



Ali v Independent Electoral and Boundaries Commission & 2 others (Petition 31 of 2018) [2019] KESC 58 (KLR) (Election Petitions) (6 February 2019) (Judgment)

Mohammed Mahamud Ali v Independent Electoral and Boundaries Commission [2019] eKLR

Neutral citation: [2019] KESC 58 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
ELECTION PETITIONS
PETITION 31 OF 2018**

MK IBRAHIM, JB OJWANG, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ

FEBRUARY 6, 2019

BETWEEN

MOHAMMED MAHAMUD ALI APPELLANT

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST
RESPONDENT**

**AISHA ABUBAKAR CHANGAMWE CONSTITUENCY RETURNING
OFFICER 2ND RESPONDENT**

OMAR MWINYI SHIMBWA 3RD RESPONDENT

*(Being an Appeal from the Judgment and Order of the Court of Appeal in
Mombasa (Visram, Karanja & Koome JJ. A) on 26th July, 2018, in Mombasa)*

The Supreme Court lacked jurisdiction to hear a matter, about the constitutionality of a statute, that was first raised at the Court of Appeal and was not considered at the High Court

Reported by Beryl Ikamari & Mathenge Mukundi

***Jurisdiction** - jurisdiction of the Supreme Court - appellate jurisdiction – jurisdiction in matters of constitutional interpretation and application - where an appeal raised matters on the constitutionality of a statute which was not canvassed in both of the superior courts below - whether the Supreme Court had jurisdiction to hear and determine the matter on constitutionality of the statute.*

***Electoral Law** – elections – nullification of elections - whether minimal irregularities in an election could led to the nullification of the election – Elections Act (cap 7), section 83.*

***Electoral Law** - election petition appeal - award of costs - discretion to award costs - whether election petitions were forms of public interest litigation in which parties should bear their own costs - Elections Act (cap 7), section 84.*



Evidence Law - burden of proof - burden of proof in election petitions - discharge of the burden of proof by a petitioner and the shifting of the burden of proof to the respondent - when did the burden of proof shift in an election petition - Evidence Act (cap 80) sections 108 and 109.

Brief facts

The appellant filed a petition at the High Court, citing various electoral irregularities, including improper influence, issuance of multiple ballot papers, and discrepancies in the number of votes cast. He also claimed that some ballot papers were not signed or stamped by presiding officers. Despite acknowledging some irregularities, the High Court ruled that they were not significant enough to annul the election, and the petition was dismissed with costs.

Aggrieved by the High Court's decision, the appellant filed an appeal at the Court of Appeal and raised a new argument regarding the constitutionality of section 83 of the Elections Act. However, the Court of Appeal dismissed the appeal, agreeing with the High Court that the alleged malpractices did not affect the election result. The appellate court also refused to rule on the constitutional issue since it had not been raised in the lower court. Undeterred, the appellant brought the case before the Supreme Court, arguing that the irregularities should have resulted in the election being nullified. Additionally, he contested the High Court's order requiring him to pay Kshs 8,000,000.00 in costs, arguing that each party should have borne their own costs.

Issues

- i. Whether an issue on constitutionality of a statute, which was not canvassed at the High Court but was first raised at the Court of Appeal, could be raised at the Supreme Court.
- ii. Whether minimal irregularities in an election could lead to the nullification of the election.
- iii. Whether an election petition was a form of public interest litigation, and therefore every party to an election petition should bear its own costs.
- iv. When did the burden of proof shift in an election petition?

Held

1. The Supreme Court lacked jurisdiction to hear and determine issues of constitutionality of section 83 of the Elections Act. The issue of constitutionality of section 83 was not raised at the High Court. The issue was first raised in the Court of Appeal which neither entertained nor pronounced itself on the issue. The constitutionality issue did not originate from the High Court and therefore the Supreme Court could not hear and determine it. In addition, questions entailing the interpretation and application of the Constitution, for good order and efficiency in the administration of justice, had to commence at the High Court.
2. In an election petition, the burden of proof remained at all times with the appellant. An appellant was under an obligation to discharge the initial burden of proof before the respondents were invited to bear the evidential burden. Where a party alleged non-conformity with the electoral laws, the appellant had to not only prove that there had been non-compliance with the law, but that such non-compliance affected the outcome of the elections. Upon discharging that burden, the respondent would bear the burden of proving the contrary. The evidential burden of proof remained with the appellant at all times and that was the legal position regarding the questions of burden of proof in election petitions.
3. The appellant was obligated to provide evidence in support of any alleged violations of the Constitution to vitiate an election. A party that alleged irregularities, malpractices and collusion, was mandated with the duty to adduce evidence in support of those allegations. The test for the nullification of an election was provided for in section 83 of the Elections Act. The section in the form that it was before the 2017 amendment was applicable to the appeal. It provided that an election would not be voided for non-compliance with any written law relating to the election if it appeared that the election was not conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election.



