Mutua & 2 others v Ndeti & another (Petition 11 & 14 of 2018 (Consolidated)) [2018] KESC 1 (KLR) (21 December 2018) (Judgment)

Alfred Nganga Mutua & 2 others v Wavinya Ndeti & another [2018] eKLR

Neutral citation: [2018] KESC 1 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PETITION 11 & 14 OF 2018 (CONSOLIDATED)

DK MARAGA, CJ & P, MK IBRAHIM, JB OJWANG, I LENAOLA & N NDUNGU, SCJJ

DECEMBER 21, 2018

BETWEEN

ALFRED NGANGA MUTUA ..... 1ST APPELLANT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 2ND APPELLANT

COUNTY RETURNING OFFICER ..... 3RD APPELLANT

AND

WAVINYA NDETI ..... 1ST RESPONDENT

PETER MATHUKI ..... 2ND RESPONDENT

(Being two appeals against the judgment and decree of the Court of Appeal (Ouko, Warsame & Gatembu, JJA) dated 8th June 2018 delivered Nairobi in Election Petition Appeal No. 8 of 2018)

Regulation 87(2)(b)(iii) of the Elections (General) Regulations which required transposition of results on Form 37C declared null and void for contradicting section 39 of the Elections Act

Reported by Chelimo Eunice

Jurisdiction *- appellate jurisdiction - jurisdiction of the Court of Appeal - election petition appeals - appeals relating to matters of law - the meaning given to a matter of law in an election petition - claim that the Court of Appeal considered matters of fact contrary to section 85A of the Elections Act - where it was alleged that non-conformity of the impugned Form 37C had not been pleaded before the trial court and it was a factual issue - Elections Act (cap. 7) section 85A.*

Statutes *- interpretation of statutes - Elections Act - interpretation of section 39 of the Elections Act vis-a-vis regulation 87(2)(b)(iii) of the Elections (General) Regulations – whether the provisions of section 39 of the Elections Act with regard to the handling of the results in the presidential election applied mutatis mutandis to other elections- whether regulation 87(2)(b)(iii) of the Elections (General) Regulations which required the Constituency*

Returning Officer (CRO) to transpose results of each polling station on Form 37C in contradistinction to section 39 of the Elections Act was ultra vires - whether the CRO was required to transpose the results for the election of the county governor, senator and county women representative under section 39(1B) of the Elections Act into the results on the A forms from polling stations - Elections Act, section 39; Elections (General) Regulations (cap 7 Sub Leg) regulation 87(2)(b)(iii).

***Electoral Law** - election offences - participation in elections by public officers - County Government officer serving as an agent of a gubernatorial candidate - where it was alleged that a County Government Chief Officer acted as an agent of a gubernatorial candidate - nature of evidence necessary to prove the offence - what was the burden and standard of proof in such a case - Election Offences Act (Cap 66) section 15; Political Parties Act (cap 7D) section 45.*

***Electoral Law** - statutory forms - forms used to declare the result of an election - the validity of Form 37C - legal requirements as to the form and content of Form 37C - effect of failure to state in Form 37C the results from all polling stations for each candidate in the election - Constitution of Kenya 2010, article 86; Elections Act, section 39(1)(B); Elections (General) Regulations, regulation 87(2); Interpretation and General Provisions Act (Cap 2), section 72; Statutory Instruments Act (cap 2A) section 26.*

Brief facts

The consolidated appeals by the appellants faulted the Court of Appeal for nullifying the 1st appellant's election and directing the 2nd appellant (the Independent Electoral and Boundaries Commission (IEBC) to conduct a fresh election. It was argued that the Court of Appeal paid undue regard to procedural technicalities contrary to article 159(2)(d) of the Constitution and that it misapprehended the burden and standard of proof in electoral disputes, among other arguments. The 1st respondent opposed the appeal arguing that it was fatally defective and therefore incompetent for failure to specify the constitutional provisions that the Court of Appeal misinterpreted or misapplied and founding the appeal upon various issues outside the court's jurisdiction under article 163(4)(a) of the Constitution.

Issues

i. Whether a matter on the verifiability of the election results under article 86(a) of the Constitution was appealable to the Supreme Court.
ii. Whether the Court of Appeal considered matters of fact that it had no jurisdiction to entertain.
iii. What was the standard of proof applicable in electoral disputes?
iv. Whether the Court of Appeal misapprehended the issues of burden and standard of proof in electoral disputes.
v. Whether regulation 87(2)(b)(iii) of the Elections (General) Regulations which required the County Returning Officer to transpose results of each polling station on Form 37C in contradistinction to section 39 of the Elections Act was *ultra vires,* and therefore null and void.
vi. What was the effect of failure by the County Returning Officer to state the results for each candidate in the election from all polling stations in Form 37C?
vii. Whether the Court of Appeal paid undue regard to procedural technicalities and nullified the election which had been conducted in substantial compliance with the law on elections on minor and immaterial irregularities which did not affect the election result.
viii. Whether an appeal on verifiability of the election results under article 86(a) of the Constitution was competent.

Relevant provisions of the Law

Elections Act;

Section 85A;

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.

Section 39 (1B);

The commission shall appoint county returning officers to be responsible for tallying, announcement and declaration, in the prescribed form, of final results from constituencies in the county for purposes of the election of the county governor, senator and county women representative to the national assembly.

Elections (General) Regulations;

Regulation 87(2)(b)(iii);

(2) The county returning officer shall upon receipt of the results from the

constituency returning officers as contemplated under regulation (1)—

(a) tally and announce the results for the county governor, senator and county woman representative to the National assembly;

(b) complete Forms 37C, 38C and 39C set out in the Schedule in which the county returning officer shall declare, as the case may be, the—

(i) name of the respective electoral area;

(ii) total number of registered voters;

(iii) votes cast for each candidate ... in each polling station;

(iv) number of rejected votes for each constituency;

(v) aggregate number of votes cast in the respective electoral area; and aggregate number of rejected votes....”

Held

1. Verifiability of the election results under article 86(a) of the Constitution was the fulcrum of the appeal. Hence, the appeal, brought as of right under article 163(4)(a) of the Constitution was competent.
2. On the format and the piecemeal filing of the record of appeal, the case of *Yusuf Gitau Abdallah v. Building Centre (K) Ltd & 4 Others [2014] eKLR* was distinguishable from the instant matter. In the *Yusuf Gitau Abdallah* case, the petitioner purported to appeal a High Court decision directly to the Supreme Court without any other proceedings, filed or anticipated. In the instant case, the 1st appellant’s application for stay of execution of the Court of Appeal judgement was filed pending the filing of an appeal. Even though the irregularity in the form of the petition and the piecemeal filing of the record of appeal was frowned upon, the same was filed within the prescribed time of thirty (30) days. That, as well as the 1st appellant’s written submissions exceeding the length set out in the practice directions were irregularities curable by article 159(2)(b) of the Constitution. Hence the appeal was competently before the court.
3. Bearing in mind that the line between points of law and fact was opaque, an appellate court had to undertake a delicate examination to ensure that appeals were not outrightly and without proper investigation rejected on ground that they raised matters of fact if there were points of law also involved. Section 85A of the Elections Act should not be invoked to strike out appeals on account of inelegance in the drafting of the memorandum of appeal.
4. The Court of Appeal did not veer into the credibility of witnesses or the calibration of evidence and reached its own conclusions. It did not exceed its jurisdiction under section 85A of the Elections Act.
5. In the absence of any law prohibiting public officers from being engaged as election officials and more particularly in the absence of evidence of anything the employees of the Machakos County Government engaged in the election did or omitted to do that compromised their impartiality, IEBC’s conduct of the election was not compromised.
6. Under section 45 of the Political Parties Act and section 15(1)(a) of the Elections Offences Act, it was an offence for any public officer to engage in any partisan political activity. Under section 15(2) of the Election Offences Act, it was equally an offence for any candidate to engage such an officer as her or his party’s agent. The allegation that 1st appellant’s party’s agent in the election was one and the same person as the Chief Officer of the Machakos County Government was therefore an allegation of commission of an election offence.

7. The burden of proof lay upon the party alleging a fact to prove it to the required standard. The standard of proof of any election offence or quasi criminal conduct was that of beyond reasonable doubt. The allegation that Maendeleo Chap Chap Party's (MCCP) agent was one and the same person as the Chief Officer of the Machakos County Government amounted to commission of an election offence, proof of which the law required to be beyond reasonable doubt. Other than making that allegation in their petition and in the evidence of the 1st respondent, the respondents never provided any proof of the allegation. A mere allegation could not be proof, leave alone proof to the required standard of beyond reasonable doubt. The respondents needed to do more than that. To discharge their burden of proof on that allegation, the respondents should have invoked article 35 of the Constitution and obtained records from the Machakos County Government to verify that allegation. Thus the Court of Appeal erred in basing its nullification of the 1st appellant's election partly on that ground.
8. The issue of non-compliance of the impugned Form 37C was pleaded in the petition before the trial court, since the respondents had pleaded that the votes garnered by each candidate had wrongly been captured on impugned Form 37C and that Independent Electoral and Boundaries Commission (IEBC) failed to use standardized statutory forms to declare the results of the elections. Consequently, the ground of appeal based on failure to plead the illegality of Form 37C was dismissed.
9. The words of section 39(1B) of the Elections Act required the County Returning Officer to announce and declare the election of the county governor, county senator and county women representative in the prescribed form, of final results from constituencies in the county. Regulation 87(1)(b)(iii) of the Elections (General) Regulations, 2012, on the other hand went further to require Forms 37C, 38C and 39C used for the declaration of the election results of the county governor, senator and county women representative respectively to have a column for the votes cast for each candidate in each polling station. And the format of those forms, contained in the schedule to those Regulations, had such a column.
10. The provisions of section 39 of the Elections Act could not be said to apply *mutatis mutandis* to other elections with regard to the handling of the results in the presidential election. Read as a whole, that section made a clear distinction between the handling of results in the presidential election and other elections
11. It was clear from section 39 (1A), 1 (B) and 1 (C) of the Elections Act that at the constituency level, the constituency returning officers (CROs) were required to tally and collate the final results from each polling station and announce the results for the election of a member of the national assembly and members of the county assembly and for the election of the President, county governor, senator and county women representative to the national assembly. The results from the polling stations were on the A forms which were the primary documents. CROs were required to submit, in the prescribed form, the collated results for the election of the President to the national tallying centre and the collated results for the election of the county governor, senator and county women representative to the respective county returning officer.
12. Section 39 (1C) of the Elections Act dealt with the tally, collation and announcement of the presidential results at the county level. There was a clear distinction between that subsection and subsection (1B). Unlike subsection (1B), subsection (1C) required under clause (a) the electronic transmission and physical delivery of the tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre.
13. Section 39 (1B) of the Elections Act dealt with tallying, collation and announcement or declaration of election results at the county level. The section made no mention of results from polling stations. It only talked of final results from constituencies in the county. The section required the county returning officers, for purposes of the election of the county governor, senator and county women representative, to tally only final results from constituencies in the county. The final results from the constituencies were on the B forms. It followed that in the tallying and announcement of the results for the election of the county governor, senator and county women representative, although they would

have been delivered to the CRO and they would therefore be in his possession at the time of declaring the results, the CRO did not go into the figures in the A forms. He would only tally and collate into the C forms the results on the B forms from the constituencies in the county. The Court of Appeal erred in holding that the CRO was concerned and had to be concerned with the Forms 37A's being the primary documents that capture the results at the polling stations.

14. The position of the President was different from those of other elective posts. Due to the importance of the office of the President, section 39 of the Elections Act demanded for a more rigorous process in the tally, collation and verification of the presidential election results than those of the other elections. That was why clause (b) of subsection (1C) demanded not only for the tally but also for the verification of the results received at the constituency tallying centre and the national tallying centre. Hence, there was a clear distinction between the handling of the presidential election results and those of other elections.

15. The tallying and announcement of the results for the election of the county governor, senator and county women representative, under section 39(1B) of the Elections Act, the CRO was not required to go into the results on the A forms from polling stations. But in contradistinction, regulation 87(2)(b)(iii) of the Regulations which was supposed to give effect to that section, required the CRO to transpose results of each polling station on Form 37C. For that purpose, the prescribed template of that form contained in the schedule to the Regulations had a column for results cast for each candidate at each polling station. That was an additional requirement that was not in the section which incidentally formed the turning point of the Court of Appeal decision giving rise to the instant appeal.

16. A provision of any subsidiary legislation that conflicted with that of the parent Act was *ultra vires*. Thus regulation 87(2)(b)(iii) of the Elections (General) Regulations, 2012, was *ultra vires* section 39(1B) of the Elections Act and was null and void *ab initio*. The court assumed it never existed and concluded that the 3rd appellant was right in ignoring it and omitting from the impugned Form 37C used in the declaration of the Machakos County gubernatorial election results a column with results from the polling stations.

17. In the light of the provisions of section 72 of Interpretation and General Provisions Act and section 26 of the Statutory Instruments Act, and in the absence of any challenge to the results posited on it, even if regulation 87(2)(b)(iii) of the Regulations were not *ultra vires*, the variation on Form 37C was minor and inconsequential. Section 72 of the Interpretation and General Provisions Act and section 26(2) of the Statutory Instruments Act, 2013, made it clear that an instrument or document should not be void by reason of a deviation from the prescribed form if the deviation did not affect the substance of the instrument or document or was not calculated to mislead. The most crucial item on the said form that required verifiability was the data of the election results. Even if regulation 87(2)(b)(iii) of the Regulations was not *ultra vires*, the transposition of the results on to Form 37C would not be the only way of verifying the results of the election. The deviation on the impugned Form 37C was immaterial.

18. The distinction between the handling of presidential election results and those of others did not in any way affect the verification demanded by article 86(a) of the Constitution. According to regulation 76 of the Regulations, after voting closed, the ballot papers were to be held up and openly displayed for all the candidates or their agents to verify that they were valid votes and ascertain for who they were cast. The counting was opened and any dissatisfied candidate was entitled to demand for a recount up to two times. The countersigning of the result forms by the candidates and/or their agents was a declaration that they had verified and were satisfied that the data was correct. The candidates and/or their agents were involved and they countersigned the forms used in the declaration of results at the subsequent tallying and collations of the results at the constituency, county and national tallying centres.

19. The impugned Form 37C was signed not only by the CRO but also by the candidates' agents, including the 1st respondent's agent. The data on that Form left the 1st appellant ahead of the 1st respondent with a margin of over 40,000 votes. The deviation on the impugned Form 37C that the 3rd appellant used

to declare the results would not have affected the verifiability of those results. Unverifiability could not be pegged only on failure to transpose the polling station results on Form 37C.

20. The Court of Appeal erred in holding that the Machakos County gubernatorial election was not conducted in accordance with constitutional principles thus rendering it null and void. To the contrary, the 1st appellant was duly elected governor of Machakos County in a fair and free election.

As per N. Ndungu, SCJ, concurring

21. The finding on the anomalies in Form 37C not being in the prescribed form, metamorphosized into the central issue in the appeal leading to the conclusion by the Court of Appeal that the results as declared were not done with reference to Form 37As and were therefore not verifiable and were unconstitutional.
22. Forms 37C were un-pleaded. There was no specific mention of the format of Form 37 C (that it was in excel) other than what was mentioned at paragraph 76 of the petition at the High Court. Further, the evidence did not allude to non-use of standardized forms but at paragraph 46, the petitioner mentioned anomalies in the form which were stated to be; 3 different Form 37C's; non-signing of the Forms by agents and or different orders of the purported agents in the different forms and missing security features on Forms.
23. The pleadings as to Form 37C were vague, without a reasonable degree of precision as it was not immediately clear that they were alluding to the improper format of the said Form. Parties were bound by their pleadings. Pleadings were the bedrock upon which all the proceedings derived from and it followed that any evidence adduced in a matter had to be in consonance with the pleadings.
24. Issues to be considered had to be pleaded, and those pleadings had to be set out in a clear and precise manner. Un-pleaded issues were not an anomaly that could be cured by article 159 of the Constitution since that article was not a panacea for all procedural shortfalls. Moreover, with the stringent nature of election petitions, courts act only within the terms of the statute, as guided by the Constitution.
25. The pleadings were binding not just on the parties to the suit, but on the court as well. A court could not delve into matters not specifically pleaded and a vague claim could not sustain a cause of action. The matter was not properly before the Court of Appeal and it ought not to have been considered.

Appeal allowed.

Orders

i. *The judgment of the Court of Appeal dated June 8, 2018 was set aside and that of the High Court was reinstated.*
ii. *The declaration of the election results by the Independent Electoral and Boundaries Commission in respect of the Governor of Machakos County was affirmed.*
iii. *The appellants were to have the costs of the appeal as well as those of the courts below.*

Citations

Cases

Kenya

1. *Abdallah, Yusuf Gitau v Building Centre (K) Ltd & 4 others* Petition 27 of 2014; [2014] KESC 50 (KLR) - (Distinguished)
2. *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others* Civil Appeal 105 of 2017 - (Explained)
3. *In the matter of the principle of gender representation in the National Assembly and the Senate* Advisory Opinions Application 2 of 2012; [2012] KESC 5 (KLR); [2012] 3 KLR 718 - (Followed)
4. *Rai & 3 others Rai & 4 others* Petition 4 of 2012; [2014] 2 KLR 253 - (Followed)
5. *Joho & another v Shahbal & 2 others* Petition 10 of 2013; [2014] KESC 34 (KLR) ;[2014] 1 KLR 111- (Mentioned)

6. *Judges and Magistrates Vetting Board & 2 others v Centre for Human Rights and Democracy & 11 others* Petition 13A of 2014 & 14 & 15 of 2013 (Consolidated); [2014] KESC 9 (KLR) - (Followed)
7. *Kenya Country Bus Owners' Association (Through Paul G. Muthumbi, Samuel Njunguna & Joseph Kimiri) & 8 others v Cabinet Secretary for Transport & Infrastructure & 5 others* Judicial Review Case 2 of 2014 & Miscellaneous Application 464 of 2013; [2014] eKLR - (Mentioned)
8. *Kombe, Mbaraka Issa v Independent Electoral and Bounderies Commission (IEBC) & 2 others* Election Appeal 3 of 2013; [2018] KECA 650 (KLR) - (Explained)
9. *Macharia & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] KESC 8 (KLR); [2012] 3 KLR 199 - (Mentioned)
10. *Mati, John Munuve v. Returning Officer Mwingi North Constituency & 2 Others* Election Appeal 5 of 2018; [2018] KECA 700 (KLR) - (Explained)
11. *Munya v Kithinji & 2 others* Petition 2B of 2014; [2014] KESC 38 (KLR) - (Explained)
12. *Munya v Kithinji & 2 others* Petition 2 of 2014; [2014] KESC 49 (KLR) - (Mentioned)
13. *Mututho v Kihara & 2 others* Civil Appeal 102 of 2008; [2008] KECA 205 (KLR); [2008] KLR 10 - (Explained)
14. *Nduttu & 6000 others v Kenya Breweries Ltd & another* Petition 3 of 2012; [2012] KESC 9 (KLR); [2012] 2 KLR 804 - (Followed)
15. *Ngoge v Kaparo & 5 others* Petition 2 of 2012; [2012] KESC 7 (KLR);[2012] 2 KLR 419 - (Followed)
16. *Obado v Oyugi & 2 others* Petition 4 of 2014; [2014] KESC 22 (KLR) - (Followed)
17. *Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others* Petition 5, 3 & 4 of 2013 (Consolidated); [2013] KESC 6 (KLR) - (Explained)
18. *Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae)* Presidential Election Petition 1 of 2017; [2017] KESC 42 (KLR) - (Explained)
19. *Salat v Independent Electoral and Boundaries Commission & 7 others* Petition 23 of 2014; [2015] KESC 31 (KLR) - (Explained)
20. *Speaker of the Senate & another v Attorney-General & another; Law Society of Kenya & 2 others (Amicus Curiae)* Advisory Opinion Reference 2 of 2013; [2013] KESC 7 (KLR) - (Followed)
21. *Waweru, John Kiarie v Beth Wambui Mugo& 2 others* Election Petition 13 of 2008; [2008] KEHC 826 (KLR) - (Explained)
22. *Wetangula & another v Kombo & 5 others* (Petition 12 of 2014) [2015] KESC 12 (KLR) - (Explained)

Ghana

Nana Addo Dankwa Akufo -Addo & Others v John Dramani Maham & Others Presidential Election Petition Writ No J1/6/2013 - (Followed)

India

1. *Arikala Narasa Reddy v Venkata Ram Reddy Reddygarri & another* Civil Appeal Nos 5710 -5711 of 2012; 2014 (5) SCC 312 - (Explained)
2. *Basu, Jyoti & others v Debi Ghosal & others* [1982] AIR 983; [1982] SCR (3) 318 - (Explained)
3. *Charan Lal Sahu & others v Singh* [1985] LRC (Const) 31 - (Explained)

Canada

Opitz v Wrzesnewskyi 2012 SCC 55; [2012] 3 SCR 76 - (Followed)

Statutes

Kenya

1. Constitution of Kenya articles 35, 38, 81, 86, 86(a); 138(3)(c); 159(2)(d); 163(4)(a); 259 - (Interpreted)
2. Election Offences Act (cap 66) sections 15; 15(1)(a); 15(2) - (Interpreted)
3. Elections (General) Regulations, 2012 (cap 7, Sub Leg) regulations 87(2)(b)(iii); 87(3)(a) - (Interpreted)

4. Elections Act (cap 7) sections 39(1A); 39(1B); 39(1C); 83, 85A - (Interpreted)
5. Evidence Act (cap 80) section 107(1) - (Interpreted)
6. Interpretation and General Provisions Act (cap 2) section 72 - (Interpreted)
7. Political Parties Act (cap 7D) section 45 - (Interpreted)
8. Statutory Instruments Act (cap 2A) section 26 - (Interpreted)
9. Supreme Court Act (cap 9B) sections 15(2); 19(a) - (Interpreted)
10. Supreme Court Rules, 2012 (cap 9B, Sub Leg) rules 3(5); 9 ; 33 - (Interpreted)

Advocates

1. *Mr Kilukumi, Waweru Gatonye, Wilfred Nyamu, Benjamin Musau, Gibson Kimani, Leonard Rono* and *Stanley Nthiwa* for the 1st appellant.
2. *Mr. Muhoro* and *Mr. Mudoli* for the 2nd appellant.
3. *Ahmednassir Abdullahi*, Senior Counsel, *Willis Otieno* and *Martin Gitonga* for the respondents

JUDGMENT

(1) Introduction

1. Before the court are two petitions of appeal against the judgment of the Court of Appeal (Ouko, Warsame & Gatembu, JJA) dated June 8, 2018 and delivered at Nairobi in Election Petition Appeal No 8 of 2018. In that judgment, the Court of Appeal overturned the decision of the High Court (Muchelule, J) in Machakos Election Petition No 1 of 2017 and held that the Machakos County gubernatorial election (the election) was not conducted in accordance with constitutional principles and was thus null and void. Consequently, the Court of Appeal directed that a fresh election be held in conformity with the *Constitution*, the *Elections Act* and the relevant Regulations.

(2) Litigation History

2. Alfred Nganga Mutua, the 1st appellant, as well as Wavinya Ndeti, 1st respondent and two others contested the Machakos gubernatorial seat in the general elections held in the country on August 8, 2017. The 1st appellant garnered 249,603 votes with the 1st respondent as the runner-up garnering 209,141 votes. The 1st appellant was accordingly declared the elected governor.

3. Aggrieved by that declaration, the 1st respondent and her running mate, Peter Mathuki, the 2nd respondent, (the respondents) filed Machakos High Court Election Petition No 1 of 2017 challenging the election on a litany of allegations of electoral malpractices. After hearing the petition, the trial Judge, Muchelule, J, dismissed it holding that though there were irregularities in the conduct of the election, the same did not affect the results thereof. Being dissatisfied with that decision, the respondents appealed against it to the Court of Appeal (Election Petition Appeal No 8 of 2018). As stated, in its Judgment dated 8th June 2018, the Court of Appeal (Ouko, Warsame, Gatembu, JJA) overturned the High Court decision and directed that a fresh election be held in conformity with the *Constitution*, the *Elections Act* and the relevant Regulations. That is the decision that has provoked the two appeals before us brought as of right under article 163(4)(a) of the *Constitution*.

(3) Appeals Before the Supreme Court

4. The first appeal, Supreme Court Petition Appeal No 11 of 2018, is by Alfred Nganga Mutua, 1st appellant, while the second one, Supreme Court Petition Appeal No 14 of 2018, is by Independent Electoral & Boundaries Commission (IEBC) and the Machakos County Returning Officer (the

CRO), the 2nd and 3rd appellants respectively. By consent of the parties, both appeals were consolidated on 16th July 2018 with Petition No 11 of 2018 being the lead file.

5. Following the notice of motionfiled by the 1st appellant, on the June 12, 2018, this honorable court granted conservatory orders and stayed the execution of the Court of Appeal decision pending the hearing and determination of this appeal.

6. In both appeals, the appellants mainly fault the appellate courtfor paying undue regard to procedural technicalities contrary to article 159(2)(d) of the *Constitution* and nullifying the election which had been conducted in substantial compliance with the Constitution and the law on elections on unsubstantiated irregularities which did not affect the election result; for misapprehending the burden and standard of proof in electoral disputes; and for considering matters of fact contrary to section 85A of the *Elections Act*.

7. In response, the 1st respondent filed a replying affidavit on July 4, 2018 in which she dismissed the appeal as fatally defective and therefore incompetent for failure to specify the constitutional provisions the appellate court misinterpreted or misapplied and founding this appeal upon various issues outside this court's jurisdiction under article 163(4)(a).

(4) Appellants' Submissions

8. Highlighting their written and further submissions filed on July 23, 2018 and on August 3, 2018 respectively, Mr Kilukumi learned counsel, teaming up with Messrs Waweru Gatonye, Wilfred Nyamu, Benjamin Musau, Gibson Kimani, Leonard Rono, and Stanley Nthiwa, for the 1st appellant, raised four main points: constitutional test of verifiability; balancing competing constitutional rights; the nullification test; and the burden as well as the standard of proof.

9. On the first issue of the constitutional test of verifiability, Mr Kilukumi submitted that the Court of Appeal nullified the election on failure to meet the verifiability test under article 86 in that Form 37C which the CRO used to declare the result was not in the prescribed form as required by regulation87(2)(b)(iii) of the *Elections (General) Regulations, 2012*, (the Regulations). The first point he took on this issue was that, as the trial judge found, the non-conformity with the prescribed form of Form 37C (the impugned Form 37C) that used to declare the election results had not been pleaded. Counsel further submitted that the non-conformity of the impugned Form 37C was not pleaded was a factual issue, which, in accordance with section 85A of the *Elections Act*, the appellate court had no jurisdiction to entertain. Counsel also argued that following this court's decision in *Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 others*, Sup. Pet. 23 of 2014; [2015] eKLR that court findings must be hinged on pleadings, the challenge of the impugned Form 37C was untenable. Even if that point had been pleaded, while nonetheless conceding that the said Form 37C was in excel format (for purposes of efficiency and accuracy) and omitted the column with the transposition of results from all 1332 polling stations in the County, counsel downplayed that omission as a minor deviation which was excusable not only under section 72 of the *Interpretation and General Provisions Act* and section 26 of the *Statutory Instruments Act* but also under article 159(2)(b) of the *Constitution*. This is because, he submitted, as is clear from section 39(1B) of the *Elections Act*, the CROs are only obliged to tally on Form 37C gubernatorial results on Forms 37B from constituencies in the Counties and not the results on Forms 37A from the polling stations. That being the case, counsel submitted that regulation 87(2)(b)(iii) of the Regulations, in as far as it requires the CROs to tally results from polling stations, should be outlawed as *ultra vires* section 39(1B) of the *Elections Act*.

10. More importantly, Mr Kilukumi submitted, there was no dispute on the data of election results on Forms 37A from any of the 1332 polling stations in the County which the CRO had when she declared

the results of the election; there was no dispute that that data was accurately tallied onto Forms 37B from the 8 constituencies in the County which the CRO also had; and there was also no dispute that all those Forms 37A and 37B as well as the impugned Form 37C were signed by the candidates' agents. He said the execution by the candidates' agents of those Forms is indisputable testimony that the election results were verified at all 1332 polling stations and at the 8 Constituency Tallying Centres as well as at the County Tallying Centre thus rendering spurious the respondents' allegations of non-verifiability of results. Counsel further argued that the fourth verification stage was before the trial court. He said it is common ground that all Forms 37A and 37B as well as the impugned Form 37C were deposited in the trial court and nobody challenged the accuracy of the data on any of them. Furthermore, the respondents, who were the petitioners in the trial court, abandoned their application for scrutiny thus leaving the data on those forms unchallenged.

11. At any rate, counsel further argued, although article 86(a) of the *Constitution* requires the voting method in all elections to be "verifiable", the term "verify" is used in article 138(3)(c) of the *Constitution* and section 39(1C)(b) as well as Regulation 87(3)(a) of the *Regulations* only in relation to Presidential elections. In this matter, there having been no allegation of non-verifiability of the voting method used in the election, the Court of Appeal therefore misapprehended this Honorable Court's decision in *Raila Amollo Odinga & another v Independent Electoral and Boundaries Commission & 4 others & Attorney General & Another*, Presidential Petition No 1 of 2017 (*Raila 2017*) in which the basis of nullification of the presidential election was IEBC's admission that not all Forms 34A were transmitted to the National Tallying Centre as required by law let alone verified by the Chairman of IEBC before he declared the final results. In the Machakos County gubernatorial election, the CRO had all Forms 37A with results from all polling stations and Forms 37B with results from the 8 constituencies in the county. After tallying on Form 37C the results from those constituencies, she declared the final results for the election after the candidates' agents had verified their authenticity and countersigned the impugned Form 37C. Counsel said *Raila 2017* was therefore clearly distinguishable on both facts and the law.

12. Reiterating that the primary duty of an election court is to ascertain the will of the people, counsel for the 1st appellant submitted that it would be a monumental injustice to vitiate an election on account of minor administration errors such as a form deviating from the prescribed format which has, however, correct figures of the votes garnered by each candidate. In support of this submission, the appellants relied on the Ghanaian case of *Nana Addo Dankwa Akufo -Addo & others v John Dramani Maham & others*, Presidential Election Petition Writ No J1/6/2013; and the Canadian Supreme Court decision in *Opitz v Wrzesnewskyi* 2012 SCC 55, [2012] 3 SCR 76.

13. Mr Kilukumi also faulted the appellate court for failing to pay due regard to the rule of harmony in article259 of the *Constitution* that all constitutional provisions should be interpreted and applied as an integrated whole as this Court stated *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* Sup. Advisory Opinion No 2 of 2012, [2013] eKLR; *The Speaker of the Senate & another v The Attorney – General & 4 others* Sup. Advisory Opinion No 2 of 2013, [2013] eKLR; and in *Judges & Magistrates Vetting Board & 2 others v Center for Human Rights & Democracy & 11 others*, Sup Pet No 15 of 2013, [2014] eKLR. Instead, it harped, and even then wrongly, on the verifiability test in article 86 and ignored the will of the electorate (under article 38) which elected the 1st appellant with a whooping margin of about 40,000 votes over those of his runner-up. Counsel argued that the rule of harmony in the construction of the constitution requires holistic and not interpretation of a single article without bringing into focus the other articles having a bearing on the same subject matter.

14. Citing this court's decisions in *Zachary Okoth Obado v Edward Akongo Oyugi & 2 others* Supreme Court Petition No 4 of 2014 and *Raila 2017*, counsel also faulted the Court of Appeal for misapprehension of the nullification test under section 83 of the *Elections Act* that an election can only be nullified if it is not conducted in accordance with the Constitution and the applicable law on elections or, if its conduct was fraught with irregularities that affected its results. As the deviation on Form 37C did not affect either limb of that nullification test, he urged us to find and hold that the Court of Appeal had no warrant to nullify the election.

15. Lastly, counsel for the 1st appellant faulted the appellate court's decision on the issue of the burden and standard of proof in connection with the alleged employment by IEBC of public officers, to wit, Machakos County employees in the conduct of elections. They argued that the list of public officers the 1st respondent provided to the trial court having been expunged from the record, that left only the participation of one Urbanus Wambua Musyoka, alleged to have been a Chief Officer of the Machakos County Government. Since his participation, if proved, would have amounted to an election offence, counsel submitted that the threshold in the standard of proof required in such allegation is one of beyond reasonable doubt which was not met. He argued that, as the trial court found, the respondents did not prove that the said Urbanus Wambua Musyoka, who was the 1st appellant's party's agent in the election, was one and the same person as the Chief Officer of the Machakos County Government. And that being a factual finding, counsel submitted that the Court of Appeal fouled section 85A of the Elections Act in re-evaluating the evidence on that point and reaching a different conclusion. To make matters worse, counsel said, the Court of Appeal also erred in shifting the burden of proving that allegation to the 2nd and 3rd appellants. On those submissions, counsel for the 1st appellant urged us to allow this appeal with costs.

(5) The 2nd & 3rd Appellants' Submissions

16. Mr Muhoro, learned counsel teaming up with Mr Mudoli, for the 2nd and 3rd appellants, submitted that, contrary to the respondents' contention, the issues as to whether the election was free and fair under article 81; and whether or not the election was accurate, verifiable, secure, accountable and transparent under article 86 of the *Constitution* have been raised in this appeal. In the circumstances, and on the authority of this court's decision in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*, Supreme Court Petition 2B of 2018, [2014]eKLR (*Munya 2*), this court's jurisdiction under article 163(4)(a) of the *Constitution* to hear this appeal is a foregone conclusion.

17. On the other issues, counsel adopted the submissions by counsel for the 1st appellant and added that the conduct of the election from the inspection of the ballot boxes very early on the voting day as well as the counting of votes at polling stations and tallying at Constituency and County Tallying Centres, was done in the presence of the candidates' agents who also signed Forms 37A, 37B and 37C. In the circumstances, he said the verification was done at every stage and as no single agent was called to dispute the results at any stage, the first ground must fail.

18. On the format of the forms used, counsel submitted that save for Form 37A, there were minor variations on all Forms 37B and 37C used in all the gubernatorial elections in the whole country. Counsel further submitted that he is the one who raised the objection that the illegality of Form 37C was at any rate not pleaded and the trial court upheld his objection. In the circumstances, and bearing in mind the cardinal rule in pleadings that a party's pleadings should be set out in sufficient clarity and particularity to enable the adversaries to know the case against them, counsel relied on this Court's decision in *Raila 2017* and that of the Indian Supreme Court in the case of *Arikala Narasa Reddy v Venkata Ram Reddy Reddygarri & anr*, Civil Appeal Nos 5710 -5711 of 2012;[2014] 2 SCR and submitted that no court has jurisdiction to determine any issue not arising from pleadings.

19. On the standard of proof, counsel submitted that Urbanus Wambua Musyoka is a common name in Machakos County. There was therefore no proof beyond reasonable doubt that the 1st appellant's party's agent in the election was one and the same person as Urbanus Wambua Musyoka who was a Chief Officer of the Machakos County Government. A mere allegation that he was the same person was not enough.

20. On those submissions, counsel for the 2nd and 3rd appellants also urged us to allow this appeal with costs here and in the courts below.

(6) The Respondents' Submissions

21. For the respondents, Mr Ahmednassir Abdullahi, SC, teaming up with Mr Willis Otieno and Martin Gitonga, submitted that out of the 26 grounds of the 1st appellant's appeal, only 10 relate to constitutional interpretation and application. He cited this Court's decisions in *Lawrence Nduttu & 6000 other v Kenya Breweries Ltd & Another* Supreme Court Petition No 3 of 2012; *Samuel Macharia Kamau & another v Kenya Commercial Bank & 2 others* [2012] eKLR; *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others* Supreme Court Petition No 10 of 2013; *Gatirau Peter Munya v Dickson Mwenda Kithinji & others* [2014] eKLR and *Peter Oduor Ngoge v Hon Ole Kapara & others*, Supreme Court Petition No 2 of 2012, as well as sections 15(2) and 19(a) of the *Supreme Court Act* and submitted that this court therefore lacks jurisdiction to entertain the other grounds like the one on standard of proof which are premised on statutory provisions and common law principles.

22. Besides lack of jurisdiction in respect of some grounds, counsel also contended that contrary to the decision of this Court in the case of *Yusuf Gitau Abdallah v. Building Centre (K) Ltd & 4 Others* [2014] eKLR, the appellant filed a notice of motion without substantive proceedings; that contrary to rule 9 of the *Supreme Court Rules*, the petitions of appeal as drawn do not contain a concise presentation of the arguments supporting each of the grounds; that contrary to rule 33 of the *Supreme Court Rules*, the first petition of appeal was not filed along with the record of appeal; and that the appellants' written submissions exceeded 15 pages in length contrary to the practice directions. As this court held in Raila 2013, article 159(2)(d) is not a *carte blanche* ticket to ignore all rules of procedure for to do so would breed anarchy and amount to abuse of the court process. In the circumstances, counsel urged, this appeal is incurably defective and should be struck out.

23. On pleadings, counsel submitted that the issue of the non-conformity of Form 37C with the prescribed format was pleaded. He said the trial court's finding that it was not was therefore perverse and without any basis and that was a legal point for consideration by both the appellate courtand this court. At any rate, the Court of Appeal's finding that that issue was pleaded does not involve interpretation or application of the Constitution to warrant a review by this Court.

24. Counsel further argued that verifiability in the voting method referred to in article 86(a) of the Constitution should be construed holistically to encompass the entire electoral process right from identification of voters, casting and counting of votes, and the announcement and declaration of the results. It is this entire voting system that the Constitution requires to be simple, accurate, verifiable, secure, accountable and transparent. He said this is what this Court had in mind when it stated at paragraph 282 in *Raila 2017* that "verifiability involves an election with a proper and verifiable record made on the prescribed form." Counsel argued that it would therefore be absurd to posit that it is the simple act of the casting of votes that is required to be simple, accurate, verifiable, secure, accountable and transparent. As a proper record is an important aspect of any election, and a prescribed form is an integral part of the verifiability process in any election, be it the presidential or gubernatorial election both of which are subject to articles 81 and 86. According to counsel, both

section 39(1B) and regulation 87(2)(b)(iii) invariably state one and the same thing. Regulation 87(2)(b)(iii) merely gives the particulars required by section 39(1B) in the declaration of results. In the circumstances, the format of the impugned Form 37C used in the declaration of results in this case, cannot be trivialized and wished away under the provisions of article 159(2)(d) of the Constitution, section 72 of the *Interpretation and General Provisions Act* and section 26 of the *Statutory Instruments Act*, as immaterial. Rather, that omission is substantive and makes those results unaccountable and unverifiable. Because a declaration of the votes garnered by each candidate in each polling station is a requirement by article 86(c) of the *Constitution*, he said regulation 87(2)(b)(iii) is an integral part of Form 37C.

25. Counsel further submitted that the 1st respondent annexed to her affidavit in support of the Petition filed before the trial court Form 37C (which appears at pages 2426 to 2446 of Volume 5 of Petition No 14 and at pages 2493 to 2513 in Volume 6 of Petition No 11) that had been prepared by the CRO in accordance with the prescribed format with a column for the votes garnered by each candidate in a number of polling stations together with the constituency sub-totals. However, upon realizing that results of every candidate in over 100 polling stations affecting over 55,000 votes (or 100,000 according to his oral submissions) were missing, in court the 2nd and 3rd appellants jumped from the frying pan into the fire by disowning that form as not originating from IEBC and asserted that the correct Form 37C used in the declaration of results is the one on page 2126 of Volume 5. As that form omits results from all polling stations, counsel said that it was then concocted to cover up the aspect of verifiability. In the circumstances, the provisions of both section 72 of the *Interpretation and General Provisions Act* and section 26 of the *Statutory Instruments Act* cannot assist them.

26. Counsel also dismissed his counterparts submissions that save in presidential elections, in all other elections County Returning Officers are not concerned with results on the "A" forms. They are required to tally only the results on the "B" forms and aggregate them on the "C" forms. He said given this court's decision in *Raila 2017*, the verifiability test in article 86 applies to all elections and the provisions of regulation 87(2)(b)(iii) of the *Regulations* are therefore mandatory. He lauded the Court of Appeal finding that the CRO's omission to tabulate on the impugned Form 37C results from all polling stations is a deviation which not only affected the substance of the election but was also intended to mislead. And that being the case, counsel concluded, the election remains unverifiable to date and the will of the people of Machakos County in the gubernatorial election is still at large.

27. Besides Urbanus Wambua Musyoka, counsel said over 300 other employees of the Machakos County Government, who worked under the 1st appellant, were engaged in the conduct of the elections. In the circumstances, he claimed, the Machakos gubernatorial election was not conducted by an impartial body. At any rate the status of the said Urbanus Wambua Musyoka does not involve the interpretation or application of the Constitution.

28. On those submissions, counsel urged us to uphold the decision of the Court of Appeal and dismiss this appeal with costs.

29. In a short rejoinder, Mr Kilukumi for the 1st appellant submitted that the CRO was right in disowning the results on Form 37C on pages 2493-2513 of the record of appeal, which was filed by the respondents, as it was not signed by any election official or any of the candidates' agents. In contrast, the one on page 2126, that the CRO used to declare results, cannot be a forgery as counsel for the 1st and 2nd respondents contended because it was signed by all candidates' agents including the 1st respondent's agent. On the format of Form 37C, he said the subsidiary legislation in regulation 87(2)(b)(iii) requiring the CRO to tabulate on that Form results from all polling stations is clearly ultra vires section 39(1B) of the *Elections Act* and should be outlawed.

30. On his part, Mr Nyamu reiterated his colleague's submissions that the constitutional provisions on elections are required to be harmonious and complementary of each other as contemplated by article 259.

31. In his rejoinder, Mr Muhoro for the 2nd and 3rd appellants, submitted that the results on pages 2493-2513 in Volume 6 of the record of appeal did not originate from IEBC but were Exhibit WN10 annexed to the 1st respondent's affidavit. They were therefore the 1st respondent's spurious allegations in the High Court. He urged us to find that as the respondents did not adduce any evidence to challenge the declared results on pages 4189 to 4199 in Volume 9, which are the same as those on page 2126, we should avoid speculation. Instead of transposing the results on Forms 37A onto the impugned Form 37C, the CRO attached Forms 37A from all 1332 polling stations to Form 37C which were deposited them in court and the authenticity of the declared results would have been confirmed if the 1st and 2nd respondents had prosecuted their application for scrutiny. He concluded that as the issue of a public officer employed as an agent of a political party was raised in relation to section 15 of the *Election Offences Act* and the 1st appellant was exonerated from any blame, the matter should rest there.

(7) Analysis

32. From these rival submissions, it is clear that the issues for our determination in this appeal are: whether or not this appeal is competent; whether or not, contrary to section 85A of the *Elections Act*, the appellate court considered matters of fact it had no jurisdiction to entertain; whether or not the Appellate Court misapprehended the issues of burden and standard of proof in electoral disputes; and whether or not, contrary to article 159(2)(d) of the *Constitution*, the appellate court paid undue regard to procedural technicalities and nullified the election which had been conducted in substantial compliance with the Constitution and the law on elections on minor and immaterial irregularities which did not affect the election result.

(a) Competency of the Appeal

33. Verifiability of the election results under article 86(a) of the *Constitution* is the fulcrum of this appeal. On this ground alone, we find that this appeal, brought as of right under article 163(4)(a) of the *Constitution*, is competent. The other point on the competency of this appeal is on the format and the piecemeal filing of the record of appeal. As stated, counsel for the respondents relying on the decision of this Court in the case of *Yusuf Gitau Abdallah v. Building Centre (K) Ltd & 4 others* [2014] eKLR urged us to find that the filing of the application for stay without substantive proceedings and the failure to give a concise presentation of the arguments supporting each of the grounds in the petitions of appeal as well as the appellants' written submissions exceeding the maximum 15 pages, renders this appeal incurably defective and should be struck out.

34. The *Yusuf Gitau Abdallah case* is distinguishable from the matter before us. In that case, the petitioner purported to appeal a High Court decision directly to the Supreme Court without any other proceedings, filed or anticipated. In this case, the 1st appellant's application for stay of execution of the Court of Appeal judgement was filed pending the filing of an appeal. And whereas we frown at the irregularity in the form of the petition and the piecemeal filing of the record of appeal, nevertheless the same was filed within the prescribed time of thirty (30) days. That, as well as the 1st appellant's written submissions exceeding the length set out in our practice directions are irregularities curable by article 159(2)(b) of the *Constitution*. In the circumstances, we find that this appeal is competently before us and ground 1 therefore fails.

(b) The Appellate Court's Jurisdiction under Section 85A of the Elections Act

35. Section 85A of the *Elections Act* limits the appellate court's jurisdiction in electoral disputes to only matters of law. It directs 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."

36. Thus far is axiomatic and there is no dispute. What is, however, in controversy under this provision is what amounts to points of law. Even that issue should not be in controversy any more given this court's decision in *Gatirau Peter Munya v Dickson Mwenda Kithinji & others*, [2014] eKLR. At paragraph [81] of that judgment, this court stated that "the phrase 'matters of law' 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."

37. As the Court of Appeal correctly stated recently in the case of *John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others*, [2018] eKLR, pursuant to section 85A of the *Elections Act*, in an election appeal, an appellate court should not be drawn into considerations of the credibility of witnesses. Its engagement with the facts should be limited to satisfying itself "whether the conclusions of the trial judge are based on the evidence on record or whether they are so perverse that no reasonable tribunal would have arrived on them."

38. In this matter, in the Court of Appeal, counsel for the respondents had argued, *inter alia*, that the averments in the memorandum of appeal that the trial court had "erred on facts and law" rendered the appeal incompetent. In its determination of that issue, the Court of Appeal, quite correctly in our view, held that bearing in mind that the line between points of law and fact is opaque, an appellate court "has to undertake a delicate examination to ensure that appeals are not out rightly and without proper investigation rejected" on ground that they raise matters of fact if there are points of law also involved. We also concur with it that Section 85A should not be invoked to strike out appeals on account of inelegance in the drafting of the memorandum of appeal as was done in this matter.

39. Upon perusal of the record, we find that the Court of Appeal's engagement with the facts was limited to the determination of the issues raised before it, namely, whether or not the trial court properly

evaluated the evidence on record to determine if the conduct of the election fouled the principles laid down in the Constitution as the respondents had contended; whether or not there were irregularities and illegalities in the conduct of the election and, if so, whether they indeed affected the election results as the trial court found; whether or not the declaration of the results itself was unconstitutional; and lastly, whether or not the 1st appellant committed election offences and if so what impact that had on the validity of the election. The Court of Appeal did not veer into the credibility of witnesses or the calibration of evidence and reach its own conclusions. In the circumstances, we find that the Court of Appeal never exceeded its jurisdiction under section 85A of the Elections Act as the appellants claimed and that ground of appeal also accordingly fails.

40. On the principles of free and fair elections decreed by article81 of the Constitution, the Court of Appeal said the trial judgewas obliged to determine if any candidate derived any unfair advantage by the acts or omissions of IEBC. Upon consideration of the evidence on record, the Court of Appeal faulted the trial court's finding that the respondents had not given particulars of employees of the Machakos County Government who IEBC had engaged in the conduct of election. It found, quite correctly in our view, that particulars of 167 (not 300 as the respondents had alleged) of employees of Machakos County Government who IEBC engaged in the conduct of the elections and the role each of them played had been given in paragraph 64 of the petition and in the 1st respondent's affidavit which she also made reference to in cross-examination.

41. Upon further consideration of this issue, save for involvement in partisan politics, we concur with the Court of Appeal that in the absence of any law prohibiting public officers from being engaged as election officials and more particularly in the absence of evidence of anything the employees of the Machakos County Government engaged in this election did or omitted to do that compromised their impartiality, IEBC's conduct of the election was not compromised. We, however, disagree with the Court of Appeal's finding that IEBC's engagement of one Urbanus Wambua Musyoka as an agent of the Maendeleo Chap Chap Party (MCCP), the party that sponsored the 1st appellant in the election, compromised its independence. We wish to consider that issue contemporaneously with the one on burden and standard of proof.

(c) Burden & Standard of Proof

42. As learned counsel for the appellants submitted, one of the major grounds upon which the Court of Appeal overturned the decision of the trial court and nullified the 1st appellant's election was the engagement of one Urbanus Wambua Musyoka as an agent of the Maendeleo Chap Chap Party (MCCP), the party that sponsored the 1st appellant in the election. Under section 45 of the *Political Parties Act* and section 15(1)(a) of the *Elections Offences Act*, it is an offence for any public officer to engage in any partisan political activity. Under section 15(2)of the *Election Offences Act*, it is equally an offence for any candidate to engage such an officer as her or his party's agent. The allegation that Urbanus Wambua Musyoka ID No 203xxxx4 was one and the same person as the Chief Officer of the Machakos County Government was therefore an allegation of commission of an election offence.

43. It is now settled law in this country, (see *Raila 2013* and many authorities following it as well as section 107(1) of the *Evidence Act*), that the burden of proof lies upon the party alleging a fact to prove it to the required standard. It is also settled law, (see *Raila 2017*) that the standard of proof of any election offence or quasi criminal conduct is that of beyond reasonable doubt. In this case, the Court of Appeal concurred with the trial court that it is the 1st appellant's party, MCCP, not him, who engaged Urbanus Wambua Musyoka as its election agent. Consequently, it absolved the 1st appellant of any culpability in the engagement of the said Urbanus Wambua Musyoka as an agent of the 1st appellant's sponsoring political party in the election.

44. However, the Court of Appeal found that by the mere establishment that one Urbanus Wambua Musyoka ID No 203xxxx4 was engaged by the 1st appellant's sponsoring party as its agent in the election and that he signed Form 37B in respect of Mavoko Constituency, the respondents had discharged their burden of proving that he was one and the same person as the Chief Officer of the Machakos County Government and with that burden had shifted to the 1st appellant to rebut that allegation, by referring to the County records which were at any rate under his control. The Court of Appeal therefore faulted the trial court for creating doubt in the identity of the said Urbanus Wambua Musyoka ID No 203xxxx4 by suggesting that the respondents should have invoked the provisions of article 35 of the *Constitution* and obtained from the Machakos County Government records to corroborate the allegation that the said Urbanus Wambua Musyoka ID No 203xxxx4 was indeed an employee of the Machakos County Government.

45. As we have stated, this allegation amounted to commission of an election offence proof of which the law requires to be beyond reasonable doubt. With profound respect, the Court of Appeal erred in finding that the said Urbanus Wambua Musyoka was one and the same person as the Chief Officer of the Machakos County Government. Other than making that allegation in their petition and in the evidence of the 1st respondent in her supporting affidavit at Par 85 (Volume 3) wherein she made reference to annexture WN 27, the respondents never provided any proof of the allegation that the said Urbanus Wambua Musyoka was one and the same person as the Chief Officer of the Machakos County Government. A mere allegation cannot be proof, leave alone proof to the required standard of beyond reasonable doubt. The respondents definitely needed to do more than that. In our respectful view therefore, the learned trial judge was quite right in finding that the respondents had not discharged their burden of proof on that allegation to the required standard. We also find no anomaly in the trial Judge's suggestion that, to discharge their burden of proof on that allegation, the respondents should have invoked article 35 of the *Constitution* and obtained records from the Machakos County Government to verify that allegation. In the circumstances, we find that the Court of Appeal erred in basing its nullification of the 1st appellant's election partly on that ground.

(d) The Legality of Form 37C Used in the Declaration of the Election Results

46. Three points were taken with regard to the impugned Form 37C that was used in the declaration of the results of the Machakos gubernatorial election. The first point was the propriety of the respondents' challenge of the form. Counsel for the appellants contended that on account of their failure to plead in the petition before the trial court the illegality of that form, the respondents had no right to raise the issue in their submissions. On their part, counsel for the respondents maintained that the issue had been pleaded.

47. Having perused the record ourselves, we concur with counsel for the respondents and the Court of Appeal that, the issue of non-compliance of the impugned Form 37C was actually pleaded in paragraphs 73 and 76 of the petition before the trial court. In paragraph 73 of their petition to the High Court, the respondents pleaded that the votes garnered by each candidate had wrongly been captured on impugned Form 37C. And in paragraph 76 they had averred that "the first respondent [IEBC] failed to use standardized statutory forms to declare the results of the said elections" and instead relied on fake documents to irregularly and illegally declare the results. Consequently, we reiterate that the issue of non-compliance of the impugned Form 37C was pleaded and we accordingly dismiss the ground of appeal based on failure to plead the illegality of Form 37C.

48. The second point taken was on the identification of the correct Form 37C that was used in the declaration of those results. As we have stated, counsel for the respondents urged that the correct Form 37C is the one on pages 2426 to 2446 of Volume 5 of Petition No 14 (also appearing on pages 2493

to 2513 in Volume 6 of Petition No 11) of the record of appeal which has a column on results from polling stations but omits results from 145 stations. Counsel further argued that if the CRO had in her possession all the Forms 37A when declaring the results, she would have made a note of that fact in the handing over notes in the Forms 37B and transposed the polling station results on Form 37C as required by law.

49. On their part, the 2nd and 3rd appellants disowned that Form and asserted that the correct Form 37C that was used to declare the election results is the one on page 2126 of Volume 5 of the record of appeal, filed by the respondents, which has no column on results from polling stations. As regards Forms 37A, the CRO testified that she had them when declaring the results and that she attached them to the impugned Form 37C. Pursuant to the order later made by the trial court, all those forms and other documents were all later deposited in court.

50. Upon perusal of the record, we note that the said Form 37C on pages 2426 to 2446 of Volume 5 of Petition No 14, which also appears at pages 2493 to 2513 in Volume 6 of Petition No 11, is not signed by either the CRO or the agents. However, the one on page 2126, which the appellants said was the correct one that was used to declare the election results was signed by the CRO and the candidates' agents including those of the 1st respondent. In the circumstances, we agree with counsel for the 2nd and 3rd respondents that the correct form that was used to declare the election results is the one on page 2126. The 1st respondent's agent could not have appended his signature on a form bearing erroneous results. As the Ghanaian Supreme Court observed in the case of *Nana Addo Dankwa Akufo-Addo & others v John Dramani Mahama & others*, Presidential Election Writ No 11/6/2013 that "...by appending his signature to the declaration" of the results form, the polling agent "serves notice to his principal and the generality of the citizenry" of the integrity in the conduct of the election. And the respondents having abandoned their application for scrutiny which would have cast doubt, if any, on the results in those forms, we have no basis to find that the Machakos County gubernatorial election was unverifiable.

51. The last and main point taken on the impugned Form 37C was its non-compliance with the prescribed form as the law required and the effect of its use in the declaration of the results. While admitting that the impugned Form 37C was not in the prescribed form in that it completely omitted a column on the results from the polling stations as required by regulation 87(2)(b)(iii) of the *Regulations*, counsel for the appellants submitted that that omission was immaterial as that regulation is, at any rate, ultra vires section 39(1B) of the Elections Act. They said it is only in presidential elections that the national Returning Officer is required to tally and aggregate on Form 34C results on Form 34A from polling stations. In respect of other elections, they said County Returning Officers are not required to concern themselves with results on the "A" forms.

52. In response, counsel for the respondents submitted that contrary to his counterparts submissions, regulation 87(2)(b)(iii) of the *Regulations*, is not *ultra vires* section 39(1B) of the *Elections Act*. In his view, regulation 87(2)(b)(iii) is an amplification of that section. And since it is in mandatory terms, the CRO's failure to tabulate on the Form 37C results from all polling stations is because she did not have Forms 37A from several polling stations and was unable to account for between 55,000 and 100,000 votes. The deviation on Form 37C was therefore a deliberate cover up of that omission that was intended to mislead. That failure therefore not only rendered the data of the results on that form unverifiable but also affected the substance of the entire gubernatorial election.

53. From these rival submissions on this point, the issues for our determination at this stage is whether or not the omission is immaterial and whether or not regulation 87(2)(b)(iii) of the *Elections (General) Regulations, 2012* is ultra vires Section 39(1B) of the *Elections Act*.

54. As the Court of Appeal, citing with approval the Indian Supreme Court decision in *Jyoti Basu & others v Debi Ghosal & others* [1982] AIR 983; [1982] SCR (3) 318, stated in *Mbaraka Issa Kombe v Independent Electoral and Boundaries Commission & 2 others*- Election Petition Appeal No 3 of 2017 (unreported), "... electoral law is a special jurisdiction whose interpretation is strictly confined within the parameters of the Constitution and relevant electoral statutes ...." In that Indian case, the Supreme Court stated:

> "An Election petition is not an action at Common Law, nor in equity. It is a statutory proceeding to which neither the Common Law nor the principles of Equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to Common Law and Equity must remain strangers to Election Law unless statutorily embodied. A courthas no right to resort to them on considerations of alleged policy because policy in such matters as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, [the] courtis put in a straightjacket. Thus the entire election process ... is [a] self-contained code within which must be found any rights claimed in relation to an election or an election dispute."

It is clear from this authority, which we endorse, that in electoral disputes, save where the contrary so demands, the words of a statutory provision should be given their ordinary meaning and strictly interpreted in defining the rights of the parties to the dispute.

55. In this case, the words of Section 39(1B) of the *Elections Act* require the County Returning Officer to announce and declare the election of the county governor, county senator and county women representative "in the prescribed form, of final results from constituencies in the county ...." Regulation 87(1)(b)(iii) of the *Elections (General) Regulations, 2012* on the other hand goes further to require Forms 37C, 38C and 39C used for the declaration of the election results of the county governor, senator and county women representative respectively to have a column for the "votes cast for each candidate ... in each polling station." And the format of those forms, contained in the schedule to those Regulations, has such a column.

56. It is not in dispute, and the appellants readily so admit, that the impugned Form 37C on page 2126 of the record of appeal that was used in the declaration of the Machakos gubernatorial election results omitted a column for votes cast for each candidate in each polling station and was therefore not in the prescribed form. It therefore clearly fouled regulation 87(2)(b)(iii) and was thus non-compliant. The issue is whether or not that format required by regulation 87(2)(b)(iii), with an additional column having results from all polling stations, is ultra vires section 39(1B) of the parent *Act* and, if it is, whether that omission is immaterial as the appellants contended. Let us read these provisions.

57. The relevant part of regulation 87(2)(b)(iii) of the *Regulations* reads:

> "2) The county returning officer shall upon receipt of the results from the constituency returning officers as contemplated under regulation (1)—
>
> (a) tally and announce the results for the county governor, senator and county woman representative to the National assembly;
>
> (b) complete Forms 37C, 38C and 39C set out in the Schedule in which the county returning officer shall declare, as the case may be, the—

(i) name of the respective electoral area;

(ii) total number of registered voters;

(iii) votes cast for each candidate ... in each polling station;

(iv) number of rejected votes for each constituency;

(v) aggregate number of votes cast in the respective electoral area; and aggregate number of rejected votes...."

58. Is this regulation *ultra vires* section 39 (1B) of the *Election Act*? The Section reads:

> " The commission shall appoint county returning officers to be responsible for tallying, announcement and declaration, in the prescribed form, of final results from constituencies in the county for purposes of the election of the county governor, senator and county women representative to the national assembly." [Emphasis supplied].

59. With profound respect, we do not agree with the Court of Appeal that the provisions of section39 of the *Elections Act* with regard to the handling of the results in the presidential election apply *mutatis mutandis* to other elections. Read as a whole, that section makes a clear distinction between the handling of results in the presidential election and other elections. Before we consider the provisions of that section and point out the distinction, it is important to remember the historical background giving rise to the 2016 amendments to that section.

60. As the majority of this courtstated in *Raila 2017*, following the electoral frauds in the 2007 presidential election, "the Government formed the Independent Review Commission (IREC), commonly known as the Kriegler Commission, to inquire into the conduct of the 2007 elections and the cause of the violence following that election. One of the critical areas of that Commission's focus was the integrity of vote counting, tallying and announcement of presidential election results." [Par 228] "Among the significant recommendations the Kriegler Commission made related to the use of technology in the electoral process." [Par 229]. Those recommendations led to the amendments to the *Elections Act* to integrate the use of technology in the electoral process. Before those amendments the section read:

39. " Determination and declaration of results

(1) The Commission shall determine, declare and publish the results of an election immediately after close of polling.

(2) The Chairperson may declare a candidate elected as the President before all the constituencies have transmitted their results if the Commission is satisfied the results that have not been received will not affect the result of the election.

(3) The Commission shall announce the final results in the order in which the tallying of the results is completed."

61. With regard to the tallying, collation and verification of election results, new clauses were added to sub section (1) of the *Elections Act* as follows:

39. Determination and declaration of results

(1A) The Commission shall appoint constituency returning officers to be responsible for—

(a) tallying, announcement and declaration, in the prescribed form, of the final results from each polling station in a constituency for the election of a member of the National Assembly and members of the county assembly;

(b) collating and announcing the results from each polling station in the constituency for the election of the President, county Governor, Senator and county women representative to the National Assembly; and

(c) submitting, in the prescribed form, the collated results for the election of the President to the national tallying centre and the collated results for the election of the county Governor, Senator and county women representative to the National Assembly to the respective county returning officer.

(1B) The Commission shall appoint county returning officers to be responsible for tallying, announcement and declaration, in the prescribed form, of final results from constituencies in the county for purposes of the election of the county Governor, Senator and county women representative to the National Assembly.

(1C) For purposes of a presidential election, the Commission shall —

(a) electronically transmit and physically deliver the tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre;

(b) tally and verify the results received at the constituency tallying centre and the national tallying centre; and

(c) publish the polling result forms on an online public portal maintained by the Commission.

62. It is clear from these added provisions that at the constituency level, the constituency returning officers are required to tally and collate the "final" results "from each polling station" and announce the results "for the election of a member of the National Assembly and members of the county assembly" and "for the election of the President, county Governor, Senator and county women representative to the National Assembly...." The results from the polling stations are of course on the "A" forms which are the primary documents. After that, Clause (c) of the new subsection (1A) directs the constituency returning officers to submit, "in the prescribed form, the collated results for the election of the President to the national tallying centre and the collated results for the election of the county Governor, Senator and county women representative ... to the respective county returning officer." Before we analyze the new subsection (1B), we would like to deal with the new subsection (1C).

63. The new subsection (1C) deals with the tally, collation and announcement of the presidential results at the county level. There is a clear distinction between this subsection and subsection (1B). Unlike subsection (1B), subsection (1C) requires under Clause (a) thereof the electronic transmission and physical delivery of "the tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre."

64. The new subsection (1B) deals with tallying, collation and announcement or declaration of election results at the county level. The Section makes no mention of results from polling stations. It only talks of "final results from constituencies in the county." We understand the Section to require the county returning officers, "for purposes of the election of the county governor, senator and county women representative", to tally only "final results from constituencies in the county." [Emphasis supplied]. The final results from the constituencies are of course on the "B" forms. It follows that in the tallying

and announcement of the results for the election of the county governor, senator and county women representative, although they would have been delivered to the CRO and they would therefore be in his possession at the time of declaring the results, the CRO does not go into the figures in the "A" forms. He only tallies and collates into the "C" forms the results on the "B" forms from the constituencies in the county. We therefore find that the Court of Appeal erred in holding that "the county returning officer is concerned and must be concerned with the Forms 37A's being the primary documents that capture the results at the polling stations."

65. It is common knowledge that the position of the President is different from those of other elective positions. The President is not only the head of the Executive Arm of Government; he is also the head of State and the Commander in Chief of the Defence Forces of the Republic of Kenya. Because of the importance of that office, it is clear to us that section 39 of the *Elections Act* demands for a more rigorous process in the tally, collation and verification of the presidential election results than those of the other elections. That is why, in our view, Clause (b) of subsection (1C) demands not only for the "tally" but also for the "verification" of "the results received at the constituency tallying centre and the national tallying centre."

66. It is for these reasons that we agree with counsel for the 1st appellant and find that there is a clear distinction between the handling of the presidential election results and those of other elections.

67. We have already found that in the tallying and announcement of the results for the election of the county governor, senator and county women representative, under section 39(1B) of the *Elections Act*, the CRO is not required to go into the results on the "A" forms from polling stations. But in contradistinction, regulation 87(2)(b)(iii), which is supposed to give effect to that Section, requires the CRO to transpose results of each polling station on Form 37C. For that purpose, the prescribed template of that form contained in the Schedule to the Regulations has a column for results cast for each candidate at each polling station. That is an additional requirement that is not in the section which incidentally formed the turning point of the Court of Appeal decision giving rise to this appeal.

68. It is trite law that a provision of any subsidiary legislation that conflicts with that of the parent Act is *ultra vires*. (See Odunga, J's decision in Judicial Review Petition No 2 of 2014: *Kenya Country Bus Owners' Association (Through Paul G Muthumbi, Samuel Njunguna & Joseph Kimiri) & 8 others v Cabinet Secretary for Transport & Infrastructure & 5 others:* Consolidated with Miscellaneous Application No 464 of 2013 between: *Republic v The Chairman National Transport and Safety Authority & 3 others*). We therefore find and declare that regulation 87(2)(b)(iii) of the *Elections (General) Regulations 2012*, is *ultra vires* section 39(1B) of the *Elections Act* and is null and void *ab initio*. It follows that we should assume it never existed and the 3rd appellant was right in ignoring it and omitting from the impugned Form 37C used in the declaration of the Machakos County gubernatorial election results a column with results from the polling stations.

69. In the light of the provisions of section 72 of *Interpretation and General Provisions Act* and section 26 of the *Statutory Instruments Act*, and in the absence of any challenge to the results posited on it, even if regulation 87(2)(b)(iii) were not ultra vires, we agree with counsel for the appellants that the variation on Form 37C in this case was minor and inconsequential.

70. Section 72 of the *Interpretation and General Provisions Act* and section 26(2) of the *Statutory Instruments Act, 2013*, provide that "an instrument or document ... shall not be void by reason of a deviation" from the prescribed form if the deviation "... does not affect the substance of the instrument or document thereof or ... is not calculated to mislead." The Court of Appeal dismissed the appellants' submission that the deviation on the impugned Form 37C was a matter of mere form and held that "[f]orms are an integral part of an election and an election outcome will depend largely on the

information contained in the forms used in the process." Holding the view that regulation 87(2)(b)(iii) requiring a column with results from polling stations is a mandatory provision, at paragraph 110 of its judgment, the Court of Appeal concluded that "...the election results declared by the county returning officer for the position of governor Machakos County failed the constitutional test of verifiability and the declaration made by him that the 3rd respondent was duly elected had no legal basis. Consequently, the learned Judge erred in holding that that election was conducted in accordance with the constitutional principles under articles 81 and 86 of the *Constitution*."

71. With profound respect, we find that the Court of Appeal also erred on this point for two reasons. One, the most crucial item on the said form that required verifiability is the data of the election results. Even if regulation 87(2)(b)(iii) were not ultra vires, the transposition of the results on to Form 37C would not be the only way of verifying the results of the election.

72. The distinction we have found between the handling of presidential election results and those of others does not in any way affect the verification demanded by article 86(a) of the *Constitution*. Regulation 76 tells us what happens at the polling stations after voting closes. The ballot papers are held up and openly displayed for all the candidates or their agents to verify that they are valid votes and ascertain for who they were cast. The counting is equally open and any dissatisfied candidate is entitled to demand for a recount up to two times. The countersigning of the result forms by the candidates and/or their agents is a declaration that they have verified and are satisfied that the data therein contained is correct. The candidates and/or their agents are similarly involved and they countersign the forms used in the declaration of results at the subsequent tallying and collations of the results at the constituency, county and the national tallying centres.

73. It is not claimed in this case that the 1st respondent or any of her agents disputed the results on any of those forms and refused to countersign it. To the contrary, the impugned Form 37C was signed not only by the CRO but also by the candidates' agents, including the 1st respondent's agent. That form has the figure of 249,603 as the votes cast in favour of the 1st appellant against the 1st respondent who received 209,141 votes. The data on that Form still leaves the 1st appellant ahead of the 1st respondent with a margin of over 40,000 votes. With respect, we are therefore unable to appreciate how the deviation on the impugned Form 37C that the 3rd appellant used to declare the results affected the verifiability of those results.

74. Unlike in *Raila 2017* where the majority held that not all Forms 34A were transmitted or delivered to the national tallying centre as section 39(1C) of the *Elections Act* required rendering it impossible for anyone to verify the final results posted, in this case the 3rd appellant testified that she attached Forms 37A from all the 1332 polling stations to the impugned Form 37C and they were all deposited in court. We agree with counsel for the respondents that in cross-examination, she conceded that she did not produce those forms in court. But there is no dispute that they were nonetheless deposited in court pursuant to an order of the trial court. The respondents having abandoned their application for scrutiny which would have cast doubt, if any, on the results in those forms, what basis then is there for the finding that the Machakos County gubernatorial election is unverifiable? Unverifiability cannot be pegged only on failure to transpose the polling station results on Form 37C. With respect, the respondents misapprehended the issue of verifiability in *Raila 2017*.

75. Secondly, and most importantly, other than the aspect of verifiability, the Court of Appeal did not say whether or not the deviation on the impugned Form 37C in this case affected its "substance" or was in any way "calculated to mislead" and if so, how. We therefore reiterate that even if regulation87(2)(b)(iii) were not *ultra vires* section 39(1A) of the *Elections Act*, the deviation on the impugned Form 37C was immaterial.

Concurring Opinion of Njoki Ndungu, SCJ

76. I concur with the conclusion of the majority but write separately as I have applied a different path of reasoning on the issue of un-pleaded matters, more specifically, whether that issue which became integral to the determination of the cause - was properly before the court.

77. To illustrate my reasoning, it is imperative that I lay basis by extrapolating determinations by both the High Court and Court of Appeal on the same.

78. At the High Court, the learned judgeMuchelule J while addressing the issue of Form 37C stated:

> " 44. I agree that the issue that Form 37C was not valid because it did not include the information contained in regulation 87(2) cannot be raised if it was not one of the grounds on which the petition was based. Further, I have found in the foregoing that the results in Form 37C were acknowledged by Wiper Party. More important, and for the avoidance of doubt, Forms 37A contain the primary results in a gubernatorial election. These results cannot be varied by the constituency returning officer in Form 37B or the county returning officer in Form 37C. Any mistakes, if at all, therein cannot be corrected by these officials, or any other official, of the IEBC. It is only the election court that can interfere with them. Form 37B contains the tallying and collation of Forms 37A, and Form 37C contains the tallying and collation of Forms 37B. The county returning officer does not deal with Forms 37A when putting together Form 37C. In *IEBC –v- Maina Kiai & 5 Others* [2017]eKLR the court emphasized the finality of the results at the polling station in the following terms:-
>
> > "It is clear beyond peradventure that the polling station is the true locus for the exercise of the voter's will. The counting of the votes as elaborately set out in the Act and Regulations, with its open transparent and participatory character using the ballot as the primary material, means as it must, that the count there is clothed with a finality not to be exposed to any risk of variation or subversion."

79. On the other hand, the Court of Appeal stated:

> " 86. Expounding further on the grievances in reference to Mwala Constituency, the appellant averred at paragraph 73 of the petition that:
>
> > "It is instructive to note that the 1st Respondent relied on the said wrong total votes cast for the Petitioner and the 3rd Respondent in declaring the results of the Machakos County gubernatorial elections in the Form 37C thereby rendering the said results inaccurate and out rightly invalid."

87. At paragraph 76 of the petition, the appellants pleaded:

> " That the first respondent failed to use standardized statutory forms to declare the results of the said elections and instead relied on fake documents to irregularly and illegally declare the results."

88. Based on those averments, it is difficult to accept the view taken by the respondents that the matter was not raised in the pleadings. We are satisfied that the complaints regarding the validity of Form 37C and the declaration of results were anchored in the petition and the respondents had due notice of the grievances. Indeed, the learned Judge correctly acknowledged elsewhere in his judgment that "the gubernatorial results for Machakos County were declared in Form 37C. This Form contains the results that the petitioners are challenging through the petition." Our conclusion on this ground is that the issue of validity of Form 37C was sufficiently pleaded."

80. It is clear that the finding on the anomalies in Form 37C not being in the prescribed form, metamorphosised into the central issue in the appeal leading to the conclusion by the appellate courtthat the results as declared were not done with reference to Form 37As and were therefore not verifiable and are unconstitutional. That court held that the complaints regarding the validity of Form 37C were anchored in the petition and ought to have been considered by the trial court. They were of the opinion that the respondents had due notice of the grievances and relying on Supreme Court's decisionin *Raila Odinga & another v IEBC & 2 others*, Presidential Petition No 1 of 2017 (*Raila 1 2017*), and the decision in *IEBC v Maina Kiai & 5 others*, Civil Appeal No 105 of 2017 (*Maina Kiai* case), which made clear that Form 37A was the primary document for verification, they went on to find that the county returning officer was under duty to verify results in that form before declaring them in Forms 34C. Simply put, that the declaration for the position of Machakos governor failed the constitutional test of verifiability.

81. I am with respect not in agreement with such a determination and I am at all limbs in agreement with the finding of the trial Judge that Forms 37C were in fact un-pleaded. On the perusal of the record, I see no specific mention of the format of Form 37 C (that it was in excel) other than what is mentioned at paragraph 76 of the Petition at the High Court, further, the evidence does not allude to non-use of standardized forms but at Paragraph 46, the Petitioner does mention anomalies in the form which are stated to be: i) 3 different Form 37C's; (ii) non signing of the Forms by agents and or different orders of the purported agents in the different forms; and (iii) missing security features on Forms.

82. The pleadings as to Form 37C are vague, without a reasonable degree of precision as it is not immediately clear that they are alluding to the improper format of the said Form. It is well settled principle of law that parties are bound by their pleadings. Pleadings are the bedrock upon which all the proceedings derive from and it follows that any evidence adduced in a matter must be in consonance with the pleadings.

83. This court has had the occasion to express itself on the specificity of pleadings where in our decision in *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission and 2 others*, S C Presidential Petition No 1 of 2017 [2017] eKLR, we quoted with approval, *Arikala Narasa Reddy v Venkata Ram Reddy Reddygari & anr*, Civil Appeal Nos 5710-5711 of 2012; [2014] 2 SCR where the Supreme Court of India which held at paragraph 59:

(52) Further, the courtwent on and observed that:

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

84. Similarly, the Indian case of *Charan Lal Sahu & others v Singh* [1985] LRC (Const). Chief Justice Chandrand expressed himself thus on specificity of pleadings:-

> "The importance of specific pleading in these matters can be appreciated only if it is realized that the absence of a specific plea puts the respondent at a great disadvantage. He must know what case he has to meet. He cannot be kept guessing whether the petitioner means what he says "connivance" here or whether the petitioner has used that expression as meaning 'consent'. It is remarkable that in their petition, the petitioners have furnished no particulars of the alleged consent, if what is meant by the use of the word connivance is consent. They cannot be allowed to keep their options open until the trial and adduce such evidence of the consent as seems convenient and comes handy. That is the importance of precision in pleadings, particularly in election petitions. Accordingly, it is impermissible to substitute the word "consent" for the word "connivance" which occurs in the pleading of the petitioner."[Emphasis]

85. Persuasively, the Appellate Court, *John Waweru Kiarie v Beth Wambui Mugo & 2 others* - Election Petition No 13 Of 2008, the court, in dealing with a petitioner who sought to adduce evidence on matters not pleaded held thus:-

> "The petitioner raised several issues concerning the validity of the Form 16As that were produced in evidence by the 2nd respondent. It was evident that the petitioner did not consider the manner in which the Form 16As were filled to be of such an importance as to merit consideration by the court. The petitioner did not plead failure by the 2nd respondent to properly fill the Parliamentary Form 16As. It is trite law that a party is bound by his pleadings. The petitioner cannot be allowed to introduce new grounds in the course of adducing evidence in support of his petition. This court will not therefore address the issues raised by the petition regarding the validity of the Parliamentary Form 16As."

86. On the same line of reasoning, the Court of Appeal decision in Nakuru, Civil Appeal 102 of 2008, *John Michael Njenga Mututho v Jayne Njeri Wanjiku Kihara & 2 Others* [2008] eKLR had this to state with regards to pleadings in election petitions:

> "Election petitions are special proceedings. They have a detailed procedure and by law they must be determined expeditiously. The legality of a person's election as a people's representative is in issue. Each minute counts. Particulars furnished count if the petition itself is competent, not otherwise. Particulars are furnished to clarify issues not to regularize an otherwise defective pleading. Consequently, if a petition does not contain all the essentials of a petition, furnishing of particulars will not validate it"
>
> "...The law has set out what a petition should contain, and if any of the matters supposed to be included is omitted, then the petition would be incurably defective. For instance, paragraph (a) of rule 4(1) deals with capacity to petition. If a petitioner omits to make an averment in that regard the petition will be incurably defective. Likewise, if the date of the election omitted that omission would be fundamental in nature and would of itself without more render a petition incurably defective. We say so advisedly. The provisions of the National Assembly and Presidential Elections Act, have been held, to provide a complete code of the law and rules on elections and election petitions.
>
> "...In view of the conclusions we have come to on that aspect, it follows that the term "shall" as used in rule 4, must be read as having a mandatory import. Reading it otherwise will render the provisions of that rule otiose." (Emphasis added)

87. It is clear from the foregoing cases, that issues to be considered must be pleaded, and these pleading must be set out in a clear and precise manner. Moreover, un-pleaded issues are not an anomaly that can be cured by article 159 of the *Constitution* as this court previously stated that the article is not a panacea for all procedural shortfalls. Moreover, with the stringent nature of election petitions, this court observed in the case of Supreme Court Petition 12 of 2014, *Moses Masika Wetangula v Musikari Nazi Kombo & 2 others* [2015] eKLR that the rules have to be followed strictly. We stated;

> "(157) Several other issues emerged from this case, such as: what is the essential character of proceedings in an election court? What is the nature of the electoral code? How are election offences to be tried, heard and determined? It is now an indelible principle of law that the proceedings before an election court are *sui generis*. They are neither criminal, nor civil. The parameters of this jurisdiction are set in statute (the Elections Act). As such, while determining an election matter, a Court acts only within the terms of the statute, as guided by the Constitution."[emphasis]

88. In that same decision, while quoting from the Indian Supreme Court, we further observed as follows:

> "[108. The comparative experience, in the Indian Supreme Court case, *Jyoti Basu & others v Debi Ghosal & others* [1982] AIR 983; [1982] SCR (3) 318, illuminates our perception on the nature of election petitions:
>
> > "An Election petition is not an action at Common Law, nor in equity. It is a statutory proceeding to which neither the Common Law nor the principles of Equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special

> jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to Common Law and Equity must remain strangers to Election Law unless statutorily embodied. A courthas no right to resort to them on considerations of alleged policy because policy in such matters, as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, the Court is put in a straight jacket."

89. It is in light of the foregoing that I conclude that pleadings are binding not just on the parties to the suit, but on the court as well. A court cannot delve into matters not specifically pleaded and a vague claim cannot sustain a cause of action. Simply put, the matter was not properly before the Appellate Court and, it ought not have been considered.

(8) Disposition

90. For these reasons, we find that the Court of Appeal erred in holding that the Machakos County gubernatorial election was not conducted in accordance with constitutional principles thus rendering it null and void. To the contrary, we find that the 1st appellant was duly elected governor of Machakos County in a fair and free election.

91. On costs, as stated in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2014] eKLR, SC Petition 4 of 2012 costs follow the event unless the court, in its discretion, otherwise orders. In this case we do not see any reason to depart from that principle.

92. Consequently, we make the following orders.

    1. We allow this appeal with the result that the judgment of the Court of Appeal dated June 8, 2018 is hereby set aside and that of the High Court is hereby reinstated.

    2. The declaration of the election results by the Independent Electoral and Boundaries Commission in respect of the Governor of Machakos County is hereby affirmed.

    3. The appellants shall have the costs of this appeal as well as those of the courts below.

It is so ordered.

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

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D. K. MARAGA

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT COURT

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M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

J B. OJWANG

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