



REPUBLIC OF KENYA



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**Kipkeu v Kangogo & 2 others (Petition 23 of 2018)
[2019] KESC 60 (KLR) (Election Petitions) (18 January 2019) (Judgment)**

Sammy Kemboi Kipkeu v Bowen David Kangogo & 2 others [2018] eKLR

Neutral citation: [2019] KESC 60 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
ELECTION PETITIONS
PETITION 23 OF 2018**

**DK MARAGA, CJ & P, MK IBRAHIM, JB OJWANG,
SC WANJALA, N NDUNGU & I LENAOLA, SCJJ**

JANUARY 18, 2019

BETWEEN

SAMMY KEMBOI KIPKEU PETITIONER

AND

BOWEN DAVID KANGOGO 1ST RESPONDENT

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
(IEBC) 2ND RESPONDENT**

**MARTIN KITUYI WEKESA – (RETURNING OFFICER MARAKWET EAST
CONSTITUENCY) 3RD RESPONDENT**

The requirements to be met by a party before it can invoke the Supreme Court’s appellate jurisdiction

Reported by Kakai Toili

***Jurisdiction** - jurisdiction of the Supreme Court - appellate jurisdiction - requirements to be met before appealing to the Supreme Court - what were the requirements to be met by a party before it could invoke the Supreme Court’s appellate jurisdiction - Constitution of Kenya, article 163(4).*

Brief facts

The 1st respondent was declared the winner in the election of August 8, 2017 for the Member of Parliament Marakwet East Constituency. The appellant was dissatisfied with the result and challenged the election at the trial court on the grounds that the election had been marred by irregularities. The trial court nullified the election of the 1st respondent. Aggrieved by the trial court’s decision, the 3rd respondent filed an appeal at the appellate court. The appellate court allowed the appeal and set aside the trial court’s decision. Aggrieved by the decision the appellant filed the instant appeal. The 1st respondent filed a notice of preliminary objection



against the appeal on grounds that the court lacked jurisdiction to entertain the appeal as it raised no issue of constitutional interpretation or application among other grounds.

Issues

- i. What were the requirements to be met by a party before it could invoke the Supreme Court's appellate jurisdiction?

Held

1. An appeal under article 163(4) (a) of the Constitution lay as of right in any case involving the interpretation or application of the Constitution. The court was at pains to pinpoint which of the issues isolated for determination, if any, turned on the interpretation and application of the Constitution. In the instant case, the main questions that the trial court and the appellate courts dealt with in arriving at their decisions revolved around the burden and standard of proof, the effect of the findings from the scrutiny exercise and the effect of irregularities on the result of the election as per the provisions of section 83 of the Elections Act. None of those questions were resolved through the interpretation or application of the Constitution. There was no question of constitutional novelty, to which the appellate court applied its mind so as to activate the appellate jurisdiction of the court under article 163(4)(a) of the Constitution.
2. The statement that the Elections Act and the regulations thereunder were normative derivatives of the principles embodied in articles 81 and 86 of the Constitution and that in interpreting them a court could not disengage from the Constitution was not a *carte blanche* for invoking the court's jurisdiction under article 163 (4) (a) of the Constitution. An appellant had to convincingly, bring his/her appeal within the coordinates of article 163 (4) (a).
3. In assuming jurisdiction, the appellate court fully appreciated the frontiers of section 85 (A) of the Elections Act. There was no basis upon which to conclude that the appellate court acted in excess of its jurisdiction. The appeal could not be sustained as it did not involve any question of the interpretation and application of the Constitution.

Appeal dismissed; preliminary objection allowed.

Orders

- i. *Judgment of the Court of Appeal dated July 12, 2018 upheld.*
- ii. *The declaration of the result of the election by the Independent Electoral and Boundaries Commission in respect of Member of Parliament for Marakwet East Constituency affirmed.*
- iii. *The appellant to bear his own costs and the costs of the 1st respondent.*
- iv. *The 2nd respondent to bear its own costs and those of the 3rd respondent.*

Citations

Cases

Kenya

1. *Abdalla v Imu & 3 others* Civil Appeal 36 of 2013; [2014] KECA 888 (KLR); [2014] 1 KLR 545 - (Explained)
2. *Adam, Nathif Jama v Abdikhaim Osman Mohamed & 3 others* Petition 13 of 2014; [2014] KESC 48 (KLR) - (Followed)
3. *Chege, Esther Waithira v Manoah Karega Mboku & 2 others* Civil Appeal 4 of 2013; [2014] KEHC 6474 (KLR) - (Followed)
4. *Independent Electoral Board Commission v Mule & 3 others* Civil Appeal 219 of 2013; [2014] KECA 890 (KLR); [2014] 1 KLR 176 - (Followed)
5. *Joho & another v Shabbal & 2 others* Petition 10 of 2013; [2014] KESC 34 (KLR); [2014] 1 KLR 111 - (Followed)
6. *Karua, Martha Wangari v Independent Electoral & Boundaries Commission & 3 others* Civil Appeal 12 of 2018; [2018] KECA 41 (KLR) - (Followed)



7. *Kidero & 4 others v Waititu & 4 others* Petition 18 & 20 of 2014 (Consolidated); [2014] KESC 11 (KLR) - (Followed)
8. *Law Society of Kenya v Center for Human Rights and Democracy & 12 others* Petition 14 of 2013; [2014] KESC 29 (KLR); [2014] 3 KLR 239 - (Explained)
9. *Macharia & another v Kenya Commercial Bank & 2 others* Application 2 of 2011; [2012] KESC 8 (KLR); [2012] 3 KLR 199 - (Followed)
10. *Munya v Kitbinji & 2 others* Application 5 of 2014; [2014] KESC 30 (KLR); [2014] 3 KLR 36 - (Explained)
11. *Nduttu & 6000 others v Kenya Breweries Ltd & another* Petition 3 of 2012; [2012] KESC 9 (KLR); [2012] 2 KLR 804 - (Followed)
12. *Ngoge v Kaparo & 5 others* Petition 2 of 2012; [2012] KESC 7 (KLR); [2012] 2 KLR 419 - (Followed)
13. *Obado v Oyugi & 2 others* Civil Appeal (Application) 39 of 2013; [2014] KECA 784 (KLR); [2014] 3 KLR 91 - (Followed)
14. *Odinga, Raila & 5 others v Independent Electoral and Boundaries Commission & 3 others* Petition 5, 3 & 4 of 2013 (Consolidated); [2013] KESC 6 (KLR) - (Explained)
15. *Odinga, Raila & another v Independent Electoral and Boundaries Commission & 2 others* Presidential Election Petition 1 of 2017; [2017] KESC 42 (KLR) - (Explained)
16. *Olweny, Ayiecho v James Onyango K'oyoo & 2 others* Petition 12 & 13 of 2017; [2018] KESC 64 (KLR) - (Followed)
17. *Walker Munro, Charles Michael Angus v Pamela Ann Walker-Munro* Petition No 7 of 2015 - (Followed)

Texts

Maraga, D., CJ; (2016), *Balancing the Scales of Electoral Justice: 2013 Kenyan Election Disputes Resolution and Emerging Jurisprudence*. International Development Law Organization (IDLO) pg 243

Statutes

Kenya

1. Constitution of Kenya - (Interpreted) articles 25, 27(1); 50(1); 81; 86; 87; 88(5); 94(1); 163(3)(b)(i) (4)(a); 163(4)(a)
2. Elections (Parliamentary and County Elections) Petition Rules, 2017 (cap 7 Sub Leg) - (Interpreted) rule 29
3. Elections Act (cap 7) - (Interpreted) sections 83, 85
4. Supreme Court Rules (cap 9B Sub Leg) - (Interpreted) rule 33

Advocates

None mentioned

JUDGMENT

1. What is before the court is a Petition of Appeal dated August 14, 2018 and filed on August 17, 2018. The appeal is challenging the decision of the Court of Appeal, dated July 2, 2018, which decision upheld the appeal by the 1st respondent and the 2nd respondent's cross appeal, as a result setting aside the High Court Judgment dated February 27, 2018 which had annulled the elections for Member of Parliament, Marakwet East Constituency.



B. Litigation Background

(i) At the High Court

2. In the election of August 8, 2017 for Member of Parliament Marakwet East Constituency, David Bowen (the 1st respondent), was declared the winner after garnering 14,812 votes against his closest rival Linah Jebii Kilimo tally of 13,845 votes. The petitioner, a registered voter in Sambalat Primary School within the Constituency, was dissatisfied with the result and instituted petition *Sammy Kemboi Kipkeu v Independent Electoral and Boundaries Commission & 2 others Election Petition No 2 of 2017*, in the High Court at Eldoret on September 6, 2017, challenging the election of the 1st respondent.
3. The petitioner's claim for nullification of the election was based on grounds that the election had been marred by massive irregularities and systematic manipulation of results, abdication by the 2nd respondent (IEBC) of its duties to conduct free, fair and verifiable elections, as required under articles 10, 38, 81(e) and 86 of the Constitution, disparities between the results in Form 35B and the online portal results, unsigned Forms 35A, violence leading to the death of 15 years old Nancy Chepchumba Kiprop, voting without KIEMS kits, delivery of unsealed ballot boxes to the tallying centre, voter disenfranchisement, failure to secure ballot boxes, and rigging by the respondents.
4. These allegations were in turn denied by the respondents and the petitioner put to strict proof thereof.
5. On November 29, 2017, following an application by the petitioner, the trial Court ordered for partial scrutiny of election materials and partial comparison of forms 35A against forms 35B in a total of 18 polling stations. A detailed Scrutiny Report was filed by the Deputy Registrar of that court on December 6, 2017 and the contents of the said report were not contested by any of the parties before the trial Court.
6. Upon hearing the parties, Kimondo J in his determination framed the only issue for determination as whether the 1st respondent was validly returned as the Member of National Assembly for Marakwet East Constituency. Taking note of the burden of proof, the Learned Judge dismissed the allegations relating to the non-use of the KIEMs Kit in a number of polling stations and voting by unregistered voters.
7. Similarly dismissed, were allegations relating to unsealed ballot boxes from Mungwa Primary Polling Station, the occurrence of violence, and alterations of Forms 35A and 35B. The court also dismissed all the other allegations save for two findings in the Scrutiny Report. Towards this end, the court found that there were a number of ballot boxes with broken seals and yet no satisfactory explanation had been given. Regarding the final tallies, the court concluded that the difference in the final figures cast doubt on the verifiability of the election under article 81(e) of the Constitution, leading to the nullification of the election.

(ii) At the Court of Appeal

8. Aggrieved by the decision of the trial court, the 1st respondent appealed to the Court of Appeal at Eldoret, in *Bowen David Kangogo v Sammy Kemboi Kipkeu & 2 others Election Petition Appeal No 15 of 2018*, challenging the election Court's decision. The appellant's case was that the Election Court had erred: in nullifying his election when the evidence did not support nullification as per section 83 of the Elections Act, in applying the wrong principles of standard and burden of proof, in failing to appreciate that seals fastened on ballot boxes at the start of voting must eventually be broken to facilitate counting, and re-sealed again after counting, in finding that the result was opaque and



- unverifiable, in relying on the partial Scrutiny Report filed in court when parties did not have an opportunity to cross-examine witnesses hence violating his right to fair hearing, and in failing to admit electronic evidence in support of his case, among other grounds.
9. The 2nd respondent also cross-appealed against the decision of the Election Court on grounds that the Learned Judge had erred in failing to hold that the petitioner had not proved his case to the required standard of proof, having found that the petitioner had partially proved his case; in nullifying the elections despite having concluded that the election generally went on smoothly on election day and that the violence did not affect the elections; by placing too much weight and undue attention on the renaming and relocation of two polling stations while failing to adequately consider the Returning Officer's explanations of public participation, and lack of complaints in the results from the two renamed polling stations, by giving undue weight and drawing wrong inferences from the broken seals found in the ballot boxes after partial scrutiny without demonstrating how the same affected the results; by failing to realise that the errors if any were trivial in nature and did not materially affect the election to warrant a nullification.
 10. In its determination, the Court of Appeal identified the following as the issues for determination; whether the appeal and cross-appeal had raised issues of fact to oust its jurisdiction; whether the application by the trial Court of the principles of standard and burden of proof was proper, whether the election Court properly applied the nullification test under section 83 of the Elections Act; whether the election Court properly relied on un-pleaded issues in determining the petition before it; and whether the election Court properly exercised its discretion in condemning the petitioner to pay costs.
 11. On jurisdiction, the Court of Appeal found that it had jurisdiction, guided by the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* Sup Ct Appl No 5 of 2014 [2014] eKLR (Munya Case) and *Timamy Issa Abdalla v Swaleh Salim Swaleh Imu & 3 others* [2014] eKLR, (Timamy Issa Abdalla case) where the Supreme Court interpreted what constituted matters of law under section 85A of the *Elections Act* to include conclusions arrived at by the Election Court.
 12. On burden of proof, the court relied on *Raila Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others*, Petition No 5, 3 & 4 of 2013 [2013] eKLR (Raila 2013), where the Supreme Court held that the evidential burden keeps on shifting, and that the standard of proof for election matters is somewhere between the civil case standard of "balance of probabilities" and the criminal case standard of "beyond reasonable doubt".
 13. The learned judges of appeal, applied the disjunctive test as elucidated by the Supreme Court in *Raila Odinga & another v IEBC & 2 others* Election Petition No 1 of 2017 (Raila 2017) in finding that the illegalities and irregularities did not affect the result of the election. On the issue of broken seals, the Learned Judges held that the same was not pleaded before the trial Court, having only come up after the scrutiny exercise, and hence the trial Judge, ought not to have relied on such finding to nullify the election. On the issue of stations affected by transposition errors, the Judges held that the same were so minor and insignificant to affect the results. Regarding the issue of un-gazetted polling stations, the appellate court found that the same had not been pleaded. At any rate, the court concluded, the same had not affected the result of the election. The appellate Court relied on the case of *Independent Electoral Board Commission v Stephen Mutinda Mule & 3 others* [2014] eKLR, for the holding that parties are bound by their pleadings.
 14. In conclusion, the appellate court held that the irregularities and illegalities complained of were not pleaded with precision and clarity to allow the respondents an opportunity to respond, the court relied on the case of *Zacharia Okoth Obado v Edward Okongo Oyugi & 2 others* [2014] eKLR (Zacharia



Obado case). The court thus set aside the Election Court's decision dismissing the election, upheld the election of the 1st respondent and awarded costs to the respondents.

(iii) At the Supreme Court

(a) Appeal

15. The petitioner, aggrieved by the Court of Appeal decision, has filed the present appeal seeking the following orders:
 - i. An order setting aside the decision and Order of the Court of Appeal and substituting the same with an Order allowing this appeal and reinstating the Judgment of the Election Court.
 - ii. An order declaring that the 1st respondent was not validly elected as a Member of the National Assembly for Marakwet East Constituency.
 - iii. An order directing the 2nd and 3rd respondents to conduct a by election for the Member of National Assembly of Marakwet East Constituency.
 - iv. An order awarding costs in this appeal, in the Court of Appeal and the High Court to the petitioner, payable by the respondents jointly and severally.
16. The appeal is founded on 17 grounds framed under the following 5 broad claims that; the learned judges of appeal misapplied and misinterpreted the law on scrutiny in contravention of articles 27 and 50 of the Constitution; the appellate court misinterpreted the verifiability test in article 86 of the Constitution; the Court of Appeal disregarded the findings of fact in Forms 35A and in particular, the authenticity of Form 35A from Bororwa Polling Station hence condemning the petitioner unheard, contrary to article 27(1) and 50(1) of the Constitution; the Court of Appeal erred in law in admitting the Cross Appeal which was filed outside the timelines prescribed under article 87 of the Constitution and section 85 of the Elections Act; the Court of Appeal erred by misapplying the decision in Raila 2017 [supra] in interpreting section 83 of the Elections Act contrary to articles 163(7) on stare decisis as read with articles 87(1) and 50(1) of the Constitution in its finding that the irregularities and illegalities demonstrated did not affect the results; and finally, that the Court of Appeal erred in law, in awarding costs that were manifestly excessive.
17. On November 26, 2018, the court dismissed the petitioner's application dated October 4, 2018 seeking to amend the record of appeal together with his supplementary record of appeal, and the 1st respondent's application dated September 14, 2018, seeking to strike out the appeal for failure to include the proceedings of J Mohamed JA

C. Parties' Respective Submissions

(i) Petitioner's submissions

18. The petitioner filed his written submissions on December 5, 2018 in which he reiterates his grounds of appeal set out in the petition of appeal. On jurisdiction of this court, he urges that the appeal invokes articles 163(3)(b)(i) and 163(4)(a) of the Constitution, the petitioner cites the case of Hassan Ali Joho & Another v Suleiman Said Shabbal & 2 others Sup Ct Pet No 10 of 2013, and Munya case [supra] in support of this argument. He in addition submits that while interpreting the provisions of the Elections Act, the Election Court and the Court of Appeal could not disengage from the Constitution as the electoral law is founded on the Constitutional provisions of articles 81 and 86. He then proceeds to address what in his view are the main issues for determination as summarized hereunder.



19. On jurisdiction of the Court of Appeal, he submits that the Appellate Court derives jurisdiction to hear election petition appeals pursuant to articles 87(1), 88(5) and 94(1) of the Constitution and section 85A of the Elections Act, which jurisdiction is only on questions of law. He cites the decision in Zacharia Obado. He submits that the Learned Judges erred in the law in recalibrating the evidence tendered at the election Court.
20. On the issue of what weight was to be accorded to the findings in the scrutiny report, the petitioner submits that the matters raised by the report were of great concern in nature and that the learned judges ought not to have dismissed the same in the manner and style that they did. He cites rule 29 of the Elections (Parliamentary and County Elections) Petition Rules 2017, the Court of Appeal decision in Esther Waitihira Chege v Manoah Karega Mboku & 2 others Civil Appeal No 4 of 2013 [2014]eKLR and this Court's decision in Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others Pet 18 & 20 of 2014 [2014] eKLR, Raila 2017 [supra], Munya Case [supra], Zacharia Obado Case [supra] and the article by the Hon Chief Justice Maraga in the book Balancing the Scales of Electoral Justice: 2013 Kenyan Election Disputes Resolution and Emerging Jurisprudence. It is the submission of the petitioner that the findings of the scrutiny ought to have been considered as pointers to the fact that the elections were not conducted in accordance with the principles in articles 81 and 86 of the Constitution.
21. The petitioner further contends that the issue of increasing the scope of pleadings does not arise as all the matters relating to irregularities and illegalities unearthed during the scrutiny exercise were exhaustively pleaded in the petition and the affidavit in support thereof, as was rightfully held by the trial Court. He urges this court to find that the entire election was not conducted in accordance with the principles of free and fair elections as enshrined in articles 81 and 86 of the Constitution.
22. It is further submitted by the petitioner that the appellate court, erred in dismissing the findings made by the trial court on irregularities relating to violence, unsigned Form 35A, errors of transposition, and new discoveries contained in the Scrutiny Report.
23. The appellant submits that, by disregarding crucial evidence, the Court of Appeal violated his non-derogable right to a fair hearing as enshrined in articles 25 and 50 of the Constitution.
24. On burden of proof, the petitioner submits that he satisfied the set legal threshold, contrary to the appellate court's finding.
25. On costs, the petitioner submits that, the two Superior Courts erred in law, by requiring him to pay excessive costs, when he had not been found guilty of any wrong-doing. He relies on the Court of Appeal decision in Martha Wangari Karua v Independent Electoral & Boundaries Commission & 3 others [2018] eKLR.
26. In conclusion, the petitioner submits that it does not matter who won or was declared as the winner of the election; the validity of the results as announced was irredeemably inaccurate. Consequently, the appeal ought to be allowed as prayed.

(ii) 1st Respondent's Case

27. On August 31, 2018 the 1st respondent filed a notice of Preliminary Objection dated August 30, 2018 against the Petition of Appeal on grounds that this court lacks jurisdiction to entertain the appeal as it raises no issue of constitutional interpretation or application; the petition raises new issues not canvassed at the courts below; and finally that the petition is grounded purely on issues of fact, camouflaged as constitutional questions.



28. In support of the preliminary objection, the 1st respondent filed his written submissions on November 30, 2018. He submits that not every grievance should find its way to the Supreme Court except issues of cogent constitutional controversy. It is his argument that, not all election petitions are capable of sustaining an appeal before the Supreme Court, under article 163(4)(a) of the *Constitution*. He cautions against the danger of this court being drawn into litigation when the Court of Appeal has already made binding decisions in exercise of its jurisdiction.
29. He urges that the Petition of Appeal is not properly filed before the court, for the record lacks proceedings of J Mohamed JJ A. The 1st respondent, further submits that the petition offends rule 33 of the *Rules* of this court, as the pages are not correctly numbered making it hard for the respondents to interrogate the court record. It is his argument that these lapses, go to the jurisdiction of the court, and that article 159 cannot be a cure for every lapse, as was held by this court in *Zacharia Obado*; and *Law Society of Kenya v Center for Human Rights and Democracy & 12 others* SC Pet No 14 of 2013 [2014] eKLR. He submits that the discretion of the court should not be exercised to subvert justice as without the proceedings, the court would not be able to properly determine the appeal before it. He prays that the record of appeal be struck out.
30. Further, the 1st respondent filed his submissions to the appeal dated December 3, 2018. The 1st respondent condenses the issues for determination into 3 as follows:
- (a) Whether the Court of Appeal acted within its jurisdiction as per section 85A of the *Elections Act*.
 - (b) Whether the Court of Appeal addressed the issue of Scrutiny properly.
 - (c) Whether the Court of Appeal's conclusion on Burden and Standard of Proof was meritorious.
31. The 1st respondent submits that the Appellate Court acted within its jurisdiction, in accordance with the provisions of section 85A of the *Elections Act*, and this court's decision in *Peter Gatirau Munya* (Munya 2). As to the effect of section 83 of the *Elections Act*, the 1st respondent submits that the appellate court correctly applied the disjunctive test as determined by this court in *Munya 2*, and *Raila 2017*. As regards scrutiny, he submits that the exercise should not be used as a fishing expedition for new evidence not presented at the hearing. He relies on the decisions of this court in *Natbif Jama Adam v Abdikbaim Osman Mohamed & 3 others* Pet No 13 of 2014 [2014] eKLR, *Munya 2* and *Zacharia Okoth Obado*, wherein it was held that, findings from a scrutiny exercise, should not be used 'to introduce new spheres of disputes', away from the initial pleadings. It is his contention that the speculative finding of the election Court on broken seals ought not to have formed the basis for vitiating the election.
32. The 1st respondent also submits that the Appellate Court correctly held that the petitioner had not discharged his burden of proof, as most of the allegations in the petition were not backed by evidence. He therefore faults the election Court for adopting an inquisitorial approach to the trial instead of the age-old adversarial system. He urges that the appeal be dismissed.

(iii) 2nd and 3rd Respondents' Submissions

33. On the issue of jurisdiction, it is the argument by the 2nd and 3rd respondents that this court lacks jurisdiction, given the fact that the Court of Appeal, did not interpret or apply any provision of the Constitution to trigger the appellate jurisdiction of the court under article 163(4)(a) of the Constitution. They rely on the Supreme Court decisions in *Lawrence Nduttu & 6000 others v Kenya Breweries Limited & Another* [2012] eKLR, *Charles Michael Angus Walker – Munro v Pamela Ann Walker-Munro* Sup Ct Pet No 7 of 2015, and *Oyiicho Olweny v James Onyango K'Oyoo & others* Sup Ct



Pet No 12 of 2017. It is further submitted that the issues for determination, as distilled by the petitioner in his petition of appeal do not turn on the interpretation and application of the *Constitution*.

34. As to whether the Court of Appeal erred in law in admitting the cross-appeal out of time, the respondents submit that, this issue is being raised for the first time, as it was never raised at the Court of Appeal.
35. Regarding the issue as to whether, the Court of Appeal acted within the jurisdiction conferred upon it by section 85A of the *Elections Act*, they submit that the jurisdiction of the Court of Appeal was properly invoked by the appeal and cross-appeal. It is further urged that the grounds of appeal advanced by the petitioner on this issue, are generic and vague as they do not establish with a reasonable measure of specificity the manner in which the Appellate Court delved into matters of fact in violation of section 85A of the *Elections Act*.
36. However, on a without prejudice basis, the respondents submit that the fact that, the appellate judges considered matters of fact does not necessarily mean, that the court acted in excess of its jurisdiction. They submit that the Appellate Court, is entitled to look into matters of fact, for the sole purpose of determining whether, the conclusions arrived at by the Trial Court were backed by the evidence on record.
37. Regarding the Scrutiny Report, the respondents submit that, the only substantive issue unearthed by the Report was the fact of broken seals found inside sealed ballot boxes at Mungwa Primary School and Dispensary Hall Polling Stations. They contend that it was a new ground which emerged after the scrutiny, yet the trial Judge failed to give the parties an opportunity to address the same.
38. On the issue of interpretation and application of section 83 of the *Elections Act*, the 2nd and 3rd respondent maintain that the petitioner did not prove to the required standard that the conduct of the elections substantially violated the principles laid down in the Constitution or any election laws. They in addition submit that, the Learned Judge, was obliged in law to consider the second limb of section 83 on effect on the results. They fault the trial Court for failing to undertake a quantitative analysis of the votes affected by the said irregularities and demonstrate how the vote gap between the 1st respondent and the runners up would have diminished so as to reverse the victory in favour of the runner up.

D. Issues For Determination

39. Having considered the pleadings, the submissions by the parties and the authorities cited in support thereof, it is our view that there are only two issues, the determination of which, would dispose of this appeal. These are:
 - i. Whether the Supreme Court has jurisdiction to determine the Appeal; and
 - ii. Whether the Court of Appeal acted in excess of its jurisdiction under section 85 A of the *Elections Act*.

E. Analysis

(i) On Jurisdiction

40. The appeal is brought under article 163(4)(a) of the Constitution. An appeal under this article lies as of right in any case involving the interpretation or application of the Constitution. (Emphasis added). The jurisdictional frontiers of this article have been delimited in many decisions of this court. Thus, in *Samuel Kamau Macharia and Another v Kenya Commercial Bank and 2 others*, [2012] eKLR; *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & Another* [2012] eKLR; *Peter Oduor Ngoge*



v Francis Ole Kaparo & 5 others; [2012] eKLR; *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR; *Evans Odhiambo Kidero & 4 others v Ferdinand Ndung'u Waititu & 4 others* [2014] eKLR; *Hassan Ali Joho & Another v Suleiman Shabbal & 2 others* [2013] eKLR; among others; the court has set out clear guidelines as to when its jurisdiction may be invoked. These guiding principles have been restated in recent decisions by this court.

41. Considering the reasons the Appellate Court gave for its decision to uphold the election of the 1st respondent, and further considering the issues that have been isolated for determination in this appeal, by the petitioner himself, we are at pains to pinpoint which of these, if any, turns on the interpretation and application of the Constitution. In this case, the main questions that the two Superior Courts dealt with, in arriving at their decisions, revolved around the Burden and Standard of Proof, the effect of the findings from the scrutiny exercise, and the effect of irregularities on the result of the election, as per the provisions of section 83 of the Elections Act [Emphasis added]. None of these questions were resolved through the interpretation or application of the Constitution.
42. On the contrary, the Court of Appeal decided all these issues, on the basis of settled applicable legal principles, as established by this court, in earlier decisions wherein similar questions had arisen. There was no question of constitutional novelty, to which the Appellate Court applied its mind so as to activate the appellate jurisdiction of this court under article 163(4)(a) of the Constitution.
43. In his submissions to the effect that the jurisdiction of this court had been properly invoked, counsel for the petitioner placed a lot of reliance on this court's pronouncement in *Munya 1* to the effect that "the Elections Act, and the Regulations thereunder, are normative derivatives of the principles embodied in articles 81 and 86 of the Constitution, and in interpreting them, a court of law cannot disengage from the Constitution." We wish to reiterate that the foregoing statement, is not a Carte Blanche for invoking this court's jurisdiction under article 163(4)(a) of the Constitution. The context under which it was rendered was extensively explained in *Evans Odhiambo Kidero v Ferdinand Waititu*. Towards this end, an appellant must still convincingly, bring his/her appeal within the coordinates of article 163(4)(a) as established by this Court in earlier decisions.

(ii) Whether the Court of Appeal Acted in Excess of its Jurisdiction under section 85 of the Elections Act

44. We have carefully considered the Judgment of the Court of Appeal. We are satisfied that in assuming jurisdiction, the Learned Judges of Appeal fully appreciated the frontiers of section 85(A) of the Elections Act as established by this Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [*supra*]. This being the case, we find no basis upon which to conclude that the Appellate Court acted in excess of its jurisdiction.
45. Applying these principles to the case before us, we have no hesitation in holding that the Petition of Appeal cannot be sustained as it does not involve any question of the interpretation and application of the Constitution. It follows that the preliminary objection is one for allowing.

F. Orders

- (i) The preliminary objection is hereby allowed.
- (ii) The Petition of Appeal is hereby struck out.
- (iii) The Judgment of the Court of Appeal dated July 12, 2018 is hereby upheld.



- (iv) For the avoidance of doubt, the declaration of the result of the election by the Independent Electoral and Boundaries Commission in respect of Member of Parliament for Marakwet East Constituency is hereby affirmed.
- (v) The petitioner shall bear his own costs and the costs of the 1st respondent.
- (vi) The 2nd respondent shall bear its own costs and those of the 3rd respondent.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF JANUARY, 2019.

.....

D.K. MARAGA

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

.....

M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

J. B. OJWANG

JUSTICE OF THE SUPREME COURT

.....

S. C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA

