



**Opo v Independent Electoral and Boundaries Commission & 2 others  
(Petition 32 of 2018) [2018] KESC 5 (KLR) (21 December 2018) (Judgment)**

*Zebedeo John Opo v Independent Electoral and Boundaries Commission & 2 others [2018] eKLR*

Neutral citation: [2018] KESC 5 (KLR)

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

**PETITION 32 OF 2018**

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

**DECEMBER 21, 2018**

**BETWEEN**

**ZEBEDEO JOHN OPORE ..... PETITIONER**

**AND**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 1<sup>ST</sup>  
RESPONDENT**

**DAVID K. CHEROT (RETURNING OFFICER BONCHARI) 2<sup>ND</sup> RESPONDENT**

**JOHN OROO OYIOKA ..... 3<sup>RD</sup> RESPONDENT**

*(Being an Appeal from the Judgment of the Court of Appeal (Makhandia, Gatembu & M'Inoti, JJ.A) sitting at Kisumu in Election Petition of Appeal No. 16 of 2018, dated 25 July 2018)*

**Principles applicable to the Supreme Court in determining issues requiring interpretation or application of the Constitution**

Reported by Beryl A Ikamari

***Jurisdiction** - jurisdiction of the Supreme Court - appellate jurisdiction of the Supreme Court - jurisdiction relating to issues of constitutional interpretation and application - election petition disputes - considerations of the Supreme Court in determining whether an election petition raised issues of constitutional interpretation and application - whether a second appeal contesting the validity of an election of member of National Assembly that had been dismissed at both the High Court and Court of Appeal raised issues of constitutional interpretation and application to warrant an appeal to the Supreme Court - Constitution of Kenya article 163 (4)(a).*

**Brief facts**

Pursuant to the August 8, 2017 general elections, the 3<sup>rd</sup> respondent was declared the duly elected Member of the National Assembly for Bonchari Constituency. There were 11 contestants in the election and the



petitioner came in second. The petitioner challenged the outcome of the election while citing various electoral malpractices and irregularities.

The alleged electoral irregularities and malpractices included violence and intimidation in the course of voting, bribery, improper sorting of votes, campaigning at polling stations, denial of the right to vote for voters, agents being turned away from polling stations, compromised process of aid to the elderly by the presiding officer, insecurity of ballot boxes after vote-counting, voter-record discrepancy, undue influence, stuffing of votes in ballot boxes and conspiratorial acts against the petitioner.

The petitioner sought orders to nullify the results and to either declare him as duly elected or to order for fresh elections. The High Court dismissed the petition and found that the election was conducted in accordance with the Constitution and electoral laws. An appeal at the Court of Appeal was dismissed and the High Court's decision was affirmed. On a further appeal at the Supreme Court, the respondents contended that the Supreme Court had no jurisdiction to hear and determine the matter as it did not raise issues of constitutional interpretation and application and certification that it raised issues of general public importance was not sought. The 3<sup>rd</sup> respondent raised a preliminary objection on the question of jurisdiction.

### **Issues**

Whether a second appeal contesting the validity of an election of member of National Assembly that had been dismissed at both the High Court and Court of Appeal raised issues of constitutional interpretation and application to warrant an appeal to the Supreme Court.

### **Held**

1. In concluding that the elections were conducted in accordance with the Constitution and the electoral laws, the High Court noted that the petition was not complex and the issues raised were straightforward. That was an indication that the petition did not raise issues of interpretation or application of the Constitution.
2. The High Court and the Court of Appeal did not interpret or apply the Constitution. Therefore an appeal on questions of constitutional interpretation and application could not lie at the Supreme Court.
3. The cause did not raise any cardinal issues inviting the interpretation of any provision of the Constitution. The electoral process drew legitimacy from the broad lines of the Constitution and from electoral laws. It was necessary for a litigant to indicate the issues requiring interpretation or application of the Constitution before the Supreme Court could assume jurisdiction over a matter. Generally, the following principles were applicable:-
  - a. in election petitions before the court, a party could not invoke the court's jurisdiction under article 163 (4) (a), where the trial court had found that alleged irregularities and malpractices were not proved.
  - b. The articles of the Constitution cited by a party as requiring interpretation or application by the court, had to have required interpretation or application at the trial court, and to have been a subject of appeal at the Court of Appeal; in other words, the article in question had to have remained a central theme of constitutional controversy, in the life of the cause.
  - c. A party seeking the court's intervention had to indicate how the Court of Appeal misinterpreted or misapplied the constitutional provision in question. The constitutional provision had to have been a subject of determination at the trial court.
  - d. As a logical consequence of the foregoing, a party had to indicate to the court in specific terms, the issue requiring the interpretation or application of the Constitution, and to signal the perceived difficulty or impropriety with the appellate court's decision.

*Petition of appeal dismissed.*

### **Orders**

- i. *The preliminary objection dated September 14, 2018 was upheld.*



- ii. *The petition of appeal dated September 5, 2018 was struck out.*
- iii. *Parties bore their costs.*

## Citations

### Cases

#### Kenya

1. *Aviation & Allied Workers Union of Kenya v Kenya Airways Limited & 3 others* Petition 4 of 2015; [2017] KESC 11 (KLR) - (Followed)
2. *Kidero & 4 others v Waititu & 4 others* Petition 18 & 20 of 2014 (Consolidated); [2014] KESC 11 (KLR) - (Mentioned)
3. *Munya v Kitbinji & 2 others* Petition 2B of 2014; [2014] KESC 38 (KLR) - (Followed)
4. *Nduttu & 6000 others v Kenya Breweries Ltd & another* Petition 3 of 2012; [2012] KESC 9 (KLR) - (Explained)
5. *Ngoge v Kaparo & 5 others* Petition 2 of 2012; [2012] KESC 7 (KLR) - (Mentioned)
6. *Odinga & 7 others v Independent Electoral and Boundaries Commission & 3 others* Petition 5, 3 & 4 of 2013 (Consolidated); [2013] KESC 1 (KLR) - (Explained)

### Statutes

#### Kenya

1. Constitution of Kenya articles 81, 86, 163(4)(a)(b) - (Interpreted)
2. Election Offences Act (cap 66) sections 6(a); 10(1)(a) - (Interpreted)
3. Elections (General) Regulations, 2012 (cap 7 Sub Leg) regulations 5(5); 73(2); 83 - (Interpreted)
4. Elections Act (cap 7) sections 2, 83, 85A - (Interpreted)
5. Evidence Act (cap 80) sections 107 (1); 108 - (Interpreted)
6. Supreme Court Rules, 2012 (cap 9B Sub Leg) rule 33 - (Interpreted)

### Advocates

None mentioned

## JUDGMENT

### A. Introduction

1. This is an appeal against the judgment of the Court of Appeal dated July 25, 2018, in Election Petition of Appeal No. 16 of 2018, which affirmed the decision of the High Court dismissing the petitioner's appeal. The petitioner herein had contested the election of 3<sup>rd</sup> respondent as the Member of the National Assembly for Bonchari Constituency.

### B. Background

2. Following the 8 August 2017 General Elections, the 3<sup>rd</sup> respondent was declared to be the duly elected Member of the National Assembly for Bonchari Constituency, having garnered 11,934 votes. There were 11 contestants in this election. The petitioner came second, having garnered 9,281 votes. He contested the election results before the High Court, as he was convinced that he had not, as a fact, and by lawful criteria, lost to 3<sup>rd</sup> respondent.
3. In his petition at the High Court at Kisii, in Election Petition No. 2 of 2017, the petitioner raised several grounds regarding perceived irregularities in the election process, which he urged to have affected the results. These related to: the tallying and declaration of results; violence and intimidation in the course of voting; bribery; improper sorting of votes; campaigning at polling stations; denial of voters' right to vote; agents turned away from polling stations; compromised process of aid to the elderly,



- by the Presiding Officer; insecurity for ballot boxes after vote-counting; voter-record discrepancy; undue influence; stuffing of votes in ballot boxes; conspiratorial acts against the petitioner; want of impartiality, neutrality, efficiency, accuracy and accountability on the part of election officials.
4. On such grounds, the petitioner sought a declaration nullifying the election, and ordaining that he was the duly-elected Member of the National Assembly for Bonchari Constituency. In the alternative, he sought an Order for the conduct of fresh elections.
  5. The petitioner also made prayers for the 1<sup>st</sup> and 2<sup>nd</sup> respondents to be directed to avail all records in their custody relating to numbers of voters identified by the electronic voter identification device (EVID); electoral Forms 32A; and polling station diaries for every polling station. In addition, he sought scrutiny and recount of all votes cast.
  6. The respondents contested the petition, their stand being that the election process was wholesome, having been conducted in a free, fair, transparent and verifiable manner.
  7. In the course of the trial, a number of interlocutory applications were dispensed with, these being:
    - (a) an application by the 3<sup>rd</sup> respondent, dated 26 September 2017, for extension of time within which to file and serve his answer to petition, as well as the witness statements, and for such documents filed out of time to be deemed to have been duly filed and served;
    - (b) an application by the 1<sup>st</sup> and 2<sup>nd</sup> respondents of 2 October 2017, for the Court to extend time for filing and service of answer to the petition, and for replying affidavits filed and served out of time;
    - (c) the petitioner's application dated 28 September 2017, which sought to have the 1<sup>st</sup> and 2<sup>nd</sup> respondents' response to petition filed on 19 September 2017, and the affidavit of David K. Cherop, struck out;
    - (d) the petitioner's application of 28 September 2017, which sought to have the 3<sup>rd</sup> respondent's response to the petition filed on 21 September 2017, as well as the respondents' replying affidavit, and witness affidavits, struck out.
  8. In a composite Ruling dated 9 November 2018, the applications by the 3<sup>rd</sup> respondent and by the 1<sup>st</sup> and 2<sup>nd</sup> respondents (listed as (a) and (b) above) were allowed with costs to the petitioner. The applications by the petitioner against the 1<sup>st</sup> and 2<sup>nd</sup> respondents, and against the 3<sup>rd</sup> respondent, were dismissed, with each party bearing own costs.
  9. The petitioner made a further application dated 3 October 2017, seeking leave to lodge a supplementary affidavit, annexing polling-station diaries within the constituency, as well as copies of Form 32A (voter identification and verification form) used at the polling stations within the constituency.
  10. The 1<sup>st</sup> and 2<sup>nd</sup> respondents also made an application on 9 October 2017, seeking leave to lodge supplementary affidavits by the Presiding Officers of 14 polling stations listed in the application.
  11. In a composite Ruling dated 9 November 2018, in respect of the foregoing two applications, the applications were allowed in the public interest – that of enabling the electorate to express free political choice.
  12. The petitioner made another application dated 3 October 2017, for Orders of scrutiny and recount of votes in the entire constituency. Through his Ruling dated 11 December 2017, the trial Judge partially



- allowed the application, based on his analysis of the anomalies found in the polling-station diaries vis à vis the declaration Form 35A.
13. The trial Judge found it necessary to have a scrutiny and recount of the votes cast in 12 polling stations. Such a process was restricted in purpose, to the ascertainment of the number of valid votes cast at each polling station, and attributed to each candidate, as well as any unaccounted - for votes, and the cumulative votes for the candidates in the 12 polling stations.
  14. In compliance with the said ruling, the Deputy Registrar who supervised the scrutiny and recount exercise, filed a written report which became part of the record of proceedings.
  15. The matter then proceeded to hearing; and in his judgment dated February 27, 2018, Ndungu, J set out the following issues for determination:
    - (i) whether the petitioner has enjoined all parties he has complained about, and the effect of any omission;
    - (ii) whether the elections in Bonchari Constituency were conducted in accordance with the principles laid down in the Constitution and the electoral law;
    - (iii) whether the 3<sup>rd</sup> respondent and/or his authorized agents were involved in electoral malpractices or bribery, or breach of the code of conduct;
    - (iv) whether there were irregularities committed during the entire electoral process;
    - (v) if there were irregularities or illegalities, what was their impact, if any, on the integrity of the election?
    - (vi) whether the 3<sup>rd</sup> respondent was validly elected as Member of the National Assembly for Bonchari Constituency;
    - (vii) how do the costs of this petition devolve?
    - (viii) whether the 4<sup>th</sup> petitioner was entitled to scrutiny and recount of votes.
  16. The learned judge considered the pleadings and evidence, as well as the submissions of counsel, and came to the conclusion that the election of Member of the National Assembly for Bonchari Constituency was conducted within the terms of the Constitution and the electoral law; and he dismissed the petition.
  17. Being aggrieved, the petitioner filed an appeal in the Court of Appeal at Kisumu, being Election Petition of Appeal No. 16 of 2018. He framed ten issues for determination, which the appellate court resolved into just two, namely:
    - (i) whether the appeal was properly before it, in the light of the pre-emptory provisions of section 85A of the [Elections Act](#) which limits its jurisdiction to matters of law only; and
    - (ii) whether the trial court erred in upholding the 3<sup>rd</sup> respondent's election.
  18. On the first question, the appellate court determined that the issues raised – interpretation and application of electoral principles and laws; whether the elections were credible, transparent, accountable free and fair; whether the results were properly declared; exercise of discretion to extend time; standard of proof; scrutiny and recount; disenfranchisement of registered voters; commission of electoral offences; and the effect of illegalities and irregularities — were issues of law which the appellate court was bound to entertain and resolve.



19. On the second question, the Court of Appeal held that the trial court's judgment had duly taken into account the applicable constitutional principles and laws; and accordingly, the appellant's cause was for dismissal.

### C. The Supreme Court: Appellant's Case

20. [The petitioner's appeal, dated September 5, 2018, is lodged on the basis of article 163 (4) (a) of the *Constitution*, and rule 33 of the *Supreme Court Rules, 2012*. It rests on several grounds, set out in the body of the petition of appeal, thus:
- (i) the judges of appeal erred in failing to find that the 1<sup>st</sup> and 2<sup>nd</sup> respondents did not conduct a credible and accountable election pursuant to articles 81 and 86 of the *Constitution*;
  - (ii) the appellate court erred, by failing to find that the 1<sup>st</sup> and 2<sup>nd</sup> respondents had not complied with the court order requiring them to supply the petitioner with the record of voters identified by the electronic voter identification device at every polling station;
  - (iii) the Court of Appeal misapplied the provisions of the Constitution, in upholding the High Court's decision without independent assessment, and by its default in the exercise of discretion;
  - (iv) the Court of Appeal erred in law in allowing the respondents to defend the petition on the basis of time-barred responses, filed irregularly;
  - (v) the appellate court erred in law, in failing to find that there had been no proper declaration of results according to the Constitution and the electoral law, and that the purported declaration was a nullity;
  - (vi) the appellate court erred in law, by improper interpretation and application of the law on scrutiny and recount, contrary to established precedent, and contrary to the terms of the Constitution.
21. The appellant now proposed the following specific issues for determination before this court:
- (i) whether appellate court judge erred in failing to find that the 1<sup>st</sup> and 2<sup>nd</sup> respondents did not conduct a credible and accountable election, as required by the *Constitution*;
  - (ii) whether the learned Judges of Appeal misdirected themselves in the interpretation of articles 81 and 86 of the *Constitution*;
  - (iii) whether the Court of Appeal erred by upholding an election that was marred with violence and intimidation;
  - (iv) whether the Court of Appeal erred, by holding that the petitioner had not sought election records relating to the relevant election, and also erred in its estimation of the effect of the 1<sup>st</sup> respondent's failure to comply with court orders on the same.
22. The appellant sought the following reliefs:
- (a) the petition of appeal be allowed with costs;
  - (b) the judgment of the Court of Appeal be set aside, and in place thereof, certain orders be made, to this effect:



- (i) a declaration that the National Assembly Election for Bonchari Constituency was not conducted in accordance with the Constitution and the applicable law, rendering the declared result a nullity;
  - (ii) a declaration that the 3<sup>rd</sup> respondent was not validly elected as the Member of the National Assembly for Bonchari Constituency, and the declaration by the 2<sup>nd</sup> respondent is invalid;
  - (iii) an order for the conduct of fresh election for Member of the National Assembly for Bonchari Constituency;
- (c) that, this court be pleased to award the petitioner costs in respect of the proceedings in the first two superior courts.
23. The 3<sup>rd</sup> respondent filed a preliminary objection, of September 14, 2018, contesting this Court's jurisdiction to entertain this appeal. He rested his case on the following grounds:
- (i) the grounds of appeal are flawed, for want of a case involving interpretation or application of the Constitution;
  - (ii) the grounds of appeal are not premised on any factual findings emanating from both the trial court and the Court of Appeal;
  - (iii) neither this court nor the Court of Appeal has certified the appeal herein as a matter of general public importance – thus meriting a hearing at the Supreme Court.

#### **D. Submissions of Counsel – In Summary**

24. The petitioner, in his written submissions filed on October 1, 2018, urges that this court has jurisdiction to entertain the appeal under article 163 (4) (a) of the Constitution, in the light of this court's decision in *Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others*, S.C Petition No 2B of 2014 [2014] eKLR. He submits that the entire petition rests upon interpretations of articles of the Constitution.
25. The petitioner contends that the election was not credible, or accountable in terms of the Constitution, and that such impropriety offended the supreme law, and negated the validity of the election.
26. He contends that he had adduced evidence of constitutional cast, showing a nexus between the Presiding and Deputy Presiding Officers, as supporters of the 3<sup>rd</sup> respondent, that negated the principles of impartiality and neutrality under article 81 of the Constitution. The petitioner submits that the results were predetermined, as the Form 35B record was dated August 8, 2017, yet the tallying was completed on August 9, 2017.
27. Learned counsel submitted that there had been a disenfranchisement of registered voters, and a prevention of voters from voting. It is urged that this election was conducted in a manner contrary to the terms of articles 81 and 86 of the Constitution.
28. It is also submitted that the appellate court judges misdirected themselves in the interpretation of articles 81 and 86 of the Constitution, with regard to the appeal before them. To fortify this allegation, counsel cites discrepancies that were admitted, in relation to various polling-station diaries; evidence of the Returning Officer who admitted the inaccuracy of the diaries; and breach of regulation 73(2) of the Elections (General) Regulations, 2012 in this regard.



29. The petitioner submits that the appellate court erred by upholding an election marred with violence and intimidation. He contends that the appellate court erred in holding that incidents of violence on the eve of the election were minimal, and that there was no evidence to demonstrate low voter-turnout due to violence. He urges that there was unchallenged evidence on this issue, which the appellate court judges overlooked.
30. The petitioner contends that the failure by the 1<sup>st</sup> respondent to comply with lawful court orders was a ground for nullifying the election, an issue which the appellate court overlooked. He urges that non-compliance with court orders entails grave implications for the transparency, verifiability and accountability of the disputed election.
31. The 3<sup>rd</sup> respondent, in his preliminary objection to the appeal, invokes earlier decisions of this court: *Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd. & Another*, SC Petition No. 3 of 2012 (2012) eKLR; and *Aviation and Allied Workers Union of Kenya v. Kenya Airways Limited & 3 Others*, Supreme Court Petition No. 4 of 2015 (2017) eKLR. On that basis, he submits that the petitioner has not raised a single constitutional issue bearing a nexus to the petition, such as would have called for the interpretation and/or application of the Constitution, by the High Court. He urged that, mere invocation of various articles of the Constitution, in one's pleading, does not in itself mean that such sections of the Constitution are truly in contention.
32. The 3<sup>rd</sup> respondent contends that neither of the two superior courts had been engaged in the task of applying or interpreting the Constitution, in disposing of the matter in question. Learned counsel submit that no constitutional issues arose, warranting this court's pronouncement thereupon: and to buttress this assertion, he cited this court's decision in the case of *Peter Oduor Ngoge v. Francis Ole Kaparo & 5 Others*, Supreme Court Petition No. 2 of 2012 (2012) eKLR.
33. It was 3<sup>rd</sup> respondent's standpoint that the superior courts' reasoning, which sustained their common decision, was that the matter never took a trajectory of constitutional interpretation or application, as there were no issues touching on the interpretation or application of the Constitution.
34. Learned counsel submitted that the appeal does not lie as of right, and the same could only be entertained under this court's jurisdiction by virtue of article 163(4) (b) of the *Constitution*, which requires prior certification. Failing this condition, learned counsel submitted, the appeal becomes fatally defective, and with no standing before this court; and this court lacks jurisdiction to entertain this appeal.
35. Learned counsel, on the appellant's grounds of appeal, urged that the learned judges did not err by finding that the 1<sup>st</sup> and 2<sup>nd</sup> respondents had conducted a credible and accountable election, as required by article 81 and 86 of the *Constitution*.
36. On the appellant's ground that there had been a failure to supply the petitioner with a record of voters at every polling station, the 3<sup>rd</sup> respondent urged that this was not pleaded in the memorandum of appeal. Learned counsel urged that some five of the appellant's grounds clearly fell outside jurisdiction of the Supreme Court – these being privileged factual determinations by the trial court, pursuant to article 163(4) (a) of the *Constitution*.
37. The 1<sup>st</sup> and 2<sup>nd</sup> respondents, through the submissions of counsel, contested this appeal, and supported the 3<sup>rd</sup> respondent's preliminary objection. They urge that the petitioner's case is ordinary, and raises no matter of constitutional controversy; and to that effect they rely on past decisions of this court: *Lawrence Nduttu; Peter Ngoge; Munya*; and *Evans Odhiambo Kidero & 5 Others v. Ferdinand Ndungu Waititu and Others*, Sup. Ct. Petition No. 18 of 2014. The 1<sup>st</sup> and 2<sup>nd</sup> respondents submit that this



being a second appeal, factual issues, and conclusions or inferences thereon, are no longer proper subjects of inquiry, as the petitioner has called for interpretation and application of the Constitution.

38. The 1<sup>st</sup> and 2<sup>nd</sup> respondents submit that the petitioner has not demonstrated that the trial court and the appellate court had misapplied the law, in determining the matter before them. They ask for dismissal of the petition, contending that it by no means raises any cardinal issues of law, besides normal issues which have been dealt with appropriately and in the right forum.

#### **E. Issue for Determination**

39. The sole issue for determination, which crystallizes from the petition of appeal, the responses thereto, and the written and oral submissions of counsel, is whether this court has jurisdiction to entertain this appeal.

#### **F. The Supreme Court's Jurisdiction: Analysis**

40. [40] The 3<sup>rd</sup> respondent contests this court's jurisdiction to hear and determine this appeal, on the basis that such jurisdiction, under article 163 (4) (a) and (b) of the *Constitution*, has not been called forth. This contention is supported by the 1<sup>st</sup> and 2<sup>nd</sup> respondent.
41. The petitioner on the other hand, is of the view that this appeal lies as of right under article 163 (4) (a) of the *Constitution*. He urges that the law is now settled in this regard, in respect of election petitions. He contends that the context of this petition is set in interplay with the scheme of interpretation; in this regard, he relies on this court's decision in *Munya*.
42. The record shows that the petitioner, Zebedeo John Opore, lodged this petition in the High Court on the September 5, 2017, on the premise that the election was so badly conducted, and so marred with irregularities, that the extent of such irregularities significantly affected the results.
43. The trial judge entred upon the task by highlighting the applicable principles of law which centred on: articles 1(2), 38, 81(e) and 86 of the *Constitution*; sections 2 and 83 of the *Elections Act*; regulations 5(5) and 83 of the *Elections (General) Regulations, 2012*; sections 107 (1) and 108 of the *Evidence Act* (Cap. 80, Laws of Kenya); sections 6 (a) and 10 (1) (a) of the *Election Offences Act*; the *Munya* case; and *Raila Odinga & 2 Others v. Independent Electoral & Boundaries Commission & 3 others*, SC Pet. No. 5 of 2013 as consolidated with Petitions 3 and 4 of 2013 [2013] eKLR.
44. The learned judge then proceeded to evaluate all the evidence before him, so as to verify the reality of the irregularities and malpractices such as were pleaded by the petitioner. He found the evidence insufficient to sustain the allegations of irregularities and malpractices. The judge observed (paragraph 171) thus: "There is no [proof] of irregularities, and where minor errors have been shown to exist, and where acts of violence are shown to have occurred, the same did not affect the conduct and results of the election."
45. The trial judge noted that that the petition was not complex, and the issues were generally straightforward. He came to the conclusion that the election of Member of the National Assembly for Bonchari Constituency was conducted within the terms of the Constitution and the electoral law.
46. The state of affairs obtaining, as thus depicted by the trial judge, signals to us that the cause in the High Court was distinctly short on the makings of an interpretation or application of the Constitution, as the situations alleged to have been in violation of the Constitution, were not proven in the first place.



47. When the matter went on appeal, one of the arguments made by the petitioner was that the trial court erred in law, in failing to properly interpret and apply the electoral principles set out in the Constitution – in particular articles 81 and 86 of the Constitution, apart from other electoral laws.
48. The appellant’s memorandum of appeal contained numbers of grounds of appeal, as follows: the trial judge erred in law by finding that the 1<sup>st</sup> respondent conducted a credible and accountable election within the Constitution and the electoral law; the ascertained instances of non-compliance with the law, and the irregularities, were insignificant, and not substantial enough to affect the integrity and quality of the general election; there was a proper declaration of results, according to the Constitution and electoral law; by allowing the respondents to defend the petition on time-barred responses filed irregularly; by raising the burden of proof inordinately high on matters that had to be proved; by limiting the extent, nature and scope of scrutiny and recount, and by refusing to allow the application for scrutiny and recount in totality; by failing to take into account the results of the scrutiny process in the context of the issues raised during trial; by dismissing solid and unchallenged evidence on violence, and setting unreasonably high standards of proof; by failing to appreciate the overall effect of the violence on the election; by unjustifiably dismissing wholesale the appellant’s concrete and largely-unchallenged evidence of electoral offences, illegalities, irregularities and malpractices; and by casting doubt on clear, cogent and concrete evidence of disenfranchising of registered voters, and of prevention of voters from voting.
49. It is to be noted that, in respect of the foregoing grounds, the petitioner did not fault the trial judge for misinterpretation or misapplication of the Constitution, and did not invite the appellate court to interpret or apply a particular provision of the Constitution.
50. The appellate court broke down the various grounds into two issues for determination, namely: whether the appeal was properly before it, in the light of the pre-emptory provisions of section 85A of the Elections Act (which limits the jurisdiction of the appellate court in election petition appeals to matters of law only); and secondly, whether the trial Court erred in upholding the 3<sup>rd</sup> respondent’s election.
51. Within the latter issue, the appellate court considered whether the trial court had properly interpreted and applied the electoral principles set out in the Constitution, and in other electoral laws; whether the elections were credible, transparent, accountable, free and fair, within the terms of the Constitution and electoral law; whether the declaration of the results was irregular, null and void; whether the trial court erred in extending time for filing and serving an answer to the petition and to affidavits; whether the trial court misconstrued the law on standard of proof, as regards violence, and its overall effect on the election; whether the trial court erred in limiting the scope, extent and nature of scrutiny and recount, and in considering the report of the scrutiny; whether it was in error, in holding that voters were not disenfranchised or prevented from voting; and lastly, whether the petitioner proved the alleged commission of election offences, and other illegalities, malpractices and irregularities, such as would justify nullification of the election.
52. The appellate court, in the discharge of its appellate duty, evaluated the merits of the judgment of the trial court, and held that the trial judge’s judgment was duly regular and conscientious, thus giving cause for dismissing the appeal. The court observed: “There is no doubt that all applicable constitutional principles and other electoral laws were taken into account by the court. On the evidence on record, the majority of the registered voters exercised their free will. The appellant did not persuade the court that, indeed, there were substantial breaches of the Constitution and other electoral laws [such] as would have warranted the nullification of the election.”



53. We have a basis, therefore, for drawing the conclusion that there was no issue of application or interpretation of the Constitution, before the appellate court, and so it made no move of such a kind.
54. The logical consequence, consequently, is that as there was no issue of constitutional controversy before both superior Courts, and so neither interpreted or applied the Constitution, quite in line with our dictum in Lawrence Nduttu & 6000 Others v Kenya Breweries Ltd and Another, Sup. Pet. No. 3 of 2012 [2012] eKLR, that “only appeals arising from cases involving the interpretation or application of the Constitution can be entertained by the Supreme Court”, the instant appeal lies not before this court.
55. We are, besides, of the perception that this cause does not raise any cardinal issues inviting the interpretation of any provision of the Constitution. And furthermore, we cannot perceive the conclusions of either superior court as having taken a trajectory of constitutional interpretation or application, in the terms of the Munya case, notwithstanding the petitioner’s claim.
56. We are alive, however, to the broader context of the electoral process: elections in general, draw legitimacy from the broad lines of the Constitution, and from the electoral laws. This generality, however, has to be crystallised into clearly-defined normative prescriptions, before the Supreme Court will take up an election appeal as a matter of course, by virtue of the terms of article 163(4) (a) of the Constitution.
57. Certain principles emerge from the terms of this judgement, as follows:
  - (a) In election petitions before this court, a party may not invoke the court’s jurisdiction under article 163 (4) (a), where the trial court had found that alleged irregularities and malpractices were not proved, as a basis then does not lie for an application or interpretation of the Constitution.
  - (b) The articles of the Constitution cited by a party as requiring interpretation or application by this court, must have required interpretation or application at the trial court, and must have been a subject of appeal at the Court of Appeal; in other words, the article in question must have remained a central theme of constitutional controversy, in the life of the cause.
  - (c) A party seeking this court’s intervention has to indicate how the Court of Appeal misinterpreted or misapplied the Constitutional provision in question. Thus, the said constitutional provision must have been a subject of determination at the trial court.
  - (d) As a logical consequence of the foregoing, a party must indicate to this court in specific terms, the issue requiring the interpretation or application of the Constitution, and must signal the perceived difficulty or impropriety with the appellate court’s decision.

## **G. Determination**

58. This court’s jurisdiction, as provided for under article 163 (4) (a) or (b) of the Constitution, has not been properly engaged in this cause, and so we decline to resolve the claim.

## **H. Orders**

59. Consequently, we make the following orders:
  - (a) The preliminary objection dated September 14, 2018 is upheld.
  - (b) The petition of appeal dated September 5, 2018 is hereby struck out.
  - (c) Parties shall bear their own respective costs.



DATED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF DECEMBER 2018.

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**M. K. IBRAHIM**

**JUSTICE OF THE SUPREME COURT**

.....

**J. B. OJWANG**

**JUSTICE OF THE SUPREME COURT**

.....

**S. C. WANJALA**

**JUSTICE OF THE SUPREME COURT**

.....

**NJOKI NDUNGU**

**JUSTICE OF THE SUPREME COURT**

.....

**I. LENAOLA**

**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

**REGISTRAR,**

**SUPREME COURT OF KENYA**

