



REPUBLIC OF KENYA



**KENYA LAW**  
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**Waibara v Kibeh & another (Petition 24 of 2018) [2019] KESC 61 (KLR)  
(Election Petitions) (18 January 2019) (Judgment)**

*Clement Kungu Waibara v Annie Wanjiku Kibeh & another [2019] eKLR*

Neutral citation: [2019] KESC 61 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA  
ELECTION PETITIONS  
PETITION 24 OF 2018**

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

**JANUARY 18, 2019**

**BETWEEN**

**CLEMENT KUNGU WAIBARA ..... PETITIONER**

**AND**

**ANNIE WANJIKU KIBEH ..... 1<sup>ST</sup> RESPONDENT**

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION**

**(IEBC) ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgment of the Court of Appeal (Gatembu, Nambuye & Murgor, JJ.A) sitting at Nairobi, in Election Petition of Appeal No. 20 of 2018, dated 31 July 2018)*

**Principles to be considered in determining whether an election petition appeal merits the Supreme Court's appellate jurisdiction**

Reported by Kakai Toili

***Jurisdiction*** - jurisdiction of the Supreme Court - appellate jurisdiction - where a party filed an election petition appeal - principles to be considered - what were the principles to be considered in determining whether an election petition appeal merited the Supreme Court's appellate jurisdiction - Constitution of Kenya, article 81, 86 and 163(4); Elections Act (cap 7) section 83.

***Electoral Law*** – election petition – scrutiny of votes – application for scrutiny of votes – requirements - whether it was mandatory for a party making an application of scrutiny of votes to identify the particular polling stations in which he sought the scrutiny of votes - Constitution of Kenya, article 48 and 159(2)(d).



***Electoral Law** – election petitions – standard of proof – where there were irregularities and illegalities - whether the mere sight of irregularities and illegalities was a basis for annulling an election for the position of Member of the National Assembly.*

### **Brief facts**

The 1<sup>st</sup> respondent was declared the winner of the elections for the position of Member of National Assembly Gatundu North constituency. The appellant, who was a contestant in the said elections, challenged the election before the trial court on the grounds of irregularities in the conduct of elections. At the end of the trial, while nullifying the 1<sup>st</sup> respondent's election, the trial court concluded that the election was so badly conducted for failure by the 2<sup>nd</sup> respondent to strictly comply with the Constitution and statutory law. Aggrieved by the decision of the trial court, the 1<sup>st</sup> respondent filed an appeal at the appellate court which allowed the appeal and set aside the decision of the trial court. Aggrieved by the appellate court's decision the appellant filed the instant appeal.

### **Issues**

- i. What were the principles to be considered in determining whether an election petition appeal merited the Supreme Court's appellate jurisdiction?
- ii. Whether it was mandatory for a party making an application of scrutiny of votes to identify the particular polling stations in which he sought scrutiny.
- iii. Whether the mere sight of irregularities and illegalities was a basis for annulling an election for the position of Member of the National Assembly.

### **Held**

1. Elections in general drew legitimacy from the broad lines of the Constitution and from the electoral laws. That generality, however, had to be crystallized into clearly-defined normative prescriptions, before the court could take up an electoral appeal as a matter of course, by virtue of article 163 (4) (a) of the Constitution.
2. It was not every election petition that merited the court's appellate intervention. For an electoral dispute to come within the court's mandate, the conclusion reached by the trial court had to clearly emerge as one requiring constitutional interpretation or application. The principles to be considered in determining whether an election petition merited the court's appellate jurisdiction included the following:
  - a. a party could not invoke the court's jurisdiction under article 163(4)(a) of the Constitution, where the trial court found that alleged irregularities and malpractices were not proved, as a basis therefore it did not lie for an application or interpretation of the Constitution;
  - b. the articles of the Constitution cited by a party as requiring interpretation or application at the trial court, had to have required interpretation or application at the trial court and had to have been a subject of appeal at the appellate court; in other words, the article in question had to have remained a central theme of constitutional controversy, in the life of the cause;
  - c. a party had to indicate how the appellate court misinterpreted or misapplied the constitutional provision in question. Therefore, the said constitutional provision had to have been a subject of determination at the trial court; and
  - d. a party had to indicate in specific terms the issues requiring the interpretation or application of the Constitution and had to signal the perceived difficulty or impropriety with the appellate court's decision.
3. A limited number of the issues raised in the petition involved constitutional interpretation or application: for instance, the issue of the application of section 83 of the Elections Act, 2011 and the conduct of election in relation to the terms of articles 81 and 86 of the Constitution. However, some of the issues raised in the appeal and in the cross-petition fell outside the court's mandate and the court would omit them from the ambit of its determination.



4. The trial court's order of scrutiny was made pursuant to the appellant's motion. It was incumbent on the appellant to identify the particular polling stations in respect of which he sought scrutiny, a matter to be ascertained from the petition and the evidence. The scrutiny had been conducted in polling stations that could not be identified in the petition or in the evidence. The forensic audit by the trial court had improperly opened out the scope of the election petition to all polling stations thus grasping such matters as were not part of the pleadings. The forensic audit projected well beyond the trial motions that embodied the essence of the course of justice.
5. A question regarding regular method in trial court processes and the importance of such in assuring justice was certainly a constitutional question: for article 159 (2) (d) of the Constitution stipulated that the purpose and principles of the Constitution would be protected and promoted and a central one of such principles was access to justice with article 48 of the Constitution specifying that the State should ensure access to justice for all persons.
6. The conduct of an election took many vital roles and inputs on the part of a large number of persons and agencies: so that the co-ordinated initiative and outcome was the basis of the overall integrity that would convey the democratic and electoral intent. That was essentially an episode of administrative ethics that depended upon the inputs of many, including the voters, by their integrity and conduct. Such a scenario would not lend itself to any specific formula of rectitude and each case stood to be assessed on the basis of general standards of compliance and integrity.
7. The trial court ought to have ascertained whether the irregularities revealed by the process of scrutiny affected the outcome of the election. It was inapposite to settle the dispute on the basis of any conjecture, however logical.
8. The basis for the annulment of the election of the 1<sup>st</sup> respondent was that the electoral process entailed irregularities. The audit conducted in the trial court did not form an integral element in the lawful proceedings of that court, such irregularities or illegalities as disclosed lay outside proper procedure and would not constitute a basis for annulling the election.
9. The mere sight of irregularities and illegalities gave no basis for annulling the election: they had to have affected the election outcome. The irregularities and illegalities named in the pleadings did not affect the election results. Therefore, the appellate court rightly upheld the election of 1<sup>st</sup> respondent.

*Appeal dismissed.*

### **Orders**

- i. *Petition of appeal dated August 16, 2018 disallowed.*
- ii. *Cross-appeal by the 1<sup>st</sup> respondent, dated September 4, 2018 disallowed.*
- iii. *The declaration of election results by the Independent Electoral and Boundaries Commission in respect of the seat of Member of the National Assembly for Gatundu North Constituency affirmed.*
- iv. *The 2<sup>nd</sup> respondent to bear the 1<sup>st</sup> respondent's costs incurred in the appeal, as well as in the courts below.*
- v. *The appellant and the 2<sup>nd</sup> respondent to bear their own respective costs.*
- vi. *Costs to be regularly assessed and determined by the Deputy Registrar.*

### **Citations**

#### **Cases**

#### **Kenya**

1. *Abdalla v Imu & 3 others* Civil Appeal 36 of 2013; [2014] KECA 888 (KLR): [2014] 1 KLR 545 - (Explained)
2. *Munya v Kithinji & 2 others* Petition 2B of 2014; [2014] KESC 38 (KLR) - (Followed)
3. *Ngoge v Kaparo & 5 others* Petition 2 of 2012; [2012] KESC 7 (KLR); [2012] 2 KLR 419 - (Explained)
4. *Oporo v Independent Electoral and Boundaries Commission & 2 others* Petition 32 of 2018; [2018] KESC 5 (KLR) - (Explained)



5. *Waititu, Ferdinand Ndung'u v Independent Electoral & Boundaries Commission (IEBC) & 8 others* Election Petition 1 of 2013; [2014] KECA 615 (KLR) - (Explained)

### **Malawi**

*Malawi Railways Ltd v Nyasulu* (MSCA Civil Appeal 13 of 1992) [1998] MWSC 3 - (Explained)

### **Statutes**

#### **Kenya**

1. Constitution of Kenya articles 81, 86, 159(2)(d); 163(4)(a) - (Interpreted)
2. Elections (Parliamentary and County Elections) Petitions Rules, 2017 (cap 7 Sub Leg) clauses 28, 29 - (Interpreted)
3. Elections Act (cap 7) sections 82(1); 83; 85A - (Interpreted)
4. Supreme Court Rules, 2020 (cap 9B Sub Leg) rule 38 - (Interpreted)

### **Advocates**

None mentioned

## **JUDGMENT**

### **A. Introduction**

- 1 This is an appeal from the judgment of the Court of Appeal dated July 31, 2018, in Election Petition No 20 of 2018, which set aside the Judgment and decree of the High Court at Kiambu, by Mr Justice Ngugi, dated March 1, 2018. The outcome upheld the 1<sup>st</sup> respondent as the duly elected Member of the National Assembly for Gatundu North Constituency.

### **B. Background**

2. Following the August 10, 2017 General Elections, the 1<sup>st</sup> respondent was declared to be the winner, having garnered 39, 447 votes. There were 7 contestants in this election. The petitioner came second with 9,314 votes. He challenged the election before the High Court, as he was dissatisfied with the outcome. He believed there had been widespread irregularities in the tallying and tabulation of results, and that this was in breach of articles 81 and 86 of the Constitution.
3. The petitioner sought the following Orders in the High Court:
  - (i) a declaration that the 1<sup>st</sup> respondent was not validly elected;
  - (ii) a declaration that he, the petitioner, was the one validly elected as Member of Parliament for Gatundu North Constituency;
  - (iii) an Order for scrutiny and recount and/or re-tally of all the votes cast, to ascertain the actual winner;
  - (iv) a declaration that the election for Gatundu North Constituency held on August 8, 2017, and the subsequent tallying and declaration of results, and the certificate issued to the 1<sup>st</sup> respondent, were invalid, for not being free, fair credible and verifiable;
  - (v) a declaration whether electoral malpractice of a criminal nature had occurred;
  - (vi) the declaration of results for Gatundu North Constituency made on August 10, 2017, and the Certificate issued pursuant thereto and subsequent Special Issue Gazette Notice No Vol CXIX-N0 121 of August 22, 2017 declaring the 1<sup>st</sup> respondent as Member of National Assembly for Gatundu North Constituency, be nullified;



- (vii) in alternative to (ii) above, an Order that a fresh election for Gatundu North Constituency in Kiambu County be held; and
  - (viii) the respondents bear the costs of the petition.
4. Subsequent to the filing of the petition, the parties made various interlocutory applications. These were heard together, and the trial judge issued a consolidated ruling on the October 30, 2017, bearing a set of orders as follows:
- (i) an order striking out certain paragraphs and grounds in the petition, and certain paragraphs in the supporting affidavit of the petitioner;
  - (ii) petitioner allowed to file additional affidavits in support of the petition;
  - (iii) a limited order of scrutiny, covering only ten stations;
  - (iv) certain orders related to KIEMS kit, SDCards, print-out of all the information in the KIEMS kit and SD Cards;
  - (v) leave granted to 2<sup>nd</sup> respondent to file two further affidavits;
  - (vi) the court declined to grant some of the prayers made by the parties.
5. The High Court considered the 30 grounds raised by the petitioner, dismissing all but one, upon which the trial Court came to the inference that the irregularities, omissions and errors in the conduct of the election, and especially in the process of counting, tallying and tabulation of votes, would lead to the conclusion that there had been no substantial compliance with the law. The learned trial judge held that the election was conducted so badly, that it was not substantially in accordance with the law on elections, and so the quantitative vote-outcome itself had no relevance.
6. More than two dozen of the allegations dismissed by the trial court were as follows: the KIEMS kits contained details different from the hard copy; tallying of votes was marred by violence, intimidation, and improper influence; the petitioner's votes were deliberately allocated to the 1st respondent during the tallying exercise; there was a scheme to take the petitioner's votes and allocate them to the 1st respondent; the petitioner's agents were denied entry at the various polling stations; the KIEMS's kits malfunctioned in 4 polling stations; the petitioner's agents were forced to take a 30-minute break before the tallying and tabulation of votes cast, so as to interfere with the credibility of the whole process; the Mwea Primary School Presiding Officer influenced assisted-voters' choices, by refusing to read out all the candidates' names on the ballot papers; non-officials of the 2<sup>nd</sup> respondent were entrusted with the counting of votes at Gatunguru Polling Station, where voting and tabulations of votes did not commence until 10 hours after the close of voting; the petitioner's agents were denied copies of the signed Forms 35A; the Forms 35A were not displayed at the door of the polling stations; at Huruma Kieni Primary School, the Presiding Officer intentionally spoilt votes; the members of the public found ballot papers used in the general elections scattered in various shopping centres, and in Mangu Primary School; the Presiding Officers did not display the Forms 35A properly for verification by agents; there was insufficient lighting in some polling stations; the elections were marred by bad influence and violence, and agents were threatened and intimidated; the party leader and Presidential candidate of the Jubilee Party urged voters to vote as a block for Jubilee, thus disadvantaging other candidates; 203 rejected votes cast in the petitioner's favour were wrongly counted as rejected votes; violence, threats and intimidation scared away voters from Gikandi, Njatha-ini, Murigo and Kawira Polling Stations; certain polling stations had overcast votes; and that finally, witchcraft was used to scare away voters.



7. The final allegation was that the tallying and tabulation of votes was not carried out in an impartial, neutral, efficient, accurate or accountable manner, and did not meet the legal requirements. It is precisely on this all-inclusive allegation, that the learned trial Judge concluded that the election was so badly conducted, for failure by the 2<sup>nd</sup> respondent to strictly comply with the Constitution and Statutory law, that the electoral process merited annulment.
8. Being aggrieved by the decision of the trial court, the 1<sup>st</sup> respondent filed an appeal, citing 14 grounds — that the trial court:
  - (i) failed to consider whether any irregularities affected the outcome of the elections;
  - (ii) misinterpreted section 83 of the *Elections Act, 2011*;
  - (iii) wrongly conducted an inquiry with the Deputy Registrar in the absence of the parties;
  - (iv) wrongly nullified the appellant’s election on errors in the entry of details in Polling Station diaries, without considering whether such error affected the results as contained in the Form 35A;
  - (v) disregarded the results of the elections as contained in Forms 35A;
  - (vi) determined the petition on un-pleaded issues, and expanded the scope of the petition;
  - (vii) disregarded the scrutiny process of 23rd November 2017, and conducted an analysis to which the parties were excluded;
  - (viii) wrongly held that there was a statutory requirement to stamp Result Declaration Forms, when there was none;
  - (ix) improperly applied a novel test [‘the per se test’], as unavoidably leading to election annulment, without considering the terms of section 83 of the *Elections Act, 2011*;
  - (x) failed to apply section 83 of the Elections Act to proven irregularities;
  - (xi) failed to exclude from the final count, results contained in the Forms 35A, thus trivializing the declared results;
  - (xii) failed to apply the principle of stare decisis;
  - (xiii) wrongly found that 2<sup>nd</sup> respondent had failed to provide Form 35A for Maria-ini Polling Station, and Polling Station diaries from Gatei Primary School, Kanyambi Primary School and Maria-ini Primary school; and
  - (xiv) committed an error of law by subjecting the appellant (1<sup>st</sup> respondent herein) to an unfair trial, contrary to article 50(1) of the *Constitution of Kenya, 2010*.
9. The petitioner herein, by his notice of motion of 9<sup>th</sup> April 2018, sought to strike out the 1<sup>st</sup> respondent’s notice of appeal; and he later lodged a cross-appeal bearing two issues, namely:
  - (i) whether the 1<sup>st</sup> respondent was eligible to contest for the seat of Member of Parliament for Gatundu North Constituency; and
  - (ii) whether the petitioner should be excluded from a process of investigation for an alleged election offence.
10. The appellate court dismissed the petitioner’s notice of motion which sought to strike out the appeal. As regards the petitioner’s cross-appeal, the Court of Appeal held that even though the trial judge erred



in declining jurisdiction, and by finding that there was no connection between the application and the petition, the judge properly exercised his discretion in declining to grant a motion of 2<sup>nd</sup> October 2018, which sought the production of 1<sup>st</sup> respondent's employment records and salary payments for July and August 2017, from the County Secretary of Kiambu. The Court of Appeal agreed with the High Court that the production and admission of evidence would have extended the petition beyond the constitutional timelines.

11. The appellate court affirmed the following as the issues for determination:
  - (i) whether the trial court's order of scrutiny for 10 representative Polling Stations was proper, when no particulars had been pleaded;
  - (ii) whether the trial judge established a new test to invalidate elections, which displaced the criteria applicable to section 83 of the *Elections Act*;
  - (iii) whether, by invalidating the election, the trial judge had claimed justification by historical perception, rather than by proven facts of the case;
  - (iv) whether the trial judge determined the petition on the basis of findings of a forensic audit that was before the court, and which had not been pleaded nor proved;
  - (v) whether the trial judge misapprehended the law, when nullifying the elections for Gatundu North Constituency.
12. On the first issue, the appellate court held that scrutiny ought not to have been ordered, as no basis had been laid for the same. The court was not satisfied that the trial judge complied with the requirements of section 82(1) of the *Elections Act*, the Regulations, as well as the guidelines set out by the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*, Supreme Court Petition No 2B of 2014 [2014]eKLR.
13. With regard to the trial judge undertaking an independent forensic audit on Forms 35A and B, the Court of Appeal held that the issue was not pleaded by the petitioner, and neither was there any application, or an Order made suo motu by the court for the same. The appellate court found it improper for the trial judge to have proceeded to undertake forensic audit, while affording no opportunity to the parties to address him on its conduct and scope. The appellate court found that the trial judge had crafted issues that went beyond the scope of the petitioner's case; and since the forensic-audit report was formulated without the participation of the parties, and comprised unpleaded matters, it could not be relied upon as a basis for nullifying the election.
14. With regard to the pleaded issues, and the shortcomings in respect of Forms 35A for some 14 Polling Stations, the appellate court considered them to have been ordinary administrative errors or anomalies, such as were incapable of forming a basis for nullification of an election.
15. Had the trial judge established a new test for invalidating elections, and in effect, displaced the recognised tests applicable to section 83 of the *Elections Act*? The appellate court held that the trial judge had introduced an imprecise, and low threshold for nullifying election; and that this was in departure from the benchmark that the violation is to be substantial, to constitute a basis for nullification of an election.
16. On the question whether, by invalidating the election, the trial judge based his decision on historical supposition rather than on the hard facts of the case, the Court of Appeal held that, notwithstanding the judge's significant reference to historical narratives on election in Kenya, this was not the basis upon which he had nullified the election.



17. As regards the missing electoral materials, the Court of Appeal was not satisfied that such would be sufficient to nullify the election: the court found that the scattered ballot papers had not in any way affected the election process, or the results.
18. In the circumstances, the Justices of Appeal allowed the appeal. They set aside the decision of the High Court, recapitulating their finding as follows:

“Our evaluation of the reasons for which the learned Judge nullified the election which were because of the missing ballot papers and the identified administrative and procedural irregularities concerning form 35 As, brings us to the conclusion that nothing demonstrated that there was a substantial violation of the principles laid down in the Constitution and other written law on elections such as to demand for the election to be nullified.

“Furthermore, we find that the irregularities and illegalities alleged were both insufficient and too insignificant to affect the result of the election. By nullifying the election in the manner that he did, the learned Judge failed to appreciate that the overwhelming majority of votes attained by the appellant was an explicit manifestation of the will of the people of Gatundu North Constituency, and we so declare.”

### C. The Cause at the Supreme Court

19. The petitioner is aggrieved, and seeks redress in this court, by his petition dated August 20, 2018, supported by an affidavit which he swore on August 16, 2018. Both were filed on the same date.
20. What reliefs does the petitioner seek? They are as follows:
  - (i) that the court be pleased to issue a stay against the Judgment and Decree delivered on the July 31, 2018, pending the hearing and final determination of an application for stay;
  - (ii) that the Judgment and/or Orders of the Court of Appeal of July 31, 2018, in Election Petition of Appeal No 20 of 2018 be set aside, and the Judgment and Decree of the High Court at Kiambu, of March 18, 2018 re-instated;
  - (iii) that a declaration do issue to the effect that the election of Member of the National Assembly for Gatundu North Constituency conducted by the 2<sup>nd</sup> respondent on the August 8, 2018, was so badly conducted, contrary to the *Constitution of Kenya 2010* and the electoral laws, that it and is, therefore, a nullity;
  - (iv) that a consequential Order do issue declaring that the 1<sup>st</sup> respondent was not validly elected as the Member of the National Assembly for Gatundu North Constituency;
  - (v) that the costs of this appeal, costs in the Court of Appeal, and costs in the High Court, be awarded to the appellant herein; and
  - (vi) the recommendation that the appellant be probed by the Director of Public Prosecutions, be quashed.
21. The petitioner’s contentions before this court may be summarized as follows:
  - (i) that the appellate court misdirected itself and applied wrong principles in interpreting the values that underpin articles 10, 81 86 and 249 of the *Constitution*, to the prejudice of the petitioner;



- (ii) that the Court of Appeal erred in law, by holding that issues of scrutiny were not pleaded, yet the petition and its final prayers requested scrutiny;
  - (iii) that the Court of Appeal erred in law, and misdirected itself on the issue of scrutiny, in the context of section 82 of the [Elections Act](#);
  - (iv) that the appellate court erred, by failing to appreciate that the Order for scrutiny had been obtained by consent, and was unchallenged;
  - (v) that the court erred in law, by finding and holding that illegalities and irregularities had not been pleaded;
  - (vi) that the Court of Appeal was wrong in faulting the trial Court in its findings on a partial scrutiny;
  - (vii) that the appellate court erred by holding that, of the 30 grounds raised by the petitioner, only one was established as a proper basis of the cause;
  - (viii) that the Court of Appeal perverted the interpretation and application of articles 10, 81, 86 and 249 of the [Constitution](#), by holding that the trial court was justified in invoking historical reminiscence, as a basis of interpretation of articles 81 and 86, even as it found fault with that court for putting up novel theory unknown to the law;
  - (ix) that the Court of Appeal failed to appreciate that the trial court had duly addressed its mind to the law on scrutiny, and had applied the scrutiny report in good faith, as part of the adjudication process in an election petition;
  - (x) that the Court of Appeal erred by holding that the errors in the electoral process were merely administrative and procedural, yet such errors offended the letter and spirit of articles 10, 81, 86, 249 of the [Constitution](#);
  - (xi) that the Court of Appeal erred by departing from well settled jurisprudence regarding errors and violations that distorted the election outcome.
22. Relying upon rule 38 of the [Supreme Court Rules](#), 1st respondent has filed a cross-appeal, contending that the appellate court erred —
- (i) in faulting the trial court for declining jurisdiction to determine the question whether the 1st respondent had been a County Assembly member who abdicated his position before seeking a parliamentary seat; and
  - (ii) in faulting the trial Judge for determining an application for additional evidence

#### **D. Standpoints of the Parties: Submissions of Counsel**

23. The petitioner has raised, as the first issue, the question whether the election for Member of the National Assembly for Gatundu North Constituency violated the Constitution and the applicable law. He departs from the trite perception in election disputes: that an election is a process regulated by the Constitution, the [Elections Act](#), and a set of Regulations; and it is of relevance whether it was carried out in compliance with those laws, in the terms of section 83 of the [Elections Act](#).



24. To reinforce the general argument, learned counsel cited *Ferdinand Ndung'u Waititu v Independent Electoral & Boundaries Commission (IEBC) & 8 Others*, [2013] eKLR, in which this court adopted the earlier stand of the trial judge (Mwongo, J) who had thus pronounced himself (para. 71):

“I think that to constitute a void election on account of non-compliance with the law, the evidence of irregularities and discrepancies in the election must be of such a nature as to disclose through clear and weighty evidence, any one or more of the following:

- (a) an attempt to establish a winner otherwise than in compliance with the Constitution; and/or
- (b) an attempt to suppress, alter or undermine the will of the voters exercising their rights under article 38, in such a manner as to affect the overall outcome of an election; and/or
- (c) a failure by or of the electoral system, or in the processes used therein, such as to constitute non-compliance with the general principles of the electoral system under article 81 of the Constitution; and/or
- (d) such clear and glaring flaws in the conduct of the elections as substantially render any of the aspirations of article 86(a),(b),(c) or (d) ... meaningless; and/or
- (e) that the non-compliance with the electoral law or regulations was substantial enough to, and did in fact, affect the result of the election.”

25. Learned counsel further advanced the broad picture by citing this court’s decision in *Gatirau Peter Munya v Dickson Mwenda Kithinji and 2 Others*, Petition 2B [2014] eKLR, thus:

“The *Elections Act*, and the Regulations thereunder, constitute the substantive and procedural law for the conduct of elections...Where an election is conducted in such a manner as demonstrably violates the principles of the Constitution and the law, such an election stands to be invalidated.”

26. Counsel thereafter submitted that the election for the position of Member of the National Assembly for Gatundu North, was in violation of cardinal constitutional principles, and of the *Elections Act* and the Regulations: so the trial court, relying upon the test established by this court, rightly invalidated the same.

27. Learned counsel submitted that section 85A of the *Elections Act* limits the Court of Appeal’s jurisdiction in election petitions to matters of law only, and that the court ought to defer to the trial court’s decisions regarding the probative value, and the admissibility of evidence, as well as the conclusions and inferences drawn from such evidence. He urged that admissibility of the evidence guiding the trial court was not challenged, and neither did the appellate court determine such evidence to be inadmissible. Therefore, counsel urged, by excluding a portion of the admitted evidence, and reaching conclusions on irregularities on pleaded issues only, the appellate court re-calibrated evidence and exceeded its jurisdiction. Counsel presented this argument as resting upon the pillars of this court’s



decision in *Gatirau Peter Munya v Dickson Mwenda Kithinji and 2 Others*, Petition 2B (*supra*), where it was held as follows (para. 93):

“Much as the court [of Appeal] is free to navigate the evidential landscape on appeal, it must, in a distinct measure, show deference to the trial Judge: regarding issues such as the credibility of witnesses and the probative value of evidence....”

28. Learned counsel urged it to be of no significance that 1<sup>st</sup> respondent was not the author of certain irregularities in the conduct of the election; and that the bare fact of the disappearance of election materials, constituted a manipulation such as would benefit her, 1<sup>st</sup> respondent. He invoked the general proposition that election petitions are inherently public-interest matters, that transcend individual interest.
29. He submitted that, by requiring as a scheme of proof that an admitted illegality had affected the election the petitioner must prove deliberate involvement by both IEBC and the 1<sup>st</sup> respondent in the proven illegalities and irregularities, the Court of Appeal had introduced a new standard of proof unknown in law, and had made the wrong decision.
30. Counsel argued that election materials were not properly secured, and therefore the outcome of the election was not verifiable, and that this position was not controverted at the appellate stage.
31. Learned counsel’s submissions culminated with the plea that the appellate court’s findings be set aside, and the trial court’s orders reinstated.
32. The 1<sup>st</sup> respondent, in contesting the appeal and establishing her cross-appeal, proposed several issues for determination:
  - (i) whether the appellate court’s findings on the trial court’s treatment of the scrutiny issue was right;
  - (ii) whether the appellate court erred in finding that the trial court had addressed unpleaded issues;
  - (iii) whether the appellate court misunderstood section 83 of the *Elections Act*;
  - (iv) whether the appellate court erred in upholding the 1<sup>st</sup> respondent’s election.
33. Learned counsel was in agreement with the appellate court, and contested the propriety of the trial court’s position on scrutiny: on the basis that well after the parties had addressed the trial court on the scrutiny report, the trial judge had conducted a forensic audit on that report, recording his findings on the basis of charts that are referred to in his judgment— charts that were formulated out of the scheme of court process.
34. The next issue rested upon section 83 of the *Elections Act*, 2011. Learned counsel urged that this Section had been interpreted by the trial court as entailing three thresholds: (i) where the electoral process fails to meet the standards prescribed in articles 81 and 86 of the *Constitution*; (ii) where the electoral process substantially violates written laws (a qualitative test); and (iii) where specific irregularities or illegalities in the electoral process have affected the election outcome (a quantitative test).
35. Counsel submitted that the trial court had treated the first of the said three criteria as an inherent, dispositive yardstick, based on the makings of a “per se standard”, for determining the validity of an election: and that once this yardstick was met, then the basis of invalidation of an election was fulfilled — without any need to examine the matter in the context of section 83 of the *Elections Act*. Learned counsel supported the appellate court’s position, that the mode of proof advanced by the trial court lacked a basis in law.



36. The 2<sup>nd</sup> respondent stands on the same plank as 1<sup>st</sup> respondent, and in that behalf, raises specific questions for this court’s attention. These include:
- (i) whether the appellate court was in error, in finding the trial court to have misapprehended the law on scrutiny;
  - (ii) whether the appellate court should have upheld the forensic audit by the direction of the trial judge;
  - (iii) whether the trial Judge’s “per se” test was sustainable in law;
  - (iv) whether the appellate court erred in upholding the election of Member of Parliament for Gatundu North Constituency;
  - (v) whether 1<sup>st</sup> respondent was qualified to contest the Parliamentary seat in question.
37. Learned counsel expressed agreement with the appellate court’s finding; that the trial court’s discretion to order scrutiny was improperly exercised, as the petitioner’s application had not conformed to the terms of clause 24(4) of the Elections Regulations; and as the Order of scrutiny did not emanate from any Orders made *suo motu*, by virtue of section 82 of the *Elections Act*.
38. Counsel acclaimed the appellate court’s decision which deprecated the trial court’s forensic audit, the effect of which was to “[craft] issues that went well beyond the scope of the petitioner’s case”, urging that court sought to limit themselves to parties’ pleadings. It was submitted that while it was proper for a court to grant *suo motu* an Order for scrutiny, the said forensic audit was not such an Order as envisaged by section 82 of the *Elections Act* — and so it was an instance of straying into unpleaded matters. In support of the relevant principle, counsel cited a passage in a case of comparative pertinence, *Malawi Railways Ltd. v Nyasulu*, MSCA Civil Appeal No 13 of 1992; [1998] MWSC3 (11 Nov 1998), in the following terms:
- “[T]he court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realms of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all, and thus it would be a denial of justice ....”
39. Counsel has then considered the question whether the appellate court was in error, in holding the ‘*per se*’ concept to have been an improper basis for annulling an election, and whether such was the test applied by the trial court. He submits that the appellate court rightly found that the trial court had improperly sought to lower the threshold for the invalidation of an election.
40. Learned counsel then addressed himself to the question whether the appellate court had erred, in upholding the election of the Member of the National Assembly for Gatundu North Constituency. He submitted that the appellant’s cause is founded upon accounts of irregularities in the electoral process: such as lack of official IEBC stamps; cancellations; wrong entries; and lack of signatures. But in his persuasion, such factors did not constitute a basis for the nullification of an election. He urged the court to affirm the appellate court’s decision. He urged that the standing judicial obligation was



to give effect to the electoral voice, citing the terms of the decision in *Timamy Issa Abdalla v Swaleh Salim Swale Imu & 3 Others* [2014] eKLR:

“It is the duty of the election court to give effect to the will of the electorate”.

41. On the question of missing ballots, the 2<sup>nd</sup> respondent relied on the principle in the *Timamy Issa Abdalla* case (para. 70):

“The election court ought to have applied [a recognized principle] in determining whether the irregularities of the missing bundles affected the outcome of the election .... Had the trial judge properly applied this [principle], she would have found that the final outcome of the results was not affected as the appellant still maintained the lead. Thus the election results could not be nullified on account of this irregularity”.

### **E. The Question of Jurisdiction**

42. Whereas the instant case has been brought pursuant to article 163(4)(a) of the *Constitution*, “as of right in any case involving the interpretation or application of [the] Constitution”, the 1<sup>st</sup> respondent, in her grounds of objection (dated September 4, 2018), contended that the petition raised no “cardinal issues of law or [of] jurisprudential moment” [*Peter Oduor Ngoge v Francis Ole Kaparo & 5 others*, Sup Ct of Kenya, Pet No 2 of 2012], and bore no element of constitutional interpretation or application. Such is not the case, as we find, taking into account this court’s recent clarification of its jurisdictional scope in electoral matters which, by their very nature, spin around political-cum-constitutional manifestations. More light radiates on this question from the decision in *Zebedeo John Opore v Independent Electoral and Boundaries Commission and 2 Others*, Sup Ct Election Petition No 32 of 2018 (para 56):

“We are alive, however, to the broader context of the electoral process: elections in general, draw legitimacy from the broad lines of the Constitution, and from the electoral laws. This generality, however, has to be crystallized into clearly-defined normative prescriptions, before the Supreme Court will take up an electoral appeal as a matter of course, by virtue of article 163(4)(a) of the Constitution”.

43. On that basis, it is to be recognized that, not every election petition merits this court’s appellate intervention. For an electoral dispute to come within this court’s mandate, the conclusion reached by the trial court must clearly emerge as one requiring constitutional interpretation or application. The scenario is more specifically depicted in the said *Zebedeo John Opore* case, thus (para 57):

“Certain principles emerge from the terms of this Judgment, as follows:

- ‘(a) In an election petition before this court, a party may not invoke the court’s jurisdiction under article 163(4)(a), where the trial court had found that alleged irregularities and malpractices were not proved, as a basis then does not lie for an application or interpretation of the Constitution.
- ‘(b) The articles of the *Constitution* cited by a party as requiring interpretation or application at the trial court, must have required interpretation or application at the trial court, and must have been a subject of appeal at the Court of Appeal; in other words, the article in question must have remained a central theme of constitutional controversy, in the life of the cause.



- ‘(c) A party seeking this court’s intervention has to indicate how the Court of Appeal misinterpreted or misapplied the constitutional provision in question. Thus, the said constitutional provision must have been a subject of determination at the trial court.
- ‘(d) As a logical consequence of the foregoing, a party must indicate to this court in specific terms, the issues requiring the interpretation or application of the Constitution, and must signal the perceived difficulty or impropriety with the appellate court’s decision’.”

44. On the foregoing principles, we consider that a limited number of the issues raised in the petition do indeed involve constitutional interpretation or application: for instance, the issue of the application of section 83 of the *Elections Act, 2011* and the conduct of election in relation to the terms of articles 81 and 86 of the *Constitution*. We recognise, however, that some of the issues raised in the petition of appeal and in the cross-petition fall outside this court’s mandate, and accordingly, we will omit them from the ambit of our determination.

## F. Analysis

45. It is the petitioner’s argument that the trial court’s Order for scrutiny was issued *suo motu* — and that this was in accordance with the terms of section 82 of the *Elections Act*. Such a standpoint is contested by the respondents, who submit that the said Order was issued in response to a motion by the petitioner, of 2 October 2017 — and that, therefore, by virtue of the *Election (Parliamentary and County Elections) Petition Regulations, 2017*, Clauses 28 and 29, the relevant polling stations ought to have been specified. And the appellate court’s determination was that the trial court’s Order of scrutiny had been made pursuant to the petitioner’s motion. Such a finding has merit; and the implication is that the Order for scrutiny ought to comply with certain principles established in judicial practice (*Gatirau Peter Munya v Dickson Mwenda Kithinji and 2 Others*, Pet No 2B [2014] eKLR). As the appellate court held, it was incumbent on the petitioner to identify the particular polling stations in respect of which he sought scrutiny — a matter to be ascertained from the petition and the evidence. The appellate court established that the scrutiny had been conducted in polling stations that could not be identified in the petition, nor the evidence.
46. Did the appellate court rightly fault the forensic audit by the trial judge, which occasioned reliance on unpleaded issues to invalidate the election? According to the petitioner, the material relied on by the trial court in conducting the forensic audit was on record, and so the parties did have an opportunity to raise questions upon it. But the respondents have contended that they were denied the right to be heard on the forensic audit report itself, about which they came to learn only at the hour of Judgment-delivery. They affirm that the audit had certainly not arisen from a lawful *suo motu* judicial order, and no such order appeared on record. And the appellate court was in agreement, holding that the said audit had improperly opened out the scope of the election petition to all Polling Stations — thus grasping such matters as were no part of the pleadings.
47. The rationality and integrity of the appellate court’s finding is, in our view, unanswerable. The forensic audit, though a critical factor in the learned trial judge’s finding, projects well beyond the trial motions that embody the essence of the course of justice.
48. Such a question, regarding regular method in trial court process, and the importance of such in assuring justice, is certainly a constitutional question: for article 159(2)(d) of the *Constitution* stipulates that “the purpose and principles of this Constitution shall be protected and promoted”. And a central one



of such principles is access to justice — article 48 specifying that “[t]he State shall ensure access to justice for all persons”.

49. However, the most direct question falling to this court’s mandate is whether the appellate court did not properly apply articles 81 and 86 of the *Constitution*, and whether that court misapprehended the object of section 83 of the *Elections Act*. It was the finding of that court that the trial court had misapplied the law, by detracting from the elevated threshold for nullifying elections.
50. The trial court had interpreted section 83 of the *Elections Act* as incorporating three separate criteria for annulling an election: firstly, where the electoral system in place, or the actual conduct of election, falls short of the standards contemplated; secondly, where the conduct of the election is perceived in qualitative terms under section 83 of the *Elections Act*, to be in departure from the terms of written law; and lastly, where there were irregularities or illegalities in the conduct of the election — this being regarded as a “quantitative test” under section 83 of the *Elections Act*. Of the three gauges, the trial judge presented the first as a “*per se* test”, which once established, precluded all other considerations, and inexorably occasioned the annulment of an election: and so there was no need to consider the possible scenarios under section 83 of the *Elections Act*. The appellate court found it improper to proceed from such a postulate, in resolving a dispute such as had arisen in this instance; and that it was necessary for the court to ascertain whether the irregularities or illegalities in question had, indeed, affected the election outcome.
51. The conduct of an election takes many vital roles and inputs, on the part of a large number of persons and agencies: so that the co-ordinated initiative and outcome, is the basis of the overall integrity that will convey the democratic, electoral intent. This is essentially an episode of administrative ethics, that depends upon the inputs of many, including the voters, by their integrity and conduct. Such a scenario, it is plain to us, would not lend itself to any specific formula of rectitude; and each case stands to be assessed on the basis of general standards of compliance and integrity.
52. In view of such considerations, we are in agreement with the appellate court’s standpoint: that the trial court ought to have ascertained whether the irregularities revealed by the process of scrutiny, did affect the outcome of the election. It was clearly inapposite to settle the dispute on the basis of any conjecture, however logical.
53. This brings us to the vital question: whether the appellate court rightly upheld the election of 1<sup>st</sup> respondent as Member of the National Assembly for Gatundu North Constituency. Our inclination in this regard emerges from the course of deductions in this judgment. The basis for the annulment of the election was that the electoral process had entailed irregularities. But it is our finding that the appellate court correctly held that the audit conducted in the trial court did not form an integral element in the lawful proceedings of that court: and so, such irregularities or illegalities as it disclosed, lay outside proper procedure – and so will not constitute a basis for annulling the election.
54. We are, furthermore, in agreement with the Court of Appeal, that the mere sight of irregularities and illegalities gave no basis for annulling the election: they must have affected the election outcome. The appellate court did establish that the irregularities and illegalities named in the pleadings, had not affected the election results. Therefore, the appellate court rightly upheld the election of 1<sup>st</sup> respondent.

## G. Orders

55. Our detailed consideration of the permutations of this case, and its pertinent questions of the Constitution and the law, now culminates in a set of orders, as follows:
  - (a) The petition of appeal dated August 16, 2018 is hereby disallowed.



- (b) The cross-appeal by 1<sup>st</sup> respondent, dated September 4, 2018 is similarly disallowed.
- (c) The declaration of election results by the Independent Electoral and Boundaries Commission in respect of the seat of Member of the National Assembly for Gatundu North Constituency, is hereby affirmed.
- (d) The 2<sup>nd</sup> respondent shall bear 1<sup>st</sup> respondent's costs incurred in this appeal, as well as in the courts below.
- (e) The appellant and the 2<sup>nd</sup> respondent shall bear their own respective costs.
- (f) Costs shall be regularly assessed and determined by the Deputy Registrar.

**DATED AND DELIVERED AT NAIROBI THIS 18<sup>TH</sup> DAY OF JANUARY, 2019.**

.....

**D.K. MARAGA**

**CHIEF JUSTICE AND THE PRESIDENT OF THE SUPREME COURT**

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**M. K. IBRAHIM**

**JUSTICE OF THE SUPREME COURT**

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**J. B. OJWANG**

**JUSTICE OF THE SUPREME COURT**

.....

**S.C. WANJALA 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**

