IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: BOSIRE, WAKI & VISRAM, JJ.A)

CIVIL APPEAL NO. 205 OF 2011

BETWEEN

CLEMENT KUNGU WAIBARA..APPELLANT

AND

BERNARD CHEGE MBURU..1ST RESPONDENT
CHARLES MARARO NJOROGE...2ND RESPONDENT
THE INTERIM INDEPENDENT ELECTORAL COMMISSION.........3RD RESPONDENT

(Being an appeal from the Judgment and Order of the High Court of Kenya at Nairobi (Ochieng', J) dated 26th day of August, 2011

In

H.C. Election Petition No. 24 of 2008)
****

JUDGMENT OF THE COURT

Following the National Assembly and Presidential Elections held in Kenya on ***27th December, 2007***, **Clement Kung'u Waibara**, the appellant, was declared as the successful candidate for the Gatundu North Constituency, by Charles Mararo Njoroge, the 2nd respondent, who was the Returning Officer for the constituency in the aforesaid elections, and was later gazetted as the duly elected representative for the above Constituency, by the Electoral Commission of Kenya. He was later sworn in as a Member of Parliament for the Gatundu North Constituency by the Speaker of the National Assembly and has hitherto served as the Member of Parliament for that Constituency.

By an Election Petition filed in the Central Registry of the High Court, in Nairobi on 24th January, 2008, Peter Kamau Njeri, a voter in the said Constituency challenged the appellant's election on the following grounds:

"(1) The appellant was not sufficiently proficient in the English and Swahili languages to enable him take an active part in the proceedings of the National Assembly, and was therefore ineligible to be nominated or elected as a Member of Parliament.

(2)The appellant committed many election offences prior to and during the election period, among them, bribery of voters by handing over to them varying sums of money to influence them to vote for

him, and also items of clothing and beddings.

(3)The appellant perpetrated violence on supporters of his opponents.

(4)The appellant disrupted a political rally of one of his opponents.

(5)The 2nd and 3rd respondents mismanaged the conduct of the election that it did not constitute a transparent, free and fair election as required by section 42 A of the Constitution and the National Assembly and Presidential Elections Act."

For those reasons the petitioner prayed that the election of the appellant be declared null and void for not being transparent, free and fair, and because the appellant himself was ineligible to contest for the seat.

The Gatundu seat attracted 17 candidates, but none of them petitioned for the nullification of the appellant's election. However, in the course of the hearing of the petition one of those candidates, Patrick Muiruri Kariuki, testified that he supported the petition, and when later the petitioner developed cold feet and wanted to withdraw from the petition, he nominated Bernard Chege Mburu, the 1st respondent, to take his place. It would appear to us that Muiruri was effectively the Petitioner, although not directly.

Since its filing, the petition has had a chequered history. Soon after it was filed, a request was made for leave to withdraw the petition. However, soon thereafter, Bernard Chege Mburu requested to be substituted as the petitioner and he filed a notice of intention to be substituted. By a ruling dated 26th September, 2010, he was granted the leave. No sooner had the substitution been made than another application was filed by Patrick Muiruri seeking to be substituted as the petitioner. It was his case that Benard Chege Mburu had been compromised, and he, like the original petitioner had evinced an intention of either withdrawing the petition or he himself pulling out of the cause. His motion was, however, dismissed because Benard Chege Mburu, protested that the allegation about him withdrawing the petition had no proper basis.

In the meantime, Peter Kamau Njeri, the original petitioner requested the High Court to release the security for costs which he had deposited as stipulated in the relevant legislation. He was, however, apparently persuaded to transfer it to the in-coming petitioner to obviate the petition being struck out as incompetent. The petition was thus regularized. That was not the end of the problems against the continuation of the petition.

By an undated chamber summons filed in court on 22nd September, 2010, the appellant sought an order for Wendoh, J who was seized of the petition to disqualify herself from hearing the petition. By then she had not done much which would have been construed as showing that she had acted improperly against any of the parties. Wendoh, J obliged and by a ruling dated 29th September, 2010 she recused herself. Ochieng, J was gazetted to take over the hearing of the petition. The validity of his appointment was also challenged. He, however, declined the request to recuse himself. In the end, he heard the petition to completion.

