



REPUBLIC OF KENYA



KENYA LAW
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**Karan v Ochieng & 2 others (Petition 36 of 2018)
[2018] KESC 4 (KLR) (21 December 2018) (Judgment)**

Christopher Odhiambo Karan v David Ouma Ochieng & 2 others [2018] eKLR

Neutral citation: [2018] KESC 4 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
PETITION 36 OF 2018
MK IBRAHIM, JB OJWANG, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ
DECEMBER 21, 2018**

BETWEEN

HON CHRISTOPHER ODHIAMBO KARAN PETITIONER

AND

DAVID OUMA OCHIENG 1ST RESPONDENT

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 2ND
RESPONDENT**

**ISAIAH NABWAYO (RETURNING OFFICER UGENYA CONSTITUENCY) .. 3RD
RESPONDENT**

*(Being an appeal from the judgment and decree of the Court of
Appeal at Kisumu (Githinji, Okwengu & J. Mohammed, JJ. A)
dated the 16th day of August 2018 Election Petition No. 13 of 2018)*

Supreme Court affirms Court of Appeal decision to nullify results for the election for Member of the National Assembly for Ugenya Constituency held on August 8, 2017

Reported by Beryl A Ikamari

***Jurisdiction** - jurisdiction of the Supreme Court - appellate jurisdiction of the Supreme Court - matters involving issues of constitutional interpretation and application - contest on dismissed application to extend time to file a response - whether an election appeal in which the petitioner was denied extension of time to file a response warranted an appeal to the Supreme Court grounds of constitutional interpretation of denial of the right to a fair hearing - whether an appeal at the Supreme Court raised issues of constitutional interpretation and application - Constitution of Kenya article 163(4)(a).*

***Constitutional Law** - fundamental rights and freedoms - right to a fair trial - failure to observe procedural stipulations within which to file a response to an election petition - dismissal of an application for extension of time*



within which to file a response to an election petition and denial of an opportunity to participate in proceedings- whether under the circumstances, the right to a fair trial was violated - Constitution of Kenya articles 25(c), 50 and 159(2)(d); Elections (Parliamentary and County Elections) Petitions Rules 2017 (cap 7 Sub Leg) rules 11 and 19.

Jurisdiction - *jurisdiction of the Court of Appeal - jurisdiction of the Court of Appeal in election petitions - appeal limited to matters of law only - whether the Court of Appeal wrongfully delved into matters of fact when making its determinations in an election petition appeal - Elections Act (cap 7) section 85A.*

Electoral Law - *conduct of an election - electoral malpractices and irregularities - remedies related to an election which did not substantially comply with the law or had irregularities that affected the outcome of the election - nullification of the election result - what amounted to substantial electoral irregularities and illegalities to warrant the nullification of an election - Elections Act (cap 7) section 83.*

Civil Practice and Procedure – *extension of time – considerations by the court in extension of time applications - what principles should courts consider in exercising discretion to extend time*

Brief facts

The Court of Appeal upheld a High Court decision to invalidate the appellant's election as the Member of the National Assembly for Ugenya Constituency.

The grounds of the High Court petition were electoral malpractices during the campaign period, the voting process and polling process. Other grounds included campaigning in polling stations during the polling day and harassment and intimidation of presiding officers and returning officers. The 2nd and 3rd respondent applied for enlargement of time within which to file a response to the petition after a delay in filing the response within the stipulated 7 days. The application was allowed by consent of the respective counsels.

The appellant also sought an extension of time within which to file a response to the petition. The appellant explained that he was not served with the petition (service was effected by way of newspaper advertisement) and that he fell sick and was admitted in hospital. The 1st respondent opposed the application and sought orders for the appellant's response to be struck out on the ground that it was filed out of time. The appellant's application for enlargement of time was dismissed and the 1st respondent's application was allowed. When the day for settlement of issues came, the 1st respondent objected to the appellant's participation in the proceedings pursuant to rule 11(8) of the Election Petition Rules, 2017, and the High Court upheld that objection. In spite of an application by the appellant for stay of proceedings pending an appeal on the rulings, related to enlargement of time for the filing of a response to the petition by the appellant, the High Court heard the matter and a judgment was delivered in March 1, 2018.

The appellant's appeal at the Court of Appeal was based on an alleged denial of the right to a fair hearing as concerned the dismissal of the appellant's application for enlargement of time within which to respond to the petition. The 2nd and 3rd respondents cross-appealed on two issues relating to whether discretion to disallow the appellant's application for enlargement of time was exercised properly and whether the Court of Appeal should interfere with that exercise of discretion. The Court of Appeal found that the High Court properly exercised its discretion to dismiss the application to extend time and to strike out the appellant's response and affidavits judicially. The Court also stated that it could not grant orders to admit the appellant's response at the High Court and incorporate it to its determination because section 85A of the Elections Act limited the Court of Appeal's jurisdiction to matters of law only. The cross-appeal was also dismissed. The appellant filed an appeal at the Supreme Court.

Issues

- i. Whether the Supreme Court had jurisdiction to hear and determine the matter under article 163(4) (a) as a matter involving issues of constitutional interpretation and application.
- ii. Whether in dismissing an appellant's application for extension of time in which to file a response to an election petition and denying the appellant an opportunity to participate in proceedings, the High Court violated that appellant's right to a fair trial.



- iii. Whether, in making its determinations, the Court of Appeal delved into matters of fact contrary to section 85A of the Elections Act.
- iv. What principles should courts consider in exercising discretion to extend time?
- v. What amounted to substantial electoral irregularities and illegalities to warrant the nullification of an election?

Held

1. Under article 163(4)(a) of the Constitution an appeal from the Court of Appeal to the Supreme Court would lie as of right in matters involving constitutional interpretation and application. In such matters it would be necessary for the appellant to challenge the interpretation or application of the Constitution which the Court of Appeal used in determining a matter. The matter of constitutional interpretation and application would have to have been canvassed at the superior courts and to have progressed through the normal appellate mechanism and reach the Supreme Court via an appeal.
2. The issues raised at the superior court included an issue at the Court of Appeal as to whether the High Court had denied the appellant the right to a fair hearing by declining to extend time within which the appellant could file a response to the petition and denying him an opportunity to participate in the proceedings. Considering the context in which the appeal arose, the appeal was within the ambit of article 163(4)(a) of the Constitution.
3. Article 50(1) of the Constitution provided for the right to a fair and public hearing and article 25 of the Constitution stipulated that the right to a fair trial could not be limited. Pursuant to article 87(1) of the Constitution, there were timelines within which election disputes were to be heard and determined. Article 87(2) of the Constitution provided that election petitions, other than presidential election petitions, would be filed within 28 days after the declaration of results by the IEBC. Under article 105, a dispute relating the validity of the election of a Member of National Assembly would have to be heard and determined within 6 months of the date of lodging the petition. Compliance with timelines was a constitutional principle and it enhanced constitutional values. It was important to the operation of a democratic system.
4. It was not generally the intention of the legislature to lock out a litigant from the right to be heard merely on the basis of inability to file a response on time due to inadvertent reasons. The Elections Act and the Rules made thereunder signified an intention by the legislature to facilitate the right to be heard by giving the court the discretion to enlarge timelines within which to file a response.
5. Under article 159(2)(d) of the Constitution, when courts exercised judicial authority, they had to be guided by the principle that justice was to be administered without undue regard to procedural technicalities. That did not mean that all procedural requirements were to be disregarded in the administration of justice. The courts had a duty to determine objectively, where a question of an undue procedural technicality arose, whether the procedural stipulation fell within the class of undue procedural technicality and if so, whether it should be disregarded in favour of substantive justice.
6. Rule 11 of Election Petition Rules 2017 gave a respondent who wished to oppose a petition 7 days to file a response. The response would have to be supported by an affidavit and accompanied by the affidavits of any witnesses that the respondent wished to call. Rule 19(1) of Election Petition Rules 2017, provided that for purposes of ensuring that injustice was not done to any party, time could be extended or limited where the Rules or an order of the Court required an act or omission to be done within a certain timeframe.
7. Extension of time was a creature of equity and one could only enjoy it if he acted equitably. Extension of time was not a litigant's right but a discretionary power of the Court. To enjoy it, a litigant had to not only demonstrate that he had a *bona fide* cause of action but also that time had lapsed and that there were compelling reasons for the delay. Courts could only indulge such a litigant if it was established



that the litigant was not at fault. The underlying principles that the court should consider in exercising discretion to extend time were the following:-

- a. extension of time was not a right of a party. It was an equitable remedy that was only available to a deserving party at the discretion of the Court;
 - b. a party who sought extension of time had the burden of laying a basis to the satisfaction of the Court;
 - c. whether the Court should exercise the discretion to extend time, was a consideration to be made on a case to case basis;
 - d. whether there was a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 - e. whether there would be any prejudice suffered by the respondents if the extension was granted;
 - f. whether the application had been brought without undue delay; and
 - g. whether in certain cases, like election petitions, public interest should be a consideration for extending time.
8. The appellant did not comply with the principles set by the Supreme Court so as to deserve extension of time to file his response. Electoral laws and regulations were not made in vain, they were meant to advance the provisions of the Constitution on settlement of electoral disputes which were disputes filed in the interest of the general public.
9. Rule 11(8) of the Election Petition Rules 2017 provided that a respondent who had not filed a response to a petition as required under the rule would not be allowed to appear or act as a party in the proceedings. On the basis of that provision, the High Court disallowed the appellant from participating in the hearing of the petition. Article 159 of the Constitution was not meant to aid in overthrow or destruction of rules of procedure and could not help the appellant.
10. Article 50(2) of the Constitution provided for the right to challenge evidence through cross-examination. It did not operate in a vacuum and it operated together with other laws to give the greatest effect. The Superior Courts were aware of the provisions of articles 20(3), 25(c) and 50 when making their determinations. There was no reason for faulting their interpretation and application of the Constitution.
11. Section 85A of the Elections Act provided that the Court of Appeal's jurisdiction in election petitions was restricted to matters of law only. Under the provision a matter of law was an issue or question involving:-
- a. the interpretation, or construction of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, in an election petition in the High Court, concerning membership of the National Assembly, the Senate, or the office of county governor;
 - b. the application of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, to a set of facts or evidence on record, by the trial Judge in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of county governor;
 - c. the conclusions arrived at by the Court in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of county governor, where the appellant claimed that such conclusions were based on "no evidence", or that the conclusions were not supported by the established facts or evidence on record, or that the conclusions were "so perverse", or so illegal, that no reasonable tribunal would arrive at the same; it was not enough for the appellant to contend that the Court would probably have arrived at a different conclusion on the basis of the evidence.
12. The record did not disclose that the Court of Appeal delved into evidence. The Court of Appeal only analysed the High Court's conclusions so as to address the grounds of appeal and the cross-appeal.



13. In determining the question as to whether to nullify an election, the court should be alive to the fact that an election was a direct expression of the sovereign will of the people and should not be interfered with whimsically or arbitrarily. Under article 1(1) of the Constitution, all sovereign power belonged to the people.
14. An election could be nullified where it fell short of the principles stipulated in articles 81 and 86 of the Constitution. Additionally, section 83 of the Elections Act provided that an election could be nullified where it did not substantially comply with written law applicable to the election and where there were electoral irregularities which affected the result of the election.
15. The right to a fair trial was a right that could not be limited under article 25(c) of the Constitution. However, it was an individual right that was held *in personam* (made against or affecting a specific person only) and the remedy for the violation of such a right could not be the nullification of an election. An election reflected the people's views as expressed through the vote, not just rights of individuals and therefore, courts had to be careful not to exercise power in a manner that interfered with the people's expression in instances where proven irregularities did not affect the election results.
16. The nullification of the appellant's election was based on the finding that electoral malpractices, irregularities and illegalities were such that the elections were not conducted substantially in accordance with the Constitution and relevant electoral laws and the results did not pass the test of being transparent, accountable, verifiable and credible. That finding was upheld by the Court of Appeal. The appellant did not demonstrate that the Court of Appeal erred in its interpretation and application of the Constitution in that regard.
17. Had the appellant proved his claim of violation of the right to a fair trial, the remedies set out in article 23(3) of the Constitution would have been available to him. The remedies were such that the Court could grant appropriate relief including a declaration of rights, an injunction, a conservatory order, a declaration of invalidity of a law that denied, violated, infringed or threatened a right or fundamental freedom in the Bill of Rights and was not justified under article 24 of the Constitution, an order for compensation and an order for judicial review.
18. Costs followed the event and the court had discretion in awarding costs. The party that instituted a suit would bear costs if the suit failed and where that party was successful, the defendant or respondent would bear the costs.

Petition of appeal dismissed.

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2. *Cornel Rasanga Amoth v William Oduol and 2 others* Civil Appeal No. 13 of 2013-(Explained)
3. *Gakuru, David Kamau v National Industrial Credit Bank Ltd* Civil Appeal 84 of 2001; [2002] KECA 274 (KLR) - (Mentioned)
4. *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* Petition No. 4 of 2012; [2014] eKLR - (Followed)
5. *Joho & another v Shabbal & 2 others* Petition 10 of 2013; [2014] KESC 34 (KLR) - (Followed)
6. *Judicial Service Commission v Mbalu Mutava & another* Civil Appeal 52 of 2014; [2015] KECA 741 (KLR) - (Followed)
7. *Kagwe, John Wainaina v Hussein Dairy Limited* Civil Appeal 215 of 2010; [2013] KECA 488 (KLR) - (Explained)
8. *Kidero & 4 others v Waititu & 4 others* Petition 18 & 20 of 2014 (Consolidated); [2014] KESC 11 (KLR) - (Explained)
9. *Kiptoo, Nicholas Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* Application 16 of 2014; [2014] KESC 12 (KLR) - (Explained)



10. *Mokaya, Jackson v James Onchangwa Macharia* Environment & Land Case 415 of 2013; [2014] KEHC 212 (KLR) - (Mentioned)
11. *Mosiany, Kakai Ene Nangoo v Katoto Ole Keriongi Miisia* Succession Cause 61 of 2009; [2012] KEHC 1332 (KLR) - (Mentioned)
12. *Munene v King'ara & 2 others* Petition 7 of 2014; [2014] KESC 37 (KLR) - (Explained)
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14. *Munya v Kitbinji & 2 others* Petition 2B of 2014; [2014] KESC 38 (KLR) - (Explained)
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16. *Ndeti, Wavinya v Independent Electoral and Boundaries Commission (IEBC) & 4 others* Petition 19 of 2014; [2014] eKLR - (Explained)
17. *Nduttu & 6000 others v Kenya Breweries Ltd & another* Petition 3 of 2012; [2012] KESC 9 (KLR) - (Explained)
18. *Ngoge v Kaparo & 5 others* Petition 2 of 2012; [2012] KESC 7 (KLR) - (Explained)
19. *Obado v Oyugi & 2 others* Petition 4 of 2014; [2014] KESC 22 (KLR) - (Followed)
20. *Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others* Petition 5, 3 & 4 of 2013 (Consolidated); [2013] KESC 6 (KLR) - (Explained)
21. *Republic v Board of Governors, Our Lady of Victory Girls School Kanyeberai & another Ex-parte Korir Kipyego Joseph & another* Judicial Review Miscellaneous Application 13 & 14 of 2013; [2015] KEHC 3680 (KLR) - (Followed)
22. *Republic v Public Procurement Complaints Review & Appeals Board Ex Parte Invesco Assurance Co. Ltd* Miscellaneous Application 996 of 2003; [2014] KEHC 5272 (KLR) - (Explained)
23. *Shollei & another v Judicial Service Commission & another* Petition 34 of 2014; [2018] KESC 42 (KLR) - (Followed)
24. *Torres, Juan & another v Michael Njai* Civil Appeal 154 of 2015; [2017] KECA 508 (KLR) - (Explained)
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26. *Wagunza, Zachariah & another v Office of the Registrar Academic Kenyatta University & 2 others* Judicial Review Miscellaneous Application 155 of 2013; [2013] KEHC 6908 (KLR) - (Followed)
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28. *Wetangula & another v Kombo & 5 others* (Petition 12 of 2014) [2015] KESC 12 (KLR) - (Explained)

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1. *Bhandari v Gautamna* [1964] EA 606- (Mentioned)
2. *Mbaki & others v Macharia & another* [2005] EA 206 - (Mentioned)
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5. *Tang Gas Distributors Ltd v Said & others* [2014] EA 448 - (Mentioned)

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Statutes

Kenya

1. Constitution of Kenya articles 1(1); 2(5)(6); 19; 20(3); 22;24 ; 25(c); 38(3) (c) ; 47; 48;50(2); 50(2)(k); 87(1)(2); ; 10(2); 159(2)(d); 164(3); 163(4)(a); 258(1) - (Interpreted)



2. Civil Procedure Act (cap 21) In general - (Cited)
3. Elections (Parliamentary and County Elections), Petition Rules, 2017 (cap 7 Sub Leg) rules 11(1)(6) (7)(8); 12; 19(1);30 - (Interpreted)
4. Elections Act (cap 7) sections 84, 85A, 96(1) - (Interpreted)
5. Evidence Act (cap 80) sections 145(2); 146; 153; 154 - (Interpreted)
6. Interpretation and General Provisions Act (cap 2) section 29 - (Interpreted)
7. Statutory Instruments Act (cap 2A) sections 5, 10, 13 - (Interpreted)
8. Supreme Court Act (cap 9B) sections 3(a)(b); 15(a); 21 - (Interpreted)

Advocates

Mr TJ Kajwang and *Mr S Ligunya* for the appellant.

Mr Daniel Achach, *Mr David Ochieng* and *Mr Alphonse Omondi* for the 1st respondent.

Mr Olendo Raymond for the 2nd and 3rd respondents.

JUDGMENT

A. Introduction

1. This is an appeal against the judgment of the Court of Appeal (Githinji, Okwengu & J Mohammed, JJ A), upholding the decision of the Election Court sitting in Siaya (Lady Justice Cherere) in Election Petition No 1 of 2017, delivered on March 1, 2018. The Court of Appeal decision invalidated the appellant's election as the Member of National Assembly for Ugenya Constituency.

B. Background

a. Proceedings in the High Court

2. The appellant was declared the duly elected Member of the National Assembly, Ugenya Constituency, following the General Election held on August 8, 2018 having garnered 23,765 votes against his closest rival, the 1st respondent, who garnered 23,418 votes. Afterwards, the 1st respondent filed an Election Petition on September 4, 2017 in the High Court at Siaya, Election Petition No 1 of 2017, seeking a determination that: the election for Member of National Assembly for Ugenya Constituency was not conducted in accordance with the Constitution and the relevant electoral laws; that the results declared were invalid, null and void; that the election of the appellant as the elected Member of National Assembly for Ugenya Constituency be declared null and void and orders directing the Independent Electoral and Boundaries Commission (IEBC) to conduct fresh elections in conformity with the Constitution and the Elections Act. The broad grounds of the petition were malpractices during the campaign periods; malpractices during the voting process, campaigns in the polling stations on the polling day; malpractices during the polling process and harassment and intimidating of Presiding Officers and Returning Officers.
3. Whereas the 2nd respondent (IEBC) was served with the petition at its offices on September 6, 2017, the 3rd respondent (Returning Officer) was served personally on September 7, 2017. The 1st respondent on the other hand was served through an advertisement published in the Standard Newspaper on Friday September 8, 2017. Despite being properly served, neither of the three respondents filed their respective responses to oppose the petition within the seven (7) days stipulated by rule 11(1) of the *Elections (Parliamentary and County Elections), Petition Rules, 2017* (Election Petition Rules, 2017).
4. Subsequently, the 2nd and 3rd respondents filed a Notice of Motion application dated September 23, 2017 seeking extension of time within which to file a response and a further order that upon the time



being enlarged, their response be deemed properly filed and served. Various reasons for delay were given including the time taken to send the file to their advocate in Kakamega, tracing the scattered witnesses, and the limited human resources due to numerous petitions filed in courts across the country. That application was allowed by consent of the respective counsels on October 18, 2017.

5. Likewise, the appellant filed a notice of motion application dated September 25, 2017, for enlargement of time for filing a response to the petition. He also sought a further order that his response to the petition dated September 22, 2017 and witnesses' affidavits be deemed as duly filed and served. The application was based on three grounds namely, that he was not served with the petition, that he fell sick on September 6, 2017 and was admitted in hospital until September 13, 2017 and that he learnt of the petition from a friend on September 14, 2017. The application was supported by the affidavit of the appellant and documents annexed thereto and a supplementary affidavit sworn on October 12, 2017. The 1st respondent filed a replying affidavit opposing the application. Subsequently, the 1st respondent filed a notice of motion dated October 2, 2017 for orders, inter alia, that the response filed by the appellant be struck out on the ground that it was filed out of time. Both applications were heard and considered by the election court and by a ruling dated November 16, 2017, the appellant's application was dismissed and the 1st respondent's application was allowed, with the result that the appellant's response was struck out with costs.
6. On the day fixed for settlement of issues, the appellant's participation in the hearing was objected to by the 1st respondent pursuant to rule 11(8) of the [Election Petition Rules, 2017](#). By a ruling dated November 21, 2017, the election court upheld the objection.
7. Thereafter, the petition proceeded to full hearing on December 4, 2017 despite the appellant's application for stay of proceedings pending appeal against the rulings of November 16, 2017 and November 21, 2017. The 1st respondent gave evidence and called thirty-nine (39) witnesses. The 3rd respondent gave evidence and eight (8) other witnesses testified in support of the case for the 2nd and 3rd respondents. By a judgment delivered on March 1, 2018, the election court allowed the petition, nullified the appellant's election, directed the 2nd respondent to conduct a fresh election and capped the costs at Kshs 7 million.

b. Proceedings at the Court of Appeal.

8. Aggrieved by the High Court's decision, the appellant appealed to the Court of Appeal challenging principally the denial of his right to a fair hearing. The 2nd and 3rd respondents cross-appealed challenging the merit of the decision of the election court's decision to enlarge time for the appellant. The grounds of appeal were set to address the following salient issues:
 1. Whether by refusing to extend time, striking out the appellant's response to the petition, and denying him an opportunity to cross-examine witnesses, the trial court denied the appellant any fair hearing contrary to Election Laws, the Constitution and the Rules of Natural Justice.
 2. If the answer to the above is in the affirmative, what is the consequence of this upon the judgment?
 3. Whether the learned judge manifested bias against the appellant and in favour of the 1st respondent.
 4. Whether the trial court addressed its mind to the nature and ramification of article 159 of the [Constitution](#)".



9. The grounds of the cross-appeal were set to address two issues, namely, whether the learned judge properly and judiciously exercised her discretion in dismissing the appellant's application for enlargement of time, and whether the appellate court should interfere with the exercise of that discretion.
10. On August 16, 2018, the Court of Appeal dismissed the appeal with costs to the 1st respondent and held that the trial court properly exercised its discretion to dismiss the application to extend time and to strike out the appellant's response and affidavits judicially and in accordance with the law. Further, the appellate court observed that the appellant's prayer to admit his response at the trial court and incorporate it in its determination could not be granted in view of section 85A of the [Elections Act](#) which limits the Court of Appeal's jurisdiction to matters of law only. On costs, it held that there was no good reason to interfere with the decision of the High Court capping costs at Kshs 7 million. The court also dismissed the cross-appeal with costs to the 1st respondent and found that the electoral court considered the nature of the electoral malpractices, and whether or not those malpractices affected the results of the election, and came to the conclusion that electoral malpractices established were of such magnitude that they affected the results of the election. Further, that the electoral malpractices established to have been proved by the election court affected the very core of the Constitutional principles of the electoral system, that of free expression of the will of electors through a free and fair election.

c. Proceedings at the Supreme Court

11. Dissatisfied with the judgment of the Court of Appeal, the appellant, on September 17, 2018 filed a petition challenging the Court of Appeal's decision on the following seven (7) grounds:
 - a. The Court of Appeal misdirected itself by construing the judicial discretion of the High Court in issuing the striking out ruling and locking out rulings in a manner which violated articles 24, 25(c) and 50(2) of the [Constitution](#) thereby perpetuating violation of the petitioner's rights to fair hearing.
 - b. Having found out that the High Court proceedings amounted to a mistrial to the extent that it violated the petitioner's constitutional right to fair hearing therefore null and void *ab initio*, the Court of Appeal erred in law by failing to apply its own finding and ultimately failed to hold that the said High Court proceedings and the resultant judgment and consequential orders were a nullity that should be obliterated from the court's record even without feeling obliged, as they did, to consider or apply article 105(2) of the [Constitution](#).
 - c. The Court of Appeal erred by failing to hold that the consideration and application of article 105(2) of the [Constitution](#) was superfluous as there was no record before the superior court to which the trial court could be remitted, the same having been found as unconstitutional therefore a nullity.
 - d. The Court of Appeal erred and reached a manifestly wrong decision by dismissing the appeal effectively upholding the High Court Judgment and Order, setting the dangerous precedent that the judgment flowing from a mistrial is equal to a judgment of a fair trial before a court of competent jurisdiction.
 - e. The Court of Appeal failed to correctly apply binding principles of constitutional interpretation in determining the petitioner's appeal by failing to overturn the High Court striking out ruling, and failing to find that the perceived delay occasioned no incurable



prejudice on any party neither did it affect the High Court's competence to determine the election petition within defined timelines.

- f. The Court of Appeal failed to correctly apply the appellate jurisdiction under article 164(3) of the *Constitution* limited to matters of law by section 85A of the *Elections Act* by dismissing the petitioner's meritorious appeal solely on a flawed review of factual and evidentiary matters, without legal justification.
 - g. The Court of Appeal failed to correctly consider the constitutional underpinnings of evidence in election petitions contrary to article 50(2)(k) of the *Constitution* and to the petitioner's detriment.
12. The petitioner itemized seven issues for determination namely: Whether the Supreme Court has jurisdiction to entertain this appeal; Whether the Court of Appeal judgment dated August 16, 2018 dismissing the petitioner's appeal by itself perpetuated the limitation and violation of the petitioner's right to fair trial contrary to article 24, 25 (c) and 50 of the *Constitution*; Whether the Court of Appeal exceeded its jurisdiction limited to points of law only pursuant to article 164(3) of the *Constitution* as read with section 85A of the *Elections Act*; Whether the Court of Appeal correctly applied the binding principles of constitutional interpretation set out by article 159(2) by resorting to procedural technicalities to defeat the petitioner's claim by substantive justice; whether the Court of Appeal correctly interpreted and applied the evidentiary underpinnings of the constitutional right to fair trial under article 50(2)(k) within the context of election petition appeals; and Whether the Court of Appeal correctly interpreted and applied article 47 of the *Constitution* as by law required to grant the broadest enjoyment to the Petitioner of the right to access to justice.
 13. The petitioner seeks that this court allow the appeal and set aside the decision of the appellate court, and the Election Court, and declare also that he was validly declared as the Member of the National Assembly Ugenya Constituency.
 14. The parties were represented by several advocates: Mr TJ Kajwang and Mr S Ligunya for the appellant, Mr Daniel Achach, Mr David Ochieng and Mr Alphonse Omondi for the 1st respondent, and Mr Olendo Raymond for the 2nd and 3rd respondents.

C. The Parties' Respective Cases

a. The appellant

Jurisdiction

15. The appellant, in his written submissions, submitted that the appeal is premised on article 163(4) (a) of the *Constitution*, section 3(a) and (b) of the *Supreme Court Act, 2011* and the decisions of this court in the cases of *Lemanken Aramat v Harun Meitamei Lempaka & 2 others*, Sup Pet 5 of 2014, [2014]eKLR (the Aramat Case); *Hassan Ali Joho v Suleiman Said Shabbal & 2 others* SC Pet No 10 of 2013, [2014]eKLR (the Joho Case); *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*, SC Appl No 5 of 2014, [2014]eKLR (Munya2)
16. Counsel submitted in that context that this appeal raises Constitutional issues which involve the application and interpretation of the following articles of the *Constitution* namely, 38(3)(c), 25(c), and 50(2).



The right to fair hearing

17. Mr Kajwang, counsel for the appellant submitted that the Court of Appeal erred in law by failing to reverse and or set aside the trial court's decision which locked out the appellant from participating in a hearing affecting his rights under article 38 of the Constitution, and test the evidence of the Petitioner and his witnesses.
18. Learned counsel submitted that the striking out rulings made by the trial court, the proceedings thereof and injudicious exercise of discretion violated the appellant's right to fair hearing. Additionally, counsel submitted that despite the appellate court(Okwengu JA) faulting the trial court for contravening the appellant's right to fair hearing, it proceeded to dismiss his appeal.
19. The appellant, in his written submissions further faults the Court of Appeal for narrowly construing and applying the legal principles enunciated in *Mbogo & another v Shab* [1968] EA93 and by not appreciating all the reasons for filing a response on time (especially the reason that the 12 days delay was to enable his advocates prepare witnesses and file a response); hence dismissing his motion and making it impossible for him to participate in the proceedings. In Counsel's view, the Court of Appeal ought to have dispensed justice by overturning the unjust High Court judgment and interlocutory rulings, and restore the electoral result declaring the appellant as Member of the National Assembly for Ugenya Constituency.
20. Further, counsel faulted the appellate court(Githinji J) in his finding that rule11(8) of the Election Petition Rules, 2017 is not unconstitutional but rather a consequence of failure to comply with timelines sanctioned by the Constitution. Counsel urged that in this holding, the learned judge failed to address himself to the principle of constitutional sovereignty over other legal norms and ignored this court's decision in Evans Odhiambo Kidero & 4 others v Ferdinand Waititu & 4 others, SC Pet No 18 & 20 of 2014.
21. Counsel further more urged that the Court of Appeal erred in law by making its judgment on the basis of article 105(2) of the Constitution thereby violating the principle of natural justice, that no one shall be condemned unheard. In counsel's view, the pleadings and proceedings at the trial Court ought to be struck out leaving no room for a re-trial.[22.

Learned counsel for the appellant also faulted the Court of Appeal for reviewing the 1st Respondent's evidence contrary to section 85A of the Elections Act, 2017, citing this court's decision in Zacharia Okoth Obado v Edward Akogo Oyugi & 2 others, SC Pet No 4 of 2014, [2014] eKLR . Counsel added that in its analysis of the High Court evidence, the Court of Appeal excluded the appellant's documents from its evaluation thereby perpetuating an injustice.

22. Counsel urged that by upholding the trial court's judgment, the Court of Appeal relegated the right to fair hearing, imposed an unlawful limitation on the non-derogable right to fair hearing contrary to article 24 and 25(c) of the Constitution, and set a dangerous precedent, that a court of law can extinguish an individual's right to hold elective office under article 38(3)(c). He urged that the Court of Appeal thus failed to grant him an appropriate remedy when he was deserving
23. While citing articles 20(3), 25(c) and 50 of the Constitution and this court's decisions in Kidero Case, Gladys Boss Shollei v Judicial Service Commission & another Sc Pet 34 of 2014, [2014] eKLR(the *Shollei* case), the petitioner urged that this court has a duty to authoritatively give effect to the Appellant's right to fair hearing by setting aside the superior court's decisions and affirm his election as the Member of Parliament for Ugenya Constituency.



24. Counsel, in addition urged that the Court of Appeal erred and misinterpreted articles 2, 20(3), 25(c), 50(2) and 159(2) of the *Constitution* by elevating procedure as to filing timelines defined by subsidiary legislation over substantive administration of justice proclaimed by the Constitution. In the appellant's view, the timelines are meant to advance the right to fair hearing and that the Court of Appeal should have adopted an interpretation that favours the broadest enjoyment of the said right. While citing the concurring opinion of Njoki Ndungu, SCJ in the *Kidero Case*, the appellant submitted that the Court of Appeal failed to give effect to public policy favoring preservation of the election result. The appellant also urged that to meet the constitutional threshold, evidence tendered in court must be tested and verified to the required legal standard pursuant to article 50(2)(k). Consequently, he blamed the Court of Appeal for not correctly interpreting this article.
25. Counsel finally submitted that there are no timelines for filing an affidavit in response to a petition according to rule 12 of the *Election Petition Rules*, that only a response has timelines. He urged further that even where a judge strikes out both a response and an affidavit, an accused person has a right to challenge evidence and accusations leveled against him through cross examination, a chance he was not given thereby, violating his right to fair trial and access to justice under articles 22(1), 48, 50 and 258(1) of the *Constitution*.

b. 2nd and 3rd Respondent

26. Mr Olendo, counsel for the 2nd and 3rd respondents submitted in support of the appeal that the petition is grounded on article 50 and 25(c) on the right to fair hearing. He urged that the appellant was entitled to an opportunity to cross examine the witnesses, so as not to be condemned unheard. Counsel buttressed these submissions with the following decisions: *Zachariah Wagunza & another v Office of the Registrar Academic Kenyatta University & 2 others* [2013] eKLR, High Court at Nairobi Judicial review No. 155 of 2013; *R v Board of Governors, Our Lady of Victory Girls School Kanyeberai & another Ex-parte Korir Kipyego Joseph & another* [2015] eKLR and *R v Public Procurement Complaints Review & Appeals Board Ex-parte Invesco Assurance Co Ltd* [2014] eKLR; *Judicial Service Commission v Mbalu Mutava & another* [2015] eKLR; *Bhandari v Gautamna* [1964] EA 606 at page 606; *Tang Gas Distributors Ltd v Said & others* [2014] eKLR; and *Mbaki & others v Macharia & another* [2005] EA 206. In all these decisions, the right to fair hearing was emphasized by the courts.

c. The 1st Respondent

27. Mr Ochieng, the 1st respondent and learned counsel submitted that the appellant failed to respond to the Petition at the trial court on time thereby losing the right to be heard in the proceedings therein. Counsel also urged that article 87 of the *Constitution* contemplates that Parliament would enact legislation to govern settlement of disputes including timelines within which disputes should be settled and that the *Elections Rules* is one such legislation.
28. Consequently, counsel submitted, the appellant became undeserving of the remedy of extension of time thereby losing the opportunity to be heard and to participate in the proceedings therein. While citing *Union Insurance Co of Kenya Ltd v Ramza Abdul Dhanji* Civil Application No Nai 179 of 1998. Counsel further submitted that the petitioner failed to satisfactorily explain why he did not utilize the opportunity to be heard. Counsel urged that the appellant also failed to demonstrate how the trial court abused his discretion to enable the Court of Appeal interfere with the same pursuant to the decision in the *Mbogo v Shab* case. Counsel thus urged this court to respect the decision of the superior courts since the same was exercised judiciously pursuant to this court's decision in the case of *Peter Oduor Ngoge v Francis Ole Kaparo & 5 others*, SC Pet 2 of 2012; [2012] eKLR the (*Ngoge* case).



29. Counsel urged further that the appellant, by advancing new grounds to justify a claim for extension of time by the superior courts, is prosecuting a new application for extension of time. Counsel cited *Shabir Din v Ram Parkash Anand* (1955) 22 EACA 48; and article 159(2)(d) to support his submission that discretion to extend time is intended to avoid an injustice resulting from accident, inadvertence or excusable mistake or error but not designed to assist a person who has deliberately sought to obstruct or delay the course of justice. Counsel also cited *Raila Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others*, SC Pet 5 of 2013; [2013] eKLR (*Raila 2013*) where this court held that the law and rules relating to interpretation and application of the Constitution must be taken with seriousness and the appropriate solemnity as the Rules and timelines established are made with special consideration.
30. Counsel furthermore urged that the appellant's claims of violations of right to fair hearing are based on falsehoods, incurable indolence and also incurable by this court. Counsel thus submitted that the remedy of extension of time is equitable in nature and cannot be granted to a party with unclean hands referring to *Jackson Mokaya v James Onchangwa Macharia* [2014] eKLR, *Titus Gicharu Mwangi v Mary Nyambura Murima & another* [2014] eKLR, *David Kamau Gakuru v National Industrial Credit Bank Limited* Civil Appeal No 84 of 2001; and *Kakai Ene Nangoo Mosiany v Katoto Ole Keriongi Miisia* [2012] eKLR. He maintained that unless it is demonstrated that the trial court, abused its discretion, the court has no mandate to interfere with such an exercise of discretion.
31. On the appellate court's finding that the appellant's right to fair trial was violated, counsel submitted that, the finding was a minority finding and is not a decision of the court warranting our examination. Counsel also added that the constitutionality of rule 11(8) was not one of the appellant's grounds of appeal and that the court addressed only because it was mentioned in oral submissions. Counsel also faulted the Court of Appeal (Okwengu J) for holding that the appellant's right to fair trial was violated arguing that her decision was not based on the proper analysis of the law. Counsel urged that a broader interpretation of the Constitution to afford enjoyment of the right to a fair trial should only be given when the applicant is deserving of such orders.
32. It was further submitted that the rules and timelines in election petitions are not mere procedural technicalities but constitutional imperatives, which must be respected. Counsel anchored this submission by citing articles 87, 105, 159(2) of the *Constitution*, section 96(1) of the *Elections Act* and several of this court's decisions including: the *Jobo* case, *Munya 2*, the *Aramat* case; and the *Nicholas Salat* case.
33. On the Court of Appeal's alleged violation of section 85A of the *Elections Act*, counsel submitted that the appellate court has jurisdiction to evaluate the evidentiary basis of the conclusions drawn by the trial court, as a matter of law especially where the appellant claims that the conclusions of the trial court were not based on the evidence on record referring to this court's decision in *Munya 2*.
34. On whether the appellant's right to fair trial can be violated by non-joinder of all the necessary parties, counsel submitted that it cannot. He supported this submission by citing the Court of Appeal's decision in *Cornel Rasanga Amoth v William Oduol and 2 others*, Civil appeal No. 13 of 2013, where it was held that misjoinder or non-joinder of parties cannot be a ground to defend a suit. Consequently, counsel urged this Court to determine the appeal based on the principles and laws governing the conduct of elections, and not on claims of violations of the right to fair trial.
35. Finally, learned counsel concluded by stating that the remedies sought by the appellant are legally untenable due to constitutional timelines on determination of election petitions (6 months), and that the 1st respondent just like the appellant, has equal protection of the law.



D. Issues for Determination

36. The appellant has identified the following issues for determination by this court:
- a) Whether this appeal is rightly before this court pursuant to article 163(4)(a)?
 - b) Whether the appellant's right to fair trial was violated by the superior courts?
 - c) Whether Court of Appeal delved into issues of fact contrary to section 85A of the Constitution?
 - d) What reliefs are available to the parties?

E. Analysis

a. Jurisdiction

37. Although the respondents did not address us on the issue of jurisdiction, counsel for the appellant relied on the written submissions filed on October 2, 2018 and October 16, 2018. On this issue, learned counsel invoked the jurisdiction of this Court under article 163(4)(a) of the Constitution, which allows for appeals as a matter of right, in cases involving the interpretation or application of the Constitution. Counsel also invoked section 3(a) and (b) of the Supreme Court Act, No. 7 of 2011 which mandates this court to assert the supremacy of the Constitution and provide authoritative and impartial interpretation of the Constitution respectively.
38. Before addressing the substantive issues which go into the heart of this appeal, we have to be satisfied therefore that this appeal is rightly before us.
39. The appellate jurisdiction of this court is precisely set out in article 163(4) of the Constitution of Kenya which state as follows:
- Article 163 (4).
- (4) 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 Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5)
 - (5) A certification by the Court of Appeal under clause (4) (b) may be reviewed by the Supreme Court, and either affirmed, varied or overturned.
40. Section 15 (1) of the Supreme Court Act further provides that Appeals to the Supreme Court shall be heard only with the leave of the court. Section (15)(2) on the other hand then provides that subsection (1) shall not apply to appeals from the Court of Appeal, in respect of matters relating to the interpretation or application of the Constitution.
41. In its previous decisions, this Court has unequivocally outlined the realm of its jurisdiction under article 163(4)(a) of the Constitution which decisions are still applicable. In the case of Lawrence Nduttu & 6000 others v. Kenya Breweries Ltd & another Sup. CT Petition No 3 of 2012; [2012] eKLR a two-Judge Bench of this court (Tunoi and Wanjala SCJJ) the set guiding principles were affirmed as follows:



- [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).”
42. Likewise, in the *Jobo Case*, this court observed as follows:
- [37]: “ In light of the foregoing, the test that remains, to evaluate the jurisdictional standing of this court in handling this appeal, is whether the appeal raises a question of constitutional interpretation or application, and whether the same has been canvassed in the Superior Courts and has progressed through the normal appellate mechanism so as to reach this court by way of an appeal, as contemplated under article 163(4)(a) of the *Constitution*...” [emphasis added].
43. The same principle was echoed in this court’s decision in *Munya 1* where we stated thus:
- [69]: “ 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.”
44. We cannot decide if the Appeal is properly before us without examining the nature of issues from which this appeal arose. We have thus taken note of the issues identified by the trial court as issues for determination at page 1524 of the record of appeal to include the following:
- a. Whether the election for the Member of National Assembly for Ugenya Constituency was conducted in accordance with the principles laid down in the Constitution and Electoral Laws.
 - b. Whether there were electoral malpractices, irregularities and illegalities committed in the conduct of the election for the Member of National Assembly for Ugenya Constituency.
 - c. If there were electoral malpractices, irregularities and illegalities, what was their impact if any, on the integrity of the election and the results there from.
 - d. Whether the 3rd respondent was validly elected as the Member of National Assembly for Ugenya Constituency.
 - e. Who is to bear the costs of this petition?
45. The record at page 12833 and 2936 also shows that on appeal, the appellate court identified three issues as being central in the appeal:
1. Whether by refusing to extend time, the striking out of the appellant’s response to the petition and denying him an opportunity to cross-examine witnesses, denied the appellant any fair hearing contrary to Election Laws, the Constitution and the Rules of Natural Justice.
 2. If answer to the above is in the affirmative, what is the consequence of this upon the judgment?
 3. Whether the learned judge manifested bias against the appellant and in favour of the 1st respondent.



4. Whether the trial court addressed its mind to the nature and ramification of article 159 of the Constitution.
46. The Court of Appeal upheld the decision of the High Court nullifying the appellant's election on the ground that the electoral malpractices, irregularities and illegalities witnessed in the impugned election were such that it could not be said that the election had been conducted substantially in accordance with the Constitution, and the relevant electoral laws and the results there from do not pass the test of being transparent, accountable, verifiable and credible. In affirming the judgment of the High Court, the appellate court stated (at paragraph 2857 of record) as follows:

“Upon considering this aspect of the appeal objectively, applying the principles of electoral laws, and considering the special and rigid electoral disputes resolution regime, I am satisfied that the election court exercised its discretion to dismiss the application to extend time and to strike out the appellant's response and affidavits judicially and in accordance with the law . “

At page 2902 of the record, the appellate court stated further as follows:

“It is clear therefore that the electoral court considered the nature of the electoral malpractices and whether or not those malpractices affected the results of the election and came to the conclusion that electoral malpractices established were of such magnitude that they affected the results of the election. The electoral malpractices established to have been proved by the election court affected the very core of the Constitutional principles of the electoral system that of free expression of the will of electors through a free and fair election”

47. taking all the above matters in context, we hold that this appeal, indeed, falls within the ambit of article 163(4)(a) of the Constitution and is rightly before us.

b. Right to fair trial under article 50 of the Constitution.

48. Both counsels for the appellant and for the 2nd and 3rd respondents urged us that by declining to enlarge time for the appellant to file his response; striking out his pleadings; and denying him an opportunity to test the 1st respondent's evidence through cross-examination, the trial court violated the appellant's right to be heard under article 50(2) of the Constitution. Counsels urged that the Court of Appeal also failed to correctly interpret the Constitution on the right to fair trial in determining the appellant's appeal. Counsel for the 1st respondent, by contrast, urged us to affirm the decision of the appellate court, and find that the superior courts properly interpreted the Constitution and relevant election laws in respect to the right to fair hearing.

49. In examination of the question before us, that is, to determine whether the judges of the High Court and Court of Appeal in any way, at any stage of trial of this matter, violated the right to a 'fair hearing, we first of all need to remind ourselves on the significance, distinctive meaning, scope and implication of this right. This right is clearly spelt out in the Constitution. article 50(1) of the Constitution provides that:

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”



50. Article 25 of the Constitution stipulates that:

“Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited –

- (a) freedom from torture and cruel, inhuman or degrading treatment or punishment;
- (b) freedom from slavery or servitude;
- (c) the right to a fair trial;
- (d) the right to an order of habeas corpus.”

51. Borrowing from this court’s decision (the Concurring Opinion of Njoki Ndungu, SCJ) in the case of Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others, Sc Pet 18 of 2014, [2014] eKLR, article 50(1) and 50(2) should be accorded an expansive and inclusive construction to give the right to fair trial a full effect pursuant to articles 19 and 20 of the Constitution.

52. At the international level, the African Commission on Human and People’s Rights has established general principles to all legal proceedings applicable by Member States, of which Kenya is one. These principles are binding under article 2(5) and (6) of the Constitution, and include the following:

General Principles Applicable To All Legal Proceedings:

1. Fair and Public Hearing

In the determination of any criminal charge against a person, or of a person’s rights and obligations, everyone shall be entitled to a fair and public hearing by a legally constituted competent, independent and impartial judicial body.

2. Fair Hearing

The essential elements of a fair hearing include:...

- (e) adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence;
- (f) an entitlement to consult and be represented by a legal representative or other qualified persons chosen by the party at all stages of the proceedings; ...
 - (i) an entitlement to a determination of their rights and obligations without undue delay and with adequate notice of and reasons for the decisions; and
 - (j) an entitlement to an appeal to a higher judicial body.”

53. The scope of fair hearing was also extensively examined in Kidero in the following terms:

(257) Fair hearing, in principle incorporates the rules of natural justice, which includes the concept of audi alteram partem (hear the other side or no one is to be condemned unheard) and *nemo iudex in causa sua* (no man shall judge his own case) otherwise referred to as the rule against



bias. Peter Kaluma, *Judicial Review: Law, Procedure and Practice* 2nd Edition (Nairobi: 2009) at page 195, notes that the rules of natural justice generally refer to procedural fairness in decision making. Further he analyses the two mentioned concepts of the rules of natural justice and states [at pages 176 and 177] that it is the duty of the courts, when dealing with individual cases, to determine whether indeed the rules of natural justice have been violated and noting that “although the necessity of hearing is well established, its scope and contents remain unsettled.”

- (258) What then are the norms or components of a fair hearing? The Supreme Court of India, in *Indru Ramchand Bharvani & Others v Union of India & Others*, 1988 SCR Supl. (1) 544, 555 found that a fair hearing has two justiciable elements: (i) an opportunity of hearing must be given; and (ii) that opportunity must be reasonable (citing *Bal Kissen Kejriwal v Collector of Customs, Calcutta & Others*, AIR 1962 Cal 460).
- (259) That court in *Union of India v JN Sinha & another*, 1971 SCR (1) 791 and *CB Boarding & Lodging v State of Mysore*, 1970 SCR (2) 600 held that with regards to fair hearing, each case has to be decided on its own merits. In *Mineral Development Ltd v State of Bihar*, 1960 AIR 468, 160 SCR (2) 909 the court further observed that the concept of fair hearing is an elastic one and “is not susceptible of easy and precise definition.”
- (260) The Court of Appeal at Kampala in Uganda in *Obiga v. Electoral Commission & anor*, Election Petition Appeal No 4 of 2011 [2012] UGCA 29 (Obiga) held that in order to determine whether a party received a fair hearing, the court has to look to the statutes, case laws, and regulations that govern the decisions that the court made.
- (261) It is important to restate that a literal reading of the provisions of the Constitution show that the right to a fair hearing is broad and includes the concept of the right to a fair trial as it deals with any dispute whether they arise in a judicial or an administrative context. Comparative experience shows that the European Court has elaborated on the question regarding the scope of the right to fair trial applying the right in both civil and in criminal matters. The European Court of Human Rights (European Court) has severally explained that: “it is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court.” (See *Steel and Morris v United Kingdom*, [2005] ECHR 103, paragraph 59).”

54. It is therefore settled law that all persons who come to any Court are entitled to a fair hearing whether the matter instituted is criminal or civil in nature. In this context, the drafters of the Constitution 2010 in article 25(c) placed a bar on limitation of the right to a fair trial, in civil and criminal matters.

Timelines and the right to fair trial

55. Since this appeal emanates from the appellant’s non-compliance with constitutional timelines at the trial court, we need to analyze the significance of timelines in settlement of electoral disputes. Article 87(1) of the [Constitution](#) provides:

“Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes”

56. Article 87(2) unequivocally limits the timelines for filing election petitions, other than presidential petitions, to twenty eighty (28) days after the declaration of results by the IEBC.

57. Further, article 105(2) as read with article 105(I) of the [Constitution](#) provides, *inter alia*, that a question whether a person has been validly elected as a Member of Parliament shall be heard and determined by



the High Court within six (6) months of the date of lodging the petition. Article 105(3) commands Parliament to enact legislation to give full effect to article 105 .

58. The envisaged legislation for dispute resolution in election disputes is the *Elections Act*. Section 96(1) of the *Elections Act* gives power to the Rules Committee, constituted under the *Civil Procedure Act*, to make rules generally to regulate the practice and procedure of the High Court with respect to filing and trial of election petitions including, *inter alia*, specifying the time within which any requirement of the rules is to be complied with.
59. The *Election Petition Rules, 2017* is a subsidiary legislation enacted pursuant to section 96 (1) of the *Elections Act*. The procedure for making subsidiary legislation is regulated by the *Statutory Instruments Act* No 23 of 2013 which requires the Rules Committee to ensure consultation or public participation (section 5) and ultimately, parliamentary scrutiny and approval (section 10). Additionally, section 13 of the *Act* provides for scrutiny of such legislation to ensure that such subsidiary legislation is in harmony with the provisions of the Constitution; the Act pursuant to which it is made, or other written laws; and whether it infringes on fundamental rights and freedoms of the public.
60. On the construction of subsidiary legislation, section 29 of the *Interpretation and General provisions Act* is clear that such legislation, except where a contrary intention appears, shall have the same respective meanings as in the Act conferring the power. Consequently, the *Election Petition Rules, 2017* are part of the Electoral laws in their own right.
61. We further affirm that in relation to this appeal, rules 11(1) and 11(8) of the *Election Petition Rules 2017* have the same legal effect as if they had been enacted under the *Elections Act*.
62. This court has severally emphasized the importance of timelines in the electoral disputes resolution in several of its decision including the *Aramat* case at paragraph 69 where we stated thus:

“We have to note that the electoral process and the electoral dispute – resolution mechanism in Kenya are marked by certain special features. A condition set in respect of electoral disputes, is the strict adherence to the time lines prescribed in the Constitution and the electoral law”.

And at paragraph 78:

“We are not, with respect, in agreement with the learned counsel for the 1st respondent that there is any conflict at all in this case, between the electoral requirements of timelines on the one hand, and values of the Constitution on the other hand. It is clear to us that compliance with timelines, is itself a Constitutional principle one that reinforces the Constitutional values attendant upon the electoral process”

63. Further, in the *Joho Case*, this court cited with approval the declaration of legal principle by the Court of Appeal in *Ferdinand Waititu v. Independent Electoral and Boundaries Commission, (IEBC) & others*, Civil Appeal No 137 of 2013), that adherence to the imperatives of time, as decreed by the Constitution, is a vital element in the operation of a democratic system based upon electoral expression. At paragraph 101 we held that:

“...expedition in the disposal of electoral disputes is a fundamental principle under the Constitution ...”
64. Additionally, in *Mary Wambui Munene v Peter Gichuki King'ara & 2 others* SC Petition No 7 of 2014, this court, while annulling the proceedings of the High Court and Court of Appeal in an election



petition that had been filed outside the time-frame prescribed in article 87(2) of the Constitution, stated as follows:

“... Time as a principle, is comprehensively addressed through the attribute of accuracy, and emphasized by article 87(1) of the Constitution, as well as other provisions of the law. Time in principle and applicability, is a vital element in the electoral process set by the Constitution. This court’s decision in *Joho* was guided by this consideration. For purposes of this case, we apply the precedent in *Joho*, taking into account that the issue in question involves imperatives of timelines demanded by the Constitution in settling electoral disputes which involve accuracy, efficiency and exactitude, limiting any other considerations, in the exercise of our discretion.”

65. Also, in *Gatirau Peter Munya v Dickson Mwenda Kithinji & others* SC Petition No 2B of 2014, this court clearly established the constitutional genealogy of section 85A of the Elections Act, when it declared that the same was “neither a legislative accident nor a routine legal prescription. “Section 85A, the court affirmed, “is a product of a constitutional scheme requiring electoral disputes to be settled in a timely fashion.”

66. In the *Aramat case*, this court further stated at paragraph 123:

“A court dealing with a question on procedure where jurisdiction is not expressly limited in scope as in the case of article 87(2) and 105(1)(a) of the Constitution – may exercise a discretion to ensure that any procedural failings that lends itself to cure under article 159, is cured. We agree with the learned counsel that certain procedural shortfalls may not have a bearing on the judicial power (jurisdiction) to consider a particular matter. In most cases, procedural shortcomings will only affect the competence of the cause before the court, without in any way affecting courts’ jurisdiction to entertain it. A court so placed, taking into account the pertinent facts and circumstances may cure such defects; and the Constitution requires such exercise of discretion in matters of a technical character”.

67. In *Wavinya Ndeti versus Independent Electoral & Boundaries Commission [IEBC] & 4 others* [2014] eKLR, this court also stated in part:

“It stands to reason that the enactment of section 85A (a) having been sanctioned by the Constitution cannot be inconsistent with the right of access to justice and fair hearing. As the Supreme Court of Nigeria held in *Senator John Akpanu doedehe versus Godswill Obot Akabio* SC No 154 of 2012, where a Constitution provides a limitation period for hearing a matter, the right to fair hearing is guaranteed by the Courts within the specified period. In one view, the same is true when the limitation period is provided by a statute sanctioned by the Constitution like in the instant case. The right of access to justice and fair hearing is guaranteed by the courts within the law”.

The appellant in that appeal (*Wavinya Ndeti*) filed a petition in the Supreme Court on the grounds, *inter alia*, that article 159 (1) and (2) of the Constitution had been violated and the petitioner’s right to just and fair trial under article 25(1) and 50(1) of the Constitution were also violated. This court in the same case and in allowing a preliminary objection to the petition stated at paragraph 43:

“The Court of Appeal has itself noted that section 85A (a) of the Elections Act having been sanctioned by the Constitution could not be inconsistent with the right of access to justice and fair hearing. That court’s judgment focused on the interpretation of section 85A of



the *Election Act*, the *Election Rules* and the *Court of Appeal Rules*, and on clarifying the jurisdiction of the Court of Appeal to extend time in matters of election petition appeals. The appellate courts holding in this regard has been reaffirmed repeatedly in our decisions cited above”

68. Additionally, in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others*, SC Pet 16 of 2016 [2014] eKLR, we emphasized that time is a crucial component in dispensation of justice, hence the maxim: Justice delayed is justice denied . We also underscored the fact that it is a litigants’ legitimate expectation where they seek justice, that the same will be dispensed timeously hence, the various constitutional and statutory provisions on time frames within which matters have to be heard and determined. Time, is of more essence in election matters, where the people’s sovereign power to elect their legal representatives is involved.
69. In the instant case, the trial court declined to enlarge time to enable the appellant to file his response; struck out the already filed response; and denied the appellant the right to participate in the proceedings for two reasons; first, that the application for extension of time was based on falsehoods and second, that the appellant was properly served. The question we need to ask ourselves is, was it the intention of Parliament to shut out a litigant from filing a response consequently offending the Constitution, especially articles 10, 20 and 25(c)? In the present case, we are convinced that it was not generally the intention of the Legislature, subject to what we shall state later, to lock out a litigant from the right to be heard, merely on the basis of inability to file a response on time due to inadvertent reasons. Indeed, the *Elections Act*, (rule 19(1)) signifies the intention of Parliament to facilitate the right of to be heard, by giving the court the discretion to enlarge timelines within which to file a response. This leads us to the next aspect of the exercise of judicial discretion in the right to fair hearing.

Judicial discretion and the right to fair trial

70. Article 159(2) of the *Constitution* provides that, in exercising judicial authority the courts and tribunals should be guided by the principle inter alia that:
- (d) Justice shall be administered without undue regard to procedural technicalities”.
71. It is noteworthy that the phrase “ procedural technicalities ” in article 159(2)(d) is qualified by the preceding phrase “undue regard”. The word , “undue” is defined in the *Concise Oxford Dictionary* 9th Edition. The first meaning is “excessive, disproportionate”. Thus, article 159(2)(d) cannot be interpreted to mean that all procedural stipulations are to be disregarded in the administration of justice. Certainly, the procedural requirements which facilitate the courts in functioning as courts of justice, in a particular case, are not targeted. The courts have a duty to determine objectively in every case where the question of undue procedural technicality arises, whether the procedural stipulation falls in the class of undue procedural technicality, and if so, whether it should be disregarded in favour of substantive justice.
72. Rule 11 of *Election Petition Rules 2017* in the above context, gives a respondent who wishes to oppose a petition, 7 days to file a response. Such a response should be supported by an affidavit sworn by the respondent (rule 11(5)). If a respondent wishes to call a witness, such a witness is required to file an affidavit which should be filed at the time of filing the response {rules 11(6) and 11(7) } respectively.



73. The appellant, in the instant matter, did not comply with those Rules. He filed the response, his affidavit and affidavits of witnesses 12 days outside the stipulated 7 days. Such time could be extended under rule 19(1) which provides:

“Where any act or omission is to be done within such time as may be prescribed in the Rules or ordered by an election court, the election court may for purposes of ensuring that injustice is not done to any party extend or limit the time within which the act or omissions shall be done with such conditions as may be necessary even where the period prescribed or ordered by the court may have expired”

74. In *Raila 2013* we had occasion to address the implication of article 159(2)(d) as follows:

[para 217]

“The essence of that provision is that a court of law should not allow the prescriptions of procedure and form to trump the primary object, of dispensing substantive justice to the parties.”

75. In the *Nicholas Salat* case, we furthermore categorically stated that extension of time being a creature of equity, one can only enjoy it if he acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to lapse. Consequently, extension of time is not a right of a litigant against a court, but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant it. To enjoy it a party has to demonstrate that he has a *bona fide* cause of action and time had lapsed, but was constrained to pursue within time that cause, because of some compelling reasons, and the courts of law can only intervene and indulge such a person if established that he was not at fault.

76. This court in the *Raila Odinga vs Independent Elections and Boundaries Commission & Others*, Petition No 5 of 2013 while addressing itself on discretion to extend timelines stated:

“It may be argued that the Supreme Court ought to apply the principle of substantial justice, rather than technicalities, particularly in a petition relating to Presidential election, which is a matter of great national interest and public importance. However, each case must be considered within the context of its peculiar circumstances. Also, the exercise of such discretion must be made sparingly, as the law and Rules relating to the Constitution, implemented by the Supreme Court, must be taken with seriousness and the appropriate solemnity. The Rules and time – lines established are made with special and unique considerations.” (Emphasis provided).

77. In *Nicholas Salat* case, we clearly laid out the following as the under-lying principles that a court should consider in exercise of such discretion:

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;



4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 6. Whether the application has been brought without undue delay ; and
 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
78. This court has, in previous decisions, has held that election petitions are *sui generis*, they are neither criminal nor civil. In *Moses Masika Wetangula v Musikari Nazi Kombo & 2 others*, SC Pet 12 of 2014; [2015] eKLR(*Moses Masika* case), at paragraph 157 we thus stated as follows:

“ [Para 157]

.....It is now an indelible principle of law that the proceedings before an election court are *sui generis*. They are neither criminal, nor civil. The parameters of this jurisdiction are set in statute (the *Elections Act*). As such, while determining an election matter, a court acts only within the terms of the statute, as guided by the Constitution. This approach is in keeping with the stand taken by the Supreme Court of India in *Jyoti Basu & others v Debi Ghosal & others* 1982 AIR 983:

“An Election petition is not an action at Common Law, nor in Equity. It is a statutory proceeding to which neither the Common Law nor the principles of Equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to Common Law and Equity must remain strangers to election law unless statutorily embodied. A court has no right to resort to them on considerations of alleged policy because policy in such matters, as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, the court is put in a strait jacket.”

79. We have in the above regard taken note of the grounds advanced by the appellant at page 1127 (volume 3) of the record of appeal, the trial court’s reasoning at page 1210 (volume 3) of the record and the appellate court’s judgment at page 2854 (volume 6) of the record of appeal, and are inclined to agree with the superior courts that the appellant did not comply with the principles set by this court, so as to deserve the extension of time to file his response. This is because election petition laws and regulations are not made in vain, they are meant to advance the provisions in the Constitution on settlement of election disputes, which disputes are filed for interest of the general public.

The role cross-examination in fair trial

80. Learned counsel for the appellant submitted that the trial court, via its ruling issued on November 21, 2017, violated the appellant’s right to fair hearing by locking him out of the hearing and disallowing him from testing the veracity of the evidence by way of cross-examination. We note from page 1213 of the record of appeal, that the 2nd and 3rd respondent had at the trial court supported the 1st respondent’s objection to the appellant’s right to cross-examine witnesses.
81. Article 50(2)(k) of the *Constitution* provides that every accused person has the right to a fair trial which includes the right to “ adduce and challenge evidence ”



82. Section 145(2) of the *Evidence Act*, Chapter 80 of the Laws of Kenya defines cross-examination as the examination of a witness by the adverse party. Section 146 of the same *Act* makes provisions for the order and direction of examinations of witnesses whereby witnesses shall first be examined-in-chief, then, if the adverse party so desires, cross-examined.
83. Pursuant to section 153 of the *Evidence Act*, a witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him or being proved, but if it is intended to contradict a witness by a previous written statement, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.
84. Further, section 154 provides for cross-examination as to credibility. It provides thus;
- “When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend—
- (a) to test his accuracy, veracity or credibility;
 - (b) to discover who he is and what is his position in life;
 - (c) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to incriminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.”
85. The purpose of cross examination is therefore principally to unearth the truth. Cross-examination is regarded as one of the most important evidentiary safeguards of the adversarial system and an entrenched right of the defendant. In *Juan Torres & another v Michael Njai*, Civil Appeal No 154 of 2015; [2017] eKLR, the Court of Appeal thus emphasized that cross examination is intended to help the court to reach a just decision.
86. In the Court of Appeal decision of *John Wainaina Kagwe v Hussein Dairy Limited Mombasa* Court of Appeal 215/2010 (Githinji, Makhandia and Murgor JJA), the Court of Appeal was categorical that “answers in cross-examination cannot form a basis of a party’s case or built a defence. They must tender evidence in support of the allegation.”
87. This court (Concurring Opinion by Njoki Ndungu SCJ) has also defined the significance of cross-examination in the *Kidero* case as follows:
- 295] Generally, the purpose of cross-examination as elucidated in *Cross & Tapper on Evidence*, (Oxford University Press, 12thed, 2010, page 313), is: first, to elicit information concerning the facts in issue or relevant to the issue that is favourable to the party on whose behalf the cross-examination is conducted; and second, to cast doubt upon the accuracy of the evidence-in-chief given against such party.
- (297) In the Indian High Court decision of *Delhi RK Chandolia v Cbi & others*, 225/2012 the court held that:
- “The “relevant facts” in cross examination of course have a wider meaning than the term when applied to examination-in-chief. For instance, facts though otherwise irrelevant may involve questions affecting the credit of a witness, and such questions are permissible in the cross examination as per section 146 and 153 but, questions manifestly irrelevant or not intended to contradict or qualify the statements in examination-in-chief, or, which do not impeach the credit of a witness, cannot be



allowed in cross examination. It is well- established rule of evidence that a party should put to each of a witness so much of a case as concerns that particular witness. ...While allowing latitude in the cross examination, court has to see that the questions are directed towards the facts which are deposed in chief, the credibility of the witness, and the facts to which the witness was not to depose, but, to which the cross examiner thinks, is able to depose. It is also well-established that a witness cannot be contradicted on matters not relevant to the issue. He cannot be interrogated in the irrelevant matters merely for the purpose of contradicting him by other evidence. If it appears to the Judge that the question is vexatious and not relevant to any matter, he must disallow such a question. Even for the purpose of impeaching his credit by contradicting him, the witness cannot be put to an irrelevant question in the cross examination.

However, if the question is relevant to the issue, the witness is bound to answer the same and cannot take an excuse of such a question to be criminating. That being so, it can be said that a witness is always not compellable to answer all the questions in cross examination. The court has ample power to disallow such questions, which are not relevant to the issue or the witness had no opportunity to know and on which, he is not competent to speak. This is in consonance with the well-established norm that a witness must be put that much of a case as concerns that particular witness.” [Emphasis added]”

88. From the foregoing analysis, it is evident that cross-examination plays an important role in a party’s right to fair hearing. However, in the present case, the trial court, in its ruling delivered on November 21, 2017, disallowed the appellant from participating in the hearing of the petition on the basis of section 11(8) of the [Election Petition Rules](#), which is coached in the following terms:

“A respondent who has not filed a response to a petition as required under this rule shall not be allowed to appear or act as a party in the proceedings.”

The election court held further that article 159 of the [Constitution](#) was not meant to aid in the overthrow or destruction of rules of procedure and could not be of any assistance to the Appellant.

89. We have already discussed the legal effect of rules 11(1) and 11(8) of the [Election Petition Rules 2017](#) in disposition of election petitions that they have the same impact as the parent Act which originates from article 87 of the [Constitution](#). Article 50(2) of the [Constitution](#) on the right to challenge evidence through cross-examination does not operate in a vacuum, it operates with other laws to give the greatest effect. We note in that context that the superior courts were aware of the [Constitution](#) provisions under article, 20(3), 25(c) and 50 before arriving at their decision. We see no reason for faulting their interpretation and application of the Constitution in this petition.

The Court of Appeal’s exercise of jurisdiction under section 85A of the [Elections Act](#)

90. Learned counsel for the appellant faulted the Court of Appeal (Githinji J) for allegedly exceeding the bounds of his jurisdiction on account of violation of the petitioner’s right to fair trial by reviewing the tainted record and by not reviewing the appellant’s evidence at the High Court. Counsel for the 1st respondent refutes these submissions and instead submits that Court of Appeal’s evaluation of fact at the High Court were only aimed at addressing the appellant’s contention that the trial judge arrived at erroneous conclusions.



91. The bounds of the Court of Appeal’s jurisdiction in election appeals are articulated at section 85A of the [Elections Act](#) No 24 of 2011 namely, on election appeals to matters of law only . The specific section states as follows:

- (1) An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of county government shall lie to the Court of Appeal on matters of law only and shall be-
 - (a) filed within thirty days of the decision of the High Court; and
 - (b) heard and determined within six months of the filing of the appeal.
- (2)

92. This court has discussed section 85A of the [Elections Act](#) in the case of [Gatirau Peter Munya v Dickson Mwenda Kitbinji & 3 others](#), Petition No 2B of 2014; [2014] eKLR ([Munya 2B](#)). The objective of limiting the Court of Appeal’s jurisdiction to questions of law in electoral disputes was stressed as follows:

- (64) Section 85A of the [Elections Act](#) is, therefore, neither a legislative accident nor a routine legal prescription. It is a product of a constitutional scheme requiring electoral disputes to be settled in a timely fashion. The Section is directed at litigants who may be dissatisfied with the judgment of the High Court in an election petition. To those litigants, it says:

“Limit your appeals to the Court of Appeal to matters of law only .”

93. This court in that case then proceeded to set the principles for determining whether a matter involves questions of law or not. We specifically state as follows:

[80] From the foregoing review of the comparative judicial experience, we would characterize the three elements of the phrase “matters of law” as follows:

- a. the technical element: involving the interpretation of a constitutional or statutory provision;
- b. the practical element: involving the application of the Constitution and the law to a set of facts or evidence on record;
- c. the evidentiary element: involving the evaluation of the conclusions of a trial court on the basis of the evidence on record.”

(81) Now with specific reference to section 85A of the [Elections Act](#), it emerges that the phrase “matters of law only”, means a question or an issue involving:

- a. the interpretation, or construction of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, in an election petition in the High Court, concerning membership of the National Assembly, the Senate, or the office of County Governor;
- b. the application of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, to a set of facts or evidence on record, by the trial judge in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of County Governor;



- c. the conclusions arrived at by the trial judge in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of County Governor, where the appellant claims that such conclusions were based on “no evidence”, or that the conclusions were not supported by the established facts or evidence on record, or that the conclusions were “so perverse”, or so illegal, that no reasonable tribunal would arrive at the same; it is not enough for the appellant to contend that the trial judge would probably have arrived at a different conclusion on the basis of the evidence.”

94. This court proceeded to state further as follows:

(82) Flowing from these guiding principles, it follows that a petition which requires the appellate court to re-examine the probative value of the evidence tendered at the trial court, or invites the court to calibrate any such evidence, especially calling into question the credibility of witnesses, ought not to be admitted. We believe that these principles strike a balance between the need for an appellate court to proceed from a position of deference to the trial judge and the trial record, on the one hand, and the trial judge’s commitment to the highest standards of knowledge, technical competence, and probity in electoral-dispute adjudication, on the other hand.”

95. It is on the basis of these guiding principles that we must determine whether the Court of Appeal delved into matters of fact, and exceeded its jurisdiction provided under section 85A of the [Elections Act](#).

96. We have taken note of paragraph 77 of the Court of Appeal’s judgment where the court states thus:

“Further, ground 6 of the appeal raises a legal issue that the election court nullified the election on the basis of non-compliance with the law and regularities without considering whether the non-compliance affected the outcome of the elections. On this ground, the appellant’s counsel submitted, amongst other things, that mere non-compliance with the law does not invalidate an election, that the learned judge having correctly identified the test failed to apply it correctly; that the election court failed to objectively consider whether the election which is presumed by law to be lawfully conducted was vitiated.”

98. At paragraph 78 of the Court of Appeal’s judgment, the court observed the 2nd and 3rd respondents’ allegations as follows:

“Although ground 16 of the cross appeal is not clearly worded it implicitly raises the same legal-issue the effect of malpractices irregularities and illegalities on the results of the election. Indeed, the 2nd and 3rd respondents’ counsel has submitted in the written submissions, amongst other things, that the 1st respondent did not challenge the election results and therefore the question of procedural irregularities of such magnitude as to affect the results does not arise; that the procedural or administrative irregularities and other errors occasioned by human imperfections are not enough by themselves to vitiate an election; that the learned judge framed an issue about the meaning of the phrase “affected the result” and the margin of votes which issue was not pleaded and that the election court erred in considering the margin of result and the returned result when the petition was entirely on the qualitative aspect of the election”



97. On this issue, the Court of Appeal at paragraph [82] rendered itself as follows:

It is clear therefore that the electoral court considered the nature of the electoral malpractices and whether or not those malpractices affected the results of the election and came to the conclusion that electoral malpractices established were of such magnitude that they affected the results of the election. The electoral malpractices established to have been proved by the election court affected the very core of the Constitutional principles of the electoral system that of free expression of the will of electors through a free and fair election.

In the circumstances of the case, I too find that the malpractices were of fundamental nature and put the narrow victory of the appellant in doubt. I am satisfied that the elections were validly nullified .

98. Having noted the foregoing paragraphs, we do not see anywhere in the record where the Court of Appeal delved into evidence. The court as it should, only analyzed the conclusions of the trial court so as to address the grounds of appeal and cross appeal posed for determination by the appellant. This ground of appeal therefore fails.

F. Remedies

What remedies are available if the trial Court infringed the right to a fair trial?

99. The appellant prays for orders that this court sets aside the judgment of the Court of Appeal dated August 16, 2018 and all consequential orders thereto, together with the judgment of the High Court dated March 1, 2018 and affirm him as the elected member of the National Assembly Ugenya Constituency.

100. When determining whether or not to nullify an election through an election petition, every court should always be alive to the fact that an election is a direct expression of the sovereign will of the people and as such that will should not be interfered with whimsically or arbitrarily since all sovereign power belongs to the people as per article 1(1) of the *Constitution*.

101. An election can only be nullified when it falls short of the principles stipulated in articles 81 and 86 of the *Constitution*. These are the constitutional principles which an electoral body should aim to attain when conducting an election or a referendum . Section 83 is certain as to when an election can be nullified that is , when it has not substantially comply with the written law to that election – in this regard, the *Constitution*, the *Elections Act*, and the *Regulations* made thereunder, and any other relevant law; or, where there is substantial compliance with the written law in an election the irregularities must indeed have affected the result of the election for that election to be invalidated.

102. This court has detailed the electoral law in Kenya in its decision *Munya* where we specifically stated as follows:

[at paragraph 60]

“Pursuant to this provision, Parliament has enacted a raft of legislation to regulate the conduct of election disputes, including election petitions at all levels of the court system. In what is increasingly being referred to as the “Electoral Code”, we now have, inter alia: the *Elections Act 2011* , the *Elections (General) Regulations 2012*, the *Elections (Parliamentary and County Elections) Petition Rules, 2013* and the *Supreme Court (Presidential Election Petition) Rules 2013* .



103. In the *Raila 2013*, decision this court cited with approval the jurisprudence in *Morgan and others v. Simpson and another* [1974] 3 All ER 722 (*Morgan* case) where it was held:

“...an election court was required to declare an election invalid (a) if irregularities in the conduct of elections had been such that it could not be said that the election had been conducted as to be substantially in accordance with the law as to election, or (b) if the irregularities had affected the results. Accordingly, where breaches of the election rules, although trivial, had affected the results, that by itself was enough to compel the court to declare the election void even though it had been conducted substantially in accordance with the law as to elections. Conversely, if the election had been conducted so badly that it was not substantially in accordance with the law, it was vitiated irrespective of whether or not the result of the election had been affected...”

104. This court, drawing from the *Morgan* case and having examined other jurisdictions, held with regard to invalidation of an election thus:

(196) We find merit in such a judicial approach, as is well exemplified in the several cases from Nigeria. 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. It is on that basis that the respondent bears the burden of proving the contrary. 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 have been 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 law.” (Emphasis provided)

105. Under article 25(c) of the *Constitution*, the right to a fair trial is a right that cannot be limited. However, it is an individual’s right, that is a right in personam and the remedy for the violation of such a right cannot be the nullification of an election . In *Raila 2013*, we reiterated that an election reflects the views of the people expressed through the vote, not just rights of individuals, and therefore, courts of law must be careful not to exercise their power in such a manner as to interfere with the people’s expression in instances where the proven election irregularities do not affect the election results.

106. We note in the above case, that the appellant’s election was nullified on the following grounds; that the electoral malpractices, irregularities and illegalities witnessed in the impugned election were such that it could not be said that the elections had been conducted substantially in accordance with the *Constitution* and the relevant electoral laws and the results there from do not pass the test of being transparent, accountable, verifiable and credible. The Court of Appeal upheld the finding of the trial court noting that the malpractices were of fundamental nature and put the narrow victory of the appellant in doubt. The appellant has not demonstrated how the Court of Appeal erred in its interpretation and application of the Constitution to enable us reach a contrary opinion from that of the Court of Appeal.

107. Had the appellant proven his claim for violation of the right to fair trial, then the remedies available to him will be the ones laid out at article 23(3) of the *Constitution*. The article provides as follows:

“In any proceedings brought under article 22, a court may grant appropriate relief, including-

- a. A declaration of rights;
- b. An injunction;



- c. A conservatory order;
 - d. A declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under article 24;
 - e. An order for compensation; and
 - f. An order of judicial review.” [Emphasis added]
108. While these remedies are available at the High Court in determining matters of enforcement of the bill of rights, section 21 of the Supreme Court Act, 2011 gives this court general power to make any Orders, or grant any relief that could have been made or granted by a court from where an appeal emanates. In addition, election appeals are determined by this court in exercise of its jurisdiction under article 163(4) (a). As such, while interpreting the Constitution, this court bears all the powers to grant constitutional remedies on appeal. Since the appellant has not proven his case, we shall not exercise this jurisdiction.
109. Lastly, taking all these legal provisions into consideration, it is manifest that the appellant’s appeal lacks merit.
110. On the issue of costs, the appellant asks this court to set aside the Court of Appeal orders, award him costs in Kisumu Election Petition Appeal No 13 of 2018, and award him costs in this court. On the other hand, the 1st respondent prayed for the dismissal of the appeal with costs. The 2nd and 3rd respondents did not address us on the issue. He has not demonstrated why we should interfere with the exercise of discretion by the superior courts on this issue.
111. Section 84 of the Elections Act provides for costs and states that:
- “An election court shall award the costs of and incidental to a petition and such costs shall follow the cause.”
112. The Elections Petitions Rules, 2017, provide as follows:
- “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...”



113. This court has previously settled the law on this issue, stating that costs follow the event and that the judge has the discretion in awarding costs in its decision in the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others Petition No 4 of 2012; [2014], where it was stated as follows:

“ [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 .”

114. Therefore, we see no reason to divert from the above legal provisions and the decision of this court.

Orders

115. Consequent upon our findings above, the final orders are that:

1. The petition of appeal dated September 14, 2018 is hereby dismissed.
2. The judgement of the court of Appeal in Election Petition No 13 of 2018 is hereby upheld.
3. The certificate issued by the trial court pursuant to section 86 of the Elections Act, that the appellant was not validly elected as Member of the National Assembly of Ugenya constituency during the elections held of the August 8, 2017, is hereby confirmed.
4. The 2nd respondent is directed to organize and conduct a fresh election for the position of Member of the National Assembly for Ugenya Constituency, in conformity with the Constitution and the Elections Act.
5. The appellant shall bear the costs of the appeal.

116. Orders accordingly.

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

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M.K IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

J.B. OJWANG



JUSTICE OF THE SUPREME COURT

.....

S. C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA

