Ibren v Independent Electoral and Boundaries Commission & 2 others (Petition 19 of 2018) [2018] KESC 75 (KLR) (21 December 2018) (Judgment)

Nasra Ibrahim Ibren v Independent Electoral and Boundaries Commission & 2 others [2018] eKLR

Neutral citation: [2018] KESC 75 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PETITION 19 OF 2018

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

DECEMBER 21, 2018

BETWEEN

NASRA IBRAHIM IBREN ..... APPELLANT

AND

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

ARNOLD MUTWIRINJABANI ..... 2ND RESPONDENT

SAFIA SHEIKH ADAN ..... 3RD RESPONDENT

(Being an Appeal from the Judgement and decree of the Court of Appeal at Nairobi (Musinga, Kiage & M'Inoti, JJA) delivered on 22nd June, 2018, in Election Petition Appeal No. 9 of 2018)

Election petition appeal need to raise issues of constitutional interpretation to warrant an appeal to the Supreme Court

Reported by Kakai Toili

Jurisdiction *- jurisdiction of the Supreme Court - appellate jurisdiction-requirements to be met before appealing to the Supreme Court - statement of the particular appellate jurisdiction of the Supreme Court - whether it was mandatory for a party appealing to the Supreme Court to out rightly state the particular appellate jurisdiction of the Supreme Court in which he was appealing and what was the effect of failure to do so - whether it was sufficient for a party appealing to the Supreme Court as of right in any case involving interpretation or application of the Constitution to state that the Court of Appeal in its reasoning and conclusions took a constitutional trajectory - Constitution of Kenya article 163(4)*

Brief facts

The appellant and 3rd respondent were among the candidates vying for the position of Women Representative to the National Assembly for Marsabit County during the August 8, 2017 general elections. Upon conclusion

of counting and tallying of the votes, the 2nd respondent declared the 3rd respondent winner, hence the duly elected Woman Representative to the National Assembly for Marsabit County.

Aggrieved by the declaration, the appellant challenged the election of the 3rd respondent and sought its nullification at the High Court on the grounds of illegalities and irregularities allegedly committed in all the four constituencies of Marsabit County. The High Court dismissed the petition for lack of merit. Aggrieved by the High Court's decision, the appellant filed an appeal at the Court of Appeal, the Court of Appeal dismissed the appeal. Aggrieved by the decision of the Court of Appeal, the appellant filed the instant appeal.

Issues

i. Whether it was sufficient for a party appealing to the Supreme Court, as of right in any case involving interpretation or application of the Constitution, to state that the Court of Appeal in its reasoning and conclusions took a constitutional trajectory.

ii. Whether it was mandatory for a party appealing to the Supreme Court to outrightly state the particular appellate jurisdiction of the Supreme Court in which he was appealing and what was the effect of failure to do so?

Held

1. A jurisdictional issue was fundamental and could even be raised by the court *suo moto*. A court had to be moved under the correct provisions of the law. That was not an idle requirement but had its rationale anchored in the specialized nature of the jurisdiction of the Court as provided in article 163(3) of the Constitution. Appeals to the Supreme Court from the Court of Appeal were not as a matter of course. Not every appeal from the Court of Appeal was appealable to the Supreme Court.
2. Article 163(4) of the Constitution demarcated a two-prong appellate jurisdiction of the Supreme Court from decisions of the Court of Appeal. The two jurisdictional avenues were not mutually inclusive but were independent of each other and there was need for a party that came before the court to clearly state which one she/he invoked.
3. Parties seeking to appeal to the court had a duty to outrightly state the particular jurisdiction of the court that they invoked. Jurisdiction was thus so fundamental that it should not be left to conjecture. The court and other parties in a matter should not be left agonizing under what appellate jurisdiction a matter was filed. The court faulted the appellant for not having outrightly disclosed under which appellate jurisdiction she moved the court.
4. A matter that directly involved an interpretation and/or application of a particular provision of the Constitution constituted an appeal as of right under article 163(4)(a) of the Constitution.
5. Where a party in an election petition invoked the court's jurisdiction under article 163(4)(a) of the Constitution, it was not enough for one to generally allege that the Court of Appeal erred in its decision(s) and that its reasoning and conclusions took a constitutional trajectory. The constitutional trajectory was not illusionary. It was tangible and should be discernable from a party's pleadings. A party was under a constitutional forensic duty to clearly set out the particulars of the constitutional transgressions that in his/her opinion the Court of Appeal committed in their interpretation and/or application. Those grounds had to be pleaded with precision and the constitutional principle and/or provision alleged to have been violated clearly set out.
6. The court retained the constitutional discretion to filter and determine whether a matter before it satisfied the constitutional muster in article 163(4)(a) of the Constitution. The phrase appeal as of right as provided under article 163(4)(a) of the Constitution did not in any way absolve a party from fulfilling that constitutional forensic requirement.
7. There was no mention of any provision of the Constitution that was alleged to have been violated and/or misapplied or misinterpreted by the Court of Appeal. Being an appeal from the Court of Appeal, the appellant was under an obligation, with clarity and precision, to point out the errors of law in the judgment of the Court of Appeal. The appellant was supposed to satisfy the court that the Court of Appeal erred in reaching at the decision it made. Hence, the focal point of the

appellant's grievances should be directed at specific portions of the Court of Appeal judgment with the aim of demonstrating how the Court of Appeal erred and/or misinterpreted and/or misapplied the Constitution. The appellant had to state with precision the particular constitutional principle and/or provision violated. All the eight grounds upon which the petition was grounded fell short of that requirement.

8. The court was at pain to discern which constitutional issue(s) the appellant wanted the court to settle. The appellant was generally aggrieved by the High Court decision and the fact that the Court of Appeal did not reverse that decision on her appeal. Her grievances were anchored on the factual findings by the High Court which issues could not invoke the court's jurisdiction under article 163(4)(a) of the Constitution. Further, none of the issues framed by the appellant in her petition or submissions was framed as a constitutional issue.
9. The appellant had not rightfully invoked the court's jurisdiction under article 163(4)(a) of the Constitution. There was no issue of constitutional interpretation and/or application that beckoned the court's further input. The court could not delve into determination of the other issues framed for determination since it did not have jurisdiction to admit the appeal for consideration.

Appeal dismissed.

Orders

Costs to the respondents.

Citations

Cases

Kenya

1. *Erad Suppliers & General Contractors Limited v National Cereals & Produce Board* Petition 5 of 2012; [2012] KESC 6 (KLR) - (Mentioned)
2. *Joho & another v Shahbal & 2 others* Petition 10 of 2013; [2014] KESC 34 (KLR) - (Followed)
3. *Kidero & 4 others v Waititu & 4 others* Petition 18 & 20 of 2014 (Consolidated); [2014] KESC 11 (KLR) - (Explained)
4. *Munya v Kithinji & 2 others* Civil Appeal (Application) 38 of 2013; [2014] KECA 876 (KLR) - (Followed)
5. *Munya v Kithinji & 2 others* Application 5 of 2014; [2014] KESC 30 (KLR) - (Explained)
6. *Nduttu & 6000 others v Kenya Breweries Ltd & another* Petition 3 of 2012; [2012] KESC 9 (KLR) - (Explained)
7. *Ngoge, Peter O v Francis Ole Kaparo & 3 others* Civil Application 260 of 2007; [2012] KECA 6 (KLR) - (Followed)
8. *Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others* Petition 5, 3 & 4 of 2013 (Consolidated); [2013] KESC 5 (KLR) - (Explained)
9. *Odinga & another v Independent Electoral and Boundaries Commission & 2 others* Election Petition 1 of 2017; [2017] KESC 32 (KLR) - (Explained)
10. *Oduol, William Odhiambo v Independent Electoral and Boundaries Commission & 2 Others* Election Petition 2 of 2013; [2013] KEHC 779 (KLR) - (Followed)
11. *Omondi, Hezbon v Independent Electoral and Boundaries Commission & 2 others* Election Petition 17 of 2017; [2018] KEHC 8960 (KLR) - (Explained)
12. *Owners and Masters of the Motor Vessel "Joey" v Owners and Masters of the Motor Tugs "Barbara" and "Steve B"* Civil Appeal 286 of 2000; [2007] eKLR; [2008] 1 EA 367 - (Explained)
13. *Political Parties Dispute Tribunal & another v Musalia Mudavadi & 6 others Ex Parte Petronila Were* Miscellaneous Civil Application 406 of 2014; [2014] KEHC 1901 (KLR) - (Mentioned)
14. *Steyn v Gnecchi-Ruscone* Application 4 of 2012) [2013] KESC 11 (KLR) - (Explained)

15. *Twaha, Fahim Yasin v Timamy Issa Abdalla & 2 others* Civil Application 35 of 2014; [2015] KESC 20 (KLR) - (Explained)

Uganda

Babihuga, Winnie v Masiko Winnie Komuhangi & Others (HCT-00-CC-EP.0004-2001) — (Explained)

Statutes

Kenya

1. Constitution of Kenya articles 81, 86, 163(3)(b)(i); 163(4)(a); 163(7) — (Interpreted)
2. Elections Act (cap 7) sections 75(3); 83 — (Interpreted)
3. Elections (Parliamentary and County Elections) Petition Rules, 2017 (cap 7 Sub Leg) rule 29(3) — (Interpreted)

Advocates

1. *Messers Omwanza* and *Nyabuti* for the appellant
2. *Ochieng' Opiyo* and *Wachira Kabene* for the 1st and 2nd respondents
3. *Mr. Muganda* and *Ms Hashi Amina* for the 3rd respondent

JUDGMENT

I. Introduction

1. Before the court is a petition of appeal dated July 27, 2018 and filed on July 30, 2018. It challenges the judgmentand orderof the Court of Appeal in Nairobi Election Petition Appeal No. 9 of 2018, delivered on June 22, 2018, that dismissed the appeal therein, hence upholding the High Court decision that affirmed the election of the 3rd respondent as the Woman Representative to the National Assembly for Marsabit County.

2. The appeal is premised on eight (8) grounds, to wit, the learned judgesof the Court of Appeal.

    1. Misapprehended the law on scrutiny and recount in concluding that the learned trial judgecould not be faulted in the manner he dealt with the scrutiny and preservation applications and exercise.

    2. Erred in law by arriving at a finding that the learned trial judgewas not entitled to consider material before him.

    3. Erred in law by focusing on the quantitative aspect of the elections without considering the qualitative effect of irregularities established by the appellant.

    4. Erred in law by concluding that the appellanthad not impugned the election results.

    5. Erred in law by trivializing the importance of security of election materials when they upheld the Trial Judge's conclusion that the election materials were secured.

    6. Erred in law by failing to take into consideration errors/irregularities that had been brought to the electioncourt's attention; irregularities the election courthad also failed to take into account.

    7. Erred in law in awarding costs that were manifestly excessive.

    8. Erred in law in failing to find that the Result Declaration Forms 39B were non-compliant with the law.

3. The petitionseeks the following reliefs, reproduced verbatim:

   i. An ordersetting aside the decision/orderof the Court of Appeal and substituting the said decision/orderwith an order allowing the appeal;

   ii. An orderdeclaring that the Woman Representative to the National Assembly election conducted in Marsabit County was not in accordance with the Constitution and written law;

   iii. An orderdeclaring that the 3rd respondent was not validly elected as Woman Representative to the National Assembly, Marsabit County;

   iv. An Order directing the 1st and 2nd respondents to conduct a fresh election for the office of Woman Representative to the National Assembly, Marsabit County;

   v. An Order awarding the costs of this appeal, and the proceedings before the Court of Appeal and the High Court, to the appellant; and

   vi. Any other orderor further relief as this courtmay deem fit.

II. Background

4. The appellant and 3rd respondent were among the candidates for the position of Women Representative to the National Assembly for Marsabit County during the August 8, 2017 General Elections. Upon conclusion of counting and tallying of the votes, the 2nd respondent declared the 3rd respondent winner, hence the duly elected Woman Representative to the National Assembly for Marsabit County having garnered 41, 019 votes. The 3rd respondent emerged the first runner-up with 35, 340 votes.

5. This declaration aggrieved the appellant herein, and on September 7, 2017she filed Election Petition No. 22 of 2017 challenging the election of the 3rd respondent and seeking its nullification. She impugned the election on the basis of illegalities and irregularities allegedly committed in all the four constituencies of Marsabit County, namely Laisamis, Saku, Moyale and North Horr. She faulted the 1st and 2nd respondents for conducting an election that did not meet the requirements of the *Constitution* and the *Elections Act*.

