of the evidence in arriving at a contrary finding.

27. With regard to the contention that the election court conducted the proceedings in violation of the appellant's right to fair trial, the appellant's complaints are multi-pronged. Firstly, it was submitted that in refusing to recuse herself, the Judge failed to apply the proper legal test as enunciated in ***Attorney General vs. Anyang Nyongo & others [2007]1 EA12***; that the circumstances were such as to give rise to a reasonable apprehension that the Judge would not apply her mind to the case impartially in light of the views she had already expressed with regard to the appellant's case. It was further submitted that Judge misdirected herself in conducting the proceedings as a response to this Court's decision in her first appeal and in taking the view that this Court had given her "*a clean bill of health*" and thereby reached the wrong conclusion on the appellant's application for recusal.

28. Secondly, it was submitted that the Judge wrongly limited the appellant from making reference to and relying upon Forms 37A, B and C and to the Deputy Registrar's report on scrutiny to demonstrate discrepancies, alterations and forgeries in those forms; that the Judge failed to appreciate the nature and purpose of scrutiny; that the Judge allowed scrutiny as well as the appellant's request to be supplied with Forms 37A, B and C in terms of a court order given on 23rd October 2017 but disallowed reference to the results of scrutiny.

29. Third, that the Judge failed to make an adverse finding against IEBC on account of its failure to produce records and data in its possession including original Forms 37A, B and C and the KIEMS Kits as ordered and for wilfully destroying or concealing evidence by reconfiguring the KIEMS Kits without the court's permission and for its failure to supply 50 SD cards (secure digital memory cards); that the court was duty bound to deem the Deputy Registrar's report as proof of the matters contained in it; that scrutiny of the KIEMS Kits was of utmost importance in the verification of the authenticity of the results; and that the results announced by IEBC declaring the 3rd respondent as the duly elected Governor remain unauthenticated. In that regard, the decision of this Court in ***Ferdinand Ndungu Waititu vs IEBC & 8 others [2014] eKLR*** was cited for the proposition that without the requested recount and scrutiny, the court could not verify the extent to which the irregularities and errors impacted on the results and it could not be verified whether the requirements under Articles 81 and 86 of the Constitution were met.

30. Fourth, it was submitted that the Judge erred in excluding electronic and photographic evidence tendered by the appellant and her witnesses; that the photographs in question were annexed to the appellant's verifying affidavit and were also part of the record in the appellant's first appeal and were not objected to; that the Judge also wrongly excluded video evidence recorded on the mobile hand set of the appellant's witness Kepha Sagana(PW7); that Section 106B of the Evidence Act on which the court relied to exclude the evidence is not applicable as the witness, Kepha Sagana who personally recorded the video on his mobile phone sought to show it to the court in its raw form; that the Judge failed to appreciate that the applicable provision is Section 78A of the Evidence Act; that it was not open to the Judge to reject that evidence that would have corroborated that of the appellant and then conclude as she did that the appellant had not proved bribery, canvassing and tampering of ballot boxes; that the Judge failed to conduct any or any adequate inquiry into the complaint regarding interference with the evidence; that the appellant gave evidence on oath that a flash disk and a backup CD had been filed together with her petition despite which the court made a premature, arbitrary and oppressive finding.

31. Fifth, it was submitted that the Judge should have proceeded on the basis that the petition was not defended by the 3rd and 4th respondents on account of the 3rd respondent's failure to testify; that the failure by the 3rd respondent to testify rendered her affidavit and the joint response to the petition by the 3rd and 4th respondents devoid of any probative value; that in the circumstances the claims by the appellant that the supporters of the 3rd and 4th respondents were bribing voters on the polling queues and that the 3rd and 4th respondents aided and abetted electoral malpractices remained uncontroverted by the 3rd respondent; that the election court should in those circumstances have made an adverse inference against the 3rd and 4th respondents. In that regard, reference was made to the decision of the English court of appeal in ***Comet Products U. K. Ltd vs. Hawkex Plastics Ltd [1971] All E R***

32. As regards the contention that the election was marred by bribery and canvassing and widespread unlawful barring of the appellant's agents and therefore not in compliance with Article 86 of the Constitution, it was submitted that contrary to the finding by the Judge, the appellant did establish to the required standard, that there was bribery and canvassing; that there was an admission by the respondents witness, Muriithi Kangara that he talked to a person on the queue in breach of Regulation 65 of the Elections (General) Regulation, 2012 and that he was a perpetual money giver; that in addition there was cogent evidence from Elias Mwangi Wachira (PW3) and Maurice Njeru Kanyoko(PW4) who witnessed Muriithi Kangara give voters money on the queues while asking them to vote for the 3rd respondent; and that there was no valid reason why the election court chose not to believe the appellant's witnesses.

33. It was submitted further that the Judge misdirected herself in evaluating the evidence tendered by the appellant and her witnesses regarding the widespread unlawful barring of the appellants agents and thereby arrived at the wrong conclusion that the complaint had not been proved; that the appellant gave direct evidence of the step she took upon receiving reports that her agents had been barred from polling stations including the visits she personally undertook to five of those polling station which the Judge wrongly termed as hearsay; that the conclusion reached by the Judge that the appellant's witness, Loise Karua, who was her super-agent, was contradictory had no basis given that it was IEBC's presiding officer who gave different explanations to the appellant and to the said Loise Karua as to why the appellant's agents were barred.

34. It was also submitted that the polling station diaries on which reliance was placed by the respondents to demonstrate the presence of agents at polling stations were unreliable "*at least on the time agents checked in*"; that the Judge ought to have found that those diaries were haphazardly maintained and should not be relied upon considering also that IEBC was selective in the extracts of the diaries it made available.

35. It was urged that had the election court given due consideration to the entire evidence, it would have arrived at the conclusion that the appellant's agents had the requisite identification documents in the form of letters of appointment and oaths of secrecy despite which there was widespread barring of the appellant's agents manifesting a conspiracy to give the 3rd respondent undue advantage in the election; that there was evidence, which the Judge failed to consider, of misleading of assisted voters; that the presiding officers at Kimunye Tea Buying center and Karani Tea Buying center with respect to which the appellant and her witness led evidence of misleading of assisted voters should have been called to produce registers required to be maintained under Regulation 72 of the Elections (General) Regulations, 2012.

36. Counsel for the appellant concluded by urging that the Judge erred in capping instructions fees as opposed to capping the costs of the petition in accordance with Rule 30 of the Elections (Parliamentary and County Elections) Petition Rules, 2017 thereby leaving room for inflation or escalation of the respondents' costs.

37. In support of the proposition that IEBC was enjoined to ensure that the elections were conducted in a transparent and accountable manner and that the burden of proof shifted to IEBC to prove that there were alterations, cancellations and forgeries on statutory forms, reliance was place on decisions of this Court in ***Wavinya Ndeti & another vs IEBC & 2 others [2018] eKLR***; **Annie Wanjiku Kibeh vs Clement Kungu Waibara and another EPA No. 20 of 2018**; and the decision of the Supreme Court of Kenya in ***Raila Amolo Odinga & another vs IEBC and others Presidential* Petition No. 1 of 2017**.

38. Opposing the appeal, counsel for IEBC submitted that the election court did not violate the appellant's right to fair trial; that the question of bias had already been considered by this Court in the appellant's first appeal and had been rejected and the Judge gave a reasoned ruling for rejecting the application; that the claims by the appellant that she was denied the opportunity to refer and comment on Forms 37A, B and C is not borne out by the record; that with regard to the appellant's application filed before the Election Court on 15th September 2017 in which she sought numerous orders for access to IEBC's systems, the court, in its ruling delivered on 23rd October 2017 allowed access to KIEMS electronic devises on the basis of "*read only of the data preserved in the KIEMS or memory cards*" in addition to ordering IEBC to supply the appellant "*with certified photocopies of Forms 37A and 37B*" as well as "*access to the original Forms37A and 37B*"; that in so ordering the court was aware that the KIEMS kits had been reconfigured in preparation for the repeat presidential elections that had been ordered by the Supreme Court by the time the ruling was rendered; that the information in the KIEMS kit was preserved in the SD cards and the same were provided to the appellant to read as were the certified copies of the Forms 37A and 37B although there was no order that the same were to form part of the court record.

39. It was submitted that the appellant did not in her petition assert, and neither did she establish in her evidence, that the data captured in the Forms 37A in any of the 659 polling stations was incorrect; that her request for access to KIEMS kits and the Forms was therefore no more than a fishing expedition; that the Judge was right in concluding in her judgment that the failure to provide the KIEMS Kits did not, in the circumstances, amount to concealment of evidence in that an explanation was given why the KIEMS kits had to be reconfigured; and that the supply of SD cards that contained the data was sufficient to verify the results.

40. It was submitted that IEBC conducted the elections in accordance with the constitutional requirements under Article 86 of the Constitution; that the claim by the appellant that the 3rd respondents' votes were inflated by over 48,000 votes had no basis and no evidence was tendered to that effect; and that the burden to establish the claims made in the petition remained throughout with the appellant but she did not discharge that burden. It was submitted that the appellant was attempting to expand the scope of her petition by introducing documents through the back door in the course of the trial.

41. As regards the complaints regarding exclusion of electronic and photographic evidence, it was submitted that the photographs the appellant filed in the court file were different from those that were served on the respondents as was conceded by counsel for the appellant; that no flash disc or CD was in fact filed with the petition and the judge was right, upon conducting an inquiry that included summoning the court officer who received the petition, in concluding as she did that no flash disc was ever filed considering that no reference was made to a flash disc either in the petition or in the supporting affidavits; that to have allowed the appellant's witness, Kepha Sagana to produce the raw video from his mobile phone would have been an ambush and the authenticity of the recording could not be verified; that the appellant had indicated to the court that she would call two witnesses to testify on the issue of the flash disc but failed to do so.

42. Regarding claims of bribery and denial of access of the appellants agents, it was urged that no proof was offered to the court; that the Judge was correct in stating that no agent was called to confirm that they had been denied access to the polling stations unlawfully; that the polling station diaries produced by IEBC demonstrated that at one time or another the appellant's agents were indeed allowed into the polling stations that the appellant was complaining of.

43. On costs, counsel for IEBC submitted that the Judge was right to cap instructions fees; that in any event the capping of the instruction's fees at the amount of Kshs.2,000,000/= was too low having regard to the length of time the trial took.

44. In support of the submissions by IEBC, counsel relied on: the case of ***Jackton Nyanungo Ranguma vs IEBC & 2 others, EPA 1 of 2018 Kisumu*** for the proposition that a court should only overturn an election only on ascertained facts and not conjecture and must demonstrate how the final statistical outcome has been compromised and that a petitioner must adduce evidence of the nature that would entitle him to judgment if the respondent did not adduce any evidence in rebuttal; the case of ***Raila Odinga & 5 others vs. IEBC & 3 others[2013]eKLR*** for the proposition that the legal burden of proof remains with the petitioner at all times; the case of ***Walter Enock Nyambati Osebe vs IEBC & 2 others[2018]eKLR*** for the proposition that it is incumbent upon the appellant, who is seeking to nullify the election on the specific grounds set out in the petition, to prove those allegations to the required standard by tendering cogent evidence to the satisfaction of the court; and the case of ***Raila 2017*** for the proposition that before vitiating an election, the court should be satisfied that the conduct of the whole election substantially breached the principles in the Constitution, the Elections Act and other electoral law.

45. For the 3rd and 4th respondents it was submitted that the jurisdiction of this Court is limited under Section 85A of the Elections Act to matters of law. In that regard, reference was made to the Supreme Court decision in ***Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others [2014] eKLR***, amongst other decisions to the same effect; that quite apart from the fact that the proceedings from which the appeal emanates are a nullity as contended in the cross appeal, to the extent that the appeal herein is premised on matters of fact and mixed questions of law and facts, the same is incompetent. In that regard, it was urged that the appellant's complaints relating to: the manner in which the election court evaluated the evidence; the finding of fact by the Judge with regard to the flash disk; whether IEBC complied with the order on access to KIEMS kits and the alleged condonation of destruction of evidence are complaints on matters of fact and therefore outside the jurisdiction of this Court. It was also submitted that most of the appellant's complaints have no foundation in the pleadings and are an attempt to expand the scope of the petition.

46. With regard to the complaint that the appellant right to a fair hearing was violated by the election court, the 3rd and 4th respondents submitted that this was not the case. As to the complaint that the appellant's electronic evidence was wrongfully excluded, it was submitted

that the appellant did, in her affidavit in support of the petition, annex photographic evidence, which photographs, she indicated in the same affidavit, was not taken by her but by other persons, namely Kennedy Muriithi and Edward Njoka; that in the course of the appellant's testimony in chief, it was indicated to the court that those persons would be called to testify and the photographs were accordingly marked for identification; that the appellant subsequently closed her case without calling those witnesses with the result that the photographs were eventually not produced as exhibits; that on the strength of the case of ***Kenneth Mungai vs Austin Kiguta & 2 other, CA 140 of 2008***, the photographs were therefore not admissible.

47. Furthermore, it was submitted that the mandatory conditions for admission of electronic evidence under Section 106B of the Evidence Act were not fulfilled in that there was no certificate to vouch for the authenticity and integrity of the evidence. In support, the case of ***County Assembly of Kisumu & 2 others vs Kisumu County Assembly Service Board & 6 others [2015] eKLR*** was cited. The election court was therefore correct, it was urged, when in its ruling of 21st May 2018, it held that the photographs were inadmissible and did not form part of the record.

48. As to the complaint by appellant that her right to fair hearing was compromised by the election court (in its ruling given on 2nd May 2018) sustaining the respondents objection to reference to Forms 37A and 37B that did not form part of the record, it was submitted that the appellant did not specifically challenge the results obtained by the candidates in any of the polling stations and did not therefore attach any Forms 37A to the affidavit in support of the petition; that the copies of the Forms 37A and 37B which the appellant sought to be made part of the record were supplied to her pursuant to an order of the court given on 23rd October 2017 but were not part of the record.

49. It was urged that the appellant could not therefore have been allowed to rely on the forms that were not pleaded and which did not form part of the record of the election court; that to have been allowed to do so would have been tantamount to introducing new and fresh evidence that was not pleaded; that the scope of the petition would thereby be expanded to the detriment of the respondents who would not have had an opportunity to respond to the new evidence introduced by those forms; that had the appellant challenged the results and filed the forms with the petition, the respondents would have had a chance to respond to the issues the appellant was seeking to raise with the forms. According to counsel, the order given by the court granting the appellant access to the forms was not a fishing expedition to gather new evidence on matters that had not been pleaded with a view to introducing the same through the back door. In that regard, reliance was placed on the case of ***Philip Kyalo Kituti Kaloki vs IEBC & 2 others [2018] eKLR***.

50. It was submitted that there is no merit in the appellant's complaint that her right to fair trial was violated on account of the finding by the Judge that no flash disk was filed. According to counsel, the appellant admitted in the course of her testimony that there was no reference to DVD or flash disk when assessment of court filing fees was done on presentation of the petition; that the affidavits of the appellant's witnesses Kepha Sagana and Tabitha Wanjiru Mutero did not have a CD when they were filed; that the appellant's affidavit in support of the petition does not make any reference to a flash disk or CD; that the receipt issued for court fees paid does not refer to flash disk or CD; and that there was no receipt for annexures to the affidavit of Kepha Sagana and Tabitha Wanjiru Mutero. It was also submitted that the court summoned the member of staff from the court registry, one Jackson Kabiru, who received the petition and who testified that no flash disk was attached to the documents that were filed in court by the appellant. In those circumstances, it was submitted, the finding by the Judge that no flash disk was ever filed in court is well supported by the evidence.

51. Concluding on the question of fair trial, counsel for the 3rd and 4th respondents submitted that even if there was violation of the appellant's right to fair trial, which the 3rd and 4th respondents denied, it would not be a basis for nullifying the election; that at best, it could only result in an order for a re-trial, which in the instant case would not be viable as the jurisdiction of the election court has since lapsed in view of Section 75 of the Elections Act. The decision of the Supreme Court of Kenya in ***Lemanken Aramat vs Harun Meitamei Lempaka & 2 others [2014] eKLR*** was cited.

52. As regards the appellant's complaint that the Judge erred in failing to find that the orders she made on 23rd November (should be October) 2017 following the appellant's application dated 14th September 2017 were orders of scrutiny of the KIEMS system and Forms 34A, B and C; and further that the Judge should have made an adverse finding against IEBC on account of its alleged failure to produce records and data in its possession including original Forms 37A, B and C and the KIEMS Kits as ordered; and for willfully destroying and or concealing evidence by reconfiguring the KIEMS Kits without the court's permission, it was submitted: that the orders of the court given on 23rd October 2017 were not orders of scrutiny as envisaged under Section 82 of the Elections Act; that what the court granted were orders of access by the appellant to KIEMS system and Forms 34A, B; that an order of scrutiny as envisaged under Section 82 of the Elections Act entails examination of various election materials by the Deputy Registrar on behalf of the court with a view to verifying irregularities that are pleaded in the petition; that scrutiny can only be conducted in specific polling stations where results are disputed; that the appellant was alive to the fact that the order given was not in nature of the order for scrutiny as she subsequently intimated in the course of her testimony that she would be applying for scrutiny but no such application was ever presented; that the report of the Deputy Registrar emanating from the scrutiny exercise could not therefore be a basis for proving irregularities in the results of the election of Governor; further, that report contained the appellants own comments on Forms 37A and 37 B and the data from KIEMS kit that would have resulted in introduction of new facts and evidence beyond the scope of the petition.

53. As to whether there was compliance with the order of on 23rd October 2017 granting the appellant access to KIEMS system and Forms 34A, B, counsel submitted that access to data was indeed granted; that the KIEMS kits had already been reconfigured and redistributed for the repeat presidential election as noted in the Deputy Registrar's report; that all the information that the appellant required to verify the results was supplied by IEBC in the form of the SD cards and voter turnout logs.

54. As to the complaint that the 3rd respondent did not testify, it was submitted, on the strength of ***Raila Odinga & 5 others vs. IEBC & 3 others [2013]eKLR***, that the legal and evidential burden of proof for demonstrating that the election was not conducted in accordance with Article 86 of the Constitution lay with the appellant; that as that burden did not shift, there was no obligation for the 3rd respondent to testify; that no specific and adverse allegations were made directly against the 3rd respondent that would have obliged her to testify; that considering she did not testify, her affidavit was of no probative value and the court could therefore not consider it.

55. Regarding the appellant's grievances relating to the conduct of the election, it was submitted that considering that the standard of proof regarding allegations of bribery and canvassing is beyond reasonable doubt, no credible and cogent evidence was tendered to support those

allegations; that the evidence adduced in support of the allegations was hearsay and the Judge correctly found the appellant's witnesses not to be credible. The cases of ***Moses Masika Wetangula vs. Musikari Nazi Kombo & 2 others [2015] eKLR*** and ***Frederick Otieno Outa vs Jared Odoyo Okello & 4 others [2014] eKLR*** were cited.

56. As regards the complaint by the appellant that the Judge erred in failing to finding that her agents were barred from the polling stations, it was submitted that it was incumbent on the appellant's agents to produced letters of appointment, letters of accreditation and duly signed oath of secrecy to prove they were authorized agents in order to have access to the polling stations; that the appellant failed to discharge the burden of proving that her agents were so authorized agents; that the agents who were allegedly barred did not swear affidavits and neither did they testify; that all the witnesses who testified on the matter based their testimony on hearsay; that the polling station diaries produced before the court by IEBC confirmed that the appellant's agents were indeed allowed into the polling stations.

57. Counsel concluded by urging that none of the grounds of appeal have merit; that the appellant did not establish before the election court that the elections were not conducted in accordance with the principles laid down in Articles 81 and 86 of the Constitution and that the appeal should be dismissed with costs.

Analysis and determination on the appeal

58. We have considered the appeal and the submissions. The main issues for determination in the appeal are first, whether the appeal is properly before the Court in light of Sections 85A of the Elections Act that limits the jurisdiction of the Court to matters of law. Secondly, whether the appellant's right to fair trial was violated by the election court. Third, whether the appellant established, to the required standard, that the election for the position of governor, Kirinyaga County, was not conducted in accordance with the Constitution, the Elections Act and the Regulations. Within that, we consider whether the learned Judge erred in holding that the appellant failed to discharge her burden of proof to establish that the election was not conducted in accordance with the constitutional principles for the conduct of elections and in accordance with electoral laws and regulations. The fourth issue is whether the election court erred in its award of costs.

59. We start with the question whether the appeal is properly before the Court in light of Section 85A of the Elections Act. As already indicated, the 3rd and 4th respondents contend the jurisdiction of the Court has not been invoked because the appeal is "*premised on matters of fact and/or questions of mixed law and facts*." The appellant on the other hand submits that the appeal is properly before the Court. The relevant part of Section 85A provides that:

> **"An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of county governor shall lie to the Court of Appeal on matters of law only."**

60. In ***Timamy Issa Abdalla vs Swaleh Salim Swaleh Imu & 3 others [2014] eKLR*** this Court re-affirmed a holding in **The Attorney General vs. David Marakau [1960] EA 484** (a decision of the then Supreme Court of Kenya) that "*a decision is erroneous in law if it is one to which no court could reasonably come*" which is the same thing as a decision of fact in which there was no evidence to support. Recently, in ***John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others [2018] eKLR***, this Court, following in the footsteps of the Supreme Court of Kenya in ***Gatirau Peter Munya vs Dickson Mwenda Kithinji & 3 others [2014] eKLR*** stated that "matters of law" mean:

> "**... the interpretation or construction of the Constitution, statute or regulations made thereunder or their application to the sets of facts established by the trial Court. As far as facts are concerned, our engagement with them is limited to background and context and to satisfy ourselves, when the issue is raised, whether the conclusions of the trial judge are based on the evidence on record or whether they are so perverse that no reasonable tribunal would have arrived at them. We cannot be drawn into considerations of the credibility of witnesses or which witnesses are more believable than others; by law that is the province of the trial court."** [Emphasis added]

61. One of three elements identified by the Supreme Court in ***Gatirau Peter Munya vs Dickson Mwenda Kithinji & 3 others*** (above) as characterizing "matters of law" was the "***evidentiary element: involving the evaluation of the conclusions of a trial court on the basis of the evidence on record***." On an appeal such as this, the Court is therefore entitled to consider whether the conclusions reached by the election court accord with the evidence.

62. In addition to the appellant's complaint that the election court violated her right to a fair hearing under Article 50 of the Constitution, the effect of the bulk of the other grievances set out in the memorandum of appeal is to challenge the conclusions reached by the election court on the grounds that the evidence on record should have led to a different conclusion. To that extent we are satisfied that the appeal raises "*matters of law*" within the meaning of Section 85A of the Elections Act and therefore reject the contention by the 3rd and 4th respondents that the appeal is not properly before the Court under Section 85A of the Elections Act.

63. Next is the issue whether the appellant's right to fair trial under Article 50 of the Constitution was violated by the election court. In that regard, the first grievance is that had the trial Judge applied the proper test as enunciated in ***Attorney General vs Anyang Nyongo & others*** (above), she would have allowed the appellant's application for recusal. As indicated, the appellant sought disqualification of the trial Judge through an application filed on 9th March 2018. The application was based on the grounds that continuation of a hearing before the Judge would result in miscarriage of justice; that justice would not be seen to have been done "*in light of the strong and disparaging comments*" the trial Judge made in relation to the appellant; and that in light of the judgment of this Court in the appellant's first appeal, a fair hearing could not take place before the same judge. The appellant took a dim view of the use by the Judge of such expressions "*hopelessly defective*" "*dead pleading*", "*beyond salvage*" in reference to the petition. To buttress the argument, the appellant pointed out that this Court had in its judgment in the appellant's first appeal termed the trial judge's reasoning as absurd.

64. IEBC filed grounds of opposition to the application asserting that the claims of bias had considered by the Court in the appellant's first appeal and rejected; that no grounds for recusal were made out and the application was an abuse of the process; and that the court did not

have jurisdiction to entertain the matter.

65. The 3rd and 4th respondents also contested the application and filed grounds of opposition in which they contended that the court did not have jurisdiction to entertain the motion; that no grounds of recusal were disclosed; and that the same issues had been raised, considered and determined in the appellant's first appeal and were therefore *res judicata*.

66. In a ruling delivered on 6th April 2018, (in which the court also considered the question of jurisdiction the subject of the cross appeal) the Judge, after reviewing past decisions on the question of recusal and the legal principles applicable, concluded that the appellant had not demonstrated "*a reasonable apprehension of bias and that right minded person* (sic) *applying themselves to the question would conclude that the Judge was biased "*; that the test is an objective; it is that of a fair minded and independent observer and not the subjective perception of the applicant. Further, the Judge stated that the matter had indeed been raised before this Court and determined in the appellant's first appeal and could not be raised again.

67. The grant or refusal of an application for recusal involves the exercise of discretion. The circumstances in which this Court can interfere with exercise of judicial discretion are limited. As an appellate court, we can only interfere with the exercise of discretion if satisfied that the judge misdirected herself in law or that she misapprehended the facts or that she considered extraneous considerations or that she failed to consider relevant considerations or that her decision is plainly wrong. In ***Mbogo & Another vs. Shah [1968] E.A. 93*** at page 96, Sir Charles Newbold P. stated:

> **''…a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice….'**

68. Needless mention, Judges and Judicial officers should always be sensitive and guarded in their choice of words lest they alienate those who come before the courts; they must be temperate in language and must at all times treat those who appear before the courts with respect and courtesy. To the appellant, the choice of words or adjectives used by the Judge when expressing the view that the petition was wanting are offensive and caused her to apprehend that justice would not thereafter be seen to be done. In our view, the words the Judge used are in the same group of words as "scandalous", "frivolous" or "vexations" that appear in rules of procedure on pleadings and are commonly used in reference to defective pleadings. We do not discern that the Judge employed those words in reference to the appellant but rather to the pleadings that she was evaluating against the procedural requirements as to form and content.

69. We are not persuaded that the Judge used a wrong legal principle or standard in rejecting the application for recusal. We do not have a basis on which we can interfere with the exercise of discretion by the Judge in refusing to allow the application for recusal. Furthermore, it seems to us that the issue was conclusively addressed by this Court in its judgment in the appellant's first appeal as follows:

> "**Another ground that was raised by the appellant is that the trial judge used intemperate language, imported extraneous matters in the ruling and was biased. As a court of record, and having scrutinized the record of the proceedings before us and the rulings rendered by the trial judge, we do not see anything to show that the trial judge used inappropriate language or imported extraneous issues in a manner that suggested any bias. She may have used unnecessary strong language to express her appreciation of the law and issues before, (sic) but that per se cannot be construed to imply that she was biased. So we similarly reject ground**."

70. There is therefore no merit in the appellant's complaint that the Judge erred in rejecting her application for recusal.

71. The next matter in the context of the appellant's grievance pertaining to fair trial is that the Judge wrongly limited reference by the appellant to Forms 37A and 37B and to the Deputy Registrar's report. As already stated, one of the grounds on which the appellant sought nullification of the election was that her agents were disallowed and kept out of polling stations. Under that head, the appellant averred in the petition that the results transmitted by the presiding officers to the County tallying center and subsequently to the national tallying center were based on forged forms that did not bear signatures of her agents. In the supporting affidavits and in her testimony, the appellant addressed the matter of exclusion of her agents from polling stations at length.

72. The objection to reference to documents that were not part of the record was raised in the course of the appellant's testimony. The record of proceedings on 2nd May 2018 shows that the Deputy Registrar, High Court Kirinyaga testified and produced his report of an exercise that had taken place at the offices of the IEBC in accordance with an earlier order of the election court. The appellant wished to put questions (cross-examine) to the Deputy Registrar to get clarification to which the respondents objected. In upholding that objection, the Judge stated:

> **"The Deputy Registrar has appeared in c*ourt and produced a report which he has confirmed on oath that is his report. The registrar is an officer of the court. As it was submitted he was called to this court to produce the report, he has done that and he has no other role. The provisions and authorities I cited in the ruling of 20th April are clear that the Deputy Registrar produces the report and submissions follow. I note the Deputy Registrar has given a report. The court will take that as the deputy registrar's report and any issues on the report will be canvassed through submissions. I direct that the report will be accepted as it is. The deputy registrar will not be subjected to cross- examination or clarifications*."

73. Immediately thereafter the appellant resumed her testimony and indicated that she "*expected the deputy registrar*" to produce a box file which contained "*the forms*" that were supplied following the court orders and that the "*failure to produce the box file denies the court an opportunity to cross check*" and that "*the report is incomplete*." The appellant then proceeded to testify that after the forms were supplied, she "*sat with a team and personally went through each of them*" and was in the process of testifying when objection was raised that "*the witness is giving evidence of her exercise*" and that she was introducing "*new evidence*"; that the forms did not "*form part of the record*" as

they were not annexed; that although the court ordered that the appellant be supplied with the forms, those forms did not form part of the record and were not included in the Registrar's report and it would therefore be prejudicial for the appellant to make comparisons based on forms that did not form part of the record. The appellant on the other hand maintained that the order granting access was not made in vain and having been supplied with the forms in the box file, there should be liberty to refer to them.

74. After hearing the rival arguments in that regard, the Judge gave a ruling on the same date in which she stated:

> "**I have considered the objection by Mr. Nyamodi on the ground that the honourable petitioner is giving new evidence. That they would need to respond and will not have an opportunity to do so. It was also submitted that the forms do not form part of the record and they are not the primary evidence…**
>
> **…I have considered the objection. The petitioner wishes to rely on or to refer to documents which have already been filed and form part of this record, this would not be prejudicial and the court would not bar her from doing that. That is what the Court of Appeal was saying in this matter that the court cannot ignore evidence which is before the court…**
>
> **…The petitioner would therefore be at l*iberty to refer to the documents filed by the respondents…***
>
> **…I however find that the petitioner cannot rely on documents which are not pleaded in her evidence and do not form part of the record of this court. This would be prejudicial. The right to fair trial applies to all parties. Though the court stated that exercise was not in vain. The report of exercise now forms part of the record of this court.**
>
> **It would be against the rules of evidence to rely on documents which do not form part of the record either in the pleading or in the affidavit of the petitioner. I therefore direct that the petitioner is at liberty to refer to the annexures to the affidavits filed by the respondents. She is giving her evidence in chief and that is the opportunity she has to address that evidence. <u>The objection on referring to forms which do not form</u> <u>part of the record is sustained</u>**."

75. That ruling is seen against the background that by an application filed on 15th September 2017, the appellant had sought, in addition to an order of access to KIEMS system, an order under prayer 4 of the application of "*access to and <u>supply to the Court and to the</u> <u>Petitioners</u>, for scrutiny, certified photocopies of the original Forms 37A's and 37B's prepared at and obtained from the Polling stations*." [Emphasis added]. Under prayer 5 of the same application, the appellant sought access to "*original form 37A's and 37B's from all polling stations in Kirinyaga County*."

76. In its ruling given on 23rd October 2017, the court ordered IEBC "*to supply the petitioner certified copies of Form 37A and 37B <u>as prayed</u> <u>in prayer No. 4</u> and the petitioner access to originals Forms 37A and 37B*" [Emphasis added]. As highlighted above the appellant's prayer 4 was for certified photocopies to be supplied to the petitioners as well as to the court. As prayer 4 was granted "**as prayed**", it seems to us that IEBC was thereby obliged to supply the photocopies of the forms not only to the appellant but to the court as well. In that event the contention that the forms were not part of the record would not have arisen. The appellant should then have been at liberty to refer to them, subject of course to relevance dictated by her pleadings.

77. Provided the reference to the forms by the appellant would have been confined to relevant matters that were pleaded, we do not see what prejudice would have been occasioned to the respondents especially considering that IEBC was the originator of the forms. We are therefore satisfied that the Judge erred in declining the prayer for the forms to be supplied to the court (if indeed that is the construction to be given to her order) and in limiting the appellant from referring to them on the basis that the forms did not form part of the record. There is therefore merit in the appellant's complaint in that regard.

78. Next is the complaint that the Judge failed to make an adverse finding against IEBC for its failure to produce records and data in its possession including original Forms 37A's and 37B's and KIEMS kits; for willfully destroying or concealing evidence by reconfiguring the KIEMS kits without the court's permission; and for failure to supply 50 SD cards. This issue stems from appellant's contention that IEBC failed to comply with orders of the court given on 23rd October 2017 pursuant to the appellant's application dated 14th September 2017 and filed on 14th September 2017. As is evident from the face of that application, in seeking an order for access to the KIEMS system, the appellant was alive to the fact that there was "*an impending presidential election scheduled for 17th October 2017 at which the 1st respondent is likely to use the KIEMS kit nationally*."

79. In the grounds of opposition to that application, the IEBC stated that "*all the KIEMS equipment countrywide have been recalled from the field to the commissions warehouse in Nairobi for preparation and reconfiguring for the purposes of the fresh presidential election to be held on the 26th October 2017*". In her ruling of 23rd October 2017, the Judge stated:

> "**The petitioner has a right to access the KIEMS kits-Electronic Device (s) used to capture Forms 37A and 37B and transmitted to County tallying centre. This will be a read only of the Data preserved in the KIEMS or memory cards whatever the case may be in view of the submission that the KIEMS have been configured. Since it is only a few days to the repeat Presidential Elections, the 1*st* respondent is ordered to preserve the data extracted from the KIEMS kits and the petitioner to have the read only access after the presidential elections**."

80. The Judge ordered IEBC to "*allow <u>a read only access of the data</u> in the KIEMS kits with regard to the gubernatorial elections of Kirinyaga County*." In answer to the appellant's complaint that IEBC had failed to comply with that order, the Judge in her final judgment expressed the view that IEBC had substantially complied with the order by supplying the data as captured in the SD cards even though the KIEMS kits themselves were not made available.

81. There was seemingly lack of clarity on what access to the information in the KIEMS Kits entailed. On the one hand, the Judge

seemed to consider it necessary for the appellant to have access to the kits themselves whilst on the other the Judge took the view that access to the data storage medium would suffice. That as it may, we do not think that the Judge can be faulted for concluding that there was substantial compliance with her order. It was common knowledge, as between the appellant and IEBC, that the KIEMS system would be deployed in the repeat presidential election. Cognizant of that fact, the election court was aware that the KIEMS Kits were not available but that did not prevent IEBC from providing "*the electronic data stored in the KIEMS kits*" and restricted the order it granted to access to data.

82. There was material in addition to the testimony of the 2nd respondent that IEBC did not provide the appellant with the KIEMS kits because they left Kirinyaga County on 8th September 2017 having been recalled for the fresh presidential election. The court was correct in our view, when it stated in its judgment that IEBC had "*substantially complied with the court order save for the KIEMS kit which had been configured*" and that the information was confirmed by the Deputy Registrar. We accordingly agree with the Judge when she stated in her judgment that:

> ***"We are told by 1st and 2nd respondent that the KIEMS kit is like a DVD player such that once the CD is removed it cannot show anything. I am of the view that failure to avail the KIEMS kit did*** (sic) **amount to concealing evidence. The Court order of 23.10.2017 ordered that the access given was to the data in the KIEMS kits. The SD cards contained the data. The 1*st and 2nd respondent have explained why the KIEMS kit had to be configured. There was no Court order which had been issued to order preservation of the KIEMS kit. The data was preserved in the SD card. Technology in respect to gubernatorial elections is limited to identification of voters. There is no requirement for transmission electronically. Section 44 of the Elections Act provides for use of technology which enables voter registration, identification and transmission of results. Section 39 (1) provides electronic transmission of results in Presidential election. I find that no prejudice was suffered by failure to give access to the KIEMS kit. The information required to verify the results was adequately supplied and accessed."***

83. We turn now to the complaint touching on the appellant's electronic and photographic evidence. In her memorandum of appeal, the appellant contends that the Judge should have found that respondents were estopped from objecting to the appellant's photographic and video evidence as the same was referred to in the appellant's evidence and responded to by the respondents in their affidavits; that the Judge should have made an adverse inference based on the respondents failure to make an application "*to challenge service of the photos and video evidence*"; that the Judge erred in making a finding in relation to the filing of the missing flash disk when criminal investigations were pending before the DPP; that there was sufficient evidence to show that the flash disk was filed and the Judge erred in finding otherwise.

84. Related to that complaint is the appellant's application that was presented to this Court on 20th July 2018 seeking leave to adduce additional evidence "*contained in the said flash disk"* to corroborate her evidence that there was bribery and canvassing, tampering with ballot boxes, and other acts contrary to law. As indicated, we rejected that application as it would have been tantamount to pre- determining the grounds of appeal in relation thereto. We indicated we would give further reasons for taking that course in this judgment which we now do.

85. In rejecting the appellant's application for additional evidence, we were conscious of the principles governing the exercise of the discretionary power under Rule 29 of the Court of Appeal Rules as summarized in ***Mzee Wanjie & 93 others v A.K. Saikwa & others (1982-88) 1 KAR 462*** where Chesoni J.A restated the principles enunciated by Denning L.J in ***Ladd v Marshall [1954] 1 WLR 1489 at 1491*** that:

> "***(a)*** **It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;**
>
> **(b) The evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive;**
>
> **(c) The evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.**"

86. We note that the Supreme Court has recently laid down the governing principles on allowing additional evidence in appellate courts in Kenya in the case of ***Mohammed Abdi Mahamud vs. Ahmed Abdullahi Mohamad & 3 others [2018] eKLR.*** That Court cautioned that a party who has been unsuccessful at the trial must not seek to adduce additional evidence, to make a fresh case in appeal, fill up omissions or patch up the weak points in his or her case.

87. Based on those principles, the jurisdiction of the Court under Rule 29 of the Rules of the Court could therefore not be invoked in this case where the complaint is that evidence was available before the election court but that court declined to admit it. It is not a case of evidence coming to light subsequent to the trial. The question as to whether or not it was rightly excluded is therefore not one that could be answered or determined through an application for additional evidence. It is a question of whether the election court erred in its treatment of that evidence by rejecting it. That is within the province of an appeal and not within the province an application for additional evidence under Rule 29 of the Rules of the Court.

88. Returning the issue at hand, the effect of the appellant's multifaceted complaints is that the photographs that were exhibited to the affidavit in support of the petition and the video recording captured in a cellphone should have been admitted into evidence and the judge erred in excluding the same.

89. At paragraph 18 of her affidavit in support of the petition the appellant deposed that "we were informed that the deputy chairperson of the Jubilee Kirinyaga who was also the chief campaigner of the respondent was canvassing and bribing voters at Kangaru Primary School. Annexed herewith and marked MWK1 are photos of the incident taken by one Kennedy Muriithi." At paragraphs 34 to 37 of the affidavit, the appellant deposed that she received a call on 9th August 2017 from Tabitha Mutero with information that the presiding officer of Ciagini was caught outside Wanguru tallying center having broken seals of the governor's ballot box and tampering with electoral materials. In support, the appellant annexed "*copies of photos of the incident taken by one Edward Njoka*."

90. In the course of her evidence in chief, the appellant expounded that her agent Tabitha Mutero called her at 7.00pm while at Wanguru with information that the presiding officer of Ciagini Polling station was caught having cut the seals on the ballot boxes and tampering with election materials. She stated that one of her agents who took photographs of the incident would be testifying later.

91. It was also the appellant's testimony that she "*provided the court with two flash disks*"; that on 5th September 2017, she accompanied her advocate Mr. Gitobu Imanyara to the court registry to file the petition and that she personally witnessed the passing of the envelope containing the CD and flash disk and told the registry staff to handle with care; that "*photographs, a flash disk in an envelope and a back up CD*" were filed alongside the petition and affidavits; that "*the video in the flash disk was taken showing Muriithi Kangara canvassing and bribing voters at Kangaru School-was taken by Kennedy Muriithi*"; that the appellant had in the course of the trial requested for, and arrangements were made for projector to be made available in order to play or project the flash disk and the court duly provided the projector without any objection.

92. Tabitha Wanjira Mutero, a super-agent of the appellant's during the elections deposed in her affidavit in support of the petition that at Mutithi Primary School polling station she bumped into a team of two women and a man at the main entry of the polling station with a register against which voters getting into the station would be cross checked against the register and given Kshs. 1,000.00 and told to ensure they voted for the 3rd respondent; that on realizing what was happening she turned the video recorder on and called the presiding officer and security and that the presiding officer chased her away. She went on to say: "*Annexed herewith and marked "TWM- 01 is a CD with the video recording*.

93. Tabitha Wanjira Mutero deposed further that: at Karoti Girls School polling station, she found agents of the 3rd respondent bribing queued voters and went on to say: "*Annexed herewith and marked "TWM-02 is a CD with the video recording of the incident*."; that at Wanguru Girls School tallying center, the main tallying centre of Mwea Constituency, she found 3 people opening ballot boxes and sealing them again; that she raised alarm, the 3 people identified themselves as presiding officer Ciagini Polling station and her two clerks; that she called the returning officer who said that he would handle the case and that she took video of all happenings including the broke seals; that at Gategi B, the presiding officer approached her and requested help because she had sealed BVR kit in the ballot box and she could not fill in or transmit her final results; that she handed her to the returning officer of Wanguru Girls who demanded that she leaves the case to her and stated "*Annexed herewith and marked "TWM-03 is a CD with the video recording of the incident*."

94. In his supporting affidavit, Kennedy Muriithi deposed that he was a super-agent of the Narc Kenya gubernatorial candidate during the elections and that at Kangaru polling station he witnessed a Mr. Muriithi Kangara, "*a well known Kirinyaga political operative*" go to the end of the queue and started greeting people on the queue telling them to vote in "*Minji Minji*" as gave out money, and that he decided to "*take photos and video of what was happening*"; that thereafter, after the appellant was informed of what was happening, she arrived with her running mate the 2nd petitioner, one Hon. Gachoki Gitari, whereupon he "*reviewed the photos and video of the events since I did record the happenings on my mobile phone*." No exhibits were however mentioned in his affidavit.

95. In an affidavit sworn by one Kepha Sagana (PW7) in support of the petition, he deposed that at Wanguru Girls School tallying center, he witnessed the opening of ballot boxes and papers being put in to the open ballot box; that he took a video of the box and "*Annexed herewith and marked "KS-1 is a CD with the video taken"*

96. In his affidavit in support of the petition, the appellant's running mate who was the 2nd petitioner in the lower court, Hon. Gachoki Gitari deposed that they continued receiving calls from their super agents on bribery allegations "*and we asked them to take photo and videos*".

97. We have sampled those affidavits to demonstrate that there was considerable reference to photographs and CD's containing videos as annexures to the affidavits filed in support of the appellant's petition. The appellant was consistent in her evidence in chief and under cross examination that photographs, flash disks and CD's were presented to the registry on filing the petition. Indeed, in the replying affidavits that were filed in response to the petition and to the supporting affidavits, there appears to be tacit acknowledgment of those annexures as there is no complaint or other indication that any of the said annexures were missing or that the respondents were in any way hampered, by reason of missing photographs or CD's from responding to the allegations made by the appellant. For instance, in the affidavit sworn by Joyce Emily Munene, the head teacher at Mutithi Primary School in response to the claim made by Tabitha Wanjira Mutero that there was bribery taking place at polling station at that school deposed that the said Tabitha Wanjira Mutero "*appeared and started shouting making wild allegations as her colleagues recorded the incident of me holding the documents*" without any suggestion that the annexure to which she was responding was missing. Similarly, James Muriithi Kangara in his affidavit sworn on 16th September 2017 in response to paragraph 18 of the appellant's supporting affidavit and in response to the claims made by Kennedy Muriithi deposed at paragraphs 6 of his affidavit that "*the alleged photograph of Kennedy Muriithi is misleading and a misrepresentation*."

98. The appellant was emphatic in her evidence that she filed the "petition, supporting affidavit and annextures to my affidavit and I filed a CD and a flash disk". Although there appears to be some mix up or confusion as to whether what was annexed were flash disks or a flash disk or compact discs, or both, and as to the quantities that were filed, when the appellant's evidence is considered alongside the foregoing, we are satisfied that photographs, as well as the annexures referred to in the supporting affidavits were indeed filed as they purport notwithstanding the testimony of Jackson Kabiru, the Executive Assistant who stated that he was in the registry when the petition was filed and that no flash disks were submitted during filing.

99. The thorny question pertains to the admissibility of that photographic and video evidence (collectively referred to as electronic evidence). The appellant submitted that there was a grand conspiracy and collusion by the respondents, wittingly or unwittingly aided by the court, to deliberately impair the production of that evidence. As noted, reference to electronic evidence was made in the affidavits including those of the appellant, Kepha Sagana (PW1), Ruth Mukuba (PW8), Edward Njoka, Elias Nganga, Tabitha Mutero, Kennedy Muriithi, and Jason Chewa. However, the latter four did not testify. They were therefore not examined in chief or cross examined. In the absence of consensus to have their evidence admitted as presented in the affidavits as required under Rule 12(13) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017, their evidence was of no probative value.

100. In relation to the electronic evidence annexed to the appellant's affidavit, the appellant deposed in the affidavit that the same was taken

by Kennedy Muriithi and Edward Njoka. During the appellant's testimony before the election on 20th April 2018, she is recorded saying this:

> **"I now wish to deal with the photos. I will not be able to explain all the photos, witnesses will do that but I can comment on the 2*nd photo showing a cover of ballot box with seals on top of it and is on the floor as there is grass. That is the photo that I am informed by my witness will testify, Samuel Gachoki Gachini and Edward Njoka, Tabitha Mutero also refers to it. That is the lid of the gubernatorial tallying center at Ciagini which was violated. More will come from the witnesses*."**

101. At the close of her testimony on the same day, the appellant stated: "*I wish to play the video before I conclude*". Thereafter the court ordered the deputy registrar of the court to liaise with the ICT to avail a projector in court on 2nd May 2018 "*for the purpose of viewing some videos contained in a flash disk which are to be produced in court as exhibit*." On 2nd May 2018, counsel for the appellant indicated "*we have the video evidence*" at which point the court noted that "*the officer who received the flash disk is not available*" and that he would be available in the course of the day. The appellant then testified that she accompanied her counsel when filing the petition and that she "*witnessed the passing of the envelope containing the CD and flash disk and told them to handle it with care*."

102. Jackson Kabiru, an executive assistant of the court subsequently testified that he was heading the registry in the night of 5th September 2017 when the appellant's petition was filed and that "*there was no flash disk attached.*"; that when an exhibit like that is filed, it is minuted and then handed over to the executive officer for safe custody. After the evidence of Jackson Kabiru, counsel for the appellant indicated that two witnesses, namely "*Mr. Imanyara and Mr. C. Wanjau*" would be called to testify on the same issue.

103. In the course of her testimony on 4th May 2018, the appellant referred to the electronic evidence. Objection was raised that the respondents did not have some of the photographs to which she was referring and that she was not the maker of the same and could not therefore produce them. In response to the objection, counsel for the appellant stipulated that the same should be marked for identification pending "*the calling of witnesses*" and that whether they will be admitted can be decided later. It was also confirmed that there were disparities between the photographs that had been served on the respondents with the supporting affidavits and those in the appellant's affidavit and the ones the respondents did not have were identified. By the time the appellant closed her case, Kennedy Muriithi and Edward Njoka had not been called as witnesses with the result that the photographs were never produced.

104. The other reference to electronic evidence was by Kepha Sagana who stated that he was an observer accredited by the IEBC. As already stated, he deposed in his affidavit that he took a video of the ballot box that he witnessed being tampered with at Wanguru Girls School tallying center and annexed to his affidavit a CD with the video taken marked as KS-1. In his evidence in chief before the election court on 16th May 2018, he stated that on the evening of the polling day, he went to Wanguru Secondary, the tallying centre and noticed a man opening a gubernatorial ballot box and another man put papers in the ballot box and he took a video; that he later swore his affidavit and had a CD which he gave to his lawyer "*with the details and still have in my phone*. *It had the details of the incidents I captured*." That marked the end of his examination in chief at which point counsel for the appellant is recorded as stating: "*I will not go to the details on that in (sic) subject to investigation. The CD cannot be projected. They can go on with cross-examination*."

105. It is not clear why, in the absence of the CD, the witness's phone was not then offered or tendered into evidence at that point. The witness was then cross examined during which he maintained that he "*took photographs a video*" and that "*he put a CD*". Later in re-examination he was to state that "*the video shows clearly, persons, a person opening and something in a bag being poured*." After the cross examination of the witness was completed, counsel for the appellant then rose and made "*an application that he produces the video which is in his mobile phone before I re-examine and then I (sic) can cross- examine*." It is hardly surprising that the respondents objected contending, among other things, that the application should have been made "*when the witness gave evidence in chief*" and that the appellant was seeking to cover "*gaping holes*" that came up in the course of the cross examination and that it would be irregular to introduce new evidence in re-examination. The learned Judge reserved her decision.

106. The issue was to arise again in the course of cross examination of the 2nd respondent when objection was raised to the witness being cross examined on the photographs on the basis that they were not part of the record.

107. In her ruling delivered on 21st May 2018, the Judge stated:

> **"Other than the photographs been attached** (sic) **to the affidavit of the petitioner, they were not produced as exhibits. Documents marked for identification are so marked so that at a later stage they are produced as exhibits and form part of the court records. The marking of the document for identification is to facilitate its reference when a witness refers to it. It also awaits the party to comply with the rules of evidence on production of the document before it can be produced as evidence. Before it is produced as exhibit it cannot be stated to be forming part of the record. The petitioner had intimated that the marker of the documents would be called. The marker was not called. Objection could only be raised at the time of production. This time never came as the case was closed. I am of the view that the photographs do not form part of the court record for want of production of the documents as exhibits."**

108. The conclusion reached by the Judge is supported by decisions of this Court in ***Kenneth Nyaga Mwige vs Austin Kiguta & 2 other [2015] eKLR*** and ***Ferdinand Ndungu Waititu vs IEBC*** on which the Judge relied. In ***Kenneth Nyaga Mwige vs Austin Kiguta & 2 other***, this Court stated that:

> **"The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading record, the parties and the court should be able to identify and know which was the document before the witness. The marking of the document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification."**

109. In **Ferdinand Ndungu Waititu vs IEBC** (above) the Court expressed the view that it was necessary to call makers of photographs

exhibited to an affidavit to produce the same and as the appellant herself acknowledged, she was not in a position to testify on the majority of the photographs.

110. The video recordings were said to have been stored in either the flash disks or in CD (compact disc). Both, according to their definitions in the Concise Oxford English Dictionary are mediums of data storage. A flash drive or flash disk is defined there as a small electronic device used for storing data or transferring it to or from a computer, digital camera, etc while a compact disc is defined a small plastic disc on which digital information is stored in the form of a pattern of metal coated pits from which it can be read using laser light reflected off the disc. In our view, the admissibility of either mediums would be subject to the safeguards set out under Section 106B of the Evidence Act. See ***County Assembly of Kisumu & 2 others vs. Kisumu County Assembly Service Board & 6 others [2015] eKLR*.** Furthermore, the manner in which counsel for the appellant attempted to introduce the video recording that was said to be contained in the cell phone of PW7, that is in the course of re-examination of the witness, was also not procedural and would have been prejudicial to the respondents.

111. In the result we uphold the decision of the election court declining to admit the photographs and the video recordings whether contained in CD's or in flash disks.

112. The last issue for consideration under genre of the complaints that the appellant's right to fair trial was breached was the complaint that as the 3rd respondent did not testify and that the Judge should therefore have concluded that the petition was not defended. We have elsewhere in this judgment addressed the question of the burden of proof in election petitions. The appellant had the burden to prove the claims she made in the petition to the required standard. The effect of the failure on the part of the 3rd respondent to testify was to render her affidavit useless. (See Rule 12(13) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017and also ***Alfred Kiptoo Keter vs Bernard Kibor Kitur & IEBC [2018] eKLR***). It did not discharge the burden the appellant had to prove her case. We do not think there is merit in this complaint.

113. Away from considerations of fair trial, we turn to consider the appellant's grievances in relation to the conduct of the elections. In that regard, the question is whether the appellant established, to the required standard, that the election for the position of governor, Kirinyaga County, was not conducted in accordance with the Constitution, the Elections Act and the Regulations. In that regard, apart from the claim that the gubernatorial elections for governor had to be annulled because the Supreme Court of Kenya had annulled the presidential election, and the generalized plea in the petition that the elections were not free and fair, the specific complaints that the appellant particularized in the petition were that the elections were marred by bribery and canvassing and that the appellants agents were barred from polling stations. It was for those reasons that the appellant contended that the election did not meet the constitutional threshold of a free and fair election. In that regard, it is the appellant's case that the learned Judge did not properly evaluate the evidence and that had she done so, she would have reached a different conclusion.

114. Articles 81 and 86 of the Constitution as expanded in the Elections Act and the Regulations enact the principles for the electoral system and the obligations imposed on IEBC with regard to management of elections to ensure delivery of credible elections. Article 81 demands, among other things, that elections should be conducted by an independent body; must be transparent; and must be administered in an impartial, neutral efficient, accurate and accountable manner.

115. Under Article 86 IEBC is required to ensure, among other things, that at every election, the electoral system is simple, accurate, verifiable, secure, accountable and transparent; that the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station; and that the results from the polling station are openly and accurately collated and promptly announced by the returning officer. The Supreme Court of Kenya condensed those principles in ***Raila Odinga and another vs IEBC and others [2017] eKLR*** (**Raila 2017)** as follows:

> **"The principles cutting across all these Articles include integrity; transparency; accuracy; accountability; impartiality; simplicity; verifiability; security; and efficiency as well as those of a free and fair election which are by secret ballot, free from violence, intimidation, improper influence or corruption, and the conduct of an election by an independent body in transparent, impartial, neutral, efficient, a*ccurate and accountable manner."*** [Emphasis added]

116. The burden to prove that the election of governor of Kirinyaga County held on 8th August 2017 fell short of those standards on account of the malpractices that the appellant claimed were committed during and in the course of the election lay with the appellant. As the Supreme Court stated in ***Raila 2013***:

> **"Where a party alleges non-conformity 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."**

117. Elsewhere in the same case, the Supreme Court stated at that:

> **"…a petitioner should be under obligation to discharge the initial burden of proof before the respondents 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."**

118. In ***Raila 2017*** the Supreme Court expounded further that a petitioner who seeks the nullification of an election on account of non-conformity with the law or on the basis of irregularities must adduce cogent and credible evidence to prove to the satisfaction of the court and that although the legal and evidential burden of establishing fact and contentions to support the case remains with the petitioner but may shift depending on the effectiveness with which the petitioner discharges its burden. The Supreme Court expressed thus:

> **"It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant**

impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce 'factual' evidence to prove his/her allegations of breach, then the burden shifts and it behoves the respondent to adduce evidence to prove compliance with the law."

119. Beyond the burden of proving that there was non-conformity with the electoral laws, the appellants also had the burden to prove that such non-conformity affected the validity of the election. [See ***Raila Odinga 2013***; ***Zachariah Okoth Obado vs Edward Akong' o Oyugi and 2 others [2014] eKLR***.] In the latter case, the Supreme Court stated that:

> "***. . . irr*egularities in the conduct of an election should not lead to annulment, where the election substantially complied with the applicable law, and results of the election are unaffected**."

120. Further explanation was offered by this Court in ***Owino Paul Ongili Babu vs Francis Wambugu Mureithi and 2 others, EPA No. 18 of 2018, Nairobi*** in these words:

> **"It is trite law that for an election to be invalidated for reason of non- compliance with provisions of the Constitution, the Elections Act and or any other electoral law, a party must demonstrate that the election was not conducted in accordance with the constitutional principles and the relevant electoral law, or that the non- compliance affected the result of the election. It means the court should not chart an easy course of nullifying an election or invalidating it under the slightest pretext. There must be sufficient reasons supported by evidence."**

121. Bearing those principles in mind, one of the complaints in the petition on the basis of which the appellant sought the nullification of the election was that there was bribery and canvassing. Bribery is an election offence under Section 9 of the Elections Offences Act. The appellant was required to prove those claims beyond reasonable doubt. In the case of ***Moses Masika Wetang'ula v Musikari Nazi Kombo & 2 others (above)*** the Court stated that:

> **"If there are allegations of commission of election offences in an election, the law requires that those allegations be proved beyond reasonable doubt. In other words, the standard of proof required in allegations of commission of election offences made in election petitions is beyond reasonable doubt."**

122. In ***Phillip Kyalo Kituti Kaloki vs IEBC and 2 others, Nairobi Election Petition Appeal No. 25 of 2018 [2018]eKLR***, this Court cautioned that:

> **"A finding that there has occurred a malpractice of a criminal nature that may have been committed has serious consequences, and cannot be made without adequate evidence…"**

123. In the latter case, this Court noted that following the recommendations by the Supreme Court in ***Moses Masika Wetang'ula v Musikari Nazi Kombo & 2 others (above)*** Section 87 of the Elections Act was amended in order to safeguard the principles of natural justice and to avoid the risk of double jeopardy as the election court was hitherto empowered to make a definitive finding as to the guilt of a party with respect to an election offence. Section 87(1) of the Elections Act as amended by the Elections Laws (Amendment) Act, No. 36 of 2016 now empowers the election court, to determine that "a malpractice of a criminal nature" may have taken place and to ensure that the order containing such determination is transmitted to the Director of Public Prosecutions. What is not clear, and we were not addressed on this, is whether that has any impact on the standard of proof.

124. What then was the evidence presented before the election court and was the conclusion reached by the election court misplaced in light of that evidence?

125. The appellant complains that the Judge misdirected herself in the evaluation of the evidence and failed to appreciate that there was sufficient evidence tendered to prove of bribery and or canvassing. As already indicated the appellant pleaded in her petition that there was "*canvassing and voter bribery*" among other "*electoral offences/malpractices*". The particulars that were pleaded with respect to specific alleged incidents of bribery were: That the Deputy chairperson of Jubilee Party, Muriithi Kangaru was canvassing and bribing voters at Kangaru Primary School and other areas with the facilitation of the OCPD Mwea West, one Suarey Kiptoo and two of his officers. The second incident pleaded was that the head teacher Mutithi Primary School had a printed list of voters at the entrance of the polling station at that school "*where she was intercepting voter, checking their names on the printed voters list canvassing and bribing them before they entered to vote*." The appellant expounded further on those claims in her supporting affidavit. In addition, in her supporting affidavit, the appellant referred to a third incident that allegedly took place in Kirinyaga Central. She deposed she was informed that one Mary Wambui Ngengi, a supporter of the 3rd respondent was bribing voters at Joseph's primary. There were other generalized claims of bribery and canvassing.

126. In relation to the alleged incident involving the Deputy Chairperson of Jubilee Party, Muriithi Kangaru who was said to have canvassed and bribed voters at Kangaru Primary School, the appellant's witnesses were Elias Mwangi Wachira (PW3) and Morris Njeru Kanyoko (PW4). In his supporting affidavit Elias Mwangi Wachira deposed that on 8th August 2017 at 7.30 am he was at Upper Baricho Secondary Polling station queuing to vote when he saw James Muriithi Kangara, the Deputy Chairman of Jubilee Party in Kirinyaga County entering the station; that he noticed him "*walking along the queue shaking the voters hands giving them money and telling them to vote for "Minji Minji*" an alias or nickname for the 3rd respondent; that once the people on the queue that Mr. Kangara was giving bribes, they started to move backwards and caused a commotion after which Mr. Kangara took "*off in a motor bike*." In his supporting affidavit, Morris Njeru Kanyoko also a voter at Upper Baricho Secondary Polling station deposed that the events described by Elias Mwangi Wachira in his affidavit are true.

127. At the trial, Elias Mwangi Wachira adopted his affidavit in examination in chief and maintained, under cross examination, that he was at the front of the queue and witnessed James Muriithi Kangara give out money in notes to those at the back of the queue; that he couldn't tell the amount of money he was giving; that he did not report the incident to the presiding officer or to the police.

128. Morris Njeru Kanyoko also relied on his affidavit in his evidence in chief and was cross examined. He stated that he was also in the front of the queue and saw Muriithi Kangara "*shaking the voters with some amount of money*"; that after voting he called the appellant so that she could take action; that he did not report to the presiding officer and that "there were policemen" but did not report to them.

129. James Muriithi Kang'ara (DW10) testified and was cross examined stating that he got to Kangaru Primary School at around 9.00am and was informed that IEBC needed help to access a classroom with electricity; that he assisted in IEBC to get the class with electricity; whilst acknowledging that he is blessed with resources and that "*during campaigns I gave money*" he denied the claims that he bribed voters as claimed by Elias Mwangi Wachira.

130. As to the claim that the head teacher Mutithi Primary School had a printed list of voters at the entrance of the polling station at that school "*where she was intercepting voter, checking their names on the printed voters list canvassing and bribing them before they entered to vote "* Elias Nganga Nyanjui, Narc Kenya Party Constituency chief agent deposed in his supporting affidavit of information he received of incidents of alleged bribery at Kianganga Polling station, Mutithi Primary School and Karoti Girls School polling stations. He was however not called to testify. Tabitha Wanjira Mutero, a super- agent of the appellant, had deposed in her affidavit that at Mutithi Primary School Polling station, she bumped into two people seated at the main entrance of the polling station with a register against which the voters name would be checked and once found "the voter was given Kshs. 1,000.00" and told to ensure that they voted for the 3rd respondent. This witness was also not called to testify.

131. Felix Wanjohi (PW9) chief agent of the appellant stated in his affidavit and in his testimony before the election court that at Karoti Girls Secondary School they found two people with a list of voters against which voters were ticked off as they entered as they were reminded to vote for Jubilee candidates. He stated that they managed to get the list and to retain it in their custody; that the issue of bribing voters was reported to him by super agents in various places; that he was also informed of the bribery incident at Baricho Primary School but on driving there found that Mr. Muriithi Kang'ara had left the station.

132. The learned Judge considered the claims at length in her judgment. She made a finding that the evidence of the appellant regarding the alleged bribery was hearsay and that PW3 and 4 were not credible witnesses. She stated:

> "**The evidence of PW3 & 4 if indeed it happened is based on mere suspicion which can never be a basis to prove an allegation of criminal nature. The witnesses said they did not see money. No voter was called to say he or she was given money to be induced on the manner to vote. The contention by Muriithi Kangara is convincing that if a person gave out money at the polling station violence could break out. There were no incidents of violence reported. At Kang'aru the Presiding Officer when confronted by the 1*st Petitioner said he was not aware of bribery. He said he would be vigilant*."**

133. The Judge then concluded that "*the allegation of bribery is not proved to the required standard*." Based on the totality of the evidence tendered in a bid to support the claims of bribery and canvassing, we do not think that the Judge can be faulted for reaching the conclusion that she did. Although the testimonies may have been sufficient to raise suspicion, "*suspicion alone"* as observed by Tuiyott, J in ***Henry Okello Nadimo vs. IEBC & 2 others [2013] eKLR***, "*is not good enough*". The evidence on bribery and canvassing fell short of proof, to the required standard, of "*focused and clear-cut*". It did not meet the required standard, beyond reasonable doubt, to sustain the claims that election offences were committed. In the words of the Supreme Court in ***Moses Masika Wetangula vs Musikari Nazi Kombo & 2 others [2015] eKLR***, the evidence was not "*cogent, reliable, precise and unequivocal*." In that case, the Supreme Court stated:

> **"The legal framework for electoral dispute- settlement confers upon the Court a quasi- criminal jurisdiction which is not part of the established criminal code. Being derived from the fundamental elements of the criminal law, which imposes strict penalty in respect of prohibited acts, and which is attended with established trial safeguards, such quasi-criminal offences as are provided for in the electoral law, too, are required to be strictly proved, as a basis for any penal consequences."**

134. We cannot interfere with the decision of the election court unless the same is perverse, that is, if the decision was arrived at on the basis of no evidence or on the basis of evidence that cannot be relied upon. As the Supreme Court stated in ***Frederick Otieno Outa vs. Jared Odoyo Okello & 4 others, Petition No. 6 of 2014;***

> **"Election offences are, therefore, quasi-criminal in nature; and the Court ought not to enter a finding of guilt, if the evidence adduced is not definitive and cannot sustain such a finding, or if there is any doubt as to whether such offence was, indeed, committed, or by whom...**
>
> **…, the person alleging the commission of the offence, is required to prove the ingredients of the offence. And such proof of an offence takes a higher level than the mere preponderance of probabilities."**

135. There is therefore no merit in the appellant's complaint that the election court failed to properly evaluate the evidence regarding claims of bribery and canvassing. Accordingly, this ground of appeal fails.

136. We turn now to the complaint that the Judge misdirected herself in the evaluation of the evidence in failing to find that there was sufficient evidence to proof unlawful barring of the appellant's agents. It was the appellant's case as set out in the petition and supporting affidavit that there was widespread unlawful barring of her agents from the polling stations. Upon considering the matter, the election court held that the evidence in support of those allegations was not cogent. The question is whether the finding by the Judge was well founded.

137. Although the specific polling stations where it was alleged agents were excluded were not set out in the petition, the appellant identified 75 polling stations in her affidavit in support of the petition where she stated her agents were barred, sent away, kept away for certain lengths of time and then allowed in, and excluded during voting and counting. Evidence in support of the claim was led by the appellant; PW 2, Mercy Njoki Kangi, who was an agent of an independent MCA candidate; PW 5, Loise Wanjiku Karua, one of the appellant's super agents at Kabare Ward of Gichugu Constituency; Samuel Gachoki Cini, PW6, the appellant's super- agent in Tebere Ward; Felix Wanjohi, PW 9, the appellant's chief agent engaged by the appellant to assist her monitor the elections

138. The appellant testified at length on this issue. She stated that after voting at 6.30 am at Mugumu Polling Station, she started receiving calls from her super agents informing her that her agents were being barred from accessing polling stations. One such station was Kimunye polling station. She went there and on enquiring from the returning officer why her agent in stream 2 was locked out while the one in stream 1 was allowed in, he claimed that the letter she presented did not have an IEBC stamp and after engaging one Mary Nyambura Murigu from IEBC, she was informed that her agent required a letter from IEBC whereupon the appellant informed the said IEBC officer that she could verbally appoint her agents; that the agent was eventually allowed in at 8.30 am; that she continued receiving calls from her agents and on realizing the problem was widespread, she telephoned the 2nd respondent, the County Returning Officer, who agreed with her that the demand for IEBC stamped letters was not a requirement for the agents to access the polling stations and undertook to call the constituency returning officers with directions that the appellants agents should be allowed in to the polling stations; that despite the assurance given by the 2nd respondent, the complaints persisted the entire morning; that at Ndaba polling station, she found, at 12.00noon, that only Jubilee Party agents had been allowed into the polling station; that she continued receiving calls from her agents into the afternoon and yet again called the 2nd respondent and she realized that there was a calculated plot to ensure that her agents did not have access to the polling stations; that the problem was experienced in a total of 188 polling stations where her agents did not have an opportunity to verify whether ballot boxes were empty or stuffed at the opening of polling.

139. The appellant stated further that while at Wanguru tallying center, after polling had ended she received messages from her agents of being barred from witnessing the tallying; that at Itangiini at Murinduko during counting, she found her agents had been chased away by security officers; that none of the security officers could explain why her agents were being excluded; that she returned the agents to the respective centers, the classrooms, and counting did not start until 5.00 am and after the counting, she had won with a landslide in both classrooms; that the Forms 37A's that were supplied confirm that in a total of 187 stations, her agents were not present during the opening of polling stations; that her super agents of all the stations in the County were mandated to ensure that all her agents had the required documents, namely the oath of secrecy and a letter from Narc Party showing they were agents; that all her agents had those documents but, in a deliberate act to lock them out, were told they required a letter from IEBC which was not the case.

140. Commenting on the polling station diaries produced by IEBC, the appellant stated that most of them have no indication of time; that many of the diaries indeed confirm that her agents were not there on opening of the polling stations; that contrary to claims by IEBC, it is not true that her agents were barred because they did not have the required documents, namely identification cards, oaths of secrecy and appointing letters; that she had issued them with letters signed by the party secretary general and that she had "*a super-agent who will confirm the agents had all the requirements*"; that the barring of her agents was extensive.

141. PW 2, Mercy Njoki Kangi, who was an agent of an independent MCA candidate deposed in her affidavit that she witnessed the appellant's agent, one Mr. Muriithi, as well as the agent for a candidate for Women Representative, being thrown out of Karani Tea Buying Center at about 7.am; that on enquiring from the presiding officer why that was done she was informed that their documents were not in order.

142. PW 5, Loise Wanjiku Karua, was one of the appellant's super agents at Kabare Ward of Gichugu Constituency. She deposed in her affidavit that on the polling day, she received a call from one Lucy Njeri Njagi, one of the agents she had recruited, informing her that she had been barred from entering the polling station at Kimunye Primary School on grounds that her appointment letter did not have a stamp of Narc Kenya Party; that she found that odd as another agent had been admitted into the polling station on the basis of a similar letter; that she engaged the presiding officer, Mary Nyambura Murigi, who was adamant that the letter should bear a stamp of Narc Kenya Party; that she then called the appellant who arrived shortly and engaged the presiding officer after which the said Lucy Njeri Njagi was allowed into the polling station.

143. Under cross examination, the witness stated that according to the presiding officer, the stamp of IEBC was required on the appointing letter and an agent would only be allowed into the polling station with the candidate's consent. She stated further that she was the one in charge of distributing the letters of authority which did she by moving from one polling station to the other distributing the letters between 4.30 am and 6.00 am; that "*if the area is big you start earlier and there are those who got them later*"; that if the appointing letter "has letter head you don't need a stamp"; that she gave the letter to Lucy Njeri Njagi at the gate at 6.00 am; that she was not present when Lucy Njeri Njagi was barred.

144. Samuel Gachoki Cini, PW6, was the appellant's super-agent in Tebere Ward where he was to oversee 39 polling stations; on polling day he started his day at 5 am when he left his house to distribute appointment letters to the appellants agents at Wanguru Girls School polling station; that he delivered the letters and to his disappointment some of the agents had not arrived until later at 7.30 am at Wanguru Girls Station; that at 6.30am he learnt that the appellant's agents at Wanguru Girls School polling station had not been let in under the pretext that they did not have IEBC accreditation letters; that the presiding officers remained adamant after he engaged them until the appellant arrived when the agents were allowed in after 9 am.; that he received similar complaints from super agents at Gathigiriri Ward where the appellant's agents were not allowed into Kirogo Primary School polling station and Kamucege Play Ground until 10.30 to 11 am; that in many polling stations, the appellant's agents were not able to witness the starting of the voting or to monitor the voting exercise during the pick voting time in the early morning hours; that when he checked with the presiding officer he was informed that the agents were not to be allowed without accreditation letter; that the returning officer Mr. Maingi gave him a copy of a letter that he photocopied; and that he received numerous calls from agents. Under cross examination, he contradicted the statement in the petition that agents were barred in all the polling stations in Ngurubani which had 10 stations; that he had distributed the appointment letters to the agents the previous day but did so the morning of the polling day for Wanguru Girls.

145. Felix Wanjohi, PW 9, was the appellant's chief agent whose role was to assist the appellant monitor the elections; that after voting at

6.00 am, he was immediately called by one of the super agents from Mwea Constituency seeking intervention as some of their agents had been barred by the presiding officers at Kangai Ward; that his attempts to call the 2nd respondent were not successful; that he then received similar complaints from super agents in Tebere Ward, Nyangati Ward, Kariti Ward, Murinduko Ward, Muthithi Ward and Wamumu Ward; that he then got a call from the Deputy Returning Officer, Mr. Kinyua and reported the matter; that by 8.00 am the matter had not been resolved and he again tried to call the 2nd respondent in vain and sent him a text message informing him that agents were still being barred from accessing the assigned polling stations; that at 9.30 am he visited Upper Sagana Primary and found the agents had just been allowed in; that he went to Upper Baricho Primary School at 10.00 am he found that the agents had just been allowed in; that at Karoti Secondary School, 2 of the appellant's agents had not been allowed to access the polling stations by 10.20 am but were quickly allowed in when he made enquiries with the presiding officers; that he called the super agents at Kabare, Kerugoya, Karumande, Ngariama, Mutira, Baragwi and Njukiini and confirmed that everything had been normalized in most polling stations in those 6 wards; that in 14 other wards, he learnt that more than 8 agents were being kept outside the polling stations 6 hours after voting had started after which he mobilized his super agents to attend to those stations and the agents were allowed in after intervention; that after midday, the appellant did not have agents in around 8 polling stations; he confirmed that the agents were supposed to have a letter of appointment from the Party, the oath of secrecy and the identification card; that he distributed the letters through 20 super agents; that their strategy was to ensure that every agent had the required documents by 3.00 am.

146. The witnesses for IEBC who testified on the matter were the returning officers of three of the constituencies in the County, namely, Millicent Wanjiru Mbui (DW7), Julius Maingi (DW8) and Dominic Kapiri Leparmari (DW9). They stated that agents were allowed into the polling stations provided they could produce a letter of appointment from the political party or candidate, the oath of secrecy and their national identity card. They exhibited to their respective affidavits copies of polling station diaries that captured, in most cases, the agents present at the polling stations and the time they signed in.

147. The learned Judge reviewed and analyzed all that evidence before concluding that the appellant's evidence in support of the claims was not cogent. The court expressed itself on the matter as follows:

> **"We have a situation where no single agent testified as to why he/she was not at the polling station in time, why he/she was barred if at all and was not present at some point during polling. There are many reasons why agents could fail to be at polling station. A fact which the petitioner admitted during cross-examination. One is that one could oversleep and come late, sickness etc. It is only the agents who could tell. I understand the petitioners had many agents but she had a burden to discharge that the agents were not allowed through no fault of their own. In cross- examination she said she submitted a list to I.E.B.C. and was left with a copy but did not attach it to her affidavit. The documents which were given to the petitioner's agents were not exhibited in court to show that they had in deed given the agents the required documents. The list of agents was not exhibited in court."**

148. There can be no doubt that in some polling stations, there was an issue or issues that hampered or affected or prevented the agents of the appellant from being admitted or allowed into the polling stations from the onset when those stations were opened. The respondents maintained that, that could only happen if the agents did not have the requisite identification documents.

149. Based on the evidence, several factors seem to have been at play that resulted in the agents not being at the polling stations on opening and at the commencement of voting. One of the appellant's witnesses (PW6) expressed disappointment that some of the agents had not arrived at their assigned polling stations when they were supposed to have arrived. Another witness (PW5) suggested that the letters of appointment may not have reached some of the agents in a timely fashion. Yet another witness intimated absence of the appointing letters from the Party.

150. The testimony of the affected agents themselves to explain the circumstances that led to denial of entry or late entry was critical. The burden would then have shifted to IEBC to rebut those claims. As the Judge noted, none of the agents who were said to have been denied admission or who were said to have been allowed in late, were called to testify. The testimony of the appellant and her witnesses who testified on the matter was to a large extent based on the information that had been given to them. It is not clear why none of the affected agents were called to testify, firsthand, why they were either prevented from accessing the polling stations or why their access was delayed. Consequently, the conclusion reached by the election court is not without foundation. As Justice Kurian of the Supreme Court of India stated in ***Damodar Lal vs. Sohan Devi and others, Civil Appeal No. 231 of 2015***,

> **"30. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is against the weight of evidence, or if the finding so outrageously defies logic as to suffer from the vice of irrationality. If a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with."** *[Emphasis]*.

151. We are not persuaded that we have good reason to interfere with the findings of the Judge on the question of the appellant's agents.

152. The last issue arising from the appeal is with regard to costs. That is whether the election court erred in capping instructions fees only as opposed to putting a cap on the costs in totality. Section 84 of the Elections Act provides that:

> **"An election court shall award the costs of and incidental to a petition and such costs shall follow the cause."**

153. The power to award of costs in election matters is a matter of exercise of judicial discretion. In ***Mercy Kirito Mutegi vs BeatriceNkatha Nyaga & 2 others [2013] eKLR*** this Court held:

> ***"[59]The power to impose costs on parties is usually discretionary. Therefore, before an appellate court can interfere with the Judge's discretion, it must be satisfied that there was misdirection in some matter and as a result, the Judge arrived at a wrong decision or, that he/she misapprehended the law or failed to take into account some relevant matter."***

154. Costs of the petition would undoubtedly include disbursements.

In the absence of an itemized bill of costs setting out the disbursements claimed, we do not think it would be practical for the election court to impose a blanket cap on costs that would include a cap on disbursements within the province of the taxing officer to assess. We construe the decision of the election court as leaving the assessment of disbursements to the taxing officer to determine.

155. The upshot of the foregoing is that save for the grievance pertaining to the improper denial to refer to the statutory forms, we find no merit in the other grounds of appeal. But even then, apart from the fact that it was not demonstrated how, having regard to the grounds on which the election petition was based, the reference to forms would have altered or changed the decision of the election court, it is not open to us to nullify the election on account of that "*judicial error which is not directly related to the conduct of the election*" (to use the words of Githinji, JA in ***Christopher Odhiambo Karani vs David Ouma Ochieng & 2 others [2018]eKLR***). In the result we would dismiss the appellant's appeal. But there is the matter of the cross appeal.

The Cross Appeal.

156. As indicated, the cross appeal by the 3rd and 4th respondents is founded on Section 75(2) of the Elections Act which provides that questions regarding the validity of an election of a county governor must be heard and determined within 6 months from the date of lodging the petition. They contend that the ruling of the election court given on 6th April 2018 refusing to uphold their contention that the jurisdiction of the election court lapsed on expiry of the 6 months after the filing of the petition is erroneous. The appellant on the other hand supports that ruling maintaining that time stopped to run during the pendency of her first appeal.

157. The issue for consideration in the cross appeal therefore, is whether the proceedings and judgment of the election court are a nullity by dint of Section 75(2) of the Elections Act.

Submissions on the Cross-Appeal

158. In support of the cross appeal, counsel for the 3rd and 4th respondents submitted that under Section 75(2) of the Elections Act, questions regarding the validity of an election of a county governor must be heard and determined within 6 months from the date of lodging the petition; that the petition in this case was lodged on 5th September 2017; that six months lapsed on 4th March 2018; that the election court did not therefore have jurisdiction to hear and determine the petition after 4th March 2018; that on the authority of the Supreme Court decision in ***Lemanken Aramat vs Harun Meitamei Lempaka & 2 others [2014] eKLR*** and the decision of the Court in ***Cornel Rasanga Amoth vs William Odhiambo Oduol & 2 others [2013]eKLR*** the election court lacked jurisdiction to entertain the matter after expiry of the six months.

159. Counsel urged that the Judge erred in assuming jurisdiction on the basis of a misapprehension that by dint of Section 85A (2) of the Elections Act, time was frozen and did not run for the duration of the appellant's first appeal. According to counsel, by adopting that interpretation, the election court purported to wrongly "*arrogate to itself jurisdiction through the craft of interpretation*" [***Re the Matter of the Interim Independent Electoral Commission [2011] eKLR***].

160. Counsel submitted that the effect of the ruling given on 6th April 2018 in which the election court determined that it was properly seized of the matter, was to wrongly extend time contrary to Section 75(2) of the Elections Act and contrary to decisions of this Court in ***Ferdinand Ndungu Waititu vs IEBC & 8 others [2013] eKLR***; ***Patrick Ngeta Kimanzi vs Marcus Mutua Muluvi & 2 others [2014] eKLR***.

161. According to counsel for the 3rd and 4th respondents, the election court fell into further error in assuming and speculating that this Court addressed the question of jurisdiction of the election court in the appellant's first appeal when it directed the matter to be mentioned before the election court for directions and disposal. Counsel maintained that the proceedings conducted by the election court after 4th March 2018 are a nullity.

162. In opposition to the cross appeal, it was submitted for the appellant that the contention that the election court lacked jurisdiction on account of six months having elapsed since the filing of the petition is based on a wrong premise; that the petition was filed on 5th September 2017; that the order made on 15th November 2017 striking out the petition constituted a final determination of the matter and the petition was therefore heard and determined within six months of filing as stipulated under Section 75(2) of the Elections Act.

163. It was submitted that upon successfully appealing to this Court against the decision of the election court made on 15th November 2017 striking out the petition, the matter was remitted back to the election court whereupon time began to run afresh.

164. In the alternative, it was submitted, time stood still from 15th November 2017 (when the petition was struck out by the election court) to 5th March 2018 (when the matter returned to the election court as directed by this Court on successful appeal from decision of 15th November 2017). In other words, in computing the period of six months for purposes of Section 75(2) of the Elections Act, the period taken to hear and determine the appellant's first appeal is to be excluded; that this accords with the interpretation the election court gave to Section 75(2) of the Elections Act in its ruling given on 6th April 2018. To hold otherwise, it was submitted, would be to render nugatory, the right of appeal conferred by the law.

165. Invoking Article 259 of the Constitution, counsel urged that the Court has a duty, in interpreting Section 75(2) of the Elections Act, to breathe life into the law and construe that that provision in a manner that would not render the appellant's right of appeal nugatory and in a manner consistent with dispensing substantive justice without undue regard to technicalities of procedure. Citing a passage from a paper

titled, "***The 2010 Constitution of Kenya and its interpretation: Reflections from the Supreme Court Decision***" by Dr. Willy Mutunga, it was submitted that in a case such as this where there is a lacuna, the Court must interpret the law in a robust manner that responds to the needs of the people and to the national interest; that timelines were enacted to overcome the mischief of inordinate delays in petitions and not as roadblocks to keep litigants from the temple of justice.

166. It was submitted that the decision of the Supreme Court in ***Lemanken Aramat vs Harun Meitamei Lempaka & 2 others [2014] eKLR*** is distinguishable in that, in that case, the dispute had been heard and determined on merits and the Court had then sought to reopen the case unlike the present case where the petition had been struck out on a technicality without having been heard on merits.

Analysis and determination on the cross appeal

167. As will become clear, the cross appeal raises a difficult question.

It brings to the fore, the seeming tension between the constitutional value of timely disposal of electoral disputes on the one hand and the equally important constitutional value of fair hearing. This case is a testimony that our election laws need reform.

168. The Elections Act No. 24 of 2011(the Elections Act) was enacted pursuant to Article 87 (1) of the Constitution which mandates Parliament to enact legislation to establish mechanisms for the timely settling of electoral disputes. Section 75 (2) of the Elections Act provides that a question as to the validity of an election of a county governor shall be heard and determined by the High Court within six months of the date of lodging the petition. In the words of the Supreme Court of Kenya in ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR,*** Section 75 (2) of the Elections Act meets the constitutional command under Article 87 of the Constitution for the timely resolution of electoral disputes. In the same case, the Supreme Court explained the rationale behind the constitutional and statutory stipulations on timelines in these words:

> "**This provision must be viewed against the country's electoral history. Fresh in the memories of the electorate are those times of the past, when election petitions took as long as five years to resolve, making a complete mockery of the people's franchise, not to mention the entire democratic experiment. The Constitutional sensitivity about "timelines and timeliness", was intended to redress this aberration in the democratic process. The country's electoral cycle is five years. It is now a constitutional imperative that the electorate should know with finality, and within reasonable time, who their representatives are. The people's will, in name of which elections** ***are decreed and conducted, should not be held captive to endless litigation***."

169. The timeline prescribed by Section 75(2) of the Elections Act is a constitutional imperative as was also stated by this Court in **Evans Odhiambo Kidero & 4 other vs. Ferdinand Ndungu Waititu & 4 others [2014] eKLR**. In that case the Court pronounced that the six months period prescribed by Section 75(2) of the Elections Act "*is cast in stone and cannot be altered*".

170. There is no dispute that the petition in this case was lodged on 5th September 2017. Without a hearing on the merits, the petition was struck out by the election court on 15th November 2017. The appellant successfully appealed to this Court, which, in its judgment given on 2nd March 2018 directed the parties "*to appear before Gitari, J on 5th March 2018 for directions on hearing and disposal of the petition*." Meanwhile, the 6 months period prescribed by Section 75(2) of the Elections Act expired on 4th March 2018. On objection to jurisdiction being raised, Gitari J held, as already stated, that the court had jurisdiction. That decision was contained in her ruling delivered on 6th April 2018.

171. The circumstances in this case are to an extent comparable to those in ***Mbaraka Issa Kombe v Independent Electoral and Boundaries Commission (IEBC) & 2 others [2018] eKLR (Election Petition Appeal 3 of 2017).*** In that case, this Court allowed an appeal from a decision of an election court and remitted the election petition back to the election court for hearing and determination on merits. Once the matter was back before the election court, objection on jurisdiction was taken on the grounds that the time limited under Section 75(2) of the Elections Act had lapsed. In dismissing that objection, Ogola, J captured the tension exemplified here between the constitutional value of timely disposal of electoral disputes on the one hand and the constitutional value of fair hearing in his decision in ***Mbaraka Issa Kombe v Independent Electoral and Boundaries Commission (IEBC) & 3 others [2018] eKLR (Election Petition No. 10 of 2017*** *(Malindi))*. It is necessary to quote from the decision of Ogola, J at length:

> "**In my view the right to a fair hearing includes the right to have an election petition determined on its merits. Can this right be limited by Article 105 (2) of the Constitution? Under Article 25 of the Constitution the right to a fair trial is among the fundamental rights and freedoms that cannot be limited. I do not believe that the drafters of the Constitution in coming up with timelines for election petitions intended to lock out legitimate or deserving litigants from the seat of justice. Article 105 (2) brings about certainty, efficiency and effectiveness in resolving electoral disputes. In doing so, justice cannot be denied to litigants especially those who find themselves at the mercy of the provisions of Article 105 (2) through faults not of their own making. … it is imperative to qu*estion the intention of the drafters of the Constitution. As explained above, I do not think the provision intended to deny justice to litigants whose petitions were dismissed at the interlocutory stage and succeeded on appeal. Justice would not only be denied to such litigants but also to electorates who have the right to know who their leaders are. … Section 85A makes it clear that the Court of Appeal is a necessary intervention in election petitions. Therefore, parties to an election petition have the right to appeal against the decision of an election court. This Section neither restricts the lodging of appeals emanating from decisions such as the present case nor does it state that appeals may only be filed against petitions that were heard on their merits. In hearing an appeal, the Court of Appeal is not estopped from issuing an order remitting a petition back to the High Court for hearing and determination on its merits. … A restrictive interpretation of Article 105(2) of the Constitution would mean that upon hearing an appeal and allowing it, such as is the case in this matter, the Court of Appeal's hands are tied. It can do nothing to enforce the rights of a successful appellant. Such an appellant will have succeeded at the court but his or her victory would be pyrrhic, and amount to nothing. The remedy provided in law would be useless, and the question as to whether there was a fair hearing guaranteed under the Constitution would be in doubt. I do not think that our laws intended to disenfranchise successful litigants. … In the view of this court, the decision of the Court of Appeal gave a new lease to the Petition herein meaning that the six months period provided by the law would run a fresh in this matter."***

172. A similar approach was taken in ***Charles Kamuren v Grace Jelagat Kipchoim & 2 others [2013] eKLR*** where this Court expressed:

> **"*Turning to*** Article 105 **of the** Constitution **which requires the High Court to hear and determine an election petition as to whether a person has been validly elected as a member of parliament or whether a seat of such a member has become vacant, within a period of six months of the date of lodging the petition, we are of the considered view that where such a petition had been struck out and an appeal against such an order this Court finds that the petition ought not to have been struck out, the Court has power to direct the High Court to hear and determine the petition, even if the six months' period stipulated under** Article 105 **has lapsed. In such an instance, it cannot be argued that the constitutional period for hearing and determining the petition has already lapsed. The period of six months shall begin to run from the date of delivery of the judgment by the appellate Court. It would occasion great injustice if a successful appellant, (that is, one whose election petition is found to have been wrongfully struck out), were to be denied the right to be heard simply because the appeal is determined after six months from the date the petition was lodged."**

173. However, in ***Lemanken Aramat vs. Harun Maitamei Lempaka & 2 others*** (above) the Supreme Court was categorical that once the timelines had lapsed, the Court has no jurisdiction to extend the same. That Court stated that:

> "**The Constitution and the Elections Act, which are the foundation of a special electoral-dispute regime, confer upon the High Court the power to determine electoral disputes within six months; and the appellate Court cannot confer upon itself powers to resurrect the jurisdiction of Election Courts, after such jurisdiction is exhausted under the law**."

174. We accept, as was submitted by the appellant, that the inflexibility of the time lines fixed by the Constitution and the statute may lead to an injustice to a party in the sense that a party who would otherwise be deserving of a remedy may indeed be locked out. However, the jurisdiction conferred on the election court in election disputes of this nature is a jurisdiction that is circumscribed in relation to the period within which the petition must be heard and determined. In ***Raila Odinga & 5 others vs IEBC & 3 others [2013] eKLR***, the Supreme Court observed in the context of a presidential election petition that its jurisdiction "*is not boundless in scope: it is circumscribed in extent and in time*"; that it is "*limited in time span*"; and that a petition contesting the election of a president "*does not set off an open-ended course of litigation without time frames*." We think the same is true of the jurisdiction of the election court under Section 75(2) of the Elections Act. The jurisdiction of the election court under that provision is what the Supreme Court termed as "*a special electoral dispute regime*" in ***Lemanken Aramat vs. Harun Maitamei Lempaka & 2 others*** (above).

175. It bears repeating that the jurisdiction of the High Court to determine questions as to validity of an election of a county governor is conferred under Section 75 of the Elections Act which statute is underpinned in the Constitution under Article 87 of the Constitution. Section 75(1) of the Elections Act provides that "*a question as to the validity of an election of a county governor shall be determined by High Court within the county or nearest to the county*." Subsection (2) provides that "*a question under subsection (1) shall be heard and determined within six months of the date of lodging the petition.*" That is the jurisdiction the election court was called upon to exercise in this case. As the Supreme Court stated in ***Samuel Kamau Macharia & another vs Kenya Commercial Bank Limited & 2 others [2012] eKLR***:

> "**A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred by the constitution or other written law**."

176. It is a jurisdiction, to use an expression used elsewhere in that judgment, that is "*delimited by the legal source*" and whose parameters are set in the statute (in the words of Rawal, DCJ & VP in ***Moses Masika Wetangula vs Musikari Nazi Kombo & 2 other [2015] eKLR***.)

177. Comparatively, the Supreme Court of Nigeria in ***All Nigerian Peoples Party (ANPP) and 2 others vs. Alhaji Mohammed Goni and 8 others, SC. 1/2012(consolidated)*** when interrogating the jurisdiction of an election tribunal where, under the Constitution of that country, the time for determining the dispute and delivering judgment was limited to 180, stressed that "*jurisdiction is a creation of statute or the constitution*". That court went further to state:

> "**it follows that where a tribunal fails to comply with the above provisions the jurisdiction to continue to entertain the petition lapses or becomes spent and cannot be extended by any court order howsoever well intentioned, neither can a court order create and confer jurisdiction on any court/tribunal on any matter where jurisdiction has not been conferred by either statute or the constitution**."

In the same case, the court went on to say:

> "**…by the lower court ordering a retrial by a tribunal which had ceased to have jurisdiction in the matter it attempts to create jurisdiction in the said tribunal by operation of a court order which is not only very erroneous but unacceptable**."

178. That court opined that the time fixed by the constitution is like the rock of Gibraltar or Mount Zion which cannot be moved; that the time cannot be extended or expanded or elongated or in any way enlarged; that if what is to be done within the time so fixed, it lapses as the court is thereby robbed of the jurisdiction to continue to entertain the matter; that the time fixed "*is like a statute of limitation which takes away the right of action from a party leaving him with an unenforceable cause of action. The law may be harsh but it is the law and must be obeyed to the letter more so when it is a constitutional provision*." (Per Onnoghen, JSC). In the same case, Adekeye, SJC expressed that "*once a petition comes before the tribunal outside the 180 days, the court is divested of jurisdiction to hear it*."

179. In ***Senator John Akpanudoedehe & others vs Godswill Obot Akpapio & others, Suit No. SC. 154/2012 Citation (2012)6 iLAW/SC.154/2012*** the Supreme Court of Nigeria grappled with the question of the constitutional right to fair hearing in the context of fixed

timelines for resolution of an election dispute. Justice Rhodes-Vivour, JSC had this to say:

> **"Section 36 of the Constitution guarantees the right to fair hearing in our courts. When the Constitution provides a limitation period for the hearing of a matter (in this case 180 days) the r*ight* to fair hearing is guaranteed by the courts within 180 days. Once 180 days elapsed the hearing of the matter fades away along with any right to fair hearing. There is no longer a live petition left. There is nothing to be tried even if a retrial order is given. It remains extinguished forever. Put in another way fair hearing provided by section 36 of the Constitution is only applicable when the petition is alive. In this case the petition is dead by exflusion of time and so the issue of fair hearing cannot be raised.**"

180. In the same case, Ngwuta, JSC was even more emphatic and stated that:

> **"Fair hearing cannot be conducted in vacuuo. There must be a live case before anyone can have a right to a fair hearing and the petition here was struck out in the trial Tribunal. Since it cannot be relisted, the applicant cannot enjoy a right to a fair hearing in respect of that petition. The right to a fair hearing can be exercised only in relation to a live case. If the applicant is aggrieved by the provision, he should appeal to the Law Makers rather than ask this Court to usurp the function statutorily reserved for the National Assembly and pass a legislative judgment.**"

181. The position taken by our own Supreme Court is no different. It has in many decisions held that the statutory timelines are sacrosanct and that the jurisdiction of the election court in election petitions is time bound. In ***Lemanken Aramat vs. Harun Maitamei Lempaka & 2 others*** (above) the Supreme Court expressed:

> **"We would not agree with the opinion of counsel for the 1*st* respondent that the Appellate Jurisdiction Act (Cap. 9, Laws of Kenya) confers jurisdiction upon the Court of Appeal to remit an electoral-dispute matter back to the High Court after the six-month limit set out in Article 105 (1) and (2) of the Constitution has lapsed. The Constitution and the Elections Act, which are the foundation of a special electoral-dispute regime, confer upon the High Court the power to determine electoral disputes within six months*; and the appellate Court cannot confer upon itself powers to resurrect the jurisdiction of Election Courts, after such jurisdiction is exhausted under the law."***

182. Fortified by those pronouncements, and guided as we must be by the decision of our Supreme Court in ***Lemanken Aramat vs. Harun Maitamei Lempaka & 2 others*** (above) we are satisfied, and hold, that the time stipulated under S. 75(2) of the Elections Act is fixed and cannot be extended by the court. Like Mount Kenya or the rocks of Kit Mikayi, those time lines cannot, under the present state of the law, be moved.

183. Section 85A (2) of the Elections Act on which the election court relied as a basis for extension of time is not applicable. Section 85A deals with appeals to the Court of Appeal. It provides that appeals to this Court from decision of the High Court in an election petition shall be on matters of law and shall filed within 30 days of the decision of the High Court and that the appeal shall be heard and determined within 6 months of filing the appeal. Section 85A (2) provides that:

> **"An appeal under subsection (1) shall act as a stay of the certificate of the election court certifying the results of an election until the appeal is heard and determined."**

184. It is the certificate of the election court certifying the results that is required to be issued by the election court under Section 86 of the Elections Act that is stayed or frozen to await a determination of the appeal by this Court. That provision cannot be construed, as the learned Judge did, as extending the time fixed under Section 75 within which the election petition should be determined, which as we have already stated cannot be moved. It is not open to the Court to interpret the provisions in a manner that would negate the constitutional and legislative intent or imperative of having electoral disputes resolved in a timely fashion.

185. We do not think that the solution to the difficulty brought to the fore by this and other like cases is for the court to extend the time stipulated for hearing and determination of election disputes. We do not think that the court has the mandate to do so. Perhaps the situation can be ameliorated by an amendment to the Elections (Parliamentary and County Elections) Petition Rules, and other relevant rules, to provide that all election petitions must be heard and determined on merits and that no election petition should be dismissed or struck out for want of form or on a technicality. That might minimize the risk of the jurisdiction of the election court lapsing before a substantive determination of the election dispute is reached.

186. The result of the foregoing is that the cross-appeal succeeds. To the extent that the ruling of the election court delivered on 6th April 2018 dismissed the 3rd and 4th appellants' objection to jurisdiction that part of the ruling is hereby set aside and substituted with an order upholding the objection that the election court lacked jurisdiction to hear and determine the election petition after 4th March 2018.

187. In conclusion, we allow the 3rd and 4th respondents cross appeal dated and filed on 17th July 2018 and uphold the objection that the High Court had no jurisdiction to hear and dispose of the election petition upon expiry of 6 months after the election petition was lodged. We declare that all proceedings before the High Court in Nyeri Election Petition Number 2 of 2017 subsequent to the expiry of the 6 months after the election petition was lodged are a nullity.

For the same reason, the appellant's appeal is hereby dismissed

188. Given this result, we think that the appropriate order on costs is that each party should bear their own costs of this appeal as well as the costs of the proceedings before the High Court.

Orders accordingly

Dated and delivered at Nairobi this 20th day of December, 2018.

R. N. NAMBUYE

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

I certify that this is

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JUDGE OF APPEAL

The true copy of the original.

DEPUTY REGISTRAR