IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIAGE, GATEMBU & M'INOTI, JJ.A)

CIVIL APPEAL NO. 228 OF 2013

BETWEEN

NICHOLAS KIPTOO ARAP KORIR SALAT.....APPELLANT

AND

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

WILFRED ROTTICH LESAN.....2ND RESPONDENT

ROBERT SIOLEI

RETURNING OFFICER BOMET COUNTY.....3RD RESPONDENT

KENNEDY OCHAYO.....4TH RESPONDENT

WILFRED WAINAINA.....5TH RESPONDENT

PATRICK WANYAMA.....6TH RESPONDENT

MARK MANZO.....7TH RESPONDENT

ABDIKADIR SHEIKH.....8TH RESPONDENT

(Being an appeal against the whole of the Judgement and Orders of (Aggrey Muchelule

delivered on 19th August, 2013 at Kericho Law Courts

in

ELECTION PETITION NO. 1 OF 2013)

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JUDGMENT OF KIAGE, JA.

The background to this appeal, the grounds upon which it is brought as well as the submissions made by counsel appearing before us and the authorities they cited have all been amply and succinctly captured in the judgment of my brother Gatembu Kairu, J.A. I have had the advantage of reading and engaging with the same in draft and I do not consider it necessary to restate the same herein.

As I find myself unable to agree with the analytical path and destination taken by my honourable brothers in the majority, however, I find myself compelled to take the road less travelled and to express myself differently on a number of issues I consider germane herein.

Can the election court be said to have erred in the exercise of its discretion in refusing to order scrutiny and recount? With great respect to the learned Judge, I most definitely think so even though on this occasion, I find myself alone. This aspect of the case has caused me great anxiety as it must cause all who must decide and who must advise on the true meaning, scope and contours of scrutiny and recount of votes in the context of an election petition. It is no exaggeration to say that the true place of scrutiny and recount of votes after an election raises fundamental questions of public and legal policy the importance of which cannot be over estimated. It also calls for an authoritative and over arching jurisprudence that is truly reflective of the electoral justice that our nascent **Constitution of 2010** aims to achieve.

The appellant's application for scrutiny and recount sought two main prayers namely;

a. Recount of all votes cast in all the polling stations, or, in the alternative, a partial recount in respect of some of the polling stations in Bomet Central, Sotik, Konoin, Chepalungu and Bomet East constituencies and

b. Scrutiny of the votes in all the polling stations indicated in (a)

The application was supported by the appellant's affidavit. The grounds upon which the application was based were stated to be that;

> ***"(a) voter turnout in the election was exaggerated with a view to inflating the figures in favour of some of the candidates especially the 2nd respondent;***
>
> ***(b) the respondents had fraudulently manipulated documents to conceal irregularities and electoral malpractices;***
>
> ***(c) the election was not free, fair or transparent;***
>
> ***(d) the Commission did not conduct the election in an impartial, neutral, efficient, accurate and accountable manner;***
>
> ***(e) there were manifest variations in the results announced and declared in terms of documentation and records; and***
>
> ***(f) unless the orders were granted the petitioner would suffer irreparable loss and damage."***

In dealing with the application, which was strenuously opposed by all the respondents, the learned Judge first located the Election Court's jurisdiction to deal with it in the **Elections Act, 2011, Section 82** whereof provides as follows;

> ***"82. (1) An election court may, on its own motion or on application by any party to the petition, during the hearing of an election petition, order for a scrutiny of votes to be carried out in such manner as the election court may determine.***
>
> ***(2) Where the votes at the trial of an election petition are scrutinized, only the following votes shall be struck off –***

a. ***the vote of a person whose name was not on the register or list of voters assigned to the polling station at which the vote was recorded or who had not been authorized to vote at that station;***

b. ***the vote of a person whose vote was procured by bribery, treating or undue influence;***

c. ***the vote of a person who committed or procured the commission of personation at the election;***

d. ***the vote of a person proved to have voted in more than once constituency;***

e. ***the vote of a person, who by reason of conviction for an election offence or by reason of the report of the election court, was disqualified from voting at the election; or***

f. ***the vote cast for a disqualified candidate by a voter knowing that the candidate was disqualified, or after sufficient public notice of the disqualification or when the facts causing it were notorious."***

The learned Judge also adverted to **Rule 33(1)** of the **Elections (Parliamentary and County Elections) Petition Rules, 2013;**

"The parties to the proceedings may, at any stage, apply for scrutiny of the votes for purposes of establishing the validity of the votes case."

Finally, the learned Judge made reference to the **Elections (General) Regulations,** 2012 which deal with rejection of ballot papers in the following terms;

"77(1) At the counting of votes at an election, any ballot paper –

a. ***which does not bear the security features determined by the Commission;***

b. ***on which votes are marked, or appears to be marked against the names of, more than one candidate;***

c. ***on which anything is written or so marked as to be uncertain for whom the vote has been cast;***

d. ***which bears a serial number different from the serial number of the respective polling station and which cannot be verified from the counterfoil of ballot papers used at that polling station; or***

e. ***is unmarked, shall subject to sub regulation (2), be void and shall not be counted.***

(2) A ballot paper on which a vote is marked –

(a) elsewhere than in the proper place;

(b) by more than one mark; or

(c) which bears marks or writing by identify the voter, shall not by that reason only be void if an intention that the vote shall be for one or other of the candidates, as the case may be, clearly appears, and the manner in which the paper is marked does not itself identify the voter and it is not shown that the voter can be identified thereby."

The learned Judge proceeded to render himself as follows;

> ***"It follows that the purpose of scrutiny is to identify votes by people who were ineligible to vote, and those who were legible to vote and voted but their votes are void because they were not properly marked, were unmarked or had a different serial number. This is my understanding of Section 82(2) of the Act and rule 77(1) of the General Rules. A petitioner seeking scrutiny must, therefore, bring himself within Section 82(2) or Rule 77, or both. He should in the application, identify, for the purpose of exclusion, votes by people who were not eligible to vote or votes which were included in the count but which the presiding officer should have rejected."***

With respect to the learned Judge, I do think that his appreciation of the purpose of scrutiny was impermissibly restrictive. I think that scrutiny does serve a wider purpose than the learned Judge ascribed to it, as I shall shortly show. What is more, the onus he placed on an applicant to identify the particular votes that should have been rejected by the presiding officer is well-nigh impossible to discharge. I also think that the learned Judge fell into error in collapsing and conflating the separate and distinct processes under **Section 82(2)** of the **Act** and **Rule 33(4)** of the **Rules** by imposing an extra requirement that to succeed **"a petitioner should further lay a basis founded on Rule 77(1) of the General Rules."** The learned Judge deliberately added this further requirement to the ones identified by Emukule, J. in **Harun Meitamei Lempaka v Hon. Lemanken Aramat & Others**, Nakuru Election Petition No. 2 of 2013.

The learned Judge was quite emphatic that there needed to be laid a sufficient basis for an order of scrutiny and in this he was giving effect to the plain wording of **Rule 33(2)** of the **General Rules** and following a long line of authorities which have posited that there is no automatic, matter of course right to scrutiny and a petitioner is duty bound to establish sufficient reason or, as it is otherwise put, to establish or lay a basis for scrutiny or recount. See for instance, **Joho v Nyange & Another** (N02) [2008] 3KLR (EP).

A question does arise, but which I do not find it necessary to definitively answer on this occasion, as it was not raised by the parties herein, whether, on a proper consideration, **Rule 33(2)** of the Elections Petition Rules is inconsistent with the parent Act. It is noted that whereas under **Section 82(1)** of the Act scrutiny of votes is at the absolute and unfettered discretion of the Election Court and may even be exercised ***suo motu,*** the Rule imposes the condition that the court has to be satisfied that there are "sufficient reasons" before a scrutiny or recount can be ordered. I very much doubt that subsidiary legislation can efficaciously purport to limit and fetter a jurisdiction that is absolutely free under the Act itself. It appears to me that Courts have, in a juridical vivification of the philosopher Jean-Jacques Rousseau's complaint that **man is born free but everywhere he is in chains**, voluntarily assumed and defended fetters to discretion that may be subject to question. A full answer to that question must await a proper occasion.

The learned Judge in dealing with the issue of sufficient cause for ordering scrutiny proceeded to state that "the task of laying sufficient basis is made difficult the wider the margin." The Judge took the view that the margin of **17,895** votes between the petitioner and the winning respondent in the declared results was "a wide margin." The appellant's complaint is that the learned Judge gave undue prominence to this figure and he goes further to dispute the perception that the margin was wide pointing out that it represented only **7%** of the votes that were cast.

I do not think that the Judge's approach to the issue of the margin was entirely correct. First, as pointed out by the appellant, the margin could easily be viewed as not wide when the total number of votes cast, is borne is mind. More important, I think, is the impression given by the learned Judge that a wide margin imposes a heavier burden on the part of a petitioner who makes an application for scrutiny and recount. Given what I have already opined about Section 82(1) of the Elections Act, I take the view that the learned Judge misdirected himself in that respect.

I am also of the view that the learned Judge ought to have appreciated the gravity of the allegations of voter bribery made by PW2. That witness testified that on 3rd March 2013 at around 6.00pm to 7.00pm at Bingwa Location, Siongiroi Ward, agents of the 2nd respondent were dishing out money to the voters so as to influence their decisions. PW2 also found agents of the 2nd respondent campaigning for him on the queue on polling day at Kapamba Polling Station. The learned Judge took the narrow view that without

the names of the voters allegedly bribed, scrutiny could not be ordered. If our electoral systems are to approach to the constitutional vision of integrity and transparency, complaints of this kind must attract opprobrium and not tolerance or acceptance.

The learned Judge appears to have dealt rather peremptorily with the appellant's complaints around the casting of votes and tallying and announcement of results. The appellant had asserted that polling clerks and agents of the 2nd respondent had been allowed to mark ballot papers for voters and that the returning officer for Chepalungu Constituency had announced results at the Olbutyo Secondary School tallying centre that totaled **63,535** way above the registered voters of **51,620** yet later filled in a Form 36 with different results. The learned Judge appears to have been content with the respondent's denials of these allegations, but, taken together with the admitted errors in the statutory forms, which the respondent stated did not reach **1000** votes but which the appellant asserted were more than **1,500** votes in some two constituencies alone, I think it was an error for the learned Judge to fail to order a scrutiny and recount as requested. This the more so considering it is not uncommon for scrutiny and recount to reveal that the figures complained of turn out to be but the tip of an iceberg.

This reality has a pointed and poignant application to this case because of the close parallels it has with the case of **William Odhiambo Oduol v IEBC & 2 Others Kisumu H.C. Election Petition No. 2 of 2013** (**Oduol v Rasanga**) concerning the Siaya Gubernatorial Seat and decided by the same learned Judge. It is significant that the learned Judge there ordered for a recount in three of the six constituencies notwithstanding that the proven or admitted votes in error when the application was made, were less than in this case. After the recount, the so called big or large margin the respondents had been so confident about, shrank towards disappearance with the result that the Judge said this in his judgment;

> ***"In the instant case the recount results showed that the wide margin of 9,001 votes in favour of the 3rd respondent that the Commission had declared following the election conducted on 4.3.13 had been reduced to 897 votes only, and when the recount was in respect of three constituencies out of six constituencies. I consider that the recount was at the instance of the petitioner who was questioning the conduct of the election and the credibility of the results as returned by the Commission. I have considered all the circumstances of the petition and have come to the conclusion that the credibility of the results of the election was severely and materially tainted by the recount to the extend (sic) that I am unable to find that the results as declared by the 1st and 2nd respondents were either accurate or verifiable."***

What is good for the goose is good for the gander and the learned Judge should, with tremendous respect, have had the same approach to this case.

It is also not lost to me that the appellant operated under a definite prior handicap in that contrary to law, the 1st respondent did not avail him the requisite statutory forms until compelled to do so by court order. The learned Judge made no mention of this.

I am persuaded that on a proper consideration of all the errors, discrepancies and mistakes alleged by the appellant in the petition and the further affidavit in which he made extensive tabulations and analyses of the variances in the tallying of the votes as well as problems with the statutory Forms 35 and 36, the situation was such as prompted this Court in **Peter Kingara v IEBC & 2 others Civil Appeal (EP) No. 31 of 2013** to state as follows;

> ***"The issue as to the extent of errors in the counting and tallying of votes was not resolved by the evidence, and there was no way it could have been resolved, without an order of recount and scrutiny. There was also no way of verifying whether those errors affected the overall results and the democratic will of the people of Othaya Constituency. In the first place, the admission of so many errors should have reversed the onus of proof to 1st and 2nd respondents who should have, in order to vindicate themselves, desired to demonstrate and lay bare to the all-world that, what was contained in the ballot boxes was the democratic will of the people of Othaya Constituency. Instead the respondents strenuously opposed the request for scrutiny which in any event was***

within their right. We find that without an opportunity of examining what was contained in the ballot boxes, we agree with the appellant that there was no evidential foundation for the trial Judge to conclude that the errors were minor. In election matters qualitative and quantitative tests are applied as a basis of establishing whether the errors materially affected the outcome.

…

Given that there was no test that was applied to justify the conclusion that the totality of the errors was negligible (sic). If any attempt was made to examine the evidence critically, it would have been evident to the learned Judge that there was no factual basis for the conclusion that the errors committed during the counting and tallying did not affect the outcome of the results. The only way a correct conclusion could be arrived at, was through a recount and scrutiny of the ballots.

…

The question that lingers in our minds is whether there could have been more errors if the ballot boxes were opened, or indeed the opening of the ballot boxes would have vindicated the respondents all together from any wrong doing. With all these mistakes by the election officers, it was necessary to order the recount and scrutiny of the ballots so as to establish whether the election was substantially conducted according to the law. We have to state here that a recount or scrutiny of ballots is not rocket science, the terms are synonymous and there cannot be one without the other. There was sufficient evidence to show with was not an exercise meant to abuse the court process or take the court on a 'wild goose chase', there were sufficient grounds in this matter to justify the request. As it was held in the case of Said v Hemed [2008] eKLR (ED) 323. The aim of a recount is to assist the court to establish the correctness or otherwise of the allegations by a petitioner. Also a recount is meant to assist the court in its duty to investigate the validity of alleged breaches of the law and the irregularities. We think we have said enough to demonstrate that there was justification to order a recount and scrutiny in this election so as to ascertain the materiality of the errors alleged by the appellant and those which were admitted by the respondents." *(My emphasis)*

I am far from persuaded that the points of principle enunciated so recently by this Court are any less applicable to the present case. The errors and irregularities may have varied in extent but in both scenarios they were, on an objective basis, considering the evidence adduced and the admissions made, such as would trigger a judicial desire for certitude. Such certitude is a ***sine qua non*** to the process of attaining electoral justice as scrutiny and recount are tailored to meet that inherent good.

Whereas courts must guard against the salutary tool of scrutiny and recount being hijacked and turned into a fishing expedition by speculative and ambitious petitioners, I think there is much to commend it where there is a ***prima facie*** good faith basis for it. Scrutiny is not a thing to be feared but one to be embraced within reason. There is a sense in which it throws open boxed-in errors and anomalies and, by shedding the bright beam of close examination, is able to dispel them and thereby aid in the discovery of the true will of the electorate. In **Webuge v Limo & Another** [2008] 1 KLR (EP) 417 the election court took an approach that I would commend as worthy of emulation in appropriate cases;

"After careful consideration of all the submissions and the decisions cited in support thereof we granted the petitioner's application for a full scrutiny and a record of all the ballot papers cast. Our reasons for granting this application was based upon Court's desire to provide the petitioner with a full opportunity for the prayers made in the interest of justice and to test the bona fide of the election exercise." (at p. 419)

Bearing those considerations in mind, I am of the view that the learned Judge ought to have allowed, if not a full scrutiny and recount, at least a partial one touching on the **twenty-six** polling stations the results of which the appellant specifically disputed in his petition. Such scrutiny would have been in accordance with Rule 32(4) of the Elections (Parliamentary and County Elections) Petition Rules which I set out in

full;

> ***"Scrutiny shall be confined to the polling stations in which the results are disputed and shall be limited to the examination of-***
>
> *a.* ***the written statements made by the presiding officers under the provisions of the Act;***
>
> *b.* ***the copy of register used during the elections;***
>
> *c.* ***the copies of the results of each polling station in which the results of the election are in dispute;***
>
> *d.* ***the written complaints of the candidates and their representatives;***
>
> *e.* ***the packets of spoilt papers;***
>
> *f.* ***the marked copy register;***
>
> *g.* ***the packets of counterfoils of used ballot papers;***
>
> *h.* ***the packets of counted ballot papers;***
>
> *i.* ***the packets of rejected ballot papers; and***
>
> *j.* ***the statements showing the number of rejected ballot papers."***

This Rule shows that the phenomenon of scrutiny is actually wider than the very narrow and limited meaning the learned Judge ascribed to it. It does not deal merely with the votes cast but also involves an examination of statutory statements, the register, the statutory forms containing the results, as well as any written complaints that the candidates and their representatives may have made. Without a doubt scrutiny is wider and more comprehensive than a mere counting and allocation or ascription of votes. It provides an opportunity to explore and interrogate a greater collection of materials that go to show a clear picture of the propriety or otherwise of the electoral process. I would posit that in a real sense, scrutiny is the triumph of transparency over opacity. If U.S. Supreme Court Justice Louis Brandeis was right that ***it is said sunlight is the best disinfectant***, and I think he was, I am quite convinced that scrutiny provides one of the safest and most effective therapies for our electoral malaise. 'Let there be light' must surely be the first step towards the creation of the new electoral reality that the Constitution promises. It behoves election courts to midwife that child of promise, careful not to abort the vision.

Whereas my finding on scrutiny and recount ought on its own to dispose of this appeal, there are a number of other complaints that also merit consideration. The first relates to the issue of margin of votes which I have already addressed at some length herein.

I readily agree with counsel for the appellant that an election is a process and not an event and that the margin of votes between contestants is not, in itself, the determinant factor with regard to the question whether the results announced in a given election reflect the will of the electorate. If that were the case nothing would be easier than to manipulate the electoral process by all means, legal and extra legal, to ensure that the margin of votes is unassailable. A lionization of margin as a trump to all other complaints would embolden might and mischief over right. A Swahili proverb states ***"ukitaka kula nguruwe chagua aliye nona."*** This Court should be loathe to send such a message.

In determining the effect of any errors, irregularities and anomalies in the form of non compliance with electoral law, **Section 83** of the **Election Act** is apposite;

> ***"83. No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the***

principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election."

I do not apprehend **Section 83** to at all lower the accountability bar for the conduct and management of elections in this country in accordance with the constitutional principle of free and fair elections the elemental precepts whereof are;

"(i) by secret ballot

(ii) free from violence, intimidation, improper influence or corruption

(iii) conducted by an independent body;

(iv) transparent; and

(v) administered in an impartial, neutral, efficient, accurate and accountable manner."

Article 81(c) of the **Constitution** states that the electoral system shall comply with the principle of free and fair elections, among others. It is a mandatory requirement and whenever, as in the matter before the learned Judge, allegations, not demonstrably devoid of substance, are made that the principle has been violated, **Section 83** cannot be treated as an easy refuge or an automatic panacea. Rather, the Court must with due gravity and circumspection seek to enquire into those allegations and make specific, evidence-based findings on them. I am unable to see from the record that the learned Judge did so herein.

Pronouncing on a similar provision in the now repealed National Assembly and Parliamentary Elections Act, Omolo, J.A for the majority (Tunoi, JA concurring) in **James Omingo Magara v Manson Onyongo Nyamweya & 2 Others** [2010] eKLR stated as follows;

"I would respectfully agree. The scrutiny and recount of the votes by the learned Judge disclosed numerous irregularities, among them unsigned and, therefore unauthenticated Forms 16A, three missing ballot boxes, broken ballot seals and many others set out in the learned Judge's judgment. In my view these irregularities could not have been cured under section 28 of the National Assembly and Presidential Election Act. That section cannot be used to cover a situation where even the source of the votes in the ballot boxes cannot be conclusively determined. Again to use that section to cover the disappearance of ballot boxes, irrespective of the number of the ballot papers in the missing boxes, would simply amount to encouraging vandalism in the electoral process. Our experiences in Kenya following the 2007 elections part of which we are discussing herein, show us that no Kenyan, whether as an individual or as part of an institution, ought to encourage such practices. Section 28 cannot be used to white-wash all manner of sins which may occur during the electoral process and for my part I have no doubt that Parliament did not design the section for the purpose of covering serious abuses of the electoral process." (My emphasis)

I consider the foregoing judgment of this Court as good law which has been followed by this Court in many cases. It was also binding upon the learned Judge but, in what the appellant complains to have been a violation of the rule of precent, it appears the court below preferred the dissenting sentiments of Githinji, J.A. The learned Judge quoted those dissenting views immediately after what I have set out above and proceeded to decide the matter before him in accordance with the minority judgment. That was an error of law on the part of the learned Judge.

It is a great and remarkable irony that operating under a Constitution that this is more demanding of transparency, probity and accuracy for free and fair elections, this Court should speak in less emphatic terms than it did on a more difficult day.

The case of **Magara v Nyamweya** is also important and applicable to the case before us in that it addressed at length the absolute necessity for an election court to ensure that an election and its attendant

processes were transparent, free and fair. The Court there gave expansive treatment to the need for the statutory Forms 16A and 17A (our current forms 35 and 36) to be filled in properly and fully in the presence of the candidates and their agents who would then be invited to sign and if they refused to sign, the reasons for their refusal be recorded.

Had the learned Judge given full consideration to that binding decision of this Court, he would in all probability have come to the conclusion that the many complaints by the appellant about statutory forms being unsigned or altered and therefore void were not devoid of substance. Equally, he would have treated with the necessary gravity the omission by various returning officers to faithfully and accurately complete the statutory forms, being careful to include all the information mandatorily required under **Regulations 83 and 87** of the **General Regulations**. By not doing so, the learned Judge misdirected himself on an important aspect of the case, and that on a matter of law.

Other than not following and applying the **Magara v Nyamweya** case, I also find it disquieting that the learned Judge appears to have had no consideration whatsoever to the many judicial decisions that were placed before him by the appellant. The cases, all of which clearly had a bearing on and were relevant to the petition before him, included **John Michael Njenga Mututho v Jayne Njeri Wanjiku Kihara & 2 Others** [2008]eKLR where this Court stated that announcement of results was not confined to just declaring who won but rather a detailed result is envisaged; **William Kabogo Gitau v George Thuo & 2 Others** [2010]eKLR where it was held that elections are a process and reflect a democratic ideal and the roles of agents was set out as well. The statutory forms that the returning officer must fill and the desirability of scrutiny and recount were restated. The case also categorically stated that the width or largeness of a margin (it was much wider than herein) was no bar to nullification of an election and also warned of the perils to our nationhood that electoral malfesceace can portend. There was also the case of **Ali Omar v Julius Daraka Mbuzi** [2006] eKLR where this Court upheld the nullification of an election notwithstanding that the allegations in the petition went largely unproved.

It is also a matter of concern to me that the learned Judge does not seem to have directed his mind to the evidence by further affidavit that the appellant placed before the court complete with tabulations, analyses and pointers to anomalies and discrepancies in the tallying and declaration of results as well as the filling in of the statutory forms. Equally, there is no direct or any reference to the detailed written submissions that were filed on the contested issues before the learned Judge. Whether it was an oversight on the part of the learned Judge or a consideration that it was not important to record having interacted with the material under reference, the effect of the omission by the learned Judge is to lend credence to the appellant's contention that his case was not given proper and attentive consideration as was his right. This is given a further disturbing twist by the fact, submitted to us by counsel, that the learned Judge approached his case in a manner opposite to what he had done in the **Oduol v Rasanga** case and to the appellant's detriment.

Another matter that merits consideration relates to the learned Judge's treatment of the evidence of **Richard Kiplangat Sigei** PW2 who was the appellant's campaigner and a major witness on his behalf. This witness testified as to various irregularities and breaches of the law on elections. He said he witnessed the dishing out of money on the eve of the poll. He mentioned the culprit by name and linked him with the 2nd respondent's party. He testified further thus about Siongiroi Polling Station;

> ***"In the room the agents mingled with voters, agents assisting voters whom they wanted to vote for and marked for voters. Outside the station some voters were wearing caps and t-shirts for parties. I reported to the presiding officer. It was a lady from Western Kenya. She looked disappointed saying the voters did not respect her. She tried to put things in order. I went to count at Code 127. It had the smallest number of voters and was close to Siongiroi. I witnessed the counting and the presiding officer announced that Salat had 42 votes, but when it came to signing Form 35 Salat was allocated 0 votes. I complained but it fell on deaf ears."***

The witness testified at length about other irregularities but when the learned Judge came to analyzing that evidence, he rejected it, rather peremptorily in my respectful view, as follows;

"It is clear to me that, in view of the evidence of DW8, the evidence of PW2 is not believable and therefore the complaints in (b) (c) and (d) are without basis."

I respectfully hold that the learned Judge fell into error in rejecting the important evidence tendered by PW2 on the basis only of DW8 having stated that everything had gone on well (at the poll) and she had nothing to complain about. This DW8 **Rachel Cherotich Langat**, had been an agent of the appellant. She jumped ship and joined the opposing side for whom she came to testify. When asked at whose behest she came to testify, she did not want to answer, with the result that the learned Judge had to step her down with this note on record;

"Court: it is noted that witness is unwilling for a long time to answer the question who asked her to testify. I stand her down to reflect on the question as the next witness in called."

I find it peculiar that not only did the learned Judge not reflect on this witness' recalcitrance and shenanigans and therefore treat her evidence with the necessary caution and circumspection as being of doubtful veracity and shadowy credibility, he went ahead to use that same evidence to improperly reject wholesale the evidence of PW2. This was a misdirection which as an appellate court we ought never to let go unreversed. It is a matter of law when a Judge rejects evidence tendered by a witness under circumstances that call to question whether evidentiary principles have been observed. All that would have been required is an indication that the patent deficiency of credit on the part of the witness was borne in mind and resolved before her testimony was launched to peremptorily cancel the other party's testimony. The law on how the evidence of hostile witnesses should be approached is well-settled, anyway.

The final matter I will address is assisted voters. It was the appellant's contention that there was mischief in the manner voters were assisted, in that the 2nd respondent's agents demanded and were allowed to assist elderly voters who had not requested assistance. Those agents ticked the ballots in favour of the 2nd respondent and also intimidated some voters by accompanying them into the polling booth and monitoring to ensure they voted for the 2nd respondent.

The respondent's own witness **Daniel Maritim Chelogan** (PW9) confirmed that indeed, there was voter assistance at Siongiroi Polling station. Under cross examination he stated as follows;

"Old voters came with their grandchildren etc. The grandchildren assisted the voters. I don't recall the number of those who came with the grandchildren. I did not count them. <u>The number was big</u>. The assisted were those who were illiterate."

The law regarding assisted voting is set out in Regulation 72 of the General Regulations and it is simply this;

(i) a voter gets assisted to vote upon that voter's application to the presiding officer

(ii) The request may be based on disability or inability to read or write

(iii) The voter is then permitted to be assisted or supported by a person of the voter's own choice after the presiding officer respectfully enquires and establishes fitness for assistance

(iv) The person assisting the voter must be an adult, need not be a voter, but must not be a candidate or an agent.

(v) If the voter is unaccompanied by such person to assist him, the presiding officer shall assist the voter in presence of the agents.

(vi) The person assisting a voter must make a declaration of secrecy before the presiding officer in Form 32 before assisting a voter and cannot assist more than one voter.

As the phenomenon of assisted voters goes to the heart of secret ballot, and implicates free and fair election, it is strictly regulated by law the breach of which is an offence under the Elections Act. Of particular note is the fact that agents are not allowed to assist voters. Assistance is to be sought, not offered or imposed. No assistance shall be given before the taking of the oath of secrecy. Finally, the presiding officer shall, under sub-regulation (6) **"record in the polling station register against the name of the voter the fact that the voter was assisted and the reason for the assistance."**

From my perusal of the record, it seems plain that the law respecting the assisted voters was honoured more in the breach at the stations complained about. No oaths of secrecy were taken, and no record of the assistance was made as required. Yet these requirements are clearly mandatory, not least because they relate to an aspect of the democratic process that is vulnerable to capture and manipulation. That the learned Judge made no finding on this issue was a grave non-direction that ought to attract this Court's power of reversal. It is no secret that in many parts of rural Kenya, old but conscientious voters are often unable to read or write. When evidence exists that they might have been taken advantage of, Courts should not take it lightly. The laws exist for a good and noble purpose. We do them violence when we do not insist on their being complied with or lightly treat their contravention. In doing so we telegraph that laws are mere platitudes and their mandatory postulates no more than optional extras. I am decidedly against that view of electoral or any other law.

The upshot of the matters I have set out herein is that there is merit in the complaints constituting the appeal before us, which I would therefore grant. The judgment of the High Court made on 19th August 2013 I would set aside in entirety and substitute it with an order that the second respondent was not validly elected to the position of Senator of Bomet County.

I would order that the respondents shall pay the appellant's costs of this appeal and of the petition at the High Court.

As mine is a lone voice, however, and the majority are of a contrary view, the final dispositive orders are that this appeal is dismissed with costs.

Dated and delivered at Nairobi this 28th day of February, 2014.

P. O. KIAGE

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JUDGE OF APPEAL

JUDGMENT OF GATEMBU KAIRU JA

1. This is an appeal from the judgment of the High Court (the honourable Mr. Justice Muchelule) given on 19th August 2013 dismissing the appellant's petition challenging the election of the 2nd respondent as the senator of Bomet County.

Background

2. The appellant, Nicholas Kiptoo Arap Korir Salat, contested for the Senate seat for Bomet County during the 4th March 2013 general elections, having been nominated by the political party, Kenya African National Union (KANU). The 1st respondent, IEBC, declared the second respondent, Wilfred Rottich Lesan, who contested the same seat as a nominee of the United Republic Party (URP), as the winner. There were four other contestants for the same seat.

3. In a Petition presented to the High Court at Kericho, Petition No. 1 of 2013, the appellant challenged the senatorial election results for Bomet County and sought orders for recount and scrutiny of all votes cast in the election for the senate seat in Bomet County; a declaration that the 2nd respondent was not validly elected for the position of Senator in Bomet County; a declaration that he, the appellant, was validly elected for the position of Senator in Bomet County; an order directing IEBC to issue him with a certificate to that effect and to gazette him as the duly elected Senator; and an order barring the 2nd respondent from participating in any elections under the Elections Act for a period of five years on account of electoral malpractices. He also sought costs of the Petition.

4. The basis of the appellant's petition was that the election was flawed, irregular and unfair in that in some polling stations the number of votes cast exceeded the number of registered voters; that voter turn out was lower than average; that votes cast in favour of the appellant were understated and votes in favour of the 2nd respondent overstated.

5. The appellant's specific complaints were that the total number of votes assigned or allocated to candidates in some polling stations exceeded the number of votes cast, meaning 'ghost votes' were added; that votes cast in favour of the appellant were not included; that the 2nd respondent was allocated more votes than were cast and that rejected votes exceeded votes cast in some cases. In Chepalungu constituency the appellant's complaints related to 20 polling stations. In Bomet East Constituency the complaints related to 2 polling stations where it was contended that the returning officer should have disregarded the results from those stations as the total number of votes cast exceeded the number of registered voters. In Sotik Constituency the complaints relate to 3 polling stations where it was contended that votes in favour of the appellant were understated.

6. It was also the appellant's case that the election was riddled with such grave malpractices, irregularities, fraud, intimidation and coercion of voters by the constituency presiding officers and the returning officer of Bomet County, the 3rd respondent, that the outcome of the election was not free and fair and did not reflect the will of the Bomet County electorate. The irregularities complained of include permitting agents of the 2nd respondent to conduct campaigns on the voting day; permitting agents of the 2nd respondent to assist elderly voters, who did not require assistance, to vote; declining to announce results at the polling stations; declining access and chasing away agents from the polling stations; bribery of voters; refusing to provide agents with copies of results announced; fabricating results and exaggerating votes cast in favour of the 2nd respondent; permitting polling clerks to mark ballot papers in favour of the 2nd respondent; withholding information on votes cast; denying the appellant's agents access to Forms 34,35 and 36 in order to verify entries; and declaring flawed results without addressing the appellant's complaints.

7. The appellant further complained that IEBC failed to explain the disparities in terms of the votes cast for women representative, presidential election, and governor election in Bomet County as percentages of registered voters.

8. For those reasons it was the appellant's case that the election for the senate seat for Bomet County was not validly, fairly and freely conducted by IEBC and that the result announced did not reflect the true outcome of the will of the people of Bomet County and should be nullified.

9. In their responses to the Petition, the respondents denied the appellant's allegations regarding malpractices, irregularities, fraud, intimidation, bribery and coercion; they added that no agents were denied access or chased away from polling stations. The respondents asserted that the election, polling and counting of votes was free, fair, accurate, transparent and credible and the tallying was accurate and verifiable and the results declared reflected the will of the people of Bomet County. According to the respondents the process of counting and scrutiny of votes cast was transparent and conducted with the full involvement of the appellant's agents who approved the results entered in Form 35; that the entire electoral process was free, fair, transparent, and credible and complied with the Constitution, the Elections Act and all laws and regulations on the conduct of elections and that any errors in the tallying process that might have occurred were minor and did not materially affect the final outcome of the

senatorial elections in Bomet County.

10. At the conclusion of the oral hearing the appellant applied for an order of recount of all votes in Bomet County in respect of the senatorial election or alternatively a partial recount in identified polling stations. In the same application the appellant sought an order for scrutiny of votes in the listed polling stations. The respondents opposed that application. After hearing the application, the court dismissed it in a ruling delivered on 10th July 2013 on the basis that sufficient reasons had not been given to order either scrutiny or recount.

11. In his judgment that is the subject of this appeal the learned judge dismissed the appellant's petition on the grounds that the appellant did not prove that any errors committed in the electoral process were such as would materially influence the results in favour of the appellant; that there was no evidence that votes cast in any station exceeded the registered voters; that the 2nd respondent won the election by a wide margin of 17,895 votes; that the allegation of bribery was not proved; that upon consideration of the evidence the outcome of senatorial elections expressed the will of the people of Bomet County and that the election was free, fair and credible and that the petition was therefore devoid of merit.

The appeal

12. Being aggrieved by that judgment, the appellant instituted the present appeal complaining that the election court erred in: failing to consider that the election of the senator is a legal process that is not solely dependent on the margin of votes between the contesting candidates; failing to consider, analyse and make findings on the discrepancies and irregularities in Forms 35 and Forms 36 including existence of different sets and versions of those forms and unfilled and unsigned forms; failing to consider that results from some streams in identified polling stations were not taken into account in the final announcement of the results; failing to consider the evidence contained in the appellant's further affidavit filed on 24th May 2013; failing to consider the appellant's submissions; failing to consider the Deputy Registrar's report and to order scrutiny and recount of votes; relying on the oral as opposed to the documentary evidence and failing to hold that the elections were not conducted in accordance with the Constitution, the Elections Act and Election Regulations.

Submissions by counsel

13. At the hearing of the appeal the parties were represented by learned counsel. Mr. T. Koceyo and Mr. E. Orina appeared for the appellant. Mr. Z, Yego appeared for the 1st, 3rd to 8th respondents while Mr. P. Lilan and Mr. Arusei appeared for the 2nd respondent. Counsel made written as well as oral submissions.

14. Mr. T. Koceyo for the appellant submitted that the appellant is challenging the decision of the Election Court on points of law; citing Articles 81 to 86 of the Constitution and the decisions in **James Omingo Magara v Manson Oyongo Nyamweya Civ App 8 of 2010; William Kabogo V George Thuo High Court Election Petition No. 10 of 2008; William Oduol V IEBC Ksm Election Petition No. 2 of 2013,** Mr. Koceyo submitted that the learned judge should not have paid undue regard, as he did, to the margin of votes between the 2nd respondent and the appellant; that the judge should instead have looked at the entire electoral process including the errors in tallying, the discrepancies between entries in Forms 35 and Forms 36 including a consideration that the appellant got more votes in Form 35 than the votes indicated in Forms 36 which showed less votes; that the appellants votes were understated in various stations and that in the entire judgment the learned judge did not make a determination on the loss of votes; that without basing his decision on any evidence the judge found that the appellant did not loose more than 1000 votes when in fact it was demonstrated that the votes lost were about 1,500 votes and that the judge erred in law in failing to decide on the wrong posting of votes.

15. Mr. Koceyo went on to say that considering that there was admission that there were in existence at least 3 sets of Forms 35 and 36 the learned judge erred in failing to make a determination on multiplicity of those forms; that there was also evidence of stream of voters that were not taken into account and that, having regard to Article 38(2) of the Constitution, the judge made no determination on that either and

neither did he make a determination on existence of unsigned Forms 35 and 36 which, based on Regulation 83 of the Election Rules and on the strength of the decision in **James Omingo Magara v Manson Oyongo Nyamweya (supra)** are void and invalid and should therefore have been disregarded.

16. Counsel further submitted that the learned Judge erred in failing to consider the appellants entire evidence including the evidence contained in the further affidavit filed on 24th May 2013 and also in failing to order scrutiny and recount of votes as there were sufficient grounds for doing so including the matters raised in the report of the Registrar. Counsel submitted that the omission to include streams of voters in specific polling stations as well as the evidence of the unsigned and altered Forms 35 and Forms 36 were further reasons why scrutiny and recount should have been ordered. In that regard counsel cited **James Omingo Magara v Manson Oyongo Nyamweya William Kabogo v George Thuo, Musikari Kombo V Moses Wetangula Petition 3 of 2013; Philip W Wasike V James Lusweti Petition 5 of 2013 Bungoma; and William Oduol's case.**

17. Relying on the decision of the Nigerian Supreme Court in **Rauf Adesoji A. And others V Olangunsonye Oyinlola and others CA/1/EPT/GW/98/2008 Nigeria Court of Appeal** counsel submitted that the learned judge placed undue reliance on oral evidence and disregarded the documentary evidence and thereby ran into error.

18. Counsel concluded by saying that the entire electoral process was not transparent, accurate, free and fair and that the defects in the senatorial elections in Bomet County substantially altered the results as declared and the appeal should therefore be allowed.

19. Opposing the appeal Mr. Yego for the 1st, 3rd to 8th respondents submitted that it is not true that the learned trial judge pre occupied himself with the margin of votes with which the 2nd respondent won the election; that the judge alluded to the wide margin of votes in connection with the application for scrutiny and recount and correctly took the position that where the margin of votes is wide, the burden of laying sufficient basis for an order for scrutiny and recount as required by Rule 33(2) Election (Parliamentary and County Elections) Petition Rules is heavier and that the appellant did not surmount that burden in order to succeed in his application for an order for recount. Citing **Buhari V Obasanjo (2005) CLR 7 K; Ibrahim V Shagari and Others (1985) LRC (Const) 1** Mr. Yego submitted that the appellant garnered 98,036 votes against the 2nd respondent's 115,931 votes, a margin that was too wide to be ignored.

20. Counsel added that the appellant did not file a notice of appeal in respect of the ruling of the election court declining the order for scrutiny and recount and that the Court has no jurisdiction to hear an appeal from that interlocutory order. Counsel cited **Benjamin O Andama V Benjamin Andayi and 2 others Ksm C.A. Civ App No. 24 of 2013.**

21. Mr. Yego went on to say that as the appellant contended that he won the senatorial election for Bomet County, he bore the burden to show that he did and the judge cannot therefore be blamed; that the appellant's petition was determined on basis of and in accordance with Article 81 the Constitution, the election laws and the evidence; that the appellant failed to prove that he won the election or that the election was not free and fair but instead clutched on insignificant, transposition human errors that were satisfactorily explained. He stated that the appellant failed to demonstrate that the election was skewed in favour of any party; that the 3rd respondent detected the anomalies and duly attended to them; that there were 3 polling stations where results of other streams were not captured and the 2nd respondent, who should be the one complaining, was denied 341 votes that would have widened his margin of win by up to 18,000 votes; that all candidates were affected by the errors without discrimination; that the admission that there were errors, attributable to fatigue, does not mean the election was flawed and that in the end the results reflected the will of the people of Bomet county. He submitted that despite the errors the will of the people was reflected and cited the case of **Col. Dr. Kizza Besigye V Yoweri Museveni Kaguta and Electoral Commission Election Petition 1 of 2001(cited in the case of Raila Odinga V IEBC and others).**

22. Counsel submitted that there was no polling station that did not have a signed form 35; that

Regulation 87(2)(c) Election (General) Regulations 2013 imposing an obligation to transmit results electronically does not require the forms transmitted electronically to be signed and only the forms 35 for transmission manually should be signed; that under Regulation 97(2) Election (General) Regulations 2013 agents need not sign the forms as they could otherwise hold the results at ransom by refusing to sign; that the evidence presented by the appellant before the Election Court did not meet the required threshold for nullifying an election as there was lack of consistent, credible and coherent evidence on the basis of which the learned judge could nullify the election, beyond the attempt by the appellant to harp on errors that were conceded and sufficiently explained. For that proposition, counsel referred us to the Supreme Court decision in **Raila Odinga vs. IEBC and others Supreme Court Petition No. 5 of 2013**; **Benjamin Andama vs. Benjamin Andayi and others CA Civil Appeal No. 24 of 2013**; **Gagawala Wambuzi v Lubogo, CA (Uganda) Civil Appeal No. 10 of 2011** and **IEBC vs. Stephen Mule and others CA Civil Appeal No. 219 of 2013**.

23. Counsel denied that there were multiple Forms 35 and 36 or that any admission was made by the respondents to that effect and submitted that the allegation was baseless.

24. Regarding the contention that the evidence in the appellant's further affidavit was not considered, counsel submitted that the appellant was cross-examined on it and the judge analyzed all the evidence. Counsel also submitted that the appellant was unable to prove any of the allegations or prove that he lost any votes or that tallying errors affected the outcome of the election. He submitted further that the affidavit sought to introduce matters not set out in the petition but the trial judge nonetheless took into account all material placed before him including the further affidavit.

25. On the complaint that the judge did not consider the report of deputy registrar, counsel submitted that the report by the Deputy Registrar pursuant to Rule 21 of the Elections (Parliamentary and County) Petition Rules, 2013 was not part of the record and was not necessary once the application for recount and scrutiny was dismissed by the High Court.

26. For the 2nd respondent Mr. Lilan submitted that the 2nd respondent, who sought election under URP was duly elected as Senator for Bomet County and that it is instructive that all seats in Bomet County were won by URP candidates and that not a single candidate seeking election through any other party got elected in the County.

27. Turning to the appellant's grievances, counsel for the 2nd respondent submitted that the standard applicable is captured in the case of **Morgan v Simpson [1974] 3 All E R 722** at 728 which finds expression in section 83 of the Elections Act; that the grievances by the appellant relate to minor errors in the electoral process that were adequately explained and which did not in any event affect the result; that the appellant was subjected to cross examination on the further affidavit; that affidavit dealt with matters that went beyond the scope of the petition; that leave of the court was not granted to introduce those matters despite which the learned judge considered all the evidence placed before him in arriving at his judgment; that the judgment of the election court is compliant with the requirements of the rules with regard to the contents of a judgment. Counsel disputed that the judge relied on oral evidence alone maintaining that all the evidence, including the documentary evidence, was duly considered.

28. Counsel concluded by submitting that the appellant failed to provide evidence of the total number of votes that he alleges were left out so as to demonstrate the overall effect of the alleged omissions on the result of the election. With that Mr. Lilan urged us to dismiss the appeal.

29. Taking over from Mr. Lilan, Mr. Arusei also appearing for the 2nd respondent submitted that the appellant failed to demonstrate before the election court that the outcome of the senatorial election in Bomet County did not represent the will of the people of Bomet County; that it is clear from the evidence of the County returning officer whose duty it was to tally county results that when announcing the results, no figures were left out and that the actual results were announced; that any discrepancies in the figures in Forms 35 and Forms 36 were adjusted by the returning officers pursuant to Regulation 83 of the General Regulations to ensure consistency; that any discrepancies were not substantial so as to affect the result and that even though the appellant sought to be declared winner by the election court, he did not lay any

basis for that claim. With that Mr. Arusei also urged us to dismiss the appeal with costs.

30. In reply Mr. Koceyo submitted that the total number of votes that were not taken into account due to irregularities in the electoral process remain a mystery and that the results that were announced were substantially altered.

31. Mr. Orina, who joined Mr. Koceyo in reply took issue with the submission by counsel for the appellant that the decision of the election court refusing to order recount and scrutiny is not the subject of appeal having been a decision on an interlocutory application and submitted that that issue is properly before this Court. Counsel submitted that having regard to rules 77 and 88(2) of the Election Rules, the learned judge erred in rejecting the application for recount.

32. Regarding the appellant's further affidavit, Mr. Orina submitted that leave was in fact granted on 6th May 2013 to present it and that the contents of that affidavit do not go outside the petition. Mr. Orina urged that the circumstances of the present case are distinguishable from those in the case of **Raila Odinga vs. IEBC and others**.

33. Mr. Orina concluded his submissions by stating that the Court must be wary of attaching undue weight to the margin of votes between the candidates considering that a wide margin can be procured by corruption; counsel emphasized that whilst the margin may be a relevant factor, the entire election process must be looked at and that had the learned trial judge done so he would have come to the conclusion that the outcome of the senate election for Bomet County did not represent the will of the people of that County.

Analysis and determination

34. Under section 85A of the Elections Act, our mandate in this appeal is restricted to matters of law. **Section 85A** provides that:

> ***"An appeal from the High Court in an Election Petition concerning membership of the National Assembly, Senators or the Office of the County Governor, shall lie to the Court of Appeal on matters of law only."***

35. Therefore, we can only interfere with findings of fact by the trial court if such findings have no basis in evidence or if the election court acted on wrong principle in reaching a finding or the court failed to take into account material circumstances or took into account matters it should not have. In **Mwangi v Wambugu [1984] KLR 453** the court stated:

> ***"A Court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding; and an appellate court is not bound to accept the trial Judge's finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."***

36. What then are the issues that arise for our determination in this appeal? Although the appellant set out 27 grounds of appeal in his memorandum of appeal I think the central question is whether the election court erred in declining to order scrutiny and recount of votes. Collateral to that are the issues whether the appellant established that the election was fraught with material irregularities that adversely affected the outcome of the election and whether the election substantially complied with the Constitution, election laws and regulations.

37. I begin with the question whether the election court erred in refusing to grant the appellant's request for scrutiny and recount.

38. The starting point is in relation to the contention that the complaint on recount and scrutiny is not properly before us absent a notice of appeal with respect to the ruling of the court refusing recount and scrutiny. I do not think there is merit in that contention. In **Peter Gichuki King'ara vs. IEBC & 2 Others (Civil Appeal No. 23 of 2013)** this Court held that it has jurisdiction to hear and determine appeals from interlocutory decisions of the High Court in election matters, save that that jurisdiction is deferred and exercisable after a final judgment and decree of the High Court. The Court was even more categorical in **Jared Odoyo Okello vs. IEBC and others Civil Appeal No. 16 of 2013** where this Court stated that:

> *"**We have come to the conclusion that nothing in the Elections Act or the Election Petition Rules limits the jurisdiction this Court under Art 164(3) to hear and determine interlocutory appeals. However, in our view, a purposive and holistic interpretation of Art 164(3) together with other pertinent provisions of the Constitution to which we have made reference below lead us to conclude that the right of appeal to this Court from the High Court in interlocutory elections matters has legitimately been regulated that it is invoked after the final determination in an election petition**"*

39. The challenge to the election court's decision on the application for recount and scrutiny is therefore properly before us. I move next to consider whether the learned judge err in refusing to order recount and scrutiny?

40. The appellant's application sought orders of recount of all votes in the entire Bomet County in respect of the Senatorial election held on 4th March 2013. In the alternative, he sought a partial recount in disputed polling stations. He attached a list of the polling stations to his application. He also applied for an order for scrutiny of the votes in the listed polling stations.

41. The basis of his application was that the voter turnout in the Senatorial election held on 4th March 2013 was exaggerated in order to inflate figures in favour of some respondents, especially the 2nd Respondent; that the respondents fraudulently manipulated documents in order to conceal irregularities and electoral malpractices; that the elections were not free, fair and transparent; that IEBC did not administer the election in an impartial, neutral, efficient, accurate and accountable manner; and that there were manifest variations in the result announced and declared in terms of documentation and records.

42. In support of the prayer for an order for recount the appellant had alleged that at polling stations in Chepalungu, Bomet East and Sotik Constituencies his votes were understated while those of the 2nd Respondent were overstated; that at some polling stations the total votes allocated to candidates were more than the declared number of valid votes; that there were stations where the votes cast were more than the registered voters and that there were contradicting entries on Forms 35 and Forms 36.

43. After reviewing the material before him, the learned judge determined that the errors were explained and were in any event not such that would materially influence the declared results.

44. Basing his ruling on the provisions of S. 82 of the Elections Act, Rule 33 of the Elections (Parliamentary and County Elections) Petition Rules, 2013 as well as Rule 77 of the Elections (General) Regulations, 2012 under the Elections Act, the learned judge determined that a petitioner who seeks scrutiny and recount has to demonstrate 'sufficient basis' to justify the order under Rule 33(2). The judge took the view that the task of laying sufficient basis to justify an order for scrutiny and recount is made difficult when the margin is wider. He cited the decision of the High Court (Maraga J ,as he then was) in the case of **Joho Vs Nyange and another [2008] 3 KLR (EP) 500,** where the court held that "...where the margins are narrow, the courts have ordered scrutiny without necessarily seeking that a foundation (*a basis*) be laid. The judge did not say that where the margin is wide then no scrutiny will be ordered. It only means that, the task of laying 'sufficient' basis is made difficult the wider the margin."

45. The judge was not satisfied on the material placed before him that sufficient basis was laid for him to grant the appellant's request for recount and scrutiny. He pointed out that no evidence was presented to demonstrate that, under Rule 77(1) of the Elections (General) Regulations, there were any void votes that

the presiding officers included in the count.

46. As held by this Court in the recent decision **Peter Gichuki Kingara vs. IEBC and others** the grant or refusal of an order for scrutiny and recount is an exercise of judicial discretion and the question therefore is whether the learned judge proceeded on the correct basis. In that case, this Court, differently constituted, stated that in denying the prayer for scrutiny the election court exercises judicial discretion and that that discretion has to be exercised judiciously and for reasons, which are stated. The Court cited the famous passage by Sir Charles Newbold P. in **Mbogo & Another V Shah 1968 EA** 93 at page 95 that:

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

47. It is also trite that an appellate court should not substitute the trial judge's discretion with its own discretion and that in order to interfere it has to be shown that the lower court was clearly wrong because of misdirection or for failing to take into account matters he should have taken into account or for taking into account matters that he should not have taken into account. [See **Matiba v Moi & 2 Others, 2008 1 KLR 670**].

48. The discretion to order scrutiny is conferred under Section 82(1) of the Elections Act No. 24 of 2011. Under Rule 33 of the Election (Parliamentary and County Elections) Petition Rules, 2013 a party may at any stage of the proceedings apply for scrutiny for purposes of establishing the validity of votes cast. Rule 33(2) requires the court to be satisfied that there is sufficient reason and the manner in which the scrutiny is to be carried out is set out in detail. An order for scrutiny and recount is therefore not automatic; sufficient reason has to be shown before the court orders scrutiny and recount. There must be enough material placed before the court, which will impel the court to order scrutiny or re-count of votes. Whether or not that criterion is met will depend on the nature of the claims being put forward by the petitioner and the weight the court will attach to the evidence in support of the matters complained of. The irregularities complained of by the petitioner should be of such a nature that would compromise the electoral process so that it was capable of affecting the results and cannot be said to have been free and fair. What the Supreme Court of Kenya in **Raila Odinga and 5 others vs IEBC and 3 others [2013] eKLR** stated, in the context of presidential elections, is true of all elections, that elections are not perfect. Similarly in this case the trial judge was alive to the fact that there were errors and irregularities as well as discrepancies in the entries on the forms. However the trial judge was convinced by the evidence of the respondents, which explained the errors and noted that they not only affected all the parties without favour or any partiality, but were corrected and were not capable of affecting the results substantially. The trial judge was not satisfied that the appellant had laid sufficient basis to warrant an order for scrutiny and recount.

49. Can the election court be said to have erred in the exercise of its discretion in refusing to order scrutiny and recount? I do not think so. Unlike the situation in **Peter Gichuki King'ara Vs IEBC and 2 others Civil Appeal (EP) No. 31 of 2013** where this Court recently held that the trial judge in that case erred in rejecting an application for recount and scrutiny, I am not satisfied that the trial judge erred in the present case.

50. The first part of the appellant's prayer sought an order for recount throughout the entire Bomet County. The appellant laid no basis whatsoever to justify that request. As submitted by counsel for the respondents, it seemed that the appellant was on a fishing expedition. The alternative prayer for recount was restricted to some polling stations in three constituencies, namely Chepalungu, Bomet East Constituency and Sotik constituency. Each of those constituencies had numerous polling stations with respect to which the appellant made no complaints. Unlike the situation in **Peter Gichuki King'ara vs. IEBC and 2 others** where the appellant had set out too many errors and discrepancies that went beyond simple administrative errors, the situation here is different. Having regard to the number of polling

stations complained of, the total number of votes complained of by the appellant, the nature of the complaints, the explanations given by the respondents with regard to those complaints, and the margin of votes separating the 2nd respondent from the appellant I, like the trial judge, are not satisfied that the errors are such as would have had an impact on the final results as tallied and announced. In my view the appellant failed to lay sufficient basis for the court to order for scrutiny and recount and the trial judge rightly rejected the prayers for orders of scrutiny and recount and cannot be faulted for doing so.

51. The next issue is whether the learned judge erred in holding that the appellant did not prove that any errors committed in the electoral process were such as would materially influence the results in favour of the appellant. I will consider this together with the complaint that the learned judge erred in determining the petition solely on the margin of votes between the appellant and the 2nd respondent.

52. I readily agree with counsel for the appellant that an election is a process and not an event and that the margin of votes between contestants is not, in itself, the determinant factor with regard to the question whether the results announced in a given election reflect the expression of the electorate. If that were the case nothing would be easier than to manipulate the electoral process by all means, legal and extra legal, to ensure that the margin of votes is unassailable.

53. There is however a rebuttable presumption under section 83 of the Elections Act, that elections are conducted in accordance with the principles laid down in the Constitution, the Elections Act and the regulations. That section provides that:

> ***"83. No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election."***

54. It is therefore incumbent on the one asserting that the election was not conducted in accordance with the Constitution and the law to prove. In **Raila Odinga and 5 others Vs IEBC and 3 others [2013] eKLR** the Supreme Court proceeded on the basis that a petitioner seeking to nullify an election should "clearly and decisively" demonstrate that the conduct of the election was so devoid of merits and so distorted as not to reflect the expression of the people's electoral intent and that the evidence should disclose "profound irregularity in the management of the electoral process".

55. All parties before us were in agreement that in applying section 83 of the Elections Act, the principles captured in the English case of **Morgan vs Simpson [1975] 1 QB 151** are instructed. The court in that case held that:

1. **"If the election was conducted so badly that it was not in accordance with the law as to elections the elections is vitiated, irrespective of whether the result was affected or not…;**

2. **If the election is so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by breach of the rules or a mistake at the polls…**

3. **But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless, if there was a breach of the rules or a mistake at the polls and it did affect the result, then the result is vitiated."**

56. It is also common ground that some errors were committed in the senatorial elections in Bomet County. The question is whether those errors affected results or the outcome of the election in terms of performance by the candidate and the number of votes each obtained. [See **Clare Eastern Division Case (1892)4 QM & H 167, *at p. 162,* Ruffle vs. Rogers [1982]QB 1220]**

57. Georges CJ. in the Tanzanian case of **Mbowe v. Eliufoo [1967] EA 240** considered the meaning of the phrase **'***affected the result'* in a provision similar to our **section 83** of the Elections Act and held:

"In my view in the phrase "affected the result", the word 'result' means not only the result in the sense that a certain candidate won and another candidate lost. The result may be said to be affected if after making adjustments for the effect of proved irregularities the contest seems much closer than it appeared to be when first determined. ***But when the winning majority is so large that even a substantial reduction still leaves the successful candidate a wide margin, then it cannot be said that the result of the election would be affected by any particular non-compliance of the rules."***

58. English courts have expressed similar views. Lord Coleridge, in the old English case of **Woodward v. Sarsons (1875) L. R. 10** at 733 noted as follows:

"If this proposition be closely examined it will be found to be equivalent to this, that the non-observance of the rules or forms which is to render the election invalid, must be so great as to amount to a conducting of the election in a manner contrary to the principle of an election by ballot, and must be so great as to satisfy the tribunal that it did affect or might have affected the majority of the voters, or in other words, the result of the election."

59. In **John Fitch –vs- Tom Stephenson & 3 Others, QBD (2008) EWHC** 501 it was held that:

"*The decided cases, including those which Lord Denning considered in* ***Morgan –vs.- Simpson****, established that* ***the courts will strive to preserve an election as being in accordance with the law, even where there have been significant breaches of official duties and election rules, providing the results of the election was unaffected by those breaches. This is because where possible, the courts seek to give effect to the will of the people…" (emphasis added)***

60. In my view, the grounds on the basis of which the appellant challenged the election of the 2nd respondent ranging from complaints that there were unsigned Forms 35 and Forms 36; that there were multiple Forms 35 and Forms 36; that the appellant had more votes in Form 35 than Form 36; and that some streams from certain polling stations were not taken into account were effectively answered. The evidence tendered by the respondents showed that although some streams from some polling stations were not taken into account, the oversight was corrected and the results entered before the final tally. The respondents also explained that only the properly signed Forms 35 and 36 were submitted and the same were presented before the court. The respondents also readily acknowledged and clarified that there were errors in entry of data into the forms, which were noticed and rectified before the final tally of results.

61. The appellant contended that the total number of votes lost or unaccounted for were in the region of 1500 votes as opposed to 1000 as indicated by the learned judge of the election court.

As observed by Georges CJ. in the Tanzanian case of **Mbowe v. Eliufoo**

"…But when the winning majority is so large that even a substantial reduction still leaves the successful candidate a wide margin, then it cannot be said that the result of the election would be affected by any particular non-compliance of the rules."

62. It is clear from the judgment of the election court that the margin of 17,895 votes between the candidates was not the only factor that the election court considered in dismissing the appellant's petition. The election court also found, correctly in my view that the appellant failed to prove that the errors and irregularities made in the elections affected the results of the election. Let me conclude with the words of the Supreme Court of Canada in **Opitz vs Wrzennewsky, 2012 SCC 55, 2012 3 SCR 76,** where the court stated:

"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."

63. For those reasons I would dismiss the appeal with costs. As the Honourable Mr. Justice Kathurima M'Inoti JA agrees the order of the Court is that the appeal fails and is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 28th day of FEBRUARY, 2014.

S. GATEMBU KAIRU

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JUDGE OF APPEAL

JUDGMENT OF M'INOTI, J.A.:

I have had the advantage of reading in draft the judgment of my brother, S. Gatembu Kairu, JA. I agree with his decision and the orders that he has proposed. I have nothing useful to add.

Dated and delivered at Nairobi this 28th day of February, 2014.

K. M'INOTI

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JUDGE OF APPEAL