6. The illegalities and irregularities alleged included: discrepancies between the results on the 1st respondent's online Portal and those recorded on Form 39B; denial of the appellant's agents from accessing polling stations and accessing Forms 39A; illegal appointment of Laisamis Constituency Returning Officer, one Jaffer Galgalo; improperly assisted voting and coercion; irregular tallying of votes; failure by the IEBC to secure ballot papers; and voter disenfranchisement. Further on the entire election, that there was an unexplained mismatch of the total votes cast in all the six elections, hence undermining the credibility of the election.

7. The respondents delivered their responses to the Petition denying the averments therein. The 1st and 2nd respondents asserted that the election was conducted strictly in accordance with the *Constitution* and the *Elections Act*. It was their case that the declared results reflected the true will of the electorate in Marsabit County as regards the position of Woman Representative to the National Assembly. On her part, the 3rd respondent contended that she was validly elected in a free, fair and transparent elections conducted pursuant to the *Constitution* and the electoral laws.

8. Upon hearing the parties and considering all the pleadings on record, the High Court, Chitembwe J, in a judgment delivered on February 19, 2018, dismissed the petition for lack of merit, thus:

> " The petitionlacks merit and is hereby dismissed with costs. In line with the provisions of section 75(3) of the *Elections Act*, this court does declare and confirm that the 3rd respondent, Safia Sheikh Adan was validly elected as the Marsabit Woman Member of the National Assembly. A certificate of this Court as to the validity of the election to issue to the Independent Electoral and Boundaries Commission and the Speaker of the National Assembly."

9. The trial courtawarded the respondentscosts capped at Kshs. 2,500,000 each: the 1st and 2nd respondents on one hand, and the 3rd respondent on the other.

10. This High Court judgmentaggrieved the petitionerfurther. She moved to the Court of Appeal on appeal and filed Election Appeal No. 9 of 2018 challenging the whole Judgement. The appeal was founded on 28 grounds, which grounds the appellate Court disabused as being verbose, repetitive and empty rhetoric; contrary to the Court's Rules requirement that a Memorandum of Appeal only "set forth concisely and under distinct head, without argument or narrative, the grounds of objection to the decision appealed against."

11. In her submissions, the appellantcoalesced the grounds into six grounds, to wit that, the learned trial judgeerred:

    1) by irregularly admitting and relying on Form 39As submitted after the parties had closed their respective cases, in violation of her right to a fair hearing;

    2) by upholding the illegal and irregular appointment of Jaffar Galgalo as the Laisamis Constituency Returning Officer;

    3) by failing to hold that the right to vote was violated or diminuted in the impugned elections;

    4) by ignoring irregularities regarding the storage and preservation of the electoral materials and refusing to order scrutiny and recount;

    5) by selectively taking judicial notice of the results in Form 39C relating to the gubernatorial election in Marsabit County but failed to take judicial notice that it could not possibly have been signed by Hussein Malicha, the KANU party agent, as claimed; and

    6) lastly, as a consequence of the foregoing, by holding that the 3rd respondentwas duly elected the Marsabit County Woman Representative to the National Assembly.

12. Upon hearing the parties and considering the pleadings before it, the Court of Appeal, in a judgementdelivered June 22, 2018, agreed with the trial courtand dismissed the appeal stating thus:

> " Looking, as a whole, at the manner in which the election for the Woman Representative to the National Assembly was conducted in Marsabit County, we would agree with the learned judge that there was no substantial breach of the Constitution or the law proved that would have justified nullification of the election. In the event, we find no merit in this appeal, which is hereby dismissed in its entirety. The appellant shall pay costs of Kshs. 500, 000.00 to the IEBC and a like sum to the 2nd respondent. She shall also pay costs of Kshs. 1, 500, 000.00 to the 3rd respondent. It is so ordered."

13. It is this Court of Appeal judgement that further aggrieved the appellantand propelled her to prefer the Petition before this honourable court.

14. In the petition, the appellantsets forth the following as the issues for determination by this honourable court:

    a. Whether the Court of Appeal erred in affirming the manner with which the trial judgeexercised discretion when he ruled on scrutiny motions;

    b. Whether the Court of Appeal erred in concluding that the learned trial judgewas not entitled to consider material that was before him;

    c. Whether the Court of Appeal misapplied section 83 of the *Elections Act*;

    d. Whether the Court of Appeal erred in concluding that the appellanthad not discharged the burden of proof; and

    e. Whether the Court of Appeal erred in awarding costs that were manifestly excessive.

III. Submissions

(a) Appellant's

15. The appellantfiled her written submissionsdated October 2, 2018 on October 3, 2018. Her case was urged before the courton November 7, 2018 by Counsel Messers Omwanza and Nyabuti. In her submissions, she framed five issues for determination, which are slightly different from the issues framed in the body of the petition (above). These are:

    i. The jurisdiction of the court;

    ii. Whether the learned judgesof the Court of Appeal erred in concluding that election materials were secured;

    iii. Whether the learned judgesof the Court of Appeal misapprehended the law on scrutiny and recount exercises and purpose thereof;

    iv. Whether the learned judgesof the Court of Appeal erred in law in failing to consider qualitative irregularities in the conduct of the election; and

    v. Whether the learned judgesof the Court of Appeal erred in law in concluding that the costsawarded by the petitionerwere not manifestly excessive.

16. Urging her case, she submitted that this courtis clothed with jurisdiction under article163(3)(b)(i) of the *Constitution* to hear and determine appeal from the Court of Appeal, and that her appeal falls for determination before this court under article 163(4)(a) of the *Constitution*, as of right. She cited the cases of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*, 2014. eKLR and *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others*, [2014] eKLR in support.

17. On security of electoral materials, it was submitted that under article86 of the *Constitution*, the 1st respondent (IEBC) is obligated to amongst other duties, ensure the safe-keeping of electoral materials. It was contended that safekeeping of the election materials in this case was a live issue before the trial Court. That on October 19, 2018, the court ordered for the preservation of electoral materials, and that from this exercise it was evident that there were missing ballot boxes' seals and unsealed ballot boxes. She referred to the High Court decision in *William Odhiambo Oduol v Independent Electoral and Boundaries Commission & 2 Others* 2013. eKLR as regards allegations of tampering with electoral

materials and urged that the Court of Appeal erred in concluding that the election materials were properly secured.

18. On scrutiny and recount, counsel Mr. Omwanza submitted that there is mixed jurisprudence on this issue and under article 163(7) of the *Constitution*, the Supreme Court need to settle the law. By analogy, Counsel submitted that the manner the trial court treated the issue of scrutiny was akin to a doctor ordering for a postmortem to be done to ascertain the cause of death but thereafter refusing to look at the Report of the postmortem.

19. Counsel submitted that by a notice of motion dated October 12, 2017 the appellant sought orders of scrutiny and preservation of electoral materials. This was partially allowed in a ruling delivered on November 30, 2017. It was submitted that despite granting the order sought, the trial court stated that: "apart from providing access and the forms and documents indicated in the orders herein above, no report should be filed with the courtand the Deputy Registrar shall not participate in the above exercise." In the appellant's submission, this 'rider' was contrary to rule 29(3) of the *Elections (Parliamentary and County Elections) Petition Rules, 2017* which provide that scrutiny shall be carried out under the direct supervision of the registrar or magistrate. It was submitted that this 'limitation' denied the appellant the right to a fair trial, and also denied the trial judge the opportunity to satisfy himself that the election was conducted in accordance with the law.

20. The appellant urged that with the prohibition of filing the scrutiny reports, she moved the trial courtthrough a second motionon January 12, 2018 for orders of scrutiny and recount and by a rulingdated January 31, 2018 the trial courtdismissed that motiontoo. Hence, it was submitted that in dismissing the second motion, the courtaffirmed its stance to avert its eyes from any scrutiny exercise. Consequently, it was submitted that the Court of Appeal erred in affirming the trial judge's findings on scrutiny and recount. In the appellant's submission, it was evident that the superior courtswere interested in the results and not the process of arriving at the results.

21. It was contended that despite all the illegalities and irregularities pleaded, the trial courtprejudiced the appellant's case when it prohibited the filing of a scrutiny report. Reliance was placed on the case of *Winnie Babihuga vs Masiko Winnie Komuhangi & Others* HCT-00-CC-EP.0004-2001 in urging that, "in a democratic election, the means by which a winner is declared plays a very important role. The votes must be verifiable by the paper trail left behind, it must be demonstrated that there existed favourable circumstances for a fair election and that no party was prejudiced by an act or omission of an election official."

22. On costs the appellant submitted that the Court of Appeal erred in concluding that the costs awarded by the superior courtwere not excessive. It was argued that where a petitioner has proven that there were instances of irregularities and disregard to the electoral code, then such a party should not be saddled with costs. It was submitted that the appellantwas denied fair hearing in the High Court; hence she could not be condemned to pay costs. She cited the case of *Hezbon Omondi v Independent Electoral and Boundaries Commission & 2 others* [2018] eKLR to emphasis that costs should not result in disproportionate consequences on any unsuccessful petitioner.

(b) 1st and 2nd Respondents'

23. The 1st and 2nd respondents filed their written submissions dated October 7, 2018 on October 9, 2018. Their case before this court was urged by counsel Messers Ochieng' Opiyo and Wachira Kabene.

24. They submitted that the court lacks jurisdiction to hear and determine the appeal as the same does not involve the interpretation or application of the Constitution. They urged that the appellant misapprehended the decisions of the superior courts and that in her submissions; she has not faulted

the Court of Appeal on the interpretation and application of the Constitution. They relied on the case of *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & Another* [2012] eKLR (*Lawrence Nduttu* case) to urge that the court lacks jurisdiction since not all intended appeals lie from the Court of Appeal to the Supreme Court.

25. They urged that the appellant had misapprehended the law on scrutiny and recount. It was submitted that this courtin *Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 others* [2014] eKLR (*Munya* case), set out the guiding principles with respect to scrutiny and recount of votes in an election petition. They urged that scrutiny is meant to assist the court to verify allegations already pleaded and not to unearth new evidence to sustain an election petition.

26. It was submitted that scrutiny was partially granted by the trial court; with the 1st respondent directed to provide the Appellant with original Statutory Forms, Register of Voters and access to KIEMS kit and SD cards; and the appellant granted leave to file an application after perusal of the said materials, an avenue which she failed to explore. That the appellant was granted leave to even recall any witness but failed to take up the opportunity. Hence, they urged that having failed to utilize the window left open for her; she cannot be heard to allege having suffered prejudice. They urged that scrutiny involved an exercise of discretion and that where the superior court exercises discretion in granting a partial scrutiny, unless it is demonstrated that it was exercised in an adverse way, an appellate court should not be dragged into it.

27. On qualitative irregularities, it was submitted that articles 81 and 86 of the *Constitution* provides the threshold against which the conduct of elections is measured. They asserted that the election, subject of this appeal, was substantially conducted in conformity with the election laws and regulations and that the appellant failed to discharge the burden of proof of any non-conformity with the laws. They urged that the appellant did not plead any allegation of fraud, bribery, illegal practices and/or wrong doing by any candidate. That they were no suggestions of discrepancies between what was contained in the Statutory Forms 39As, Bs and C garnered by each candidate and that which was announced in respective polling stations and neither was this pleaded or proved at trial.

28. The 1st and 2nd respondents disabused the appellant's allegations as regards security of election materials. They submitted that the appellant in her application, to the trial court dated October 12, 2017, sought inter-alia an order for preservation of all ballot boxes used in the election. That on October 19, 2017, with consent of parties, Chitembwe, J ordered for preservation of the said election materials, and a preservation exercise was conducted from October 23, 2017 to October 25, 2017 which exercise was supervised by the Deputy Registrar in presence of representatives of the parties and a report of the exercise filed in court. That the Report did not raise any doubt on the security of the election materials and that the ballot boxes were in good condition as per the Deputy Registrar's Report.

29. It was submitted that it is trite law that costs follow the event and the appellant had not demonstrated that the awarded costs were excess and/or punitive. Consequently, they urged that the appeal be dismissed with costs.

(c) 3rd Respondent's

30. The 3rd respondent filed her submissions dated October 9, 2018 on the even date. Her case was urged before this court by counsel Mr. Muganda and Ms Hashi Amina. She opposed the appeal and prayed that it be dismissed with costs.

31. She submitted that while the appellant has invoked this court's appellate jurisdiction under article 163(4)(a) of the *Constitution*, the grounds in support of the petition do not demonstrate how the

Court of Appeal erred in its interpretation and/or application of any article or principle of the Constitution. She urged that the court has no jurisdiction to entertain this matter as the appellant basically seeks this court to look at the factual findings and the rationale in the scrutiny and recount exercise. She further urged that this court lacks the jurisdiction to consider the issues raised on the scrutiny ruling of November 30, 2017, since there was neither an appeal nor a review to the Court of Appeal or the High Court; and no direct appeal lies to this court.

32. On the merits of the appeal, it was urged that in *Raila Odinga and 5 others v Independent Electoral and Boundaries Commission and 3 others* [2013. eKLR (Raila 2013 case), the court settled the law in regard to the burden and standard of proof in election matters. She urged that the appellant failed to discharge the burden of proof in the superior courts to the required standard. That the allegations of illegalities and irregularities by the appellant did not meet the threshold for upsetting an election as provided in section 83 of the *Elections Act*.

33. With regard to the preservation of election materials, the 3rd respondent echoed the 1st and 2nd respondents' submissions. She reiterated that the Report filed by the Deputy Registrar remains unchallenged to date and that it was signed by all the parties. It was submitted that while parties were not supposed to file any report upon the partial scrutiny exercise, the appellant proceeded to file one, which report was later refuted by the court as the appellant's own analysis and of no probative value.

34. On scrutiny, the 3rd respondent urged that an allegation must be pleaded, proved and demonstrated how it affected the results. She contended that the appellant never pleaded any particular polling station that required scrutiny and no results for a particular station were challenged either. In any event, it was urged that the High Court ruling on scrutiny was never appealed. There is no error committed by the trial judge that has been demonstrated by the appellant. Further, it was the 3rd respondent's case that the appellant was allowed by the court to file "any application" after the scrutiny exercise. However, after the exercise, the appellant never sought to re-open her case or re-call any witnesses. Hence, it was urged that the appellant having reneged on that right, she now seeks to camouflage that failure through a ground of Appeal seeking to re-open her case.

35. The 3rd respondent reiterated that exercise of discretion cannot be upset unless proved that it was wrongly exercised, which has not been shown in this matter. The trial Judge correctly exercised his discretion and gave reasons for his decision. It was submitted that parties are bound by their pleadings and that the appellant sought and was granted the statutory forms. That she did not dispute any results in the Forms neither did she demonstrate any defects in the Forms on the results declared.

36. The 3rd respondent argued that the appellant failed to demonstrate that the alleged irregularities or non-compliance with the Law in the conduct of the elections did affect the result or outcome of the Election thus warranting interference by the court in accordance with section 83 of the *Elections Act*. That it is not enough for the appellant to generally point out irregularities that may have taken place, if at all there was any, during the election. The circumstances under which the election court can invalidate an election are set out in Section 83 of the *Elections Act* which this court expounded in *Raila 2017* and the elections in contest in this appeal was conducted substantially in conformity with the dictates of the *Constitution* and election laws; and no cogent evidence has been adduced before the court to prove that the appellate judges erred in law in their finding.

37. On costs, it was submitted that the costs were awarded in accordance to section 84 of the *Elections Act* and that the appellant totally failed to lay a basis for a departure from the superior courts' findings. Hence it was urged that the appeal be dismissed with costs.

IV. Issues for Determination

38. The following issues emerge for determination by this honourable court:

    a) Whether this court has jurisdiction under article 163(4)(a) of the *Constitution* to hear and determine this appeal;

    b) Whether the trial judge exercised his discretion erroneously and misdirected himself in regard to the scrutiny motion;

    c) Whether there were proved irregularities and illegalities that affected the results of the election for Woman Representative Member of National Assembly of Marsabit County;

    d) Whether the costs awarded in this matter were excessive; and

    e) Appropriate orders to issue.

V. Analysis

a) Whether this Court has jurisdiction under Article 163(4)(a) of the Constitution to hear and determine this appeal

39. The jurisdiction of this court to hear and determine this matter has been questioned by the respondents. The respondents urged that there is nothing of constitutional interpretation and/or application in this appeal to warrant invocation of this court's jurisdiction under article 163(4)(a) of the *Constitution*. They contended that the appellant was just but seeking a second appeal before the Supreme Court. In reply, the appellant was emphatic that she has properly invoked this Court's jurisdiction as of right under article 163(4)(a) of the *Constitution*. While this issue has not been zealously canvassed by the parties, upon perusal of the record, we note that this is a fundamental issue warranting this court's consideration.

40. A jurisdictional issue is fundamental and can even be raised by the court *suo motu*, as was persuasively and aptly stated by Odunga J in *Political Parties Dispute Tribunal & another v Musalia Mudavadi & 6 others Ex Parte Petronila Were* [2014] eKLR. The learned judge drawing from the Court of Appeal precedent in *Owners and Masters of The Motor Vessel "Joey" vs. Owners and Masters of The Motor Tugs "Barbara" and "Steve B"* [2008] 1 EA 367 stated thus:

> " 25. What I understand the court to have been saying is that it is not mandatory that an issue of jurisdiction must be raised by the parties. The court on its own motion can take up the issue and make a determination thereon without the same being pleaded..."

    Consequently, while the parties have not given the jurisdiction issue the much premium that it deserves, upon evaluation of the matter before us, it is our considered opinion that the issue of jurisdiction of this court to hear and determine this appeal warrants settlement upfront.

41. Outrightly, we note that in the petition before the court dated July 27, 2018, the appellant does not state under which law she moves this court. It is only at paragraph 24 of the petition under the heading "Arguments in Support of the grounds of Appeal" that she states that "the present appeal invokes the court's appellate jurisdiction under article 163(3)(b)(i) and 163(4) (a) of the *Constitution*". In the *Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone* [2013] eKLR, this court stated that "it is trite law that a court of law has to be moved under the correct provisions of the law". In this court, this is not an idle requirement but has its rationale anchored in the 'specialized' nature of the jurisdiction of the

Supreme Court as provided in article 163(3) of the *Constitution*. Appeals to this court from the Court of Appeal are therefore not as a matter of course as the Supreme Court was not established as another tier of court in the judicial hierarchy. Not every appeal from the Court of Appeal is also appealable to this court. (See *Peter Oduor Ngoge vs Francis Ole Kaparo & 5 Others*, [2012] eKLR; *Erad Suppliers & General Contractors Limited V National Cereals & Produce Board*, [2012] eKLR; and L*awrence Nduttu & 6000 Others v. Kenya Breweries Ltd. & Another,* [2012] eKLR).

42. Article 163(4) of the *Constitution* clearly demarcates a two prong appellate jurisdiction of this court from decisions of the Court of Appeal. These two jurisdictional avenues are not mutually inclusive but are independent of each other and there is need for a party that comes before this court to clearly state which one she/he invokes. The modus operandi of invocation of each of these appellate jurisdictions was underscored in the case of *Fahim Yasin Twaha v Timamy Issa Abdalla & 2 others* [2015] eKLR thus:

> "...This court's appellate jurisdiction is set out in article 163(4) of the Constitution, in the following terms:
>
> "Appeals shall lie from the Court of Appeal to the Supreme Court?
>
> (a) as of right in any case involving the interpretation or application of this Constitution; and
>
> (b) in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5)"

(39) The two avenues of the appellate jurisdiction of this court are distinct. Firstly, an appraisal of the nature of an appeal as involving matter of constitutional interpretation and/or application, signals access to the Supreme Court "as of right"; and no form of authorization or leave from the Court of Appeal, or the Supreme Court is required at the beginning. The principles regulating this limb of the court's appellate jurisdiction were set in *Gatirau Peter Munya v. Dickson Mwenda Kithinji & Others* S.C. Civil Application No. 5 of 2014; [2014] eKLR (*Munya 1*).

(40) If, on the other hand, the appeal does not fall with the ambit of article 163(4)(a) of the Constitution (i.e, appeal "as of right"), then it should be certified as one involving a "matter of general public importance", by being brought within the *Hermanus* principles. On this limb, as indicated by this Court in the *Sum Model* case, an application for certification has to be originated in the Court of Appeal.

...

(43) Thus, a litigant is under forensic obligation to categorize his or her case, indicating the constitutional or legal category under which he or she is moving the Supreme Court. The pathway thus identified, is for pursuit. And where it is perceived that an appeal raises both categories of issues, the course of merit is to comply with the requirements of both: file an appeal "as of right" on the constitutional issues; and seek leave as regards "matters of general public importance". As regards the latter, the relevant appeal is to be filed only after grant of leave."

43. Hence we reiterate that parties seeking to appeal to the Supreme Court have a duty to outrightly state the particular jurisdiction of the court that they invoke. Jurisdiction is thus so fundamental that it should not be left to conjecture. The court, and other parties in a matter, should not be left agonizing under what appellate jurisdiction a matter is filed. Consequently, we are surprised by the

appellant's approach to this court and fault her for not having outrightly disclosed under which appellate jurisdiction she moved this court. She left this fundamental indicator far late in the day during her submissions when she mentions that this court has jurisdiction to hear this appeal under article 163(4)(a) of the *Constitution*.

44. Be that as it may, the appellant case is that she has moved this court as of right under article 163(4)(a) of the *Constitution*. This court is now replete with case law on what amounts to a matter warranting appeal to this court under article 163(4)(a) of the *Constitution*. In *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others* [2014] eKLR this court was emphatic that a matter that directly involves an interpretation and/or application of a particular provision of the Constitution will constitute an appeal as of right under article 163(4)(a) of the *Constitution*. Subsequently, in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*, Application 5 of 2014, [2014] eKLR (Munya 1 case) the court went further to define this Court's jurisdiction under article 163(4)(a) of the *Constitution*. In determining whether it had jurisdiction to entertain an appeal from the Court of Appeal, subject of an election petition, other than a Presidential Election Petition, upon evaluation of the court's previous jurisprudence touching on jurisdiction, it stated at [paragraph] 69 thus:

> " The import of the court's statement in the *Ngoge* case is that where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, the very least an appellant should demonstrate is that the Court's reasoning, and the conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application"

45. Hence, while in the *Joho* case the principle developed was that the issue in dispute should be an express interpretation and/or application of a provision of the *Constitution*, in the *Munya 1* case, the court found that "one may still find locus in this court, where if no particular provision of the Constitution is identified as having been interpreted and/or applied, if he/she is able to show that the appellate Court in its reasoning and/or conclusion, took a trajectory of constitutional interpretation and/or application. In that *Munya 1 case*, the court went further to state paragraphs 76-78. thus:

> " (76) We note that, right from the High Court, the central issue revolving around the petition against the applicant's election was: whether this election was conducted in accordance with the principles of the *Constitution*. The operative principles in question, in our view, were the provisions of articles 81 (e) and 86 of the *Constitution*. Although the issues, as later formulated by the Court of Appeal, narrowed down to the specifics of irregularity, scrutiny and recount of the vote, the central theme of the application of Articles 81 and 86 to the dispute, was never lost. Throughout its analysis and assessment of the evidence on record, in determining the integrity of this particular election, the Court of Appeal was applying the provisions of articles 81 and 86 of the *Constitution*. This is illustrated by the court's own conclusion at paragraph 220 (quoted above) of its judgment.
>
> (77) While we agree with Mr. Muthomi, regarding his contention that Section 87 of the Elections Act cannot be equated to a constitutional provision, we must hasten to add that the Elections Act, and the Regulations thereunder, are normative derivatives of the principles embodied in Articles 81 and 86 of the *Constitution*, and that in interpreting them, a Court of law cannot disengage from the *Constitution*.

(78) Applying these principles to the matter at hand, we hold that this appeal, indeed, falls within the ambit of article163(4) (a) of the *Constitution*."

Suffices it to say that the *Munya 1* case expounded that if specific constitutional provision cannot be cited, then it should be shown that the Court of Appeal judgment in its reasoning and conclusion took a constitutional trajectory.

46. At this juncture, we would like to state that the *Munya 1* case did not in any way open a carte blanche window so that any appeal can be brought to this court on allegation that the judgment of the Court of Appeal took a constitutional trajectory. Neither should the phrase "the *Elections Act*, and the regulations thereunder, are normative derivatives of the principles embodied in articles 81 and 86 of the *Constitution*" be construed as providing a blanket right of appeal to the Supreme Court in all election petition matters to the Supreme Court from the Court of Appeal. It is thus not enough for a party in an election dispute to simply cite the *Munya 1* decision and allege that in determining his matter, the Court of Appeal in its reasoning took a constitutional trajectory. A party is under a duty to squarely bring his case within the four corners of *Munya 1* case. In *Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others* [2014] eKLR, this court disabused an abstract interpretation of the *Munya 1* decision when counsel in the matter argued that the *Munya 1* decision had opened up the court to hear all types of appeals from the Court of Appeal and urged the Supreme Court to depart from it. This court in dismissing counsel's invitation to depart from that case emphasised the need to understand the *Munya 1* case in its context, thus:

"(134) Learned counsel, Mr. Abdullahi's argument that, "all laws are normative derivatives of the *Constitution*", while by no means illogical, had in our view taken an abstract point out of the context of the real dispute being redressed within the judicial system. If the *Constitution* is equated to Kelsen's grundnorm in the hierarchy of norms, then it follows that all laws are "normative derivatives" of the *Constitution*, as they derive their validity therefrom. And since the *Constitution* vests the legislative authority in Parliament, then all laws that the latter enacts "derive from the *Constitution*".

(135) However, the *Constitution* itself, for its meaningful implementation, and with definite socio-political goods accruing to the people, has duly empowered the judicial system and this Supreme Court to establish operational beacons. Such is the role this Court has played in settling disputes, a typical example in this regard being, *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*, Sup. Ct. Advisory Opinion Appl. No. 2 of 2012, in which the Court, considering the Attorney-General's reference on the proper effect of article 81 (b) of the *Constitution*, thus expounded the critical questions of principle which learned counsel in the instant case should take into account (paragraph 54):

> "Certain provisions of the *Constitution* of Kenya have to be perceived in the context of such variable ground situations, and of such open texture in their scope for necessary public actions. A consideration of different *Constitution*s shows that they are often written in different styles and modes of expression. Some *Constitution*s are highly legalistic and minimalist, as regards express safeguards and public commitment. But the Kenyan *Constitution* fuses this approach with declarations of general principles and

> statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and to interact among themselves and with their public institutions. Where a *Constitution* takes such a fused form in its terms, we believe, a Court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favor of an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; and care should be taken not to substitute one for the other. In our opinion, the norm of the kind in question herein, should be interpreted in such a manner as to contribute to the enhancement and delineation of the relevant principle, while a principle should be so interpreted as to contribute to the clarification of the content and elements of the norm."

(136) The court's statement in *Munya 1* is to be perceived in the context of the foregoing passage, which sought to unlock the frontiers of Article 81(b) of the *Constitution*, as read with other provisions of the *Constitution*. The court was advancing and applying the interpretative schema of the *Constitution*, in the light of its transformative character. In this regard, plain abstract theory founded upon the Kelsenian grundnorm, rested upon a secondary pedestal."

47. Consequently, it is pragmatic that the *Munya 1* case should be construed within the larger framework of the constitutional rationale in article 163(4)(a) of the *Constitution*. Parties cannot disengage from the legal filtering mechanism enshrined in article 163(4) of the *Constitution* and haphazardly cite this caselaw when invoking this court's appellate jurisdiction as of right. The rationale of the filtering mechanism was further and aptly captured in the case of*Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd. & Another*, Supreme Court Petition No. 3 of 2012, [2012] eKLR thus:

> "(26) Mr. Ngoge has urged that whenever a citizen alleges in his pleadings before the Supreme Court that the High Court and Court of Appeal were complicit in facilitating violations of his fundamental Human Rights, the Supreme Court automatically assumes jurisdiction without the necessity of leave in order to uphold the *Constitution*, human rights and the rule of law. Anything to the Contrary would be unconstitutional and retrogressive. We understand Mr. Ngoge to be arguing that a mere allegation of a violation of human rights automatically brings an intended appeal within the ambit of article 163 (4) (a) of the *Constitution* hence dispensing with the need for leave under article 163 (4) (b) of the *Constitution*.
>
> (27) With respect, but firm conviction, we disagree with this contention. Such an approach as is urged by counsel if adopted, would completely defeat the true intent of article 163 (4) (a) of the *Constitution*. This article must be seen to be laying down the principle that not all intended appeals lie from the Court of Appeal to the Supreme Court. Only those appeals arising from cases involving the interpretation or application of the *Constitution* can be entertained by the Supreme Court. The only other instance when an appeal may lie to the Supreme Court is one contemplated under article 163 (4) (b) of the *Constitution*. Towards, this end, it is not the mere allegation in pleadings

by a party that clothes an appeal with the attributes of Constitutional interpretation or application.

(28) The appeal must originate from a court of appeal case where issues of contestation revolved around the interpretation or application of the *Constitution*. In other words, an appellant must be challenging the interpretation or application of the *Constitution* which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation or application of the *Constitution*, it cannot support a further appeal to the Supreme Court under the provisions of article 163 (4) (a)".

48. Consequently, it is our determination that where a party in an election petition invokes this court's jurisdiction under article 163(4)(a) of the *Constitution*, it is not enough for one to generally allege that the Court of Appeal erred in its decision(s) and that its reasoning and conclusions took a constitutional trajectory. The constitutional trajectory stated by this honourable court is not illusionary. It is tangible and should be discernable from a party's pleadings. A party is under a constitutional forensic duty to clearly set out the particulars of the constitutional transgressions that in his/her opinion the Court of Appeal committed in their interpretation and/or application. Those grounds must be pleaded with precision and the constitutional principle and/or provision alleged to have been violated clearly set out.

49. We hasten to add that the Supreme Court retains the constitutional discretion to filter and determine whether a matter before it has satisfied the constitutional muster in article 163(4)(a) of the *Constitution*. The phrase 'appeal as of right' as provided under article 163(4)(a) of the *Constitution* does not in any way however absolve a party from fulfilling this constitutional forensic requirement. As to what is meant by interpretation and/or application of the *Constitution* under article 163(4)(a) of the *Constitution*, this court settled the law in the *Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others* [2014]eKLR. First the Court collated the guiding principles in exercise of the jurisdiction under article 163(4)(a) thus:

"130. Since its inception, this court has consistently pronounced itself on the nature, scope, extent and limits of its jurisdiction under article 163(4)(a) of the *Constitution* (see *Re IIEC*; *Peter Oduor Ngoge*; *Lawrence Nduttu*; *Erad Suppliers*; *Hassan Ali Joho*; *Munya 1&2*). In each of those decisions, the Court has considered different angles of the jurisdictional question. In his concurring opinion in *Munya 2*, Mutunga, CJ& P analysed the various facets of the Court's pronouncements into 'guiding principles', to be taken into account by appellants who seek to predicate their appeals upon article 163(4)(a) of the *Constitution*. Such guiding principles are hereby restated with appropriate elaboration as is consistent with the terms of this court's other decisions:

i. a court's jurisdiction is regulated by the *Constitution*, by statute law, and by the principles laid out in judicial precedent;

ii. the chain of courts in the constitutional set-up have the professional competence to adjudicate upon disputes coming up before them; and only cardinal issues of law or of jurisprudential moment deserve the further input of the Supreme Court;

iii. not all categories of appeals lie from the Court of Appeal to the Supreme Court under article 163(4)(a); under this head, only those appeals from cases involving the interpretation or application of the *Constitution* can be entertained by the Supreme Court;

iv. and under that same head, the lower court's determination of an issue which is the subject of further appeal, must have taken a trajectory of constitutional application or interpretation, for the cause to merit hearing before the Supreme Court;

v. an appeal within the ambit of article 163(4)(a) is one founded on cogent issues of constitutional controversy;

vi. with regard to election matters, not every petition-decision by the Court of Appeal is appealable to the Supreme Court; only those appeals arising from the decision of the Court of Appeal in which questions of constitutional interpretation or application were at play, lie to the Supreme Court."

50. The court then proceeded to interpret the two terms thus:

"140. There is yet another issue regarding the frontiers of article 163(4) (a) of the *Constitution*, which has not been accorded adequate attention by counsel, as they urge their clients' cases on the basis of its terms. The provision thus reads:

" Appeals shall lie from the Court of Appeal to the Supreme Court

a. as of right in any case involving the interpretation or application of this *Constitution*..."

(141) The operative words are "interpretation or application". Do these words have the same meaning? In our perception, these terms do not mean one and the same thing. Otherwise, the drafters would have simply opted to use either of them. As it is, the Supreme Court will not infrequently be called upon either to interpret or to apply the *Constitution*. It emerges from the comparative lesson that judicial approaches in different jurisdictions, do not accord the expressions "constitutional interpretation", and "constitutional application" the same meaning.

(142) For our purposes, interpretation of the *Constitution* involves revealing or clarifying the legal content, or meaning of constitutional provisions, for purposes of resolving the dispute at hand (call it the hermeneutic aspect). The basic reference-point in constitutional interpretation is the text. Application of the *Constitution* is a more dynamic notion. It comes into play when the provision of the *Constitution* remains in some vital respects (even after the jural process of content-ascertainment) indeterminate, or ambiguous, or vague, or contradictory. In other instances, a constitutional text may be quite clear on paper, but when applied to a dispute, it leads to absurd consequences. In such a situation constitutional application ceases to be a simple exercise in interpretative syllogism. It takes on the character of "creative interpretation" (see Jeffrey Goldsworthy, *German Law Journal*, Vol.14 No.08, pp. 1279-1295 (August 2013)), or what some American theorists have called "*constitutional construction*" (see Randy E. Barnet, *Interpretation and Construction*, 34 Harv. J.L and Pub. Policy65 (2010)).

(143) Constitutional application, therefore, entails creatively interpreting the *Constitution* to eliminate ambiguities, vagueness and contradictions, in furtherance of good governance. Quite often, this exercise involves interpreting the *Constitution* in such a manner as to adapt it to changing circumstances in the community, with the care not to usurp the role of the legislature. This is what is meant when the *Constitution* is said to be "a living document". A Constitution is, thus, to be interpreted both according to its text, and creatively as well, to breath life into it (see Jakab, "*Judicial Reasoning in Constitutional Courts*", German Law Journal; Vol.14, No. 08, pp. 1215-1272 (August 2013)).

(144) It follows that article 163(4) (a) of the *Constitution* confers upon the Supreme Court a role of Constitutional interpretation and application, which cannot be performed through a bare apportionment of judicial tasks, as learned Senior Counsel, Mr. Abdullahi suggests. It is not feasible in electoral disputes, in respect of which the *Constitution* dedicates a whole chapter to "general principles" of the electoral system principles that stand alongside prescriptive norms. Where disputes arise with regard to the interpretation and application of such principles and norms in election petitions, this court, Kenya's apex court, cannot gaze helplessly when moved by a litigant. Not so long ago, in *Aramat v. Lempaka & Others* (Petition No.5 of 2014), this court was categorical about the nature of its jurisdiction. At paragraph 107 of the majority judgment, the court stated:

> " The *Constitution*'s paradigm of democratic governance entrusts to this court the charge of assuring sanctity to its declared principles. The court's mandate in respect of such principles cannot, by its inherent character, be defined in restrictive terms. Thus, such questions as come up in the course of dispute settlement..., especially those related to governance, are intrinsically issues importing the obligation to interpret or apply the *Constitution*¾and consequently, issues falling squarely within the Supreme Court's mandate under article 163(4) (a), as well as within the juridical mandate of the court as prescribed in article 259 (1) (c) of the *Constitution*, and in section 3(c) of the Supreme Court Act, 2011..."

51. It is with the above background that we now proceed to determine whether the appeal before us is founded upon issues of cogent constitutional controversy; and whether the controversy, if any, is to be resolved through a final interpretation or application of the *Constitution* by this honourable court. This will determine whether this Court's jurisdiction has been correctly invoked.

52. As earlier stated, upon perusal of the petition, we found no mention of any provision of the *Constitution* that is alleged to have been violated and/or misapplied or misinterpreted by the Court of Appeal. This being an appeal from the Court of Appeal, we note that the appellant is under an obligation, with clarity and precision, to point out the errors of law in the judgment of the Court of Appeal. The appellant before us is supposed to satisfy this court that the Court of Appeal erred in reaching at the decision it made. Hence, the focal point of the appellant's grievances should be directed at specific portions of the Court of Appeal judgment with the aim of demonstrating how the Court of Appeal erred and/or misinterpreted and/or misapplied the *Constitution*. The appellant has to state with precision the particular constitutional principle and/or provision violated.

53. All the eight (8) grounds (set out *verbatim in seriatim* in paragraph 2 above) upon which the petition is grounded fall short of the above requirement. We are at pain to discern which constitutional issue(s) the appellant wants this court to settle. What is apparent is that the appellant is generally aggrieved by the High Court decision and the fact that the Court of Appeal did not reverse that decision on her appeal. Her grievances are anchored on the factual findings by the trial court which issues cannot

invoke this court's jurisdiction under article 163(4)(a) of the *Constitution*. Further, looking at the issues the appellant frames for determination in both her petition and her written submissions, none is framed as a constitutional issue.

54. The upshot is that the appellant must be told in no uncertain terms, which we hereby do, that she has not rightfully invoked this court's jurisdiction under article 163(4)(a) of the *Constitution*. There is no issue of constitutional interpretation and/or application that beckons this court's further input. As we have found no jurisdiction to admit the appeal for consideration, the court cannot delve into determination of the other issues framed for determination.

55. Consequently we do not find it necessary to address issues Nos. (b), (c) and (d) set out above as falling for determination. The petition of appeal dated July 27, 2018 is hereby dismissed with costs to the Respondents for want of jurisdiction.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF DECEMBER, 2018,

.....

M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

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J. B. OJWANG

JUSTICE OF THE SUPREME COURT

.....

S. C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

N. NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT