



**Abdalla v Imu & 3 others (Civil Appeal 36 of 2013)
[2014] KECA 888 (KLR) (13 January 2014) (Judgment)**

Timamy Issa Abdalla v Swaleh Salim Swaleh Imu & 3 others [2014] eKLR

Neutral citation: [2014] KECA 888 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL 36 OF 2013
HM OKWENGU, MSA MAKHANDIA & F SICHALE, JJA
JANUARY 13, 2014**

BETWEEN

TIMAMY ISSA ABDALLA APPELLANT

AND

SWALEH SALIM SWALEH IMU 1ST RESPONDENT

FAHIM YASIN TWAHA 2ND RESPONDENT

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 3RD
RESPONDENT**

SILVANO BUKO BONAYA 4TH RESPONDENT

*(An Appeal from the Judgment, Decree and Order of the High Court of
Kenya at Malindi (Muchemi, J.) dated 25th September, 2013 in Election
Petition No.4 of 2013 Consolidated with Election Petition No. 5 of 2013)*

**Court of Appeal Reinstates Timamy Issa Abdalla as the Duly Elected Governor in the Lamu
Gubernatorial Elections.**

Reported by Nelson K. Tunoi

***Election Law** - election petition - gubernatorial election - conduct and results - documents to be placed in the ballot box - ballot papers - counter foils - whether there was a legal requirement that counterfoils of the used ballot papers be stored in ballot boxes - Elections (General) Regulations, regulation 81(2).*

Brief facts

The Appellant (Timamy Issa Abdalla) sought to have the judgment and the certificate issued by the Election Court under section 86 of the Election Act altering the election of the Appellant as the duly elected Governor of Lamu County set aside. The Memorandum of Appeal filed by the Appellant raised 32 grounds, alleging *inter alia*, that the Election Court erred in law and fact in: failing to give effect to the democratic will of the voters



in Lamu county by failing to uphold the election of the Appellant; nullifying the election of the Appellant on the basis of alleged missing counterfoils for four polling stations when the elections and results for the four polling stations were in dispute; and misdirecting itself on the issue of the burden and standard of proof in an election petition by shifting the burden to the Appellant, the 3rd and 4th Respondents.

In his cross appeal the 1st Respondent challenged the dismissal of his petition on several grounds, *inter alia*, that the Election Court erred in making separate findings in two election petitions which had been consolidated under rule 18 of the Election Petition Rules; that having found that the election was not conducted within the requirement of articles 81 and 86(d) of the Constitution, the Election Court ought to have allowed the 1st Respondent's petition; and that having exercised its discretion and ordered scrutiny the judge erred in applying the evidence arising from the scrutiny selectively in Petition No 5 of 2013 and not Petition No 4 of 2013.

The 2nd Respondent opposed the main appeal and filed under section 94 of the Court of Appeal Rules, 7 grounds for affirming the decision of the Election Court, which grounds included the fact that the election process was grossly flawed, inaccurate and the results prematurely announced; that the burden of proof in regard to the missing counterfoils and extra bundle of votes found in the sampled ballot boxes shifted to the Appellant and the IEBC as per section 108, 112 and 119 of the Evidence Act, which burden was not discharged as no explanation was offered to rebut any adverse presumption; and that allowing the Appellant's appeal would cause a constitutional crisis as the right of appeal under section 85A of the Elections Act 2011 is irreconcilable with article 182(5) of the Constitution.

The IEBC (3rd Respondent) and 4th Respondents supported the main appeal and opposed the 1st Respondent's cross appeal. IEBC and the 4th Respondent challenged the Election Court's finding that the election process was not transparent, free and fair on account of missing vote bundle of the Appellant's votes and missing counterfoils in the ballot boxes, contending that the current election laws did not oblige the presiding officer to insert the used counterfoils in the ballot boxes; that the Election Court failed to accept the report on scrutiny which showed that the Appellant had received the most number of votes and that the Election Court's decision was based on speculation.

Issues

- i. Whether in determining the integrity of the electoral process and the democratic will of the voters in Lamu, the Election Court properly interpreted and applied the general electoral principles provided in the Constitution, together with the provisions, rules and regulations stipulated under the Elections Act.
- ii. Whether the nullification of the results of the gubernatorial elections for Lamu County and the election of the Appellant was the appropriate legal consequence.
- iii. Whether the results of the scrutiny and recount of the ballots that was initiated by the Court *suo motto* should have been used in determining the two petitions (consolidated) filed before the Election Court.
- iv. Whether the Election Court was right in drawing a conclusion that the IEBC had failed in its constitutional duty provided under article 86 of the Constitution because the counterfoils were not in ballot boxes.
- v. Whether the irregularities of the missing vote bundles affected the outcome of the election results.

Held

1. The scrutiny and recount of the ballots was an issue before the Election Court, and the findings of the Election Court on issues arising therefrom were not superfluous matters but matters originating from the pleadings. Thus the Election Court could not ignore the scrutiny report or its findings therein. The Election Court had an obligation to use its findings on the primary facts established before it, in determining the integrity of the elections.

2. Under regulation 86 the Returning Officer was required after the final tallying and announcement of the results to seal in separate tamper proof envelopes, the counted ballot papers which were not in dispute, the disputed ballot papers, and rejected disputed ballot papers, and put the sealed tamper proof packets in used



ballot box. Thus it was evident that at no time were the counterfoils required to be sealed in the ballot box, but were required to be delivered to the Returning Officer in tamper proof sealed envelopes. This position was a departure from the former regulations provided under the National Assembly and Presidential Elections Act (cap 7). Regulation 34 of the Presidential and Parliamentary Elections Regulations listed counterfoils of used ballot papers among the documents required to be put in separate sealed packets, which packets were, under regulation 39(3) of the same Regulations, to be put inside the ballot boxes and delivered to the Returning Officer.

3. Counterfoils were included in the definition of election materials under section 2 of the Elections Act, and under article 86 of the Constitution, IEBC had a constitutional obligation to ensure that the voting system employed for the Lamu gubernatorial election was simple, accurate, verifiable, secure, accountable and transparent and appropriate structures and mechanisms to eliminate electoral malpractices were put in place including the safekeeping of electoral materials. That imposed a responsibility on IEBC to ensure the safekeeping of counterfoils of ballot papers.

4. Although the Election Court made reference to regulations 73(3) and (4) of Elections (General) Regulations 2012, it misdirected itself in relying on a decision which was decided under the former Regulations, hence the erroneous conclusion that the counterfoils were absent from the ballot boxes.

5. The Election Court misapprehended the requirement for the presence of counterfoils in the election boxes and took into account factors it ought not to have taken into account. This led the Election Court to wrongly shift the burden of proof onto IEBC and the 4th Respondent with regard to the alleged missing counterfoils. Under these circumstances the finding of the Election Court that the counterfoils were missing and that IEBC and 4th Respondent failed in discharging their responsibility, was based on a fundamental misapprehension of the Regulations and wrong application of the law.

6. The Election Court's conclusion that the will of the people of Lamu County would not be said to have been done with such "glaring evidence of manipulation" was further an apparent misdirection and contradiction in light of the Election Court's findings in regard to the irregularities complained of in the petition, all of which were found either not established or where established not to have affected the elections.

7. There were no primary facts established by the Election Court which could support the finding that the missing vote bundles was evidence of glaring manipulation of the election result. The facts established revealed an administrative mistake and not deliberate manipulation of the election such as could reasonably lead to a conclusion that the electoral principles in regard to free and fair elections were breached. In addition, the Election Court did not apply section 83 of the Elections Act, 2012 as neither the missing counterfoils nor the missing vote bundles were irregularities that affected the elections or undermined the integrity of the electoral process, such as could justify the nullification of the Appellant's election.

8. The Election Court did not give effect to the will of the electorate in Lamu County in regard to the Lamu gubernatorial election. The will of the electorate could not be determined through conjecture and supposition. The will of the electorate was clearly demonstrated by the majority votes cast in favour of the Appellant in an election that was apparently free and fair, as the administrative mistakes committed by IEBC and 4th Respondent did not affect the results of the elections or undermine the integrity of the electoral process.

9. Under rule 18 of the Election Petition Rules, 2013, the consolidation of the Petition was only intended for the purpose of expediting the hearing of the election petitions, so that one inquiry was carried out in regard to petitions arising from the same election. The Rule did not take away the individual characteristic of the petitions, as each petition questioned the conduct of the elections on its own peculiar grounds. While a general inquiry into the conduct of the election was carried out, the Election Court was obliged to make specific findings in regard to the grounds put forward by each petitioner, to the extent that the general inquiry applied. Where necessary the Election Court would have to go beyond the general inquiry in addressing issues peculiar to a particular petition.



10. The Election Court properly applied rule 18 to arrive at a conclusion regarding the specific prayers sought in Petition No 4 of 2013 and Petition No 5 of 2013. The decision of the Court in dismissing one petition and allowing the other was obviously informed by its findings on the specific grounds upon which the conduct of the elections was challenged, and the prayers sought in each petition.

11. There was no selective application or discrimination in applying the results of the scrutiny and recount of the ballots to petition No 5 of 2013 and not Petition No 4 of 2013. Nor was there any violation of the 1st Respondent's constitutional rights under article 27 of the Constitution of Kenya, 2010. Moreover, the finding made by the Election Court that there was breach of articles 81 and 86(d) of the Constitution of Kenya, 2010 was wrong as it was a conclusion that a reasonable tribunal could not have arrived at given the primary facts that were established.

12. On the issue of costs, under section 84 of the Election Act, the Election Court had discretion to award costs but such costs should follow the cause. Further rule 36(2) of the Election (Parliamentary and County Election) Petition Rules 2013, gave the Election Court discretion to make orders on costs. Thus, the award of costs was in the unfettered discretion of the Election Court.

13. An Appellate Court could only interfere if the Election Court's discretion was not exercised judiciously. In imposing the burden of payment of costs upon IEBC and the 4th Respondent whose conduct led to Petition No 5 of 2013 being allowed, and ordering the 1st Respondent (whose petition was dismissed) to meet its own costs, the Election Court exercised its discretion judiciously and in accordance with the relevant provisions of the law.

Appeal allowed.

Orders

Appellant declared validly elected as Lamu County Governor; order by Election Court nullifying the gubernatorial elections quashed and set aside; cross appeal dismissed with costs to the 1st & 2nd Respondents equally.

Citations

East Africa

1. *Albeity, Hassan Abdalla v Abu M Abu Chiaba & another* Election Petition No 9 of 2013 - (Mentioned)
2. *Amana, Richard v Independent Electoral and Boundaries Commission & 2 others* Election Petition No 6 of 2013 - (Explained)
3. *Attorney General v David Marakaru* [1960] EA 484 - (Distinguished)
4. *Bura v Sarwatta* [1967] EA 234 - (Explained)
5. *Bwana, Bwana Mohamed v Shakilla Abdalla Mohamed* Election Petition No 7 of 2013 - (Explained)
6. *Waititu, Ferdinand v Independent Electoral and Boundaries Commission & 8 others* Election Petition No 1 of 2013 - (Explained)
7. *Jobo v Nyange* [2008] 3 KLR (EP) 500 - (Explained)
8. *King'ara, Peter Gichuki v Independent Electoral & Boundaries Commission & 2 others* Civil Appeal No 23 of 2013 - (Explained)
9. *Mbowe v Eliufoo* [1967] EA 140 - (Distinguished)
10. *Owners of the Motor Vessel "Lillians" v Caltex Oil (Kenya) Limited* [1989] KLR 1 - (Followed)
11. *Musau, Thomas Mulinda & 2 others v Independent Electoral and Boundaries Commission & 2 others* Election Petition No 2 of 2013 - (Followed)
12. *Musimba, Patrick Mweu v Richard N Kalembe Ndile & 3 others* Civil Application No 231 of 2013 - (Explained)
13. *Nairobi City Council v Thabiti Enterprises* [1995-1998] 2 EA 231 - (Explained)
14. *Ndile, Richard Kalembe v Patrick Musimba* Election Petition No 117 of 2013 - (Explained)



15. *Nyamweya, Manson Onyongo v James Omingo Magara & 2 others* Election Petition No 3 of 2008 - (Followed)
16. *Odinga, Raila & 3 others v Independent Electoral and Boundaries Commission & 2 others* Petition No 5 of 2013 - (Explained)
17. *Peters v Sunday Post* [1958] EA 424 - (Explained)
18. *Selle & another v Associated Motor Boat Co Ltd* [1968] EA 123 - (Explained)
19. *Speaker of the Senate & another v Attorney General & another & 3 others* Advisory Opinion Reference No 2 of 2013 - (Followed)
20. *Wambua, Gideon Mwangangi v Independent Electoral and Boundaries Commission & others* Election Petition No 4 of 2013 - (Explained)

United Kingdom

21. *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] EWCA Civ 1; [1948] 1 KB 223 - (Explained)
22. *Bracegirdle v Oxley* [1947] 1 All ER 126; [1947] KB 349 - (Followed)
23. *Morgan v Simpson* [1974] 3 All ER 722 - (Followed)

Statutes

East Africa

1. Appellate Jurisdiction Act (cap 9) section 3(1) - (Interpreted)
2. Constitution of Kenya, 2010 articles 27, 38, 81(e); 86(d); 88(5); 164(1)(3); 182(4)(5) - (Interpreted)
3. Court of Appeal Rules, 2010 (cap 9 Sub Leg) rules 32(6); 94 - (Interpreted)
4. Election (Parliamentary and County Elections) Petition Rules, 2013 (Act No 11 Sub Leg) rules 9(a); 18; 21; 33; 34(1); 36(1)(2); 39(3) - (Interpreted)
5. Elections (General) Regulations, 2012 (Act No 11 Sub Leg) regulations 73(3)(4); 74; 77(1)(d); 78; 79(6)(7); 81(1)(2); 83(1)(a); 86; 93(1); 97(1) - (Interpreted)
6. Elections Act, 2011 (Act No 24 of 2011) sections 2; 80(3); 82(1), 83, 85A - (Interpreted)
7. Evidence Act (cap 80) sections 107, 108, 112, 119 - (Interpreted)
8. National Assembly and Presidential Elections Act (cap 7) (Repealed) section 23(4) - (Interpreted)

JUDGMENT

Introduction

1. The Appellant Timamy Issa Abdalla was declared Governor of Lamu County following the General Elections held on 4th March 2013. Swaleh Salim Swaleh Imu and Fahim Yasin Twaha, 1st and 2nd Respondents who had also vied for the same position, separately challenged the Appellant's election in Election Petition No 4 of 2013 and Election Petition No 5 of 2013 respectively, filed in the High Court at Malindi (sitting as Election Court). The Respondents in the Petitions were the Independent Electoral and Boundaries Commission (IEBC), Silvano Buko Bonaya, now the 3rd and 4th Respondent to this appeal (hereinafter referred to as IEBC and 4th Respondents respectively), and the Appellant. Pursuant to an order made by the Election Court (Muchemi J), the two Petitions were consolidated and heard together.
2. On 20th August 2013 the Election Court allowed the 2nd Respondent's Application for scrutiny in respect of 6 polling stations. Invoking section 82 of the *Elections Act*, the Election Court also ordered suo motto, random scrutiny of 20 polling stations. The scrutiny was done under the supervision of



the Deputy Registrar of the High Court. On 25th September 2013, the Election Court (Muchemi J) delivered judgment in which petition No 4 of 2013 was dismissed but Petition No 5 of 2013 allowed, and orders made nullifying the election of the Appellant and ordering fresh elections for the position of Governor for Lamu County. This triggered the Appeal lodged by the Appellant and the cross Appeal by the 1st Respondent. On 21st November 2013 we gave our decision allowing the main Appeal and reinstating the Appellant as Governor of Lamu County. In accordance with rule 32(6) of the Court of Appeal Rules we reserved the reasons for our decision. We now give the reasons for our decision in this judgment.

The Judgment of the Election Court

3. The learned judge of the Election Court identified the issues for determination in the Petitions before her as follows:
 - (i) whether the gubernatorial election in Lamu county were free, fair and credible and conducted in accordance with the principles laid down in articles 81 and 86 of the Constitution, statutes and regulations;
 - (ii) whether any election offences or irregularities were proved and the effect of such offences and irregularities on the election;
 - (iii) whether the Appellant was validly elected as a Governor of Lamu county;
 - (iv) who among the parties to this petition will meet the cost of the Petition.
4. The gist of the learned judge's findings on these issues can be discerned from the following extract of the judgment:

“The analysis of the evidence does not establish any election offence on part of any of the parties. However, several irregularities have been proved.

- a) transfer of polling station without complying with the law;
- b) failure by presiding officers to comply with several aspects of regulation 79;
- c) flawed announcement of results;
- d) failure by the returning officers to avail copy of the result declaration to the candidates and agents;
- e) discrepancies in the scrutiny report;
- f) missing ballot bundles;
- g) missing counterfoils.

The Court will be guided by the established principles in electoral law. ... Section 83 of the Act is based on the principle that a petitioner is not only required to prove non-compliance with the law but must prove that the irregularities materially affect the election. This was clearly stated in the case of *Richard Amana v IEBC & others* by Kimaru, J in regard to discrepancy and irregularities:

“Apart from that, the Petitioner is required to establish that the errors and irregularities were either occasioned by outright negligence or deliberate action on the guilty party, irregularities which can be attributed to an innocent mistake



or an obvious human error cannot constitute a reason for impeaching an election result.”

... On the issue of mathematical errors and discrepancies, the Court noted that these were not deliberate mistakes. The presiding officers, for (sic) first time in this country were handling six (6) elections simultaneously and at counting time which took place at night in most stations, the officers must have been quite exhausted. The errors were explained by the officers who testified in court and I am convinced that similar circumstances cut across the board. The discrepancies did not substantially affect the outcome of the election.

Bearing in mind the provisions of regulations 79(6), 79(7), 97(1), it is my finding that the breaches by the presiding officers as regards the candidates and agents, are not reasons enough to invalidate an election.

The flawed announcement of the results by the returning officer may have been affected by long hours at work waiting for delayed results and the need to meet the deadline of submitting the county results to the national tallying centre. The results were subsequently gazetted and thus validated. The tallying process was completed and winners announced before the returning officer left in a hurry to Nairobi. The Petitioners did not establish that the irregularity materially affected the outcome of the elections.

The irregular transfer of Ndau Dispensary polling station though irregular did not affect the voter turnout which was over 86%. One would be very ambitious to expect 100% voter turn out in any election. It was held in the case of *Bura v Sarwatta* (1967) EA 234 that:

“The transfer of voters and their admission to vote at polling stations other than those allotted to them constituted a non-compliance with the Act but such non-compliance did not affect the result of the elections.”

Article 86(d) of the Constitution imposes a duty on the 2nd Respondent;

“the duty to ensure that appropriate structures and mechanisms to eliminate electoral malpractices are put in place, including the safe keeping of electoral materials.”

Regulation 73(3) and (4) requires that a presiding officer shall seal counterfoils of the used ballot papers in a tamper proof envelope for purposes of being delivered to the returning officer.

Counterfoils are part of the ballot paper issued to a voter and must correspond with the document issued in all material particulars. The accountability of a document is validated by the counterfoil. The significance of a counterfoil in an election is to ensure that the ballots issued to the registered voters are the only ones which go to the ballot box. The essence of a counterfoil is to keep in check malpractices including ballot stuffing.

In the case of *Manson Nyamweya v James Magara and 2 others* (2009) eKLR, Musinga, J (as he then was) held:

“If scrutiny showed that the documents in the ballot boxes were substantially non-compliant or that certain statutory documents were not contained therein, a recount of the ballots per se cannot cure the inherent defect. The presence of a ballot paper in a ballot box is validated by the counterfoil thereof and the marked



voters register. Without the two there is no telling how it found its way in the ballot boxes.”

In the case of *Thomas Mulinda Musau & 2 others v IEBC & others* Machakos Election Petition No 2 of 2013 Mutende, J held:

“lack of counterfoils is therefore grave as the ballot papers in the ballot boxes cannot be ascertained and verified if indeed they were duly cast as votes or not. Missing counterfoils would basically mean that ballot papers in ballot boxes were not the ones used by the voters.”

I am in agreement with the decisions of the Court in the two cases that missing of counterfoils in a ballot box affects the integrity of the election. The recount and scrutiny was done in only 26 polling stations out of 136 in Lamu County covering only 35% of the electoral area. There is a great probability that a scrutiny of votes for all the 136 polling stations would have shown a lot more.

The issue of missing vote bundles is in violation of the principles set out in article 81 of a free, fair and transparent election. The conduct of the officials of the 2nd Respondent in the election is put into question. The will of the people of Lamu county will not be said to have been done with such glaring evidence of manipulation.

The 3rd Respondent led with a margin of 1,798 votes upon scrutiny and recount of the 26 stations. I was referred to the case of Ferdinand Waititu v IEBC and others where the margin between the Petitioner and the Respondent was over 85,000 votes which is indeed a very high margin in comparison with the case before me. However, there comes a time depending on the circumstances of each case when a court will not look at number but at the integrity, credibility and fairness of an election. In considering whether the 1st and 2nd Respondent conducted the election in a transparent, free and fair manner, the Court must of necessity give a purposive interpretation to the *Constitution* and electoral code in order to give effect to article 81 and 86 of the *Constitution*.

It is my finding that in view of the foregoing, the 3rd Respondent was not validly elected as the governor of Lamu county on the 4th March 2013. I find Petition No 5 of 2013 successful and hereby order that the election be and is hereby nullified. A fresh election is hereby ordered ”

The Appeal and Cross Appeal

5. In his Appeal the Appellant seeks to have the judgment of the Election Court set aside, and the certificate issued by the judge under section 86 of the *Election Act* altering the election of the Appellant as the duly elected Governor of Lamu County similarly set aside. The Memorandum of Appeal filed by the Appellant raised 32 grounds, alleging inter alia, that the trial judge erred in law and fact in: failing to give effect to the democratic will of the voters in Lamu county by failing to uphold the election of the Appellant; reaching a decision that is contrary to the *Constitution* of Kenya 2010 and electoral laws; improperly exercising her discretion by taking into account matters which she ought not to have taken into account and failing to take into account the matters she should have taken into account; nullifying the election of the Appellant on the basis of alleged missing counterfoils for four polling stations when the elections and results for the four polling stations were not a disputed issue raised or pleaded by the 2nd Respondent in his Petition; arriving at a conclusion which was inconsistent with her holding that the irregularities and non compliance with the law and regulations, by the 3rd and 4th Respondents did



not affect the final results; misdirecting herself on the issue of the burden and standard of proof in an election petition by shifting the burden to the Appellant, 3rd and 4th Respondents; failing to dismiss Petition No 5 of 2013 when the Petitioner had not proved the grounds alleged in the Petition to the required standard; nullifying the election on the basis of post declaration interference and post election acts and events which had no relevance or effect on the elections, the counting of votes or the tallying and announcement of results; the exercise of her discretion on issue of costs, by failing to issue an order in relation to the Appellant's costs in Election Petition No 4 of 2013 and limiting the Appellant's costs in Election Petition No 5 of 2013 to a sum of Kshs 2 million only.

6. In his cross appeal the 1st Respondent challenges the dismissal of his petition on 14 grounds. The gist of the grounds is that the judge erred in making separate findings in two Election Petitions which had been consolidated under rule 18 of the Election Petition Rules; that having found that the election was not conducted within the requirement of articles 81 and 86(d) of the Constitution, the judge ought to have allowed the 1st Respondent's Petition; that having exercised her discretion and ordered scrutiny the judge erred in applying the evidence arising from the scrutiny selectively in Petition No 5 of 2013 and not Petition No 4 of 2013; that the judge erred in denying the 1st Respondent costs after finding that the Appellant committed irregularities and that the 3rd and 4th Respondents failed in their mandate to discharge their duties under article 81 of the Constitution.
7. The 2nd Respondent opposed the appeal and filed under section 94 of the Court of Appeal Rules, 7 grounds for affirming the decision of the Election Court. The grounds included the fact: that the election process was grossly flawed and inaccurate and the results prematurely announced; that the burden of proof in regard to the missing counterfoils and extra bundle of votes found in the sampled ballot boxes shifted to the Appellant and the IEBC as per section 108, 112 and 119 of the Evidence Act, which burden was not discharged as no explanation was offered to rebut any adverse presumption; that allowing the Appellant's appeal would cause a constitutional crisis as the right of appeal under section 85A of the Elections Act 2011 is irreconcilable with article 182(5) of the Constitution; that the appeal does not meet the threshold set under section 85A of the Elections Act, as some of the Appellant's grounds of appeal raises issues of facts and not pure points of law; and that the Appellant had introduced without leave of court, evidence that was never adduced at the trial.
8. IEBC and 4th Respondents supported the Appeal and opposed the 1st Respondent's cross appeal. IEBC and 4th Respondents challenged the Election Court's finding that the election process was not transparent, free and fair on account of missing vote bundle of the Appellant's votes and missing counterfoils in the ballot boxes, contending that the current election laws does not oblige the presiding officer to insert the used counterfoils in the ballot boxes; that the Election Court failed to accept the report on scrutiny which showed that the Appellant had received the most number of votes and that the Election Court's decision was based on speculation.

Preliminary Issues

9. Prior to the filing of this Appeal, the Appellant had filed a Miscellaneous Application dated 30th September 2013 seeking orders of injunction, stay of further proceedings and stay of execution of the judgment of the High Court. The 2nd Respondent also filed a notice of preliminary objection to the appeal dated 30th October 2013 in which he challenged the competence of the appeal. The gist of preliminary objection was that the appeal contravenes section 85A of Election Act 2011 as the grounds of appeal raises issues of facts. Thus it was contended that the jurisdiction of the Court has not been properly invoked. Secondly that the Appeal challenging the finding of the Election Court on grounds anchored on the order of scrutiny and recount of the votes, had been filed out of time and was therefore incompetent.



10. Section 85(A) of the Elections Act provides:

“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 and shall be -

- (a) filed within thirty days of the decision of the High court; and
- (b) heard and determined within six months of the filing of the Appeal.”

This means that appeals to this Court from the High Court as an Election Court can only be on matters of law and the appeal must be heard and determined within six months from the date of filing of the Appeal. The provisions of the Elections Act have to be read together with the relevant constitutional provisions relating to elections of County Governor.

11. The relevant provisions are articles 182(4) & (5) of the Constitution which states as follows:

“ 182

- (1) the office of the County Governor shall become vacant if the holder of the office-
 - (a) ...
 - (b) ...
 - (c) ...
 - (d)
 - (e) is removed from the office under this Constitution
“(4) If a vacancy occurs in the office of county governor and that of deputy county governor, or if the deputy County Governor is unable to act, the speaker of the County Assembly shall act as county governor.
 - (s) If a vacancy occurs in the circumstances contemplated by clause (4), an election to the office of County Governor shall be held within sixty days after the speaker assumes the office of County governor.”

12. In accordance with the above provisions IEBC that is the body mandated under article 88 of the Constitution to conduct and supervise elections, scheduled a by-election for the position of the County Governor for Lamu for 2nd December 2013, which was within the sixty days provided under article 88(5) of the Constitution. The Appeal before this Court having been lodged on 26th September 2013 this Court had until 26th April 2014 to finalize the Appeal. However, the by-election created urgency, as it was desirable to have the Appeal determined before the by-election is held. The rationale for this was that determination of the Appeal would obviate the by-election being carried out in an atmosphere of uncertainty or confusion, or the possibility of the by-election being rendered a futile exercise and an unnecessary waste of public funds, should the Appeal be declared successful after the by-election. It was for this reason that the Court conferred with the parties and agreed on strict time lines for the



expeditious disposal of the Appeal. Consequently, the Appellant opted to withdraw his interlocutory application in preference to the hearing of the main appeal. For the same reasons of expediency, the Court directed that the Preliminary Objection that was filed by the 2nd Respondent be argued within the Appeal. It was also agreed that the Appeal be heard by way of written submissions which were filed, exchanged and highlighted orally before the Court.

Appellant's Submissions

13. Mr Nowrojee, Mr Buti and Mr Isaac Onyango duly represented the Appellant with Mr Nowrojee orally highlighting the Appellant's written submissions. It was submitted that the Appeal was brought in conformity with the provisions of section 85A of the *Elections Act* as it raises issues of law. *Bracegirdle v Oxley* (1947) 1 All ER 126; and *Attorney General v David Marakaru* (1960) EA 484 (*Marakaru case*) were relied upon on what amounts to matters of law, and the proposition that a decision is erroneous in law if it is one to which no court would reasonably come to. Focusing on grounds 22, 25, 28 and 29 in the Memorandum of Appeal, it was submitted that the grounds upon which Election Petition No 5 of 2013 was anchored, were fully analyzed by the learned judge who found no merit in all the complaints and allegations that were pleaded, as they were either not proved or did not affect the results of the election; that the judge misdirected herself in the purpose of scrutiny and recount of votes and erred in introducing new evidence in her judgment in respect of the polling stations whose elections and results were neither pleaded or questioned in the Petition nor challenged by affidavit evidence in court.
14. It was argued that the learned judge committed a grave error of law in basing her decision on the issue of missing counterfoils with regard to stations that were not the subject of dispute in the Petition; that the alleged tampering in those stations was shown to have happened after the receipt of the ballot boxes by the Court.
15. It was reiterated that the judge had no other legal avenue but to dismiss the Petition, having found that none of the allegations contained in the Petition were proved; that none of the parties had committed an election offence; and that the recount and scrutiny report had established that the Appellant was in the lead over other contenders.
16. *Mbowe v Elinfoo*, (1967) EA 140 was cited for the conclusion that the election results were not "affected" as the contest between the Appellant and other contenders did not seem "much closer" than it appeared to be when first determined. It was pointed out that at the close of the poll, the Appellant was leading with a clear difference of 1,959 votes; that after the scrutiny the Appellant was still in the lead with a clear difference of 1,798 votes; and that a slight decrease in the results of the Appellant did not make the contest to appear "much closer" than it was earlier and therefore, it could not be said that the election "was affected". Maintaining that any post election irregularities of non compliance with the Regulations did not affect the elections, *Jobo v Nyange* (2008) 3 KLR 500 was cited for the proposition that:

"It is not every non-compliance or every act of omission in breach of the elections regulations or procedure that invalidates an election for being non compliant with the law."
17. It was further argued that the learned judge was wrong in using the submissions advanced by the 2nd Respondent as the only basis for annulling the election of the Appellant, as submissions tendered by litigants in any proceedings are not and do not form part of the evidence in the case; that in polling stations where the judge held there were missing ballot bundles and missing counterfoils, there had been no complaints or disputes raised by the 2nd Respondent; and that the issues not having been pleaded, the judge could not deal with them. In this regard *Nairobi City Council v Thabiti Enterprises* (1995-1998) 2 EA 231 CAK was cited. It was argued that in concluding that there was



“great probability that the scrutiny of votes for all 136 polling stations would have shown a lot more” the judge was guided by speculation and conjecture rather than evidence.

18. In regard to the burden of proof it was counsel’s view that the judge misdirected herself as the legal burden was on the petitioner to prove his petition to the required standard of proof as set out in section 107 of the *Evidence Act*, and that the evidential burden of proof could only shift to the Respondent in accordance with the provisions of section 108 of the *Evidence Act*. *Raila Odinga & others v IEBC & others* Petition No 5 of 2013, (Raila Odinga case) was relied upon for the proposition that where a party alleged nonconformity with the electoral law, the Petitioner must not only prove that there have been non-compliance with the law, but that such failure of non-compliance did affect the validity of the election; that the 2nd Respondent did not discharge the legal or evidential burden of proof as the Court had made a finding that the grounds in the Petition were either not proved or where the grounds were proved they did not affect the results of the election; and that the Court should have as in the *Raila Odinga case* upheld the presumption in law that the elections were done rightly and regularly.
19. It was further argued that the circumstances in *Manson Nyamweya v Omingo Magara & 2 others* (2009) eKLR (Magara case) which was applied by the learned judge were different from the Appellant’s case as there were many other irregularities the cumulative effects of which led to the conclusion that there was substantial non-compliance. In addition the *Magara case* was determined on the repealed *National Assembly and Presidential Elections Act* under which the 2007 elections applied. A distinction was drawn from that Act which required the counterfoils to be sealed in ballot boxes, and the present law under the *Elections Act* 2011 and Elections General Regulations 2012 that does not provide for such a requirement. It was noted that regulation 74 provides that the counterfoils should be in tamper proof sealed envelopes and not in ballot boxes, while regulation 81 of the Elections General Regulations 2012 that specifies what is required to go inside the ballot boxes does not include counterfoils, and therefore the trial judge erred in following a decision which applied a law that was not applicable.
20. *Thomas Mulinda Musau v IEBC & others* Election Petition No 2 of 2013 Machakos (Mulinda Musau case), was also distinguished it being noted that unlike the present case in which the learned judge made a finding that there was no evidence of rigging or malpractice established by the Petitioner, and that no election offence was committed by either of the parties, the Petitioner therein had specifically sought for scrutiny of counterfoils of the votes cast and the Court found various irregularities established apart from the missing counterfoils.
21. Further it was pointed out that the position adopted by the learned Judge in the case of *Bwana Mohamed Bwana v Shakilla Abdalla Mohamed* Election Petition No 7 of 2013 Malindi (Shakila case), where there were missing counterfoils in three polling stations, and the learned judge nullified the results of the three polling stations and not the entire election, was the correct approach supported by regulations 77(1)(d) of the Election General Regulations and regulation 83(1)(a) of Election General Regulations, and that if these provisions were applied to each of the candidates in the four polling stations in respect of which the counterfoils were missing, the Appellant would still remain the winner with a clear margin of 1,575 votes.
22. *Gideon Mwangangi Wambua v IEBC & others* EP No 4 of 2013 Mombasa, was relied upon for the proposition that the aim of scrutiny is to assist the Court to verify the allegations made by the parties to the Petition, which allegations themselves must be hinged on pleadings. It was submitted that the judge erred in law: in diverting from the very purpose that she had correctly set out to do, which was to ascertain the number of votes each candidate got in each polling station; in relying on unpleaded matters which did not form part of the Petitioner’s case; in relying in post-election interference of election materials to allow the election of the Appellant as the Deputy Registrar who received the ballot



boxes for purposes of scrutiny confirmed that there were seals broken after the ballot boxes from some of the affected polling stations were received in court.

1st Respondent's Submissions

23. In response to the Appellant's submissions, Mr Adhoch who represented the 1st Respondent submitted that the learned judge was right in nullifying the election on post election interference and post election acts because these acts were actually relevant to the elections; that rule 9(a) of the Elections (Parliamentary and County Elections) Petition Rules 2013 makes it mandatory for the IEBC to be a party in election petitions because of the obligations imposed on IEBC by article 86(d) of the Constitution and regulation 93(1) of the Elections Petition Rules 2013; that a continuing obligation is imposed on IEBC and 4th Respondent to ensure the safety of the electoral materials during and even after the elections; that IEBC was in breach of this duty and failed to present credible election material that would enable the Court to determine the will of electorate; and that the interference affected the outcome of the petition. Counsel found support for his submissions in the Magara case.
24. Counsel further argued that contrary to the Appellant's submissions, the Petitions as consolidated and the resultant judgment, supported what had been pleaded and was as a result of the evidence that emanated during the trial; that the issue whether the evidence which arose out of the scrutiny was to be relied on, was raised by the Appellant and determined by the Court; that the Court could not ignore the material aspect of the report; and that the judge having invoked section 82(1) of the Elections Act in ordering scrutiny and made the analysis of resultant evidence, including missing counterfoils, discrepancies in transposition, broken and missing seals, missing forms 35s, failure to sign form 35s and missing bundles, it cannot be said that the judgment was not supported by pleadings.
25. In regard to burden of proof, counsel submitted that in view of section 112 of the Evidence Act the judge correctly shifted the burden to IEBC and 4th Respondent in so far as disproving discrepancies in the ballot boxes was concerned; that the IEBC who had the duty to safeguard the election materials did not rebut the evidence contained in the scrutiny report which confirmed that they failed to discharge their constitutional duty; that the obligations to avail the counterfoils was upon the IEBC and the 4th Respondent as these were special facts within their knowledge.
26. Counsel maintained that the learned judge correctly directed herself on the issue of scrutiny as she had a special jurisdiction in determining election disputes and had inquisitorial powers to examine the process of elections to ensure that justice is done. In this regard Hassan Abdalla Albeity v Abu M Abu Chiaba & another Malindi Election Petition No 9 of 2013 was cited. Applying Richard Kalembe Ndile v Patrick Musimba Election Petition No 117 of 2013 counsel pointed out that the purpose of scrutiny is:
 - (i) To assist the Court to investigate if the allegations of irregularities and breaches of law complained of are valid.
 - (ii) To assist the Court in ascertaining valid votes for each candidate.
 - (iii) To assist the Court to understand the vital details of the electoral process and gain impression on the integrity of the election process.
27. Counsel argued that the 2nd Respondent pleaded for scrutiny and recount of votes in the whole County of Lamu and the judge had discretion under section 82(1) of the Elections Act to allow or reject scrutiny of any stations or to exercise her powers suo motto to order for scrutiny; that the scrutiny and recount of the votes could not therefore be confined to disputed polling stations; that the judge could not be faulted for exercising her discretion as she acted in accordance with the law. That as regards the missing



- counterfoils it was immaterial whether the polling stations were pleaded or whether the scrutiny of the counterfoils was itself pleaded, as the judge had powers to deal with the issue under section 82(1) of the *Election Act*; and that there was no precondition that the issue of missing counterfoil must be pleaded before the judge could exercise her discretion nor could the pleadings limit the Courts statutory discretion and constitutional mandate.
28. Counsel for the 1st Respondent maintained that contrary to the Appellants submissions that there were no irregularities, the judge made a finding that IEBC and 4th Respondent had committed irregularities by violating articles 81 and 86(d) of the *Constitution*; that the burden of disproving the irregularities in the scrutiny shifted to IEBC and 4th Respondent; and that it was immaterial that the Appellant still maintained the lead after scrutiny as the judge was rightly concerned with the integrity of the whole electoral process. Relying on *Mbowe v Eliufoo* (1967) EA 242, counsel submitted that the irregularities noted affected the final outcome of the election results, as the contest in the case at hand became much closer than it was before scrutiny; that the margin of 1798 votes was not a wide margin in light of the total votes cast which was more than 43,000; that the numbers were irrelevant as the whole process was questionable the Appellant's election having been marred with irregularities and his votes having been reduced after scrutiny.
 29. Counsel reiterated that the *Constitution* is superior to the Rules made under the specific Acts of Parliament, and the learned judge rightly nullified the elections having found that there was non compliance with articles 81 and 86(d) of the *Constitution* which spells out the principles upon which election ought to be conducted; that scrutiny having been done in 26 polling stations and discrepancies established, the judge acted reasonably in accordance with the reasonable test principle enunciated in the *Wednesbury Corporation* case.
 30. A distinction was drawn between the *Shakila* case and the present case, in that scrutiny in the *Shakila* case was done by consent and was for the whole county, unlike the present case where scrutiny was done in exercise of discretion under section 82(1) of the *Elections Act* and limited to only 26 polling stations; that the margin in the *Shakila case* was more than 5000 votes as compared to 1575 votes in the present case; that in the *Shakila case* the Court nullified elections for three polling stations where there were counterfoils missing after having established that there were no other irregularities in all the other 133 polling stations; that in the present case scrutiny was conducted in only 26 out of 136 polling stations, and the judge had no knowledge of irregularities that might have emerged in the 110 polling stations which had not been scrutinized; that the judge did not go beyond the scope of the scrutiny as the purpose of the scrutiny included inter alia, assisting the Court to investigate irregularities and assess the integrity of the electoral process; that the decision of the judge to nullify the election was not based on post election interference such as broken seals, but was based on missing counterfoils and the failure by IEBC and 4th Respondents to exercise due diligence in preservation of the ballot boxes; and that there was no credible evidence before the Court, of election materials upon which the Court could determine the will of the electorate in Lamu
 31. As regards the 1st Respondent's cross appeal counsel submitted, that having consolidated Petition No 4 of 2013 and Petition No 5 of 2013 and correctly heard the two Petitions as one, the judge failed to follow rule 18 of the *Election (Parliamentary and County Election) Petition Rules* 2013 in making separate determinations, thereby allowing Petition No 5 of 2013 and dismissing Petition No 4 of 2013; that rule 18 being mandatory, the failure to observe that rule rendered the decision of the judge a nullity; that the scrutiny having been ordered suo motto the evidence from the scrutiny was meant to assist in the just and expedient determination of the Petition as consolidated and it was wrong for the judge to render her decision selectively by applying the results of the scrutiny to one petition and not the other.



32. Further, counsel contended that the decision of the judge violated the 1st Respondent's constitutional rights under article 27 of the Constitution in so far as equal benefits and protection of the law is concerned; that the 1st Respondent was discriminated against in regard to the benefit of the scrutiny results; that the judge having found that IEBC and 4th Respondent were in breach of article 86(d), the elections were not conducted as required under article 81 of the Constitution; that IEBC and 4th Respondent having failed to act as required by law in the manner in which they conducted the elections, their actions were invalid; that there was a clear pleading by the 1st Respondent that the election was done in violation of the Constitution and this fact having been proved by the scrutiny, the Petition No 4 of 2013 ought to have been allowed. Further, that the trial judge having framed an issue for determination with regard to compliance of the gubernatorial elections with article 81 and 86(d) of the Constitution, the judge failed to decide on the issue in regard to Petition No 4 of 2013.
33. Underscoring the purpose and importance of scrutiny, counsel argued that once the Court had determined that the integrity of the voting was questionable and that the Appellant was not validly elected, it could not allow Petition No 5 of 2013, and disallow Petition No 4 of 2013 as both petitions challenged the conduct and constitutionality of the same elections; that the judge having adopted the report of the deputy registrar on the scrutiny as evidence, she had no reason in failing to apply the results of the scrutiny to Petition No 4 of 2013 in a matter that arose out of scrutiny, and that had the potential of adversely affecting the result and the will of the voter.
34. On the issue of costs the 1st Respondent was aggrieved that notwithstanding the finding that IEBC and the 4th Respondent committed irregularities that led to the nullification of the election, no award of costs was made to the 1st Respondent against them. Counsel argued that rule 34(1) of the Election Petition Rules imposes a burden of payment of costs on the party who has caused an unnecessary expense which in this case was the IEBC and 4th Respondent, and therefore the Court's discretion was not exercised judicially or was exercised on wrong principles in denying the 1st Respondents costs in regard to Petition No 4 of 2013.

2nd Respondent's Submissions

35. Mr SM Kimani and Mr Kilonzo represented the 2nd Respondent in the Appeal with Mr SM Kimani orally highlighting the written submissions. The submissions for the 2nd Respondent were three pronged, firstly challenging the competence of the Appeal, secondly addressing the merits of the Appeal, and thirdly addressing further grounds for affirmation of the judgment of the Election Court.
36. On the competence of the appeal, counsel submitted that under section 85A of the Elections Act 2011, the Court of Appeal cannot inquire into the propriety of the Election Court's findings on matters of fact and thus such findings are final; that an appeal under section 85A of the Elections Act is a special Appeal governed by special considerations; that the right of appeal donated under section 85A of the Elections Act 2011, does not give the Court power to hear an appeal on factual matters, and an appeal based on facts is an abuse of the process of the Court; that the right of appeal under the aforementioned section is circumscribed and the Court ought to be extremely slow in accepting an invitation to re-evaluate the evidence and substitute its findings on the facts for that of the judge unless it is shown that the judge misdirected herself and arrived at an unreasonable conclusion that no properly directed tribunal could have arrived at.
37. Counsel took issue with all the grounds of Appeal advanced by the Appellant on the basis that they do not meet the threshold set under section 85A of the Elections Act; that the grounds challenge factual findings by the Election Court without demonstrating any misdirection on points of law; that the grounds were drafted "without specificity and in an opaque and slipshod manner"; that



this justifies the Court refusing the Appellant permission to urge the grounds. In particular grounds 3,7,8,9,10,12,13,14,15,16,18,19,20,22,25, and 26 in the Memorandum of Appeal were criticized as challenging the judge's findings, conclusions and determinations on factual matters, and therefore likely to contravene sections 82 and 85A of the *Elections Act*; whereas grounds 1,2,4,5,6,9,11, 17,22,23,24,27,29, and 30 of the memorandum of appeal were attacked as being general vague complaints, lacking specificity and not satisfying the threshold of section 85A; that grounds 21 and 28 in the Memorandum of Appeal, the only ones acknowledged to be raising pure matters of law, are not well founded as the Court made definite findings on what was proved before it; that the grounds are indirectly challenging the order of scrutiny and the report filed by the deputy registrar which was a process of verification of facts; and that matters arising from the report of the deputy registrar cannot be subject of appeal because of time limitation.

38. On the merits of the appeal counsel maintained that the judge did not misdirect herself but made definite findings on every complaint set out in the petition before making a determination on the totality of the evidence; such findings included: the transfer of Ndaui Polling Station without complying with the law, but that this was an irregularity that did not affect the outcome of the elections; failure of the presiding officer to comply with regulation 79 of the Election General Regulation in regards to forms 35 and 36, but that this non-compliance on its own could not justify nullifying the elections; flawed process in the announcement of the results of the gubernatorial elections, but that this defect was regularized by the gazetting of the results; discrepancies unearthed by the scrutiny and recount process which included missing ballot bundles and counterfoils, that taken together with other proven flaws and breaches of the electoral law vitiated the integrity and fairness of the electoral process.
39. Counsel further argued that the contention that the Court was not alive to regulation 73 of the *Elections General Regulations* 2012, and acted on the repealed law, was not correct as the learned judge actually referred to that particular regulation. Counsel asserted that the Election Court formed a firm and definite view after analyzing and weighing all the flaws, malpractices and breaches of the electoral law alleged and proved before it, and found that the effect of the missing votes and counterfoils was to deprive the electoral process the fairness, accuracy, transparency and accountability demanded by articles 81 and 86 of the *Constitution* of Kenya 2010.
40. In the final limb of the submissions counsel urged the Court to strike out the appeal and affirm the judgment of the Election Court for the reasons, that the appeal was incompetent and an abuse of the process of the Court, and that there were further grounds upon which the nullification of the Appellant's election could be upheld. Such grounds were identified as including: the fact that the flaw in the announcement or declaration of the results could not be sanitized by the publication of the gazette notice as the notice did not include particulars which were required to be communicated by the returning officer at the county tallying center; that the Election Court exercised its jurisdiction under section 82 of the *Election Act* 2011 and the scrutiny evidence was tabled but the Appellant and other Respondents failed to apply to introduce evidence, or to show how the breaches came about; that in the circumstances the exercise of discretion by the Election Court, in ordering scrutiny and recount, and in evaluating, accepting and rejecting the ensuing evidence cannot be faulted; that none of the parties appealed against the order of scrutiny nor did IEBC appeal or cross appeal against the judgment of the Election Court although specific findings were made that IEBC and 4th Respondent failed to comply with their constitutional obligation to facilitate fair, accurate, transparent and accountable elections; that the allegation of bias against the learned judge based on a comparison with the Shakila case was brought in bad faith as the two decisions involve different petitions and were based on different evidential material.



3rd and 4th Respondents' Submissions

41. Mr Sanjeev Khagram represented the IEBC and 4th Respondents who supported the Appeal and opposed the cross appeal, and grounds for affirming the decision of the electoral court that was filed by the 1st and 2nd Respondents respectively. In the written and oral submissions made before us, counsel reiterated that the appeal before this Court being one limited to issues of law under section 85A of the [Elections Act](#), the Court has to distinguish between matters of fact and those of law as was done in the *Marakaru case (supra)*. Counsel observed that the learned judge dismissed all allegations on which the Petition was preferred, but nullified the Appellant's Election based on the finding that upon scrutiny or recount some counterfoils and ballot bundles were found to be missing from the ballot boxes. Counsel pointed out that the judge limited the scope of the scrutiny and recount sought by the 2nd Respondent under rule 33 of the [Elections \(Parliamentary and County Elections\) Petition Rules](#) 2013, to six polling stations and ordered scrutiny and recount suo motto in regard to 20 polling stations, restricting the scope of the recount and scrutiny to ascertaining the number of votes each candidate got in each station; that the judge further ordered "an audit and tally of all forms 35 as transposed to form 36s for all polling stations in Lamu County including the county form 36 with a view of establishing the correct number of votes garnered by each candidate."
42. Counsel drew the Court's attention to the distinction in the powers and material to be scrutinized under section 82 of the [Elections Act](#) 2011 and rule 33 of the [Elections \(Parliamentary and County\) Petition Rules](#) 2013. Counsel submitted that on the question of the counterfoil the Election Court wrongly relied on the *Mulinda Musau case* and the *Magara* case, as these cases applied the [National Assembly and Presidential Elections Act](#) (repealed) and regulations made thereunder, that are different from the current applicable statute, that is the [Elections Act](#) 2012 and the regulations thereunder; that the critical distinction between the two sets of laws is that in the previous legislation the presiding officer was obliged to insert the used counterfoils into the ballot boxes, while under the current laws the obligation is to seal the counterfoils in tamper proof envelopes without any requirement to insert them in the ballot boxes; that the reason why the counterfoils were never delivered lies in rule 21 of the [Election \(Parliamentary and County Election\) Petition Rules](#) which does not include counterfoils among the documents to be delivered to the registrar of the Court; that counterfoils would have been available if applied for; that the results in the entire county were tallied after scrutiny and the Appellant emerged the winner thus reflecting the sovereign will of the people; that the judge erred in holding that the election was vitiated on account of the missing ballot papers and counterfoils, and also failed to take into account the evidence of interference of the ballot boxes after the declaration of the winners and that the learned judge erred in failing to accept the deputy registrars report which showed that even ignoring the missing ballot boxes, the will of the people of Lamuhad nevertheless been expressed.
43. In regard to the burden of proof, the Court was referred to *Raila's case* in support of the proposition that the burden was upon the petitioner to prove that there was non-compliance with the law and that such non-compliance affected the validity of the elections. Counsel urged the Court to dismiss the cross petition filed by the 1st Respondent as his only complaint in his petition related to the omission in his name on the ballot paper and the judge's finding on this complaint was supported by the evidence. In regard to the grounds for affirmation of the decision of the Election Court, counsel submitted that the grounds of affirmation could only affirm the decision of the superior court on grounds other than or additional to those which the judge relied upon in arriving at her decision; that the 2nd Respondent's contention that part of the decision of the judge should be varied or reversed and part of the decision affirmed can only be included in a notice of cross appeal, and no notice of cross appeal having been filed the Court has no jurisdiction to grant the same.



44. We have carefully perused the record of appeal, and given careful consideration to the written and oral submissions, which we have set out herein at great length. We have also taken into account the authorities that were cited by the parties' counsel.

Competence of the Appeal

45. We note that an issue has been raised regarding the scope of this court's jurisdiction in hearing an election appeal under section 85A of the [Elections Act](#). The issue of jurisdiction is a pertinent issue, the resolution of which gives direction to the Court in the handling of matters before it. In this regard we can do no better than adopt what the Supreme Court stated in [Speaker of the Senate and another v Hon Attorney General & another & 3 others](#) [2013] eKLR as follows:

“Jurisdiction in any matter coming up before a court is a fundamental issue that must be resolved at the beginning. It is the fountain from which the flow of the judicial process originates. The position is clear from the words of Nyarangi JA in *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] KLR 1 (at p 14)

“Without jurisdiction a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect to the matter before it the moment it holds the opinion that it is without jurisdiction.”

46. Thus it is necessary that we begin by examining the scope of this court's jurisdiction with regard to appeals from the Election Court as derived from the [Constitution](#) and other relevant statutes. the [Constitution](#) of Kenya 2010 that establishes the Court of Appeal under article 164(1) grants it jurisdiction under article 164(3) as follows:

“164

- (3) The Court of appeal has jurisdiction to hear appeals from-
- (a) the High Court; and
 - (b) any other court or tribunal as prescribed by an Act of Parliament.”

47. Therefore the Court of Appeal has a general jurisdiction to hear and determine appeals. Whereas the [Constitution](#) has not provided any limitation to this general jurisdiction, it has provided a window for the scope of the exercise of the jurisdiction to be limited by statute. Article 164(3) of the [Constitution](#) has to be read together with the [Appellate Jurisdiction Act](#) Cap 9 which is a statute specifically enacted to confer jurisdiction on the Court of Appeal. Section 3(1) of this Act states as follows:

“3. Jurisdiction of Court of Appeal

- (1) The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court and any other Court or Tribunal prescribed by an Act of Parliament in cases in which an appeal lies in the Court of Appeal under law.”

48. The [Appellate Jurisdiction Act](#) has introduced one qualification for the exercise of the Court's jurisdiction, that is, that the law must specifically provide for the right of appeal. Indeed both the [Constitution](#) and the [Appellate Jurisdiction Act](#) envisages an Act of Parliament giving a specific right



of appeal and the scope of that right. As regards, appeals arising from election petitions, the Court of Appeal is empowered to hear such appeals by dint of section 85A of the *Elections Act* 2011. This provision that has already been cited above, gives the Court of Appeal power to hear appeals from the High Court sitting as an Election Court in regard to elections of membership of the National Assembly, Senate or the office of Governor on matters of law only. It is important to note that the restriction of the right of appeal to matters of law only, is a departure from the previous position reflected by section 23(4) of The *National Assembly and Presidential Elections Act* (cap 7 - now repealed), which provided a general right of appeal from any decision of an Election Court. A question arises as to what would rightly amount to a matter of law. This question underlies the challenge posed by the 1st and 2nd Respondent to the propriety of the grounds of appeal put forward by the Appellant as raising issues of facts and not law.

49. In *Marakaru case (supra)* the Court in considering an appeal on matters of law, by way of case stated, held that a decision is erroneous in law if it is one to which no court could reasonably come to. The Court followed *Bracegirdle v Oxney (supra)* in which Lord Denning gave the following guidance:

“ The question whether determination by a tribunal is a determination in point of fact or in point of law frequently occurs. On such a question there is one distinction that must always be kept in mind, namely, the distinction between primary facts and conclusions from those facts. Primary facts are facts which are observed by the witnesses and proved by testimony; conclusions from those facts are inferences deduced by a process of reasoning from them. The determination of primary facts is always a question of facts. It is essentially a matter for the tribunal who sees the witnesses to assess their credibility and to decide the primary facts which depends on them. The conclusions from those facts are sometimes conclusions of facts and sometimes conclusions of law. ...The Court will only interfere if the conclusions cannot reasonably be drawn from the primary facts ”

50. In addition to the above guidance, this Appeal being a first appeal to this Court, it is important to keep in mind the principles to be followed in a first appeal as reflected in *Peters v Sunday* (1958) EA 424; and *Selle v Associated Motor Boats Company Limited* (1968) EA 123, that although the Court has jurisdiction to reconsider the evidence, re-evaluate and draw its own conclusion, this jurisdiction must be exercised cautiously. This caution is of greater significance in an appeal such as the one before us where the right of appeal is limited to matters of law only, because the jurisdiction of this Court to draw its own conclusions can only apply to conclusions of law. We must therefore be careful to isolate conclusions of law from conclusions of facts, and only interfere if two conditions are met. Firstly, that the conclusions are conclusions of law, and secondly, that the conclusions of law arrived at cannot reasonably be drawn from the findings of the lower court on the facts.
51. That having been said it is evident that in determining whether the Election Court properly performed its duty, this court must be satisfied that the Court acted judiciously and correctly applied the law. The conclusions of law drawn from the facts must also be reasonable and in accordance with the spirit and purpose of the *Constitution* of Kenya. This calls for examination of the findings of the Election Court and conclusions on primary facts in totality, taking into account the *Constitution* and the electoral laws, with a view to determining whether any conclusions of law arising therefrom have been properly arrived at. Thus the objection taken that the Appeal is incompetent because the grounds of appeal raise issues of facts, was wrongly brought as a preliminary issue, as there is need to evaluate the conclusions arising from the primary facts. Moreover, it has been conceded that there are at least two grounds of appeal that raise issues of pure law, and to that extent the threshold of section 85A of the *Elections Act* has been met.



52. It was argued that the order for scrutiny, recount and audit cannot be properly appealed against at this stage as such an appeal would be out of time. In other words, that the Appellant ought to have challenged the order of the scrutiny immediately after it was made. In our view an appeal against the order for scrutiny, would be an appeal on an interlocutory issue. The position of appeals on issues other than final judgment or the decree of the Election Court was addressed by this Court (differently constituted) in Civil Appeal No 23 of 2013 *Peter Gichuki King'ara v Independent Electoral & Boundaries Commission & 2 others*, where the Court stated as follows:

“The nature of jurisdiction of the Court of Appeal under section 85A of the *Elections Act* is an omnibus ex-ante jurisdiction exercisable a posteriori after the High Court has issued judgment and decree in an election petition. The appellate omnibus jurisdiction is consequential and is to hear and determine all contested and amalgamated points of law in an election petition whether such points of law arose in an interlocutory matter or in the judgment or the decree of the High Court. The jurisdiction of the Court of Appeal under sections 80(3) and 85A of the *Elections Act* is sequential whereby the appellate court is required to exercise its jurisdiction sequentially after judgment and decree of the High Court. It is an all encompassing comprehensive blanket jurisdiction rather than piece meal jurisdiction.”

53. We find no merit in the objection to the grounds of appeal relating to the order for scrutiny, recount, and audit of votes as the right of appeal in that regard could only crystallize after the delivery of the judgment on the Election Petition. We therefore find that the appeal is properly before us.

The issue for Determination

54. This being an appeal arising from an election petition, we are mindful of the fact that the Court was obliged to apply the relevant provisions of the *Constitution* governing the electoral process. In this regard the Election Court was alive to the citizens' political rights under article 38 of the *Constitution* and the general principles of the electoral system under article 81 of the *Constitution*. The Election Court correctly directed itself in the judgment as follows:

“These rights protected by article 38 are actualized through the electoral system set out in Chapter 7 titled “Representation of the people”

The Court is obliged to consider the quality of the elections and see whether it conforms with the principles of elections as stipulated in article 81 of the *Constitution*. Under article 81(e) the system should comply with the principle of free and fair elections. Elections are free and fair when they are by secret ballot, freed from violence and intimidation, improper influence or corruption, conducted by an independent body, transparent and administered in an impartial, neutral, efficient, accurate and accountable manner.”

55. The core issue for determination in this appeal is whether in determining the integrity of the electoral process and the democratic will of the voters in Lamu, the Election Court properly interpreted and applied the general electoral principles provided in the *Constitution*, together with the provisions, rules and regulations stipulated under the *Elections Act* 2012, and whether nullification of the results of the gubernatorial elections for Lamu county and the election of the Appellant was the appropriate legal consequence. This issue will be addressed in light of the findings of the Election Court underpinning the Court's conclusion on the integrity of the elections. The findings of the Election Court have been adverted to and generally reproduced in the extracts of the judgment earlier quoted. That the judge found that there were some irregularities in the election process is clear from the judgment. The



Election Court's findings on irregularities have not been questioned except for those arising from the scrutiny report that is, the missing ballot bundles and missing counterfoils.

Scrutiny, Recount and Audit

56. Section 82(1) of the *Elections Act* provides for scrutiny to be made in two ways, namely by the Court on its own motion or on application by any party to the Petition during the hearing of the election petition. In this case the Election Court adopted both modes, ordering scrutiny of six polling stations at the request of 2nd Respondent and 20 polling stations suo motto. The finding of missing ballot bundles and missing counterfoils was made in regard to the scrutiny of 4 out of the 20 polling stations. The question is whether the results of this scrutiny that was initiated by the Court suo motto should have been used in determining the Petitions.
57. In Court of Appeal Civil Application No NAI 231 of 2013 *Patrick Mweu Musimba v Richard N Kalembé Ndile & 3 others*, this Court (differently constituted) noted that the Court has powers under section 80(1)(d) and 82(1) of the *Elections Act* to order scrutiny suo motto. In this case the Court not only ordered scrutiny suo motto but gave specific directions with regard to the purpose of the scrutiny which was to ascertain the number of votes each candidate got in each polling station, and in regard to forms 35 and 36 establishing the correct number of votes garnered by each candidate. Although the Court acted suo motto, the move by the Court was primarily anchored on the Pleadings of the 2nd Respondent who had complained in his petition that the ballot papers were tampered with and wrongly counted, and therefore sought amongst other orders, an order for scrutiny and recount of the ballots cast. The scrutiny and recount of the ballots was thus an issue before the Election Court, and the findings of the Election Court on issues arising therefrom were not extraneous matters but matters originating from the Pleadings. Thus the Election Court could not ignore the scrutiny report or its findings thereon. Indeed the Court had an obligation to use its findings on the primary facts established before it, in determining the integrity of the elections.

Missing Counterfoils

58. An issue that has been controversial is the Election Court's finding arising from the scrutiny report regarding missing counterfoils. While it is not disputed that the counterfoils in regard to four polling stations were not in the ballot boxes, it is argued that the counterfoils were in fact not required to be in the ballot boxes. This contention is supported by regulation 81 of the *Elections (General) Regulations* 2012 which lists the items to be sealed in the ballot boxes as follows:
- (1) Upon completion of a count (including a recount), the presiding officer shall seal in separate tamper proof envelopes-
 - (a) the counted ballot papers which are not disputed;
 - (b) the rejected ballot papers together with the statement relating thereto;
 - (c) the disputed ballot papers, and
 - (d) the "rejected objected to" ballot papers;
 - (2) The presiding officer shall, after demonstrating to the candidates or agents as the case may be, that the ballot box to be used to carry the election results is empty, put into that box-
 - (a) the packets specified in sub-regulation (1); and
 - (b) the statements made under regulations 78 and 79,



- (3) After the procedure in sub regulation (2), the presiding officer shall seal the ballot box with the seal of the Commission and allow the candidates or agents to affix their own seals on the ballot box, if they so wish,
 - (4) The presiding officer shall, as soon as is practicable deliver to the returning officer for the electoral area the ballot box containing the items listed under subregulation (2),
59. The procedure regarding the counterfoils is provided for under Regulation 73(3) and (4), of the *Elections (General) Regulation* 2012 that stipulates as follows:
3. Immediately after the completion of the statement under sub-regulation (2), the presiding officer, in the presence of the candidates or agents shall seal in separate tamper proof envelopes-
 - (a) the spoiled ballot papers, if any;
 - (b) the marked copy register, where necessary;
 - (c) the counterfoils of the used ballot papers; and
 - (d) the statement specified in sub regulations, and shall seal each of the envelopes with his or her own seal and the seal of the Commission and shall allow any candidate or agent who may wish to do so, to affix his seal to the envelope and any statement recorded under these regulations.
 4. after complying with the provisions of this regulation, the presiding officer shall, as soon as practicable, deliver the ballot boxes, and the tamper proof sealed envelopes to the returning officer who shall take charge thereof.”

(emphasis added)

60. Under Regulation 86 the returning officer is required after the final tallying and announcement of the results to seal in separate tamper proof envelopes, the counted ballot papers which are not in dispute, the disputed ballot papers, and rejected disputed ballot papers, and put the sealed tamper proof packets in used ballot box. Thus it is evident that at no time are the counterfoils required to be sealed in the ballot box, but are required to be delivered to the returning officer in tamper proof sealed envelopes. This position is a departure from the former regulations provided under The *National Assembly and Presidential Elections Act* cap 7. Regulation 34 of the *Presidential and Parliamentary Elections Regulations* lists counterfoils of used ballot papers among the documents required to be put in separate sealed packets, which packets are under regulation 39(3) of the same *Regulations* to be put inside the ballot boxes and delivered to the returning officer. Although the trial judge made reference to regulations 73(3) and (4) of *Elections (General) Regulations* 2012, the Court misdirected itself in relying on Musan Malinda case which followed the *Omingo Magara case* which was decided under the former Regulations, hence the erroneous conclusion that the counterfoils were absent from the ballot boxes.
61. We appreciate that counterfoils are included in the definition of election materials under section 2 of the *Elections Act*, and that under article 86 of the *Constitution*, IEBC had a constitutional obligation to ensure that the voting system employed for the Lamu gubernatorial election was “simple, accurate, verifiable, secure, accountable and transparent” and that appropriate structures and mechanisms to eliminate electoral malpractices were put in place including the safekeeping of electoral materials. This imposed a responsibility on IEBC to ensure the safekeeping of the counterfoils of ballot papers. Moreover, under regulation 93(1) of the *Election (General) Regulations*, the returning officer is required to retain all documents relating to elections in safe custody for a period of 3 years. The issue is



- whether the Election Court was right in drawing a conclusion that because the counterfoils were not in ballot boxes, IEBC had failed in its constitutional duty as provided under article 86 of the *Constitution*.
62. It has not escaped our mind that under rule 33(4) of the *Elections (Parliamentary and County Elections) Petition Rules* 2013 packets of counterfoils of used ballot papers are among the documents listed for examination during the scrutiny exercise. Nonetheless, this Rule relates to scrutiny ordered by the Court at the instance of the parties for purposes of establishing the validity of votes cast in polling stations in which the results are disputed. It does not apply to scrutiny ordered suo motto by the Court, as the scope of such scrutiny is to be determined by the Court. In the case of Lamu gubernatorial elections, there was no dispute regarding the results of the elections in the four polling stations in respect of which the counterfoils were said to be missing. In addition the scope of the scrutiny ordered suo motto by the Court was limited to ascertaining the number of votes each candidate got in each polling station and audit and tallying of forms 35 and forms 36. While it is true that counterfoils may have assisted in confirming that the ballots issued to the registered voters are the only ones that went into the ballot boxes, the result of the elections in these polling stations were not in dispute, nor was the validity of the votes cast as to require such confirmation.
63. Under rule 21 of the *Elections (Parliamentary and County Elections) Petition Rules*, IEBC was only obliged to deliver to the Registrar of the Court, ballot boxes. All that was required in the scrutiny ordered by the Court suo motto, was to ascertain the number of votes cast. Without specific orders or directions having been made by the Court for production of the counterfoils or any other documents, it cannot be said that IEBC failed to produce the counterfoils or that it failed to discharge its constitutional mandate of keeping the documents safe. Moreover the fact that there was a change in the Regulations, reflects an element of genuine confusion rather than negligence, whereby some returning officers may have followed the previous regulations and inserted counterfoils in ballot boxes, while others complied with new Regulations by keeping the counterfoils in sealed tamper proof envelopes and not in ballot boxes. In these circumstances IEBC and 4th Respondent cannot be faulted for failing to put the counterfoils in the ballot boxes in the four polling stations, nor was the absence of the counterfoils from the ballot boxes non-compliance with statutory requirements or breach of constitutional duty.
64. We find that the Election Court misapprehended the requirement for the presence of counterfoils in the election boxes and took into account factors it ought not to have taken into account. This led the Election Court to wrongly shift the burden of proof onto IEBC and the 4th Respondent with regard to the alleged missing counterfoils. Under these circumstances the finding of the Election Court that the counterfoils were missing and that IEBC and 4th Respondent failed in discharging their responsibility, was based on a fundamental misapprehension of the Regulations and wrong application of the law. Further, the Election Court concluded that the will of the people of Lamu County will not be said to have been done with such “glaring evidence of manipulation”. This was an apparent misdirection and contradiction in light of the Election Court’s findings in regard to the irregularities complained of in the Petition, all of which were found either not established or where established not to have affected the elections.

Missing Vote Bundles

65. In regard to the missing bundles, the Election Court found that some bundles of votes were missing from the ballot boxes in three polling stations. The Deputy Registrar who supervised the scrutiny exercise stated in her report that the missing vote bundles belonged to the Appellant. Nonetheless, the Election Court was not satisfied as to how the Deputy Registrar arrived at that conclusion. The learned judge rightly concluded that the issue of missing vote bundles from the ballot box is an irregularity



attributable to IEBC, as it had the responsibility to ensure that the vote bundles were kept in the ballot boxes and that the ballot boxes were kept safe.

66. It was imperative for the Election Court having established that an irregularity had occurred, to go further and determine whether the elections were conducted in accordance with the principles laid down in the Constitution, and whether the irregularity resulting in missing bundles affected the results of the elections, before coming to the conclusion whether the results of the elections reflected the will of the people of Lamu. The conclusion arrived at by the Election Court that the elections in Lamu county did not comply with the constitutional requirement in regard to principles for electoral system was a conclusion of law anchored on the learned judges findings on the missing vote bundles in the three polling stations.
67. The issue is whether the conclusion of law arrived at by the learned judge was reasonable considering all the facts established. Article 81(e)(iv) of the Constitution requires the elections to be free and fair by being administered in an impartial, neutral, efficient accurate and accountable manner. The question is whether the missing vote bundles are clear evidence of impartiality, inefficiency, inaccuracy or lack of accountability such as to lead to a conclusion that the elections were not free and fair. The missing bundles were a bundle of 134 votes at Lake Kenyatta Primary Stream 4 polling station, a bundle of 191 votes at Kizingitini Secondary School and a bundle of 59 votes at Majembeni Primary School. The counterfoils in respect to Lake Kenyatta Primary Stream 4 polling station and Kizingitini Secondary School were available, and thus the votes were accounted for. It is only the bundle of 59 votes in regard to Majembeni Primary School that had no counterfoils.
68. The Deputy Registrar who supervised the scrutiny and audit exercise was able to determine from the forms 35 and 36 that these missing vote bundles were in respect of votes for the Appellant. There was no complaint made by the 1st or 2nd Respondent in their Petition regarding any manipulation of ballots having occurred in any of the three polling stations during the counting exercise. In addition the Election Court ruled out any interference or possibility of manipulation of the ballots after the declaration of the results and upon sealing of the boxes. Given the finding of the Court regarding other irregularities established, that the same were inadvertent and a result of the pressure under which IEBC and its officials were operating, we fail to understand why the judge attributed the missing vote bundles in the three polling stations to deliberate manipulation.
69. Further, it is important to note section 83 of the Elections Act that provides:

No election shall be declared to be void by reason of noncompliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election.”
70. The Election Court did not properly consider the effect of the missing bundles on the elections. The Election Court ought to have applied *Mbowe v Eliufoo* (supra) in determining whether the irregularities of the missing bundles affected the outcome of the election results. Had the trial judge properly applied this authority, she would have found that the final outcome of the results was not affected as the Appellant still maintained the lead. Thus the election results could not be nullified on account of this irregularity.
71. Indeed the following passage from *Morgan v Simpson* (1974) 3 All ER aptly illustrates a position similar to that which was before the Election Court:

We are dealing here with a challenge based on administrative errors. There is no allegation of any fraud corruption or illegal practices. Nor is there any suggestion of wrongdoing by



any candidate or political party. Given the complexity of administering a federal election, the tens of thousands of election workers involved, many of whom have no on-the job experience, and the short time frame for hiring and training them, it is inevitable that administrative mistakes will be made. If elections can be easily annulled on the basis of administrative errors, public confidence in the finality and legitimacy of election results will be eroded. Only irregularities that affect the result of the election and thereby undermine the integrity of the electoral process are grounds for overturning an election.”

72. There were no primary facts established by the Election Court which can support the finding that the missing vote bundles was evidence of glaring manipulation of the election result. In our view the facts established reveal an administrative mistake and not deliberate manipulation of the election such as can reasonably lead to a conclusion that the electoral principles in regard to free and fair elections were breached. In addition the learned judge did not apply section 83 of the *Elections Act* as neither the missing counterfoils nor the missing bundles were irregularities that affected the elections or undermined the integrity of the electoral process, such as could justify the nullification of the Appellant’s election.

73. As rightly stated by the learned judge:

It is the duty of the Election Court to give effect to the will of the electorate. The intent of voters is established by the number of votes cast in favour of the winning candidate in an election that is conducted in compliance with the principles set out in article 81. The intention of the voters is determined by reference to the person who garners most votes in a free, fair and credible election. The duty of the Court is to strive to preserve the election held in accordance with the *Constitution* and the law.”

74. We come to the conclusion that the Election Court did not give effect to the will of the electorate in Lamu County in regard to the Lamu gubernatorial election. The will of the electorate could not be determined through conjecture and supposition. The will of the electorate was clearly demonstrated by the majority votes cast in favour of the Appellant in an election that was apparently free and fair, as the administrative mistakes committed by IEBC and 4th Respondent did not affect the results of the elections or undermine the integrity of the electoral process.

75. We have considered the grounds for affirming the judgment of the Election Court advanced by the 2nd Respondent. We note that grounds 1 and 2 do in fact challenge the Election Court’s validation from the gazette notice, the defect in the announcement of the results for the Lamu gubernatorial election; and the finding that the wrong completion of the forms 36 as an irregularity which did not affect the outcome of the elections. We dismiss these grounds as being misconceived. Grounds of affirmation are intended to support rather than question the judgment of the Election Court.

Cross Appeal

76. The 1st Respondent faulted the Election Court in making separate decisions by allowing Petition No 5 of 2013 and dismissing Petition No 4 of 2013 when the two petitions had been consolidated under rule 18 of the *Election (Parliamentary and County Election) Petition Rules* 2013. That rule states as follows:

Where more than one petition is presented relating to the same election all such petitions shall be heard and determined as one petition, in so far as the inquiry into the election is concerned. (emphasis added)”



77. Our understanding of this Rule is that the consolidation of the Petition is only intended for the purpose of expediting the hearing of the election petitions, so that one inquiry is carried out in regard to petitions arising from the same election. The Rule does not take away the individual characteristic of the Petitions, as each petition questions the conduct of the elections on its own peculiar grounds. While a general inquiry into the conduct of the election is carried out, the Election Court is obliged to make specific findings in regard to the grounds put forward by each petitioner, to the extent that the general inquiry apply. Where necessary the Election Court may have to go beyond the general inquiry in addressing issues peculiar to a particular petition.
78. We are satisfied that the Election Court properly applied rule 18 to arrive at a conclusion regarding the specific prayers sought in Petition No 4 of 2013 and Petition No 5 of 2013. The decision of the Court in dismissing one petition and allowing the other was obviously informed by its findings on the specific grounds upon which the conduct of the elections was challenged, and the prayers sought in each petition. The focus of the 1st Respondent's Petition was the violation of his constitutional rights, disenfranchisement of the electorate, and lack of accountability in the electoral system; complaints that the Election Court found were not established. On the other hand the 2nd Respondent's complaints that included the counting and tallying of ballots, is what led to the order for scrutiny and recount of the ballots, including the suo motto order which resulted in the Court's finding on missing counterfoils and missing vote bundles. This finding lent credibility to the 2nd Respondent's complaint in regard to Petition No 5 of 2013 resulting in the Election Court allowing the Petition.
79. Thus there was no selective application or discrimination in applying the results of the scrutiny and recount of the ballots to petition No 5 of 2013 and not Petition No 4 of 2013. Nor was there any violation of the 1st Respondent's constitutional rights under article 27 of the *Constitution*. Moreover, as we have endeavored to show in our analysis in regard to the main appeal, the finding made by the Election Court that there was breach of articles 81 and 86(d) of the *Constitution* was wrong as it was a conclusion that a reasonable tribunal could not have arrived at given the primary facts that were established.
80. On the issue of costs, under section 84 of the Election Act, the Election Court had discretion to award costs but such costs should follow the cause. Further rule 36(2) of the *Election (Parliamentary and County Election) Petition Rules* 2013, gives the Election Court discretion to make orders on costs as follows:
- 36
- (1)
 - (2) when making an order under sub rule (1) the Court may
 - a. disallow any costs which may in the opinion of the Court have been caused by vexatious conduct, unfounded allegations or unfounded objections on the part of either the Petitioner or the Respondent and
 - b. impose the burden of payment on the party who has caused an unnecessary expense, whether such party is successful or not in order to discourage such expense.”
81. Thus the award of costs was in the unfettered discretion of the Election Court. As an Appellate Court we can only interfere if the Election Court's discretion was not exercised judiciously. We are satisfied that in imposing the burden of payment of costs upon IEBC and the 4th Respondent whose conduct led to Petition No 5 of 2013 being allowed, and ordering the 1st Respondent (whose Petition had



been dismissed) to meet its own costs, the Election Court exercised its discretion judiciously and in accordance with the relevant provisions of the law. We therefore find no substance in the cross appeal.

Conclusion and Orders

82. In conclusion we summarize our findings as follows:

The Main Appeal:

- i. On the preliminary issue regarding the competence of the Appeal, although there are some grounds of appeal which raise issues of fact, several of the grounds raised in the Memorandum of Appeal raise issues of law and therefore, the Appeal is competent as it falls within the purview of section 85A of the *Elections Act*.
- ii. The issue of scrutiny was pleaded and the judge rightly exercised her discretion in acting suo motto and extending the scrutiny beyond the six disputed polling stations, by adding an additional twenty polling station, and the results of the scrutiny were properly treated as evidence
- iii. That although the counterfoils were not included in the ballot boxes, this was not an irregularity as the law did not require the counterfoils to be in the ballot boxes and therefore there was no proof of non conformity of the law
- iv. That even assuming that there was such non conformity established in 4 polling station out of the twenty six polling stations scrutinized, the irregularity was not such as would affect the outcome of the elections in the whole Lamu County comprising 136 polling stations.
- v. That in the absence of evidence the Judge was wrong in relying on conjecture in coming to the conclusion that the outcome of the elections in Lamu county was affected.
- vi. That given the findings of the Judge regarding the particulars set out in the petitions that there were either no irregularities established, or that the irregularity established did not affect the outcome of the elections, the dismissal of the Petition based on the missing counterfoils was wrong The Cross Appeal:

83.

- (i) That Petition No 4 of 2013 and Petition No 5 of 2013 were consolidated and heard as one, and the Judge rightly considered individually the specific particulars pleaded in each Petition, and made specific findings in regard to the same.
- ii. That having found the specific particulars pleaded in Petition No 4 of 2013 not having been established the Judge was right in dismissing the Petition
- iii. That the scrutiny ordered was in regard to the particulars and prayers made in Petition No 5 of 2013, and the Petitioner in Petition No 4 of 2013 could not piggy ride on the scrutiny exercise merely because the Petitions were consolidated for purposes of hearing.
- iv. The judge correctly exercised her discretion in awarding costs having dismissed Petition No 4 of 2013 Final Orders:

84. In light of the above we make final orders as follows:

- i. The main appeal is allowed and the order allowing the Petition No 5 of 2013 is hereby set aside and substituted with an order dismissing the Petition.



- ii. Consequently, it is declared that the Appellant was validly elected as County Governor of Lamu and the order nullifying his election as County Governor of Lamu and ordering fresh elections is hereby quashed and set aside.
- iii. The certificate issued by the Judge pursuant to section 86 of the [Elections Act](#) 2011 is set aside and substituted with a Certificate confirming that the Appellant was duly elected as governor during the elections held on 4th March 2013.
- iv. The cross appeal is dismissed with costs.
- v. The 1st and 2nd Respondent shall equally bear the costs of the Appellant in the Election Court as assessed by the Court and the costs of the Appellant in this Appeal to be assessed by the Court registrar.

85. Finally we wish to express our sincere appreciation to all the parties' counsels for their cooperation, and well-researched submissions. We also acknowledge the assistance that we received from legal researchers Eva Odongo and Lucy Gichuki, and the secretaries Milka Karuhi and Jennifer Chacha.

DATED AND DELIVERED AT MALINDI THIS 13TH DAY OF JANUARY, 2014.

H. M. OKWENGU

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JUDGE OF APPEAL

M A MAKHANDIA

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JUDGE OF APPEAL

F SICHALE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