In his judgment, Ochieng, J was not satisfied that the petitioner and his witnesses had adduced acceptable and sufficient evidence to prove the assertion that the appellant through his supporters or at all had been guilty of violence, or that he had bribed voters or that he had committed any election offence. He rejected the petitioner's contention that the appellant was not sufficiently proficient in the English and Swahili languages to enable him take an active part in the proceedings of the National Assembly. He accepted the evidence adduced by Fredrick Iraya (RW3) that the appellant sat the language test and satisfied the examiners that he was proficient in the two languages and for that reason he was eligible to stand for a parliamentary seat.

The petition was allowed on the ground that many of the Forms 16A and Forms 17A were neither signed, nor bore the official stamp of the Electoral Commission. Additionally, that those forms did not have remarks of the Presiding or the Returning Officer regarding his observations on the counting of votes,

while others did not have the signatures of the candidates or their agents as was required by the elections regulations. On the basis of those findings, the learned Judge concluded that the parliamentary elections for Gatundu North Constituency were not conducted in a transparent, free and fair manner as required by the National Assembly and Presidential Elections Act, **Cap 7** of the Laws of Kenya and Regulations made thereunder. He therefore nullified the election and thus provoked this appeal.

The appellant's memorandum of appeal has 16 grounds, but at the hearing, Mr. Evans Ondieki for the appellant, argued three broad grounds, namely:

"(1) Whether the learned Judge properly allowed the petition on grounds which were not pleaded." Mr. Ondieki pointed out to us that, the issue sufficiently covered grounds 1-5 in the memorandum of appeal.

"(2) The learned Judge erred in not appreciating that there was no Order made for the provision of security for costs." (Absence of such order, according to Mr. Ondieki, rendered the petition incompetent)**.**

"(3) The Court's decision leaked out before it was given and thus the outcome of the trial was a mistrial." (Mr. Ondieki submitted that a statement was made at a political meeting within Gatundu North Constituency to the effect that people should prepare for a by-election and that the implication was that the speaker knew the outcome of the trial. In Mr. Ondieki's view that fact raised the question whether the court was independent and impartial).

Regarding the first ground, Mr. Ondieki submitted that the petition did not include any ground relating to irregularities in the preparation of Form 16A. In his view, the trial Judge recognized this, but nonetheless proceeded to rely on it to nullify the appellant's election arguing that the matter was left to the court for its decision. Moreover, he said, he objected at the trial against the production of evidence on an un-pleaded issue, but the court overruled him. We asked Mr. Ondieki to point out to us the page where his objection was reflected, but he was unable to do so. On our own we have checked the record but are unable to come across any note indicating that learned counsel raised any objection to the calling of evidence in support of alleged irregularities in Forms 16A & 17A. We observe that parties indeed scrutinized various Forms 16A to see whether they complied with the requirements of **Reg. 35A** of the National Assembly and Presidential Elections Regulations. Indeed there are several copies of Forms 16A forming part of the record, which were produced by one Charles Mararo Njoroge (RW8) and the witness was cross-examined on them at some considerable length of time by all counsel. In our view, the issue was pleaded, though not expressly. Even assuming it was not, on the authority of **Odd Jobs v. Mubia [1970] EA 476**, the issue was canvassed at the hearing of the petition and a decision thereon was necessary.

While submitting on the same issue, Mr. Mukuria for the 2nd and 3rd respondents, urged the view that whatever anomalies that were noted on Forms 16A were explained by RW8. In his view those anomalies when viewed in the context of ***section 28*** of the National Assembly and Presidential Elections Act, were minor irregularities which should not have been relied upon without any additional evidence to nullify the appellant's election. In his view, unless any irregularities noted fundamentally affect the results of an election, they would not be relied upon to void that election. The Forms 16A, he said, were merely administrative forms and are not part of the essential documents in an election. Besides, he said, the trial Judge found that a majority of the forms were signed. We pause there to point out that Forms 16A and 17A are, contrary to what learned counsel has submitted on, important documents in the election process. They give a summary of the results of an election, and it is on the basis of their accuracy that the credibility of the election is rated.

Mr. Emanuel Wetangula with Muthomi Thiankolu appeared for the 1st respondent in the appeal. Mr. Wetangula, submitted regarding Forms 16A and 17A, that they are the only forms talked about in the election rules and were, according to him, essential. In his view, the fact that there were anomalies in several of them was clear evidence that the conduct of elections in the Gatundu North Constituency was not transparent, free and fair. Relying on the case of **James Omingo Magara v. Manson Nyamweya &**

2 Others, Civil Appeal No. 8 of 2010, (unreported), he submitted that Forms 16A and 17A were so important that they reflect the details concerning the conduct of the election. In his view, ***section 28***, above, cannot be properly used to whitewash all manner of irregularities which occured during the election process.

In the end, Mr. Wetangula concluded that the issue relating to Forms 16A and 17A, was not only pleaded, but evidence was adduced on them by witnesses who were cross-examined and re-examined on the contents thereof. Consequently, he said, no prejudice was suffered by the appellant, the 2nd and 3rd respondents on the matter.

The issue on Forms 16A and 17A is the crux of this appeal. A decision one way or the other on this appeal will largely depend on whether, on an objective view of the matter, any irregularities which might have been noted on those forms are so grave as to lead to the conclusion that the election in the Gatundu North Constituency was or was not transparent, free and fair. If the irregularities had no effect or substantial effect on the result, then there would be no proper basis for nullifying the appellant's election.

At common law the position is explained at **page 244** of the **3rd Ed. of Halbury's Laws of England**. It reads thus:

"At common law a Parliamentary election might be avoided on an election petition on the grounds of irregularities by election officials, if the irregularities were so great as to prevent the election being a true election and by statute the court before declaring an election invalid on those grounds must consider that the election was not conducted substantially in accordance with the law as to elections and that the irregularities had affected the result."

Section 28, aforesaid is worded almost in identical terms. It reads thus:

"No election shall be declared to be void by reason of a 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 that written law or that the non-compliance did not affect the result of the election."

What is the law relating to Forms 16A and 17A? **Regulation 35A**, deals with Form 16A. It is filled during the counting of votes, and the responsibility for completing it, is placed by the above regulation on the presiding officer. He has to enter details of the number of registered voters in the area, the number of votes cast, and the votes garnered by each candidate; it provides the procedure for scrutinizing the ballot papers before they are counted. Each of them has to be displayed for all present to see. It provides for candidates or their agents to be given an opportunity to object to or dispute the inclusion in the count of a ballot paper or vote at the polling station. It provides that at the end of the counting exercise each candidate or his agent should be provided with a copy of the declaration of the result. It is then that they are required to sign the Form 16A. Regulation 35A (7) provides that:-
"***The absence of a candidate or an agent at the signing of a declaration form or announcement of results under paragraph (2) shall not by itself invalidate the results announced."***

Regulation 40 provides for the tallying of results from polling stations and the announcement of election results by the Returning Officer.

The elaborate procedure we have outlined above is intended to ensure that the election is free, transparent and fair. It is a process which is geared to ensuring that the voters get a person acceptable to the majority in a given constituency declared the winner. We hasten to add that, however elaborate a process is, mistakes do occur. It was for that reason that Justice Mulenga, JSC of Uganda stated in the case of **Joy Kabatsi Kafura v. Anifa Kawooya & Another**, Election Petition No 25 of 2005 (unreported) thus:

"An election is a process encompassing several activities from nomination of candidates through to the final declaration of the duly elected candidate. If any one of the activities is flawed through failure to comply with the applicable law, it affects the quality of the electoral process, and subject to the gravity

of the flaw, it is bound to affect the election results at every polling station. If any declaration is invalid by reason of non- compliance with the applicable law, it affects the quality and result of the electoral process."

What emerges from the provisions of the National Assembly and Presidential Elections Act and Regulations made thereunder, the authorities and the Common law, is that not every non-compliance with the applicable law would lead to the nullification of an election. The court has a duty to consider the gravity of the transgression and whether such transgression was inadvertent or deliberate before coming to a decision whether or not to nullify an election.

What is the standard of proof required in a case as the one before us? In **Muliro v. Musonye & Another (2008) 2 KLL 52**, and **Joseph Wafula Khaoya v. Eliakim Ludeki** and **Lawrence Sifuna E.P. No. 12 of 1993**, it was held by the High Court, and we agree with that view, that the standard of proof is higher than on a balance of probabilities. In **Halbury's Laws of England**, 3rd Edition, page 288 paragraph 513, the learned authors thereof have stated that the standard of proof in election matters is one beyond any reasonable doubt. It means that in England election matters are taken to be on the same plane with criminal matters, or put another way, it is analogous to a criminal trial. The rationale for this is not difficult to discern. Election offences attract serious sanctions and proof of any breach of election laws and procedures has to be clear and without equivocation.

This is a first appeal and on the authority of **Selle v. Associated Motor Boat Co. [1968] EA 123**, it is our duty to re-evaluate the evidence and come to our own conclusions on it without overlooking the conclusions of the trial court and bearing in mind that we, unlike the trial court, did not have the advantage of seeing and hearing witnesses testify as to appropriately assess their credibility. Several witnesses testified in support of the petition and the first of those was Martin Ndungu Kahura (PW1). The gist of his evidence was that he did the proficiency test for and on behalf of the appellant, an act he later regretted about. The witness was, however, contradicted by Fredrick Iraya, (RW3) who was a member of the Proficiency Examination Board No. 6, who testified that the appellant appeared before the Board on 1st November, 2007, and was categorical that the appellant sat the test personally. In the end whether or not the appellant did the test was a matter of credibility, which was a matter for the trial court. That court believed RW3 and rejected the testimony of PW1.

Patrick Kariuki Muiruri (PW2), a former Member of Parliament for Gatundu North Constituency was, along with the appellant and 15 other candidates, in the 2007 Parliamentary elections in the Gatundu North Constituency. His evidence was basically on the conduct of the Parliamentary elections in Gatundu North Constituency. He produced various exhibits and his affidavit which set out the gist of his evidence. At the commencement of his testimony, it became clear to the court that the "*sets of the affidavits and exhibits filed on behalf of PW2 are not similar*". He had to be stood down for a while for the issue to be clarified. At the resumed hearing of PW2's evidence however, the issue was not clarified. PW2 continued with his testimony as though no issue had been raised on his evidence. The main thrust of his evidence centred on the contents of Forms 16A and 17A. We earlier indicated what those forms were used for. PW2 testified, on the main, that those forms were either irregularly completed or that they lacked the essential signatures or official stamp of the Electoral Commission. He produced a bundle of them, which he said he received from his election agents. The witness was categorical that he nominated the original petitioner, and the one who replaced him as petitioner in this matter. He paid all the filing fees, security for costs and even the fees for the respective advocates who have been representing the petitioners.

It is, however, noteworthy that none of the agents who provided him with copies of Forms 16A and 17A testified to explain from where they obtained copies of those forms, and to explain some anomalies which were noted on them. Charles Mararo Njoroge, the second respondent in this appeal, testified that some of the copies of those forms were clear forgeries. The trial proceeded on the basis of those forms and some copies which the 2nd respondent himself made available. It is, however, quite clear from the record that the originals which were in the custody of the court were not scrutinized. The originals, he said, were locked inside the Ballot Boxes. This is what the witness said, in pertinent part:-

"***The Forms 16A produced by PW2 were fake. Perhaps some agents filled in the blank forms 16A which the Presiding Officer had. Each polling station had to have several blank Forms 16A. The original forms 16A are in the Ballot Boxes."***

We have gone through the record but cannot find any note to show that the Ballot Boxes were opened to get the Original Forms 16A for scrutiny, more so, when it was shown that some of the forms which were exhibited were forgeries. We do not lose sight of the fact that one of the requirements at a polling centre is that a presiding officer is obliged to give a completed and signed copy of Form 16A to the candidate or his agent. The authenticity of the Forms 16A and 17A having been raised at the trial it was incumbent upon the trial Judge to order the opening of the ballot boxes in the presence of the parties or their advocates to avail the originals thereof for scrutiny. That is more so because at the end of the day the forms formed the basis of the court's decision. We also note from the 2nd respondent's evidence that Form 16A was supposed to be prepared in quintuplicate. The originals, we suppose are the ones which were placed inside the ballot boxes along with other relevant election materials. No evidence was, however, adduced to indicate how the five copies were distributed.

There is also the fact that the credibility of PW2 among other witnesses, was challenged. The evidence, as stated earlier, is clear that in practical terms, he was the petitioner but fronted other persons to act as petitioners. He was the prime mover of the petition, and if his credibility, was called to question, then the trial court, we think was obligated to test his entire evidence before acting on it. Likewise, the Forms 16A and 17A in RW8's bundle of documents, were impugned. Those were not the ones which were locked up inside the ballot boxes. It is possible they were part of those which were filled in quintuplicate. The forms he had, he said, had omissions. But did the ones in the ballot boxes also have omissions or errors as the case might be?

By the provisions of ***Regulation 19*** of the National Assembly & Presidential Elections (Election Petition) Rules 1993, all election papers are required to be sealed and handed over to the election court not less than forty- eight hours before the date fixed by the election court for the trial of the election petition, for safe keeping to await the hearing of an election petition against the successful candidate in a given Constituency. The whole purpose of doing so, is to ensure that they are readily available for the court's examination; and additionally, to obviate any tempering with them. Any papers the parties or their witnesses tender in evidence, if the need arises, are to be compared with the authentic ones in the ballot boxes.

How did the trial Judge eventually handle the issue relating to Forms 16A? He made reference to RW8's evidence in which the witness stated, inter alia, that it was wrong for the presiding officer to give out blank ECK letterheads to any person and that numerous of the Forms 16A which were produced in court were either not stamped by the presiding officers, or by the candidates' agents; and too that many Forms 16A were not signed by the presiding officers, and concluded that they demonstrated "*the casual manner in which the returning officer and the electoral body appear to have conducted their duties*." He concluded that those were irregularities which fundamentally affected the credibility of the results and the electoral process in the Gatundu North Constituency.

Whilst it is clear that the learned Judge made reference to the provisions of ***section 28*** of the National Assembly and Presidential Elections Act implying that he addressed his mind to the need for caution before voiding an election, it is clear to us that he based his conclusion on documents whose authenticity was not clearly established. As stated earlier both PW2 and RW8 produced copies of Forms 16A. PW2 included copies of the same in a bundle which he submitted with his affidavit. Many of those Forms 16A were discredited. RW8 produced his bundle on the date he testified, namely 22nd June, 2011. On that day the proceeding, as material, went as follows:

"I am the 2nd Respondent. I was the Returning Officer for Gatundu North Constituency. I wish to rely on my affidavit.

Mukuria:- *We are ready to produce the copies of the Forms 16A at this stage.*

Ondieki – No objection

Muthomi – Those documents were to have been provided at least 48 hours before the trial started. Secondly, if the documents are copies, ***I have reservations about the documents****. However, in principle I have no objections to their being produced.*

Court – RW8 is granted leave to produce the forms 16A in evidence even though they were not provided to the court earlier. ***However, the parties shall be at liberty to raise such concerns as they may have about any of the said documents.****"* - (Emphasis supplied)

As stated earlier in this judgment the original Forms 16A, were in ballot boxes which were in the custody of the court and we find no note to show that either the court or the parties' respective counsel looked at them to see if they agreed with the copies the parties produced. If the standard of proof were the same as in ordinary civil cases an appellate court would have been slow to question the conclusion the trial court reached on Forms 16A. However, nullifying an election is not a light matter. The trial court must of necessity base its decision on credible and sufficient evidence and be satisfied more than merely on a balance of probabilities that there were fundamental irregularities which discredit the process of an election before a decision nullifying the election.

We are not satisfied that the learned trial Judge addressed his collective mind to the nature of the evidence before him before he came to the decision appealed from. First, having discredited the principal witnesses, it was not open to him to accept and act on their respective evidence without question. This is what he said against, PW2, the appellant and RW8:

"To my mind, a person who had been a member of Parliament for 10 years, but who is ready and willing to pay Kshs.2.1 million as a consideration for the printing of Kshs.30 million cannot be deemed as a man who engenders trustworthiness in him. I find that he is a person of doubtful integrity and is therefore an unreliable witness, whose evidence this court finds unsafe to accept."

In the course of his evidence, PW2 admitted under cross-examination that he gave fraudsters Kshs.2.1 million as consideration for multiplying it to Kshs.30 million for his benefit.

And as against the appellant, the learned Judge remarked as follows:

"He initially denied very vigorously, any connection with the KCPE certificate produced by PW2. He said the certificate did not belong to him. However, when faced with the prospects that the Kenya National Examinations Council would spill the beans, the 1st respondent quickly admitted that the certificate was his. His conduct gives rise to doubts about his reliability as a witness."

He did not with particularity mention RW8, but it is obvious from

the proceedings that the trial Judge did not regard him as a reliable witness. The learned Judge, after the above excerpt, stated as follows:-

"In effect, I consider each and everyone of the three main actors in this case to be persons all of doubtful integrity. For that reason my sympathies go to the people of Gatundu North Constituency."

The three main actors the learned Judge had in mind must have been PW2, the appellant, and RW8. They were indeed the three main actors. The appellant was the person against whom the petition was filed along with RW8 as the returning officer. PW2 was in effect the petitioner as the petitioner himself did not testify at the hearing.

As a final point relating to Forms 16A, RW8 was cross-examined at length on the matter. Issues were

raised on Forms 16A for the polling stations at Gakoe Tea Nursery, Muhindi Primary School, Mukurwe Primary School, and Chania Primary School. The Constituency had over 56 polling centres and 95 polling stations. The polling stations with alleged irregularities were, in our assessment, too few to have had any significant effect on the result. Even those alleged to have irregularities, those irregularities have not been shown to have been ill motivated or that taken as a whole they would tilt the balance against the appellant. According to the official results, he garnered 20,573 votes, representing over 40% of all the votes cast. A total of 45,970 votes were cast.

The remaining witnesses called by the petitioner, were, Neiceh Waithera Gichia (PW3) and Stephen Ndekei Ndungu (PW4). These testified about either receiving from the appellant or witnessing the appellant giving bribes to voters. The witnesses who were allegedly bribed testified that the bribes did not influence in any way their voting. For that reason and the fact that the appellant denied ever bribing any voter made the learned trial Judge to dismiss the claim of bribery.

The appellant called six witnesses. David Gitau Kamanda (RW2), testified that he witnessed a free, fair and transparent election process at Mitero Polling Station where he voted. Fredrick Iraya, (RW3), as stated earlier was a member of the Proficiency Examination Board No 6, and his evidence was essentially that the appellant appeared before the aforesaid Board and successfully sat for the proficiency examination. Silvester Gakungu Waibara (RW4), the younger brother of the appellant, testified that he visited many polling stations on polling day, but he did not witness any violence or bribery. Edward Ndichu Mburu, (RW5), like (RW2) was at Mitero polling Station, and his evidence was that voting was peaceful.

The appellant testified as RW8, he testified that he personally sat for the language test, and was therefore eligible as a Parliamentary candidate. He denied bribery claims made against him.

We earlier discussed the testimony of Charles Mararo Njoroge, the second respondent herein and we find no necessity of rehashing his evidence here. There were three other witnesses, who testified on matters touching on credibility but we do not wish to outline their evidence as their evidence had little bearing on the decision of the learned trial Judge nor do we consider it material to our decision.

Having gone through the essential evidence and the judgment of the learned trial Judge, we pose the question, namely, whether there is a basis for interfering with the judgment of the Election Court. It is trite law, that an appellate court can only interfere with the decision appealed from, as was stated in the case of **Peters v. Sunday Post (1970) EA 265**, if upon review of the evidence it comes to the conclusion that the conclusion originally reached upon that evidence should not stand. It is, however, a jurisdiction which should be exercised with caution as it is not a light matter to interfere with the decision of the trial court which, unlike the appellate court, had the advantage of seeing and hearing the witnesses testify as to appropriately asses their credibility.

The Court of Appeal for East Africa, restated the position in **Selle v. Associated Motor Boat Co. Ltd.** (supra) thus:-

"***I accept counsel for the respondent's proposition that this Court is not bound necessarily to accept the findings of fact by the court below. An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are, this Court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hamed Saif v. Ali Mohamed Sholan [1955], 22 EACA 270).***"

In the matter before us, we have no difficulty coming to a decision that the learned trial Judge erred in principle for the reasons stated in the evaluation and analysis of the evidence above. He correctly assessed

the credibility of the witnesses and came to the conclusion that they were not reliable. In the event he should have acted with caution on their evidence, but regrettably he did not give due weight to the finding he had made on their demeanor. Presently, we do not know, nor are we likely to know which conclusion the trial court would have reached had it examined the original copies of Forms 16A and 17A which were kept inside the ballot boxes, and which in our view would have given the correct position regarding the counting process at each polling station.

Having come to the foregoing conclusion, it is our view that, there is no necessity of dealing with the other issues raised in this appeal, for instance, issues on security for costs and the alleged lack of independence on the part of the trial court; and whether or not the failure by the petitioner to testify fundamentally affected the petition.

In the result, we allow this appeal, set aside the decision of the Election Court nullifying the election of the appellant and any consequential order, and order that the petition dated 23rd January, 2008, be and is hereby dismissed. As regards costs the decision appealed from has been vacated because of an error on the part of the Election Court. Furthermore, as stated earlier, the three main actors were thoroughly discredited by the High Court and were therefore of little or no assistance in the determination of the issues raised in the petition. That being the case, we consider it proper that each party bears its own costs of both the appeal and the petition.

Dated and delivered at Nairobi this 9th day of December, 2011.

S. E. O. BOSIRE
....
JUDGE OF APPEAL

P.N. WAKI
....
JUDGE OF APPEAL

ALNASHIR VISRAM
....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR.