Musili v Independent Electoral and Boundaries Commission & another (Petition 16 of 2018) [2018] KESC 72 (KLR) (21 December 2018) (Judgment)

Mawathe Julius Musili v Independent Electoral & Boundaries Commission & another [2018] eKLR

Neutral citation: [2018] KESC 72 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PETITION 16 OF 2018

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

DECEMBER 21, 2018

BETWEEN

MAWATHE JULIUS MUSILI ..... APPELLANT

AND

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

SUMRA IRSHADALI MOHAMED ..... 2ND RESPONDENT

(Being an appeal from the Judgment and Orders of the Court of Appeal sitting at Nairobi (Warsame, Odek & Makhandia JJ.A.) in Election Petition of Appeal No. 22 of 2018, delivered on 6 July 2018)

The effect of failure to produce form 35B in an election petition challenging the results of an election of a Member of National Assembly

Reported by Kakai Toili

Electoral law *- election petitions - statutory forms - form 35B - failure to produce form 35B in an election petition - effect of - what was the effect of failure to produce form 35B, which contained the results declared in each polling station in a constituency, in an election petition challenging the results of an election of a Member of National Assembly - Elections Act (cap 7) section 39, 83, 85A; Elections (Parliamentary and County Elections) Petition Rules, 2017 (cap 7 Sub Leg) rules 2, 15 (3)*

Electoral Law *- appeals - record of appeal - supplementary record of appeal - circumstances in which a supplementary record of appeal was prepared - time for filing supplementary record of appeal - what were the circumstances in which a supplementary record could be prepared and when was it required to be filed - Court of Appeal (Election Petition) Rules, 2017, (cap 9 Sub Leg) rule 8(5).*

Electoral Law *- elections - election officials - returning officers - mandate of returning officers - what was the mandate of a returning officer at the constituency level during elections for the position of Member of National*

Assembly - Constitution of Kenya, 2010, article 81(e); Elections (General) Regulations, 2012 (cap 7 Sub Leg) regulation 83.

Evidence Law *– witnesses – witnesses in election petitions - witnesses who made depositions on a crucial subject - failure to call witnesses who made depositions on a crucial subject - effect of - whether a court was entitled to draw adverse inference from the absence of a witness who made depositions on a crucial subject of testimony in an election petition - Elections (Parliamentary and County Elections) Petition Rules, 2013 (cap 9 Sub Leg) rule 15 (3).*

Electoral Law *– election petitions – burden and standard of proof - who bore the burden of proof in election petitions and when did that burden shift - Evidence Act (cap 80) section 107(1), 107(3)*

Brief facts

The appellant was declared duly-elected as the Member of the National Assembly for Embakasi South constituency following the August 8, 2017 general elections. Aggrieved by the said declaration, the 2nd respondent filed a petition at the High Court, contesting the election of the appellant. The High Court dismissed the petition and confirmed the appellant as the Member of the National Assembly for Embakasi South Constituency. Aggrieved by that decision, the 2nd respondent appealed to the Court of Appeal. The Court of Appeal allowed the appeal and directed the 1st respondent to conduct a fresh election for the position of Member of the National Assembly for Embakasi South Constituency in conformity with the Constitution and the Elections Act. Aggrieved by the Court of Appeal's decision the appellant filed the instant appeal.

Issues

i. What was the effect of failure to produce form 35B, which contained the results declared in each polling station in a constituency, in an election petition challenging the results of an election of a Member of National Assembly?
ii. What were the circumstances in which a supplementary record could be prepared and when was it required to be filed?
iii. What was the mandate of a returning officer at the constituency level during elections for the position of Member of National Assembly?
iv. Whether a court was entitled to draw adverse inference from the absence of a witness who made depositions on a crucial subject of testimony in an election petition.
v. Who bore the evidential burden of proof in an election petition and when did that burden shift?

Relevant provisions of the Law

Evidence Act (cap 80)

Section 107 - Burden of proof

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist; and

(3) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Elections (General) Regulations (cap 7 Sub Leg)

Regulation 5(1A) - Presiding at polling station, oath of secrecy, etc

The functions of a presiding officer shall be—

1. *presiding over elections at an assigned polling station;*
2. *tallying, counting and announcement of results at the Polling station;*
3. *submitting polling station results to the Constituency returning officer; and*
4. *electronically transmitting presidential results to the constituency, counties and national tallying centers.*

Held

1. The impugned supplementary record of appeal was filed on May 2, 2018. The High Court judgment was delivered on March 2, 2018. In compliance with section 85A of the Elections Act and rule 9 (1) of the Court of Appeal (Election Petition) Rules 2017(the Rules), the appellant was required to file a memorandum and record of appeal within 30 days of the date of judgment of the High Court.

2. A supplementary record of appeal was usually prepared when a party was of the view that the record of appeal was defective or insufficient. The Rules did not expressly provide for the time frame for filing a supplementary record of appeal. The supplementary record of appeal was, however, mentioned in rule 8(5), in those circumstances in which the High Court did not avail relevant documents. In such a case, the appellant was allowed to file the record of appeal, followed within seven days by a supplementary record of appeal.
3. The supplementary record of appeal, just like the record of appeal, was to be filed within 30 days of the date of judgment of the High Court. The supplementary record of appeal was filed out of time and without leave of the court. The contents of that record were copies of polling station diaries which were produced by the appellant before the High Court and were relied upon by the parties and their witnesses during the hearing of the election petition.
4. The court hearing the appeal was an ideal forum for ascertaining whether the supplementary records introduced new evidence; whether they raised legal issues; and whether they were relevant to the matters in controversy in the appeal. The Court of Appeal determined that, as the first nine volumes had been filed in time, the belated filing of the rest of the documents contained in the supplementary record appeal did not affect its jurisdiction.
5. The Court of Appeal Rules, 2010, in rule 92 (3) allowed an appellant at any stage to lodge in the appropriate registry four copies of a supplementary record of appeal, and as soon as practicable thereafter, to serve copies of it upon every respondent who had complied with the requirements of rule 79. Rule 79 obligated respondents to furnish an address for service. However, in the Rules there was no express statutory timeline for filing a supplementary record of appeal.
6. In the circumstances, the Court of Appeal did not contravene article 163(7) of the Constitution. The Court of Appeal did not err by not dismissing the supplementary record of appeal.
7. The Judges of Appeal had not descended into the arena of examining the probative value of the evidence presented in the petition, or engaging in the calibration of evidence, with a view to determining the veracity or otherwise of evidence tendered by witnesses.
8. It was a professional task reposing in the practising lawyer, to methodically craft the client's petition-papers to reflect objectively the true claims in the cause, that they will draw precise and predictable lines of judicial response – especially in complex cases. Only upon a proper statement of claim, would the Judges be expected to respond most effectively. Short of such propriety in the conduct of litigation, all the court could do was employ its best judgement and discretion, in the context of the governing law on jurisdiction. That principle was quite clearly reflected in the position taken by the appellate court.
9. The returning officer was an integral factor in the verification process. Under regulation 83 of the Elections (General) Regulations, 2012,(the Regulations) the returning officer at the constituency level was mandated to collate and declare the results from each polling station, in the presence of candidates, agents and observers and then to complete the relevant form 35B. The tallying and collation of ballots was required to be administered in an impartial, neutral, efficient, accurate and accountable manner, as prescribed by article 81(e) of the Constitution.
10. Form 35B bore the formal declaration of election results. In the instant case, it was impossible to state with certainty and clarity what the contents of the original form 35B showed and whether the certified copy was a true copy of the original. As a consequence, it became impossible to conclude that the appellant was the declared winner of the election. The declaration form was missing and the ostensible result was both suspect and uncertain.
11. The absence of the original form 35B and the presence of the divergent results negated the constitutionally prescribed principles of verifiability, accuracy, accountability and transparency. In the circumstances, the election process was unverifiable. The declared results were indeed unverifiable.
12. An election represents the will of the people. Whenever the paper trail enabled the court to understand the intention of the voters, then the court should not interfere. In the instant case, however, the primary

declaration form 35B was unavailable and moreover, the conflicting totals negated the constitutional requirements of verifiability, accuracy, exactness and fairness.

13. The 1st respondent was not bothered to produce the original form 35B despite being; the custodian of the document and the constitutionally-mandated body, pursuant to article 86 (c) of the Constitution, to ensure that the results from the polling stations were openly and accurately collated and promptly announced by the returning officer. The respondent, moreover, disobeyed the High Court's order to produce a vital document. Besides, the 1st respondent, after intimating that the returning officer would adduce evidence in court, on which premise the 2nd respondent prosecuted his case, left that assurance unfulfilled.

14. The 1st respondent did not ensure that the results from the polling stations were openly and accurately collated and promptly announced as prescribed in articles 86(c) and 81 (e) of the Constitution and regulation 83 of the Regulations. The results declared were unsustainable as they were unsupported by any evidence.

15. Rule 15(3) of the Elections (Parliamentary and County Elections) Petition Rules, 2013 provided that a respondent's replying affidavit formed part of the record of the trial, and a deponent could be cross-examined by the petitioners and re-examined by the respondent. In view of the weighty factors moving a deponent to make averments on oath, a court was entitled to draw adverse inference from the absence of a witness who had made depositions on a crucial subject of testimony. For the court, in its quest for justice, expected that the anticipated testimony would shed light on the subject in question.

16. The High court's proven mechanism of fact-ascertainment, in the well-established common-law tradition, was the cross-examination of witnesses. It was through that device that the High Court could gauge the truth or otherwise of an allegation which could have appeared in depositions by way of affidavit. Consequently, the failure of a party to avail himself or herself, to affirm the content of depositions in affidavit, was destined to minimize the probative value of the affidavit evidence.

17. When a party failed to produce the witness, the court could infer that the testimony would have been unfavourable to the party calling the witness. The absence of the returning officer inevitably weakened the 1st respondent's response and evidence. A court could look the other way if the reason given for the absence of the returning officer was satisfactory and credible. Such, however, was not the case in the instant matter. The replying affidavit was inadmissible.

18. In electoral matters, the legal burden rested on the appellant, who was under obligation to discharge the initial burden of proof, before the respondents were invited to bear the evidential burden. The 2nd respondent placed sufficient, credible and compelling evidence before the High Court, to prove that there existed different sets of results, such that it was not possible to know who won the election. The evidential burden therefore shifted to the 1st respondent, to show that that was not so.

19. The evidence relied on by the 1st respondent was its replying affidavit sworn by the returning officer. That evidence was of no probative value. It could not possibly be concluded that the 1st respondent discharged its evidential burden.

20. The appellant's application for the striking out of the petition, for non-joinder of the returning officer as respondent was heard, and a ruling delivered. No appeal was lodged against that decision and therefore that issue was definitively settled by judicial decision. The issue of joinder of the returning officer was *res judicata*.

21. The Court of Appeal duly limited itself to evaluating the conclusions of the High Court, on the basis of the evidence on the record and ascertained that the conclusions were inapposite, by the standards of a reasonable tribunal. The Court of Appeal did not delve into factual issues with regard to the conduct of the presiding officer. The fact of the presiding officer being an official of Wiper party, raised the apprehension of bias. That was particularly so because of the key roles ascribed to election presiding officers. Article 86(b) of the Constitution required the 1st respondent to ensure that the votes cast were counted, tabulated and the results announced promptly by the presiding officer at each polling

station. The election in question was not conducted substantially in accordance with the constitutional charter, and the organic statute law incorporated within its ambit.

Appeal dismissed

Orders

i. *The petition of appeal dated July 19, 2018 disallowed.*

ii. *The Judgment of the Court of Appeal in Election Petition of Appeal No. 22 of 2018 upheld.*

iii. *The Certificate issued by the High Court pursuant to section 86 of the Elections Act set aside and substituted with a certificate that the appellant was not validly declared as having been elected as Member of the National Assembly for Embakasi South Constituency during the elections held on the August 8, 2017.*

iv. *The 1st respondent directed to organize and conduct a fresh election for the position of Member of the National Assembly for Embakasi South Constituency, in conformity with the Constitution and the Elections Act.*

v. *Parties to bear their own respective costs in the appeal.*

Citations

Cases

Kenya

1. *Aramat & another v Lempaka & 3 others* Petition 5 of 2014; [2014] KESC 21 (KLR) - (Followed)
2. *Independent Electoral and Boundaries Commission & another v Pauline Akai Lokuruka & another* Election Appeal 31 of 2018; [2018] KECA 473 (KLR) - (Applied)
3. *Independent Electoral and Boundaries Commission & another v Mule & 3 others* Civil Appeal 219 of 2013; [2014] KECA 890 (KLR) - (Mentioned)
4. *Joho & another v Shahbal & 2 others* Petition 10 of 2013; [2014] KESC 34 (KLR) - (Mentioned)
5. *Kidero & 4 others v Waititu & 4 others* Petition 18 & 20 of 2014 (Consolidated); [2014] KESC 11 (KLR) - (Mentioned)
6. *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad, Ahmed Muhumed Abdi, Gichohi Gatuma Patrick & Independent Electoral and Boundaries Commission* Election Appeal 2 of 2018; [2018] KECA 677 (KLR) - (Mentioned)
7. *Munya v Kithinji & 2 others* Petition 2B of 2014; [2014] KESC 38 (KLR) - (Followed)
8. *Nduttu & 6000 others v Kenya Breweries Ltd & another* Petition 3 of 2012; [2012] KESC 9 (KLR) - (Followed)
9. *Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others* Petition 5, 3 & 4 of 2013 (Consolidated); [2013] KESC 6 (KLR) - (Mentioned)
10. *Timamy Issa Abdalla v Independent Electoral and Boundaries Commission, Adan Ali Mohamed, Fahim Yasin Twaha & Abdulhakim Aboud Bwana* Election Appeal 4 of 2018; [2018] KECA 886 (KLR) - (Mentioned)

Statutes

Kenya

1. Constitution of Kenya articles 10, 25, 27, 38, 50, 81, 86, 87(1); 159; 163(4)(a)(7); 164(3) - (Interpreted)
2. Court of Appeal (Election Petition) Rules, 2017 (cap 9 Sub Leg) rules 8, 9(1), 19 - (Interpreted)
3. Court of Appeal Rules, 2010 (cap 9 Sub Leg) rule 92(3) - (Cited)
4. Elections (General) Regulations, 2012 (cap 7 Sub Leg) regulations 5(1), (2); 83 - (Interpreted) -
5. Elections (Parliamentary and County Elections) Petition Rules, 2017 (cap 7 Sub Leg) rules 2, 15(3) – (Interpreted)
6. Elections Act (cap 7) sections 39, 83, 85A - (Interpreted)
7. Evidence Act (cap 80) section 107(1)(3) – (Interpreted)
8. Supreme Court Act (cap 9B) section 15(2) - (Interpreted)
9. Supreme Court Rules, 2012 (cap 9B Sub Leg) rules 9, 33 - (Interpreted)

Advocates

None mentioned

JUDGMENT

A. Introduction

1. This is an appeal against the judgmentof the Court of Appeal sitting in Nairobi, delivered on July 6, 2018, overruling the decision of the High Court (Nzioka J) in Election Petition No.2 of 2017. The appellate court decision invalidated the election of the appellant as Member of the National Assembly for Embakasi South Constituency in Nairobi County.

B. Background

2. The appellant was declared duly-elected as the Member of the National Assembly following the General Elections of August 8, 2017. He was the candidate of Wiper Party, and was declared winner on August 9, 2017by the Returning Officer for Embakasi South Constituency, on the basis that he had garnered 33,174 votes, while the 2nd respondent who vied under ODM party was runner-up, said to have garnered 33,009 votes. The 2nd respondent subsequently filed a petition, contesting the election of the appellant.

3. Several applications were heard and resolved, in the course of trial. The appellant herein sought, by notice of motionof September 27, 2017, the striking out of the petition, for non-joinder of the Returning Officer of the Constituency as a respondent. In a rulingdelivered on November 8, 2017, the application was disallowed.

4. The appellant also filed a notice of motion on October 4, 2017seeking extension of time for filing a response to the petition. The application was allowed. The appellant's application of October 12, 2017for scrutiny and recount was also allowed.

5. In her judgmentof March 2, 2018, the High Court thus set out the relevant issues for determination:

    (a) whether the elections were so conducted as to be in violation of the Constitution and other laws governing elections;

    (b) whether the elections were free, fair and credible;

    (c) whether the tallying of votes was compromised by violence, intimidation or improper influence by the respondents and/or their supporters;

    (d) whether the counting, tallying and/or collation of votes was administered in an impartial, neutral, efficient, accurate and accountable manner;

    (e) whether the method used in tallying the votes was accurate, verifiable, secure and accountable and/or met the requirement of the law;

    (f) whether there were substantive irregularities or illegalities such as rendered the elections invalid, null and void;

    (g) whether the rejected votes were improperly handled by the 1st respondent, and gave undue advantage to the 2nd respondent;

(h) whether the petitioner's agents were denied entrance at the polling stations and/or harassed, obstructed, intimidated or threatened by the 1st respondent;

(i) whether the KIEMS kits at some polling stations (Jobenpha, Cheminade, and Mukuru Education Centre) were not functioning, and whether this affected the results;

(j) whether the 1st respondent allowed a partisan Presiding Officer at the tallying centre who was a member of Wiper party, and whether it affected the results;

(k) whether the issue of failure to join the Returning Officer as a respondent in the petition herein is res judicata;

(l) whether the affidavit sworn by the Returning Officer who did not come to testify is admissible in evidence; and

(m) whether the 2nd respondent was the person elected as the Member of the National Assembly for Embakasi South Constituency.

6. The High Court, on March 2, 2018, dismissed the petition, and confirmed the appellant as the Member of the National Assembly for Embakasi South Constituency. Aggrieved by this decision, the 2nd respondent appealed to the Court of Appeal.

7. At the appellate court, the 2nd respondent sought declarations that: the appellant was not validly elected; the 2nd respondent was the duly elected Member of the National Assembly for Embakasi South constituency; the election was void for want of credibility; the election results announced on August 10, 2017, the certificate issued, and the endorsing Gazette Notice No. 8239 be nullified; there be an Order for scrutiny and recount and/or re-tallying of all the votes cast. In the alternative, he sought an Order that fresh election for Embakasi South Constituency be held.

8. The appellate courtidentified five issues in the cause for resolution, namely:

(i) whether the memorandum of appeal should be struck out;

(ii) the non-joinder of the Returning Officer in the petition;

(iii) the different sets of results, as declared by the 1st respondent;

(iv) scrutiny and recount;

(v) bias on the part of an official of the 1st respondent.

9. The Court of Appeal declined to strike out the memorandum of appeal, as the pertinent issues of law in the appellate cause had been set out clearly enough. The appellate courtfound, besides, that the filing of 6 volumes of record outside the prescribed 30-day period was not an omission that went to the root of the appeal, or in any way affected the jurisdiction of the Court.

10. On the second issue, the Court of Appeal held it to be erroneous for the trial Court to refer to the Returning Officer's affidavit which lacked the consent of the parties. The appellate courtheld that the trial courthad misconstrued the difference between the legal and the evidentiary burden of proof. On the third issue, the courtagreed with the appellant, that the results given by the 1st respondent were not verifiable, and were in violation of the requirements of articles 81 and 86 of the *Constitution*, section 39 of the *Elections Act*, and regulation 83 of the *Elections (General) Regulations*.

11. On scrutiny and recount, the appellate courtheld that the 1st respondent failed to fully and candidly discharge its duty of bringing before the court all evidence in its possession and control, to enable the court to decide the petition.

12. As to whether there was bias on the part of an official of the 1st respondent during the election, the Court of Appeal held that there was a real likelihood of bias. The Court of Appeal allowed the appeal with costs to the 2nd respondent herein, and directed the 1st respondent to conduct a fresh election for the position of Member of the National Assembly for Embakasi South Constituency, "in conformity with the *Constitution* and the *Elections Act*".

C. The case before the Supreme Court

13. Aggrieved by the said judgment, the appellant filed an appeal dated July 19, 2018, and an urgent notice of motion seeking conservatory orders at the Supreme Court. The application was certified as urgent by Ojwang, SCJ on July 20, 2018; and on September 7, 2018 the Court granted interim Orders, staying the Court of Appeal judgment pending *inter partes* hearing.

14. This appeal is founded upon article 163 (4) (a) of the *Constitution of Kenya 2010*; section 15 (2) of the *Supreme Court Act* (Cap 9A, Laws of Kenya); and rules 9 and 33 of the *Supreme Courts Rules, 2012*. It rests on grounds specified in the body of the petition of appeal, to the following effect:

    (a) the Court of Appeal exceeded its jurisdiction under articles87(1) and 164(3) of the *Constitution*, by overlooking the terms of section 85A of the *Elections Act*, which limits their jurisdiction to matters of law only;

    (b) by considering issues of law that were raised under grounds of "mixed law and fact", the appellate court judges denied the appellant justice, and deprived him of his rights to fair hearing, equal protection and benefit of the law, thus contravening articles 25, 27 and 50 of the *Constitution*;

    (c) the Court of Appeal exceeded its jurisdiction under articles 87(1) and 164(3) of the *Constitution*, and denied the appellant the right to fair trial under article 25(1) and 50 of the *Constitution*, by rewriting, redrafting and reframing the grounds of appeal;

    (d) the Court of Appeal exceeded its jurisdiction under article 87(1) and 164(3) of the *Constitution*, by finding that the failure of the 2nd respondent to file the Record of Appeal or part of the Record of Appeal within the period prescribed under section 85A of the *Elections Act,* could be cured by article 159 of the *Constitution*;

    (e) the appellate court contravened article 163 (7) of the *Constitution* by departing from the decision of the Supreme Court in *Evans Odhiambo Kidero & 4 Others v. Ferdinand Ndungu Waititu & 4 Others* [2014] eKLR, which held that Section 85A of the *Elections Act* was not a routine legal prescription, but a product of the constitutional scheme requiring electoral disputes to be settled in a timely fashion;

    (f) the appellate court contravened article 163 (7) of the *Constitution* by departing from the decision in *Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others* (2014) eKLR, which held that only one result emanated from an election – that declared by the Returning Officer at the tallying centre;

    (g) the Court of Appeal exhibited bias by denying the appellant equal protection and benefit of the law, contrary to articles 25, 27 and 50 of the *Constitution*, when it relied on the pleadings,

testimony, written and oral submissions of the 2nd respondent, to the exclusion of the pleadings, testimony written and oral submission of the appellant as well as the 1st respondent;

(h) the Court of Appeal departed from the legal principle that 'costs follow the event', thereby depriving the appellant of his right to equal protection and benefit of the law under article 27 of the *Constitution*;

(i) the Court of Appeal contravened article 163(7) of the *Constitution* and departed from the binding decisions in *Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others* (2014) eKLR, by finding that they could consider the issues of law notwithstanding that the memorandum of appeal raised grounds of mixed law and fact;

(j) the Court of Appeal exceeded its jurisdiction under articles87(1) and article163(4), by failing to consider the non-compliance with article81 and 86 of the *Constitution*, and sections 39 and 83 of the *Elections Act*;

(k) the appellate court exceeded its jurisdiction under article87(1) and article164(3) of the *Constitution*, by failing to hold that under rule 2 of the *Elections (Parliamentary and County Elections) Petition Rules*, 2017, the allegations against the conduct of the Returning Officer could not be sustained against the 1st respondent;

(l) the Court of Appeal erred by deviating from the principles of incidence of burden and standard of proof in election petitions, in departure from the binding decision of the Supreme Court in *Raila Odinga & Others v. Independent Electoral and Boundaries Commission & Others* Petition No. 5 of 2013;

(m) the Court of Appeal misinterpreted and misapplied articles 38, 86 and 81(a), (d) and (e) of the *Constitution*, in its holding that human frailties such as fatigue and consequent errors are sufficient to vitiate an election, without considering the effect of those errors on the results; and the court ignored the provisions of section 83 of the *Elections Act*;

(n) the appellate court erred in law, by disregarding regulations 5(1) and (2) of the *Elections (General) Regulations 2012*, which provide for the appointment of a Presiding Officer for any Polling Station, and states that before the appointment of a Presiding Officer, the list of the persons proposed for the same should be availed to the Political Parties at least 14 days before the proposed date of appointment and gazettement;

(o) the Court of Appeal misapplied the Constitutional threshold for a free, fair and verifiable election enshrined in articles 81 and 86 of the *Constitution*, as regards the Election of Member of the National Assembly for Embakasi South Constituency.

D. Submissions of Counsel

15. The appellant's cause rests upon five broad grounds: (i) jurisdiction, (ii) non-joinder of the Returning Officer, and the rules of natural justice; (iii) section 83 of the *Elections Act*, and compliance with articles 81 and 86 of the Constitution and with section 39 of the *Elections Act*; (iv) evidence tendered by the appellant and the 1st respondent; and (v) the Presiding Officer's neutrality.

16. The appellant contends that the appellate court failed to treat jurisdiction as a preliminary issue. He urges too that the Supplementary Record of Appeal was filed out of time, rendering the appeal incompetent. In addition, he faults the appellate court for failing to reject the Memorandum of Appeal, for raising mixed issues of "law and fact". He submits that in this way, the Appellate Court exceeded its Constitutional and Statutory jurisdictional limits.

17. The appellant submits that the appellate court"created a new appeal by re-writing and re-framing the grounds of appeal": thus depriving the appellant of his right to a fair hearing under articles25 and 50 of the *Constitution*, and negating his right to equal protection and benefit of the law under article 27, by failing to uphold the legal principle that parties are bound by their pleadings.

18. The appellant urges that only one ground at the appellate court had raised issues of law – but done so in such wide terms (premised on articles 10, 81 and 86 of the *Constitution*), that it failed to communicate to the court and to appellant, just what elements in the High Court's decision were being contested in law.

19. On non-joinder of the Returning Officer, and the rules of natural justice, it is the appellant's submission that the Court of Appeal failed to uphold rule 2 of the *Elections (Parliamentary and County) Petition Rules*. The appellant also contends that the issue of joinder of the Returning Officer was not *res judicata*, as it had not been finally and substantively considered.

20. With regard to section 83 of the *Elections Act*, the appellant contends that the appellate court failed to consider whether non-compliance with articles 81 and 86 of the *Constitution*, and section 39 of the *Elections Act* affected the results of the elections as provided by section 83 of the *Elections Act*.

21. It is urged that there is a rebuttable presumption, in election matters, that the results declared by the electoral body are correct until the contrary is proved. The appellant submits that compelling and credible evidence was required for the Court of Appeal to reverse the factual and legal finding of the High Court, that the appellant was the winner of the election.

22. On the evidence tendered by the appellant and the 1st respondent, it is urged that the Court of Appeal denied the appellant equal protection and benefit of the law contrary to articles 25, 27 and 50 of the *Constitution*, when that Court relied on pleadings, testimony, written and oral submissions of the 2nd respondent to the exclusion of the pleadings, testimony, written and oral submissions of the appellant and the 1st respondent.

23. The appellant further submits that, by mulcting him in 50% of the costs, the appellate court judgesdeparted from the legal principle that costs follow the event, thereby depriving him of his right to equal protection and equal benefit of the law, under article27 of the *Constitution*.

24. On the supposition of partisanship on the part of the Presiding Officer, the appellant contends that the appellate courtexceeded its jurisdiction by disturbing the finding of fact made the by trial court, that there was no evidence of the election record handed over to the 1st respondent's IT Clerk, and therefore, there was no proof of misconduct by any tallying clerk, or by the Presiding Officer, that affected the results of the election.

25. The 1st respondent, in support of the instant petition, filed written submissions on October 4, 2018. It submitted that, by finding that there had been four sets of election results, the Court of Appeal departed from the binding decision of this Court in the *Joho* case. The appellate court itself, indeed, in *IEBC v. Pauline Akai Lokuruka & Another* [2018] eKLR, had held that there is only one election result: that declared by the Returning Officer. It was thus urged that this Court has jurisdiction under article 163 (4) of the *Constitution*, to set the record straight.

26. The 1st respondent submits that the burden of proof in an election dispute rests with the 2nd respondent, and in the instant case, he failed to establish any irregularities against the 1st respondent, or any of its election officials.

27. The 1st respondent urged that the non-joinder of the Returning Officer did not render the petition defective. It is submitted that it was the obligation of the 2nd respondent herein to join the Returning Officer in his petition as a respondent, if he required the Officer to file a response to his petition, and to adduce evidence in Court.

28. The 2nd respondent, in his submissions, urges that this court lacks the jurisdiction to hear and determine this appeal. He urges that the appeal entails alleged breaches of the Constitution that were not canvassed in the other superior courts – and that, therefore, have no place in the Supreme Court.

29. It is submitted that the appellate courthad applied the correct principles of law, and was right in declining to strike out the memorandum of appealbefore it.

30. The 2nd respondent urges that the appellant is estopped from claiming an absence of jurisdiction, since he himself had been availed the court's jurisdiction, during the hearing.

31. The 2nd respondent submits that this court has no jurisdiction to revert to the question of non-joinder of the Returning Officer, as this matter was already canvassed in the trial Court, and dismissed, and no appeal thus far has been preferred upon it. It is urged that the absence of the Returning Officer did not prejudice the appellant in any way.

32. It is urged by the 2nd respondent that the appellant's evidence on disparities in the election results is acknowledged by 1st respondent; and so, the burden of proof shifted to 1st respondent. But this burden remained undischarged. On this account, 2nd respondent submits that 1st respondent was unable to demonstrate that the election met the requirements of verifiability, accuracy, exactness and fairness.

33. The 2nd respondent urges that the presence of a partisan Presiding Officer negated fairness, or the appearance of fairness in this case, as required under article 38 (2) of the *Constitution*.

34. The 2nd respondent contested the allegation that the appellant was denied equal protection and benefit of the law, contrary to article, 25, 27 and 50 of the *Constitution*, as it was the 2nd respondent who was thus aggrieved, as evidenced in the record.

E. Issues arising before the Supreme Court

35. The main issues for determination, as drawn from the petition of appeal, the responses thereto by the 1st and 2nd respondents, and the written and oral submissions of counsel, may be set out as follows:

    (a) whether this courthas jurisdiction to entertain this appeal;

    (b) whether the appellate courtacted in excess of its jurisdiction;

    (c) whether that courterred by finding that the election results were not verifiable;

    (d) whether the appellate court erred in shifting the burden of proof in electoral disputes, contrary to the applicable law and the governing precedent, as settled by the doctrine of stare decisis (article163(7) of the Constitution);

    (e) whether the issue of non-joinder of the Returning Officer was *res judicata*; and

    (f) whether the appellate courterred by finding that there was bias on the part of an official of the 1st respondent.

F. Analysis

(a) Jurisdiction

36. The 2nd respondent contests this court's jurisdiction to hear and determine this appeal, on the basis that the appeal contains alleged breaches of the Constitution that had not been in issue before two other superior courts.

37. A perusal of the record reveals that the appeals in the other courtshad involved issues of interpretation and application of the Constitution. The High Court considered whether the conduct of the elections was in violation of the Constitution, and the laws governing election. The trial courtfound that it was not; that the elections were free, fair and credible in accordance with the terms of article38 of the *Constitution*, and that they were not in violation of articles 81 and 86 of the *Constitution*.

38. However, the appellate courtfound that the election process was not verifiable, and was in departure from the mandatory requirements of articles81 and 86 of the *Constitution*; sections 39 and 83 of the *Elections Act*; and the *General Regulations* on the conduct of national elections.

39. Both superior courtsinterpreted and applied the Constitution in line with this court's *dictum* in *Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd and another*, Sup. Pet. No. 3 of 2012 [2012] eKLR. It is clear, moreover, that the reasoning and the conclusions of both superior courts had taken a trajectory of constitutional interpretation or application (see *Gatirau Peter Munya v. Dickson Mwenda Kithinji & Others*, Sup. Pet. No. 2B of 2014 [2014] eKLR).

40. It is our perception that this cause raises cardinal issues requiring the interpretation of article87 (1) of the C*onstitution*, in light of section 85A of the *Elections Act* which limits the appellate court's jurisdiction to matters of law only. Further, it falls to this court to determine whether the appellate court had misconstrued the terms of articles 81 and 86 of the *Constitution*. In this regard, we are not in agreement with 2nd respondent's contention that the Supreme Court lacks jurisdiction.

(b) Appellate Court, and the question of Jurisdiction

41. On the issue of whether or not the appellate courtacted in excess of its jurisdiction, two questions must be answered, namely:

    (i) did filing the supplementary record out of time render the appeal incompetent and fatally defective?

    (ii) did the courterr in failing to reject the memorandum of appealthat contained mixed issues of law and fact?

    (i) Filing of supplementary recordout of Time

42. It was the appellant's case that failure to file the supplementary record of appeal within 30 days denied the Court of Appeal jurisdiction in two ways: firstly, in that the record of appeal was incomplete, as it did not comply with rule8 of the *Court of Appeal (Election Petition) Rules*, rendering the appeal incompetent and fatally defective; and secondly, that the supplementary record of appeal was filed out of time, and was outside the regular jurisdiction of the court.

43. The 2nd respondent, on the other hand, contends that the appellate court judges applied the correct principles in law, in determining the appeal. He also urges that the appellate court was right in declining to strike out the Memorandum of Appeal.

44. It is on record that the impugned supplementary record of appeal was filed on May 2, 2018. The High Court Judgment was delivered on March 2, 2018. In compliance with section 85A of the *Elections Act*, and rule 9 (1) of the *Court of Appeal (Election Petition) Rules 2017*, the appellant was required to file a memorandum and record of appeal within 30 days of the date of judgement of the High Court. It has been argued that the supplementary record of appeal filed on May 2, 2018 was out of time.

45. The appellant herein filed an application by notice of motion under rules 8 and 19 of the *Court of Appeal (Election Petition) Rules 2017*, dated April 10, 2018, seeking to strike out the appellant's memorandum and record of appeal. The Court of Appeal heard this motion together with the appeal and declined to strike out the appeal. Ultimately, it was the appellate's court finding that this omission did not go to "the root of the appeal, or in any way affect the jurisdiction of the court."

46. A supplementary record of appeal is usually prepared when a party is of the view that the record of appeal is defective, or insufficient. It is worth noting that the *Court of Appeal (Election Petition) Rules, 2017* do not expressly provide for the time-frame for filing a supplementary record of appeal. The supplementary record of appeal is, however, mentioned in rule 8(5), in those circumstances in which the High Court does not avail relevant documents. In such a case, the appellant is allowed to file the record of appeal, followed within seven days by a supplementary record of appeal.

47. All indications are that the supplementary record of appeal, just like the record of appeal, is to be filed within 30 days of the date of Judgment of the High Court. It is not disputed that the supplementary record of appeal was filed out of time, and without leave of the court.

48. Now, what did this record contain, that in the view of the appellate court, had no effect upon its jurisdiction? The contents of this record were copies of polling station diaries. These were produced by the appellant herein before the High Court, and were relied upon by the parties and their witnesses during the hearing of the election petition.

49. In the very nature of things, the courthearing the appeal is an ideal forum for ascertaining whether the supplementary records introduce new evidence; whether they raise legal issues; and whether they are relevant to the matters in controversy in the appeal. The appellate courtdetermined that, as the first nine volumes had been filed in time, the belated filing of the rest of the documents contained in the supplementary appeal did not affect its jurisdiction to deal with this matter.

50. The appellate courtrelied on our decision in *Lemanken Aramat v. Harun Meitamei Lempaka & 2 Others* Petition No. 5 of 2014 [2014] eKLR, in which we held that "In most cases, procedural shortcomings will only affect the competence of the cause before a court, without in any way affecting that Court's jurisdiction to entertain it. A court so placed, taking into account the relevant facts and circumstances, may cure such a defect; and the Constitution requires such an exercise of discretion in matters of a technical character."

51. The appellate courtdid note that, contrary to good practice, the appellant had not sought leave to file these documents out of time. It was of the view, however, that this procedural infraction occasioned no injustice, or injurious prejudice to any party. As such, it was unable to sacrifice justice at the altar of strict adherence to provisions of procedural law.

52. It is pertinent to note that the *Court of Appeal Rules, 2010*, in rule 92 (3) allows an appellant at any stage to lodge in the appropriate Registry four copies of a supplementary record of appeal, and as soon as practicable thereafter, to serve copies of it upon every respondent who has complied with the requirements of rule 79. Rule 79 obligates respondents to furnish an address for service. However, in the *Court of Appeal (Election Petition) Rules 2017*, strictly speaking, there is no express statutory timeline for filing a supplementary record of appeal.

53. In these circumstances, it will not be proper for the appellant to argue that the Appellate Court contravened article163 (7) of the *Constitution* by departing from the Supreme Court's precedent in *Evans Odhiambo Kidero & 4 Others v. Ferdinand Ndungu Waititu & 4 Others,* Sup. Ct. Pet. 18 of 2014 as Consolidated with Sup. Ct. Pet 20 of 2014 [2014] eKLR, to the effect that the timelines in the Constitution and the Elections Act were not negotiable, or capable of extension. Accordingly, we find that the appellate court had not erred by not dismissing the supplementary record of appeal; and we find no reason for disturbing this finding.

(ii) Mixed issues of fact and law in Memorandum of Appeal

54. The appellant faults the appellate court for failing to reject the memorandum of appeal, for raising "mixed issues of law and fact". It is the appellant's contention that the appellate court rewrote and reframed the 2nd respondent's grounds, thereby creating their own appeal, forging a jurisdiction, and denying the appellant his right to fair hearing.

55. Indeed, a perusal of the record reveals that all 18 grounds in the memorandum of appeal lodged in the Court of Appeal's Registry on March 29, 2018, save for one, have raised issues of 'law and fact', in compromise to the jurisdictional bar set in section 85A of the *Elections Act.* This section stipulates that appeals to the appellate court 'shall be on matters of law only.'

56. The only ground in the memorandum of appeal that directly meets the section 85A threshold was ground 14: "That the learned judge erred in law by failing to apply the binding tests and principles set out in articles 81, 86 and 10 of the *Constitution of Kenya* and its derivative statutes and, consequently, in failing to allow the petition."

57. The appellate court adverted to this question, especially as it did have a bearing on numbers of its own earlier decisions, such as: *Mohamed Abdi Mohamud v. Ahmmed Adbullahi Mohamed & 3 Others*, Nairobi Election Petition No. 2 of 2018; [2018] eKLR; *Independent Electoral and Boundaries Commission and Another v. Stephen Mutinda Mule & 3 Others*, Nairobi Civil Appeal No. 219 of 2013; [2014] eKLR; *Timamy Issa Abdalla v. Independent Electoral and Boundaries Commission & 3 Others*, Mombasa Court of Appeal Election Petition No. 4 of 2018; [2018] eKLR. And its standpoint was that the "question of law" dimension of the appeal mandate was not compromised even though the memorandum of appeal avows that the respondent did "err in law and fact".

58. On the basis of this court's decision in *Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others* [2014] eKLR, we would be guided in our consideration of the appellate court's decision through a set of questions: Was the court cautious enough to limit itself to issues regarding the interpretation and application of the law by the trial judge, in relation to the petition at the High Court? Did the judges of appeal limit themselves to evaluating the conclusions of the trial Judge on the basis of the evidence on record; and to determining whether such conclusions were not supported by the evidence; or to ascertaining that the conclusions were not so perverse that no reasonable tribunal could arrive at the same?

59. We note that the appellate courtcompressed the 18 grounds in the appellant's memorandum of appeal into a more limited set:

    (i) whether the trial judgeapplied the correct principles whilst determining the petition;

    (ii) whether the judgeerred in law, in holding that the appellant's petition was not challenged in the absence of evidence to the contrary by the 1st respondent (who is constitutionally obligated to defend the validity of an election);

(iii) whether the trial Judge applied the correct principles of law in dealing with the refusal, neglect and failure of the Returning Officer to appear in courtfor cross-examination and, thereafter, in coming to conclusions on matters of law;

(iv) whether the judgeerred in law in not applying the principles and provisions of articles81, 86, 38 and 10 of the Constitution, and whether she erred in her assessment and conclusions in respect of Form 35B, which was not produced by the respondents before court;

(v) whether the 1st respondent fully and faithfully discharged its duty to bring before the Court all evidence in its possession and control, and within its ability to enable the court to decide the petition;

(vi) whether the judgeerred in law, by not appreciating the terms of article38(2) and the law on bias, and the appearance of bias on the part of the Presiding Officer.

60. From the foregoing summary, it is clear to us that the appellate courtdid isolate significant issues involving questions of law. And from that summary, we have come to the inference that no "new appeal" was created by the appellate court. Furthermore, a perusal of the record shows that all parties had invariably made their case for, or against all the six complaints; and they were all heard.

61. Of note also, is that the appellate courtdid evaluate the evidence on record, but as is evident from its judgement, the object was only to ascertain whether the conclusions of the trial judgewere supported by the evidence before the Court.

62. Eventually, the appellate courtdeclined to strike out the memorandum of appeal, in the interests of justice, as it found the trial Judge's application of the law to the facts inapposite. For instance, her conclusions on the pertinent issue of the Returning Officer, and the failure to answer to allegations set out by the appellant, were improper, and wanting in rationale.

63. The appellate court also held that in the absence of Form 35B, it was impossible to determine whether the electoral process complied with articles 81 and 86 of the *Constitution*, and with section 39 of the *Elections Act* and regulation 83 of the *Elections (General) Regulation,2012*. That court held that the learned trial Judge had not properly addressed herself to the evidence before her, on the issue of bias on the part of an official of the IEBC.

64. From the foregoing assessment, we must conclude that the judges of appealhad not descended into the arena of examining the probative value of the evidence presented in the petition, or engaging in the calibration of evidence, with a view to determining the veracity or otherwise of evidence tendered by witnesses.

65. It is a professional task reposing in the practising lawyer, to so methodically craft the client's petition-papers as to reflect objectively the true claims in the cause, that they will draw precise and predictable lines of judicial response – especially in complex cases. Only upon a proper statement of claim, will the judgesbe expected to respond most effectively. Short of such propriety in the conduct of litigation, all the courtcan do is employ its best judgement and discretion, in the context of the governing law on jurisdiction. This principle is quite clearly reflected in the position taken by the appellate court.

(c) Verifiability of the Election Results: Court of Appeal's standpoint

66. The appellant urged that there is a rebuttable presumption in election matters, that the results declared by the responsible electoral agency are correct, until the contrary is proved. On that basis, the 1st respondent deprecated the appellate court's finding that there were, at least, four sets of results. But, to the 2nd respondent, the evidence of disparity in the results declared was uncontroverted, and therefore,

the burden of proof shifted to the 1st respondent, which was unable to discharge it. It is clear to us that the appellate court was merely pointing out the prevailing state of the record: there were varying sets of results. The first set of results was that declared by the Constituency Returning Officer: 33,174 votes garnered by the appellant, as against 33,009 votes garnered by the 2nd respondent. The second set of results were those contained in Form 35B (S/Number NA047282), a true copy of the original, as certified by Ms. Nancy C. Koros. This certified copy showed that the appellant garnered 33,348 votes, while the 2nd respondent had 33,113 votes. The third set were those contained in the IEBC portal, which showed that the 2nd respondent garnered 33,708 votes, while the appellant garnered 33,880 votes. The fourth set were those published in Gazette Notice No.8239 of August 22, 2017, which indicated that the appellant had garnered a total of 33,348 votes. The fifth set was shown in the Returning Officer's affidavit. By that affidavit, filed in the trial Court on September 15, 2017, the appellant was declared to be the winner, having garnered 33,174 votes, as against the 2nd respondent who garnered a total of 33,009 votes, as captured in Form 35B.

67. The crucial deposition of the Returning Officer, as the appellate courtnoted, had crystallized still further bewilderment, distinctly compromising the constitutional requirement of verifiability in the electoral process. Such a position beckons from the content of two paragraphs in the affidavit:

> " 19. That due to fatigue and going without sleeping from 7th August to the material day of tallying results on August 9, 2017 some of the figures were captured wrongly in Form 35B and were different from the results as captured in the Form 35A; however the same were insignificant to change the final results.
>
> 20. "That this affected both the petitioner and the 2nd respondent but ... after reconciling Form 35As and making adjustments that [were] required, the 2nd respondent still emerges the winner with a total of 33949 votes against the petitioner's 33730 votes as shown by this annexed table..."

68. It is to be noted that the original Form 35B was not availed to the trial court, despite that court's direction to the 1st respondent to produce the same, for scrutiny. The trial court could not in the circumstances, verify the entries – whether they were the same as those in the certified copy accompanying the petition that was before the Court.

69. In the trial judge's estimation, the inconsistencies in the various sets of results did not matter, because in all of them, the appellant emerged the winner. However, the appellate court'sgenuine concern was that the trial courthad misdirected itself on this issue, as without the Form 35B, it was impossible to determine whether there had been due compliance with articles81 and 86 of the *Constitution*, and with section 39 of the *Elections Act*. The appellate court also drew the inference that the absence of Form 35B, a material document in the election process, was fatal to the prospect of validity.

70. The appellate court's stand is a meritorious one. For, an important yardstick of integrity in the electoral process must be the vital instrument for results-declaration. Effective verification of the process provides the scope for electoral-quality assurance.

71. The Returning Officer is an integral factor in the verification process. Under regulation 83 of the *Elections (General) Regulations, 2012*, the Returning Officer at the Constituency level is mandated to collate and declare the results from each polling station, in the presence of candidates, agents and observers – and then to complete the relevant Form 35B. The tallying and collation of ballots is required to be administered in an impartial, neutral, efficient, accurate and accountable manner, as prescribed by article 81 (e) of the *Constitution*.

72. Form 35B bears the formal declaration of election results. In the instant case, it is impossible to state with certainty and clarity what the contents of the original Form 35B showed, and whether the certified copy was a true copy of the original. As a consequence, it becomes impossible to conclude that the appellant was the declared winner of this election; the declaration form was missing, and the ostensible result was both suspect and uncertain.

73. The absence of the original Form 35B, and the presence of the divergent results, negate the constitutionally-prescribed principles of verifiability, accuracy, accountability and transparency. We cannot in good judgment, in these circumstances, vary the appellate court'sfinding that this election process was unverifiable. The declared results were indeed unverifiable.

74. It is to be remembered that an election represents the will of the people. On this account, whenever the paper trail enables the courtto understand the intention of the voters, then the Court should not interfere. In the instant case, however, the primary declaration Form 35B was unavailable; and moreover, the conflicting totals, as admitted by the 1st respondent, negate the constitutional requirements of verifiability, accuracy, exactness and fairness.

75. Against such a background, we find it proper to remark on the dereliction of constitutional duty on the part of 1st respondent. The 1st respondent was not bothered to produce the original Form 35B despite being, firstly, the custodian of this document; secondly, the constitutionally-mandated body, pursuant to article 86 (c) of the *Constitution*, to ensure that the results from the polling stations are openly and accurately collated and promptly announced by the Returning Officer. This respondent, moreover, disobeyed the trial court's Order to produce a vital document. Besides, the 1st respondent, after intimating that the Returning Officer would adduce evidence in court (on which premise the 2nd respondent prosecuted his case, left this assurance unfulfilled.

76. It is evident that the 1st respondent did not ensure that the results from the polling stations were openly and accurately collated, and promptly announced, as prescribed in articles 86(c) and 81 (e) of the *Constitution*, and regulation 83 of the *Election (General) Regulations*. On this account, we are of the view that the results declared were unsustainable, as they were unsupported by any evidence.

(d) Election Cases: Burden of Proof

77. Closely related to the issue of verifiability of results, is the burden of proof. The appellant urged that there is a rebuttable presumption in election matters, that the results declared by the electoral agency are correct until the contrary is proved.

78. The 1st respondent submitted that the burden of proof in an election dispute rests with the 2nd respondent and that, in the present case, he had failed to establish any irregularities against the 1st respondent, or any of its election officials, during the hearing of the petition. The 2nd respondent on the other hand, contended that his evidence of disparity in the results declared was uncontroverted, and the burden of proof, therefore, shifted to the 1st respondent, which was unable to discharge it.

79. The appellate court'sstandpoint was that the 2nd respondent had met the burden of proof to the required standard; but in the absence of the validated Form 35B from the 1st respondent, there was no basis of verifiability for Form 35C.

80. The Court of Appeal also found that the 2nd respondent in the trial court discharged both his legal and evidential burden, and thus, the burden shifted when the issues he raised were not rebutted. This was because, despite filing a lengthy affidavit, the Returning Officer did not appear to give evidence.

81. The trial courtdelivered a Ruling in which the 1st respondent was accorded an opportunity to either call the Returning Officer as a witness, or leave the court to determine the fate of the affidavit he swore, either by striking it out, or assigning to it its due measure of evidential value. Curiously, the 1st respondent still opted not to call the Returning Officer as a witness. More puzzling still, the 1st respondent did not call any witnesses.

82. The trial courtwent on to find that the replying affidavit was not admissible in evidence, and had no evidential value. The appellate court's judgment, however, recorded that the affidavit of the Constituency Returning Officer was not admitted by consent of the parties.

83. Rule 15 (3) of the *Elections (Parliamentary and County Elections) Petition Rules, 2013* provides that a respondent's replying affidavit forms part of the record of the trial, and a deponent may be cross-examined by the petitioners and re-examined by the respondent.

84. In view of the weighty factors moving a deponent to make averments on oath, we would consider that a Court is entitled to draw adverse inference from the absence of a witness who has made depositions on a crucial subject of testimony. For the Court, in its quest for justice, expects that the anticipated testimony will shed light on the subject in question.

85. Besides, the court's proven mechanism of fact-ascertainment, in the well-established common-law tradition, is the cross-examination of witnesses. It is through this device that the courtcan gauge the truth or otherwise of an allegation which may have appeared in depositions by way of affidavit. Consequently, the failure of a party to avail himself or herself, to affirm the content of depositions in affidavit, is destined to minimize the probative value of the affidavit evidence.

86. On this principle, when a party – in this case the IEBC – fails to produce the witness (Returning Officer), the Court may infer that the testimony would have been unfavourable to the IEBC. The absence of the Returning Officer inevitably weakens the IEBC's response and evidence.

87. However, a courtmay look the other way if the reason given for the absence of the Returning Officer is satisfactory and credible. Such, however, was not the case in the instant matter. Both superior courtsfound the replying affidavit inadmissible. In our view, this was an entirely proper finding on the issue of the probative value of the Returning Officer's affidavit. Now such a finding begs one question: what was the effect of this finding, as a factor in the disposal of the case?

88. The *Evidence Act* (Cap. 80, Laws of Kenya), section 107 (1) and (3) provide:

> " (1) "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist"; and
>
> (3) "When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person".

89. In *Raila Odinga and Others v. Independent Electoral and Boundaries Commission and 3 Others*, SCK Petition No. 5 of 2013 [2013] eKLR, this Court held that in electoral matters, the legal burden rests on the petitioner, who is under obligation to discharge the initial burden of proof, before the respondents are invited to bear the evidential burden. This court expressed itself as follows (paragraph 195):

> " There is, apparently, a common thread in the foregoing comparative jurisprudence on burden of proof in election cases. Its essence is that an electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner, but, depending on

the effectiveness with which he or she discharges this, the evidential burden keeps shifting. Ultimately, of course, it falls to the courtto determine whether a firm and unanswered case has been made."

90. The 2nd respondent submitted that it was impossible to know who had won the election, due to the differing results issued. He had the burden of proving that such was the case. We are satisfied that the 2nd respondent placed sufficient, credible and compelling evidence before the trial court, to prove that there existed different sets of results, such that it was not possible to know who won the election.

91. The evidential burden therefore shifted to the 1st respondent, to show that this was not so. The evidence relied on by the 1st respondent was its replying affidavit sworn by its employee: the Returning Officer. This evidence was held to be of no probative value by the superior courts. In the circumstances, we are in agreement with the appellate court: it cannot possibly be concluded that the 1st respondent discharged its evidential burden.

(e) Non-joinder of Returning Officer: was it res judicata?

92. The appellant contended that the Court of Appeal failed to uphold rule2 of the *Elections (Parliamentary and County) Petition Rules*: and so the appeal was incurably defective, as the 2nd respondent did not join the Returning Officer in the cause in the trial court, as a party.

93. A perusal of the record reveals that the appellant filed a notice of motion application in the trial court dated September 27, 2017, seeking the striking out of the petition, for non-joinder of the Returning Officer as respondent.

94. The application was heard, and a Ruling delivered on November 8, 2017: the trial Court holding that the petition was not incurably defective for non-joinder of the Returning Officer. No appeal was lodged against this decision; and the issue, therefore, was definitively settled by judicial decision.

95. It is therefore unwarranted for the appellant to maintain that the issue of joinder of the Returning Officer was not res judicata. Both superior courts having found that no appeal was made on this issue of joinder, the matter has to rest.

(f) Election Agency's Presiding Officer: Was there bias in the conduct of election? Question of fact?

96. The appellant contends that the appellate courthad improperly delved into issues of fact, when it disturbed the trial court's finding that the Presiding Officer's conduct had no effect upon the proper conduct of the electoral process.

97. The issue of a biased or partisan Presiding Officer arose at the trial court, when the 2nd respondent herein alleged that the 1st respondent allowed the said Officer at the tallying centre, while knowing that she was a member of Wiper party, to which the appellant belonged.

98. The appellate courtmade reference to the trial court's judgment, remarking the fact that it had been found that the Presiding Officer was indeed a member of Wiper party. The trial Court held that it was impossible to ascertain "whether the presence/conduct of the partisan officer had an impact on the results": and this was the basis of the appellate court'sobservation that it was clear from the judgment, that the trial judgehad accepted the evidence of a partisan election official. The Court of Appeal concluded that the trial Judge did not properly address herself to the evidence before her.

99. From such a scenario, we are satisfied that the judgesof appealduly limited themselves to evaluating the conclusions of the trial judge, on the basis of the evidence on the record; and they did ascertain for themselves that the conclusions were inapposite, by the standards of a reasonable tribunal. We are,

thus, unpersuaded by the appellant's contention that the appellate courthad delved into factual issues with regard to the conduct of the Presiding Officer. The tenor of the appellate court'sfinding was that it would appear to the reasonable man that the 1st respondent, who bore a constitutional charge to remain impartial, had on the contrary, employed a person who had an interest in the outcome of the election.

100. We are in agreement with the appellate courtthat, the fact of the Presiding Officer being an official of Wiper party, raises the apprehension of bias. This is particularly so because of the key roles ascribed to election Presiding Officers. Article 86(b) of the *Constitution* requires the IEBC to ensure that the votes cast are counted, tabulated, and the results announced promptly by the Presiding Officer at each polling station.

101. Regulation 5 (1A) of the *Elections (General) Regulations, 2012* outlines the functions of the Presiding Officer as: presiding over elections at an assigned polling station; tallying; counting and announcement of results at the polling station; submitting polling station results to the Constituency Returning Officer; and electronically transmitting Presidential-election results to the constituency, counties and national tallying centres.

G. Emerging Principle: the Court's standpoint

102. The tenor and effect of the foregoing analysis is clear enough: it is our position that the election in question was not conducted substantially in accordance with the Constitutional Charter, and the organic statute law incorporated within its ambit. It follows that the position taken by the appellate courtwas wholly meritorious.

H. Orders

103. Consequently, we will make Orders as follows:

(a) The petition of appeal dated July 19, 2018 is disallowed.

(b) The judgmentof the Court of Appeal in Election Petition of Appeal No. 22 of 2018 is hereby upheld.

(c) The certificate issued by the trial court pursuant to section 86 of the *Elections Act*, is hereby set aside and substituted with a certificate that the appellant was not validly declared as having been elected as Member of the National Assembly for Embakasi South Constituency during the elections held on the August 8, 2017.

(d) The 1st respondent is hereby directed to organize and conduct a fresh election for the position of Member of the National Assembly for Embakasi South Constituency, in conformity with the Constitution and the Elections Act.

(e) The parties shall bear their own respective costs in this appeal.

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

.....

D. K. MARAGA

CHIEF JUSTICE/PRESIDENT 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