IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPEAL NO. 47 OF 2013

BETWEEN

M'NKIRIA PETKAY SHEN MIRITI …..... APPELLANT

AND

RAGWA SAMUEL MBAE …..... 1ST RESPONDENT

INDEPENDENT ELECTORAL &

BONDERIES COMMISSION …..... 2ND RESPONDENT

SAMUEL MUCHERU …..... 3RD RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Meru (Lesiit, J.)

dated 27th September, 2013

in

Election Petition No. 4 of 2013)

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JUDGMENT OF THE COURT

Introduction:

1. Before us is an appeal from the judgment of the High Court (Lesiit, J.) dated 27th September, 2013 wherein the appellant's Election Petition challenging the election of the 1st respondent as the Governor for Tharaka-Nithi County was dismissed with costs. The appellant seeks the following orders:-

- ***The appeal be allowed with costs and the judgment and order appealed from be set aside.***

- ***A declaration that the election of the 1st respondent as the County Governor for Tharaka-Nithi County was not valid and lawful and the same was not conducted in a free, fair and regular manner as required by the Constitution and the Election Act and the Regulations made thereunder.***

- ***The election of the 1st respondent as the County Governor for Tharaka-Nithi County be set aside to allow for a fresh free and fair election.***

- ***The respondents be ordered to bear the costs both in the proceedings before the Superior Court and those before this Court.***

- ***In the alternative and without prejudice to the foregoing, the Costs awarded to the respondents be reduced to Kshs. 500,000/=.***

Background:

2. The appellant herein vied for Governorship in Tharaka-Nithi County in the concluded 4th March, 2013 general elections. The other contestants for the governorship were the 1st respondent and Mutegi Francis. After the conclusion of the said elections the 3rd respondent, being the County Returning Officer announced the 1st respondent as the winner. The results in respect of the gubernatorial elections as announced by the 3rd respondent were as follows:

   Ragwa Samuel Mbae (1st respondent) - 70,088 votes

   M'Nkiria Petkay Shen Miriti (appellant) - 54,813 votes

   Mutegi Francis - 10,741 votes

   The margin between the 1st respondent and the appellant was about 15,275 votes. On 13th March, 2013 the 2nd respondent vide Kenya Gazette special issue No. 3155 VOL. CXV No. 45 gazetted the 1st respondent as the elected Governor for Tharaka-Nithi.

3. Aggrieved with the aforementioned, the appellant filed an Election Petition in the High Court on 10th April, 2013 challenging the election of the 1st respondent as the Governor for Tharaka-Nithi County. He sought the following orders:-

- ***A declaration that the 1st respondent committed election offences contrary to Sections 71, 72 & 82 of the Elections Act.***

- ***A declaration that the 1st respondent was not validly and lawfully elected as Governor for Tharaka-Nithi.***

- ***A declaration that the 2nd and 3rd respondents conducted the elections for the Governor of Tharaka-Nithi in an irregular, unlawful and unfair manner with the intention of denying the petitioner (appellant) his right to be elected as Governor.***

- ***An order nullifying the election of the 1st respondent.***

- ***A declaration that the petitioner (appellant) was validly elected as Governor.***

- ***Costs of the Petition.***

- ***Any further and consequential orders as the court may issue.***

4. The respondents filed their respective replies denying the allegations set out in the Petition. Following a pre-trial conference, the parties together with the trial court framed uncontested and contested issues which fell for determination. The issues were framed as follows:-

Uncontested issues

- ***Whether the 1st respondent committed election offences and engaged in serious electoral malpractices contrary to Sections 63,71 & 82 of the Elections Act.***

- ***Whether the 2nd and 3rd respondents conducted the elections for Governor for Tharaka-Nithi County in an irregular, unlawful and unfair manner with the intention of denying the petitioner (appellant) his right to be elected as the Governor thereof.***

- ***Whether the 1st respondent was validly and lawfully elected as the County Governor for Tharaka-Nithi in the elections held on 4th March, 2013 due to his participation in electoral malpractices as alleged.***

- ***Whether or not there are valid grounds to nullify the elections of the 1st respondent as the elected County Governor for Tharaka-Nithi.; and if so should the elections of the 1st respondent be nullified?***

- ***Whether the petitioner is entitled to any of the reliefs sought in the Petition?***

- ***What orders, remedies and declarations should the court issue?***

- ***Who should bear the costs of the Petition?***

Contested issues adopted by the trial court

- ***Whether or not the irregularities if any were so substantial as to affect the results declared by the 2nd and 3rd respondents?***

- ***Whether or not the results in the 9 polling stations specified in paragraph 33 of the petitioner's supporting affidavit were properly counted, tallied and correctly recorded in the statutory forms.***

Appellant's case:

5. It was the appellant's case that the declaration of the 1st respondent as Governor was irregular and unlawful because he had engaged in numerous election malpractices. The appellant set out the particulars of the 1st respondent's election offences and malpractices as follows:-

    a) communicating with voters during the election process in various polling stations contrary to ***Regulation 65*** of the ***Election(General) Regulations, 2012 (the Elections Regulations).***

    b) unduly influencing voters to vote for him by dishing out bribes on the election date contrary to ***Section 63*** of the ***Elections Act.***

    c) unduly inducing voters to vote for him by paying them using treated money.

    d) visiting a witchdoctor to procure the treatment of monies through culturally unacceptable ways with a view of confusing and tricking voters into voting for him.

6. According to the appellant, he had obtained more votes than the 1st respondent in the said election; the respondents had colluded to deprive him of his votes by either failing to record the same or transferring some of his votes to the 1st respondent. He contended that the Election Court would be able to establish the same by scrutinizing and recounting the results by considering Forms 35 & 36.
7. The appellant averred that the election results as read by the 2nd and 3rd respondents were inconsistent and irregular and there were wide disparities between the votes cast and announced; in some polling stations the number of votes cast were more than the number of registered voters. The appellant contended that the respondents evicted the appellant's agents from various polling stations; therefore barring his agents from witnessing the whole election process with the intention of manipulating and doctoring the election results. He maintained that the aforementioned irregularities were intentionally designed to favour the 1st respondent.
8. The appellant averred that the gubernatorial elections for Tharaka-Nithi were contrary to ***Articles 81(e)(iv),(v)& 86*** of the ***Constitution,*** arguing that the whole election process lacked integrity, fairness and lacked compliance with the objectives and principles laid down in the ***Constitution*** and the electoral laws. According to him, the gubernatorial election results for Tharaka-Nithi were not a proper expression of the will of the people.
9. PW1, Njeru Nkoroi Kimura (Njeru), testified that he was a witchdoctor. On 17th February, 2013 at around 8:00p.m, the 1st respondent in the company of one Gitonga Mbaka visited him in his house. The 1st respondent informed Njeru that he was vying for the Governor's seat of Tharaka-Nithi and that he was not confident that he would win over the appellant who was popular. The 1st respondent requested Njeru to perform a ritual that would ensure his success in the elections. Njeru testified that it was agreed between the 1st respondent and himself that he would charge Kshs. 50,000/= for his services. A deposit of Kshs. 5,000/= would be paid immediately and the balance of Kshs. 45,000/= would be paid two days after the declaration of results and on condition that the 1st respondent won the elections. He gave evidence that he performed rituals treating the 1st respondent and the money he had brought with him. Njeru testified that he treated the money so that whoever received the money would be induced to vote for the 1st respondent and likewise whoever the 1st respondent greeted with his hands would also be induced to vote for him.
10. PW2, Mutegi Francis (Mutegi), was one of the contestants in the gubernatorial elections for Tharaka-Nithi County. He testified that on 4th March, 2013 while he was at Meru Boys he noticed that a crowd had gathered around the 1st respondent's running mate, Eliud Muriithi Mate (Eliud) (now the Deputy Governor for Tharaka-Nithi), who was outside a motor vehicle make Subaru registration number KAW 479Q. He moved closer and saw Eliud giving the crowd money and asking them to vote for the 1st respondent. Thereafter, Eliud left when he realised Mutegi had seen what he was doing. Mutegi testified that he received several complaints that some of his agents had been denied access into polling stations. PW5, Dereba, the County chief agent of the Unity Party of Kenya (the appellant's party), also gave evidence that he had received information that some of his agents had been denied access in some polling stations in Maara and Tharaka constituencies without any reasons. He stated that around five of his agents had been denied access.
11. PW6, Humphrey Gitonga Murungi (Humphrey), was an agent of Safina party stationed at Kiarugu Primary School polling station. He arrived at the polling station at around 6:00 a.m. Humphrey testified that all the parties agents with the exception of the TNA agent were directed to sit and not leave an area designated for agents; the TNA agent was one Muthoni Riungu and she was the only agent allowed by the Presiding Officer to assist disabled and illiterate voters to vote. Humphrey testified that at one point a voter voted for Raila and Muthoni tore up the ballot paper and requested for another ballot paper from the polling clerks. He further testified that the said Muthoni destroyed three more ballot papers wherein voters had either not voted for the 1st respondent or other candidates in TNA in a similar manner.
12. The appellant testified that on account of the foregoing there was no transparency in the whole electoral process.

1st respondent's case:

13. The 1st respondent contended that the gubernatorial elections for Tharaka-Nithi were conducted in conformity with, and in the spirit of, ***Articles 81 & 86*** of the ***Constitution***. He maintained that the appellant had not laid any basis to justify an order for scrutiny and recount of votes cast.
14. The 1st respondent denied being involved in any election malpractices and in witchcraft. He testified that on 17th February, 2013 he did not visit PW1, Njeru, but was in his running mate's home at Tharaka.
15. RW2, Julius Mugambi (Julius), was a polling agent for one Mercy Kirito Mutegi who was vying for the seat of Women Representative in Tharaka-Nithi. He testified that he was the overall agent of the said candidate in 33 polling stations. He maintained that he did not witness any malpractices or irregularities in the said elections.

2nd and 3rd respondents' case:

16. The 2nd and 3rd respondents argued that the gubernatorial elections for Tharaka-Nithi were accurate, verifiable, accountable and transparent. The respondents maintained that the said elections complied with ***Articles 81 & 86*** of the ***Constitution***. It was the respondents' case that any errors of transposition were inadvertent and were due to human error and fatigue; the results were a true reflection of the will of the people of Tharaka-Nithi.

Trial court's findings:

17. After considering the evidence adduced, the trial court found that the appellant had not proved any election offence or malpractice that had been committed by the respondents in the 4th March, 2013 general elections. The trial court also found that the arithmetical errors in the results, if any, were due to human error and did not affect the outcome of the results; the 1st respondent was rightly declared as the elected Governor for Tharaka-Nithi.
18. The learned Judge (Lesiit, J.) vide a judgment dated 27th September, 2013 dismissed the appellant's Petition with costs. It is that decision that has provoked this appeal.

Appeal:

19. The appeal herein is based on 26 grounds of appeal which can be aptly summarised as follows:-

- ***The learned Judge erred in law in finding and holding that the appellant failed to prove that the 1st respondent committed election offences and engaged in serious electoral malpractices.***

- ***The learned Judge erred in law in finding and holding that the appellant failed to adduce material evidence to prove that his agents were denied entry into polling stations and that the failure to allow them that access significantly affected the results of the election.***

- ***The learned Judge erred in law in failing to declare that Form 35 completed by the Presiding Officers were completed contrary to the law and the Election Regulations and as such there were no valid statutory forms from which the election results could be declared.***

- ***The learned Judge erred in law in finding and holding that there was valid election when no evidence was adduced and/or return of the election results filed by the 2nd and 3rd respondents before the honourable court contrary to the trite requirements of law.***

- ***The learned Judge erred in law by failing to consider the totality of the evidence adduced by the appellant.***

- ***The learned Judge erred in law in failing to consider and/or rule on all the issues that arose***

before her during the trial.

- ***The learned Judge erred in law in considering extraneous evidence in reaching her finding and dismissing the appellant's Petition.***

- ***The learned Judge erred in law in finding and holding that the 2nd and 3rd respondents conducted the gubernatorial elections in a regular, lawful and fair manner and that there was no evidence adduced to show that the 2nd and 3rd respondents conducted the election with the intention of denying the appellant his right to be elected as the Governor.***

- ***The learned Judge erred in law in the biased manner she treated the evidence adduced by Mr. Basilio Gitonga and PW1, Njeru Nkoroi.***

- ***The learned Judge erred in law in holding that there were no valid grounds adduced by the appellant to justify the nullification of the election of the 1st respondent.***

- ***The learned Judge erred in law in ordering the appellant to pay the costs of the Petition to the respondents.***

20. The appeal proceeded by way of both written and oral submissions.

Appellant's submissions:

21. Learned counsel, Mr. Charles Agwara appeared for the appellant. The appellant in his written submissions set out the following issues as arising for determination by this Court:-

- ***Whether in determining the validity, lawfulness and the legality of the election of the 1st respondent as the Governor of Tharaka-Nithi County, the superior court properly (sic) interpreted and applied the general electoral principles provided in the Constitution, together with the provisions, rules and regulations stipulated under the Elections Act, 2012.***

- ***Whether the 1st respondent committed election offences and engaged in serious electoral malpractices contrary to the Constitution, together with the provisions, rules and regulations stipulated under the Elections Act, 2012.***

- ***Whether or not this honourable Court can consider issues of fact in determining the appeal herein in view of the provisions of Section 85A of the Elections Act.***

- ***Whether or not the learned Judge's assessment of party and party costs at Kshs. 5 million was proper, fair and just in the circumstances.***

- ***Who should bear the costs of the Petition in the superior court and in the appeal herein?***

- ***Whether in determining the validity, lawfulness and the legality of the election of the 1st respondent as the Governor of Tharaka-Nithi County, the superior court properly interpreted and applied the general electoral principles provided in the Constitution, together with the provisions, rules and regulations stipulated under the Elections Act, 2012.***

22. The appellant submitted that the bone of contention before the trial court was whether he had received more votes than the 1st respondent, hence the application for scrutiny and recount of votes. He argued that the learned Judge erred in dismissing the said application. He submitted that without the opportunity of examining what was contained in the ballot boxes, there was no evidential foundation for the learned Judge to conclude that the election was valid and/or the errors made by the respondents were minor. He cited this Court's decision in ***Peter Gichuki King'ara -vs- Idependent Electoral Commission & 2 others- Civil Appeal No. 31 of 2013.***

23. The appellant argued that the learned Judge acted contrary to ***Rule 21*** of the ***Elections (Parliamentary & County Elections) Petition Rules 2013 (the Elections Rules)*** when she declared that the court's building was insecure to hold ballot boxes which was tantamount to prohibiting the 2nd respondent from availing the ballot boxes to the court as required by the said rule. Further, the learned Judge did not visit the offices of the 2nd respondent to consider the subject matter of the dispute therein. It was argued that the learned Judge did not consider and/or review any of the election results contained in the ballot boxes and/or Forms 35 and 36. According to the appellant, the learned Judge's actions were contrary to the appellant's legitimate expectation that in the determination of the election dispute, the court would apply both qualitative and quantitative tests as a basis of establishing whether the errors and irregularities complained of materially affected the outcome of the election results.
24. The appellant faulted the trial court for finding that the said gubernatorial elections were valid, lawful and legal contrary to the overwhelming evidence which was tendered by the appellant. He argued firstly that, the learned Judge ignored the fact that one of the 1st respondent's key campaigners, RW4, Stephen Nthiga Mitugo, testified that he had ferried IEBC election officials and the election materials used in the subject elections on the election day which clearly demonstrated that the 1st respondent through his agents had access to the election materials before and after the elections. Secondly, the appellant provided evidence that his agents were irregularly and unfairly denied access into the polling stations and an opportunity to oversee the elections as required under ***Regulations 62(1)&(2) and 74*** of the ***Elections Regulations.*** Yet RW1, Njage Mburia (Njage), testified that he was in charge of the 1st respondent's party agents on the election day; he sent two agents in every polling station and the said agents were allowed access by the 2nd respondent's Presiding Officers in the various polling stations in Tharaka-Nithi. The appellant maintained that the foregoing was contrary to ***Regulations 62(1)&(2) and 74*** of the ***Elections Regulations*** which required the presiding officers to allow only one agent in respect of each party into the polling station. Because of the breach of the aforesaid rules, the 2nd respondent had the opportunity, and did in fact, manipulate the election results.
25. Mr. Agwara argued that the learned Judge erred in requiring the appellant to prove that his agents were denied access to polling stations yet the claim was not disputed. He submitted that the learned Judge misdirected herself by holding that the issue had not been proved because the appellant's agents did not appear in court to testify. He submitted that it would not have been humanly possible to avail all the 300 agents to testify in court.
26. Thirdly, the manipulation of the elections results by the 2nd respondent was evident from the testimonies of RRW1, Helen, the returning officer for Mara constituency, RRW2,Wario, and the 3rd respondent. It was submitted that Helen confirmed in her evidence that she had prepared more than two draft election results and entered the same in Form 36 which she signed and gave out to the agents to sign as results for Mara constituency; she later changed those results and appeared before the trial court with totally different results. It was submitted that Helen claimed that the first Form 36 which was signed by agents was a draft Form 36.
27. The appellant submitted that Wario testified that he announced the results for Chuka - Igambang'ombe Constituency and later altered the same after the candidates had left. Wario testified that he altered the results after he had established mistakes in the results tallying. It was submitted that Wario did not inform the court how he established the alleged mistakes. According to the appellant, the ease and the abundant recklessness with which Wario and Hellen altered the results as recorded in Form 36 confirmed that the gubernatorial election results were largely manipulated to suit the 1st respondent's interests. The appellant also pointed out that it was interesting that despite Wario and Hellen admitting that they had changed the results in Form 35, the 3rd respondent testified that he did not see any changes in the election results. The appellant maintained that the results as announced by the 3rd respondent at the County level differed with the results as announced at the Constituency level.
28. Fourthly, contrary to ***Regulation 76(3)*** of the ***Election Regulations*** the presiding officers did not enter the election results in a tallying sheet that is Form 33 as required by the law. It was submitted that the said Form 33 was designed in such a way that it is hard to alter the results once entered as opposed to Form 35 which can be easily altered. The appellant contended that all the

three returning officers for Mara, Tharaka and Chuka Igambang'ombe constituencies testified that they received the election results from the Presiding Officers in Form 35.

29. Fifthly, according to the appellant, contrary to ***Regulation 83*** of the ***Elections Regulations*** the returning officers failed to tally the results as required by law and to make entries in Form 35. The returning officers irregularly allowed the Presiding Officers to make and doctor entries in Form 35. The appellant argued that the requirement for the returning officer to make entries in Form 35 as provided under ***Regulation 83*** of the ***Elections Regulations*** was meant to safeguard against electoral malpractice and make the process transparent and fair as provided in ***Articles 81 & 86*** of the ***Constitution***.
30. The appellant faulted the learned Judge for holding that the requirement under ***Regulation 83*** of the ***Elections Regulations*** that the returning officer should complete Form 35 was not only humanly impossible but ludicrous. It was argued that it was the 2nd respondent who had prepared the said regulations and the only issue that the learned Judge could correctly determine is whether the 3rd respondent complied with the same, and the consequence of non compliance. It was further argued that the learned Judge erred in finding that ***Regulation 83*** was ludicrous yet no party had sought such a declaration.
31. Mr. Agwara submitted that the trial court erred in holding that the appellant had the burden of proving that the said alterations in Form 35 had affected the results when in fact such alterations had not been disputed. According to him, once it was proven that Form 35 had been altered the onus shifted to the 2nd respondent to show why the alterations did not affect the results. He argued that the trial court wrongly relied on the decision of the Supreme Court in ***Raila Odinga -vs- IEBC & 3 others- Petition No. 5 of 2013,*** where the issue was whether the irregularities affected the election results; not whether failure to comply with the laid down law affected the results.
32. It was argued that the learned Judge erred in finding that the failure of the constituency returning officers to fill Form 38 as required by ***Regulation 87 (1) (b)*** of the ***Elections Regulations*** was not deliberate. The appellant maintained that the said regulation required the Constituency returning offices to forward the results to County returning officers in Form 38.
33. It was contended that the actions of the 2nd and 3rd respondents in conducting the gubernatorial elections was mischievous and contrary to the ***Constitution*** and the ***Elections Act***; it was suspicious that the the 3rd respondent announced the results at 11:00 p.m. on 6th March, 2013 in the presence of 3 respective candidates who were all members of one party and were allegedly the winners in the said election for Governor, Senator and Women Representative.
34. It was argued that the aforementioned irregularities were fundamental and went to the root of the election results and affected the credibility of the same; therefore, the results were not a true reflection of the will of the people. It is the appellant's case that the validity of an election is not dependent on the results alone but is a factor of the entire electoral process as recognized under the ***Constitution***, ***Elections Act, Rules*** and ***Regulations*** made thereunder.
35. Based on the foregoing, it was submitted that the learned Judge failed to properly interpret and apply general electoral principles provided in the ***Constitution*** and the ***Elections Act*** in determining the validity of the election of the 1st respondent.

-Whether the 1st respondent committed election offences and engaged in serious electoral malpractices contrary to the Constitution, together with the provisions, rules and regulations stipulated under the Elections Act, 2012.

36. The appellant submitted that the learned Judge was completely biased in the manner she treated the evidence of PW1, Njeru, the witchdoctor and PW7, Justin Gitonga Mbaka (Justin). Justin operated a taxi and allegedly took the 1st respondent to Njeru's house on 17th February, 2013. It was argued that the learned Judge failed to consider the totality of the evidence tendered by PW1 under the erroneous belief that all the 1st respondent was required to do was to raise doubt that the events enumerated by PW1 did not occur. The appellant submitted that the findings of the learned Judge in respect of PW1's evidence and the issue of witchcraft was not supported by any evidence.
37. It was the appellant's case that the learned Judge erred in calling Mr. Basilio Gitonga as a witness and failing to call Justin Mugambi who had allegedly taken PW1 to Basilio's office and explained the 2nd affidavit to Njeru. The appellant faulted the learned Judge for relying on the evidence of

Basilio in respect of a 2nd affidavit allegedly sworn by Njeru yet the learned Judge had held that the evidence of Basilio ought to be treated with caution.

38. The appellant maintained that the evidence on record was sufficient to prove the participation of the 1st respondent in witchcraft contrary to ***Section 63(1)*** of the ***Elections Act;*** the witchcraft was carried out for purposes of impeding and/or preventing the free exercise of the franchise of a voter. According to the appellant, the offence of witchcraft was sufficiently proved and the learned Judge erred when she held contrary to the express provisions of the law, that evidence from a voter who had been affected by the witchcraft was required to prove the offence.
39. It was submitted that there was sufficient evidence to show that the 1st respondent had engaged in voter bribery through his agents and the learned Judge erred in holding that such acts had to be proved to have been done with the knowledge of the 1st respondent. Evidence emerged that the 1st respondent had knowingly and unlawfully engaged public officers in his campaigns contrary to ***Section 43*** of the ***Elections Act.***
40. The appellant argued that the learned Judge was so biased that she failed to note the aforementioned breaches of the law by the 1st respondent. According to the appellant, the foregoing was a clear demonstration that the 1st respondent had committed election offences and engaged in serious electoral malpractices.

- Whether or not this honourable Court can consider issues of fact in determining the appeal herein in view of the provisions of Section 85A of the Elections Act.

41. While admitting that as per ***Section 85A*** of the ***Elections Act*** this Court in sitting on an appeal from the decision of the High Court is bound to consider only issues of law, the appellant submitted that legal conclusions are derived from the facts and evidence before the court; therefore, this Court is also obligated to reconsider the facts from which the trial court derived its legal conclusions. The appellant relied on the decision of this Court in ***Timamy Issa Abdalla -vs- Swaleh Salim Swaleh Imu & 3 Others- Civil Appeal No. 36 of 2013.***
42. It was further submitted that issues of irregularities , election offences and malpractices in an election are issues of law which can only be proved on factual basis. Therefore, this Court has jurisdiction to consider issues of facts herein.

- Whether or not the learned Judge's assessment of party and party costs at Kshs. 5 million was proper, fair and just in the circumstances.

43. The appellant submitted that the matter in the trial court proceeded by way of both affidavit and oral evidence; the total number of witnesses who testified was 24; the number of witnesses was less compared to other Election Petitions where there were more than 40 witnesses. The appellant contended that the reason why the witnesses in this case were few was because the Petition was mainly anchored on scrutiny and recount of votes.
44. It was argued that the learned Judge did not give reasons as to why she assessed the costs payable by the appellant at Kshs. 5,000,000/=; the said amount was the highest amount which had been ordered by any Election Court throughout the country. According to the appellant, there was no factual and/or legal basis upon which the learned Judge could justify such a high amount; the said assessment of costs was unreasonable. In support of the foregoing, the appellant relied on this Court's decision in ***Dr. Thuo Mathenge & another -vs- Nderitu Gachagua & 2 Others- Civil Appeal No. 29 of 2013*** wherein the Court upheld the costs which were assessed by the trial court at Kshs. 2,500,000/= as being reasonable. The appellant contended that the above mentioned case was more complicated and took more time than this case. Further, in ***Peter Gichuki King'ara -vs- Idependent Electoral Commission & 2 others (supra)*** this Court assessed and fixed the maximum amount of costs payable at the trial court at Kshs. 2,000,000/=. The appellant urged us to take judicial notice that the ***Peter Gichuki King'ara case*** was one of the most contested Petitions throughout the country; it involved numerous witnesses; applications both in the High Court and this Court, entailing a barrage of legal and factual issues. The said case could not be compared with this case. It was further argued that all election courts in determining Election Petitions arising from the concluded 4th March, 2013 general elections capped the total costs payable

between 2 million and 2.5 million and only in very rare and peculiar circumstances, the costs were assessed at Kshs. 3.5 million.

45. The appellant maintained that the learned Judge misguided herself in assessing the costs at Kshs 5 million and failed to take into account the principles laid down for assessing costs as set out in the case of ***Joreth Ltd- vs- Kigano & Associates 1EA 92 CAK.*** The appellant also argued that the learned Judge in assessing costs had a public duty to ensure that the costs do not rise above the reasonable level which would be tantamount to limiting access to the court to only the wealthy.

-Who should bear the costs of the Petition in the superior court and in the appeal herein?

46. The appellant contended that based on the evidence adduced, the Petition before the trial court was primarily instigated by the irregular, unlawful and belligerent actions of the 1st respondent and the 2nd respondent's officers. Due to the learned Judge's bias against the appellant she failed to appreciate that the officers of the 2nd respondent were public officers and were well trained; the ***Constitution*** required the 2nd respondent to comply with ***Articles 81 & 86;*** the 1st respondent engaged in election malpractices and committed election offences as set out herein above and was therefore not entitled to any costs; it was the respondents non-compliance with the laid down electoral laws that caused the appellant to file the said Petition.
47. It was argued that had the learned Judge been fair she would have reached an inescapable conclusion that the Petition was occasioned by irregularities committed by the respondents and as such the respondents ought to bear the costs of the proceedings. The appellant urged us to order the respondents to also bear the costs of this appeal. Mr. Agwara urged us to allow the appeal.

1st respondent's submissions:

48. Mr. Mithega appeared for the 1st respondent. He relied on the 1st respondent's written arguments and also made oral submissions, based primarily on the competency of the appeal and its merits generally.

Competency of the appeal:

49. Mr. Mithega argued that the appeal herein was incompetent, the Petition in the High Court having been filed ourt of time. He submitted that ***Article 87 (2)*** of the ***Constitution*** provided that an Election Petition ought to be filed within 28 days of the declaration of results; the 1st respondent's election was declared on 6th March, 2013 and the Petition was filed on 10th April, 2013 , seven days outside the time frame provided for under ***Article 87(2)*** of the ***Constitution***. The 1st respondent relied on the Supreme Court's decision in ***Hassan Ali Joho & Another -vs- Suleiman Said Shahbal & 2 others -Petition No. 10 of 2013*** wherein ***Section 76(1)*** of the ***Elections Act*** was declared unconstitutional and bad in law. It was pointed out that the 1st respondent had raised the issue of the competency of the Petition at the trial court but the trial court dismissed the preliminary objection and erroneously held that the declaration of results as per ***Section 76 (1)*** of the ***Elections Act*** was through gazettement of the results. According to Mr. Mithega, the Petition in the trial court was a nullity; that the trial court had no jurisdiction to entertain the same; and therefore this appeal was also a nullity. Relying on the decisions in ***Sir Ali Salim -vs-Shariff Mohammed Shary (1938) KLR 9 & Macfoy -vs- United Africa Co. Ltd (1961) 3 ALL ER 1169,*** the 1st respondent argued that it was trite law that a decision made in excess of jurisdiction was a nullity *ab initio.*
50. It was submitted that the ***Elections Act*** was a special statute which provided that the appeal be filed within 30 days of the decision of the High Court. Relying on ***Muiya -vs- Nyaga & 2 others (2008) 2 KLR (EP) 493,*** the 1st respondent argued that this appeal offended ***Section 85A*** of the ***Elections Act*** because it was filed out of time, and secondly was grounded on issues of facts and not law. Citing this Court's decision in ***IBEC & Another -vs- Stephen Mutinda Mule & 3 Others – Civil Appeal No. 219 of 2013,*** it was argued that that the grounds of appeal raised purely issues of facts contrary to ***Section 85A,*** hence this Court lacked jurisdiction to entertain the same.

According to the 1st respondent, this Court's jurisdiction on election appeals is as provided under ***Section 85A*** of the ***Elections Act*** and could not be limited or expanded by subsidiary procedural rules like the ***Court of Appeal Rules*** and ***Rule 35*** of the ***Elections Rules***. In buttressing this position the 1st respondent cited this Court's decision in ***Peter Gichuki King'ara -vs- Independent Electoral Commission & 2 others – Civil Appeal No. 23 of 2013*** wherein it was held,

> ***" It is our considered view that a subsidiary legislation or rules of procedure or a rule made by the Rules Committee cannot confer, create, establish, limit or subtract the jurisdiction of any court of law or tribunal as established by the Constitution or statute. Rule 35 of the Election Petition Rules is a subsidiary legislation which is contained within the rules of procedure for the conduct and trial of election petitions. We hold that Rule 35 of the Election Petition Rules, being a subsidiary legislation within procedural rules, is not a jurisdictional rule and cannot confer or limit the jurisdiction of the Court of Appeal to hear and determine election petitions. We further hold that Rule 35 of the Election Petition Rules cannot limit the jurisdiction of the Court of Appeal as granted under Article 164(3) of the Constitution and as operationalized by Section 85A of the Elections Act. A subsidiary legislation cannot expand, add to or reduce the jurisdiction of any court as spelt out in the Constitution or by statute. Jurisdiction is neither derived nor does it emanate from regulations or rules; jurisdiction is either from the Constitution or statute."***

51. Mr. Mithega urged us not to allow a blanket application of this Court's rules in as much as ***Rule 35*** of the ***Elections Rules*** provided for the application of the ***Court of Appeal Rules*** especially as relates to matters of form, content, and time in a manner that would defeat the purpose of the substantive law catering for such matters. It was argued that this Court's rules created completely different time frames which contradict with the laws governing the determination of election petitions and appeals. Of concern was the application of ***Rule 82*** of the ***Court of Appeal Rules*** which according to the 1st respondent contradicts ***Section 85A*** of the ***Elections Act***. Mr Mithega argued that if ***Section 85A*** was to be strictly followed it would mean that the appeal ought to have been filed on or before 27th October, 2011; the same was filed on 20th December, 2013, 84 days after the date of the High Court judgment. Therefore, according to Mr. Mithega, ***Rule 82*** has no application in election appeals.
52. It was argued that the Certificate of Delay dated 11th December, 2013 had the effect of extending the time within which an election appeal could be filed contrary to the strict timelines provided under ***Section 85A*** of the ***Elections Act***. The 1st respondent contended that it was clear from the Certificate of Delay that the appellant had requested for certified copies of proceedings and judgment contrary to ***Rule 82*** of the ***Court of Appeal Rules*** which provides for mere copies of proceedings; certified copies of proceedings are not a mandatory requirement for filing an appeal and mere copies of proceedings are sufficient to institute an appeal. The 1st respondent submitted that the proceedings in the Petition were typed as the matter proceeded and the trial court availed copies to the parties advocates to enable them prepare written submissions. According to the 1st respondent, the purpose of the proceedings being typed as the matter proceeded in the trial court was to avail the same to whichever party that wished to appeal immediately after the delivery of the judgment and to enable adherence to the strict timelines. It was submitted that a typed copy of the judgment was availed to the parties on 27th September, 2013 immediately after delivery of the same.
53. Mr. Mithega argued that the appellant requested and waited for the wrong documents to be supplied before filing his appeal and in the process failed to do so in time. The 1st respondent relied on this Court's decision in ***Rodgers Abisai t/a Abisai & Company Advocates -vs- Wachira Waruru & Another- Civil Appeal No. 26 of 2009.*** Mr. Mithega maintained that the Certificate of Delay could not cure the appeal which had been clearly filed out of time. Relying on this Court's decision in ***Ferdinand Ndung'u Waititu -vs- IBEC & 8 others- Civil Application No. 137 of 2013,*** Mr. Mithega argued that time was of essence in election petitions and parties should not be allowed to use subsidiary legislation to extend strict timelines contrary to substantive statutory provisions. He further urged us to disregard the aforementioned Certificate of Delay and strike out

the appeal with costs. He cited the decision of this Court in ***Republic -vs- The Ministries for Transport & Communication; The Minister of Finance; and KP&T Corp. Exparte Kenya Consumer Organisation & Another- Civil Appeal No. 276 of 1996.***

- Merits of the appeal:

54. It was argued that the appeal herein lacked merit and the decision of the trial court was well grounded. The nine issues framed by the trial court emanated from the pleadings and they were fully addressed in the judgment. It was submitted that cases could only be decided on the basis of the issues on record; the issues that arise for determination in this appeal are:-

- ***Whether the appellant in law proved his case to the required standard.***
- ***Whether in law the irregularities (if any) affected the election results.***
- ***Whether the order for costs against the appellant is justified.***

55. The 1st respondent contends that the appellant did not prove his case to the required standard. It is trite law that the standard of proof in election petitions is much higher than in civil cases and the evidence must be cogent, credible and consistent. It was submitted that the trial court properly addressed itself on the issues of burden and standard of proof in election petitions.
56. On the issue of bribery, it was submitted that allegations of corruption and bribery require strict proof; the appellant admitted that in as much as the offence of bribery is under ***Section 64*** of the ***Elections Act*** , he did not plead the same in his Petition or give the particulars thereof. The appellant admitted in his evidence that neither he nor his witnesses personally saw the 1st respondent commit this offence. It was argued that the appellant's case was based on allegations of bribery allegedly committed by the 1st respondent's agents; there was no evidence connecting the 1st respondent with the alleged agents. Mr. Mithega maintained that in the absence of proof the issue of bribery remained a mere allegation; mere suspicion was not sufficient to prove the offence of bribery.
57. The 1st respondent contends that the appellant did not prove that he had participated in witchcraft. This is because firstly, the appellant admitted that he did not personally see the 1st respondent visit a witchdoctor; secondly, he relied on uncorroborated evidence of PW1 who later swore another affidavit recanting his first affidavit which was in support of the appellant's case. The 1st respondent maintained that the allegation by the appellant that the learned Judge was biased in the manner she treated the evidence of PW1 lacked merit. This is because the trial court correctly formed its opinion after seeing and observing the demeanour of the witness. Mr. Mithega in relying on the case of ***Shama & Another -vs- Uganda (2002) 2 EA 589 (SCU),*** submitted that in any event the 1st respondent provided a defence of alibi which the appellant failed to negate.
58. On the issue of access into polling stations of the appellant's agents, it was submitted that despite the appellant testifying that he had personally selected and appointed his agents for the 569 polling stations, and given them letters of appointment, he did not attach a copy of the list of his agents, letters of appointment or any other documents in support thereof. He also did not give full particulars of the agents who were allegedly barred from accessing polling stations and did not call the said agents to give evidence. The particulars of the polling stations where the alleged access was denied were also not given. The 1st respondent maintained that the appellant failed to prove this allegation. Mr. Mithega submitted that in any event ***Regulation 62(3)*** of the ***Elections Regulations*** made it clear that the absence of agents would not invalidate the proceedings at a polling station. According to the 1st respondent, the trial court was correct in finding that the appellant had not proved this allegation.
59. Mr. Mithega argued that the appellant had failed to demonstrate that the respondents had committed any election irregularities. Referring to the appellant's testimony that he saw Forms 35 for the first time in court and that he wrote three letters to the 2nd respondent requesting for copies of the same, Mr. Mithega submitted that the three letters contradicted the appellant's evidence; the

letters dated 12th March, 2013 and 15th March, 2013 requested for copies of tallying sheets, that is Form 33 for Maara, Tharaka & Chuka- Igambangombe Constituencies and Tharaka-Nithi County; the letter dated 14th March, 2013 requested for Form 36 for the gubernatorial elections in Chuka-Igambangombe. None of them referred to a request for copies of Form 35. It was argued that there was no requirement in law that obligated the 2nd respondent to give copies of Forms 33 to candidates or their agents; in any event the appellant did not adduce any evidence that the forms were not availed in court. It was submitted that the appellant even had an opportunity to visit the 2nd respondent's headquarters where his advocate on record got full access to all the documents he needed for the trial.

60. Mr. Mithega submitted that the appellant had not prayed for recount and scrutiny of any election materials in the Petition and that was one of the reasons his application for scrutiny and recount dated 8th May, 2013 was dismissed. He maintained that the election results the appellant was challenging were within his knowledge and were well stated in his Petition and in the Form 36 which was attached thereto.

61. It was the 1st respondent's submission that the appellant did not prove that the 2nd respondent's agents failed to use Forms 33 & 38, or altered results in favour of the 1st respondent. With regard to the appellant's contention that he got 75,710 votes, the 1st respondent submitted that the appellant did not provide any analysis/tabulation/audit to support his contention; secondly, his claim that he got the said figure from his agents was not credible given his prior allegation that his agents were denied access into polling stations.

62. Mr. Mithega argued that inasmuch as ***Regulation 83(1)(c)*** of the ***Elections Regulations*** required the returning officer to fill Form 35, it is clear on the face of the form that it is supposed to be completed by the Presiding Officer and not the returning officer since he is the one in charge of a polling station. The Form is titled as 'Declaration of National Assembly/County Woman Representative/Senator/County Governor/County Assembly election results at a polling station.' Further, it is the Presiding Officer who declares the results in the polling station using Form 35. He submitted that ***Regulation 83(1)(c)*** of the ***Elections Regulations*** ought to be read together with ***Regulation 79(2)(b)*** that expressly requires a Presiding Officer to fill in Form 35. According to the 1st respondent, the trial court was correct in holding that the requirement that the returning officer should fill in Form 35 in every polling station was humanly impossible and ludicrous; there was need for ***Regulation 83*** to be amended to remove the absurdity therein. The returning officer is only required to fill in Form 36 which is titled 'Declaration of election results at...Constituency/County' using the information in Form 35 received from the Presiding Officer.

63. It was submitted that the gubernatorial elections were conducted within the constitutional and statutory legal framework and principles; and that any non- compliance of the law did not substantially affect the said elections. There were a few errors in transposition of the figures in Form 35 to Form 36 which were inadvertent and not calculated to benefit a particular candidate. Relying on ***Section 83*** of the ***Elections Act*** and this Court's decision in ***Khatib Abdalla Mwashetani -vs- Gideon Mwangangi Wambua & 3 others- Civil Appeal No. 39 of 2013,*** it was argued that not every non-compliance of the elections regulations or procedure invalidated an election. Further, that minor irregularities could not justify the nullification of the elections wherein the will of the people was clearly reflected by a margin of 15,000 votes between the 1st respondent and the appellant.

64. On the issue of costs, it was argued that the trial court was correct in dismissing the Petition with costs to the respondents because costs ought to follow the event. Mr. Mithega urged us to dismiss the appeal with costs.

2nd & 3rd respondents' submissions:

65. Mr. Munge appeared for the 2nd and 3rd respondents; he adopted the submissions made by Mr. Mithega and relied entirely on the 1st and 2nd respondents' written submissions. He also made oral submissions. It was submitted that the 2nd respondent is a constitutional organ established under ***Article 88*** of the ***Constitution*** and was responsible for conducting and supervising the elections as provided for in the ***Constitution,*** the relevant statutes, rules and regulations. The 3rd respondent

was duly appointed as the County Returning Officer for Tharaka-Nithi County; the County had three Constituencies namely, Maara, Chuka- Igambang'ombe and Tharaka. Upon completion of the voting process the representatives of the 2nd respondent embarked on counting and tallying the votes cast at the Constituency level in the three Constituencies within the County; thereafter the results were forwarded to the County Tallying Centre wherein the 3rd respondent oversaw the County tallying and consequently declared the 1st respondent as the elected Governor.

- Preliminary:

66. It was submitted that the trial court correctly adhered to the following considerations in determining the Election Petition:-

(i)Materiality test:

67. Mr. Munge argued that whenever an election court is faced with a question of validity of an election, emphasis should be placed on ***Section 83*** of the ***Election Act*** which stipulates that,

> ***"No election shall be declared 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 non-compliance did not affect the result of the election."***

68. It was submitted that the drafters of the ***Elections Act*** were aware that Kenya is a growing democracy, and that an election can never be free from any unintentional irregularities or errors because there is always the influence of the human factor. According to the respondents, the drafters of ***Section 83*** must have surely intended:

- ***That in an election there is the possibility of irregularities and non-compliance of the electoral laws which occur unintentionally;***

- ***That in an election process the test is not 100% accuracy of the results or 100% compliance with the law;***

- ***That the test in determining whether an election Petition should be nullified is the materiality factor, such that the irregularities should be substantial that the results declared are variably affected.***

69. It was argued that the common thread in various case law is that, if an election is conducted in such a manner that it is substantially in accordance with the law, it cannot be vitiated by breaches of the rules or a mistake at the polls. The respondents relied on the decision of the Supreme Court of Canada in ***Optiz -vs- Wrzesnewskyi 2012 SCC 55, (2012) 3 S.C.R. 76.*** According to Mr. Munge, the test in ***Section 83*** was to ensure that the will of the people as expressed in an election would be upheld.

(ii) What is the materiality formula?

70. Mr. Munge submitted that in determining the materiality of irregularities in an Election Petition, courts should consider the test as set out in the case of ***Kizza Besigye -vs- Museveni*** wherein the Supreme Court of Uganda stated that-

> ***"In determining the effect of the irregularities on the result of the election, the court should consider;***
>
> ***a) whether there has been substantial compliance with the law and principles;***
>
> ***b) the nature, extent, degree and gravity of non-compliance;***

c) whether the irregularities complained of adversely affected the sanctity of the election.

d) 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."

iii) Burden of proof:

71. Placing reliance on ***Rules 10 & 12*** of the ***Elections Rules*** and the Supreme Court decision in ***Raila Odinga -vs- IEBC & 3 others (supra),*** Mr. Munge argued that once a petitioner establishes the irregularities alleged to the requisite standard then and only then would the burden shift to the respondents to prove that the irregularities and errors did not substantially affect the election results.

iv) The standard of proof:

72. It was submitted that the standard of proof in an election petition varies depending on the issue raised. This is because Petitioners mainly rely on irregularities and non-compliance with the law by the respondents' which are of a quasi criminal nature. Mr. Munge submitted that the standard of proof should be higher than a balance of probability but lower than beyond reasonable doubt. He maintained that the appellant failed to discharge the said burden.

- Jurisdiction:

73. Mr. Munge submitted that this Court's jurisdiction was limited under ***Section 85A*** of the ***Elections Act*** to matters of law only. Mr. Munge contended that the grounds of appeal as framed were issues of facts disguised as issues of law. Consequently, this Court lacked jurisdiction to entertain the appeal.
74. In defining what a fact or law entailed, the respondents relied on the decision in ***Mary Harvey -vs- Motor Insurer's Bureau (QBD (Merc)(Manchester), Claim No. 0MA40077, 21st , December, 2011*** wherein the Court in considering Section 69 of the Arbitration Act held that,

"A question of law might arise if, on the basis of the facts found by the Tribunal, the conclusions which it reached was outside the range which could properly have been arrived at by a Tribunal which had properly directed itself as to the applicable law."

75. The respondents also relied on ***Technology and Construction Court (TCC) in Demco Investments & Commercial SA -vs- SE Banken Forsakring Holding Aktieboag, 65*** wherein Cooke, J. added that any party seeking leave to appeal under ***Section 69*** must take, as his starting point, the arbitrator's findings of fact and then identify the question of law arising from those facts, on which the arbitrator fell into error.

- Specificity of grounds of appeal:

76. It is contended that some of the grounds of appeal, that is 7,8,9,14,15,17,19,21,24 and 25, were general in nature and as such were contrary to ***Rule 86(1)*** of the ***Court of Appeal Rules***. The Court was urged to strike out the said grounds of appeal. The respondents also relied on this Court's decision in ***Law Society of Kenya -vs- Centre for Human Rights and Democracy & 13 others (2013) eKLR & Abdi Ali Dere -vs- Firoz Hussein Tundal & Others- Civil Appeal No. 310 of 2005.***

- Failure to fill form 33 and completion of Form 35 by Presiding Officers:

77. The respondents argued that the appellant never raised or pleaded in the Petition any issue regarding the failure to fill in Form 33 or that Form 35 was filled by Presiding Officers contrary to

the law in his pleadings. It was submitted that the said allegations were an afterthought and that parties could not plead or raise new issues at the point of appeal.

78. Mr. Munge submitted that the 2nd respondent was always willing and ready to bring ballot boxes to the trial court before the hearing commenced; the trial court directed that it had no secure storage space, and advised against the delivery of the ballot boxes to the court; the appellant never objected to the court's decision; therefore, the appellant was estopped by conduct from raising the issue in the appeal. He argued that the failure to take the ballot boxes to court could not be a ground for nullifying the elections.

79. Mr. Munge argued that the appellant alleged irregularities in only 10 polling stations in his Petition; the 2nd respondent provided Forms 35 for each of the said polling stations. He also argued that the appellant never prayed for an order of scrutiny and recount in his Petition.

- Costs:

80. Mr. Munge argued that the appellant had not demonstrated how the trial court erred in law on the issue of costs. He submitted that the trial court considered several issues in awarding costs payable; the issues for determination, the fact that counsel involved in the matter were all based in Nairobi and they travelled to Meru High Court, the number of witnesses who testified and the fact that the elections that were challenged were in respect of a County Governor. It was further argued that there was no evidence to show that the trial court exercised its discretion wrongly in awarding costs as set out in its judgment. Mr Munge urged us to dismiss the appeal with costs.

Appellant's response to the respondents' submissions:

81. Mr. Agwara submitted that the appellant pleaded scrutiny and recount of votes in paragraph 7 of the Petition. He maintained that the learned Judge addressed the issue of recount but misdirected herself. He argued that the 1st respondent never sought leave of this Court to raise an issue of the competency of the appeal during the hearing of the appeal contrary to ***Rule 104*** of the ***Court of Appeal Rules***; this Court ought to disregard the submissions made in respect of the competency of the appeal.

Arising issues:

82. We have considered the record, the submissions by counsel and the law. We are of the considered view that the following issues arise for our determination:-

- ***Can the competency of the appeal be raised at the hearing of the appeal?***
- ***What is the Court's jurisdiction in respect of this appeal?***
- ***Who bears the burden of proof in election petitions? and what is the standard of proof required?***
- ***Did the appellant prove his case to the requisite standard?***
- ***Did the learned Judge contravene the provisions of Rule 21 of the Elections Rules by directing the 2nd respondent not to avail ballot boxes in respect of challenged elections before the election court?***
- ***Did the learned Judge misdirect herself in declining to issue an order for scrutiny and recount of the votes?***
- ***Did the learned Judge consider the results contained in Forms 35 & 36?***
- ***Was the learned Judge biased against the appellant?***

- ***Who is required to fill in Form 35?***

- ***Did the errors and irregularities exposed (if any) affect the election results?***

- ***Did the learned Judge properly exercise her discretion in respect of costs?***

Competency of the appeal:

83. We are of the view that we should first deal with the competency of the appeal. This is because the determination of the same will determine whether we should go into the merits of the appeal. Relying on the decision of the Supreme Court in ***Hassan Ali Joho & Another -vs- Suleiman Said Shahbal & 2 others (supra)***, the respondents argued that the appeal was incompetent. Mr. Mithega submitted that the Petition was filed on 10th April, 2013, 7 days outside the requisite time frame; therefore the proceedings in the trial court ought to have been declared a nullity. It was also argued that on account of the foregoing this appeal was based on a nullity and was therefore incompetent.
84. It is not in dispute that the respondents raised the issue that the Petition had been filed out of time vide applications dated 14th May, 2013 and 21st May, 2013 before the trial court. The trial court dismissed the respondents' applications vide a ruling dated 24th June, 2013. In its ruling, the trial court found that the declaration of results which was envisaged under ***Article 87(2)*** of the ***Constitution*** is through gazettment of the results as provided under ***Section 76(1)*****(a)***of* the ***Elections Act***; the appellant's Petition was properly before the court.
85. The Supreme Court in its decision in ***Hassan Ali Joho & Another -vs- Suleiman Said Shahbal & 2 others (supra)*** which was delivered on 4th February, 2014, held that the issuance of the certificate in Form 38 to the elected candidate comprises the declaration envisaged under ***Article 87(2)***; consequently, ***Section 76(1)(a***) of the ***Elections Act*** was inconsistent with the provisions of ***Article 87(2)***. The Supreme Court declared ***Section 76(1)(a)*** of the ***Elections Act*** unconstitutional hence a nullity. Prior to this finding by the Supreme Court, both the High Court and this Court had held in several cases that declaration of results was through gazettement.
86. We note that the respondents did not file an appeal by way of cross appeal against the ruling of the trial court dated 24th June, 2013, on the issue of competency of the Petition as filed by the appellant. The issue of the competency of the appeal was raised only after the aforementioned decision was delivered by the Supreme Court and during the hearing of the main appeal. Therefore, could the respondents properly raise the issue of competency at the hearing of this appeal?
87. ***Rule 35*** of the ***Elections Rules*** provides that an appeal from the judgment and decree of the High Court shall be governed by the ***Court of Appeal Rules***. Pursuant to the Rules, a party can only raise an issue on the competency of an appeal before this Court either under ***Rule 84*** or ***104 (b)***. ***Rule 84*** provides:-

> ***"A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.***
>
> ***Provided that an application to strike out a notice of appeal or appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be."***

88. Under the aforementioned rule, it is clear that a party is required to raise an issue on the competency of the appeal before the appeal is set down for hearing. After the time frame set out under ***Rule 84*** lapses and the appeal is set down for hearing, a litigant can only raise an issue of competency of the appeal during the hearing with leave of the Court. ***Rule 104(b)*** of the Rules provides:-

"At the hearing of an appeal—

(a).....

(b) A respondent shall not, without the leave of the Court, raise any objection to the competence of the appeal which might have been raised by application under rule 84."

See this Court's decision in ***Samson Mbui Obadiah -vs- David Mithamo Gatitu- Civil Appeal No. 3 of 2013.***

89. In this case, the 1st respondent raised the issue on competency during the hearing of this appeal. His advocate, Mr. Mithega, did not seek leave of this Court to raise the issue of competency during the hearing as required under ***Rule 104(b)*** of the Rules. We therefore find that the 1st respondent did not properly raise the issue of competency of the appeal before us. Further as noted above, the respondents did not challenge the decision of the High Court on the competency of the Petition. Consequently, we find that the issue of competency of the Petition is not subject of the appeal before us and is not open for our consideration.
90. On the issue of blanket application of the Court of Appeal Rules, It is trite that Election Petitions are governed by a self contained regime and what is stated therein is what the legislature intended to be applicable. See this Court's decision in ***Peter Gichuki Kingara –vs- IEBC & 2 others- Civil Appeal No. 23 of 2013 & Muiya-vs- Nyaga & Others (2003) 2 E.A. 616.*** Mr. Mithega argued that ***Rule 82*** of the ***Election Rules*** extended the time frame within which an appeal could be filed contrary to ***Section 85A*** of the ***Elections Act. Rule 82*** provides for the institution of appeals before this Court. We find that ***Rule 82*** of this Court's Rules is applicable by virtue of ***Rule 35*** of the ***Election Rules*** which provides:-

"An appeal from the judgment and decree of the High Court shall be governed by the Court of Appeal Rules."

91. On the issue of the Certificate of Delay, we cannot help but note that there was no evidence that the appellant had been supplied with copies of the proceedings prior to the judgment as alleged. Consequently, we find that the Certificate of Delay on record was proper and clearly indicates that the proceedings were ready and supplied to the appellant on 26th November, 2013. The proviso under ***Rule 82*** of the ***Court of Appeal Rules*** provides that in computing time within which to file an appeal any period certified by the registrar as having been required to prepare the proceedings should be excluded. In ***Mariamu Abubakar Ireri & another -vs- National Cereals & Produce Board- Civil Application No. 92 of 2008,*** this Court held,

".in view of what we stated earlier, that upon requesting for copies of proceedings from the court and because the letter bespeaking those proceedings was copied to the applicant's counsel, time prescribed for filing an appeal stopped running. The running of the time resumed on or about 3rd September when copies of proceedings were delivered to the respondent."

See also this Court's decision in ***Nyeri Wholesalers Limited -vs- Kasturi Limited – Civil Application No. Nai. 132 of 2012.*** The judgment of the High Court was delivered on 27th September, 2013 ; the Notice of Appeal was filed on 10th October, 2013 and the appellant requested for proceedings vide a letter dated 9th October, 2013 which was served upon the Deputy Registrar of the High Court on 10th October, 2013. The time for filing the appeal stopped running on 10th October, 2013 and continued to run from 26th November, 2013. The appeal herein was filed on 20th December, 2013. We find that the appeal herein was filed within the requisite time and is competently before us.

Jurisdiction:

92.***Halsbury's Laws of England 4th Edition, Vol. 10, paragraph 314***, defines jurisdiction as,

> ***"By 'jurisdiction' is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision."***

We are also mindful of the case of ***Lillian 'S' [1989] KLR 1*** in which this Court succinctly set out the principles and context for determination of jurisdiction. Nyarangi, JA stated, *inter alia*:-

> ***"Jurisdiction is everything. Without it, a court has no power to make one more step. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."***

Jurisdiction is specified either by the Constitution or Statute. In ***Samuel Kamau Macharia & another – vs- Kenya Commercial Bank & 2 Others- Supreme Court Civil Appeal (Application) No. 2 of 2011***, the Supreme Court delivered itself as follows on the issue of jurisdiction:-

> ***"A court's jurisdiction flows from either the Constitution or legislation or both."***

93.***Section 85A*** stipulates:-

> ***"85A. An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of county governor shall lie to the Court of Appeal on matters of law only and shall be-***
>
> ***(a) filed within thirty days of the decision of the High Court;and***
>
> ***(b) heard and determined within six months of the filing of the appeal."***

Based on the foregoing provision, the jurisdiction of this Court on an appeal from the decision of an Election Court is limited to matters of law only.

94.*The respondents argued that the appellant's appeal as indicated in the memorandum of appeal was based on matters of fact contrary to* ***Section 85A*** *of the* ***Elections Act****. Having perused the grounds of appeal as stated in the appeal, we are of the view that the same raise an issue of whether the trial court properly considered the evidence and arrived at a correct determination which is a matter of law. This Court in* ***Peter Gichuki Kingara -vs- IEBC & 2 others- Civil Appeal No. 31 of 2013*** *held,*

> ***"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."***

In ***Mary Harvey -vs- Motor Insurer's Bureau QBD (Merc) (Manchester), Claim No. 0MA40077, 21st December, 2011. Section 69*** *of the* ***Arbitration Act*** *was considered and the court held,*

> ***"A question of law might arise if, on the basis of the facts found by the Tribunal, the conclusion which it reached was outside the range which could properly have been arrived at by a Tribunal which had properly directed itself as to the applicable law."***

Burden and Standard of proof:

95. At this juncture it is imperative to consider who bears the burden of proof and the standard proof in an Election Petition. The Supreme Court in ***Raila Odinga -vs- IEBC & Others (supra)*** expressed itself as follows:-

> ***" 191. Comparative judicial practice on the burden of proof helps to illuminate this Court's perceptions, in a case which rests, to a significant degree, on fact. In a Ugandan election case, Col. Dr. Kizza Besigye -vs- Museveni Yoweri Kaguta & Electoral Commission- Election Petition No. 1 of 2001, the majority on the Supreme Court Bench held:-***
>
> > ***"....the burden of proof in election petitions as in other civil cases is settled. It lies on the Petitioner to prove his case to the satisfaction of the Court. The only controversy surrounds the standard of proof required to satisfy the Court."***
>
> ***192. Similarly in the Canadian case, Optiz -vs- Wrzesnewskyj 2012 SCC 55-2012-10-256 it is thus stated in the majority opinion:-***
>
> > ***"An applicant who seeks to annul an election bears the legal burden of proof throughout....."***
>
> ***193. Such a line of judicial thinking is also found in the Nigerian case, Buhari -vs- Obasanjo (2005) CLR 7K, in which the Supreme Court stated:-***
>
> > ***"The burden is on petitioners to prove that non-compliance has not only taken place but has also substantially affected the results..There must be clear evidence of non-compliance, then that the non-compliance has substantially affected the election."***
> >
> > ***The Nigerian Supreme Court further stated:-***
> >
> > ***"He who asserts is required to prove such fact by adducing credible evidence. If the party fails to do so its case will fail. On the other hand if the party succeeds in adducing evidence to prove the pleaded fact it is said to have discharged the burden of proof that rests on it. The burden is then said to have shifted to the party's adversary to prove that the fact established by the evidence adduced could not on the preponderance of the evidence result in the Court giving judgment in favour of the party."***
>
> ***196. We find merit in such a judicial approach, as is well exemplified in the several cases from Nigeria. Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. "***

See this Court's decision in ***Dr. Thuo Mathenge & Another -vs- Nderitu Gachagua & 2 others – Civil Appeal No. 29 of 2013 & Peter Gichuki Kingara -vs- IEBC &2 Others (supra).*** Therefore, the burden of proof lay with the appellant to prove the electoral malpractices, irregularities and offences alleged.

96. From the practice and history of this country, the standard of proof required in Election Petitions is higher than a balance of probabilities but not beyond reasonable doubt save where offences of a criminal nature are in question. See ***Muliro -vs- Musonye & Another (2008) 2KLR (EP) 52*** & ***Nganga & Another -vs- Owiti & Another (No.2) (2008) 1KLR (EP) 799.*** In ***John Kiarie Waweru -vs- Beth Wambui Mugo & 2 others (2008) eKLR,*** the court held,

> ***"As regards the standard of proof which ought to be discharged by the petitioner in establishing the allegations of electoral malpractices, there is consensus by electoral***

courts that generally, the standard of proof in election petition cases is higher than that applicable in ordinary civil cases ie proof on a balance of probabilities. The standard is higher than proof on a balance of probabilities but lower than the standard of proof beyond reasonable doubt required in establishing criminal cases. Allegations of electoral malpractices like for instance bribery require higher proof."

The Supreme Court in ***Raila Odinga -vs- IEBC & Others (supra)*** stated,

> ***"The threshold of proof should in principle, be above the balance of probability, though not as high as beyond reasonable doubt- save that this would not affect the normal standards where criminal charges linked to an election, are in question."***

Did the appellant prove his case to the required standard?

97. The appellant alleged several electoral irregularities, offences and malpractices against the respondents. Firstly, the appellant alleged that the 1st respondent was guilty of bribery and communication with voters in various polling stations during the electoral process. That through his agents he communicated and bribed voters to vote in his favour during the election process contrary to ***Sections 64*** of the ***Elections Act*** and ***Regulation 65*** of the ***Elections Regulations. Section 64*** provides for the offence of bribery; ***Regulation 65*** prohibits a person with the exception of an election officer or police officer on duty without the authority of the Presiding Officer from communicating with a voter who is in, or in the immediate precincts of, a polling station for the purpose of voting. As herein above stated the appellant was required to prove that the respondents committed such offences.
98. The High Court while considering an allegation of bribery against a respondent in ***Sambu -vs- Genga & Another (2008) 1 KLR (EP) 396*** held that an allegation of bribery must be proved beyond reasonable doubt.
99. We concur with the learned Judge that the offence of bribery and communication with voters was not proved to the required standard. Why do we say so? This is because there was no evidence connecting the 1st respondent to the alleged offences. The appellant on cross-examination admitted that neither he nor any of his witnesses saw the 1st respondent personally bribing voters. He contended that it was the 1st respondent's agents who bribed voters. We find that there was need for the appellant to connect the alleged agents with the 1st respondent and that they had acted under the direction of the 1st respondent. As stated in ***Halsbury's laws of England , 4th Edition, Volume 14*** at paragraph 301**,**

> ***"Evidence of agency. It is not necessary in order to prove agency to show that the person was actually appointed by the candidate or that he was paid. The crucial test is whether there has been employment or authorisation of the agent by the candidate to do some election work or the adoption of his work done."***

We approve the High Court's decision in ***Komora -vs- Ddaiddo & Another (2008) 1 KLR (EP) 300,*** where it was held,

> ***"In the absence of authorisation or ratification the candidate must be proved to have either by himself or his acknowledged agents employed the agent to act on his behalf, or to have to some extent put himself in the hands of the agent, or to have made common measure with him for the purpose of promoting the candidate's election. The candidate must have entrusted the alleged agent with some material part of the business of the election. Mere non-interference on the part of the candidate with persons who, feeling interested in the success of the candidate canvas is not sufficient to saddle the candidate with any unlawful acts of theirs in which the candidate and his election agent are ignorant. …... Merely because Mr. Watie was a supporter of the 1st respondent does not make him his agent."***

Mutegi also gave evidence that he did not see the 1st respondent bribing voters and that he did not file any compliant with the police or the 2nd respondent concerning Eliud's alleged conduct of bribing voters.

100. The appellant also raised an issue of witchcraft. He submitted that the 1st respondent committed acts of witchcraft to influence voters to vote in his favour. The appellant correctly submitted before us that an allegation of witchcraft constituted the allegation of commission of the offence of undue influence under ***Section 63*** of the ***Evidence Act***. In ***Wambua -vs- Galgalo & Another- (2008) 1 KLR (EP)***, the court held,

> ***"Quite apart from these constitutional considerations, an oath compelling or inducing people to vote for only one of several candidates constitutes 'undue influence'.."***

101. Did the appellant discharge the burden of proof in respect of this serious allegation of witchcraft? In ***Komora -vs- Ddaiddo & Another (2008) 1 KLR (EP) 300*** it was held that an allegation of oathing and cursing must be strictly proved. In ***Issak -vs- Hussein & Another (2008) 1 KLR (EP) 786,*** it was held,

> ***" In our view, for one to be said to have administered an oath or for another to have taken, that person must be made to carry out actions intended to induce him to carry out certain actions. In the instant case, all that appears to have been done is that the alleged administrator of the oath is said to have told the participants that a certain oath called 'asarar' had been administered on the money which the witnesses were given and the water they were made to sip. The oath, if it exists, does not appear to have been administered on the witnesses themselves. In the circumstances, we find that the administration of the alleged oath has not been proved to our satisfaction."***

102. The High Court in ***Elima -vs- Ohare & Another (2008) 1 KLR (EP)762,*** while considering the issue of witchcraft that was raised in the Election Petition expressed itself as follows:-

> ***" On our own part we would say that allegations of administration of traditional oath is extremely serious since if this court accepts the petitioner's version then the 2nd respondent would not only lose his parliamentary seat but would be disqualified from offering himself as a candidate in a subsequent by-election. For that reason we had to treat the evidence of the petitioner and his witnesses with great care."***

103. It was imperative to prove that the 1st respondent actually went to the witch doctor's home and that rituals were performed to influence the free will of voters., and that he did take steps to influence the will of the voters. In this case the only evidence on the allegation of witchcraft as against the 1st respondent was tendered by PW1, Njeru and PW7 , Justin Gitonga (Justin).

104. RW3, Godfrey Kaburu Bundi (Godfrey), testified that on 17th February, 2013 at around 4:30 p.m. he picked up the 1st respondent from his home in Meru town and drove him to his running mate's, RW6, Eliud Muriithi Mate (Eliud), home at Tharaka, arriving there at around 6:00 p.m. They found Eliud, RW4, Stephen Nthiga Mitugo (Stephen) and Mr. Basilio Gitonga at home, and discussed strategies to be employed during the campaigns until 11:00 p.m.; they left Eliud's house with the 1st respondent and he drove the 1st respondent back to his house; they arrived at the 1st respondent's house at around midnight. Godfrey maintained that at no time did the 1st respondent leave the meeting to meet Njeru the witchdoctor. Stephen also confirmed that on 17th February, 2013 from 6:00 p.m to 11:00 p.m the 1st respondent was at Eliud's house.

105. Based on the foregoing, we concur with the learned Judge that it was important for PW1's evidence to be corroborated. We also agree with the learned Judge's findings that the evidence adduced by PW7, Justin was speculative and therefore not credible. This is because PW7 in his evidence stated that on 17th February, 2013 at around 7:00 p.m. he was hired to take a politician whom he did not know to PW1's, a known witch doctor, home at Chuka. That upon arrival he

waited for the said politician who while still at PW1's home sent him to buy an egg. He testified that he waited for the said politician and took him back to Meru town. From his evidence, Justin did not establish that it was indeed the 1st respondent who he had taken to PW1's home or that a ritual was performed by PW1 on the 1st respondent.

106. The 1st respondent's evidence as weighed with the evidence adduced by the appellant carries more weight. Therefore, we concur with the following findings by the trial court:-

> ***"The 1st respondent put forward an alibi in answer to the allegations made against him by PW1 &7 that on 17th February, 2013, he did not visit any witch doctor or PW1 as claimed. He also denied to have had witchcraft acts performed on him. The 1st respondent testified that he was in Tharaka, in the home of his running mate, Mr. Eliud Muriithi, in a strategy meeting in preparation for the campaigns. He called Mr. Eliud Muriithi, Mr. Stephen Mitugo and Mr. Kaburu Bundi who corroborated his evidence.***
>
> **…...**
>
> ***I find that the 1st respondent's alibi was very strong. The petitioner's key witness on the other hand has only convinced the court of two things, one that he is a witch doctor practising the same in contravention of witch craft laws. The second one is that his affidavit in favour of the petitioner was recanted by him so that whatever he swore he did to the 1st respondent was recanted and at the end of the day, the court had nothing left of his two affidavits to go by, due to the dichotomy of the averments in both. His evidence was worthless due to the contradictory nature of the two averments in the two affidavits attributed to him."***

We find that the appellant did not prove the allegation of witchcraft as against the 1st respondent.

107. The appellant through his written submissions which were filed after the hearing at the trial court, alleged that the 1st respondent was involved in violation of ***Section 43*** of the ***Elections Act*** in that RW3, Godfrey and RW4, Stephen who were at the material time public officers and the 1st respondent's supporters participated in elections. ***Section 43*** prohibits a public officer from participating in elections and provides that such participation is an offence. The learned Judge in the judgment which is the subject of this appeal, held that breach of ***Section 43*** was not part of the issues for determination by the court; infact the 1st respondent did not make any mention of that issue in response and neither did he deal with it during the trial nor was he cross- examined on the same. However, the learned Judge went on to deal with the issue. Was it proper for the learned Judge to deal with an issue she had found was neither pleaded nor framed as an issue for determination during the pre-trial? We find that the trial court erred by considering the issue of alleged participation of public officers in the elections. This is because the issue was neither pleaded nor framed as an issue for determination. The 1st respondent was never given fair notice of the same so that he could lead evidence in respect of the issue. We are of the view that the issue having been raised in the appellant's written submissions could not afford the 1st respondent the opportunity to lead evidence in respect of the same in his submissions. In ***Plotti –vs- The Acasia Company Ltd (1959) EA & Esso Petroleum Company-vs- Southport Corporation (1956) ALL ER 864*** it was observed that the function of pleadings is to give a fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them. In ***Galaxy Paints Ltd. -vs- Falcon Guards Ltd. (2000)2 EA 385*** it was held that the issues for determination in a suit generally flow from the pleadings and a court can only pronounce judgment on the issues arising from the pleadings or such issues as the parties framed for the court's determination.

108. On alleged election irregularities, the appellant claimed that some of his agents were denied access into polling stations contrary to ***Regulations 62(1) & (2) and 74*** of the ***Elections Regulations.*** In ***Dickson Mwenda Kithinji -vs- Gatirau Peter Munya & 2 Others- Civil Appeal No. 38 of 2013,*** this Court held,

"We hasten to add that the issues of irregularity and malpractices cited by the appellant are issues of fact. However, if the trial Judge erred in the interpretation of the facts as tendered in evidence, this becomes a point of law. On the factual aspects, we remind ourselves the dicta in Mwangi - v- Wambugu (1984) KLR 453, where it is stated that an appellate court 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 principles in reaching the finding."

109.This Court in the ***Dickson Mwenda Kithinji case*** further expressed itself as follows:-

"***The power of the Returning Officer and Presiding Officer to admit persons to the polling station is provided for by Regulations 62, 74 & 85 (1) (e) of the Elections (General) Regulations, 2012. Of significance is Regulations 62 (1), (2), (3) & (4). It is stipulated in Regulation 62 (1) that the Presiding Officer may exclude all other persons from a polling station except a candidate, authorized agents etc. Regulation 62 (3) provides that the absence of agents shall not invalidate the proceedings at a polling station. In Regulation 62 (4), it is stipulated that every agent appointed shall at all times display the official badge supplied by the IEBC. Regulation 85 (1) (e) provides for persons who shall be allowed into tallying centres, such persons include authorized agents."***

110.***Regulation 62 (1) (c)*** of the ***Elections Regulations*** stipulates that the most important criteria for admission of persons other than voters to a polling station is that the individual/person should be an authorized agent. Therefore, for a person to be lawfully present at any polling station or tallying centre, it must be demonstrated that the appellant was an authorized agent of a political party and also that the appellant had an official badge provided by the IEBC. From the evidence on record, the appellant alleged that he had an agent in all the 569 polling stations in the Tharaka-Nithi County; that his agents were not allowed in 156 polling stations. The appellant did not lead any evidence as to the particulars of the agents who were denied access and whether they were authorised to be present at any polling station or tallying centre. Further, PW5, Dereba, the then appellant's party County chief agent also did not give particulars of the agents who were allegedly denied access to polling stations. ***Regulation 74 (1)*** of the ***Elections Regulations*** stipulates that no agent shall be deemed to be an agent for purposes of counting unless the candidate or political party has submitted the name and address of the agent and a letter of appointment of the agent. In this case, the appellant also did not tender in evidence letters of appointment of the agents who allegedly were denied access.

111.This Court in ***Dickson Mwenda Kithinji -vs- Gatirau Peter Munya & 2 Others*** (***supra)*** expressed itself as herein under:-

"It is our considered view that if one is not entitled to be at a polling station or tallying centre, then one cannot claim to have been unlawfully excluded thereat. The failure of the appellant and his witnesses to prove that they were authorized agents of any political party and failure to tender evidence that they had badges issued by the IEBC is fatal to the allegation that authorized agents were excluded from the polling station and tallying centre. For such an allegation to succeed, it must be proved that the person allegedly excluded was an authorized agent - this is the sine qua non for the allegation to have a legal foothold. Upon proof that the person was an authorized agent, then proof of exclusion is to follow."

112.The appellant herein failed to establish that the agents who were allegedly denied access into polling stations were actually authorised agents. Therefore, the appellant failed to prove that his agents were denied access. We find no fault in the following findings by the trial court:-

"98. The particulars of the polling stations and the relevant IEBC officials where the alleged favoritism and non compliance took place were not given. The petitioner gave a

rough estimate of figure of 156 agents he asserts were not allowed into some polling stations by some IEBC officials. The polling stations and the IEBC officials concerned were both not disclosed. It was not enough to make allegations and state facts. The petitioner ought to have adduced evidence to support the allegations and facts.

99. During cross-examination particularly by Mr. Mithega, the petitioner was shown various Forms 35 duly signed by several agents and he could not confirm whether or not his agents were amongst those listed as having signed the Forms. He said that he could not tell at a glance whether any of them were his agents since he did not annex his list of agents, neither had he carried it to court with him on that day. He went further to admit that it was possible that he was represented in the polling stations. He admitted he did not have any documentary evidence to prove that his agents were barred from representing him. He further confirmed that non of his affected agents had sworn affidavits in support of these allegations.

100. I find that the allegations of unlawful and irregular denial of entry to the petitioner's agents into various polling stations were not proved as required or at all."

113. The appellant contended that the 2nd and 3rd respondents manipulated the election results in favour of the 1st respondent. Elaborating this allegation, the appellant claimed that the 2nd respondent's agents failed to fill in tallying sheets, that is Form 33, that the 3rd respondent altered Form 36 and that in some areas the total number of votes cast exceeded the total number of registered voters. The appellant alleged that he had obtained more votes than the 1st respondent and the respondents colluded to deprive him of his votes by either failing to record the same and transferring others to the 1st respondent.

114. After the conclusion of counting ***Regulation 79*** of the ***Elections Regulations*** requires the Presiding Officer to announce and forward the results to the Returning Officer vide a declaration which shall be in Form 35; Form 35 is required to be signed by party agents present at the polling centre. We cannot help but note that the ***Elections Regulations*** do not require the Presiding Officer to forward the tallying sheet to the Constituencies Returning Officer. All that is required to be forwarded is Form 35, the ballot boxes and the tamper proof envelopes. We further note that party agents are not required to append their signatures on Form 33. We concur with the trial court's finding that the appellant failed to adduce exact, accurate and cogent evidence which demonstrated that the Presiding Officers refused/neglected to fill in Form 33 and this affected the results of the election.

115. The appellant alleged that the Presiding Officers refused to supply his agents with Form 35 and hence he wrote three letters to the 2nd respondent requesting for the same. We perused the three letters and have noted that none was a request for Form 35; two of the letters requested for Form 33 for Maara, Tharaka and Chuka-Igambangombe Constituencies while the other requested for Form 36 for the gubernatorial elections in Chuka-Igambangombe. On this issue, we agree with the following findings of the trial court:-

" 109. Having scrutinized these letters, it is very clear that at no point in time did the petitioner or his agents request to be supplied with Forms 35 for all the polling stations in Tharaka-Nithi County. The only reasonable explanation for this is that they did not require the said forms for the reason they already had them. Furthermore, these letters contradict the petitioner that he and his agents were not given copies of Forms 35 at all. The only logical conclusion one can reach given these facts is that the petitioner did not ask for the Form 35 because they had them..... I do not believe the petitioner's evidence that he was denied these Forms."

116. PW6, Humphrey, testified that while he was at Kiarugu Primary School polling station only the TNA agent, one Muthoni, was allowed to assist illiterate and disabled voters to vote. He further testified that on several occasions Muthoni tore up ballot papers where a voter did not vote for the 1st respondent or any other candidate from the 1st respondent's party. On cross-examination,

Humphrey testified that he did not report the aforementioned conduct to the police or the Presiding Officer. We find that this allegation was also not proved to the required standard. The learned Judge correctly held,

> ***" 112. The evidence of this witness(PW6) was devoid of necessary detail to assist the court determine whether from where he was seated, he could hear the conversation between the alleged agent and the alleged voters. Secondly, no distances were given between where he was from the agent and the voters. Thirdly, he does not say why he concluded that the person who was allegedly assisting voters was a TNA agent and on what basis?***
>
> ***114. There was evidence that party agents were seated a far distance from the voting booths, so that all they could do was see but not hear clearly conversations going on at the voting booths. The court cannot therefore assess independently whether it was possible for this witness to know what was going on between the voter and the person assisting, and therefore whether he really knew to what extent the voter was assisted and whether there was interference."***

117. It was the appellant's case that upon perusal of the tallying sheet for Maara Constituency he discovered numerous discrepancies in it and was shocked at the recklessness and utter disregard for the law in the manner in which the 2nd respondent conducted the collating process. It was argued that from the said Forms and evidence on record there was a systematic, strategic, planned and executed manipulation of the election tallying process in favour of the 1st respondent. According to the appellant, manipulation of the tallying process was clearly established firstly, from the discrepancies in the total number of registered voters in 10 polling stations in Maara Constituency.
118. Mr. Agwara submitted that results in 10 polling stations from Maara Constituency were not properly counted, tallied and recorded in the statutory forms. Secondly, from the testimonies of RRW1, Hellen and RRW2, Wario who admitted to doctoring of the results in Forms 35 & 36; thirdly, from the fact that the 3rd respondent announced the election results on 6th March, 2013 at 11:00 p.m. in the presence of only three candidates who were all members of the same party and were winners in the said election for the positions of Governor, Senator and Woman representative. The appellant maintained that from the concluded elections he had garnered 75,710 votes as opposed to 54,813 votes as announced by the 3rd respondent. The appellant also contended that the votes cast exceeded the total number of registered voters in two polling stations namely, Ndunguri Primary School and Willies Primary School.
119. RRW1, Hellen, and RRW2, Wario were the Returning Officer for Maara and Chuka-Igambangombe Constituencies respectively. From the record it is clear that Wario testified that after announcing the results at around 4:00 a.m he later counter checked the results in Form 36 against Form 35 and discovered that there were errors in transposition of the results in Form 36 and the errors affected all the three gubernatorial candidates. After correcting the said errors, the 1st respondent got 47 less votes, the appellant got 968 less votes and Mutegi got 26 less votes; consequently, the appellant who was leading in the constituency garnered 40,153 votes. Hellen testified that when she received Form 35 from Presiding Officers one clerk filled the results therein manually in Form 36 while another clerk filled the results in Form 36 that was in the computer. Hellen gave evidence that she checked the Form 36 which had been filled in manually using Form 35 and realised it had mistakes. She checked the Form 36 in the computer and corrected the same before printing the final results; she used the printed Form 36 to announce the results. Both Hellen and Wario maintained that the errors in Form 36 were typographical and mathematical due to human error. Hellen also gave evidence that the errors in respect of the total registered voters in the aforementioned 10 polling stations were merely typographical and she corrected the same.
120. From the evidence adduced by Hellen and Wario it is clear that alterations were made in Forms 36. Therefore, were the said alterations illegal and were they made in an effort to manipulate the results in favour of the 1st respondent? We find that the trial Judge correctly held that,

" 135. I find, that the complaint by the petitioner, that RRW2 doctored the results is not proved. RRW2 has demonstrated why he made the correction and has shown that the error was not caused by him, but due to human error. He stated that the error affected all three candidates. RRW2 gave the explanation that the mistake may have occurred due to the failed electronic system, the resultant delay of three days between the election day and the day results were announced and the fatigue IEBC officials suffered.

140. What Mr. Wario did was part of his duty as the Constituency Returning officer. Accurate collation and tallying of results, including correction of errors before announcing results was part of that duty. Being their responsibility, I do not find it a reasonable expectation that for every mistake or error corrected at every level, the officer forwarding the results to the next senior officer must disclose all the corrections made, so long as they can be able to account for the same if required.

152. Just to start at the last sentence in Mr. Agwara's submission, the mere fact results were altered is not proof that they were so altered to favour the 1st respondent. The petitioner had the burden to adduce evidence to prove this."

We concur with the trial court that the alterations in Form 36 were legal and were made for purposes of correcting typographical and mathematical errors and the alterations affected all the three candidates.

121. We also find that the trial court correctly evaluated the evidence tendered before it and arrived at a right conclusion that the appellant had not proved the other allegations of manipulation of results by the 2nd and 3rd respondents. Firstly, on the issue of the 3rd respondent allegedly announcing the results in the presence of only three candidates from the same party, we agree with the learned Judge that the appellant had not proved that the 3rd respondent had any control over the movement of candidates at the time he announced results. Further, there was no evidence that it was only the said candidates who were present during the announcement. Secondly, the appellant had not established that the total number of votes cast exceeded the number of registered voters in two polling stations namely, Ndunguri Primary School and Willies Primary School. Thirdly, on the issue that the appellant had garnered 75,710 votes as opposed to 54,813 votes as announced by the 3rd respondent, we find no evidence substantiating the same. This is because the appellant in his own evidence stated that some of his agents were denied access into some polling stations yet he claims knowledge of the total number of votes cast in his favour from his agents. Further, he admitted that he had not prepared or produced a tallying schedule of the votes cast to support his allegation.

122. The appellant also contended that Form 35 was filled by the Presiding Officers contrary to ***Regulation 83*** of the ***Elections Regulations;*** Form 35 ought to have been filled by the Returning Officers. On this issue we can do no better than concur with the following findings by the learned Judge,

"Forms 35 are completed at the polling stations according to the schedule under the Regulation. The schedule reads 'Declaration of Governor Election Results at a polling station.' It is the Presiding Officers who are based at the polling stations and who have the information required to complete these Forms. That information is then delivered to the County coordinator in Form 35 which is an open document; and is accompanied by the parent documents where the date is obtained from sealed in ballot boxes. These other documents include statements, all the ballot papers, whether cast or not, rejected, contested, valid and spoilt, among others. This is clear proof that the Presiding Officer, who is the custodian of all these documents containing the required data to complete Form 35, should fill the said Form. The Presiding Officer is the officer accountable for the information contained in all the supporting documents. His role cannot be under any circumstances be taken over by any other officer, apart from his deputy. Form 35 is completed at the polling station by the Presiding Officer, and not at the Constituency tallying centre...

I find that the requirement under Regulation 83, that the Returning Officer should complete the details of Form 35 is not only humanly impossible..... I recommend an amendment to Regulation 83 to remove the absurdity created by that requirement."

Bias:

123.In ***Serah Njeri Mwobi -vs- John Kimani Njoroge- Civil Appeal No. 314 of 2009,*** this Court held,

> ***"It is a tenet of a fair trial that all parties to a dispute must have the right to due process of law in order to resolve the dispute, and due process of law requires that the parties be given a hearing before an unbiased and impartial decision maker as part of the resolution process. The reason is clear to us. In a constitutional order like ours, grounded on the rule of law, it is imperative that judges make decisions according to law, unclouded by personal bias or conflicts of interest. Accordingly, this in our view, is the basis upon which when a Judge is appointed to the bench, he/she takes an oath to uphold the Constitution and administer justice without fear or favour. Public confidence in the administration of justice is indispensable. It is not enough that judges be impartial, the public must perceive them to be so."***

Lord Denning in ***Metropolitan Properties -vs- Lannon (1968)3 ALL ER 304,*** held

> ***"In considering whether there was a real likelihood of bias.... the court looks at the impression which would be given to other people ....what right minded persons would think."***

124.The learned Judge in disregarding the evidence of both PW1,Njeru and PW7, Justin expressed herself as follows:-

> ***"PW7 did not follow his client and cannot say with certainty where he went. His evidence on that point is speculative and therefore inadmissible for lack of corroboration. Similarly PW7 did not state who it was he took to Mr. Chemical, PW1. It is therefore only the evidence of PW1 that the 1st respondent went to see him."***

In respect of the evidence of Justin we find that the trial court correctly disregarded his evidence because it was speculative.

125.With regard to PW1, Njeru, there were two affidavits on record sworn by Njeru; the one in favour of the appellant's case was dated 8th April, 2013 while the other which was in favour of the respondent's case was dated 30th April, 2013. The one in favour of the appellant's case was sworn first; the one in favour of the 1st respondent recanted the evidence deposed in the first one. In the 2nd affidavit the appellant deposed that the appellant's brother, PW5, Dereba Njeru Peter (Dereba), approached him and gave him Kshs. 10,000/= to swear an affidavit against the 1st respondent. In his testimony before the trial court, Njeru denied swearing the 2nd affidavit and stated that after the 1st respondent was declared the winner, Basilio Gitonga took him to Meru town where he paid Njeru the balance of Kshs. 45,000/= on behalf of the 1st respondent; Basilio told him to sign what he believed was an acknowledgement of the said payment. He later learnt that Basilio had tricked him into signing the 2nd affidavit

126.The learned Judge held that he was not a credible witness. The Judge stated,

> ***" PW1 swore two affidavits which are irreconcilable and the averments made therein so contradictory that there is a distinct dichotomy of assertions that renders the evidence of PW1 unbelievable, unreliable and untrustworthy; and in regard to his credibility a person of doubtful integrity. He testified that he was a great friend of the petitioner and***

that he believed him. Yet he 'treated' his opponent' and according to him, enabled him to win the elections. PW1was clearly not a person of integrity, but more relevantly, he was unreliable and an incredible witness."

127. In several decisions this Court has stated it will not interfere with the decisions of a trial Judge who had the benefit of hearing and seeing the witnesses. Lord Jenkins in ***Akerlin and another – vs- R De mare and others (1959) EACA 476,497*** opined that to interfere, the appellate court must be satisfied that the appeal before it is one of those exceptional cases in which an appellate court is justified in reversing the decision of Judge at first instance when the decision is founded upon the Judge's opinion of the credibility of witnesses formed after seeing and hearing the witness evidence. Credibility of a witnesses is gauged through cross-examination and the observations made by the trial court on the demeanour of the witnesses. It was the duty of the appellant to demonstrate to this Court that the findings by the trial court on the demeanour and credibility of the witness had no basis in law.
128. In the case of ***Ogol - vs- Muriithi (1985) KLR 359***, this Court emphasized that the Court of Appeal in considering evidence should be mindful of the advantage enjoyed by the trial court which saw and heard the witnesses and that the trial Judge was in a better position to assess the significance of what was said, how it was said and equally important what was not said. In ***Hahn - vs- Singh (1985) KLR 716***, it was held that before the appellate court can come to a different conclusion from that reached by the High Court Judge, it had to be satisfied that the advantage enjoyed by the Judge of seeing and hearing the witnesses was not sufficient to explain or justify his conclusion. It was further held that where there is a conflict of primary facts between witnesses and where the credibility of the witnesses is crucial, the appellate court will hardly interfere with a conclusion made by the trial judge after weighing the credibility of witnesses. See also ***Tayab - vs - Kinanu (1983) KLR.***
129. Was an error of law committed by the trial judge in relation to the findings made on credibility of the appellant's witness? Having considered the evidence on record and submissions by counsel, we are of the considered view that the appellant has not demonstrated to this Court that there was no legal basis for the trial Judge to arrive at the credibility findings that she made.
130. Did the learned Judge err in summoning Basilio to tender evidence? Pursuant to witness summons issued by the trial court, Basilio swore an affidavit dated 12th August, 2013 and testified. From the record, we note that the learned Judge summoned Basilio to testify in order to answer the following issues which had arisen:-

- ***Whether one Njeru Nkoroi, PW1, visited his office at any time in connection with this Petition.***
- ***Whether he paid the said Njeru Nkoroi the sum of Kshs. 45,000/= or any sum of money whatsoever.***
- ***If the answer to the above is positive:***

    (a) on whose behalf was he acting;

    (b) what was the purpose or reason for the payment?

- ***to produce a duplicate copy of any acknowledgement for the payment.***
- ***whether Njeru Nkoroi signed any document in his office during the said visit, and if so,***
- ***what document he signed a copy of which he should produce in court.***
- ***whether he signed voluntarily or was forced, induced or coerced to sign.***

131. PW1, in his evidence denied swearing the second affidavit in favour of the 1st respondent while the 1st respondent contended that PW1 swore the same recanting his earlier affidavit. Based on the foregoing and the fact that there were two conflicting affidavits sworn by PW1 on record it was

imperative for the learned Judge to summon Basilio in order to determine the truthfulness of the said affidavits. ***Rule 5 (1)(a)*** of the ***Elections Rules*** provides:-

> ***"5(1) For the purpose of furthering the overriding objective provided in rule 4, the court and all the parties before it shall conduct the proceedings for the purpose of attaining the following aims-***
>
> ***(a) the just determination of the election petition." Emphasis added.***

We find that the learned Judge did not err in summoning Basilio to testify and that she did the same in compliance with the overriding objective of the court.

132. The appellant argued that the learned Judge relied on the evidence of Basilio in respect of the second affidavit sworn by PW1 despite finding that Basilio's evidence ought to be treated with caution. The relevant portion of the judgment which the appellant refers to is reproduced herein under:-

> ***"57. I am aware that Basilio Gitonga was a close associate of the 1st respondent, and indeed he was part of his campaign strategy planning team. There were some questions which remained unanswered,.....Mr. Basilio's evidence needs to be treated with caution. That notwithstanding, it cannot be denied that PW1 swore two affidavits in this petition, one in favour of the petitioner in which he makes serious allegations against the 1st respondent, and a second recanting it. Which one and the court believe?"***

From the foregoing, it is clear that the learned Judge cautioned herself on relying on the evidence of Basilio. Did the learned Judge rely on the evidence of Basilio in finding that PW1 had sworn two affidavits? We are of the considered view that the learned Judge correctly held that Basilio's evidence needed to be treated with caution. However, in cautioning herself, we find that the learned Judge did not entirely disregard the evidence of Basilio. We also find that there was additional evidence that pointed to the fact that PW1 swore the second affidavit. This is because PW1 in his evidence stated that when he met Basilio in Meru town he signed something which he believed was an acknowledgement of payment.

133. We are of the considered view that there was no proof of bias on the part of the learned Judge as against the appellant.

Scrutiny and Recount:

134. According to the appellant, the learned Judge erred by failing to order scrutiny and recount of the votes cast in Tharaka-Nithi County. The appellant vide an application dated 8th May, 2013 sought an order for scrutiny and recount. The learned Judge declined to issue the said order on the ground that a basis had not been laid for the scrutiny and recount because the matter was then at the pre-trial stage. The appellant maintained that during the hearing of the Petition basis was laid for scrutiny and recount by the evidence which was adduced; the evidence demonstrated several election irregularities, offences and malpractices committed by the respondents.

135. ***Section 82(1),*** of the ***Elections Act*** it is provides:

> ***"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."***

The power exercised under the said section is discretionary. It is trite that an appellate Court cannot interfere with the exercise of discretion by a trial Judge unless it is shown that the discretion has not been exercised judicially. In ***Matiba –vs- Moi & 2 Others, 2008 1 KLR 670,*** this Court 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".

136. We find no fault in the learned Judge declining to grant the order for scrutiny and recount because the appellant had not laid any basis for the same. Evidence that was adduced did not prove to the required standard the alleged irregularities and malpractices. The appellant contended that had the trial court ordered scrutiny and recount it would have established that the appellant garnered more votes than the 1st respondent and that there were election irregularities. We disagree with the said contention and we are of the view that had the trial court ordered for scrutiny and recount without any basis being laid, the trial court would have engaged in a fishing expedition. In ***Sambu -vs- Genga & Another (2008) 1KLR (EP) 396,*** the High Court expressed itself as follows:-

" After careful consideration of the matter we formed the view that Mr. Khaminwa was inviting the court to take part in a fishing expedition in the hope that the exercise would accidentally unearth some evidence in support of the petitioner's generalised allegations about rigging. We hold the view that the petitioner must prove his case by direct evidence and it is not proper for him to call upon the Election Court to participate in evidence gathering activities."

Consideration of Forms 35 & 36:

137. Following an application by the appellant for the 2nd respondent to avail the ballot boxes at the trial court, the learned Judge declined to allow the application on the grounds that there wasn't sufficient space and the court building was insecure to store the ballot boxes. The appellant faulted that decision and contended that the same was tantamount to allowing the 2nd respondent to disregard ***Rule 21*** of the ***Elections Rules***. The appellant contended that based on the fact that the trial court did not order the 2nd respondent to avail the ballot boxes and scrutiny and recount of the votes cast, the trial court did not consider Forms 35& 36. According to the appellant there were no election results before the trial court.

138. ***Rule 21*** provides:-

"21. The Commission shall deliver to the Registrar-

(a) the ballot boxes in respect of that election not less than forty-eight hours before the date fixed by the court for the trial; and

(b) the results of the relevant election within fourteen days of being served with the Petition."

It is not in dispute that following the aforementioned decision by the trial court, the 2nd respondent did not avail the ballot boxes in respect of the gubernatorial elections in court. However, we find that despite the same there were elections results before the court and the trial court considered Forms 35 & 36. Why do we say so? Firstly, the appellant attached in his Petition Forms 35 & 36; the 2nd respondent in its reply to the Petition attached all the Forms 35 & 36 relating to the areas where results had been challenged. Secondly, from the judgment of the learned Judge it is clear that she considered the said Forms. The learned Judge at paragraph 157 of the judgment stated,

" Ms. Mutuva was taken through Forms 36 annexed to the Petition and Forms 35 (availed to the parties advocates before the trial started) and against the averments

under paragraph 30 of the Petition. After that exercise, it was clear to the court that the discrepancies complained of in that paragraph were trivial and typographical in nature....”

Did the errors disclosed materially affect the election results?

139. ***Section 83*** of the ***Elections Act*** 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 non-compliance did not affect the result of the election.”***

The Supreme Court in ***Raila Odinga & Others -vs- IEBC & Others (Supra),*** held at paragraphs 303 and 304,

> ***“303. 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.***
>
> ***304. Did the Petitioner clearly and decisively show the conduct of the election to have been so devoid of merits and so distorted as not to reflect the expression of the people's electoral intent? It is this broad test that should guide us in this kind of case, in deciding whether we should disturb the outcome of the Presidential election.”***

In ***Morgan & others -vs- Simpson & Another (1974) 3 ALL ER 722***, it was held,

> ***“An election court was required to find an election invalid-***
>
> ***a) if irregularities in the conduct of elections had been such that it could not be said that the election had been conducted as to be substantially in accordance with the law as to election, or***
>
> ***b) If the irregularities had affected the results.***
>
> ***Accordingly, where breaches of the election rules, although trivial, had affected the results, that by itself was not enough to compel the court to declare the election void.”***

140.In determining whether errors materially affected election results a quantitative and qualitative test should be carried out. In ***Dickson Mwenda Kithinji -vs- Gatirau Peter Munya & 2 Others (supra)***, this Court while considering the quantitative and qualitative test stated:-

> “***This quantitative and qualitative test is the nomenclature used by Muskoe, J. in Winnie Babihuga -vs- Masiko Winnie Komuhangi & Others HCT-00-CV-EP.0004-2001. It was stated that the quantitative test is the most relevant where the numbers and figures are in question whereas the qualitative test is most suitable where the quality of the entire election process is questioned and the court has to determine whether or not the election was free and fair. It was stated:***
>
> ***“To determine whether the results as declared in an election ought to be disturbed, the court is not dealing with a mathematical puzzle and its task is not just to consider who got the highest number of votes. The court has to consider whether the grounds as raised in the petition sufficiently challenge the entire electoral process and lead to a conclusion that the process was not transparent, free and fair. It is not just a question of who got more votes than the other. It cannot be said that the end justifies the means. It a***

democratic election, the means by which a winner is declared plays a very important role. The votes must be verifiable by the paper trail left behind, it must be demonstrated that there existed favourable circumstances for a fair election and that no party was prejudiced by an act or omission of an election official."

(See also Manson Oyongo Nyamweya – v- James Omingo Magara & 2 others, Kisii Election Petition No. 3 of 2008)."

The principles set out in ***Articles 81 & 86*** of the ***Constitution*** embody the qualitative test. The principles embody the requirement of efficient, accurate, transparent, accountable and verifiable results.

141. On the quantitative analysis, this Court in the ***Dickson Mwenda Kithinji case*** expressed itself as hereinunder:-

"***In determining whether irregularity affects the result of an election, one has to look at the number by which irregular votes exceed the plurality of the winning candidate. The margin between the winning and losing candidate is a factor in determining whether the irregularity affected the results of the election. In deciding whether to annul an election, an important consideration is whether the number of impugned votes is sufficient to cast doubt on the true winner of the election or whether the irregularities are such as to call into question the integrity of the electoral process. If a court is satisfied that, because of irregularities, the winner is in doubt, it would be unreasonable for the court not to annul the election. Before annulling an election based on irregularity, the magic number test has to be considered. This means that the contested or irregular votes casts when set aside must exceed the margin between the winner and the runner up."***

In ***Olusola Adeyeye –vs- Simeon Oduoye (2010) LPELR-CA-1/EPT/NA/67/08*** where the court stated:

"It is not enough to merely catalogue instances of malpractices and breaches of the Electoral Act without adding up or tallying the number of votes involved or affected and their impact on the overall result of the election… The reason for tying such malpractices to votes affected thereby is because irregularities affecting minority votes would not upset the election of a candidate with majority of lawful votes. An election cannot be cancelled on the mere speculation of the probable effect of uncertain or unlawful votes procured through alleged malpractices."

142. We find that the appellant did not prove that the affected votes were substantial as to cast doubt as to who the winner in the said elections was. This is because even if the affected votes were to be taken into account the margin between the appellant and the respondent which was 15,275 would still be huge. Tanzania's High Court in ***Ng'weshemi -vs- Attorney General Mwanza- HCMCC No. 5 of 1970*** expressed itself as follows:-

" The question whether non-compliance with the provisions of the Act relating to elections affected the result of the election would depend on the nature of the particular complaint or irregularity and the margin of victory...Where a specific irregularity has been proved and the number of votes affected established with some provision then allowance should be made for that and if after such adjustments have been made the successful candidate still retains some margin of victory then the irregularity has not really affected the result of the election..."

In the case of ***Mbowe – v- Eliufoo (1967) EA 240,*** the Election Court in Tanzania while interpreting the meaning of "affected the result" stated:

"affected results means not only the result in the sense that a certain candidate won and

another one candidate lost. The result may be said to be affected if, after making adjustments for the effect of proved irregularities the contest seems much closer than it appeared to be when first determined. But when the winning majority is so large that even a substantial reduction still leaves the successful candidate a wide margin, then it cannot be said that the result of the election would be affected by any non-compliance of the rules."

143. We also find that the appellant did not establish that disclosed errors affected th quality of the election results. Having expressed ourselves as above, we find that the gubernatorial election results for Tharaka-Nithi reflected the will of the electorate. In ***James Omingo Magara -vs- Manson Onyongo Nyamweya & 2 others- Civil Appeal No. 8 of 2010*** it was held,

"The courts will strive to preserve an election as being in accordance with the law, even where there have been significant breaches of official duties and election rules provided the results of the election was unaffected."

We find that the trial court was correct in dismissing the appellant's Petition.

Costs:

144. The trial court in its judgment ordered the appellant to pay the costs of the respondents as per ***Rule 36(1)*** of the ***Election Rules***. The learned Judge capped the amount of costs payable to the 1st respondent not to exceed Kshs. 3 million while the amount payable to the 2nd and 3rd respondents not to exceed Kshs. 2 million. The appellant contended that the total amount payable was Kshs. 5 million; the learned Judge did not give reasons for arriving at the colossal sum; the order of costs was contrary to the average amount of costs ordered in similar Petitions. The power to impose costs on parties is usually discretionary. Therefore, before we can interfere with the learned Judge's discretion we must be satisfied that she misdirected herself in some matter and as a result arrived at a wrong decision or, that he misapprehended the law or failed to take into account some relevant matter. In ***Mbogo & Another- vs- Shah (1968) E.A. 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 misjuctice….'

145. The trial court was correct in holding that costs ought to follow the event. The learned Judge only placed a cap of 5 million on the total amount of costs payable to the respondents and did not order payment of the said costs. ***Rule 36*** grants an Election Court the power to set a cap on the total amount of costs payable by a party. In this case,the costs payable are to be taxed by the taxing master.

146. However, we are of the considered view that the learned Judge misdirected herself on the cap she placed on the total costs payable by the appellant. This is because the cap of Kshs. 5 million is excessive and contrary to the average cap placed by the Election Court in similar Election Petitions. We therefore, set aside the cap of Kshs. 5 million on the total costs payable to the respondents and substitute it with a cap of 2.5 million.

147. Save for the ground on costs, we find that this appeal has no merit and is accordingly dismissed with costs to the respondents. We direct that the costs in the High Court shall not exceed Kshs. 2.5 million while costs of this appeal shall not exceed Kshs. 1 million.

Dated and delivered at Nyeri this 8th day of April 2014.

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

MARTHA KOOME

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL