REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A.)

CIVIL APPEAL NO. 31 OF 2013

BETWEEN

PETER GICHUKI KING'ARA……...……..…….....…… APPELLANT

AND

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION ……..…….. 1ST RESPONDENT

JAMES MBAI ……...……....….... 2ND RESPONDENT

MARY WAMBUI MUNENE ……..……...…..…… 3RD RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nyeri

(Ngaah, J.) dated 12th September, 2013

in

High Court Election Petition No. 3 of 2013)

****

JUDGMENT OF THE COURT

[1] This is an appeal from the judgment of Ngaah, J. of 12th September, 2013, in High Court Election Petition No. 3 of 2013. Peter Gichuki King'ara, the appellant, contested for the Member of the National Assembly seat of Othaya Constituency during the 4th March, 2013, general elections. The central issue that is cross cutting the entire appeal is whether the learned trial Judge properly exercised his discretion in declining to order scrutiny and recount of the ballots cast for Member of the National Assembly for Othaya Constituency during the 4th March 2013 elections. It is trite that exercise of judicial discretion is a point of law.

[2] There were a total of 9 candidates who offered themselves for the same seat. After the elections, the

Independent Electoral and Boundaries Commission, the 1st Respondent through its agent, James Mbai the 2nd Respondent who was the Returning Officer declared the following results:

Candidate's Name	Number of Votes
a) David Kimengere Waititu	**112**
b) David Ringaru Gichane	**395**
c) Emilio Kibui Mwangi	**162**
d) Esau Kihumba Kiai	**755**
e) Gerald Warogo Mwangi	**65**
f) James Gichuki Mugambi	**10,972**
g) Peter Gichuki King'ara	**14,218**
h) Joshua Mwangi Mugo	**616**
(i) Mary Wambui Munene	**16,285**

[3] Mary Wambui Munene, the 3rd respondent was declared the elected Member of the National Assembly seat for Othaya Constituency. The appellant was second and as the results show, the margin between them was 2077 votes. Being aggrieved by those results, the appellant filed a petition in the High Court challenging the validity of the said elections. The appellant cited a litany of grounds which were presented and argued in a thematic order to wit:

> ***(a) Failure to inquire into the eligibility of the 3rd respondent to offer herself as a candidate for elective office leading to the admission of an ineligible person as a candidate in the election.***
>
> ***(b) Failure to issue directives regulating access to the electorate, the use of public resources and access by the electorate to polling centres given the participation of the President in the campaigns for the election of Member of the National Assembly for Othaya Constituency.***
>
> ***(c) Failure to investigate the publication of negative propaganda and circulation of defamatory leaflets.***
>
> ***(d) Rampant voter bribery.***
>
> ***(e) Irregular appointment of polling clerks.***
>
> ***(f) The unilateral relocation of polling centres and materials on the Election Day.***
>
> ***(g) Contravention of electoral regulations governing voting.***
>
> ***(h) Failure to secure polling stations and their environs.***
>
> ***(i) Failure to count votes in accordance with electoral law.***
>
> ***(j) Failure to properly record the votes, display the same and avail the respective Form 35 to agents.***
>
> ***(k) Failure to submit results in electronic form.***

(h) Failure to seal ballot boxes.

(m)Discrepancies in the statutory vote tallying documents leading to the declaration of manifestly wrong results.

(n) Irregularities and inconsistencies in counting, tallying of votes and filling in of Forms 35 and 36.

(o) Interference with ballot boxes and ballot seals.

[4] Each of the aforementioned grounds was elaborated upon and details provided in the petition and in the appellant's supporting affidavit. The petition was supported by an equally long affidavit consisting of 91 paragraphs sworn by the petitioner on 26th March, 2013. The appellant annexed several documents that were referred to during the trial of the petition. The appellant also filed a total of twenty three affidavits of the witnesses he desired to call in support of the petition.

[5] The appellant principally sought for a recount and scrutiny of the votes cast; that he be declared as the duly elected Member of the National Assembly for Othaya Constituency in the March, 2013, elections and the court to certify and notify the Speaker of the National Assembly accordingly. The appellant included alternative prayers in the petition, where he prayed that a determination be made that the 1st respondent was obliged to, BUT failed and/or neglected to inquire as to whether the 3rd respondent was eligible to be a candidate for election for the office of Member of National Assembly; the court to determine that the 1st and 2nd respondent jointly or severally abated Election Offences in the course of the election for Member of National Assembly for Othaya Constituency; to declare that the election of Member of Parliament for Othaya Constituency was not free and fair due to irregularities. Finally he sought for an order for a fresh election for the office of Member of National Assembly for Othaya Constituency and the costs of the petition.

[6] As would be expected in a case of this nature, the petition was strenuously opposed by all the respondents who filed their detailed responses to the petition and replying affidavits by the 2nd and 3rd respondents and by the witnesses they intended tocall in compliance with the Election Petition Rules. The 1st and 2nd Respondents filed a joint response in which they denied most of the allegations save for what they termed as:

(a) Allegations of more than 100% voter turnout**.**

The 1st and 2nd respondents stated that at Gatugi Primary School, Form 35 indicated 446 voters while Form 36 indicated 490. This was admitted as an error of transposition. The 2nd Respondent further stated that similarly at Gatugi Secondary School and Kagondu Tea Buying Centre experienced the same typographical error, which in their own words did not affect the final result in Form 36.

(b) ***Instances where votes for the appellant were understated***:

[7]Responding to the above allegation, the 2nd respondent averred that it was an oversight on the part of the tallying clerk who swapped or entered the petitioner's votes in the wrong column which was for Joshua Mwangi Mugo, this was in respect of 365 votes at Muchera Primary School, 35 votes at Kagondu Tea Buying Centre, 192 votes at Kagumo Primary School and 43 votes at Gatuiga Primary School were cast in favour of the petitioner but were erroneously indicated as being in favour of Joshua Mwangi Mugo, although they were properly indicated as votes for the appellant in Form 36.

(c) Instances where the total number of votes cast in Form 35 differed with sum total of the votes for each candidate:

[8] While responding to the above allegation, the 2nd respondent averred that the same was a human error which was attributable to long working hours and exhaustion which did not in any way affect the final

tally of the votes. In this regard, it is indicated that a total of 439 votes were cast for the candidates at Kangere Primary School, but in Form 35, the votes were indicated as 445. It was also admitted the same case happened for polling stations Nos.28, 31, 37, 41, 60, 62, 67, 68, 70, 74, 86, 93, 94 and 99 stream 2 as per the allegations by the appellant but the correct figures were posted in Form 36. The 2nd Respondent went on to state that as regards the allegations by the appellant with respect to the 92 mentioned polling stations, an error in the tabulation of votes cast was tabulated as that of the summation of valid votes instead of rejected votes. Plus rejected votes which could possibly explain why the 20 polling stations out of 112 polling stations were not affected, as the rejected votes were zero (0) unlike the other 92 where there were rejected votes.

[9] As demonstrated by the reply and the affidavits by the 2nd respondents and their witnesses, they denied all the other allegations and they prayed that it be determined that:

> ***(i) The respondents were not in breach of or in contravention of the provisions of the Constitution, the Election Act, or any other law relating to the elections.***
>
> ***(ii) The electoral process for the elections held on 4th March, 2013 in Othaya Constituency for the elections of the Member of the National Assembly was credible;***
>
> ***(iii) A declaration that the 3rd respondent was validly elected as a Member of the National Assembly for Othaya Constituency in the Elections held on 4th March, 2013.***
>
> ***(iv) A declaration that the people of Othaya Constituency exercised their sovereign power of the vote on 4th March, 2013, and their decision should be respected.***
>
> ***(v) The petition filed herein be dismissed with costs to the 1st and 2nd respondents***.

[10] This response by the 1st and 2nd respondents was accompanied by a detailed affidavit sworn by the 2nd respondent on 24th April, 2013; Elizabeth Wairungu, the Presiding Officer at Kihome Primary School and Jane Mumbi Mulungu, the Presiding Officer in Witimi Health Centre.

[11] On the part of the 3rd respondent, she filed a detailed response on 24th April, 2013, denying all the allegations save for what she termed as minor errors. Paragraph 41 of the response is pertinent as this is what the 3rd respondent sated in her own words:

"That a scrutiny of FORM 35 AND FORM 36 for 92 of the Polling Centres in Othaya Constituency annexed to the affidavit sworn by JEREMIAH WACHIRA ICHAURA as exhibit J12, the following was noted:

> ***I. That the petitioner appears to have raised purported issues with Form 35's and Form 36 of 92 centres.***
>
> ***I1. hat in most of the centres, the reflection of VOTES CAST and VALID VOTES in the Form 35's and Form 36, appears to have been some misreporting, however, it is evident the same does not affect the votes distributed to each candidate.***
>
> ***111. That in most of the centres, the reflection of REJECTED VOTES in Form 35's and Form 36, appears to have been some misreporting, however, it is evident the same does not affect the votes distributed to each candidate especially since <u>REJECTED VOTES</u> do not count towards VALID VOTES.***
>
> ***1V. That out of the 92 centres in a few of them, the petitioner's votes have been reflected in Form 36 and less in quite a number is reflected to have mis-reportedly (sic) garnered extra votes namely;…"***

[12] According to the 3rd respondent, the appellant's votes were indicated as less by 2 votes in Gituiga Primary school, 364 votes at Mucharage Primary School, 192 votes at Kagumo Primary School, 35 votes at Kagungu TBC 35, giving a total of 636 votes. Paradoxically by the admission of the 3rd respondent, the appellant was also given some extra 44 votes at Mahiga Primary School, 26 votes at Gitugi Secondary School, 121 at Kairuthi Primary School,60 votes at Iriani Primary School, and 10 votes at Kairuthi Secondary School, giving a total of 251 votes. The 3rd respondent further stated in the response:

> ***"V That out of the 92 centres, the 3rd respondent was reflected in Form 36 as having garnered extra votes in one centre, while in quite a number of centres she was reflected as having garnered less votes…."***

The 3rd respondent proceeded to tabulate the further clerical errors for the votes at Kairuthi Primary School where her votes were indicated as less on Form 36 by 109 votes, Gitandaru Tea Buying Centre 10 votes, Kagumo Primary School 165 votes, making a total 274, while she was indicated to have more votes at Kagundu Tea Buying Centre by 45 votes. The 3rd responded concluded her written response by stating as follows:

> ***"That if there were any errors in the tallying exercise, then such errors were very minor and were mostly clerical errors and the said errors were not sufficient enough to affect the outcome of the elections".***

[13] The 3rd respondent also filed her own replying affidavit as well as those of her witnesses namely Jeremiah Wachira Ichaura, Dr. Peter Muchiri Ngatia, Dr. Joseph Maina Kiragu, Jacinta Wakaria Mwangi and Regina Muthoni Kiragu. They all denied the allegations of malpractices levied against them by the appellant. In particular, Jeremiah Wachira Ichaura stated that he was an Accountant by Profession, a holder of CPA (K), Section III and a Masters in Business Administration. He averred that he was appointed the Chief Agent of the 3rd respondent during the 4th March, 2013, Elections for Member of National Assembly for Othaya Constituency. After the elections, he carried out a scrutiny of Forms 35 and Form 36, in respect of the 92 Polling Stations. He annexed a table which identifies the polling stations where the appellant and 3rd respondent were given less votes or more votes respectively which in his view was a minor clerical error in the tallying exercise, and did not affect the outcome of the elections or the results.

[14] The parties herein endorsed the statement of issues which were agreed upon for determination by the court as drawn by the appellant. The issues were as herein below:-

- ***Whether the 3rd respondent was eligible to contest as a candidate for the elections held on 4th March, 2013 for the position of Member of National Assembly.***
- ***Whether the court should order a scrutiny and recount of the votes cast in the election of Member of the National Assembly for Othaya Constituency.***
- ***Whether the 3rd respondent was validly elected as the member of the National Assembly for Othaya Constituency in the elections held on 4th March, 2013.***
- ***Whether the appellant was duly elected to the office of Member of the National Assembly for Othaya Constituency.***
- ***Whether the respondents jointly and severally committed election offences in the course of election of Member of the National Assembly for Othaya constituency.***
- ***Whether the elections of Member of the National Assembly for Othaya were free and fair.***
- ***What orders should be issued by the court under the circumstances***?

[15] In the course of the trial, the appellant made several interlocutory applications, seeking for various orders; we intend to highlight the Notice of Motion dated 2nd May, 2013, in which he sought for the following orders:

> ***"1. This Honourable Court does take into its custody for safekeeping the seals referred to at paragraph 4.58 of the petition, paragraph 33 of the supporting affidavit of the petition sworn***

on 26th March, 2013 and produced in the affidavit of Francis Mwangi Thuita in support thereof:

An order that the 1st respondent do produce the following documents:

a) All the forms 33s, 34s and 35s used in the election for Member of the National Assembly for Othaya Constituency in the election held on 4th March, 2014, and all complaints received in relation to the said forms.

b) All the Voters' Registers in respect of Othaya Constituency in respect of the election held on 14th March, 2013.

The reports filed by the 2nd respondent in respect of the election for Member of the National Assembly for Othaya Consistency in the election held on 7th March, 2013.

An order for the scrutiny and recount of the ballots cast in the election for Member of the National Assembly for Othaya Constituency in the election held on 4th March, 2013, pending the hearing and determination of the petition."

[16] An order seeking scrutiny and recount of the votes was also repeated in the appellant's Notice of Motion dated 3rd July, 2013, wherein the appellant sought in the main prayer, for the entire scrutiny and recount of the votes in all of the polling stations for Othaya Constituency and in the alternative, an order for scrutiny and recount of the votes cast in the polling stations pleaded at paragraph 4.58 of the petition. This particular Notice of Motion was predicated *inter alia* on the grounds that, in the course of the trial, there were admissions made by the 3rd respondent as well as by her Agent, Jeremiah Wachira Ichaura, and by the affidavit of the 2nd respondent that pointed what the appellant referred to "*inescapable inferences that the subject elections were not administered in an impartial, neutral, efficient, accurate and acceptable manner*."

All the appellant's applications were disallowed although it would seem the Judge reserved his comprehensive determination on why he declined to allow scrutiny and recount for the final judgment.

[17] The dismissal of the application for scrutiny and recount in the ruling delivered on the 6th August, 2013, immediately provoked an interlocutory appeal before us being ***Civil Appeal No. 23 of 2013 Nyeri***, between the same parties herein. In our judgment, we declined to deal with the merit of the interlocutory appeal as we demonstrated in a pertinent part of our judgment that:

"We are of the considered view that Section 80(3) of the Elections Act is a jurisdictional section and when read with Section 85A and in the context of Constitutional time lines in Article 105(2) for finalization of Election Petitions, there is a deferred, delayed and sequential exercise of the jurisdiction of the Court of Appeal in interlocutory matters arising in election petitions. The jurisdiction of the Court of Appeal to hear a point of law that arises in an interlocutory matter in an election petition is not ousted by Section 80(3) of the Elections Act or Rule 35 of the Election Petition Rules but is delayed to be exercised a posteriori ex ente after final judgment and decree of the High Court. This does not mean that the Court of Appeal has no jurisdiction to hear issues of law that could have arisen during interlocutory proceedings. Far from it, the Court of Appeal under Article 164 (3) of the Constitution as read with Section 85A of the Elections Act and the exercise of its jurisdiction as deferred in Article 105(2) of the Constitution as implemented by Section 80(3) of the Elections Act and Rule 35 of the Election Petition Rules is vested with an appellate jurisdiction to hear only and all points of law that arise out of an election petition during the substantive hearing of an appeal. The sequential jurisdiction gives practical effect, expediency and implementation to the Constitutional time lines for determination of Electoral Petitions ……..for the foregoing reasons; we ground our tools and dismiss the appeal. We decline to consider the merits of the issues raised in the Memorandum of Appeal as these may well be grounds of appeal in the event a substantive appeal is lodged"

Such was the fate of the interlocutory appeal, on the issue of recount and scrutiny.

[18] Back to the trial before the learned Judge, who had to contend with voluminous bundles of documents consisting, voting materials such as polling day diaries, Forms 35 and 36 among others, very detailed submissions on the interlocutory applications and list of authorities. If the records before us are a replica of what was before the learned Judge, they run into almost 4,000 pages. The Judge had to go through the evidence by the deponents who swore the affidavits in support of their respective prepositions. Those deponents were also taken through cross-examination in particular the 2nd respondent was on the dock answering questions for a considerable period of time. The Judge had also to render several interlocutory rulings, and finally the final judgment wherein the appellant's petition was dismissed with costs.

[19] In determining the seven issues that were before the Judge, this is how he stated he proposed to deal with them on page 45 of the Judgment:

> ***"A quick glance at the issues as framed would reveal that they overlap to some extent; if for instance, in determination of the first issue, the court was to hold that the 3rd respondent was not eligible to contest as a candidate for the position of the Member of National Assembly for Othaya Constituency in the 4th March, 2013, polls, then scrutiny or recount of the votes would be an issue of little relevance; that finding also would as a matter of course, resolve the issue of the validity of the election of the 3rd respondent as the Member of National Assembly for Othaya Constituency. The findings on whether the elections for the Member of National Assembly in this particular constituency were conducted in accordance with the law will have a bearing on the orders that the court ought to make in the context of the prayers in the petition. If the respondents were to be found to have committed election offences, the court will have to decide whether the petitioner should benefit from their acts or omissions and be declared the duly elected Member of the National Assembly for Othaya Constituency or whether fresh elections should be called. The point is, a finding on one issue whether in the affirmative or in the negative will more or less have a ripple effect on the rest of the issues. It is upon this understanding that this court will now proceed to interrogate and determine the issues as agreed upon by the parties."***

[20] Upon setting the above parameters as his guide in determining the issues in dispute, the Judge proceeded to evaluate the evidence and considered each of the issues. All the issues were found to lack in merit. However, regarding the prayer for recount and scrutiny, the Judge acknowledged there were errors in the posting of numbers from Form 35 to Form 36; an error he stated was not disputed by the respondents.

This is what the Judge stated in his own words:

> ***"I understand the 1st respondent to say, and I have no reason to doubt him since his evidence is consistent with the entries in Forms 36 and Forms 35 which form part of the record and evidence in this petition, that the figures in error were arithmetical errors in the narrative part of Form 35 and these were never converted into actual votes to the advantage or disadvantage of any candidate. The votes cast for each of the candidates as indicated in Forms 35 are the same number of votes that were posted in Form 36 save for ten polling stations where the number of votes posted in Form 36 for both the Petitioner and 3rd respondent was either less or more than what they actually garnered and posted in Form 35. The polling stations in which these type of errors occurred were identified and the uncontraverted evidence of Jeremiah Wachira Ichaura (3RWS) revealed not only the number of votes involved but also demonstrated how negligible their impact was on the final tallying of the votes cast for each of the two erstwhile competitors."***

[21] The appellant's petition was dismissed and the Judge made the following conclusions:

- ***The 3rd respondent was eligible to contest as a candidate for the elections held on 4th***

March, 2013 for the position of Member of National Assembly.

- ***There is no basis for the court to order a scrutiny and recount of the votes cast in the election of Member of the National Assembly for Othaya Constituency.***
- ***The 3rd respondent was validly elected as the member of the National Assembly for Othaya Constituency.***
- ***There was no proof that the respondent jointly or severally committed election offences in the concluded elections of Member of the National Assembly for Othaya Constituency.***
- ***The elections of the Member of Parliament for Othaya constituency were free and fair and conducted substantially in accordance with the law.***
- ***Costs to the respondents.***

[22] Aggrieved by the above orders made therein, the appellant filed this appeal which is based on a total of 35 grounds of appeal. To avoid repetition, proliferation and typographical errors, also considering that the grounds were argued before us in a thematic order, we shall summarize them as follows:

That the learned Judge erred in law by:

(a) Failing to order a scrutiny and recount of the votes despite overwhelming evidence of admitted irregularities.

(b) Upholding the results espoused by the respondents despite glaring anomalies, irregularities born out of the evidence.

(c) Disregarding and countenancing of the irregular and illegal management of elections.

(d) Failure to find there was over voting despite clear and concise evidence.

(e) Misapprehending and misapplying documentary evidence rule and the law of evidence in the analysis and the findings regarding Form 35s and 36 which were tendered in evidence.

(f) Failure to consider the effect of admissions as to irregularities and discrepancies especially in holding that the same did not affect the outcome of the election.

(g) Failure to make a finding that an enquiry as to the 3rd respondent's eligibility to vie for elective office could only be made by the 1st respondent in the context of Article 88(4) of the Constitution.

(h) Misapprehending the provisions of Article 99(b) of the Constitution as read with Section 22 of the Elections act.

Declining to find that the 3rd respondent did not possess the Constitutional and legal educational qualifications required of a candidate to the office of Member of the National Assembly.

(j) Failing to find that based on the evidence tendered, the respondents had committed and/or abated the election offences pleaded in the petition.

(k) Punitively considering the petitioner to pay the cost of the petition.

[23] During the hearing of this appeal, Mr. Marete and M/s Kimere appeared for the appellant. In addition to the detailed submissions which were filed in court, Mr. Marete made oral highlights and touched on all the issues raised in the appeal. On the jurisdiction of this court to determine this appeal, he submitted that was broadly derived from ***Article 164(3)*** **of the** ***Constitution***, thus all the matters raised in the appeal should be considered in their entirety. He made reference to a recent decision of this Court in

the case of;- ***NDERITU GACHAGUA v THUO MATHENGE & 2 OTHERS*** **Civil Appeal No 14 of 2013.** Regarding the approach to be taken while interpreting the law that is "*just purposive and meaningful*" with the aim of not driving citizens from the seat of justice. On this point, counsel argued that the provisions of *Section 85A* of the *Elections Act* negate the provisions of the Constitution in as far as it restricts the jurisdiction of this Court only to matters of law. In the same case of **Nderitu Gachagua**, this court applied the known principles in determining appeals as enunciated in the oft' cited case of ***Selle v Associated Motor Boat Company EA 1968 and Jivarangi vs Sanyo Electrical Company Limited,*** *2003 KLR 425*.

[24] The gravamen of this appeal revolved on the issue of recount and scrutiny of votes which would have established whether the election for Member of National Assembly for Othaya Constituency was conducted according to the law governing elections. Indeed each of the ground Nos.1-17 of the Memorandum of Appeal somewhat are on the allegations of irregularities or errors in the tallying, an illustration that recount and scrutiny of votes was at the core of the appellant's petition. Also the appellant unsuccessfully made two interlocutory applications, and one ended at the appellate level. According to counsel for the appellant, there was sufficient justification borne from uncontroverted evidence, which was also admitted by the respondents that there were irregularities in the tallying, and the posting of results in both forms 35 and 36. The appellant produced 23 seals which he argued, and this was not controverted by the 1st and 2nd respondents, that the seals bore the serial numbers of IEBC; they were part of the election materials. According to the appellant, the seals were probably part of the election materials that were tampered with and, therefore, affected the outcome of the election.

[25] Counsel for the appellant further argued that the appellant was denied access to the polling diaries; the evidence shows that the 2nd respondent applied for an adjournment so as to avail polling diaries but he only produced 60 diaries instead of about 120 for all the polling stations. According to Mr. Marete, the court should have made an adverse finding against the 2nd respondent. Notwithstanding that the appellant was denied access to the polling materials, recount and scrutiny, the Judge held him at a very high threshold of proof. The Judge found that the respondent failed to prove that there was tampering of the ballot boxes and that the polls were riddled with irregularities.

[26] The appellant particularized every single discrepancy of all the irregularities he complained about; over-voting in 5 stations, errors in 92 polling stations; although the respondents admitted there were errors in about 20 polling stations, the appellant, maintained there were over 4,000 votes that were in contention according to his own analysis of the forms 35 and 36 such that the elections were not conducted according to the law: the 1st respondent was obligated by the Constitution and the Elections Act to administer the elections in an impartial, neutral, efficient, accurate and accountable manner. Mr. Marete also cited several decided cases that emphasize that an election court should determine and satisfy itself that the tenets of democracy which require the whole of the election process to be free, open and fair in all aspects are achieved. In this regard he made reference to several authorities, inter alia the case of**;** ***Dickson Daniel Karaba v John Ngata Kariuki & Two Others,*** *2010 EKLR;* ***Harris v Ryan 1977 44 MPLR (2D)*** *Election Petition No. 5 of 2013* ***RAILA ODINGA v IEBC & 3 OTHERS*** *and Others , EP No. 5 of 2013*. We shall refer to some of the authorities in the course of the analysis of the issues.

[27] The other ground of appeal argued by counsel for the appellant was the unilateral transfer of two polling centers and materials. He argued this was contrary to the provisions of *Regulation 63(6)* of the *Elections Regulations* especially *Regulation 7(1) (b)* and *(c)* which make it mandatory for the 1st respondent to gazette a polling station so that voters are not taken by surprise on the polling day.

[28] The ground of appeal on the 3rd respondent's eligibility to contest as a candidate for the 4th March, 2013, position of the Member of the National Assembly was also argued. Mr. Marete submitted that, whereas the 3rd Respondent claimed she had attained secondary and post-secondary qualifications, this being a matter within her knowledge, she had the burden of proving so. The Judge failed to order her to produce the certificates to disapprove the allegation by the appellant that she lacked the said qualifications. Whereas the Judge acknowledged that *Article 99(1) (B)* of the Constitution provides there ought to be some educational requirement to be satisfied by a person seeking elective office, counsel faulted the trial Judge for failing:

(i) To make an adverse finding against the 3rd respondent for her failure to provide her secondary school certificate as per the provisions of Section 119 of the Evidence Act.

(ii) Failure to declare the amendment to Section 22(1) (b) of the Elections Act unconstitutional, even though the issue of the constitutionality of the amendment arose in the course of trial.

According to Mr. Marete, the Judge should have followed the dicta in the case of;

Odd Jobs v Mubia*, (1970) EA 476 CA*. Counsel argued that nothing stopped the Judge from pronouncing himself on the constitutionality of the educational requirement for a candidate seeking a post of member of the National Assembly. The case of *Nderitu Gachagua v Dr. Thuo Mathenge & 2 Others*, was cited as an example where this Court upheld the decision that directed investigations to establish the authenticity of the education certificates of Dr. Thuo Mathenge who had vied for the position of Governor for Nyeri County but the authenticity of his education certificates were questionable.

[29] Finally, Counsel faulted the Judge for failing to make an order specifying the total amount of costs payable as provided for under Rule 36 of the Elections Act. Counsel took issue with the entire order of costs; he argued that there were many irregularities that were admitted by the respondents. For example, the entire results for Kagumo Polling Station were missing and he posed the question why the appellant was penalized for seeking answers to those anomalies. Mr. Marete urged us to allow the appeal.

[30] On the part of the 1st and 2nd respondents, they were represented by Miss Stella Muraguri. She relied on the written submissions that were filed in court on 19th November, 2013. In her oral submissions, Miss Muraguri laid emphasis on the provisions of **Section 83** of the ***Elections Act*** which guide the courts on the principles to apply when dealing with election petitions; non- compliance with the law cannot be a reason for nullifying elections, if it appears the election was conducted according to the Constitution. Miss Muraguri admitted there are possibilities of human errors in the conduct of elections and since the so called ' *irregularities'* are so immaterial, she urged us not to disturb the results; the irregularities were minor in nature and did not affect the will of the people of Othaya Constituency. The errors notwithstanding, the 3rd respondent still maintained unassailable lead.

[31] As regards the grounds of appeal on recount and scrutiny, Miss Muraguri submitted that these were matters of fact which are not appealable. Moreover, under ***Section 82*** of the ***Elections Act***, an order of scrutiny is discretionary and this court cannot interfere with the discretionary powers of a Judge unless the order made or denied, resulted to an injustice. The Judge gave reasons why the issue of recount and scrutiny could be answered by the evidence on record and this court cannot interrogate factual issues such as broken seals, over-voting, completion of Forms 35 and 36. Counsel cited the case of ***Opitz vs Wrzennewsky, 2012 SCC 55, 2012 3 SCR 76,*** where the Supreme Court of Canada while determining what constitutes an '*irregularity'* in an election pointed out the following as the guiding principle on whether or not to annul an election:

"Only irregularities that "affected the result of the election" permit the annulment of election..." Irregularities must be of a type that could affect the result of the election and impact a sufficient number of votes to have done so."

[32] Also in the case of; ***Kizza Besigye v Museveni Election Petition No. 1 of 2001,*** the Supreme Court of Uganda developed the concept of what constitutes "*material irregularities*" by looking at:

"a) Whether there has been substantial compliance with the law and principle;

b) The nature, extent, degree and gravity of non-compliance;

Whether the irregularities complained of adversely affected the sanctity of the election.

c) The court must finally consider whether after taking all these factors into account, the winning majority would have been reduced in such a way as to put the victory of the winning

candidate in doubt."

[33] Miss Muraguri further submitted that the appellant did not discharge the burden of proof. The appellant had a duty to prove all the allegations of the breaches of law and regulations as set out in the case of ***Raila Odinga, RAILA ODINGA v IEBC & 3 OTHERS, EP No. 5 of 2013***. The standard of proof was higher than a balance of probability but not beyond reasonable doubt and the appellant failed to prove all the allegations leveled against the 1st and 2nd respondents. Regarding the transposition errors, counsel submitted that these errors were adequately explained and in any event, the errors occurred only at 10 polling stations and satisfactory explanations were offered by 1st respondent's witnesses; further there was credible evidence that even with correction of the errors, the eventual results would not change as the 3rd respondent still emerged the winner with a wide margin of over 1,900 votes. Counsel for the 1st and 2nd respondents urged us to dismiss the appeal which was basically predicated on facts and did not raise any issues of law.

[34] The 3rd respondent was represented by *Messers Miller, Peter Wena and Miss Pauline Asila*. They filed written submissions on 19th November, 2013, which responded to all the issues raised in the appeal in a considerable detail. In his oral highlight to us, Mr. Miller reiterated the jurisdiction of the appellate court as provided for under ***Section 85A*** which provides:

> ***"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."***

With the above statutory provision, and also drawing from this court's decision in the case of ***Peter Gichuki King'ara v IEBC & 2 Others Civil Appeal No. 2013, Nyeri***, while following the dicta in the case of ***Lillian 'S' case (1989) KLR 1*****,** this Court held jurisdiction flows from the law, and without jurisdiction the court downs its tools.

The above decision was restated by the Supreme Court ***In the Matter of the Interim Independent Electoral Commission- Constitutional Application No 2 of 2011*** as follows:

> ***"The Lillian 'S' case [1989] KLR 1 establishes that jurisdiction flows from the law, and the recipient Court is to apply the same, with limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity."***

[35] On the issue of recount and scrutiny, counsel cited many decisions where it is emphasized that an order of scrutiny will not be granted as a matter of course. See ***Charles O. Mogere v Christopher Obure v Others****, High Court Kisii EP No. 9 of 2013* ***and Philiph Osore Ogutu v Michael Onyura Aringo & Others****, HC Busia EP No. 1 of 2013*. Mr. Miller was emphatic that an order for recount and scrutiny of votes as per the provisions of the law is a discretionary remedy which the court is not bound to grant as long as reasons are stated. Further granting an order of recount by the appellate court is tantamount to this court becoming a trial court of the facts. According to Mr. Miller, the alleged irregularities which were mere errors of juxtaposition were adequately explained by the respondent's witnesses especially on Form 35 which has a narrative section and an empirical section. The minor errors identified did not affect the number of votes distributed to candidates on Part B section of Form 35. The margin of the votes that is **2077** votes that were garnered by the 3rd Respondent ahead of the appellant was too large to affect the outcome of the results.

[36] In responding to the ground of appeal on educational qualifications of the 3rd respondent, counsel submitted that the Judge interpreted the law properly regarding the educational qualifications of the 3rd respondent**.** ***Section 22(1) (b)*** of the ***Elections Act*** was amended by ***Elections (Amendment) No. 3 Act of 2012****,* thus the requirement for post secondary school qualifications was suspended for the first general elections after the New Constitution, and thus, there was no minimum qualification. There were no

pleadings regarding the constitutionality or otherwise of the said amendment and the Judge rightly held so. Counsel also highlighted the ground of appeal on costs and stated that costs follow the events as the petition was dismissed; the appellant had to bear the costs. Further, the Judge did not admit in his judgment that there were irregularities in the conduct of the elections in the six determinations which he made.

[37] Although this is a first appeal, and the principles that guide the Court of Appeal are well settled, counsel for the respondents addressed us at length on the issue of our jurisdiction when dealing with election petitions. ***Section 72*** of **the *Civil Procedure Act*** provides as follows:-

> ***72(1) "except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds namely:***
>
> ***(a) the decision being contrary to how or to some usage having the force of law;***
>
> ***(b) the decision having failed to determine some material issues of law or usage having the force of law;***
>
> ***(c) a substantive error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits."***

Under Article 164(3) of the Constitution:

"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".***

[35] Mr. Marete urged us to embrace a liberal determination of the Jurisdiction of the Court as expressed by this Court in the case of ***Nderitu Gachagua vs Dr. Thuo Mathenge*** (supra), in which the Court comprising of the same members of this Bench pointed out that in matters involving a first appeal, the Court of Appeal is tasked with the duty of analyzing and re-evaluating the evidence and facts that were before the High Court and to arrive at its own conclusions. This remark was made *obiter dictum* and did not form the basis of the final determination of the matter, the issue before us then was also entirely different as it concerned the Court's jurisdiction in interlocutory appeal. In the same judgment, this Court underscored the fact that under **Article 165 (3) (a)** of the **Constitution**, it is only the High Court that is granted original and unlimited jurisdiction in criminal and civil matters. It is also the recognized court for election petitions other than the Presidential election disputes, where jurisdiction is given to the Supreme Court. The High Court has jurisdiction to adjudicate on all matters, *'elections'* which cannot be limited or excluded.

[36] In this appeal, and for appeals in election petitions that are appealable to the Court of Appeal, we agree the parameters are set out by the provisions of ***Section 85A*** of the ***Elections Act.*** Election petitions are *sui generis* matters which in matters of appeals are the ones aptly envisaged by the Constitution ***"as prescribed by an Act of Parliament",*** or in the *Civil Procedure Act*:

> ***"Except where otherwise expressly provided in this Act or by other laws for the time being in force....."***

[37] What are the points of law that emanate from this appeal? As it was held in the case of**;** ***Mwangi v Wambugu, [1984] KLR 453*****:**

> ***"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."

Also in the case of; ***Maina vs Mugiria, [1983] KLR 78*****:**

" On a second appeal, only matters of law may be taken. If the High Court upholds a resident magistrate on a question of whether or not he exercised his discretion judicially, the issue as to whether he was right or wrong to do so is a question of law"

[38] Bearing in mind the above principles, the most contentious issues in this appeal is whether the grounds of appeal are matters of law or facts. Having established that we have jurisdiction to determine only issues of law as per the provisions of **Section *85A*** of the ***Elections Act,*** to us the whole question of whether the trial Judge properly considered and evaluated the evidence and arrived at a correct determination that is supported by law and evidence with of course the usual caveat, that we did not see the witnesses demeanor is an issue of law. Besides, we have isolated some four broad issues that we think were cross cutting the entire spectrum of the grounds of appeal as follows:

(i) ***Whether the 3rd respondent was eligible to vie for the post of Member for National Assembly for Othaya Constituency during the 4th March, 2013, elections.***

(ii) Whether the evidence on record supported the appellant's prayer for a recount and scrutiny.

(iii)Whether the appellant proved his case to the required standard that the elections for Member of the National Assembly for Othaya was not conducted in accordance with the principles laid down in the Constitution and the law and whether the irregularities did affect the result of the election.

(iv)Was the Judge entitled to condemn the appellant to pay costs and if so, to specify the total amount payable?

Eligibility of the 3rd Respondent

[39] The issue of the 3rd respondent's eligibility to vie for the position of Member of the National Assembly for Othaya Constituency was pleaded in the petition by the appellant and it was also part of the agreed issues that fell for determination by the learned Judge. It is one of the grounds of appeal which we have identified as a matter of law. Under ***Article 99(2)*** of the ***Constitution***, it is provided that:

(2) "… a person is eligible for election as a Member of Parliament if the person:

(a) is registered as a voter;

(b) satisfies any educational, moral and ethical requirements prescribed by this Constitution or by an Act of Parliament.

(c) …"

The appellant alleged the 3rd respondent did not meet the above requirements; on moral and ethical integrity, the appellant relied on a report by the Kenya National Human Rights and Equality Commission titled ***"On the Brink of the Precipice; a Human Rights Account of Kenya"*** 2007 post election violence. The 3rd respondent is mentioned as having participated in providing or procuring the weapons that were used by the perpetrators of violence. Also the appellant relied on a Parliamentary report on the investigations into the conduct of two Armenian Nationals who were popularly known as ***"Artur***

Brothers" and their associates. The Parliamentary report recommended that there be further investigations on the role played by the 3rd respondent and her daughter *Winne Mwai* for their close association with the said persons. The learned Judge concluded and rightly so in our view, that the above reports, without more, could not form the basis for disqualification of the 3rd respondent. This is for reasons that the 3rd respondent was never investigated as per the recommendations.

[40] The appellant did not relent on the issue of educational qualifications of the 3rd respondent, despite the amendment that suspended the application of ***Section 22 (1) (b)*** *of the* ***Election Act****,* for the first general elections after the new Constitution. He even filed a notice of motion dated 9th July, 2013, seeking for an order directing the 3rd respondent to produce before the court certified copies of her 'O' Level and post-secondary school certificates and diplomas which the 3rd respondent claimed she had during her cross examination. According to the appellant, under ***Section 112*** of the ***Evidence Act*** which provides thus:

> ***"In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him"***

[41] On this matter, the learned Judge found that although ***Section 22(1) (b)*** of the **Elections Act** which makes provisions for academic threshold for the candidates vying for Member of the National Assembly to hold a Post-Secondary School qualification recognized in Kenya; **the *Election (Amendment) (No.3), Act, 2012*** suspended the said requirement. This is what the amendment of ***Section 22(1) (b)*** states:

> ***"For the purposes of the first elections under the Constitution, Section 22(1) (b) and Section 24(1) (b), save for the position of the President, the Deputy President, the Governor and the Deputy Governor, shall not apply for the elections of the offices of Parliament and County Assembly Representatives."***

We are in concurrence with the learned Judge that the aforementioned amendment suspended the operation and applicability of ***Section 22(1) (b)*** of the Elections Act in respect of the first general elections after the new Constitution. In effect, there was no requirement for a person seeking for the position of Member of National Assembly to possess the qualification stated therein.

[42] The Constitution of Kenya sets out values for persons seeking for leadership; and integrity is one such value that is emphasized. A person (s) presenting themselves for a leadership position are expected to abide by the law. Even if the learned Judge made an adverse finding against the 3rd Respondent for refusing to avail her educational certificates, nothing much would have turned on it, as the certificates were not a mandatory requirement for this particular election.

[43] Was the Judge wrong for failure to inquire on the constitutionality of the aforesaid amendment that interfered with the educational standard envisaged in the Constitution and which standard was provided in legislation but was later suspended? First of all, the issue regarding the constitutionality of the amendment of ***Section 22(1) (b)*** came up during the trial and the appellant urged the Judge to make a finding in that regard. We agree and as it was held in the case of; **Odd *Jobs v Mubia, [1970] EA 476***, a court may base its decision on an unpleaded issue, if it appears during the trial; the issue was pursued and left for the court to determine. However, in this case, there was a judgment by a court of co-ordinate jurisdiction in the case of ***Johnstone Muthama v Minister for Justice & Constitutional Affairs and Another Petition No 198 of 2012*****.** In that case, Mumbi Ngugi, J. held that ***Section 22(1) (b)*** of the Elections Act was unconstitutional because it was discriminatory on the basis of educational qualifications. The learned trial Judge held that that judgment had the same effect as the aforementioned amendment which allowed candidates to vie for Parliamentary seats without proof of academic qualifications. We think the Judge cannot be faulted in this regard, and what was available for the appellant was to appeal against the case **of *Johnstone Muthama HCC Petition No 198 of 2011*****.** There was nothing a Judge of coordinate jurisdiction could have done in this respect where our Courts abide by the principle of *stare decisis.*

Electoral Irregularities, malpractices and request for recount and scrutiny

[44] Is this a point of law? Under the provisions of ***Section 82(1),*** it is provided that:

> ***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."***

According to counsel for the respondents, this Court can only interrogate and make a finding as to whether the High Court made a correct interpretation and application of the law governing scrutiny and recount of votes. However, this Court cannot interrogate the evidence adduced before the High Court to make a finding as to whether such evidence was sufficient to warrant an order for scrutiny and/or recount of vote's case. We do not entirely agree with the second limb of this line of submissions. The court in denying the prayer for scrutiny was exercising judicial discretion. Judicial discretion is always exercised judiciously and for reasons which are stated. The aims that should be encapsulated in the reasons given for the refusal to exercise discretion are meant to further the cause of justice, and to prevent the abuse of the court process. Judicial discretion is never exercised capriciously or whimsically. See the cases of**;** ***Mbogo & Another V Shah 1968 EA*** 93 at page 95, Sir Charles Newbold P. held;

> *"…**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……."***

Matiba v Moi & 2 Others, 2008 1 KLR 670, where the Court of Appeal held that:

> ***"The High Court was exercising discretion and the Court of Appeal was not entitled to substitute the Judges' discretion with its own discretion. It had to be shown that the Judges' decision was clearly wrong because he misdirected himself or because he acted on matters on which he should not have acted on or because he failed to take into consideration matters which he should have taken into consideration and in doing so, arrived at a wrong decision".***

[45] This is precisely what we intend to do; to establish whether the Judge misdirected himself because he acted on matters on which he should not have acted on or he failed to take into consideration matters which he should have. The appellant alleged several irregularities regarding:

> ***(i) Failure to count the votes in accordance with the electoral laws.***
>
> ***(ii) Failure to properly record the votes, display the same and to avail the respective Form 35s to Appellant's agents.***
>
> ***(iii) Discrepancies in the Statutory vote tallying documents leading to a declaration of manifestly wrong results.***
>
> ***(iv) Understating votes cast in favour of the appellant.***
>
> ***(v) Indicating different total number of valid votes cast for the candidates thereby reducing the appellant's total number of votes garnered.***
>
> ***(vi) Indicating wrong number of rejected votes in Form 35 that differed with the numbers indicated on Form 36.Failure by the 1st and 2nd respondents to produce polling station diaries despite seeking an adjournment to do so***
>
> ***(vii) Failing to secure the election materials such as ballot boxes and seals.***

[45] As stated earlier in this judgment, the appellant had sought an order for scrutiny and recount of votes in his petition; and this was reiterated in two interlocutory applications. The two applications were

dismissed. The learned Judge was of the view that based on the evidence adduced by the witnesses in the matter; he was capable of making a determination on the final judgment of the entire petition without necessarily making orders of scrutiny and recount of votes. This particular matter found its way to this Court but we decided against admitting the appeal at an interlocutory stage although we held we had jurisdiction, it was a deferred, delayed and sequential jurisdiction due to the timelines dictated by the Constitution for the completion of election petitions. Recently the Supreme Court in the case of; ***Hassan Ali Joho & Another vs. Suleiman Said Shabal& 2 Others, Peition No 10 of 2013,*** the Supreme Court took cognizance of the Court of Appeal's reluctance to determine appeals arising from interlocutory applications filed during the pendency of an election petition.

[46] We directed that in the event the matter persisted after the determination of the petition, it was a matter that the appellant could take on appeal. This Court as indeed all courts, are obligated by ***Article 159*** of the ***Constitution,*** to administer justice without undue regard to procedural technicalities. We, therefore, appreciate that the appellant cannot be turned away on this pertinent issue that was the core of his petition before the High Court as argued by the respondents. Irregularity in an election is an issue of law. The consequences of any irregularity proved on a factual basis is a legal issue and with legal consequences.

[47] These allegations of election *'irregularities'* were the basis for the prayer for recount and scrutiny; it was central in the petition before the High Court and also in this appeal. In our view, it entails an interrogation of whether the provisions of the *Election Act* and the regulations thereto were followed in the conduct of the elections for Member of National Assembly for Othaya Constituency during the 4th March, 2013 elections and whether the Constitutional threshold as spelt out under Article 81 was met during the said elections:

> ***81 "The electoral system shall comply with the following principles:***
>
> ***freedom of citizens to exercise their political rights under Article 38;***
>
> ***……***
>
> ***(c)…….***
>
> ***universal suffrage based on the aspiration for fair representation and equality of vote; and free and fair elections, which are:***
>
> ***by secret ballot;***
>
> ***free from violence, intimidation, improper influence of corruption;***
>
> ***conducted by and independent body;***
>
> ***transparent and***
>
> ***administered in an impartial, neutral, efficient, accurate and accountable manner".***

[48] The appellant had a constitutional right (*what he called legitimate expectation)* to petition the High Court as provided for by the law. The learned Judge had a corresponding duty to hear, interrogate the complaints on whether the elections for Member of National Assembly for Othaya Constituency was conducted according to the law. In a pertinent part of the judgment, the learned Judge discussed at considerable length the parameters set out under ***Section 82*** of the ***Elections Act*** that guided the court on whether or not to order scrutiny of votes. To paraphrase the words of the Judge, the court is basically to establish whether:

- ***There were votes by persons who were not registered as voters;***
- ***Votes procured by bribery trick or undue influence;***

- ***Votes procured through impersonation at the election.***
- ***Whether there was double voting.***
- ***Votes by disqualified persons***.

The Judge went on to consider the provisions of *Rule 33* of the *Election Petition Rules* and discerned three important criteria for making an order for scrutiny; that is to establish the validity of the votes cast; for polling stations where the results are disputed and for particular ballots and documents to be examined. Thus the Judge found, and we agree with him entirely on the following findings which were factual:

- ***The appellant's allegations that the 3rd respondent and her agents bribed voters were not proved.***
- ***That the polling stations were manned by untrained polling clerk was not proved.***
- ***The relocation of two polling stations was not in accordance with Regulation 64(1) of the Election Regulations was not proved***.

[49] However we do not agree with the following findings for reasons that there was no way the court could have established those findings without the benefit of accessing the information contained in the ballot boxes and scrutinizing the entire polling day diaries and other election materials that were in use during the said election:

- ***The appellant's agents failed to record their objections and complaints to the presiding officers regarding bribery and;***
- ***Failing to read out the full names of the appellant and his competitor who shared a name "Gichuki" when announcing the results as for Regulation 80(1);***
- ***That the allegation of over voting was not proved;***
- ***The court accepting there were errors in posting of votes in Form 35 and 36 in 10 polling stations but holding that the errors were negligible;***
- ***That the appellant failed to prove the 23 seals collected from a polling station after the voting not belong to the 1st appellant;***
- ***That the appellant failed to prove the errors in forms 35 and 36 affected the overall results.***

[50] We have considered these conclusions with considerable anxiety while bringing to bear the provisions of ***Section 83*** of the ***Elections Act*** which provides:

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

Also an appellate court will not ordinarily differ with the findings, on a question of fact, by the trial Judge who had the advantage of hearing and seeing the witnesses. Our role as an appellate is to review the evidence and to determine whether the conclusions reached upon, are in accordance with the evidence and the law; although we do this with a caution as aforestated. See the case of**; *Peters v Sunday Post , [1958] EA 424 at p. 429,*** where it was held:

> "***Where a question of fact has been tried by a Judge without a jury, and there is no question of misdirection of himself by the Judge, an appellant court which is disposed to come to a different conclusion on the printed evidence would not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witness, could not be sufficient to explain or justify the trial Judge's conclusion."***

[51] The Supreme Court of Canada while considering an appeal from an election petition in the case of ***Opitz Vs Wrzesnewsky,*** **(supra)** took considerable time to analyze what constitutes an election irregularity that goes to the core of the results. The majority decision pointed *inter alia*:

> ***"At issue in this appeal are the principles to be applied when a federal election is challenged on the basis of "irregularities". 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 wrong doing 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"***

[52] Our own Supreme Court in the case of ***Raila Odinga Vs IEBC***, (Supra) noted as follows:

> ***"We came to the conclusion that, by no means can the conduct of this election be said to have been perfect, even though, quite clearly, the election had been of the greatest interest to the Kenyan people, and they had voluntarily come out into the polling stations, for the purpose of electing the occupant of the Presidential office."***

It follows that electoral systems and processes all over the world are not perfect, they are susceptible to human errors and other inadvertent mistakes as long as those mistakes do not affect the overall results and the democratic will of the people.

[53] As we have indicated earlier in this judgment, the respondents generally agreed there were errors which were minor in nature, and did not affect the overall result and the democratic will of the people of Othaya Constituency. This is what the 1st and 2nd respondents stated in their response to the petition:

Name of Polling Station	No. of voters per polling station as indicated in form 35	No. of valid votes cast as indicated in Form 36	Overcast/ Undercast	Reason
Gatugi Primary School	446	490	Nil	Form 35 on the column of total number of valid votes cast not corrected instead a direct transposition of the totals for each candidate.
Mahiga Primary School Iriani Primary School	231	264	Nil	As above.
Iriani Primary School	551	575	Nil	As above.

Similarly, Gatugi Secondary School and Kagundu Tea Buying Centre experienced the same typographical error which does not affect the final result in Form 36.

INSTANCES WHERE THE NUMBER OF VOTES CAST IN FAVOUR OF THE PETITIONER WERE UNDERSTATED AND THE RESULTS IN FORM 35 DIFFER WITH WHAT IS FILLED IN FORM 36

Polling Station	Number of votes cast in favour of petitioner	Number of votes cast in favour of Joshua Mugo	Error
Mucharage Primary School	365	1	365 votes erroneously indicated as being in favour of J. Mugo but totaled in petitioners total votes cast in his favour in Form 36.
Kagunda Tea Buying Centre	35	1	As above.
Kagumo Primary Schoool	192	0	As above.
Gituiga Primary School	43	0	As above.

INSTANCES WHERE THE TOTAL NO. OF VOTES CAST IN FORM 35 DIFFER WITH THE SUM TOTAL VOTES FOR EACH CANDIDATE

"42. In response to the above allegation, the respondents aver that the same was a human error attributable to long working hours and exhaustion which does not in any way affect the final tally of the votes.

Polling Station	Sum total of votes cast for the candidates	Valid votes cast indicated in Form 35	Error/reason	Correction executed
Kagere Primary School	439	445	An undercast in the column of the sum total of votes cast for candidates	Correct figure of 445 posted directly to Form 36
Polling Stations 28, 31,37, 41, 60, 62, 67, 68, 70, 74, 86, 93, 94, and 99 (stream 2)	As per the petitioner's allegation	As per the petitioner's allegation	As above	Correct figures posted directly to Form 36

INSTANCES WHERE THE TOTAL NO. OF VOTES CAST AS RECORDED IN FORM 36 DIFFERED WITH THE NO. OF VOTES CAST AS RECORDED IN FORM 35.

43. ***In response to the 92 mentioned polling stations, an error in the tabulation occurred in that the tabulation of votes cast was tabulated as that of the summation of valid votes instead of valid***

votes plus rejected votes which explains why the 20 polling stations out of the 112 polling stations were not affected as the rejected votes were zero (0) unlike the other 92 where there were rejected votes.

44. In response to allegations 4.59, 4.60, 4.61, 4.62, 4.63, 4.64, the respondents deny the contents thereof save that for Kagumo Primary School, the Presiding Officer failed to return his results to the Returning Officer, but were later totaled at the Bomas of Kenya Tallying Centre, creating the difference between the figures of 43,010 – announced at Othaya CDF Hall and 43,903 – announced at Bomas.

45. That the said discrepancies do not in any way invalidate the elections for the Member of the National Assembly, Othaya".

[54] To us, these errors or call them' irregularities 'are far too many to be classified as mere administrative errors. The total number of valid votes cast was about **43,310**. Out of these the 3rd respondent garnered 16,285, representing about 38%, while the appellant came second with 14,218, representing about 34%. The difference between the two candidates was about 2,077 representing about 4.5% of the valid votes cast. The errors tabulated above are too many to merely be attributed to fatigue. As stated on paragraph 7 of this judgment, the 2nd respondent admitted that 365 votes at Mucheru Primary School, 35 at Kangondu Tea Buying Centre, 192 at Kagumo Primary School and 43 at Gatungi were votes cast for the appellant but they were erroneously posted in favour of another candidate by the name Joshua Mwangi Mugo on form 35, but they were properly indicated in form 36 as votes for the appellant. The 1st and 2nd Respondents were simply not diligent in the execution of their mandate. These errors are rather spread in so many polling stations and the election officers were not at all serious when completing forms 35 and 36. We have tried to understand the evidence and the following questions have not been answered:

- ***Why the election officials gave a candidate more or less votes than he or she garnered.***
- ***Why would they post incorrect information on Part A of form 35 and make correct postings on Part B of the same form in so many stations.***
- ***Why would they make so many mistakes in the collation of the total votes in form 36 which are not drawn from forms 35?***
- ***Why would an election official fail to comply with the law and disappear with the results of Kigumo Polling station there by disenfranchising the voters of that polling station?***

[55] In our own appreciation of the evidence, considering the number of admitted errors, and the margin of votes between the appellant and the 3rd respondent, we find there was no way the Judge could have arrived at a conclusion as to whether these were the only errors or indeed there were more errors. The appellant alleged there were errors in 92 stations and what is admitted by the above admissions touch on very many polling stations. 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. [56] 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. None of the tests were applied to comprehend the votes that were posted in error; similarly there was no way the appellant could have proved the following:

- ***His name was not substituted during the counting of votes with that of another candidate.***
- ***Votes cast in his favour were not substituted for other candidates.***

- ***Votes cast in his favour were not incorrectly stated in the forms 35 and 36.***
- ***That seals collected from a polling station were not removed deliberately so as to tamper with the contents of the ballot box before the final tallying of votes was done to the appellant's disadvantage.***

[57] We also had some difficulty in understanding why the learned Judge curiously did not analyze the nature of errors that were admitted by the 1st and 2nd respondents in regard to 14 other polling stations which are noted as 28, 31, 37, 41, 60, 62, 67, 68, 70, 74, 86, 93, 94, and 99 (stream 2). This is because by the table drawn above by the 1st and 2nd respondents, there is admission of the errors and the number of votes that were indicated in error. During cross examination, the 2nd Respondent admitted that there were discrepancies in respect of 15 polling stations where the votes cast as indicated in Form 35 differed with the actual number of votes cast for each candidate; in so many other stations the total number of votes indicated in form 36 differed with the numbers recorded in form 35. However these discrepancies were not addressed in the judgment. Similarly the errors that the 2nd Respondent pointed in the aforementioned table in regard to 14 polling stations were not dealt with by the Judge.

[58] There is also no mention of the fate of the results for Kagumo polling station which were never produced for tallying. Failure to include these votes to the final result was unjust to the electorate in general at Kagumo who were disenfranchised and denied their freedom of expression through the ballot by the Presiding Officers' breach of his official duty imposed by the Constitution and the Elections Act. According to the 2nd Respondent, the Presiding Officer disappeared ostensively to make some corrections on the forms 35 and he never surrendered the results. Under Regulation 81 (4) the Presiding Officer is obligated to deliver as soon as is practicable to the Returning Officer for the electoral area the ballot box and the results as stipulated in the regulations. Interestingly, the learned Judge did not make any findings regarding this officer's dereliction of duty and sheer disregard of the law.

[58] It is also apparent, the trial Judge analyzed some portions of evidence very meticulously but unfortunately, he skirted on the pertinent issue regarding the materiality of these glaring irregularities which on a balance of probabilities could have affected the quality and standard of the said elections. In the case of**; *Hassan Ali Joho & Another vs. Suleiman Said Shabal& 2 Others*,** (Supra) The Supreme Court while discussing the issue of what constitutes declared results in an election stated as follows:

> ***"Bearing in mind the nature of election petitions, the declared election results provided, are qualitative, and involve a numerical composition. It would be safe to assume, therefore, that where candidate challenging the declared results of an election, a quantitative breakdown would be a key component the cause. It must also be ascertainable who the winner, and the loser(s) in an election are. The certificate in Form 38 declares the winner of the election and terminates the mandate of the returning officer, who acts on behalf of the commission, shifting the jurisdiction in respect of the electoral process to challenge the results of the election to the election court. We hold that the certificate in Form 38 comprises the declaration of election results. This declaration sets in motion the time-frame within which to lodge an election petition, and it is hereby so held. Consequently, the provision of Section 76(1) (a) of the Elections Act is inconsistent with the provisions of Article 87 of the Constitution, as elaborated hereinbefore, and is hereby declared unconstitutional to that extent".***

[59] Given that there was no test that was applied to justify the conclusion that the totality of the errors was negligible. 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. Notwithstanding the foregoing observations, we do not consider it feasible for this court to order for a recount and scrutiny because that would involve matters of fact that were within the jurisdiction of the trial Court but we are of the view that the Judge failed to consider the matter and as a result arrived at an erroneous conclusion.

[60] We now turn to the pleaded evidence by the 3rd respondent and in particular we refer to what she

stated in a pertinent part of her affidavit which was repeated also by her witness, one Jeremiah Wachira Ichaura:

> ***"That a scrutiny of FORM 35 & FORM 36 for 92 of the Polling Centres in Othaya Constituency annexed to the Affidavit sworn by JEREMIAH WACHIRA ICHAURA as "Exhibit J1 , the following was noted:***
>
> ***That the Petitioner appears to have raised purported issues with Form 35's and Form 36 of 92 centres.***
>
> ***That in most of the centres, the reflection of <u>VOTES CAST</u> and <u>VALID VOTES</u> in the Form 35's and Form 36 appears to have been some misreporting, however, it is evident the same does not affect the votes distributed to each candidate.***
>
> ***That in most of the centres, the reflection of <u>REJECTED VOTES</u> in the Form 35's and Form 36 appears to have been some misreporting, however, it is evident the same does not affect the votes distributed to each candidate especially since <u>REJECTED VOTES</u> do not count towards VALID VOTES.***
>
> ***That out of the 92 centres in a few of them, the Petitioner's votes have been reflected in FORM 36 as less but in quite a number of centres, he is reflected to have misreportedly garnered extra votes namely:***

CODE	POLLING STATION NAME	PETITIONER	
		EXTRA VOTES	LESS VOTES
21	GITUIGA PRIMARY SCHOOL		43
59	KARUTHI PRIMARY SCHOOL		2
73	MUCHARAGE PRIMARY SCHOOL		364
90	KAGUMO PRIMARY SCHOO		192
	KAGUNDU TBC		35
	SUB-TOTAL		636
7	MAHIGA PRIMARY SCHOOL	44	
27	GITUGI SECONDARY SCHOOL	26	
41	KAIRUTHI PRIMARY SCHOOL	121	
50	IRIAINI PRIMARY SCHOOL	50	
57	KAIRUTHI SECONDARY SCHOOL	10	
	SUB-TOTAL	251	

That out of the 92 centres, the 3rd respondent was reflected in Form 36 as having only garnered extra votes in one centre, while in quite a number of centres, she was reflected as having garnered less votes namely:

CODE		3RD RESPONDENT	
		EXTRA VOTES	LESS VOTES
41	KAIRUTHI PRIMARY SCHOOL		109
100	GITANDARA TEA BUYING CENTRE		10
90	KAGUMO PRIMARY SCHOOL		155
	SUB-TOTAL		274
51	KAGUNDU TEA BUYING CENTRE	45	
	SUB-TOTAL	45	

42. ***THAT if there were any errors in the tallying exercise, then such errors were very minor and were mostly clerical errors and the said errors were not sufficient enough to affect the outcome of the elections".***

[61] This is what the learned Judge stated in a pertinent part of his judgment regarding these admissions by the 3rd respondent:

> ***"I have found that the errors pointed out by the Petitioner were explained by both the 2nd respondent and Jeremiah Wachira Ichaura. The evidence of Jeremiah Wachira Ichaura was not only uncontroverted, but counsel for the Petitioner is on record as confirming that he agrees with it. If the Petitioner is in agreement with the 3rd respondent's evidence which addressed the errors in posting of figures in Forms 35 and 36, I find it difficult to appreciate the Petitioner's quest for scrutiny and recount of ballots ostensibly to address."***

[62] 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 this 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 Vs 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.

***Did the appellant prove his case to the required standard*?**

[62] It is trite that this being a civil matter the burden of proof was upon the appellant to provide proof of all the allegations. Since election petitions touch on the determination of the collective democratic will of the people, and some allegations are quasi criminal, the courts have in a long line of authorities, consistently held that the test to be applied is higher than a balance of probabilities but not' *beyond reasonable doubt'* as in criminal matters. See the case of; ***Raila Odinga Vs IEBC and Others***, (supra) where the Supreme Court held as follows:

> **[297]** ***"The evidence laid before the Court has to be considered on the basis of relevant principles of law. From the case law, it is clear that an alleged wrong in the electoral process cannot be rectified on the basis of the conventional yardsticks of civil or criminal law. In criminal law, proof must be "beyond any reasonable doubt", as the liberties of the subject are at stake and, failing absolute proof, an accused person must be set at liberty. By contrast, in civil law, which is a private matter between two individuals, a wrong only needs to be proved on a balance of probability***
>
> ***[298] An alleged breach of an electoral law, which leads to a perceived loss by a candidate, as in the Presidential election which led to this Petition, takes different consideration…"***

[63] We shall identify a few instances where we think the Judge misdirected himself and placed unreasonably higher standard of proof which could even pass for *"beyond reasonable doubt"* as if the petition was a criminal case. The appellant alleged that there was over voting in five polling stations in which case, the 2nd Respondent was required under the provisions of ***Regulation 83(1) (a)*** of the ***Election Act*** to disregard those results. This is what is provided for in the regulations:

> ***83 (1) (a) "Tally the results from polling stations in respect of each candidate, without recounting the ballots that were not in dispute and where the returning officer finds the total valid votes in a polling station exceeds the number of registered voters in that polling station, the returning officer shall disregard the results of the count of that polling station in the announcement of the election results and make a statement to that effect."***

After going over the evidence, the learned Judge stated the following in his own words:

> ***"It is only at Gatungi Secondary School (1) where the number of cast votes was more than the registered number of voters by six votes. The explanation given by the 2nd Respondent for the extra votes cast was that 11 voters who were deliberately omitted from the principle register in Othaya constituency because they lacked biometrics. In the absence of any evidence to the contrary, it would appear the allegations of over voting in Othaya constituency are wild and without any factual basis."***

[64] There is no dispute the plain reading of the above provisions of the Regulation clearly required the 2nd Respondent to disregard the results for Gatungi Secondary School. There was no discretion left for the Returning Officer to offer an explanation regarding a voters' register which is a printed document. The regulation is clear, and unambiguous, it was not necessary to invite the 2nd Respondent to give reasons why there was over voting which was tantamount to changing goal posts. In the result, the Judge erred by placing a further burden upon the appellant to prove a matter beyond what is provided for in the law.

[65] Another important issue where the appellant was required to discharge an impossible burden is regarding the 23 ballot boxes seals which he and his agents collected at Kenyatta High School Polling Stations and Kangere Primary School. During cross examination, the 2nd Respondent admitted those seals

belonged to the 1st Respondent and they formed election materials as defined per the interpretation section of the Elections Act which states:

> ***"election material" means ballot boxes, ballot papers, counterfoils, envelopes, packet statements and other documents used in connection with voting in an election and includes information technology equipment for voting, the voting compartments, seals and other materials and things required for the purpose of conducting an election."***

Once the 2nd Respondent admitted the seals belonged to the 1st respondent; it was the duty of the 1st and 2nd Respondents to secure them; and demonstrate how some accountable election materials left the custody of those who were entrusted with them. To expect the appellant to prove that the seals were not removed in a bid to tamper with the ballot boxes, when the Court declined to allow recount and scrutiny and the production of the polling day diaries was a clear misdirection on the part of the trial Judge.

[66] We have already analyzed hereinbefore the other evidence regarding the errors that were admitted by all the Respondents in their pleadings and others that were admitted by 2nd Respondent during cross examination, there is no point of repeating them under this heading. To us the totality of these irregularities, the extent of which was not verifiable, most probably affected the results and the ultimate will of the people of Othaya. In the English Case of; ***Morgan and Others v Simpson and Another, All England Law Reports page 722,*** the Court of Appeal held that:

> ***"1. If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not. That is shown by the Hackney case, 2 O'M. & H. 77, where two out of 19 polling stations were closed all day, and 5,000 voters were unable to vote.***
>
> ***2. If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls-provided that it did not affect the result of the election. That is shown by the Islington case, 17 T.L.R. 210, where 14 ballot papers were issued after 8 p.m.***
>
> ***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 election is vitiated. That is shown by Gunn v Sharpe [1974] Q.B. 808, where the mistake in not stamping 102 ballot papers did affect the result".***

[67] We have carefully analyzed the evidence that was before the High Court, the detailed submissions by counsel as well as the relevant laws, decided authorities and the entire record of appeal. We have come to a conclusion that due to many breaches of the law and regulations that we have highlighted, the 4th March, 2013, elections for Member of National Assembly for Othaya Constituency was not administered in an efficient, accurate and accountable manner.

[68] For the aforesaid reasons, this appeal has merit, and it is hereby allowed with the result that the 4th March, 2013, election of the 3rd Respondent as Member of the National Assembly for Othaya Constituency is null and void. The 3rd Respondent, Mary Wambui Munene, was not validly elected.

[69] The 1st Respondent is hereby directed to issue a certificate to that effect, to be served upon the Speaker of the National Assembly forthwith pursuant to ***Section 80 (5)*** of the ***Elections Act.***

The 1st respondent shall bear the costs of this appeal and also at the High Court for the appellant. We shall not award any costs to the 3rd respondent for reasons that she strenuously opposed the application for recount and scrutiny. All costs to be verified and taxed by the Deputy Registrar; costs in the High Court should not exceed Kenya Shillings two Million, while costs of this appeal should not exceed one million five hundred thousand.

Dated and delivered at Nyeri this 13th day of February, 2014.

ALNASHIR VISRAM

….....

JUDGE OF APPEAL

M. K. KOOME

….....

JUDGE OF APPEAL

J. OTIENO – ODEK

….....

JUDGE OF APPEAL

I certify that this is a

true copy to the original.

DEPUTY REGISTRAR