



**Kitur v Keter & another (Petition 27 of 2018)
[2018] KESC 77 (KLR) (21 December 2018) (Judgment)**

Bernard Kibor Kitur v Alfred Kiptoo Keter & another [2018] eKLR

Neutral citation: [2018] KESC 77 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA**

PETITION 27 OF 2018

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

DECEMBER 21, 2018

BETWEEN

BERNARD KIBOR KITUR PETITIONER

AND

ALFRED KIPTOO KETER 1ST RESPONDENT

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

(Being an Appeal from the Judgment of the Court of Appeal (Githinji, Okwengu and Mohammed JJ.A) at Eldoret in Election Petition Appeal No. 21 of 2018 dated 11th July, 2018)

Supreme Court affirms the result of the elections of August 8, 2017 for Member of the National Assembly for Nandi Hills Constituency.

Reported by Beryl A Ikamari

Jurisdiction - jurisdiction of the Supreme Court - appellate jurisdiction – jurisdiction relating to matters of constitutional interpretation and application – whether an electoral appeal of member of National Assembly that involved the interpretation of statutory and regulatory provisions of the Elections Act warranted an appeal to the Supreme Court - Constitution of Kenya article 163(4)(a)

Civil Practice and Procedure - appeals – second appeals – second appeals on matters of law - election petition appeals - nature of matters that would constitute matters of law - extent to which the Court of Appeal could consider factual evidence when making its determinations in second appeals in electoral disputes - what was the extent to which the Court of Appeal could consider factual evidence when making its determinations in second appeals in electoral disputes - Elections Act (cap 7) section 85A

Electoral Law – election petitions - withdrawal and substitution of parties to an election petition - where the original petitioner's petition and supporting affidavit - probative value of the original petitioner's petition and supporting affidavit after substitution of the petitioner - where the original petitioner did not appear as a witness



in court and give oral testimony - whether the original petitioner's petition and supporting affidavit had probative value or was hearsay - Constitution of Kenya articles 38 and 22; Elections (Parliamentary and County Elections) Petition Rules, 2017 (cap 7 Sub Leg) rules 15(1)(b), 21, and 24

Law of Evidence - *burden of proof - discharge of the burden of proof by a petitioner in an election petitions - circumstances in which the burden of proof would shift to the respondent - claim that the petitioner's evidence was hearsay and that the burden of proof could therefore not shift to the respondents - in an election petition, when would the petitioner be said to have discharged his burden of proof and thereby shift the burden of proof to the respondent*

Law of Evidence - *affidavits - supplementary affidavits - supplementary affidavits in election petitions - scope and purpose - whether in election petitions supplementary affidavits could be used to introduce new issues in an election petition - whether a single case of non-compliance with electoral laws that was criminal was enough to amount substantial non compliance with electoral law to warrant overturning an election result - Elections (Parliamentary and County Elections) Petition Rules, 2017 (cap 7 Sub Leg) rule 21*

Electoral Law - *conduct of an election - electoral irregularities and malpractices - conduct of an unlawful campaign - claim that campaigns were held outside of the gazetted period - unlawful campaigns involving groups of less than 25 people in three locations where the winning margin in an election was 10,051 votes - whether the unlawful campaigns outside the specified period for campaigns would lead to the nullification of the election result - Elections Act (cap 7) section 83*

Brief facts

The 1st respondent was declared the winner of the election for member of National Assembly for Nandi Hills Constituency held on August 8, 2017. A registered voter filed a petition to challenge that result. When that voter sought to withdraw the petition, the petitioner, who was a candidate in the election, applied to be substituted as a petitioner. The High Court dealt with issues concerning voter bribery, campaigning outside the gazetted period and mishaps in the declared results as concerned three polling stations. The results said to have been from Ng'ame Nursery School were meant to be results from Lelwak Primary School and the mix up was alleged to have added an extra 121 votes to the petitioner and subtracted 36 votes from the 1st respondent. It was alleged that Form 35B omitted results from Ndurutu Primary School thereby affecting 197 votes for the 1st respondent and 174 votes for the petitioner.

The High Court found that there was no cogent evidence on bribery and that the mishaps related to the three polling stations were not sufficiently pleaded. However, the High Court found that the 1st respondent engaged in unlawful campaigns and was therefore not validly elected. The High Court nullified the result of the election.

The 1st respondent lodged an appeal at the Court of Appeal. The petitioner and the IEBC each filed a cross-appeal, on the issue of affidavits and adducing additional evidence and on whether the evidentiary burden ought to have shifted to the respondents before the initial burden was discharged. The Court of Appeal made the determination that the petition and supporting affidavit of the original petitioner remained intact but without that petitioner appearing as a witness, the contents thereof would be hearsay. The Court of Appeal added that it was not necessary for the substituted petitioner to adopt the original petitioner's affidavit word for word as some facts were only within the knowledge of the original petitioner and they would be hearsay and of no probative value. In setting aside the High Court's decision, the Court of Appeal found that there was no evidence of unlawful campaigns and the meaning given to a campaign by the High Court was too broad.

In a Supreme Court appeal, the petitioner stated that the Court of Appeal wrongfully assumed jurisdiction and concerned itself with matters of fact contrary to section 85A of the Elections Act. He added that his right to a fair hearing was violated when the Court of Appeal denied him the right to file a supplementary affidavit based on the depositions of the original petitioner. He also asserted that on the issue as to whether the original petitioner ought to have been a witness, the Court of Appeal heavily relied on rule 12(13) of the Election Petition Rules 2017 which required personal attendance of the deponent without considering the circumstances of the case. The petitioner explained that the High Court dismissed his application to have



the original petitioner called as a witness. He said that the Court of Appeal's holding that a supplementary affidavit was not an affidavit in support of a petition left the petition unsupported. The petitioner said that those circumstances occasioned breaches of articles 25(c), 27(1) and 27(2) of the Constitution, on the right to a fair trial and to equal protection and benefit of the law.

The respondents raised a challenge on jurisdiction and stated that the appeal did not raise issues of constitutional interpretation and application.

Issues

- i. Whether an electoral appeal of member of National Assembly that involved the interpretation of statutory and regulatory provisions of the Elections Act warranted an appeal to the Supreme Court.
- ii. What was the extent to which the Court of Appeal could consider factual evidence when making its determinations in second appeals in electoral disputes?
- iii. Whether in circumstances where an original petitioner withdrew from a suit and was substituted with another petitioner, the original petitioner's petition and supporting affidavit would be hearsay if the original petitioner did not give oral testimony as a witness in Court.
- iv. In an election petition, when would the petitioner be said to have discharged his burden of proof and thereby shift the burden of proof to the respondent?
- v. What were the circumstances under which campaigning outside of the period allowed for campaigns would be a ground for nullification of the results of an election?
- vi. Whether in election petitions supplementary affidavits could be used to introduce new issues in an election petition.
- vii. Whether a single case of non-compliance with electoral laws that was criminal was enough to amount substantial non-compliance with electoral law to warrant overturning an election result.

Held

1. In order for an appeal at the Supreme Court to be admissible under article 163(4)(a) of the Constitution, a litigant had to show that the appeal involved questions of constitutional interpretation and application and that those questions had been the subject of interpretation or application at the superior courts. Alternatively, a litigant had to show that the superior court's reasoning took on a trajectory of constitutional interpretation or application.
2. Both the High Court and the Court of Appeal made determinations with respect to the issue of campaigning outside the gazetted period. The Court of Appeal considered the alleged violation of the Electoral Code of Conduct by campaigning out of the gazetted period and found the allegation unproved.
3. The Electoral Code of Conduct developed by IEBC was contained in the Second Schedule to the Elections Act. The Code of Conduct was developed by the IEBC under the provisions of article 88 (4)(i) of the Constitution while article 84 of the Constitution required candidates and political parties to comply with the Code of Conduct. The constitutional principles applicable to elections were embodied in articles 1(2), 38(2), 81, 82 and 86 of the Constitution. Those principles were given effect through the Elections Act and its Regulations, the Election Offences Act and the Independent Electoral and Boundaries Commission Act. Non-adherence to the Code of Conduct was therefore a violation of the Constitution.
4. In interpreting statutory and regulatory provisions of the Elections Act, there was interplay with a wide range of constitutional provisions touching simultaneously on individual fundamental rights and political rights; particularly those recognized in articles 38, 81 and 82 of the Constitution.
5. The petitioner's case met the jurisdictional threshold under article 163(4)(a) of the Constitution.



6. Section 85 A of the Elections Act provided that an appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of county governor would lie to the Court of Appeal on matters of law only. Matters of law meant questions 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 Court 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.
7. The High Court made a conclusion of fact to the effect that the 1st respondent conducted campaigns outside the gazetted period and thereby interfered with the integrity of the electoral process. The Court of Appeal evaluated whether the law supported a finding that the gatherings complained of were a campaign. The Court of Appeal limited itself to evaluating the conclusions of the High Court based on the evidence on record. The process of evaluating evidence at the Court of Appeal was not mechanical and the Court of Appeal was not expected to shut its mind to the evidence on record.
8. In making the determination that upon the withdrawal of the original petitioner from the proceedings, the petition and the supporting affidavit remained intact, but that they would be of no probative value if the original petitioner did not appear as a witness to give oral testimony, the Court of Appeal did not act in excess of its jurisdiction. The court made a pronouncement on the place in law of the supporting affidavit of the original petitioner after the substitution of the parties. That did not entail delving into matters of fact.
9. Electoral disputes were disputes *in rem* (made against or affecting a thing) and not *in personam* (*made against or affecting a specific person only*). Such litigation affected the interests of the public in knowing whether the declared winner was validly elected. Under rule 21 of the Elections (Parliamentary and County Elections) Petition Rules, 2017, it was necessary for leave of court to be granted before an election petition could be withdrawn as voters needed the assurance that their leaders were validly elected.
10. In order to protect the rights articulated under article 38 of the Constitution enforceable under article 22, and their public nature, the law provided for substitution of parties where an original petitioner in an election petition wished to withdraw. Rule 24 of the Elections (Parliamentary and County Elections) Petition Rules, 2017 provided for substitution of parties in that context.
11. The rationale for substitution of parties was that an election petition sought to vindicate the rights of every citizen and withdrawal of such a petition would affect rights of members of the public. Under rule 24(5) of the Elections (Parliamentary and County Elections) Petition Rules, 2017, a substituted petitioner would stand in the same position, to the extent that was possible and would be subject to the same liabilities as the original petitioner. The strict timelines set under articles 87(2) and 105 of the Constitution on the filing and disposal of petitions meant that the law did not contemplate the filing of a new petition but the replacement of one suitable petitioner with another.



12. The High Court directed the petitioner to adopt the affidavit of the original petitioner. The petitioner was required to file an affidavit personally and to swear his own evidence in support of a petition. Affidavit evidence was personal to the deponent and the petitioner could not rely on evidence that he was not privy to.
13. In limiting the substituted petitioner to adopting word for word the averments of the original petitioner, the High Court erred as that was tantamount to the petitioner relying on facts that were not within his knowledge in violation of the rules of evidence and admitting hearsay evidence. Therefore, the Court of Appeal rightfully held that an affidavit had to state the substance of the evidence and be confined to facts that the deponent was able to prove based on his own knowledge.
14. Rule 15(1)(h) of the Elections (Parliamentary and County Elections) Petition Rules 2017 allowed a substituted petitioner to file supplementary affidavits whose purpose was to advance and support a petition and its contents. However, in filing such affidavits, the substituted petitioner would not introduce new issues as that would advance a new case which was different from the original petitioner's case.
15. In an election petition, a petitioner bore the obligation to discharge the initial burden of proof before the respondents were invited to bear the evidential burden. The threshold of proof should be above a balance of probabilities but not beyond reasonable doubt. Given that the evidence tendered by the petitioner amounted to hearsay, the Court of Appeal was right in finding that the evidentiary burden did not shift to the respondents.
16. Section 83 of the Elections Act, as it was before its amendment in 2017, provided that no election would be declared void due to non-compliance with any written law relating to that election if it was apparent that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election. That meant that elections were not perfect and that irregularities would not necessarily vitiate an election. Invalidation of an election would follow substantial irregularities, malpractices and non-compliance with the law.
17. The Court of Appeal rightfully held that in light of the 10, 051 votes winning margin, the small crowds addressed in the alleged unlawful campaigns, could not have affected the result of the election. Additionally, the Court of Appeal rightfully found that the evidence in support of the alleged unlawful campaigns was hearsay.
18. A single issue, even where the effect was criminal, which did not amount to massive or substantial non-compliance with the law or irregularities was not enough to dissuade from the fact that an election was conducted largely in accordance with the law.
19. Under section 84 of the Elections Act, an election court would award costs of and incidental to a petition and costs would follow the cause. Costs were within the Court's discretion.

Petition dismissed.

Orders

- i. *The petition of appeal dated August 24, 2018 was dismissed.*
- ii. *The judgment of the Court of Appeal of Kenya sitting at Eldoret dated July 11, 2018 was upheld.*
- iii. *The declaration of the result of the election by the Independent Electoral and Boundaries Commission in respect of the Member of National Assembly for Nandi Hills Constituency was affirmed.*
- iv. *Each Party was to bear their own costs.*

Citations

Cases

Kenya

1. *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* Petition 4 of 2012; [2014] KESC 31 (KLR) - (Explained)



2. *Jobo & another v Shabbal & 2 others* Petition 10 of 2013; [2014] KESC 34 (KLR) - (Explained)
3. *Jobo v Nyange & another* (2008) 3 KLR (EP 156) - (Explained)
4. *Mbwana, Mwamlole Tchapu v Independent Electoral and Boundaries Commission (IEBC) & 7 others* Election Appeal 4 of 2017; [2018] KECA 629 (KLR) - (Explained)
5. *Mohammed, Abdi Khaim Osman & another v Independent Electoral and Boundaries Commission & 2 others* Civil Appeal 293 of 2013 - (Explained)
6. *Munya v Kithinji & 2 others* Application 5 of 2014; [2014] KESC 30 (KLR) - (Explained)
7. *Munya v Kithinji & 2 others* Petition 2B of 2014; [2014] KESC 38 (KLR) - (Explained)
8. *Nduitu & 6000 others v Kenya Breweries Ltd & another* Petition 3 of 2012; [2012] KESC 9 (KLR) - (Explained)
9. *Ngoge v Kaparo & 5 others* Petition 2 of 2012; [2012] KESC 7 (KLR) - (Explained)
10. *Njau v Mbuki* Election Petition 13 of 2015; [2017] KESC 14 (KLR) - (Explained)
11. *Obado, Zacharia Okoth v Edward Akongo Oyugi & 2 Others* Civil Appeal (Application) 39 of 2013; [2014] KECA 784 (KLR) - (Explained)
12. *Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others* Petition 5, 3 & 4 of 2013 (Consolidated); [2013] KESC 6 (KLR) - (Explained)
13. *Odinga & another v Independent Electoral and Boundaries Commission Chairman (IEBC) & another* Election Petition 1 of 2017; [2017] KESC 52 (KLR) - (Followed)

India

1. *Bijayananda Patnaik vs Satrugbna Sahu & others* 1963 AIR 1566, 1964 SCR (2) 538 - (Explained)
2. *Sheo Sadan Singh v Mohan Lal Gautam* [1969] 3 SCR 417; 41 AIR 146 - (Explained)

Statutes

Kenya

1. Constitution of Kenya articles 25(c); 27(1)(2); 38; 47; 50(1); 81; 82; 86; 87; 105; 159(2)(a); 164(3)(a); 163(7) — (Interpreted)
2. Election Offences Act (cap 66) In general— Cited
3. Elections Act (cap 7) sections 80, 83, 84, 85A, 87(2)(3) — Interpreted
4. Elections (General) Regulations, 2012 (cap 7 Sub Leg) — section 2 — (Interpreted)
5. Elections (Parliamentary and County Elections) Petition Rules, 2017 (cap 7 Sub Leg) rules 12(13); 15(1)(h); 21 ; 24(5) — (Interpreted)
6. Independent Electoral and Boundaries Commission Act (cap 7C) In general — (Cited)
7. Supreme Court Rules, 2012 (cap 9B Sub Leg) rule 33 — (Interpreted)

Advocates

None mentioned

JUDGMENT

A. Introduction

1. This is a petition of appeal dated August 24, 2018 and filed on August 27, 2018. It seeks to overturn the decision of the Court of Appeal which affirmed the election of the 1st respondent as the Member of National Assembly for Nandi Hills Constituency.



B. Background

(a) High Court

2. The petitioner and the 1st respondent were both contestants for the position of member of the National Assembly for Nandi Hills Constituency during the general election held on August 8, 2017. The 1st respondent was declared the winner. Aggrieved by that declaration, one Robert Kibet Kemei, a registered voter in that Constituency, challenged that declaration by filing an election petition—No. 1 of 2017—at the High Court in Eldoret. That Petition was supported by an affidavit sworn by himself on September 5, 2017. In addition, on September 8, 2017, Mr. Kemei filed four additional witness affidavits all sworn on September 6, 2017.
3. Before the commencement of the hearing, on September 14, 2017, Mr. Kemei applied for leave to withdraw the Petition for reasons that he was no longer interested in pursuing it. Following that application, on September 21, 2017, one Benard Kibor Kitur, the current petitioner sought leave of the Court to be substituted as a petitioner on grounds that he was a candidate, a key witness and that he supported Mr. Kemei in filing that Petition by providing the mandatory deposit for security for costs. By a Ruling delivered on November 23, 2017, the Election Court (Kimondo J) allowed Mr. Kemei to withdraw from the petition while at the same time substituting Benard Kibor Kitur as the petitioner. In doing so, the High Court, as guided by rule 24(5) of the *Elections (Parliamentary and County Elections) Petition Rules, 2017* (Elections Rules 2017) directed that the substituted Petitioner “shall stand in the same position, to the extent possible, and shall be subject to the same liabilities as the original petitioner.”
4. Upon his substitution, on November 29, 2017, the petitioner sought leave to file supplementary affidavits and to adduce additional evidence. On the same day, the 1st respondent filed an application seeking to strike out the Petition for non-compliance with the provisions of the *Elections Rules 2017* or in the alternative, for striking out the four witness affidavits filed by the original petitioner on September 8, 2017. The IEBC also filed a notice of preliminary objection urging that there was no valid petition before the court.
5. The three applications were heard together, and on December 19, 2017 the election court found as follows:
 - (a) It dismissed the petitioner’s application for adducing further evidence on grounds that additional evidence would alter the character of the petition.
 - (b) It dismissed both the 1st respondent’s application to strike out the petition and the IEBC notice of preliminary objection.
 - (c) It struck out the four witness affidavits filed by the original petitioner on grounds that they were not filed together with the Petition and hence were filed outside the 28 days of the declaration of results.
 - (d) It rejected the submission by the respondent that the affidavit of the original petitioner in support of the Petition stood withdrawn upon leave being granted to the original Petitioner to withdraw from the Petition para pages 73, 74 & 77 V. II record of appeal.; and
 - (e) It granted the Petitioner leave to file a supplementary affidavit which would be to the greatest extent possible conform word for word, without any additional facts and evidence with the affidavit of the original Petitioner sworn on 5th September, 2017 [page 72 V. II record of appeal].



6. With the preliminary applications out of the way, the substantive Petition was set down for hearing and addressed three factual issues:
 - (i) An issue relating to two polling stations: The first being results from Ng'ame Nursery School in which the Returning Officer admitted that those results were meant to be the results for Lelwak Primary School. The Returning officer conceded that the mix-up gave the petitioner an extra 121 votes while the 1st respondent lost by 36 votes. Further, that the number of votes exceeded the number of registered voters. Secondly, the results for Ndurutu Primary School were omitted in the print out of the Form 35B thereby affecting 197 votes for the 1st respondent and 174 votes for the petitioner.
 - (ii) Bribery and treating of voters.
 - (iii) The allegation that the 1st respondent campaigned outside the period gazetted by the IEBC and that such action tainted a "free election" as envisaged under articles 81 and 86 of the Constitution.
7. With regard to the issue of bribery and treating of voters, the election court found that no cogent evidence was tabled to back that allegation and that the standard of proof required was not met. On the issue of the mix up of the two polling stations alluded to above, the High Court found that the said issue was not pleaded to precision and that the irregularity did not materially affect the final results. With the disposal of the first two issues, a single issue remained and that is whether the 1st respondent conducted unlawful campaigns. The case turned on that issue.
8. With regard to that issue, the High Court began by acknowledging that the petitioner had discharged the initial burden of proof by producing the Legal Notice No. 2693 published in the Kenya Gazette of March 17, 2017 which showed that the official campaign period ran from June 1, 2017 to August 5, 2017, between the hours of 7.00am and 6.00pm daily. That further, the Petitioner placed the 1st Respondent at the scene of the alleged campaign through reliance on information supplied by the original Petitioner. The High Court dismissed the 1st respondent's contention that such information was hearsay and stated that:

"I am however satisfied on a preponderance of the evidence that on August 6, 2017
9. As a consequence, the High Court held that the 1st respondent engaged in unlawful campaigns which tainted the fairness and integrity of the poll and hence he was not validly elected. Furthermore, at paragraph 125 of its judgement, the High Court found that an electoral malpractice of a criminal nature may have occurred and went on to direct the Director of Public Prosecutions to conduct investigations under section 87(2) and (3) of the Elections Act. The election court also found that the Returning Officer should have taken action when the Petitioner complained, even though informally, about the unlawful campaigns. It thus found the 2nd respondent liable for failing to conduct elections in Nandi Constituency in accordance with the Constitution. Consequently, the High Court nullified the election of the 1st respondent as the member of the National Assembly for Nandi Hills Constituency.

(b) Court of Appeal

10. Aggrieved, the 1st respondent filed Election Petition Appeal No. 21 of 2018 at the Court of Appeal in Eldoret on grounds that:
 - (a) The court misapplied rule 24(5) by allowing the petitioner to adopt the original petitioner's affidavit thereby admitting inadmissible evidence;



- (b) The court considered and relied on hearsay evidence on allegations of illegal campaigns, failed to give due consideration and weight to the evidence of the 1st respondent and his witnesses that no campaign was held;
 - (c) The court lowered the standard and burden of proof;
 - (d) The court erred by admitting the supplementary affidavit of the petitioner which was filed out of time and which introduced new facts and allegations;
 - (e) The court failed to consider that the irregularities complained of did not affect the results; and
 - (f) The court erred in failing to find that the photographic evidence of the alleged campaigns was inadmissible.
11. On his part, the petitioner filed a cross-appeal challenging the High Court Ruling of December 19, 2017 for dismissing his application to adduce additional evidence and for striking out the four affidavits filed on September 8, 2017 by the original petitioner. The IEBC also filed a cross-appeal urging that the High Court erred by shifting the evidentiary burden of proof to the respondents before the initial burden was discharged. The IEBC also faulted the High Court for finding that they failed to take any action for breach of the campaign rules. The IEBC argued that the petitioner did not make a formal complaint for the alleged breach of electoral law but only sent a text message stating that the 1st respondent was campaigning outside the prescribed period.
 12. On consideration of the appeal, the Court of Appeal (Githinji, Okwengu and Mohammed JJA) held that the High Court rightly found that upon the withdrawal of the original petitioner, the Petition and the supporting affidavit remained intact and could be relied upon by the substituted petitioner. However, the Court of Appeal cautioned that if the original petitioner failed to appear as a witness, his deposition was of no probative value.
 13. As to the status of the supplementary affidavit subsequently filed by the petitioner, the Court of Appeal noted that:

“The supplementary affidavit of the [petitioner] which was filed more than three months after the petition was filed has the character of a witness affidavit and could not be lawfully elevated to the pedestal of a petitioner’s affidavit in support of the petition.”
 14. In view of the above, the Court of Appeal found that the High Court misdirected itself by requiring the substituted petitioner to adopt word for word the original petitioner’s affidavit as some of the facts that were adopted and relied upon could not be proved by the petitioner based on his knowledge hence, they remained hearsay and of no probative value.
 15. On the issue of unlawful campaigns, the Court of Appeal observed that the petitioner admitted that he did not witness the alleged campaigns and neither did he take the photograph which had been produced by the original petitioner. That further, the petitioner did not call any witnesses to prove those allegations. The Court of Appeal also made a finding that both the affidavit and the oral evidence of the petitioner was not direct evidence but hearsay. Thus, the court concluded that if the affidavit of the original petitioner and the facts stated therein were discounted, then there was absolutely no evidence to support illegal or unlawful campaigns. Particularly, the appellate court held that:

“It is thus evident that the [petitioner] did not prove that the appellant engaged in illegal or unlawful campaigns and that the evidential burden was erroneously shifted to the appellant”



16. The Court of Appeal also found that the learned judge gave a very broad meaning for the term ‘campaign’ contrary to the definition of the word ‘campaign’ under section 2 of the [Elections \(General\) Regulations 2012](#). Consequently, the Court of Appeal set aside the High Court decision in its entirety. It also dismissed the petitioner’s cross-appeal by holding that the petitioner failed to demonstrate that the High Court judge did not exercise his discretion judicially.

C. Petition Before the Supreme Court

17. The petitioner now seeks to appeal the Court of Appeal decision to this court. His case is based on the following summarized grounds:
- (a) Whether the Court of Appeal properly assumed jurisdiction under section 85A of the [Elections Act](#) and articles 87 and 164(3)(a) of the [Constitution](#) by admitting an appeal dwelling largely on questions of fact and evidence.
 - (b) Whether the Court of Appeal properly applied the provisions of articles 50(1) and 159(2)(d) of the [Constitution](#) by holding that the supplementary affidavit of the petitioner contained hearsay evidence and hence lacked any probative value despite leave of the Election Court having been obtained before its filing.
 - (c) Whether the Court of Appeal properly addressed itself to the dictates of articles 27(1) & (2) and 50(1) of the [Constitution](#) by holding against the petitioner on account of failure to summon the original Petitioner for cross-examination when it is the Election Court that declined to summon him upon application to that effect by the Petitioner after objection by the Respondents.
 - (d) Whether the Court of Appeal properly addressed its mind to the provisions of articles 25(c) and 27(1) of the Constitution as read with section 61 of the Evidence Act when it held that the petitioner failed to discharge the burden of proof when the facts were duly admitted by the 1st respondent in his oral testimony before the court.
 - (e) Whether the learned judges of appeal acted lawfully by downplaying the role of the code of conduct and the 2nd respondent’s duty to enforce it in an election despite the clear provision of article 84 of the [Constitution](#).
 - (f) Whether the Court of Appeal breached articles 25(c) and 50(1) of the [Constitution](#) by adopting a different standard and burden of proof and expanding the limits of section 85A of the [Elections Act](#).
 - (g) Whether the Court of Appeal violated the doctrine of precedence and stare decisis set out under article 163(7) of the [Constitution](#) by giving section 83 of the [Elections Act](#) an interpretation different from that adopted by the Supreme Court in the case of [Raila Amollo Odinga & Another v IEBC and Others](#) Petition No. 1 of 2017.
 - (h) Whether the Court of Appeal breached the petitioner’s right to fair hearing under articles 25(c) and 50(1) of the [Constitution](#) when it dismissed his cross-appeal seeking reversal of the order to strike out affidavits of four witnesses and denying him leave to call more witnesses and adduce additional evidence.
 - (i) Whether the Court of Appeal erred in law in failing to find that the petitioner’s right to free and fair elections devoid of improper influence as set out under article 81(e) (ii) & (v) was breached by the 1st respondent with the tacit approval of the 2nd respondent.



- (j) Whether the Court of Appeal acted lawfully and fairly by failing to find that the petitioner’s right to fair administrative action under article 47 of the Constitution was breached by the 2nd respondent in failing to act on his complaint against the 1st respondent despite notice of campaigns beyond the official campaign period.
18. In response, the 1st respondent filed grounds of objection and a notice of motion application dated September 10, 2018 seeking to strike out the petition of appeal and the record of appeal on the following summarised grounds:
- (a) The court lacks jurisdiction to admit, hear and or determine the Petition of Appeal lodged out of time contrary to rule 33 of the Supreme Court Rules, 2012.
- (b) The petition and record of appeal ought to have been lodged within 30 days of filing the Notice of Appeal.
- (c) There is no application on record for expansion of time within which to file an appeal or to regularize the purported appeal.
- (d) The court lacks jurisdiction to hear and determine the appeal as the appeal raises no direct or tangential questions of constitutional interpretation or application as required under article 163(4) of the Constitution.
19. Prayers (a) —(c) above have already been spent by virtue of this court’s ruling of October 31, 2018 which allowed the petitioner’s application seeking extension of time to file the record of appeal out of time. As a result, the Petitioner’s appeal was deemed as properly filed. The only residual issue is the question of jurisdiction of this court to hear the appeal under article 163(4)(a) of the Constitution.

D. Submissions

(a) Petitioner

20. The petitioner submits that the Court of Appeal improperly assumed jurisdiction by admitting an appeal that dealt mainly on issues of fact. According to him, the questions of facts that the 1st respondent sought a determination on were: the weight to be given to the affidavit of the original petitioner; the weight to be given to the photograph presented by the original petitioner; the determination that the 1st respondent’s appearance after the close of the official campaign period at the specified areas amounted to illegal or unlawful campaigns; whether addressing a crowd of about 25 people could be said to affect the overall outcome of the disputed elections and whether the depositions on oath are hearsay. Thus, the petitioner submits that by addressing the aforesaid issues, the Court of Appeal delved into issues of fact. In submitting so, the petitioner relies on this court’s decision of Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others SC Petition No. 2B of 2014; [2014] eKLR at paragraph 82 where the court held that :

“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.”



21. The petitioner further submits that part of the holding of the Court of Appeal violated his right to fair hearing as enshrined under article 50 of the Constitution. He urges that he was affected by the irregularities in which the original Petitioner had witnessed and which were set out in details in the original petitioner's affidavit. He thus urges that the Court of Appeal locked him out of the seat of justice by denying him the right to file a supplementary affidavit based on depositions of the original petitioner.
22. He further submits that article 159(2)(d) & (e) directs courts to administer justice without undue regard to procedural technicalities. He submits that the High Court had granted him permission to file a supplementary affidavit by adopting the original petitioner's affidavit wholesomely. Yet the Court of Appeal heavily relied on rule 12(13) of the Election Petition Rules 2017 which requires personal attendance of the deponent, without considering the surrounding circumstances of the case.
23. The petitioner also pleads breach of article 27(1) & (2) of the Constitution on the right to equal protection and benefit of the law. He submits that he made an application seeking to have the original petitioner summoned but the High Court declined to grant the orders, yet the Court of Appeal went on to find that the original petitioner should have been called in to testify. Furthermore, he submits that the Court of Appeal held that the supplementary affidavit could not be elevated to the pedestal of an affidavit in support of the Petition thus leaving the Petition effectively unsupported hence that was a technicality and a breach of article 25 (c) on the right to fair trial.
24. The petitioner also avers that the Court of Appeal wrongly held that he relied on hearsay evidence to prove allegations of holding of unlawful campaign by the 1st Respondent.
25. In conclusion, the petitioner submits that the appeal raises serious questions of constitutional interpretation and application. He demonstrates that by way of two examples. Firstly, he submits that in determining whether the supplementary affidavit by the petitioner took the place of the original Petitioner's affidavit, the court had to do so in light of the right to fair trial and fair hearing under articles 25(c) and 50 (1) of the Constitution. Secondly, that the question of whether his evidence was hearsay or not took a trajectory of constitutional interpretation or application in view of the withdrawal by the original petitioner. He thus submits that in denying the substituted Petitioner the chance to rely on the affidavit of the original Petitioner it amounted to unfair treatment and discrimination.

(b) 1st Respondent

25. The 1st respondent submits that the appeal herein does not raise questions of constitutional interpretation and application. He submits that the memorandum of appeal at the Court of Appeal did not require the Court of Appeal to interpret or apply any of the provisions of the Constitution and hence the Court of Appeal did not render its judgment on the basis of any constitutional provisions.
26. He further submits that the Petitioner only makes a mere mention of various constitutional provisions which he claims to have been infringed without showing how the Court of Appeal engaged upon issues which would be said to have taken a trajectory of constitutional interpretation and application of the mentioned provisions of the Constitution.
27. In submitting so, the 1st respondent relies on the cases of Lawrence Nduttu, Gatirau Peter Munya and an excerpt from the Supreme Court decision of Joseph Ndung'u Njau v Margaret Magiri Mbuki [2017] eKLR which reads:

“None of the articles 10, 22, 25, 27, 48 and 159 of the Constitution, which were only casually cited at the hearing was the subject of interpretation or application by either the High Court



or the Court of Appeal. It is obvious to us, in the above context that the appeal before us requires no interpretation or application of the Constitution, as nowhere in the appeal, or in the submissions made, are we being asked to specifically find how the two superior court's below had incorrectly interpreted and applied any provisions of the Constitution, and thereby affected the appellant's case, to his detriment."

28. On the issue whether the Court of Appeal dealt with issues of fact, the 1st respondent submits that the appeal before the Court of Appeal met the test propounded in the cases of *Zacharia Okoth Obado v Edward Akongo Oyugi & 2 Others* [2014] eKLR and *Munya 2B* as the 1st respondent was questioning the High Court's interpretation and application of rule 24 of the *Elections Rules, 2017*, the question of the burden of proof in election petition and electoral offences, the status of a supplementary affidavit where there is a substituted petitioner and the meaning of the term "campaign" as provided for under section 2 of the *Elections Act*.
29. The 1st respondent disputes that any of the provisions of the *Constitution* were infringed by the Court of Appeal. He states that the Petitioner was afforded the right to present his case in accordance with the rules of evidence and all parties were given a fair trial and equal protection of the law.
30. The 1st respondent also submits that even though section 80 of the *Elections Act* and rule 15(1)(h) of the *Election Rules, 2017* contemplates the filing of a supplementary affidavit, the said rules do not contemplate the adoption of the contents of an original affidavit by the substituted petitioner. Hence, by the High Court ordering the petitioner to adopt word for word the affidavit of the original petitioner, the High Court led the petitioner to present on hearsay evidence.
31. The 1st respondent also submits that the petitioner applied for the summoning of the original petitioner after he had closed his case and hence it was impossible to grant such a prayer.

(c) 2nd Respondent

32. The 2nd respondent submits that the appeal does not meet the jurisdictional threshold under article 163(4)(a) of the *Constitution*. That the petitioner has not identified any specific question in respect of which interpretation is sought.
33. In its further submissions, the 2nd respondent urges that the appeal is predicated on a fresh set of complaints that were neither pleaded nor considered by the High Court or the Court of Appeal. In conclusion, it urges that the appeal is without basis and should be dismissed with costs.

Issues for Determination

34. The following are the main issues for determination as crystalized from the Petition of appeal, the responses thereto, the written and oral submissions.
 - (a) Whether this court has jurisdiction to determine the petition of appeal?
 - (b) Whether the judges of appeal acted in excess of their jurisdiction by delving into matters of fact contrary to the provisions of Section 85A of the *Elections Act*?
 - (c) Whether the judges of appeal erred in their finding that the substituted petitioner's evidence amounted to hearsay evidence and that the petitioner failed to shift the burden of proof?
 - (d) Whether campaigning outside of time constitutes a ground for nullification of an election?



Analysis

(a) Whether this court has jurisdiction to determine the Petition of Appeal.

35. The preliminary issue for determination is whether this court has jurisdiction to entertain this appeal. Towards this end, the petitioner argues that this is an appeal as of right while the 1st and 2nd respondents contend that the appeal does not raise questions of constitutional interpretation and application.
36. The test for admitting appeals under article 163(4)(a) of the *Constitution* has already been settled. A litigant must show that the appeal involves a question of constitutional interpretation or application and that same issue has been the subject of interpretation or application in the superior courts. In the alternative, a litigant must show that the superior court's reasoning took on a trajectory of constitutional interpretation or application.
37. In *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) remarked that [paragraph 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).”
38. This position was emphasized in the case of *Hassan Ali Jobo & Another v. Suleiman Said Shabbal & 2 Others*, Sup.Ct. Petition No. 10 of 2013, (*Jobo* case) where we observed that [paragraph 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 supplied].
39. Additionally, in *Peter Oduor Ngoge v Hon. Francis Ole Kaparo* Petition No. 2 of 2012, this court declined to hear an appeal and stated:
- “In the petitioner's whole argument, we think, he has not rationalized the transmutation of the issue from an ordinary subject of leave-to-appeal, to a meritorious theme involving the interpretation or application of the Constitution - such that it becomes a matter falling within the appellate jurisdiction of the Supreme Court.”
40. In that case, we went on to state that:
- “the guiding principle is to be that the chain of courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment will deserve further input of the Supreme Court” [emphasis added].



41. The foregoing principle is affirmed, in this court's decision in *Gatirau Peter Munya v. Dickson Mwenda & 2 Others* SC Application No. 5 of 2014; [2014] eKLR (Munya 1)[paragraph 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.”

42. The upshot of the foregoing is that in order to transmute itself to the provision of article 164(4)(a) of the *Constitution*, the constitutional issue must have been subject of the proceedings in the courts below.

43. The present matter, perusal of the record reveals that at the High Court, the trial judge considered among other issues, the legal effect of campaigning outside the period gazetted by the IEBC and whether or not it prejudices a fair election as decreed by articles 81 and 86 of the *Constitution*. After analysis of the various provisions, it was the determination of the learned judge that;

“126. For purposes of this petition, I find that the 1st respondent's conduct tainted the fairness and integrity of the poll. By campaigning beyond the stipulated time, the contest was no longer fair; the ground became uneven; and, the other two candidates were left holding the short end of the stick.”

44. On its part, the Court of Appeal does not outrightly deliberate violations of the Constitution in this matter, but it did look at the violation of the Electoral Code of Conduct on campaigning outside the gazetted timelines, finding the allegation unproved and upholding the election.

45. The Electoral Code of Conduct developed by IEBC is contained in the Second Schedule to the *Elections Act*, and on perusal, regulation 3 of the Code explicates its objective as;

“The objective of the Code is to provide conditions conducive to the conduct of free and fair elections and a climate of tolerance in which political activity may take place without fear, coercion, intimidation or reprisals.”

46. To meet the objective set in the Code especially that elections are free and fair, then it is imperative that one also looks at articles 81 and 86 of the Constitution which sets out these conditions and general principles for the electoral system. These articles also reinforce the right to vote elaborated under article 38 of the *Constitution*. Further, under article 84 of the *Constitution*, candidates for election and political parties in every election are required to comply with the Code of Conduct prescribed by IEBC and by article 88 (4) (i), IEBC is responsible for the development of a code of conduct for candidates and parties contesting elections.

47. The constitutional principles in an election are embodied in articles 1(2), 38(2), 81, 82 and 86 of the *Constitution*. They recognize the sovereignty of the people and protect the people's right to free and fair elections that are regular, by secret ballot, free from violence, intimidation, improper influence or corruption, conducted by an independent body and administered in an impartial, neutral, efficient, accurate and accountable manner. Additionally, the Constitution requires that voting be simple, verifiable, secure and transparent and that after the voting, the votes are counted, tabulated and the results announced promptly at each polling station and further that the results from the polling stations are openly and accurately collated and promptly announced by the returning officer. These constitutional principles are given effect through the *Elections Act* and Regulations, the *Election*



Offences Act and the Independent Electoral and Boundaries Commission Act. Non-adherence to that code will therefore be in violation of the Constitution.

48. This Court has pronounced itself on the place of interpretation of statutory and regulatory provisions of the Elections Act, finding that there is an interplay with a wide range of constitutional provisions, touching simultaneously on individual fundamental rights and political rights, notably those falling under articles 38, 81 and 82 of the Constitution. Specifically, in Munya 1, the Court held at paragraph 77:

“While we agree with [Learned counsel] regarding his contention that Section 87 of the Elections Act cannot be equated to a constitutional provision, we must hasten to add that the Elections Act, and the Regulations thereunder, are normative derivatives of the principles embodied in Articles 81 and 86 of the Constitution, and that in interpreting them, a Court of law cannot disengage from the Constitution”[emphasis supplied].

49. Applying these principles to the matter at hand, we find that the petitioner’s case meets the jurisdictional threshold under article 163(4)(a) of the Constitution and is properly before the Court for determination.

(b) Whether the Judges of Appeal acted in excess of their jurisdiction by delving into matters of fact contrary to the provisions of Section 85A of the Elections Act

50. Section 85 A of the Elections Act, 2011 provides that:

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

51. This court has discussed the said Section emphasizing the objective of limiting the electoral appeal to questions of law in the case of Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 others, Petition No. 2B of 2014; [2014] eKLR (Munya 2B). We stated;

(64) Section 85 A 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.”

52. It is in that decision that we set the principles for determining whether a matter involves questions of law or not, we stated;

“(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.”

53. This court proceeded to state 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.”

54. It is on the basis of the foregoing principles that we must determine whether the appellate court acted in excess of jurisdiction in the context of section 85A of the *Elections Act*.

55. It is the petitioner’s contention that the memorandum of appeal at the Court of Appeal contained 20 grounds all seeking the court’s determination on questions of fact. Further, that the 1st respondent was seeking for the court to re-examine and determine the probative value of the weight given to the affidavit of the original Petitioner, weight to be given to the photograph presented by the petitioner,



pronouncement of illegality of campaigning conducted, the effect of the said campaigns and whether depositions on oath amount to hearsay.

56. On examination of the High Court judgment, we note that the learned judge, came to a conclusion of fact that indeed the 1st respondent conducted election campaigns outside the gazetted period, interfering with the integrity of the electoral process. The relevant paragraphs of the judgment read as follows;
117. I am however satisfied on a preponderance of the evidence that on August 6, 2017 the 1st respondent addressed a gathering of not less than ten people at Ainapng'etuny shopping centre. He addressed another gathering at Labuiywo. He also inspected a school project at Stima School in Ol'lessos Ward where he addressed yet another group of between 10 to 15 people.
118. I also find that the 1st respondent was not entirely candid about the numbers of people in the meetings. He deliberately tried to understate them. For example, he said that at Stima School there were "very few people there, 3 or 4, who live next to the school". But when pressed by counsel for the petitioner, he conceded that "there were 10 or 15 people there. It is my project through KPLC. The people were 9 or 10."
119. The Returning Officer (DW4) was emphatic that the official campaigns closed on August 5, 2017 at 6:00 p.m. Any campaigns on August 6, 2017 were undoubtedly unlawful. It is not clear why the 1st respondent did not do such a tour within the gazetted time. It is however not lost on me that on August 5, 2017 (which was well within time) the 1st respondent spent his time in Narok campaigning for another candidate in Emurua Dikir constituency. The 1st respondent denied that he neglected his own campaign; or, that he campaigned out of time because "the ground had shifted".
120. A political campaign is simply an organized and active programme geared towards winning elections. The absence of a public address system or materials did not prevent the 1st respondent from addressing the three gatherings at Ainapng'etuny Centre, Labuiywo Trading Centre and Stima School in Ol'lessos. He did not need to expressly ask for votes. By stopping in those centers less than 48 hours to the poll; and, addressing the public gathered there, he created a spectacle; and, he kept his brand alive."

Conversely, the Court of Appeal found;

30.

The word "campaign" is defined in section 2 of the *Elections (General) Regulations 2012* as "the promotion of a candidate or political party for purposes of an election during the campaign period". As correctly submitted by counsel for the 2nd respondent, the essential elements of that definition were not established. It is apparent from the judgment that the appellant was found to have addressed a very small number of people in the three places – a group of less than 25 people at each of three places. The constituency has more than 51,000 registered voters. We are not satisfied that the conduct of the appellant amounted to a campaign in law.

57. It is clear that the appellate court took the set of facts as presented at the trial court and evaluated whether the law as applied would deem the gathering to be a campaign. The issue was resolved based on what the law provided for in those circumstances. We are persuaded that the appellate court, as its duty, limited itself to evaluating the conclusion of the trial judge based on the evidence on record and no more.



58. This is keeping in mind our pronouncement in *Munya 2B* where we held that the process of evaluating evidence was not a mechanical one and that the appellate court was not expected to shut its mind to evidence on record. We stated;

“(92) It is not for this court to issue edicts to the Court of Appeal on how it should exercise its jurisdiction. The process of evaluating evidence is not a mechanical one; and we agree with learned counsel, Mr. Muthomi, that in considering “matters of law”, an appellate Court is not expected to shut its mind to the evidence on record. We are unable, thus, to hold that, by the mere fact of having considered matters of fact, the learned judges of appeal acted in excess of jurisdiction. To so hold, would place inappropriate fetters on the inquiry-scope of the appellate judges, as they determine whether an election was held in conformity with the principles of the Constitution.”

59. As to the weight to be given to the affidavit of the original petitioner, the Court of Appeal went on to find;

“(25) Having found that an affidavit of a petitioner in support of a petition is an integral part of the petition, it follows that the finding of the learned judge that upon the withdrawal of the original petitioner from the proceedings, the petition and the supporting affidavit remained intact, is the correct position in law. However, having regard to the importance of a supporting affidavit in an election petition, if the original petitioner fails to appear for examination in-chief and cross-examination at the trial and is not excused by court in its discretion or by consent of parties, his evidence, as stated in *Moses Wanjala Lukonye v Bernard Alfred Wekesa Sambu & 3 others* [2013] eKLR and other authorities, is of no probative value and the court should not consider it.”

60. While the petitioner argues that in remarking that the affidavit of the original petitioner is of no probative value, the learned justices of appeal delved into matters fact, we are of a different opinion. The statement by the appellate judges does not delve into the veracity or otherwise of the averments in the affidavit of the Petitioner but only makes a pronouncement on the place in law of the said affidavit given the substitution of the parties. We are therefore not convinced that the appellate judges delved into matters of fact in coming to their determination.

61. We consequently hold that the learned judges of appeal did not delve into matters of fact as claimed.

(c) Whether the Judges of Appeal erred in their finding that the substituted petitioner’s evidence amounted to hearsay evidence and that the petitioner failed to shift the burden of proof?

62. The rights of individual citizens are articulated in article 38 (2) of the *Constitution*, which rights are realized through the guidelines and principles enshrined in article 81 of the *Constitution*. Article 22(1) & (2) of the *Constitution* strive for the enforcement of these rights. The Article stipulates that:

- “1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
- 2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by-



- a. a person acting on behalf of another person who cannot act in their own name;
- b. a person acting as a member of, or in the interest of, a group or class of persons;
- c. a person acting in the public interest; or
- d. an association acting in the interest of one or more of its members.”

63. It is well settled that electoral disputes are in rem and not in personam. This is litigation that affects the interest of the public, who have the right to know whether the IEBC duly carried out its responsibilities, and if the person whose election is being challenged was validly elected.

64. This unique nature was noted in *Joho v Nyange and another* (2008)3 KLR (EP 156) where Justice Maraga (as he then was) held as follows:

“Election Petitions are not ordinary suits. Though they are disputes in rem, fought between certain parties, elections petitions are nonetheless disputes of great importance - *Kibaki v. Moi*, Civil Appeal No. 172 of 1999. This is because when elections are successfully challenged, by-elections ensue which not only cost the country colossal sums of money to stage but also disrupt the constituents’ social and economic activities. It is for these reasons that I concur with the Elections Court’s decision in *Wanguhu Nganga & Another v. George Owiti & Another*, Election Petition No. 41 of 1993, that election petitions should not be taken lightly.....”

65. Similarly, in *Abdi Khaim Osman Mohammed & Another -v- Independent Electoral & Boundaries Commission and 2 Others*, Civil Appeal No. 293 of 2013 (2014) eKLR the learned judge held;

“The learned judge further got the legal basis right when he stated that electoral disputes involve not only the parties to a petition, but also the electorate in the concerned electoral area and that they are therefore matters of great public importance and interest.”

66. It follows then that withdrawal of these petitions is not a simple task. The law (rule 21 of the [Election \(Parliamentary and County Election\) Petition Rules, 2017](#)), has provided for leave of the court to be granted before one can withdraw, an election Petition intentionally as the voters need the assurance that their leaders are validly elected.

67. Comparatively, in India, withdrawal of election petitions and its effect on public was articulated in [Sheodhan Singh v Mohan Lal Cautan](#) [1969] 3 SCR 417 Or 41 AIR 146 where the Supreme Court of India observed as follows:

“In an Election Petition, the contest is really between the Constituency on the one side and the person or persons complained of on the other. Once the machinery of the Act is moved by a candidate or an elector, the carriage of the case does not entirely rest with the election petitioner. The reason for the elaborate provision is to ensure to the extent possible that the persons who offend the election law are not allowed to avoid the consequences of their misdeeds.



68. Similarly, in the case of *Bijayawanda Patwak v Satrug-HnaSaba*, 1963 S.C. 1566 At 1569, the same Supreme Court stated as follows;-

“The Petitioner in an Election Petition has not an absolute right to withdraw it, nor has the respondent the absolute right to withdraw from opposing the petition in certain circumstances. The basis for this special provisions as to withdrawal of election petitions is to be found in the well-established principle that an election petition is not a matter in which the only persons interested are candidates who strove against each other at the election. The Public of the constituency also is substantially interested in it, as election is an essential part of the democratic process. That is why provision is made in election law circumscribing the right of the parties thereto to withdraw. Another reason for such provision is that the citizens at large have an interest in seeing and they are justified in insisting that all elections are fair and free not vitiated by corrupt or illegal practices. That is why provision is made for substituting any elector who might have filed the petition in order to preserve the party of election”(emphasis added)

69. We are of the opinion that it was in the quest to protect the rights articulated under article 38 of the *Constitution* enforceable under article 22 of the *Constitution*, and their public nature, that the law provides for substitution of parties where the original election petitioner wishes to withdraw.

70. The relevant rules stipulate as follows:

Rules 24 of the *Election(Parliamentary and County Elections) Petition Rules, 2017*

1. At the hearing of the application for the withdrawal of a petition, a person who is qualified to be a petitioner in respect of the election to which the petition relates may apply to the election court to be substituted as the petitioner in place of the petitioner who has applied to withdraw the petition
2. The election court may grant the application to substitute the applicant under sub-rule 1) as the petitioner
3. The election court may direct that the security deposited on behalf of the original petitioner shall remain as security for any costs that may be incurred by the substituted petitioner, and that to the extent of the sum deposited as security, the original petitioner may be liable to pay the costs of the substituted petitioner
4. If the election court does not make an order under sub-rule (3), security of the same amount as would be required of a new petitioner and subject to the same conditions imposed on the original petitioner, the substituted petitioner shall pay, within three days after the order of substitution, the security before proceeding with the petition.
5. Subject to sub-rules (3) and (4), a substituted petitioner shall stand in the same position, to the extent possible, and shall be subject to the same liabilities as the original petitioner
6. Where there is more than one petitioner, an application to withdraw a petition shall be made with the consent of all the other petitioners.



71. The rationale for substitution of parties in election petitions is that a petitioner in an election petition works to vindicate the rights of every citizen, and withdrawal of such petition would affect rights of members of public. Similarly, in the persuasive case of *Mwamlole Tchapu Mbwana v Independent Electoral and Boundaries Commission (IEBC) & 7 others*, Election Petition Appeal No 4 of 2018, [2018] eKLR; the learned justices of appeal stated;
- “ 1.The paramount rationale for substitution of parties is to enable the court to reach an effectual and complete determination of the questions or issues arising in the proceedings. A court’s power to allow substitution, if any, is regulated by rules of procedure.”
72. As earlier stated, rule 24 (5) provides the place of the substituted petitioner shall stand in the same position, to the extent possible and shall be subject to the same liabilities as the original petitioner. We must also keep in mind that with election timelines being strict as set under articles 87 (2) and 105 of the *Constitution* on filing of election petitions and swift disposal respectively, the law does not contemplate filing of a new petition but the replacement of one suitable petitioner with another.
73. However, we are convinced that it was not the intention of the Rules Committee to treat a new petitioner differently from the original one. He is to have the same rights as the old one and these rights, include the right to adduce and challenge evidence a tenant of Fair hearing under article 50 (k) of the *Constitution*.
74. In this matter, the election court granted the original petitioner, Mr. Kimei’s application, to withdraw from the Petition, allowing Mr. Benard Kibor Kitui to be substituted as a petitioner. In doing so, the court directed that the substituted petitioner stands in the same position, to the extent possible and subject to the same liabilities as the original petitioner. The learned judge also directed that the petitioner ought to adopt the affidavit of the Original petitioner. It is the latter direction that is subject of contention.
75. With this in mind, we take a look at the obligations of a petitioner in matters of evidence, which is found under Rule 12(1)(b) stipulating that in the matter of an affidavit, a Petitioner shall file an affidavit personally. The use of the word shall depicts that the petitioner must swear his own evidence in support of a petition. As affidavit evidence is evidence that is personal to the deponent, it cannot stand that a petitioner relies on evidence that he was not privy to.
76. We find that in limiting the substituted petitioner to adopting word for word the averments of the original petitioner, the learned trial judge erred as it was tantamount to relying on facts not within his knowledge violating rules of Evidence and admitting hearsay evidence.
77. We are therefore in agreement with the appellate court in their finding that an affidavit must state the substance of the evidence and must be confined to facts that the deponent is able of his own knowledge to prove.
78. We further take note, that rule 15(1)(h) of the *Election (Parliamentary and County Election) Rules 2017* allows a substituted petitioner to file a supplementary affidavits whose purpose is to advance and support a petition and its content.
79. We hasten to add that in that light, a substituted Petitioner while filing a supplementary affidavit must not introduce new issues, as this would advance a new case, different from the original petitioner’s case.
80. In that regard, one of the grounds for impugning the judgment of the Court of Appeal was that the court erred in its finding that the petitioner failed to discharge the burden of proof.



81. The petitioners argue that all facts contained in the evidence presented by the Appellant were confirmed by the 1st Respondent in his own testimony. He also argues that an election petition is similar to a criminal trial where the prosecution should establish a *prima facie* case against an accused person to warrant him being placed on his defense. On his part, the 1st respondent contends that the evidence presented was hearsay evidence which cannot meet the threshold of proof of election offences and malpractices.
82. This court has pronounced itself on the issue of burden of proof in elections petitions in *Raila Odinga & Others -v- Independent Electoral & Boundaries Commission & Others*, Petition No. 5 of 2013, where we stated that:

“...a petitioners should be under obligation to discharge the initial burden of proof before the respondents are invited to bear the evidential burden. The threshold of proof should in principle be above the balance of probabilities, though not as high as beyond-reasonable doubt. Where a party alleges non-conformity with the electoral law, the Petitioner must not only prove that there has been 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 Respondents bear the burden of proving the contrary”.

Further we observed that;

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

As regards the standard of proof, we held that;

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

83. We affirm that this remains the legal position regarding the question of burden of proof in election Petitions.
84. In this matter, having found that the evidence relied upon by the trial court to come to a determination that the evidentiary burden was duly met and shifted amounted to hearsay, we are in agreement with the appellate justices in their finding that the Petitioner's evidentiary burden of proof did not shift to the 1st and 2nd Respondents.

(d) Whether campaigning outside of time constitutes a ground for nullification of an election.

85. The measure by which an election can be invalidated is contained in section 83 of the *Elections Act* which applies to this appeal as provided before the 2017 amendment. It states;

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



86. The significance of the section was discussed by this court in *Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 Others* [2014] eKLR where it stated;

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

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

218. Where, however, it is shown that the irregularities were of such magnitude that they affected the election results, then such an election stands to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection are not enough, by and of themselves, to vitiate an election...”

87. Similarly, in *Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 4 Others & Attorney General & Another* Election Petition No. 1 of 2017 this Court considered the application of section 83 of the *Elections Act* and the circumstances under which an election may be nullified for failure to adhere to provisions of the Constitution and the law or on account of irregularities stating;

“209. therefore, while we agree with the two Lord Justices in the Morgan v Simpson case that the two limbs should be applied disjunctively, we would, on our part, not take Lord Stephenson’s route that even trivial breaches of the law should void an election. That is not realistic. It is a global truism that no conduct of any election can be perfect. We will also go a step further and add that even though the word “substantially” is not in our section, we would infer it in the words “if it appears” in that section. That expression in our view requires that, before vitiating it, the court should, looking at the conduct of the whole election, be satisfied that it substantially breached the principles in the Constitution, the Elections Act and other electoral law. To be voided under the first limb, the election should be what Lord Stephenson called “a sham or travesty of an election” or what Prof. Ekirikubinza refers to as “a spurious imitation of what elections should be.”

88. We affirm that this remains the legal position regarding the question of nullification in election petitions binding on all courts under article 163 (7) of the *Constitution* which explicitly provides that all courts, other than the Supreme Court, are bound by the decisions of the Supreme Court. The nature of that provision is absolute. This court expounded on this principle, in the case of *Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 others* [2014] eKLR, where we stated;

(196) Article 163 (7) of the *Constitution* is the embodiment of the time-hallowed common law doctrine of stare decisis. It holds that the precedents set by this Court are binding on all other courts in the land. The application, utility and purpose of this constitutional imperative are matters already considered in several decisions of this court: Jasbir Sing Raiv Tarlochan Singh



Rai & Others, and quite recently, in *George Mike Wanjohi v Steven Kariuki & Others* Petition No. 2A of 2014.

In addition to the benchmark decisions to which this court adverted in *Wanjohi v Kariuki (supra)*, regarding the importance of the doctrine of stare decisis, we would echo the dictum in *Housen v Nikoaisen* (2002) 2 SCR:

“It is fundamental to the administration of justice that the authority of decisions be scrupulously respected by all courts upon which they are binding. Without this uniform and consistent adherence, the administration of justice becomes disordered, the law becomes uncertain, and the confidence of the public in it undermined. Nothing is more important than that the law as pronounced ... should be accepted and applied as our tradition requires; and even at the risk of that fallibility to which all Judges are liable, we must maintain the complete integrity of relationships between the courts.”

89. The upshot of this is that the invalidation of an election follows substantial irregularities malpractices, and non-compliance with law.
90. Looked at as whole, this matter at the High Court and at the appellate court turned on the issue of campaigning outside of the gazetted period. While the High Court found that the alleged campaigning, affected the ‘free and fair’ aspect of the election, the appellate court was of a different view finding that not only was it not proved in light of the 10,051 votes margin, and the small crowd addressed at these gatherings, the supposed illegality, could not have affected the result. Further, that the petitioner did not call any witnesses to prove those allegations. The Court of Appeal also made a finding that both the affidavit and the oral evidence of the petitioner was not direct evidence but hearsay.
91. The question we must then ask ourselves then is, whether the issue is substantial enough to nullify an election? The impugned decisions of this court indicate that elections are voided when they are a sham or a travesty, or a poor imitation of what an election ought to be. Invalidation of an election follows considerable irregularities, malpractices and non-compliance with the law.
92. In light of the foregoing, we find that a single issue, even where the effect is criminal, where it does not amount to massive or substantial non-compliance with the law or irregularities is not enough to dissuade from the fact that an election was conducted largely in accordance with the law. This is the case in this present matter.
93. For these reasons, we find that the election for the position of Member of National Assembly for Nandi hills Constituency in the General Election held on the August 8, 2017, conducted substantially in accordance with the constitutional principles.
94. The petitioner and the 1st respondent both pray for costs in this petition, on their part the 2nd respondent argues that as the appeal lacks merit, it is an abuse of process and ought to be dismissed with costs to them.
95. 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.”
96. 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...”

97. In *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* Petition No. 4 of 2012; [2014], this court settled the law on costs, finding that they follow the event, further, that a Judge has the discretion in awarding same. We stated:

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

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

98. It is in that light that we hold that each party to the Petition shall bear their own costs.

Orders

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

1. That the petition of appeal dated August 24, 2018 is hereby dismissed.
2. That the judgment of the Court of Appeal of Kenya sitting at Eldoret dated July 11, 2018 is upheld.



3. For the avoidance of doubt, the declaration of the result of the election by the Independent Electoral and Boundaries Commission in respect of the Member of National Assembly for Nandi Hills Constituency is affirmed.
4. Each party shall bear their own costs.

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

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M.K. IBRAHIM

JUSTICE OF THE SUPREME COURT

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J. B. OJWANG

JUSTICE OF THE SUPREME COURT

.....

S.C.WANJALA

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