4. The invalidation of an election followed considerable irregularities, malpractices, and non-compliance with law. The appellant had successfully proved minimal irregularities in the conduct of the election for Member of National Assembly for Changamwe Constituency. Elections as a matter of course could not be perfect and errors, so long as they were minimal, should not affect the will of people. The superior courts correctly analyzed the effect of the illegalities and irregularities on the election and could not fault their finding that they were not of such magnitude as to justify the invalidation of the disputed elections.
5. The Court of Appeal determined that the election petition was not a public interest litigation that ought to attract no costs on the appellant. The court held that the appellant was to bear the costs of the appeal. That decision could not be faulted as costs followed the event.
6. Section 84 of the Elections Act stated that an election court would award costs of and incidental to a petition and such costs would follow the cause. Costs followed the event and a court had discretion in awarding costs. There was no reason to disturb the settled legal provisions on costs.

Appeal dismissed.

Orders

- i. *The judgment of the Court of Appeal was upheld.*
- ii. *For the avoidance of doubt, the declaration of the result of the election by the IEBC in respect of the Member of National Assembly for Changamwe Constituency was affirmed.*
- iii. *The appellant to bear the costs of the instant appeal.*

Citations

Cases

Kenya

1. *In the Matter of the Interim Independent Electoral Commission (Applicant) Constitutional Application 2 of 2011; [2011] KESC 1 (KLR); [2011] 2 KLR 32 - (Explained)*
2. *Konchellah, Gideon Sitelu v Julius Lekakeny Ole Sunkuli & 2 others* Petition 21 of 2018; [2018] eKLR - (Explained)
3. *Munya, Gatirau Peter v Dickson Mwenda Kithinji & 2 others* Petition 2B of 2014; [2014] eKLR - (Followed)
4. *Mwau, John Harum & 3 others v Attorney General & 2 others* Election Petition 2 & 4 of 2017; [2017] eKLR - (Followed)
5. *Odinga & 7 others v Independent Electoral and Boundaries Commission & 3 others* Petition 5, 3 & 4 of 2013 (Consolidated); [2013] KESC 1 (KLR); [2013] 1 KLR 63 - (Explained)
6. *Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae)* Presidential Election Petition 1 of 2017; [2017] KESC 42 (KLR) - (Explained)
7. *Rai & 3 others v Rai & 4 others* Petition 4 of 2012; [2014] KESC 31 (KLR); [2014] 2 KLR 253 - (Followed)
8. *Wanjohi v Kariuki & 2 others* Petition 2A of 2014; [2014] KESC 26 (KLR); [2014] 4 KLR 366 - (Followed)

India

1. *Arikala Narasa Reddy v Venkata Ram Reddy Reddygari & Anr* Civil Appeal Nos. 5710-5711 of 2012; 2014 2 SCR - (Explained)
2. *Charan Lal Sabu & Others v Singh* 1984 AIR 309, 1984 SCR (2) 6 - (Explained)

Statutes

Kenya

1. Constitution of Kenya articles 2(4); 10; 38; 47; 81; 82; 86 - (Interpreted)
2. Elections (Parliamentary and County Elections) Rules, 2017 (cap 7 Sub Leg) rule 30 - (Interpreted)



3. Elections Act (cap 7) sections 83, 84 - (Interpreted)

Advocates

1. *Dr. Khaminwa* and *Mr Gikandi* for the appellant
2. *Mr Munyithya*, *Mr Ochieng*, and *Mr Mutisya* for the 1st and 2nd respondents
3. *Mr Balala* for the 3rd respondent

JUDGMENT

A. Introduction

1. This is an appeal against the Judgment of the Court of Appeal dated July 26, 2018, in Election Petition of Appeal No 7 of 2018, which affirmed the decision of the High Court dismissing the appellant's appeal. The appellant herein had contested the election of 3rd respondent as the Member of the National Assembly for Changamwe Constituency, Mombasa County.

B. Background

(i) High Court

2. Following the August 8, 2017 General Elections, the 3rd respondent was declared to be the duly elected Member of the National Assembly for Changamwe Constituency, having garnered 31,584 votes. The appellant, a registered voter at St. Lwanga Polling Station in the Constituency, was not satisfied with the manner in which the election was conducted and filed Election Petition No 7 of 2017 on the 6th of September 2017 at the Election Court in Mombasa.
3. It was his contention that the election was not in accordance with the framework for a proper electoral system and voting as set out in article 81 and 86 of the *Constitution*. Further, that the 1st respondent failed to carry out a transparent, verifiable, accurate and accountable electoral process as required by articles 81, 83 and 88 of the *Constitution*. He also alleged that the 1st and 2nd respondents failed to adhere to the provisions on voting, counting of votes and declaration of results set out in the electoral laws.
4. On those grounds, the appellant sought for orders that; the 1st and 2nd respondents to be compelled to produce all the election materials including the KIEMS kits, Forms 32As and 35B and ballot boxes for preservation and safe custody; Inspection and scrutiny, recount and re-tallying of votes cast, polling station diaries, KIEMS Kits, registers and other electoral materials; a declaration that the 1st and 2nd respondents violated articles 81 and 86 of the *Constitution*; a declaration that the 3rd respondent was not validly elected as the Member of National Assembly for Changamwe constituency; an order that fresh elections be conducted in respect of Member of Parliament for Changamwe constituency; a declaration forbidding the 3rd respondent from ever vying as a candidate in the entire election or holding a public office; further relief as the court would deem fit to grant; and costs of the Petition.
5. The 1st and 2nd respondents controverted the allegations made by the appellant and filed a joint replying affidavit on September 15, 2018, four volumes of Supplementary Affidavits on October 4, 2017 and further Supplementary Affidavit on November 9, 2017. On his part, the 3rd respondent filed a response to the petition on September 19, 2017 denying the allegations by the appellant and stated that the said election was free, fair, verifiable and accountable.



6. The High Court (Njoki Mwangi J) in her Judgment delivered on January 28, 2018, dismissed the Petition. It was held in so doing, that the appellant must not only prove that the conduct of the elections violated the principles in the Constitution or other written law on elections but must also prove that the irregularities or illegalities complained, of affected the result of the election. The court cited the provisions of section 83 of the *Elections Act* and relied on the decisions in *Raila Amollo Odinga & Another v Independent Electoral and Boundaries Commission & 4others & Attorney General & Another*, Presidential Petition No. 1 of 2017 2017 eKLR (Raila 2017) and *Gatirau Peter Munya v Dickson Mwenda Kithinji and 2others* 2014 eKLR(Munya 2b). The court in dismissing the Petition stated:

“Having carefully considered the complaints arising out of the petition, the evidence tendered and the scrutiny report, I am of the considered view that the irregularities occasioned by the 1st and 2nd respondents are not of such a magnitude that would justify annulment of the elections for Changamwe constituency for the elections held on August 8, 2018 Even if the disputed votes were to be collated and added onto those garnered by the Mr. Abdi Daib, the would be margin of votes would still be wide. I therefore find that the Petitioner has failed to prove his petition to the required standards.”

7. While awarding costs to the respondents, the courtrelied on the provisions of section 84 of the *Elections Act* that the court shall award costs of and incidental to a petition and such costs shall follow the cause, and thus awarded costs to the respondents of Kshs 8,000,000.

(ii) Court of Appeal

8. Aggrieved by the High Court Judgment, the appellant moved the Court of Appeal in Mombasa in Election Appeal No. 7 of 2018 challenging the whole trial Court Judgment and preferring 31 grounds of appeal which that court encapsulated as follows: That the trial court erred in law by; failing to appreciate the grave constitutional and statutory breaches occasioned by the 1st and 2nd respondents; by asserting that the burden of proof in an election petition lies squarely on the Petitioner; by failing to determine the effect of the varying results on the online portal and declaration in Form 35; by misdirecting itself in law by holding the scale of the illegalities and irregularities could not invalidate disputed elections; by failing to critically evaluate the evidence; and by condemning the appellant to pay extortionate costs of up to KShs 8,000,000.00.

9. The respondents opposed the appeal and maintained that the learned judgehad properly addressed all the issues raised in the petition, evaluated and properly analyzed the evidence placed before the court and applied the law and precedents set in other election petitions before arriving at her Judgment. The respondent also objected to the invitation to the court by the appellant to evaluate the evidence tendered before the High Court on the ground that factual issues are a preserve of the trial court.

10. In its Judgment delivered July 26, 2018, the appellatejusticesagreed with the trial courtand dismissed the appeal. On the issue of its jurisdiction, the court stated that:

“As stated earlier, we do not think we have the latitude to heed the invitation of the appellant to wade into the labyrinth of the evidence presented before the trial court and make our own determination on facts. section 85A(1) of the *Elections Act* is succinct. It states:-

‘An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of county governor shall lie to the Court of Appeal on matters of law only.’”



11. The court went on to state;

“..... In the present case, we are inclined to agree with the trial court’s assessment and holding that the irregularities would not affect or alter the results of the 3rd respondent. All the appellant has achieved is to show that there would be an alteration in the number of votes given to the candidates but not to show the 3rd respondent as the winner of the election would be affected. In that regard, we find no basis to upset the trial court’s finding and thus this ground of appeal also fails.”

12. On the issue of the constitutionality or otherwise of section 83 of the *Elections Act*, the court held that it lacked jurisdiction as the issue had not been canvassed before the trial court. It thus stated on the issue;

“This is a prayer on an issue that has sprung out of the blues. There was no deliberation on the same before the trial court and thus the Court of Appeal can neither entertain nor make a pronouncement on it. We do not harbor any doubt that the issue is a serious one that ought to be canvassed fully and not be sprung to the court at this point. The High Court as the first port of call in interpreting the Constitution ought to have been accorded opportunity to pronounce itself on the issue.’

13. Finally on the issue of costs, the appellate court held that whereas costs are awarded at the discretion of the court, interference with the order on costs in this appeal was inevitable and observed that costs should not be used as a scarecrow to chase away deserving litigants who have grievances from seeking justice or to impede access to justice. That in view of the fact that the 1st and 2nd respondents’ conduct in the challenged elections left a lot to be desired and necessitated the filing of the election petition giving rise to the appeal, that they should not be rewarded with an award for costs of any amount.

C. Supreme Court

14. it is the Court of Appeal’s decision of July 26, 2018, that has aggrieved the appellant and necessitated the filing of the appeal before this court for orders that;

- i. The petition of appeal be allowed;
- ii. The orders of the Court of Appeal delivered in Mombasa Election Appeal No 7 of 2018 be set aside in its entirety;
- iii. In lieu thereof the Petition be granted in terms of the prayers in Mombasa Election Appeal No 7 of 2018;
- iv. If the appeal is dismissed, the appellant be awarded Costs of the Petition in the trial court, Court of Appeal and this court;
- v. Without prejudice to prayer (iv) each party be ordered to bear their own costs.

15. The appellant preferred 7 grounds in support of his Petition summarized as follows; that the Judges of the Court of Appeal erred in law by concluding the variance in the number of votes for different elections is not outright evidence of malpractice unless evidence is adduced to the contrary: by concluding that the issuance of multiple ballot papers had not been proved to the set standards; by asserting that single constitutional violation cannot invalidate an election; concluding that the illegalities and irregularities were not of a magnitude to invalidate an election; and by condemning him to pay costs of the appeal.



Appellant's Submissions

16. Highlighting their written submissions dated September 21, 2018, Dr Khaminwa appearing with Mr Gikandi for the appellant argued as hereunder;
17. Learned counsel Dr Khaminwa argued that both the trial court and the Court of Appeal appreciated that there were irregularities proved by the appellant including the issuance of extra ballot papers, improper influence and variance in votes cast with regard to other elections, but wrongly held that there was a nexus between the alleged constitutional violations and the results of the impugned election. Relying on this court's decision in *Raila 2017* at paragraph 374, 389 and 390, it was counsel's contention that once a court is seized of an election dispute and has established violation of constitutional provisions, the question of the numbers and the result does not matter, that the court must proceed to nullify the election.
18. Expounding on that issue, Dr Khaminwa contending that section 83 of the *Elections Act* be declared null and void, he noted that the appellate justices declined to do so as it was an issue that was raised for the first time at that court. Counsel further submitted that the court erred when it came to that determination, arguing that where a party demonstrates clearly that the Constitution has been breached, the issue cannot be swept under the rug and must be delved into. Dr Khaminwa was also adamant that section 83 of the *Elections Act* contravenes articles 10, 38, 47, 81, 82, and 86 of the *Constitution* adding that in light of the provisions of article 2(4) of the *Constitution*, any law that is inconsistent with the Constitution is void to the extent of that inconsistency.
19. Mr Gikandi associated himself with the submission of his learned senior Dr Khaminwa. He reiterated that once a party demonstrates that there has been constitutional breach or violation he does not need to have to go further than that, as the court has no alternative but to nullify the election. Counsel submitted that they were able to prove intimidation, issuance of extra ballot papers and improper influence, all amounting to infringements of articles 86 and 82 of the *Constitution*, arguing that where it comes to infringements, one cannot look to measure of the extent of those infringement but that any violation amounts to a nullity. He submitted that this is the position in *Raila 2017*.
20. On costs it was his submission that the appeal was public interest litigation, which in view of article 28 and as is the general rule, a court will be reluctant to award costs in a Constitutional petition more so public interest litigation. He supported this assertion citing this court's decision in Supreme Court Petition No 2 & 4 of 2017, *John Harun Mwau & 3 others v. Attorney General & 2 others* 2017 eKLR (John Harun Mwau case). He further argued that the appellate court having found that it was the conduct of the 1st and 2nd respondents' that necessitated the filing of the election petition before the trial court, should have directed that the 1st and 2nd respondents' compensate the appellant the costs incurred in the filing of the petition and the appeal. Counsel urged the court in the unlikely event it dismisses the appeal to review the orders on costs by ordering the 1st and 2nd respondents' to meet his costs before the trial court and the Court of Appeal.

Respondents Case

21. Mr Munyithya teaming up with Mr Ochieng and Mr Mutisya represented the 1st and 2nd respondents. They filed their submissions dated October 4, 2018 in opposition to the Appeal.

In court, Mr Munyithya submitted that the Court of Appeal's decision could not be faulted, the agreed with it determination that a court ought to examine the totality of the alleged violations and the impact of the same on the entire elections. Counsel argued that the elections were conducted in accordance with the principles laid down in the Constitution and other statutory requirements. It was



- also his contention that under section 83 of the *Elections Act* as read alongside articles 81 and 86 of the *Constitution*, an election cannot be nullified other than on grounds of irregularities that substantially affect the result. To fortify that submission he relied on *Gatirau Peter Munya v Dickson Mwenda Gitbinji & 2 others* 2014 eKLR and *Raila 2013*.
22. On the burden of proof in an election petition, it was his submission that the appellant ought to have proved all the allegations that were raised before the trial court, urging that the onus remains with the party making any allegation. It was his other contention that the appellant failed to plead with precision or adduce any evidence in support of the case thus failing to discharge that burden.
 23. On the issue of the constitutionality of section 83 of the *Elections Act*, counsel was adamant that the same was raised for the very first time at the Court of Appeal, and as parties are bound by their pleadings, this court ought not to delve into that matter.
 24. Mr Mutisya on his part submitted that the credibility test that any election must adhere to, was articulated in this court's decision in the *John Harun Mwaui* case. It was thus his position that the impugned election was indeed credible for a number of reasons; it was well prepared, conducted within the confines of the law, and resulted in a legitimate winner. He also agreed with the trial court's assessment and holding that the pleaded irregularities were very minute and would not have affected the outcome of the election of the results of Changamwe constituency and could not affect the will of the people.
 25. On costs, Mr Ochieng submitted that the applicable law is section 84 of the *Elections Act* and rule 30 of the *Elections (Parliamentary and County Elections) Rules 2017* which stipulates that costs shall follow the cause on that submission, he relied on the determination in *George Mike Wanjohi v Steven Kariuki & 2 others* SC Pet No 2A of 2014 and *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4others* SC No 4 of 2012.
 26. Mr Balala, represented the 3rd respondent and filed his submissions on October 19, 2018. He agreed entirely with the Court of Appeal that the alleged irregularities failed to meet the set threshold under section 83 of the *Elections Act*. It was his other submission that the discrepancies detected were all properly addressed by the Electoral Commission which gave cogent reasons thus making the allegations unsuitable before the courts. On the same breath, he submitted that if there were those allegations that remained unproven, they did not warrant the nullification of an election. To that end, he relied on *Raila 2017* and *Munya 2B* which decisions emphasized that not every irregularity or infraction of the law is enough to nullify an election.
 27. On costs, it was his submission that the appellant wrongly suggests that an election Petition is a public interest litigation matter and further that he fails to identify the class or community of people with pecuniary interest or any interest at all in the matter by which their legal rights or liabilities are affected. Counsel also agrees with the 1st and 2nd respondents submission that section 84 settles the argument as to the party to bear the costs of any litigation as costs follow the cause.

D. Issues for Determination

28. The following are the main issues for determination as crystalized from the Petition of appeal, the responses thereto, the written and oral submissions;
 - (i) Whether section 83 of the *Elections Act* violates the provisions of the Constitution;
 - (ii) Whether the Petition has met the grounds for nullification of an election;What reliefs are available to the parties.



E. Analysis

Whether section 83 of the Elections Act violates the provisions of the Constitution.

29. It is the appellant's case that section 83 of the *Elections Act* is in contravention with articles 10, 38, 47, 81, 82 and 86 of the *Constitution*. He argues that it does not reflect the correct law of the country, that as he has been able to demonstrate various breaches of the constitution, he need not illustrate further, as any breach should lead to nullification of an election.
30. On their part, the 1st, 2nd and 3rd respondents argue that this is a new issue that was only brought before the court at the appellate stage. They argue that a court should not go outside what has been pleaded by the party as those issues should be raised for the first time at the High Court.
31. It is not in contention that the issue of the Constitutionality of section 83 of the *Elections Act* was not raised at the High Court. Notwithstanding, counsel for the appellant Dr Khaminwa urges this court to address the issue as raised, as this being the apex court, it would be improper to leave pertinent issues unresolved. It is his contention that the court has no choice but to make a determination on the matter.
32. This court has had the occasion to settle the law and pronounce itself on the issue of specificity of pleadings. In our decision in *Raila 2017* we quoted with approval, *Arikala Narasa Reddy v Venkata Ram Reddy Reddygari & Anr*, Civil Appeal Nos 5710-5711 of 2012; 2014 2 SCR a Supreme Court of India decision that held:

[52] Further, the court went on and observed that:

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings. The court cannot exercise discretion of ordering recounting of ballots just to enable the election petitioner to indulge in a roving inquiry with a view to fish material for dealing the election to be void. The order of recounting can be passed only if the petitioner sets out his case with precision supported by averments of material facts.”Emphasis

33. Similarly, Chief Justice Chandrand of India in *Charan Lal Sabu & Others v Singh* 1985 LRC (Const) was of the same line of reasoning when he stated;

“The importance of specific pleading in these matters can be appreciated only if it is realized that the absence of a specific plea puts the respondent at a great disadvantage. He must know what case he has to meet.”

34. We see no reason to depart from the rational in these matters, and it therefore remains that a court only ought to address issues raised in a Petition. We emphasize that issues for consideration must not only be pleaded, but that they must also be set out in a clear and precise manner.



35. We must in addition state that questions entailing the interpretation and application of the Constitution must for good order and efficiency in the administration of justice commence at the High Court. This was the principle articulated by this court in the Advisory Opinion *In the matter of the Interim Independent Electoral Commission* (applicant), Constitutional Application No 2 of 2011 at pp 23-24, para 43 where we clearly stated;

“....The High Court has been entrusted with the mandate to interpret the Constitution. This empowerment by itself, however, does not confer upon the High court an exclusive jurisdiction; for by the appellate process, both the Court of Appeal and the Supreme Court are equally empowered to interpret the Constitution, certainly in respect of matters resolved at first instance by the High Court..... Only where litigation takes place entailing issues of constitutional interpretation, must the matter come in the first place before the High Court, with the effect that interpretation of the Constitution by both the Court of Appeal and the Supreme Court will have been limited to the appellate stages.”

36. In applying these principles to this appeal, we see no reason to interfere with the appellate court’s decision not to entertain and make a pronouncement on the issue of constitutionality of section 83 as this issue was raised for the very first time at their court, and had not been canvassed at the High Court.

Whether the Petition has met the grounds for nullification of an election;

37. In the present matter, the trial Court came to the conclusion that the irregularities occasioned by the 1st and 2nd respondents were not of such magnitude as would justify the annulment of the election results, adding that even if the disputed votes were to be collated and added on to those garnered by the runners up, the margin would remain wide. The appellate judges agreed with the reasoning of the trial court, except for its conclusion on the issue where the number of votes cast in a polling station exceeded the number of voters who turned up to vote. On that particular issue, they were of the view that it was the votes of the entire polling station that ought to have been excluded and not just the votes that exceeded the number of votes cast. The appellate justices found that, what the appellant had demonstrated, was that there would be an alteration in the number of votes given to the candidates, but that the appellant had failed to illustrate how the 3rd respondent’s win in the election would be affected.
38. On perusal of the record, it is revealed that the alleged constitutional and statutory malpractice include:- issuance of multiple ballot papers; improper influence; denial of voter’s right to vote; discrepancies in number of votes cast with number of voters who turned up to vote in several polling stations; variations in the number of votes cast for different electoral seats when compared; involvement in electoral malpractice by 3 polling clerks; failure by returning officers to give reasons for unsigned Form 35A; failure by respondents to avail two Form 35 B and unused Form 35A booklets for scrutiny; existence of two Form 35B; formatting of KIEMS Kits and the court’s opinion on KIEMS kits; failure by respondents to produce polling station diaries/producing polling station diaries that were tampered with; alleged failure by Presiding Officers to swear Oath of Secrecy and alterations that were not countersigned.



39. Out of these allegations, it was the appellate court's observation that there has to be nexus between the alleged constitutional violations and the result of the impugned election. In coming to this conclusion, the court relied on the [Raila 2013](#) decision where we stated:

“[196] ...Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections.”

40. Of the alleged malpractices, the record reveals that the appellant was able to prove the following; a single incident of improper influence by an undisclosed IEBC official who assisted PW22's sister to vote in favor of the 3rd respondent. Both the trial court and the appellate court found it doubtful that the single incident would lead to nullification of an entire election. He also proved variation in the number of the votes cast for different electoral seats, where it was held that a variance in the number of votes cast for different elections is not on the face of it evidence of malpractice unless evidence is presented to the contrary. The failure of a Returning Officer to give reasons for failure to sign some Form 34As was also deemed insufficient to invalidate the results by virtue of regulation 79(6).

41. Additionally, the courts found that failure by the Presiding officers in 69 polling stations to swear oath of secrecy and the failure to countersign corrections on a single form, insufficient to invalidate the results. As to the allegations of votes cast exceeding the number of voters in a single polling station, the Court of Appeal was of the opinion that the discrepancy did not affect the result.

42. In all the other allegations, the superior courts made conclusions that there was insufficient evidence to prove the said malpractices. They held that the burden of proving allegations made in an election petition remains at all times with the appellant and it is only where he proves the allegations, does it shift to the respondents.

43. In his petition, it was the appellant's case that the trial court was of the view that he had proved the issue of multiple voting in a station, improper influence by an IEBC official, and illegal and improper signing of Forms 35 by 3 polling clerks. However, the appellant did not submit further on the matter. On their part, the 1st, 2nd and 3rd respondents argue that he failed to plead with precision or adduce any evidence in support his case, thus to discharge the burden of proof. They argue that all the evidence tendered before the High Court and the Court of Appeal was considered, weighed against the constitutional threshold in regard to elections and that sound determinations of the same were made.

44. In this present matter, both the trial court and the appellate court found that the appellant did not provide sufficient proof of some of the allegations presented before this court. Further, that where allegations were proved, the appellant did not demonstrate that the allegations vitiated the election.

45. The issue of burden of proof in election petitions has been enunciated by this court in [Raila Odinga & others -v- Independent Electoral & Boundaries Commission & others](#), Petition No 5 of 2013, where we stated that:

“...a petitioner should be under obligation to discharge the initial burden of proof before the respondents are invited to bear the evidential burden. The threshold of proof should in principle be above the balance of probabilities, though not as high as beyond-reasonable doubt. Where a party alleges non-conformity with the electoral law, the Petitioner must not only prove that there has been noncompliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondents bear the burden of proving the contrary”.



Further we observed that;

[196] This emerges from a long-standing common law approach in respect of alleged irregularity in the acts of public bodies, *omnia praesumuntur rite et solemniter esse acta*, all acts are presumed to be done rightly and regularly. So, the Petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescriptions of the laws.

46. In respect of the standard of proof, we held that;

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

47. Similarly in *Raila 2017* we held that;

“[132] Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and “remains constant through a trial with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.

[133] It follows therefore that once the court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce ‘factual’ evidence to prove his/her allegations of breach, then the burden shifts and it behoves the respondent to adduce evidence to prove compliance with the law.....”

48. The upshot of the above is that the evidential burden of proof remains at all times with the petitioner. We affirm that this remains the legal position regarding the question of burden of proof in election Petitions.

49. It is the appellant who had the burden to ensure that he set out a clear case on any claims by adducing evidence proving the allegations. On perusal of the record, it is evident that both the trial court and the Court of Appeal found that the appellant failed to do just that. The superior courts were of the opinion that the appellant was obligated to provide evidence in support of any alleged violations of the Constitution to vitiate an election. We agree with that finding as it is the proper principle of law reflected in a long chain of decisions by this court mandating a party that alleges irregularities, malpractices and collusion, with the duty to adduce evidence in support of those allegations.



50. Coming back to the matter at hand, the test for nullification of an election, is stipulated under section 83 of the Elections Act which specifies the measure within which an election can be invalidated. The said section applies to this appeal as provided before the 2017 amendment and states;

“No election shall be declared void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non – compliance did not affect the result of the election”

51. The application of the section and the manner in which articles 81(e) and 86 of the Constitution are to be applied in determining whether the conduct of an election followed the provisions of the Constitution, was discussed by this court in Gatirau Peter Munya v Dickson Mwenda Kitinji & 20thers 2014 eKLR where we stated;

“216. It is clear to us that an election should be conducted substantially with the principles of the Constitution, as set out in article 81(e). Voting is to be conducted in accordance with the principles set out in article 86. The Elections Act, and the Regulations thereunder, constitute the substantive and procedural law for the conduct of elections.

217. If it should be shown that an election was conducted in accordance with the principles of the Constitution and the Elections Act, then such election is not to be invalidated only on grounds of irregularities.

218. Where, however, it is shown that the irregularities were of such magnitude that they affected the election results, then such an election stands to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection are not enough, by and of themselves, to vitiate an election. In this regard, we stand on the same plane as the learned Judges in Morgan, Opitz and Nana.

219. By way of example, if there would be counting or tallying errors which after scrutiny and recount do not change the result of an election, then a trial Court would not be justified, merely on account of such shortfalls, to nullify such an election. However, a scrutiny and recount that reverses an election result against the candidate who had been declared a winner, would occasion the annulment of an election. Examples of irregularities of a magnitude such as to affect the result of an election, are not however, closed.”

52. Similarly, in Raila 2017 this Court considered the application of section 83 of the Elections Act and the circumstances under which an election may be nullified for failure to adhere to provisions of the Constitution and the law or on account of irregularities finding;

“ [209] therefore, while we agree with the two Lord Justices in the Morgan v Simpson case that the two limbs should be applied disjunctively, we would, on our part, not take Lord Stephenson’ route that even trivial breaches of the law should void an election. That is not realistic. It is a global truism that no conduct of any election can be perfect. We will also go a step further and add that even though the word “substantially” is not in our section, we would infer it in the words “if it appears” in that section. That expression in our view requires that, before



vitiating it, the court should, looking at the conduct of the whole election, be satisfied that it substantially breached the principles in the Constitution, the *Elections Act* and other electoral law. To be voided under the first limb, the election should be what Lord Stephenson called “a sham or travesty of an election” or what Prof Ekirikubinza refers to as “a spurious imitation of what elections should be.”

53. By the same token, in the *John Harun Mwau* case when faced with the question whether the non-compliance, irregularities and improprieties in the second Presidential election of 2017 were substantial and significant, and affected the result thereof we stated;

“[407] Was the election credible? From the controlling factor of legitimacy, the election would be perceived as credible, in the absence of clear evidence that the bulk of it simply failed; that due procedure was not followed in the conduct of election; that someone other than IEBC conducted the election; that the procedures of vote counting were not followed; that false results were announced, in place of the true outcome; that the voters were turned away from polling stations by IEBC, or by State agencies of power; that the motions of verification and announcement of vote-outcome were not complied with. We have stated elsewhere in this judgment that none of these factors were at play or at play in any significant manner.

[408] If it emerges that, in accordance with article 81(e) of the *Constitution* of Kenya, the repeat election was conducted by secret ballot; that it was free from violence (more particularly, such violence being initiated and prosecuted by the electoral body, or by State agencies); that the voters were not influenced by intimidation or corruption; that the management process was in the hand of IEBC; that voting was transparently done; that such voting proceeded transparently, efficiently, accountably, with precision and clear expression of voter-preference – then such election has to be judged to have been credible for the purposes of the *Constitution*, the law, and the national expectation.

[409] It is our considered view, therefore, that the burden falls on the 2nd and 3rd petitioners, not just to allege, but to show by objective evidence the legal foundations of their claim; and thereafter to lay before this court weighty evidence to sustain each and all of their claims. As already demonstrated, some of their claims are of such a generic order as to lend only feeble grounds for the court to depart from prima facie perceptions of legitimacy and credibility...”

54. We affirm that this remains the legal position regarding the question of nullification in election Petitions, and it follows then that the invalidation of an election follows considerable irregularities, malpractices, and non – compliance with law.

55. In this present matter, what the appellant has successfully proved are minimal irregularities in the conduct of the election for Member of National Assembly for Changamwe Consituecy. As observed by this court in a number of cases, elections as a matter of cause cannot be perfect and errors, so long as they are minimal, should not affect the will of people.



56. We note that this court has in the recent election cycle also determined the place of minimal irregularities in an election. We thus stated in Supreme Court Petition 21 of 2018, *Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli and 2 others* (unreported):

“ [63] We also agree with the trial court’s appreciation of the evidence presented before it that the election, despite the isolated cases of irregularities which did not affect the result of the election, was essentially free and fair. We therefore find that in view of the fact that the election went on smoothly in all 165 polling stations, save one, the alleged violation of article 86(a) of the *Constitution* did not substantially affect the outcome of the election...”

57. We are accordingly satisfied that the superior courts correctly analyzed the effect of the illegalities and irregularities on the election and cannot fault their finding that they were not of such magnitude as to justify the invalidation of the disputed elections. We are also of the view that the will of the people of Changamwe Constituency was duly expressed and in keeping with our pronouncements in the above outlined cases of *Munya 2b*, *Raila 2013* and *Raila 2017*, while there may have been imperfections in the conduct of the elections, they did not impeach or affect the overall outcome of the results.

What Reliefs are available to the Parties?

58. The appellant has challenged the Court of Appeal’s determination on costs arguing that the appeal was a public interest litigation, and that it should not attract costs. Conversely, the respondents affirm the Court of Appeal’s determination that costs follow the event.

59. The law on costs is set in section 84 of the *Elections Act* which provides as follows:

“ An election court shall award the costs of and incidental to a petition and such costs shall follow the cause.”

60. Further, the *Elections Petitions Rules, 2017*, provide:

“ Rule 30.

- (1) The election court may, at the conclusion of a petition, costs, make an order specifying –
 - (a) the total amount of costs payable;
 - (b) the maximum amount of costs payable; (c) the person who shall pay the costs under paragraph (a) or (b); (d) the person to whom the costs payable under paragraphs (a) and (b)
- (2) When making an order under sub-rule (1), the election court may –
 - (a) disallow any prayer for costs which may, in the opinion of the election court, have been caused by vexatious conduct, unfounded allegations or unfounded objections, on the part of either the petitioner or the respondent; and
 - (b) impose the burden of payment on the party who may have caused an unnecessary expense, whether that party is successful or not, in order to discourage any such expense...”



61 This court has previously settled the law on award of costs, deeming that costs follow the event. Further, that a judge has the discretion in awarding the same. This was our decision in the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others Petition No 4 of 2012; 2014 eKLR (Jasbir Singh case) where we stated:

“[18] It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.”

“[22] Although there is eminent good sense in the basic rule of costs – that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the applicant.”

62 We see no reason to fault the reasoning of the learned appellate judges on costs. The appellant has not demonstrated how, in reaching their determination, the learned judges applied wrong principles or that they exercised the discretion capriciously or whimsically. We are thus satisfied that the Court of Appeal appreciated the principles enunciated in the above case and arrived at a correct decision. The costs so awarded were neither punitive nor excessive. Consequently, we shall not interfere with that determination.

63 It is in that light that we hold that the appellant shall bear the costs of this Appeal.

F. Orders

65 Consequent upon our findings above, the final orders are that;

1. That the Judgment of the Court of Appeal of Kenya sitting at Mombasa dated 26th of July 2018 is upheld.
2. That the Petition of Appeal No 31 of 2018 dated September 3, 2018 is hereby dismissed.
3. For the avoidance of doubt, the declaration of the result of the election by the Independent Electoral and Boundaries Commission in respect of the Member of National Assembly for Changamwe Constituency is affirmed.
4. The appellant shall bear the costs of this Appeal.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF FEBRUARY, 2019.

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M.K. IBRAHIM



JUSTICE OF THE SUPREME COURT

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J. B. OJWANG

JUSTICE OF THE SUPREME COURT

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S. C. WANJALA

JUSTICE OF THE SUPREME COURT

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NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

