IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, G.B.M. KARIUKI & MWILU, JJ.A)

CIVIL APPEAL NO. 239 OF 2013

BETWEEN

KAKUTA MAIMAI HAMISI……APPELLANT

AND

PERIS PESI TOBIKO……..….....1ST RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION (IEBC)…...….....……2ND RESPONDENT

RETURNING OFFICER KAJIADO

EAST CONSTITUENCY….....…….....……3RD RESPONDENT

(Appeal from the Judgment and Orders of the High Court of Kenya at Nairobi (Kimondo, J) dated 30th August, 2013

in

H.C.CC. NO. 4119 of 1993)

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JUDGMENT OF THE COURT

This appeal has its genesis in the Kajiado East Constituency 4th March, 2013 General Elections. This particular Constituency had six contestants among them the appellant ***Kakuta Maimai Hamisi*** and the first respondent ***Peris Pesi Tobiko***. The elections were conducted on behalf of the electorate by the second Respondent, the ***Independent Electoral and Boundaries Commission (IEBC***). The exercise was overseen by a returning officer, the 3rd respondent.

The first respondent was declared by the 3rd respondent as the overall winner of the said Election. She garnered 23,645 votes as against that of her closest rival the appellant who had 22,771 votes in his favour. The appellant was aggrieved by that declaration. He filed Petition number 5 of 2013 dated the 4th day of April, 2013. Various complaints were raised by him among them allegations of serious irregularities and

malpractices as enumerated in the petition. To the appellant, all these went to negate the will of the people of Kajiado East Constituency. In consequence thereof, the appellant sought from the High Court a declaratory order declaring that the poll for Kajiado East Constituency was not credible, free and fair; an order for the nullification of the election of the first respondent; and lastly that he be granted costs of the proceedings.

The 1st respondent opposed the petition on the basis of the contents of a replying affidavit deponed by her on the 25th day of April, 2013. In summary, the first respondent deponed that she was a stranger to allegations of any irregularities and malpractices as she neither witnessed nor experienced any of the incidences alluded to by the appellant. To the first respondent, the election culminating in her victory was free and fair and as such the court's intervention sought was not necessary.

The 2nd and 3rd respondents also opposed the appellant's petition. They placed reliance on the contents of a replying affidavit deponed by one ***Jenifer wanja Mugambi*** the returning officer deponed on the 30th April, 2013. The testimony of this witness basically centered on the election preparedness, preparation, procedures, the general conduct of the election exercise which according to her were free and fair and in accordance with the laid down procedures. The witness also added that the various election officials at all levels of engagement came on board earlier in time than the contestants; that in view of the large numbers of staff involved at all levels of engagement in the election exercise, it was not possible to know who would be related to any of the election contestants and who would not considering that most of these were being drawn from the locality. The returning officer went on to assert that, no complaints of any irregularities were brought to her attention in the course of the election exercise. It was also her assertion that the tallying process was transparent and properly carried out; and lastly that the first respondent was procedurally and regularly declared as the winner.

At the close of the merit trial and submission by each respective party, the learned trial Judge drew out the following issues for determination in the disposal of the petition before him:-

i. ***Was the first respondent validly elected as a member of the National Assembly for Kajiado East Constituency in the election held on 4th March, 2013?***

ii. ***Did the 2nd and 3rd respondent*** (sic) ***conduct a free and fair election and in consonance with the Constitution, Election Act 2011 and the Regulations there under***

iii. ***Did the respondents declare the true or accurate results of the election?***

iv. ***Should the election of the 1st respondent as member of the National Assembly be nullified and fresh elections ordered?***

v. ***Who will meet the costs of this petition?"***

After assessing, evaluating and analyzing the totality of the evidence tendered before him in the light of the rival submissions, the learned trial Judge delivered himself on the issues raised as hereunder:-

> ***93. "The petitioner has failed to discharge his onus of proof to the required standard of proof for the allegations of irregularities, misconduct by electoral officials or commission of election offence. The evidence proffered has not reached the threshold for nullification of the poll. The results of the election were fair and generally accurate. As a logical corollary they largely reflect the will of the people of Kajiado East Constituency. The margin between the candidates was a narrow devide, but our constitutional design remains a first past- the post system. The majority, even though by a razor thin margin and in atantalizing close contest must carry the day. Accordingly the analysis of the evidence, the law and authorities above, issue number (i) is answered in the affirmative. The first respondent Peris Pesi Tobiko was validly elected as member of the National Assembly for Kajiado East Constituency in the elections held on 4th March, 2013.***

94 From the totality of evidence and my earlier answer to issue Number (iii) in paragraph 72 of this Judgment, the 2nd and 3rd respondents conducted a free and fair election in consonance with the constitution, the Elections Act 2011 and the Regulations thereunder. That answers issue number (ii) in the affirmative.

(95) Issue number (iv) is answered in the negative. The election of the 1st respondent Peris Pesi Tobiko should not be nullified. In the result the entire petition is hereby dismissed.

96. That leaves issue number (V) on costs. Costs ordinarily follow the event. They are also at the discretion of the Court. Section 84 of the Elections Act 2011 provides that "an election court shall award the costs of and incidental to a petition and that costs shall follow the cause. Rule 36(1) of the Elections Parliamentary and County Elections) Petition Rules 2013 on the other hand provide as follows;-

36(1) The Court shall at the conclusion of an election petition make an order specifying –

a. ***The total amount of costs payable; and***
b. ***The person by and to whom the costs shall be paid.***

97. If the Court does not determine the costs, the Registrar of the Court is required by Rule 37 to tax such costs. The 1st, 2nd and 3rd respondents are entitled to costs. I grant them costs. Those costs shall be paid by the petitioner. Successful parties have in the past abused the taxation process to exaggerate their costs to the chagrin and detriment of the losing party. That is the genesis of the rule requiring the election Court to set a ceiling on costs. Accordingly and as per Rule 36(1) (a) I will cap the costs to the first respondent at kshs.2, 000,000.00 and to both the 2nd and 3rd respondents jointly at Kshs.2, 000,000.00 to the intent that the total costs or (sic) ***to be paid by the petitioner to all the respondents shall not exceed Kshs. 4,000,000.00. The Registrar of this Court shall tax the separate bills of costs under Rule 37. Lastly under Rule 37(3) I direct that part of these costs shall be paid to the respondent*** (sic) ***or upon the taxation and prorata from the money deposited by the petitioners as security in court"***

On that account, the learned Judge dismissed the appellants petition in its entirety.

Appellant was aggrieved by that decision and preferred the appeal under consideration. A total of 14 grounds of appeal have been put forth for our consideration. In summary the appellant contends that the learned trial Judge erred both in fact ***and law in:-***

i. Holding that the errors committed and omitted on the part of the 2nd and 3rd respondents were excusable when they indeed affected the results.
ii. Disregarding the results of the scrutiny ordered in selected stations.
iii. Stating that the election of the 1st respondent was valid and proper when in actual sense the Form 36 used for the declaration of the results did not have the aggregate results of the candidates.
iv. Holding that the result was valid and validly declared when there was no recognized Form 36 for declarations of the result.
v. Considering and concentrating in evaluation of the evidence on the part of the petitioner without applying himself to the respondent's evidence as well.
vi. The judgment exhibited biasness (sic), misconstruction and errors both in fact and law as to the substance of law in an election petition.
vii. The learned Judges' Construction and interpretation of the election law was thus riddled with serious errors and misconceptions of the same and fell short of the expectations of the provisions of the Constitution and the Election Act.
viii. Holding that the petitioner failed to call evidence to show and prove that his agents were chased away from the polling centres (St. Monica) whereas he denied the petitioner time to call witnesses.
ix. Denying the petitioner's chief campaigner an opportunity to testify thereby limiting the

petitioner's constitutional rights to be heard.

x. Whitewashing the evidence by the respondent instead of testing the same while darkening, ignoring and castigating the verifiable evidence by the petitioner.
xi. Holding that the complexity of the electoral process was excusable and ranked over and above the requirement of the Constitution as to the conduct of the electoral process.
xii. Awarding excessive costs of over Kshs.4,000,000.00 payable to the respondents because;-

1. The costs were overwhelmingly high and unjustifiable.
2. Having found that the election was characterized by malpractices which were due to its complexity proceeded to award costs.

(xiii). Taking refuge in election regulations to hold that even though there were lapses in the electoral process, the same were not deliberate to orchestrate or to fiddle with the election and the same did not affect the result of the election.

(xiv) Dismissing the appellants petition on grounds inter alia that the appellant failed to discharge the onus of proof above the balance of probability.

In consequence thereof, the appellant sought orders that the judgment decree and or orders delivered on 30th August, 2013 in election petition No.5 of 2013 be disallowed; that the said Judgment, decree/orders be set aside and the same be substituted by an order nullifying the election of the 1st respondent as a member of parliament for Kajiado East Constituency and ordering a fresh election and costs of the appeal.

Parties elected to proceed by way of written submissions. Pursuant to the directions given herein on the 10th day of October, 2013, Submissions for the appellant were filed on the 14th day of October, 2013; those for the 1st respondent were filed on the 17th day of October, 2013 and those of the 2nd and 3rd respondents were filed on 22nd October, 2013 respectfully.

In his oral submission to Court, learned counsel for the appellant ***Mr. Franklin Omino*** argued that the learned trial Judge arrived at the wrong conclusion in failing to allow the petition after finding as a fact that there were errors and irregularities committed in the course of the electoral process; that the learned trial Judge failed to properly appraise himself of the evidence on the scrutiny; that appellant had asked for scrutiny in all the 52 polling stations, but the Judge allowed only five polling stations; that the learned trial Judge also failed to appraise himself properly on the evidence before him on the whole intent, purport and effect of the scrutiny results and its effects on the entire electoral process with regard to issues of impartiality, right to be heard arising from the Judge's failure to allow the appellant's witnesses to adduce more evidence and lastly on wrong exercise of the Judges discretion in awarding costs.

He relied on the case of ***Morgan and others versus Simpson [1974] AIIER 151*** for the proposition that the errors and irregularities found by the learned trial Judge to have been apparent in the petition giving rise to this appeal should have been sufficient to vitiate the election for Kajiado East Constituency and declare it nullity.

Relying on the decision of ***James Omingo Magara versus Manson Onyango Nyamweya & 2 others [2010[eKLR*** learned counsel argued that the learned trial Judge having found that there were numerous irregularities in Forms 35 and 36, he should not have misconstrued the relevant provisions of law to white wash all manner of sins which may have been committed during the electoral process in Kajiado East Constituency as parliament never designed the enabling provisions of law for purposes of covering up serious abuses of the electoral process.

On impartiality, learned counsel relied on an observation in ***Rashid Hamid Ahmed Amana and IEBC and 2 others [2013] eKLR*** thus:

> ***"Regulation 83 of the Election (General Regulation 2012) does not provide for a situation where there can be generated two (2) Form 36 one being a draft and another being a final***

copy. For this reason, this Court is of the opinion that the petitioner established a case for this Court to recount and scrutinize the votes cast in the two(2) polling stations to determine whether or not the results reflected in Form 35 are the ones which were transposed into Form 36. This will enable the Court to ascertain the integrity of the results that were entered in Form 36 by the 2nd respondent"

On the allegations of denial of the right to be heard, learned counsel argued that failure to allow the appellant call his witnesses was an affront to the enshrined constitutional principle of fair hearing and fair trial; that the witnesses were crucial witnesses and their evidence should not have been shut out for the reason firstly that the appellant had failed to manage his time properly and secondly that the evidence of such would have been witnesses would not have made a difference in the overall results of the electoral process. It is learned counsel's contention that had this evidence been received by the learned Judge, it would definitely have had an impact on the outcome of the petition.

Learned counsel drew inspiration from an observation in the decision in the case of ***William Kabogo Gitau versus George Thuo and 2 others Nairobi Milimani, Commercial Court Election petition Number 10 of 2008*** to the effect that the discrepancy in the votes cast for the parliamentary and presidential elections should have raised eye brows considering that both were conducted on the basis of the same voters roll and on that basis, this should have been sufficient additional reason for discrediting the electoral process in the Kajiado East Constituency.

Turning to the issue of costs, we were urged to find that on the basis of the facts before the learned trial Judge that indeed there were irregularities and errors noted in the electoral process held in Kajiado East constituency, this was sufficient demonstration that indeed the appellant had genuine grievances to make and also considering that the second respondent was largely blamed for these errors and omissions, it should only have been fair that, the 2nd respondent should have been ordered to meet those costs. On that ground, learned counsel urged us to overturn the order on costs as against the appellant and redirect that order to operate as against the 2nd respondent.

Learned counsel for the first respondent ***Mr. Koin Lompo*** argued that the errors alleged to have been committed by the 2nd and 3rd respondents were arithmetical in nature and these did not cast doubt to the regularity of the electoral process undertaken and were thus not unique in any way.

Relying on the supreme court decision in petition **Number 5 of 2013 Raila odinga versus IEBC and others,** learned counsel argued that it was up to the appellant to establish that there had been non compliance with the law on the one hand and that such non compliance did in fact affect the validity of the election process.

Relying on the provisions of section 83 of the Elections Act No. 24 of 2011, learned counsel urged us to hold that an election ought not to be held void by reason of transgression of the law committed without any corrupt motive. This Court is therefore invited to hold the view that the issues of errors and their ultimate effect on the electoral process subject of this appeal had been extensively dealt with by the learned trial Judge and found faultless.

That the issue of selective scrutiny carried out by the learned trial Judge was raised before the learned trial Judge, arguments were received from all parties on board, a ruling was made by the learned trial Judge defining the extent of the scrutiny, an appeal was proffered against that ruling but never pursued and for this reason that issue should not be revisited on appeal in this forum.

Counsel continued to argue that the learned trial Judge found as a fact that once a petitioner or parties are satisfied with the process of voting, counting and the results entered in form 35 and later transposed on to form 36, form 35 becomes a none issue upon such transposing, any errors in form 35 which do not go to the root of the poll become irrelevant and cannot certainly be used as a reason for alleging non compliance with the law.

Mr. Koin Lompo urged us to affirm the learned trial Judge's stand that the appellant as the

petitioner in the high court bore the evidential as well as the legal burden of proving his allegation in his petition. That it is undisputed as borne out by the record that the learned Judge considered all the evidence as had been placed before him. It was accordingly assessed, evaluated and analized by the learned trial judge who applied to that assessment all the relevant provisions of the law and the regulations and arrived at the conclusion he did that the appellant had in fact not discharged that burden.

Mr. Koin Lompo also urged us to affirm the findings of the learned trial Judge that no agent of the appellant was ever harassed, mistreated, barred and or chased away from any polling station as no agent was presented to Court by the appellant who could say that in fact he was the one or one of those who had been chased away.

Mr. Koin Lompo also urged us to find that the learned trial Judge did not excuse any lapses but taking the overall picture of the entire electoral process in the Kajiado East Constituency, arrived at the conclusion that the overall picture demonstrated that the ballot had spoken and through that ballot the will of the people of Kajiado East constituency was represented and there was no need to disturb that will. That it is also evident from the reasoning of the learned trial Judge that had the scrutiny revealed a great departure from what was captured in form 35, then the learned trial Judge would not have hesitated in ruling that the State of affairs as portrayed did not represent the exercise of the democratic right of the people of Kajiado East Constituency. This then would have created a reason for the learned trial judge's right to intervene in that state of affairs in the absence of that this appellate Court has a duty to uphold the will of the people of Kajiado East Constituency as did the trial Court.

On the basis of the above, we were invited to find as did the learned trial Judge that no election can ever be 100% accurate and that is why Section 83 of the election Act was enacted. This provision gives a Court of law wide latitude to permit the Court to weigh the totality of the complaints raised by the appellants and then arrive at an appropriate decision within the legitimate expectation of Section 83 of the Act. That in the circumstances portrayed herein, the ultimate decision arrived at by the learned trial Judge was the correct position considering that all the complaints raised by the appellant were post election complaints in nature. It should also be noted that the appellant himself had indicated on oath that he had no issues with voting and counting. Neither did he make any assertion that his votes were ever taken away or that he was denied votes which rightly belonged to him or that his votes were switched with those of other candidates.

Reliance was placed on the decision in ***S.K. Njuguna and the Electoral Commission of Kenya versus John Kiarie Waweru and Beth Wambui Mugo Nai CA. No. 219 of 2008*** in reiterating that the issue of costs is in the discretion of the Court; that the learned trial Judge exercised his discretion properly and judiciously in arriving at the order on costs. There is therefore no justification for interference with that order.

In deciding whether to intervene in favour of the appellant or not we were urged to be guided by the stand taken by the Supreme Court in ***Raila's*** case (Supra) set out in Pr. 175 (3) and (7) thus, 303, 304 thus:-

> ***"In instances where there were two forms 36 provided for the same constituency these were provided in good faith, and were not used in the tallying results. In some instances the 2nd respondent made errors in forms 36 during the counting process which he then corrected in a second form 36. Both forms were submitted, having been duly signed, in order to show where the errors were in the initial form 36"***
>
> ***I …..Therefore while the IEBC officially may have made some clerical errors, no mischarge on or should be attributed thereto. This to a substantive extent, the voting counting and tallying of votes was carried out to a high degree of accuracy. This is all that is required to show that the exercise was carried out well. [Pr 197] IEBC is a Constitutional entity entrusted with specified obligation to organize, manage and conduct elections, designed to give fulfillment to the people's political rights (Article 38 of the constitution). The execution of such a mandate is by specified constitutional principle and mechanisms***

and by detailed provisions of the statute law. While it is conceivable that the law of election can be infringed especially through incompetence, malpractices or fraud attributable to the responsible agents, it behoves the person who this alleges, to produce the necessary evidence in the first place- and thereafter , the evidential burden shifts, and recaps shifting (Pr.256) …. Although as we find, there were many irregularities in the data and information- capture during the registration process, there were not substantial as to affect the credibility of the electoral process, and besides, no credible evidence was adduced to show that such irregularities were premeditated and introduced by the 1st Respondent, for the purpose of causing prejudice to any particular candidate.

[Pr.303] We come to the conclusion that by no means can the conduct of this election be said to have been perfect, even through 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.

[Pr.304] Did the petitioner clearly and decisively show the conduct of the election to have been so devoid of merit and so distorted as not to reflect the expression of the peoples electoral intent? It is this broad test that should guide in this kind of case in deciding whether we should disturb the outcome of the presidential election"

Reliance was also placed on a passage in the case of ***James Omingo Magara versus Manson Onyango (Supra)*** thus

"Broadly speaking the overriding objective of the Act is to promote the right to vote and this requires that the Act should be liberty and broadly interpreted so as to provide citizens with every opportunity to vote. The primary duty of the election court is to give effect to the will of the electorate. Reasonable compliance as opposed to strict or absolute compliance with the procedures set out in the legislation is the standard when considering procedural matters"

Lastly the guiding principles set by ***Lord Denning*** in ***Morgan versus Simpson*** (Supra) quoted with approval in ***James Omingo Magara*** case (Supra) thus:-

"Collecting all these cases together, I suggest that the law can be stated in these propositions:

1. ***If the election was conducted so badly that it was not substantially in accordance with the law as to election. The elections is vitiated, irrespective of whether the result was effected 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 of or a mistake at the polls…***

3. ***But, even though the election was conducted substantially in accordance with the law as to election 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"***

Mr. T.T. Tiego learned counsel for the 2nd and 3rd respondents also opposed the appeal. Counsel argued that the learned trial Judge did not only give a proper approach but also a proper interpretation of the law relating to elections; that set out the facts of the case and then applied the correct standard of both the evidential and legal burden of proof and rightly found that the duty to discharge that burden lay with the appellant; that the Judge applied principles of case law to the facts before him and then arrived at the correct conclusion that the integrity of the electoral process had not been violated and as such nullification of the election would not be called into place.

Learned counsel concedes that indeed there were errors identified by the learned trial Judge, but on the facts before the learned Judge, the learned Judge was entitled to reach the conclusion he did reach that what the presiding officers did regarding details of entries made in forms 35and 36 was what was expected of them under Section 83 of the Elections Act and did not in fact violate the integrity of the

electoral process. It was ***Mr. Tiego's*** argument that a proper reading and construction of the law shows clearly that the law recognizes, that indeed errors may occur in an electoral process, but in order for these to hold, they must be of a magnitude that any oridinary person interrogating them would say that they indeed violate the electoral process.

Mr. Tiego asked us to be persuaded by their argument that the learned trial judge's summary of the results of scrutiny demonstrated that there was no evidence to show that any votes were irregularly given in favour of the first respondent after giving a detailed analysis on how the details in formS 35 and 36 were entered which showed that everything had been done according to the laid down procedures, thus leaving it to the appellant to explain how the variations in those documents affected him which he had not done.

By the Court requiring the appellant to comply with the time lines set for the presentation of his evidence, did not of itself amount to bias as the Judge was simply complying with the requirement in Article 105 of the Constitution 2010; that it was imperative upon the appellant to plan how to maximize on the time allocation and he should not blame the Court for his failure to plan the use of time allocated to him properly, effectively and efficiently.

Lastly that there is no demonstration that the evidence shut out, if any, would have made a difference to the over all out come of the determination of the petition or would have gone to show that the final result reached did not meet the threshhold set by law.

As for the scuffle, ***Mr. Tiego*** agreed that indeed there was mention of a scuffle having been witnessed, but this was in the early morning hours. It subsided and voting went on normally. Further no witness came forward to say that he was not able to vote by reason of that scuffle, and secondly, that the vote of such witness would have tilted the vote in favour of the appellant.

On the issue of costs, we were urged to find that the appellant who brought to Court a frivolous petition had to meet the costs of that litigation. Further that since the alleged errors committed by the 2nd and 3rd respondents are minor, there was no reason as to why the 2nd and 3rd respondents could have been called upon to pay costs. It is ***Mr. Tiego's*** stand that the learned Judge exercised his discretion well and it should not be disturbed.

In response to the respondents' submissions ***Mr. Omino*** urged us to find that Section 3 and regulations made thereunder did not condone the errors complained of by the appellant. On costs ***Mr. Omino*** argued that the amount deposited as costs should have sufficed as the costs herein, that this should have formed the award. Lastly that they discharged both the evidential and legal burdens of proof placed on them and the Court should have ruled in their favour. They therefore ask this Court to overturn the decision of the High Court with costs to them.

This being a first appeal, our mandate is as set out in Rule 29 (1) of this Court's Rules 2010 namely to reappraise the evidence and to draw out our own conclusions on the facts. See also the case of ***Peters versus Sunday Post [1958] EA 424*** where the predecessor of this Court, the Court of Appeal for Eastern Africa had this to say inter alia:-

> ***"Whilist an appellate Court has jurisdiction to review the evidence to determine whether the conclusions of the trial Judge should stand, this jurisdiction is exercised with caution, if there is no evidence to support a particular conclusion or if it is shown that the trial Judge has failed to appreciate the weight or bearing of circumstances admitted or proved or has plainly gone wrong the appellate Court will not hesitate so to decide"***

Bearing in mind the facts and the principles of both law and case law assessed above, the questions we have to pause to ourselves are three fold.

i. What was and still is the legitimate expectation of all the players in the litigation culminating in this appeal?

ii. What are the guiding principles which are to guide this Court in the determination of the legitimate expectation of the players in number (ii) above
iii. What is the factual base on the basis of which a determination of the said legitimate expectation is to be made?

The players in this litigation are the electorate in Kajiado East Constituency, the appellant and the first respondent who had offered their candidature to the elective position of member of parliament for the Kajiado East Constituency; the independent electoral and boundaries commission (IEBC) as the body mandated by both the Constitution and the statute law to facilitate the success of the electoral process in the Kajiado East Constituency, and both the High Court and this Court as the institutions mandated by both the Constitution and the statute law to exercise supervisory powers over that process with a view to determining its legitimacy or otherwise.

Article 1 (1) of the Constitution of Kenya 2010 vests sovereign power in the electorate with a caveat that it be exercised on their behalf by parliament and the Judiciary among others. Article 20(2) gives the right to enjoy prescriptions in the Bill of Rights which rights are binding on all State Organs (Article 20 (1) gives the mandate to determine infringement of the Bill of Rights is vested in Courts (Article 20(4).) The State and State organs have a duty to respect the enjoyment of the Bill of Rights (Article 21 (1)). Any aggrieved party has a right to enforce infringement of any of the rights prescribed in the Bill of Rights. (Article 22 (1)). Courts of law have been provided with adequate remedies as a redress for any alleged infringements of such rights (Article 23(1) and (24 (1))

Article 38 is the vehicle used by the electorate to choose between the appellant and the first respondent to represent them as member of parliament for Kajiado East Constituency. It is the same vehicle, among others, that both the appellant and the first respondent used to offer themselves up for election to the position of member of parliament for Kajiado East constituency.

It is common ground that the exercise was carried out and concluded. The rival arguments fronted by both competing interests is that, the appellant moved to Court seeking to overturn the electoral process which had just been concluded while the respondents moved to Court seeking to defend and seek the affirmation of that process, culminating in this appeal.

To facilitate the legitimate expectation created under Article 38 of the Constitution, the State had put in place an electoral process system under Article 81 of the Constitution, then tooled it properly with legislation to facilitate the functionalities of the electoral process system. In pursuance to this, the Independent Electoral and Boundaries Commission (IEBC) was created as the body mandated under Article 88 of the Constitution to carry out the exercise of the electoral process. The legitimate expectation of this body and the consumers of the exercise of its mandate is that it would render its services in accordance with its mandate as prescribed under the Act and the Regulations made thereunder.

Vide Section 4 of the IEBC Act (Supra) the Commission was mandated to conduct and supervise parliamentary elections of Kajiado East Constituency. The principles to guide the second respondent in the discharge of its mandate are clearly spelt out in Section 25 of the Act. Among these, is respect for the freedom of citizens to exercise their political rights under Article 38 of the Constitution, respect for the principle of universal and equal suffrage based on the aspiration for fair representation and equality of votes, respect for the principle of free and fair elections which are free, by secret ballot, free from violence, intimidation, improper influence or corruption, conducted independently, transparently and administered in an impartial neutral , efficient accurate and accountable manner. Section 26 of the Act also required the Commission to act independently in discharging its mandate and not to be subjected to any direction or control of any person or authority but observe the principle of public participation and the requirement for consultation with stake holders.

Section 58 of the Elections Act and Regulation 59 make provision for penal consequences for the electorate if it fails to exercise its mandate in accordance with the law. Section 59 makes provision for penal consequences for the employees of the 2nd respondent if they fail to exercise their mandate properly. In a summary, these among others relate to the making of either false entries, interfering with

the electorate in the exercise of its mandate, creating an avenue for the Commission of electoral malpractices or being party to such malpractices. Section 65 outlaws use of violence during elections Whereas Section 67 creates election offences and the attendant penalties.

The legitimate expectation of the Court and the consumers of its mandate namely, the exercise of its supervisory powers over both the electorate and the 2nd respondent is that it should do so in accordance with the parameters provided by both the constitution and the relevant statute law. With regard to election matters, Article 105 of the Constitution, Section 85 and 85A make provision of the time lines within which to finalize the supervisory exercise over any one particular petition from the initiation of the petition upto the appellate stage to be six months from the date of filing of the petition or appeal as the case may be to the date of delivery of the Judgment. Specific prescriptions on how this is to be achieved is set out in Sections 79-85A of the Act and Regulations 17,32,33,35,36 of the Election parliamentary and County Elections Petitions Rules.

Section 80(d) of the Act enjoins the Court to decide matters before it without undue regard to technicalities; Section 82 permits scrutiny of votes either on the court's own motion or upon application by a party, sub section 2 authorizes the discounting of votes of persons whose names do not appear in the voting register, those not supposed to vote, those votes obtained through bribery, of those persons who are guilty of personation, those who have voted more than once, those who had been disqualified from voting.

Section 83 provides a safety valve in the whole exercise. It provides:-

> ***"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"***

Section 80 on the other hand gives an election Court the mandate to award costs to and incidental to an election petition which costs have to follow the cause. Regulations 36 (1) (2) provides modalities on how the mandate on awarding costs is to be exercised by the court. It provides:-

> ***"The court shall at the conclusion of an election petition, make an order specifying-***
>
> a. ***The total amount of costs payable; and***
> b. ***The person by and to whom the costs shall be paid.***
>
> ***2. When making an order under sub rule (1), the court may***
>
> ***(a) Disallow any costs which may, in the opinion of the court have been caused by vexatious conduct, unfounded allegations or unfounded objections on the part of either the petitioner or the respondents, and***
>
> ***Impose the burden of payment on the party who has caused an unnecessary expense whether such party is successful or not. In order to discourage any such expenses.***
>
> **….**

Regulation 17 (1) (2) on the other hand provides parameters within which an election Court should execute its supervisory powers. These include holding of pre-trial procedures within seven (7) days of the filing of the petition framing of issues for determination dealing with all interlocutory applications, confirmation of the number of witnesses the parties intended to call, give directions for the expedition of the suit or any outstanding issues, the filing of any or further documents if any. Subsection (2) mandates the Court to limit the raising of interlocutory applications after the commencement of the hearing of the petition.

The guiding principles which are to guide this Court in the determination of the appeal are the Constitutional provisions, relevant statute law and principles of case law cited to us by either side already assessed above.

With regard to the factual base on the basis of which we are to determine this appeal, this is comprised in the totality of the record as had been placed before the learned trial Judge and as it has been placed before us.

We have accordingly reassessed, re-evaluated and reanalyzed the facts before us. We have also considered them inline with the reasoning of the learned trial Judge as contained in the Judgment sought to be impugned, the complaints raised by the appellant against that Judgment as contained in the grounds of appeal fronted for our interrogation, the rival arguments for and against the learned trial Judge's reasoning as fronted by each side, the principles of the Constitution, statute law and case law relied upon by either side.

The learned Judge found as a fact that the returning officer had conceded that she announced the results using handwritten forms 35 and 36 because the printer had malfunctioned; that there was no rebuttal evidence that the printer had not in fact malfunctioned; that this notwithstanding, the results announced were correct as the correct votes garnered by each of the six candidates were the ones announced. The Judge ruled that although the announcement of the votes for candidates was done from the hand written form 36 or from a certificate, it did not alter the votes cast for each candidate. On our own, we find that indeed allegations of a malfunctioned printer were fronted as the reason for failure to announce the results from a printed form 36. It is however evident that a part from attacking of the irregularities generally, the appellant has not contended that there was any fiddling, ill motive intended or his votes got lost by reason of that procedure and we therefore affirm the learned trial judge's findings that no prejudice or miscarriage of justice was occasioned to the appellant by that action.

On tallying, the learned Judge found that ballot box No. 121469 contained form 36 signed by 10 agents, form 35 signed variously by agents 8 and 11 in number. He also noted that some serial numbers were also different. To the learned Judge the anomaly and the signing of the forms 36 variously by the agents and anomalies in the serial numbers of form 36 did not alter the number of votes cast in favour of the appellant namely 220 and the 1st respondent 202. On our own, since the contest was on the votes cast, satisfaction of the total number of votes cast for each contender as found in this ballot box renders the irregularities noted on the signing of the form 36 and different serial numbers on form 35 inconsequential as they did not disadvantage any of the contending candidates.

On ballot box No. 121032, it contained form 35 signed only by 4 agents but tallied with the content of form 36 which had not been signed by any agent. This was irregular, but the results from this ballot box were not contested. The error was therefore excused. We affirm this stand as there was no miscarriage of justice occasioned to either party.

Regarding ballot boxes from Athi River G.K Prison primary school, the Judge noted that the form 35 had been variously signed by agents; they had white out but were not duplicates of each other and therefore did not affect the overall results from this centre. It was also noted that the seal on ballot box number 121074 was broken. The Judge noted that the seal may very well have broken while in transit; that there was no evidence that it had received any foreign matter (that is being stuffed with ballot papers). We find the reason given for the presence of a broken seal reasonable. We also find that no miscarriage of justice was occasioned to any party in the absence of allegation of introduction of any foreign ballot papers into that ballot box.

On differences between votes cast for parliamentary and presidential elections in the area, the learned Judge found only one vote difference at St. Monica and 3 votes difference at Kitengela. To the learned Judge, the margin was too low as to cast doubt to the credibility of the process. We have revisited this reasoning on our own. We bear in mind the reasoning of the Judge in the cited case of ***William Kabogo versus IEBC & Others (Supra)*** we find that the two levels of irregularities are different. That in the case of ***William Kabogo*** was so high that it rightly gave rise to the raising of eye brows and a

conclusion that something must have gone wrong, that there was clear evidence of malpractices having definitely taken place. We find nothing capable of raising eye brows in a narrow margin of one vote and three votes. It has not been argued before us that what the Judge found as the difference between parliamentary and presidential election were only one vote and three votes respectively. We find he rightly dismissed this as inconsequential and could not therefore operate as a dark sport on the particular electoral process.

We have also noted that at the end of the tallying and recounting exercise, the learned Judge drew out what he felt to be a general impression of that exercise. To the Judge, form 36 did not have serious glowing contradictios, inconsistences, discrepancies and irregularities; that some form 35 had white out but this notwithstanding, there was no evidence of deliberate fiddling to defeat the people's franchise; that there was evidence that the result announced and captured in form 36 were largely accurate; that there was no evidence that the arithmetic errors noted were deliberate a fact admitted by the appellant in his cross-examination ; that the figures which had been indicated in paragraph 11 of his supporting affidavit were in fact erroneous. On that account the learned trial judge opined that no cogent evidence had been placed before him that there was evidence of any fiddling by poll officers with a view to favouring any of the competing interests; that the overall picture of all the material which had been placed before him for scrutiny, the overall winner was the first respondent notwithstanding that the win was with a very narrow margin; that according to the law such a narrow win nonetheless even of one vote was sufficient to grant a party a win. On our own we find that the Judges observation and findings were based on cogent evidence that had been placed before him. It was well supported. We have no quarrel with that finding.

The Judge correctly found as we so find that the legitimate expectation of the electorate from the 2nd and 3rd respondents was that they do conduct the election in consonance with the mandate given to them by the Constitution, statute law and the regulations. A survey of these provisions has already been done above. The learned trial Judge absolved the 2nd and 3rd respondents of any blame for any wrong doing in the conduct of that election. In arriving at that conclusion, the learned Judge took into account the fact that true and accurate results had been announced; that it was not necessary for each and every party to have an agent in the polling station as most parties were in coalitions with others and any agent for a coalition would suffice for all the parties forming that coalition; that instances of lack of space for each and every accredited agent in any polling station could not be ruled out. This would definitely force some agents to remain outside the polling booth; that in such circumstances, a returning officer would be entitled to limit the number of agents in any polling booth; that no particulars of any agent who was irregularly locked out was ever given. All these findings were supported by the evidence on record. It was therefore a correct appraisal of evidence. We affirm it.

That there may have been evidence of power outages but there is nothing to show that these had been orchestrated by the respondents with a view to committing offences as there was no allegation that these aided any party to sneak in any ballot papers with a view to stealing the election. That ***Maxmilla*** admitted that she did not witness any body stuffing ballot papers in any ballot box. It was also found as a fact that although ***Maxmilla*** claimed that 500 voters had been turned away from St. Monica polling station before casting their votes, the Judge found no proof of this from any other independent witness. We find the Judge's stand on this issue sound as no contrary evidence has been pointed out to us and we saw none from the record.

On the incident of a commotion reported earlier on, on the voting day there was evidence that this subsided and voting went on smoothly throughout the constituency. That there was no evidence of intimidation or violence directed at voters or supporters. It was noted that in fact the appellant himself agreed that voting continued peacefully throughout the Constituency. We affirm this finding as no contrary evidence has been pointed out to us to hold a contrary view.

On bias and parity, the learned Judge noted that indeed there is admission that both the appellant and the 1st respondent had their relatives who had been hired by IEBC as poll officials in various capacities. It was noted that none of the aspirants or the poll officials declared this state of affairs before the voting day. It was however noted that this arose from the fact that IEBC hired its staff long before the nomination exercise for the aspirants came into being that the lists were published; that the sole reason for

publication was to invite objections if any and since none were raised the participation of relatives of some of the aspirants in the election exercise was inevitable. But this notwithstanding, there was no evidence or allegation of any malpractice committed by such relatives in favour of any aspirant. This is borne out by the fact that neither the appellant nor the first respondent or any other candidate ever raised any complaint with any polling officer or returning officer of any prejudices suffered by them at the hands of the relatives of either the 1st respondent the appellant or any other candidate. We therefore find that no prejudice was suffered by any of those stakeholders in the Kajiado East electoral process for failure of the relatives of the candidates to declare their interests before the voting.

Turning to complaints levelled against one ***Bruce Likoma*** of misconduct in the conduct of election in stream 13 at St. Monica Nursery school, the Judge found these to be unfounded as the entries entered in form 35 for this stream had no alteration; the same had also been signed by the appellant's agents without any reservation; there was also no specific impeachment of ***Mr. Likamas*** conduct in the appellants pleadings; that although it was admitted that ***Bruce Likoma*** was an admitted relative of the 1st respondent, there was nothing to show that he had been on a mission to serve the interests of the 1st respondent in the discharge of his mandate.

Turning to complaints on partial scrutiny as opposed to total scrutiny, we were informed that this grievance formed the basis of an intended appeal. This submission was not controverted by ***Mr. Omino*** in his response to the respondent's submission. We rest the matter and say no more on it as was requested of us by the appellant. The appellant having failed to pursue his right to redress this grievance when it arose, he can only be deemed to have abandoned it and we so find.

Regarding evidence shut out , we agree with the respondents' assertion that the Court was entitled to comply with time lines set by the law. Regulation 17 gave the Court wide powers to manage petitions to ensure speedy disposal. It was therefore within the Judges power to ensure that timelines set by the law were met. We find no fault in that. Secondly we agree with the respondent's assertion that there was no demonstration that the shut out evidence would have titled the scales in favour of the appellant.

In conclusion and on the basis of the totality of the above assessment, we are in agreement that there is demonstration that the electorate in Kajiado East indeed spoke through their vote; that the margin of preference is indeed narrow but the scales tilted in favour of the first respondent; that indeed there were errors, irregularities, inconsistencies, omissions and commissions by the 2nd and 3rd respondent but these were minor and did not go to the root of the process to an extent that the process would be discredited. These were not such as would require a Court of law properly directing its mind to sent the 1st respondent packing and demand a repeat of the whole process. We entirely agree with the stand taken by the Judge. This is a matter falling within the ambit of Section 83 of the Election Act.

The question we have to ask is whether in view of the admission of minor irregularities , the appellant was in line when he moved to Court, whether the petition was so frivolous that he had to be penalized with an order for coats. We are of the contrary view. The existence of irregularities were sufficient for the appellant to move to Court. Having so moved, it was incumbent upon the Court to classify these and then determine whether they fell into the ambit of Section 83 or not. Herein the Judge found that though these existed, these fell within the ambit of the parameters in Section 83 of the Act and that on that account, the election would not be voided.

The irregularities were attributed to the 2nd and 3rd respondents and not the appellant. On this account, we find that the learned Judge fell into an error when apportioning blame worthiness as to who should meet the costs. It is our stand that had there been no single irregularity the petition may very well have not been occasioned. The 2nd and 3rd respondent take whole responsibility for this.

The law on the issue of costs in election petition is very clear on howit is to be determined. We adopt these wholly. On the basis of these, we are inclined to partially allow the appeal on the award of costs.

In the result, we dismiss the appellant's appeal as against the result of the parliamentary elections in

Kajiado East. We confirm that election. We however set aside the order of costs as against the appellant for the reasons given in the Judgment. We substitute this to an order for costs against the 2nd and 3rd respondents in favour of the appellant and the 1st respondent in line with the law and regulations and the Judge's findings. These are capped at Kshs. 4 million i.e 2 million to the appellant and 2 million to the 1st respondent. The appellant shall receive the deposit for security for costs that he paid into Court.

Dated and delivered at Nairobi this 10th day of March, 2014

R.N. NAMBUYE

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JUDGE OF APPEAL

G.B.M. KARIUKI

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JUDGE OF APPEAL

P.M. MWILU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR