REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ)

PETITION NO. E020 OF 2023

–BETWEEN–

HON. HARRISON GARAMA KOMBE.....APPELLANT

-AND-

KENGA STANLEY KARISA.....1ST RESPONDENT
INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....2ND RESPONDENT
AMINA ABUBAKAR SENG (MAGARINI CONSTITUENCY RETURNING OFFICER).....3RD RESPONDENT
MICHEAL THOYAH KINGI.....4TH RESPONDENT

Being an Appeal from the Judgment of the Court of Appeal at Mombasa (Gatembu, Lesiit and Odunga, JJ.A.) delivered in Malindi Election Petition Appeal No. E001 of 2023 on 28th July 2023)

Representation:

Mr. Kevin Wakwaya & Mr. Bryson Ometto for the appellants
(Rachier & Amollo LLP)

Mr. Wesley Gichaba & Miller Bwire for the 1st respondent
(Gichaba & Company Advocates)

Mr. Edwin Mukele, Mr. Julius Anyoka & Mr. Charles Lwanga for the 2nd and 3rd respondent
(Manyonge Wanyama & Associates LLP)

Ms. Tamari Katana for the 4th respondent
(Mayende & Busiega Advocates)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] This appeal arises from the judgment of the Court of Appeal upholding the determination of the High Court that the declaration by the 2nd and 3rd respondents of the appellant as the duly elected Member of National Assembly for Magarini Constituency in the general elections of 9th August 2022 was invalid as the election was not conducted in accordance with the Constitution and the law. The appeal presents three main questions for our determination; whether this Court is clothed with jurisdiction to entertain the appeal; whether the Court of Appeal, in affirming the decision of the High Court misinterpreted section 83 of the Elections Act; and whether the Court of Appeal misapplied the standard and burden of proof.

[2] In the course of the Court's consideration of these questions, it will be inevitable to examine, to the extent relevant to this appeal, certain operative principles of electoral law. In that regard, it is a constitutional right of every citizen to participate and freely express their will in a free and fair election based on universal suffrage through secret ballot. Free and fair elections ensure that the outcome reflects the genuine preferences of the electorate, only if the elections are transparent, free from violence, intimidation, improper influence, or corruption; and if they are administered in an impartial, neutral, efficient, accurate, and accountable manner. A transparent election allows the citizens to observe and scrutinize every stage of the electoral process, fosters trust in the integrity of the process, and eliminates fraud or manipulation. At the same time, such a process enhances accountability and engenders public trust.

[3] The 2nd respondent and its officials must in every election ensure that the system they adopt is simple, accurate, verifiable, secure, accountable, and transparent; that the votes cast are counted, tabulated and the results announced promptly at each polling station; and that those results are openly and accurately collated and promptly announced by the returning officer.

B. BACKGROUND

[4] The appellant, the 1st and 4th respondents, were amongst other candidates who contested for the seat of Member of National Assembly, Magarini Constituency, Kilifi County in the general elections held on 9th August 2022, in which by a narrow margin of only 21 votes, the appellant was declared the duly elected Member of the National Assembly for Magarini Constituency with 11,946 votes ahead of his closest contender, the 1st respondent's 11,925 votes. As would naturally be expected in such circumstances, the 1st respondent petitioned the High Court challenging the outcome and declaration contending that there were grave errors, flaws, fraud, illegalities, and irregularities committed by the 2nd and 3rd respondents; and that the overall effect of these errors was that the exercise failed to secure a free, fair, and credible election and subdued the will of the people of Magarini Constituency.

C. LITIGATION HISTORY

i. Proceedings in the High Court

[5] The 1st respondent filed High Court **Election Petition No. E001 of 2022** dated 7th September 2022 and later amended it on 12th October 2022. In the amended petition, which was premised on five grounds, the 1st respondent alleged that his agents were denied access to 4 polling stations; that Statutory Declaration Forms in 12 polling stations were falsified; that the number of votes cast in 6 electoral seats in 2 polling stations was different; that there were instances of vote padding and manipulation in 4 polling stations; and that the 2nd respondent, through its officers, committed election offences in the conduct of the election.

[6] According to the 1st respondent, his agents were denied access to Mjanaheri Primary School polling station, Masheheni Primary School polling station, Mapimo Primary School Streams 3 and 4, and Mapimo Youth Polytechnic Streams 2 and 5. Secondly, the 1st respondent sought to persuade the trial court that there were several Forms 35A whose results did not match the results posted on the 2nd respondent's portal, yet the 2nd and 3rd respondents proceeded to declare the appellant's victory on such results. More specifically, he complained that, apart

from the 2nd respondent relying on results that had been altered and not countersigned, he used results that were not properly and accurately tabulated. On the third ground, the 1st respondent argued that the total number of votes cast and accounted for by the 2nd and 3rd respondents differed significantly in the six electoral seats. Vuga Primary School polling station and Mapimo Central Primary School station 1 of 1 were identified as the scenes of this transgression.

[7] On the fourth ground, it was claimed that there were instances in 4 polling stations where Forms 35A were altered and used to transmit results after the 1st respondent's agents had already signed the original forms: in Kayadagamra Primary School, the 1st respondent's votes were reduced by 20 votes. The anomaly was only corrected upon the intervention of the 1st respondent's agent; in Adimaye Primary School, the votes were altered but were not counter-signed; in Mjanaheri Primary School, Form 35A was filled on 10th August 2022 at around 9 am, many hours after counting was complete; and in Kibaoni Primary School, votes were altered and the corrections not counter-signed to authenticate the corrections.

[8] Finally, on the fifth ground, the 1st respondent maintained that the manner in which the 2nd respondent through its officers at the polling stations and tallying centres conducted the elections, counted and tallied the votes, and transmitted the results was fraudulent and amounted to a muzzle on the electorates of Magarini Constituency. By altering and stamping Form 35As thereby inflating voter turnouts, and transmitting manipulated results in respect of Mapimo Youth Polytechnic polling station 1 of 6, the 1st respondent stated that the concerned presiding officers committed grievous electoral fraud. According to the 1st respondent, the agents were forced to sign a blank Form 35A, and thereafter the presiding officer altered the results and on realizing his intention, the agents raised their concern with the returning officer who, on 11th August 2022, decided to have the ballot box opened at the tallying centre where the anomaly was confirmed and corrected in the same Form 35A. It is the foregoing action of the 2nd respondent's presiding officers that led the 1st respondent to plead with the trial court to make a

finding that the officers had committed the offence of making false returns contrary to section 6(a) of the Elections Offences Act, 2016.

[9] For the outlined reasons, the 1st respondent asked the High Court to:

a) *invalidate the election of the appellant as the Member of National Assembly, Magarini Constituency.*
b) *declare that the 1st respondent was duly elected, having attained the majority vote in Magarini Constituency.*

In the alternative to (b) above,

c) *issue an order directing the holding of fresh elections for Member of National Assembly in Magarini Constituency.*
d) *declare that the non-compliance, irregularities, and improprieties in the impugned election for Member of National Assembly, Magarini Constituency were substantial and significant that they affected the integrity and quality of the election and the result thereof.*
e) *order for scrutiny and recount of the ballots cast.*
f) *report to the DPP for appropriate action the election offences committed by the 2nd respondent's presiding officers as pleaded and determined.*
g) *condemn the appellant, 2nd and 3rd respondents to pay the 1st respondent's costs and incidentals to this petition; and*
h) *grant such further, other, and consequential orders as the Court may lawfully make.*

[10] The 2nd and 3rd respondents on the other hand generally denied all the allegations and insisted that the election for Member of Parliament for Magarini Constituency was conducted in accordance with Articles 81 and 86 of the Constitution and Electoral Laws and Regulations, and that if there were any irregularities, they did not affect the final result; that the appellant garnered the most votes in the election and the 3rd respondent validly declared him as the duly elected Member of the National Assembly.

[11] According to the 2nd and 3rd respondents, the accredited agents were allowed in polling stations and of free will, signed Forms 35A which were then ratified by chief agents by signing Forms 35B. In their view, the differences in results, if at all, were attributed to human error, and in any case, no candidate benefited from the said errors. In any event, when the errors were discovered, they were corrected. Again, no candidate lost votes in that case. The 2nd and 3rd respondents further urged the court to conclude that errors such as vote interchange did not affect the votes or results of any candidate. As for the ballots that were found to lack IEBC stamps, a decision was taken to reject them to avoid ballot stuffing. They too, denied having committed any election offence. That isolated instances of irregularities where disclosed, were reported to the 2nd respondent, and any errors in Forms 35A and 35B were honest human errors that were rectified in the presence of the agents and chief agents.

[12] In a judgment delivered on 3rd March 2023, the High Court (*Mabeya, J*) allowed the petition and awarded costs to the 1st respondent. Addressing each of the five grounds advanced by the 1st respondent, the court found, in respect of the *alleged denial of access of the 1st respondent's agents in the polling stations*, that of the 6 witnesses called by the 1st respondent, none testified as having been denied entry into their respective polling stations, hence the ground failed. On the *alleged difference in the number of votes cast in the 6 elective posts*, the court similarly found no proof as the results of the other elective seats were not presented to ascertain the fact. Accordingly, this ground was dismissed as well.

[13] On the *alleged falsification of Statutory Declaration Forms in 12 polling stations, vote padding and manipulation in 4 polling stations,* the court considered the evidence of PW3, the 1st respondent's agent in Mapimo Youth Polytechnic Stream 1 to the effect that the Returning Officer, upon being informed that the Presiding Officer, had interchanged the 1st respondent's votes with those of the appellant's, ordered a recount of the votes. The trial court found this allegation credible as it was also admitted by R1W2**,** the Returning Officer, who

disclosed that, upon realizing that the original Form 35A had been sealed in one of the several ballot boxes, she called some of the agents and the Presiding Officer of the polling station and in their presence broke the seals on the ballot box to retrieve the original form. The court further found that the Returning Officer did not stop at retrieving the original Form 35A from the ballot box but went ahead, not only to conduct a recount, but also caused the Presiding Officer to alter the results at the tallying centre, contrary to the pronouncement in ***IEBC v. Maina Kiai & 5 others;*** Civil Appeal 105 of 2017; [2017] eKLR (the ***Maina Kiai Case***) that the votes counted at the polling station are final, and in violation of Regulations 81, 83, 86, and 93 of the Elections (General) (Amendment) Regulations 2017 which declares that once ballot boxes are sealed at the polling station, there is no authority whatsoever to break them open except by an order of the court.

[14] In addition, the court was persuaded by the evidence before it that, contrary to his admitted duty, the Presiding Officer (R1W7) failed to enter any comments on the alterations made and to indicate the particulars of the agents who witnessed the exercise. The court rejected the Returning Officer's reliance on internal manuals such as *"the training manual and guide for returning officers'* or the guidelines in the Polling Station Diary (PSD) to justify breaking of the seals, observing that, in ***Ahmed Abdullahi Mohamed & Anor v. Hon Mohamed Abdi Mohamed & 2 Others;*** Election Petition No 14 of 2017; [2017] eKLR, this Court found such an action irregular and could not be cured by citing internal rules. The transparency of the entire process was paramount, this Court emphasized.

[15] From the record, the trial court was also satisfied that the results indicated in Form 35A were falsified and consequently, the contents of Form 35B were inevitably inaccurate. Secondly, the veracity or accuracy of all Form 35As that were unsigned by the candidates or their agents without the presiding officer assigning any reason for this failure remained doubtful. All these, coupled with the admission of discrepancies between Forms 35A and 35B in several stations as well

as instances whereby the 1st respondent's votes were reduced, altered, or interchanged, led the court to arrive at the conclusion that the 1st respondent had established that the election was not conducted substantially in accordance with the Constitution and the law.

[16] On the *alleged election offences*, the learned Judge found that the only offence established from the totality of the evidence was that of failing to stamp ballot papers and counterfoils contrary to Regulation 69 of the Election (General) Regulations, 2012. However, no particular official was identified for reference to the Director of Public Prosecutions (DPP) for investigations and prosecution.

[17] On *whether the irregularities complained of affected the results of the election*, the court was of the view that, considering all the glaring anomalies and taking into account all the incidents of non-compliance with mandatory and important provisions of the law, augmented by the scrutiny report, the election was not transparent, free, and fair. There was also substantial non-compliance with the Constitution and electoral law which compromised the sanctity of the vote. There was furthermore the use of false or irregular statutory forms as well as vote stuffing and there were glaring errors committed by the Presiding Officers and the Returning Officer which affected the verifiability of the election. In the court's view, considering the slim margin of 21 votes, those irregularities, irresistibly pointed to an election that was flawed, and whose results were unreliable. Consequently, the court ultimately came to the conclusion that the election for the Member of the National Assembly for Magarini Constituency was not conducted in accordance with the Constitution and the law. As a result, the election was declared null and void and the 2nd respondent was ordered to conduct a by-election in accordance with the law. The court awarded the 1st respondent costs capped at 1 million to be borne by the appellant.

*ii. **Proceedings in the Court of Appeal***

[18] The appellant was dissatisfied by the foregoing outcome and moved the Court of Appeal by instituting ***Election Petition Appeal No. 1 of 2023*** based on the following ten grounds: that the learned Judge;

i. *Erred in law in reducing the standard of proof required in election petitions to that of mere speculation and supposition.*
ii. *Erred in law in his interpretation of Articles 81 and 86 of the Constitution, sections 82 and 83 of the Elections Act, and Part XIII of the Elections (General) Regulations, 2017.*
iii. *Misdirected himself in law in referring to provisions of the law that are non-existent and imposing obligations not recognized in law.*
iv. *Erred in law in making determinations of matters not pleaded by the 1st respondent, going outside the ambit of the parties' pleadings.*
v. *Misdirected himself in law in finding admissions where there were none.*
vi. *Erred in law in totally failing to consider the appellant's evidence, testimony, and submissions.*
vii. *Misdirected himself in law by allowing amendment of the petition outside the timelines dictated by the law.*
viii. *Erred in law when he allowed scrutiny and recount of votes even when no basis had been laid for ordering a scrutiny and recount of votes.*
ix. *Misdirected himself in law by selectively relying on the scrutiny report to find for the 1st respondent.*
x. *Misdirected himself in law when he failed to consider relevant matters and took into consideration irrelevant matters in his decision.*

[19] Similarly, the 2nd and 3rd respondents filed a notice of cross-appeal dated 14th April 2023 premised on the following grounds: that the learned Judge;

i. *Erred in law by shifting the evidentiary burden of proof to the respondents before the initial burden was discharged.*
ii. *Erred in law by ignoring the Registrar's report dated 20th January 2023 on scrutiny and recount that confirmed that the appellant had been duly declared as the Member of National Assembly for Magarini Constituency rendering the entire exercise of recount and scrutiny a mockery, futile and useless.*
iii. *Misdirected himself in law by relying on evidence of the 1st respondent without considering the evidence of the 1st, 2nd, and 3rd respondents.*
iv. *Misdirected himself in law by ordering that the 3rd respondent personally pays costs of the petition.*
v. *Misdirected himself in law by considering extraneous issues which were not pleaded.*
vi. *Misdirected himself in law by allowing amendment of the petition which expanded the scope of the petition.*
vii. *Misdirected himself in law in finding admissions where there were none.*
viii. *Erred in law in his interpretation of Articles 81 and 86 of the Constitution, section 82 of the Elections Act and Part XIII of the Elections (General) Regulations 2017.*
ix. *Erred in law by failing to consider the Appellant's, 2nd, and 3rd Respondents' evidence, testimony, and submissions.*

[20] Beginning with the appellant's appeal, it was submitted that the trial court erroneously placed a burden on him and the 2nd and 3rd respondents to disprove the 1st respondent's allegations; that the main purpose of opening the ballot box was to retrieve the original form 35A that was sealed in a box, and not to recount the votes. However, the recount was incidental to the opening of the box and was done in the presence of agents; the results were impugned based on repealed law since Regulation 69 of the Election (General) Regulations 2012 requiring

counterfoils to be stamped by presiding officers was amended and or repealed by Legal Notice 72 of 2017; that the legal requirement to place Form 42A for rejected votes in the ballot box containing the cast ballots is contrary to Regulation 81 of the Elections (General) Regulations 2012 which requires that they be placed in separate ballot boxes; and that the declaration forms for Mjanaheri Primary School and Majenejeni were signed by the agents as well as the Presiding Officer and the excusable error in writing Majenjeni instead of Mjanaheri did not affect the results for Mjanaheri Polling Station. According to the appellant, the trial court therefore erred in its interpretation of Articles 81 and 86 of the Constitution as well as sections 82 and 83 of the Elections Act and Part XIII of the Elections (General) Regulations 2017.

[21] On their part, the 2nd and 3rd respondents submitted that the allegations of denial of access of the 1st respondent's agents in polling stations, false and inaccurate statutory declaration forms, the difference in the number of votes cast in 6 elections, vote padding and manipulation as well as allegations of election offences were all not proved and even after the scrutiny exercise, it was clear that the appellant was ahead of the rest of the candidates, save for minor mistakes attributed to fatigue and human error. According to the 2nd and 3rd respondents, internal regulations permitted that as a method of dispute resolution, materials could be retrieved as long as the results were not changed.

[22] On his part, the 1st respondent argued that, once the appellant established evidence to warrant impugning the election result, the burden shifted to the 2nd and 3rd respondents to prove that the election was conducted in accordance with the Constitution and the law. It was therefore urged that there was an admission of interchange of the 1st respondent's votes at Kayadagamra Primary School and Mapimo Youth Polytechnic Stream 1, reopening of the ballot box, and recount at the tallying centre contrary to Regulations 81, 83, 86, and 93 with no countersigning of the alterations calling into question the credibility and integrity of the declaration of election result.

[23] To the 1st respondent, the trial court correctly identified the law; and considered the oral evidence of witnesses, witness affidavits, and from the totality of the evidence, was justified in the shifting of the burden of proof. The 1st respondent also urged that the scrutiny report established that there were missing Forms 42A for rejected votes in some polling stations, contrary to Regulation 81(1) of the Election (General) Regulations 2012. It was concluded that in light of the pointed-out irregularities, it was inconceivable for the court to come to a different conclusion. The election did not also meet the constitutional and statutory threshold in terms of ***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] eKLR ***(Raila 2017)***. The 4th respondent for his part was fully in agreement with the entire finding and final determination of the trial court.

[24] In a judgment rendered on 28th July 2023, the appellate court found no merit in both the appeal and cross-appeal and dismissed them with costs to the 1st respondent to be borne by the appellant. Agreeing with the trial court, the appellate court found, on the first ground that by opening the ballot box and proceeding to conduct a recount at the tallying centre, the 3rd respondent went against the principles enunciated in the ***Maina Kiai*** case; that the infringement was compounded by the explicit admission of the Presiding Officer (R1W7) on the alterations to the results in the absence of some of the candidates' agents. The court also agreed that the 2nd respondent could not resort to internal manuals to bypass settled law and judicial decisions.

[25] The learned Judges observed that the improper rejection of 3 votes that ought to have benefited the 1st respondent; the entry of 224 votes instead of 244 votes in Kayadagamra Primary School; the wrong tabulation of the total votes; and the omission to indicate in the Polling Station Diary the reasons why only some of the

agents signed Form 35A, considered singularly, may not have affected the outcome of the election. But their cumulative effect did.

[26] The appellate court, however, agreed with the appellant on three fronts, thereby reversing the High Court to that extent. Regarding *the declaration of the results for Majenjeni instead of Mjanaheri that was explained by the 2nd and 3rd respondents as having been out of fatigue and human error which in their opinion did not affect the results*, the court agreed that this issue was not pleaded in the first instance and the fact that it might have come from the scrutiny was not a valid reason to rely on it as a basis for the nullification of the results. To that extent, the court found an error in the trial court considering the allegation that, by fact of the mixup of the two polling stations, the results for Majenjeni were relied on instead of those from Mjanaheri. This position, the court held also applied to the findings of the trial court regarding the allegation of unstamped counterfoils of the ballots which was relied upon as evidence of ballot stuffing.

[27] The appellate court also set aside the conclusion by the trial court to the effect that an election offence had been committed by the 3rd respondent's failure to stamp ballot papers and counterfoils. The appellate court made it plain that the finding was made *per incuriam*. Regulation 69 of the Election (General) Regulations 2012 requiring counterfoils to be stamped by the presiding officers was amended and or repealed by Legal Notice No. 72 of 2017 and it therefore follows that the holding of the trial court, in this regard was erroneous.

[28] Similarly the appellate court set aside the finding that false or irregular statutory forms were used and that there was voter stuffing. Since this conclusion was based on the allegation that the results of Majenjeni were relied on instead of those from Mjanaheri, it was likewise found to be erroneous.

[29] On the whole, it is our assessment that the decision of both superior courts below turned on the next question. Both were unanimous that there were glaring errors committed by the Presiding Officers and the Returning Officer which affected the verifiability of the election. The Court of Appeal, while relying on

Raila 2017 and ***Odinga & 16 others v. Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae)*** *(*Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated)) [2022] eKLR ***(Raila 2022)*** reiterated that the opening of the ballot box at the tallying centre and the conduct of the recount without ensuring that all agents were present was a grave irregularity.

[30] By undertaking a recount at the tallying centre and in the absence of the parties, the appellate court declared that the 3rd respondent violated the constitutional tests of transparency and accountability, not to mention the fact that the 2nd and 3rd respondents admitted this infringement. The court further expressed the view that in appropriate circumstances, an election may be nullified where several minor irregularities are committed together with a major one, whose effect may overshadow the minor ones. For example, the unlawful reopening of the ballot box and conducting a recount at the tallying centre without the participation of all the agents and without countersigning the alterations arising therefrom was a major error. This fact, coupled with the narrow margin between the two top contenders was sufficient basis for nullifying the results. The court however clarified that a court will not nullify the results of an election merely for the reason of a small margin without other factors being considered.

[31] In the result, the court upheld the High Court's determination that the elections for Magarini Constituency were not conducted in accordance with the Constitution and the law and that the irregularities cited in the petition by the 1st respondent affected the result. Consequently, it dismissed both the appeal and the cross-appeal and affirmed the award of costs by the High Court. As for the appeal, the court likewise awarded costs to the 1st respondent capped at Kshs. 1,500,000 to be borne by the appellant.

*iii. **Proceedings in the Supreme Court***

[32] Typical of closely contested elections, the appellant, unrelenting, once again moved this Court by filing ***Supreme Court Petition No. E020 of 2023*** dated 1st August 2023 praying for orders, that:

a. *The petition be allowed, and the judgment and order of the Court of Appeal dated and delivered on 28th July 2023 be set aside;*
b. *A declaration be issued that the 2nd and 3rd respondents conducted the Member of National Assembly for Magarini Constituency election in a free, fair and a credible manner in accordance with the Constitution, the Election Act 2011 and other relevant laws;*
c. *A declaration be issued that the petitioner was validly elected and declared as a Member of the National Assembly for Magarini Constituency;*
d. *Pursuant to section 86 of the Elections Act, the Certificate of the Court as to the validity of the election be issued to the Independent Electoral and Boundaries Commission and the Speaker of the Senate(sic);*
e. *Cost be awarded to the petitioner.*

[33] Broadly speaking, the arguments on which the judgment of the Court of Appeal is assailed may be summarized as follows; the Court of Appeal erred in law and misapprehended the Constitution by:

i. *Failing to apply the conjunctive nullification test set out in Section 83 of the Elections Act.*
ii. *Misapplying and misinterpreting the provisions of Articles 81 and 86 of the Constitution.*
iii. *Finding that the alleged irregularities did not necessarily affect the outcome of the election on one hand but proceedings to find that the election was so badly conducted that the results could not be termed as being verifiable.*

iv. *Holding that there were glaring non-compliance with the law without identifying the specific law and the obligations imposed by the said law in relation to the alleged non-compliance.*

v. *Failing to properly apply the findings of the scrutiny report which had rebutted every single allegation in the 1st respondent's petition.*

vi. *Regurgitating the High Court's findings and/or conclusions relating to alterations without countersigning and wrong entries in various polling stations without interrogating whether the same were based on the evidence on record.*

vii. *Misapplying the jurisprudence of **IEBC v Maina Kiai & 5 Others**, Civil Appeal No. 105 of 2017 to the allegation regarding Mapimo Youth Polytechnic.*

viii. *Failing to find that a majority of what the 1st respondent and the High Court termed as irregularities and illegalities were actually cases that were dealt with by the 2nd and 3rd respondents prior to the declaration of results and/or filing of Forms 35A.*

[34] In opposing the appeal, the 1st respondent has filed a notice of preliminary objection, grounds of opposition, and grounds for affirming the decision, all dated 25th August 2023 as well as submissions dated 12th October 2023 in support of the notice of preliminary objection together with submissions dated 12th October 2023 opposing the petition. By a ruling of this Court made on 16th February 2024, the submissions in support of the preliminary objection were struck out for having been filed out of time. The 2nd and 3rd respondents on their part filed submissions dated 12th October 2023 in support of the appeal, while the appellant, on the other hand, filed a replying affidavit sworn by *Harrison Garama Kombe* on the 14th September 2023 opposing the preliminary objection.

D. PARTIES' SUBMISSIONS

i. Appellant

[35] The appellant's written submissions opposing the preliminary objection and in support of the appeal were filed, respectively on 14th September 2023 and 28th September 2023. On *jurisdiction*, the appellant reiterated that the appeal involves questions of interpretation and application of Articles 81 and 86 of the Constitution; that the 2nd respondent was constitutionally enjoined by Article 86 of the Constitution to conduct the election in a particular manner; that in their decisions, learned Judges of both the High Court and Court of Appeal separately reached a determination that the election was not conducted in accordance with the Constitution and that it did not meet the threshold of Article 81 of the Constitution. This conclusion, the appellant argued amounted to the courts interpreting and applying the two provisions of the Constitution.

[36] The appellant reaffirmed the validity of the principle that the *burden of proof* lies with whoever wishes the court to rely on a particular position as the true state of affairs. Conversely, the *standard of proof* in election cases is settled as being one above the preponderance of probabilities and below proof beyond reasonable doubt. It is the appellant's contention that the appellate court misapplied these well-established principles by failing to consider that the trial court shifted the burden of proof from the 1st respondent to the appellant, the 2nd and 3rd respondents in as far as the events in Mapimo Youth Polytechnic were concerned. In the same vein, the appellant argued that the 1st respondent did not prove his claim, and therefore the two courts erred in making findings that were not supported by the evidence presented and on record. The standard of proof, for this reason, was not attained according to the appellant.

[37] On the *contextualization of human errors vis-à-vis Article 81 of the Constitution*, the appellant wondered how explained human errors, which are corrected prior to the declaration of results, and which corrections are witnessed by agents could amount to a violation of Article 81 of the Constitution. It is this

misdirection that in the appellant's opinion led the court to misapply the nullification test under Section 83 of the Elections Act. The appellant argued that the section was intended to avoid turning elections conducted by human beings into perfection contests. The section gives an allowable margin of freedom and flexibility to the effect that, faced with allegations of irregularities in an election, justice demands that the court should assess whether the said irregularities vitiated the voters' choice and thereby affected the overall outcome of the election, as was declared in ***Clement Kungu Waibara v. Anne Wanjiku Kibe & Another*** [2019] eKLR. The appellant expressed surprise that the court, after admitting that the irregularities may not have affected the election, still went ahead to hold that those very results as announced by the 3rd respondent were not valid.

[38] According to the appellant, the pronouncement in the ***Maina Kiai case*** in respect of *claims about the events in Mapimo Youth Polytechnic Polling Station 1 of 6*, could only apply, and no election could be nullified, unless the reasons advanced for the nullification were weighed against the principles contained in Articles 81 and 86 of the Constitution. By recalling all agents to the tallying centre to witness the retrieval of the form and proper recording of the declared results, the Presiding Officer was satisfying the basic and central tenets of the general principles under the two provisions; and though the events complained of may have been irregular, they did not affect the will of the voters.

[39] Were *the errors identified in the 8 polling stations enough to warrant the nullification of the results in all polling stations?* The appellant's argument is that to extrapolate a finding from 8 polling stations to all 191 stations would be to condemn him and the 2nd and 3rd respondents unheard with regards to the other 173 polling stations. This would in effect translate to the court drawing an unverifiable conclusion that there were errors in the remaining stations. Relying on the case of ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 others,*** SC Petition No. 2B of 2014; [2014] eKLR ***(Munya 2)*** to support these

submissions, the appellant urged the Court to overturn the judgment of the Court of Appeal and allow the petition with costs as prayed.

ii. The 2nd and 3rd respondents

[40] The 2nd and 3rd respondents filed submissions, in support of the appeal. They agreed with the appellant that the preliminary objection lacks merit and that the Court has jurisdiction to entertain the appeal. In their view, the central issue in the dispute, from the trial court, the first appellate court, to this Court remains, whether the election was conducted in accordance with the provisions of the Constitution and the operative principles in question were those espoused in Articles 81 and 86 of the Constitution and Section 83 of the Elections Act.

[41] They also supported the appellant's submissions on the *standard and burden of proof in election petitions*, arguing that the Court of Appeal lowered the threshold of the burden of proof, that had previously been set by this Court; that the burden lay with the 1st respondent; that that burden was not discharged as no proof was tendered in support of the 1st respondent's claims. In addition, the 2nd and 3rd respondents argued that the trial court did not consider, evaluate, or analyze the scrutiny report which did not reveal any instances of irregularities or illegalities in the process; that although they conceded to having opened the ballot box, corrected arithmetic errors and transferring votes from Form 35A to Form 35B, their actions were justified in the circumstances; and that the rectifications were necessary and carried out by the 3rd respondent in the presence of the agents of the candidates.

[42] In *properly interpreting Section 83 of the Elections Act*, according to the 2nd and 3rd respondents, sight must not be lost of the practical realities of election administration. In addition that, imperfections in the electoral process are inevitable, and, on this account, elections should not be lightly overturned, especially where neither a candidate nor the voters have engaged in any wrongdoing. In their further view, the learned Judges of Appeal erred in their interpretation of Section 83 of the Elections Act in that they did not properly

consider the legal effect of irregularities upon an election. For all these reasons, it is their prayer, like the appellant, that the appeal be allowed with costs to them.

iii. ***1st respondent***

[43] The 1st respondent's notice of preliminary objection and written submissions opposing the appeal were filed on 12th October 2023. On the preliminary objection, the 1st respondent submitted that an election dispute is not a constitutional issue either under Articles 81 or 86 of the Constitution; that those provisions do not concern the *standard of proof* or the apportionment of the *burden of proof*; that they merely offer the guiding principles in an electoral system and the process of voting to ensure an ideal election as contemplated and demanded by the Constitution. Therefore, the question regarding the alleged erroneous shifting of the burden of proof by the High Court did not amount to the interpretation and application of the Constitution as envisaged under Article 163(4)(a) of the Constitution.

[44] As relates to the *standard of proof*; the purported failure by the 1st respondent to prove the claim; the finding by the Court of Appeal that was at variance with the evidence on record; the purported failure to interrogate the documents on records; and other erroneous findings, are all equally not legal issues founded on cogent constitutional controversies that deserved the further input of this Court under Article 163(4)(a) of the Constitution, according to the 1st respondent.

[45] On the *claim of contextualization of human errors vis-à-vis Article 81 of the Constitution*, the 1st respondent maintained that this Court has no jurisdiction under Article 163(4)(a) of the Constitution to re-analyze afresh the evidence but only to be satisfied, in terms of Articles 81 and 86 of the Constitution that the election in question was conducted and administered in an efficient, accurate and accountable manner; that the method used was simple, accurate, verifiable, secure, accountable and transparent; that the votes were counted, tabulated and the results announced promptly by the Presiding Officer at each polling station; and

that the results from the polling stations were openly and accurately collated and promptly announced by the returning officer.

[46] The 1st respondent further joined the superior courts below in acknowledging that the irregularities that marred the subject election contravened these principles; that the transgressions identified by the 1st respondent went beyond mere human errors excusable in law but spoke to the opaqueness of the system so grave to void the election.

[47] As to the *proper interpretation of Section 83 of the Elections Act,* the 1st respondent, first pointed out that the interpretation and application involving Section 83 was one of a statute and not of the Constitution to qualify as a ground of invocation of this Court's jurisdiction under Article 163(4)(a) of the Constitution; that the appellant sought a conjunctive interpretation and application of Section 83 of the Elections Act, to the effect that even if an election is conducted in violation of the principles laid down in Articles 81 and 86 of the Constitution and other applicable laws, as long as the non-compliance did not substantially affect the result of the election, then the said irregularities, malpractices, and non-compliance ought to be disregarded. Yet in ***Raila 2017,*** this Court firmly and authoritatively affirmed that it is inconceivable to warrant a conjunctive application of the two limbs of Section 83 and demand success in both; and that it was sufficient for a petitioner to prove any one of the two limbs. It was therefore a misreading of the section and misunderstanding of the *ratio* in ***Raila 2017*** by the appellant to insist on a conjunctive approach requiring proof of both limbs, so asserted the 1st respondent. Further, the Court of Appeal, in rendering its judgment under challenge, properly relied on ***Raila 2017*** in its interpretation and application of Section 83 of the Elections Act, laying emphasis that an election is a process that combines both the numbers and the procedure.

[48] The 1st respondent furthermore dismissed the appellant's reliance on ***Raila 2022*** to justify a conjunctive application of Section 83, when in truth this Court's determination in paragraph 297 of the judgment in ***Raila 2022*** was categorical

that the irregularities and illegalities cited by the petitioners were not proved to the required standard. In contradistinction to the peculiar circumstances of the present case, the irregularities and illegalities were proved and the Court of Appeal while rendering itself found that considering the totalities of the ascertained irregularities, both minor and major taken together, the said irregularities did affect the results of the subject election.

[49] On the *application of the* ***Maina Kiai case*** to the facts of this case, the 1st respondent submitted that it remains an undisputed fact that there was indeed a break of the seals and opening of the ballot box at Mapimo Youth Polytechnic Polling Station 1 of 6. The two superior courts below considered the effect of this action in terms of Regulations 81, 83, 86, and 93 of the Election (General) Regulations and arrived at the conclusion that the action was irregular, contrary to the regulations, and a departure from the principles enunciated in the ***Maina Kiai case***.

[50] Citing the Ugandan case of ***Col. Dr. Kizza Besigye v. Attorney General,*** Constitutional Petition No. 13 of 2009, and our own judgment in ***Munya 2***, the 1st respondent sought to persuade us to hold that it matters not the number of polling stations marred with irregularities, as long as the manner in which the election was conducted blatantly departed from the constitutional imperatives of a free, fair and transparent election. In situations like the one under consideration, the court will not equivocate but nullify the election. Accordingly, he urged that the petition of appeal be dismissed with costs to the 1st respondent on an indemnity basis, this being a second appeal.

iv. ***4th respondent***

[51] The 4th respondent, who was a candidate in the election under challenge, filed written submissions opposing the appeal and beseeching the Court to be guided by the threshold set by Section 83 of the Elections Act and the *rationes decidendi* in ***Raila 2017*** and ***Munya*** *(supra)*. In the latter, this Court expressed the opinion that, if issues of fact are improperly applied and interpreted, they are considered

as forming matters of law when raised. Like the 1st respondent, the 4th respondent stressed that, from the evidence on record several instances of violation of the Constitution, election laws, and procedures were identified that made the process susceptible to manipulation. The election, for that reason, was properly found to have been flawed, not accountable, and transparent.

[52] Finally, the 4th respondent agreed with the interpretation given by the Court of Appeal to Section 83 of the Elections Act, that the election was not only voided by reason of non-compliance with the principles laid down in the Constitution and the written law but also because the non-compliance affected the result. In the result, the 4th respondent prayed for the dismissal of the appeal.

E. ISSUES FOR DETERMINATION

[53] From our consideration of the pleadings and the arguments by counsel representing the parties, we consider the following four issues as falling for our determination:

i. *Whether this Court has jurisdiction to entertain the appeal;*
ii. *Whether the Court of Appeal misapplied and misinterpreted Section 83 of the Elections Act.*
iii. *Whether the Court of Appeal misconstrued the standard and burden of proof applicable in an election petition.*
iv. *Who should bear the costs?*

F. ANALYSIS AND DETERMINATION

i. Whether this Court has jurisdiction to entertain the appeal

[54] The 1st respondent's argument under this ground is that the appeal does not meet the threshold of Article 163(4)(a) of the Constitution. Though we heard arguments on the appeal, as a matter of practice, this Court before considering the merits of arguments in any appeal before it, must first ascertain if it has been properly moved. This is because, as *Nyarangi, JA* famously said in his statement

in the ***Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd*** [1989] eKLR, jurisdiction is everything. In ***Samuel Kamau Macharia & Another v. Kenya Commercial Bank & 2 Others,*** SC Application No. 2 of 2011; [2012] eKLR, this Court added that jurisdiction of a court can only flow from the Constitution and the applicable statutes.

[55] By defining in specific terms the jurisdiction of the Supreme Court in Article 163(4), the Constitution itself makes it clear that the Court must not treat with levity any action or proceedings brought outside those limits because such an action would amount to an abuse of its process. It is equally important to stress that not every grievance from the decision of the Court of Appeal lies to the Supreme Court. An appeal from the decision of the Court of Appeal must therefore meet the test under Article 163(4)(a) and (b) of the Constitution, which has been the subject of numerous pronouncements by the Court.

[56] Whether or not the jurisdiction under Article 163(4) has been properly invoked will depend on either the nature of the pleadings, the nature of the proceedings or the relief claimed, or the decision of the Court of Appeal being appealed against, or in some instances, all four instances. It follows that a party relying on Article 163(4)(a), like in the present case, must demonstrate that the grievance he has presented, concerns the application or interpretation of the Constitution. It is not the mere statement in the pleadings or submissions by a party that the appeal involves constitutional interpretation or application that clothes this Court with jurisdiction.

[57] Applying these principles to the instant appeal, we must advert to the nature of the issues from which this appeal has arisen. The Record of Appeal copiously demonstrates that the petition filed in the High Court by the 1st respondent, who interestingly now claims that there are no constitutional questions for us to consider in this appeal, was headed, *inter alia* ***IN THE MATTER OF: ARTICLES 81,86,87 AND 88 OF THE CONSTITUTION***. These provisions deal, respectively with general principles for the electoral system, voting,

settlement of electoral disputes and the role of the 2nd respondent in conducting elections. The 1st respondent specifically petitioned the High Court to find that the 2nd respondent did not conduct the election in question in conformity with the Constitution and the law. He went ahead and enumerated the instances where and how he believed the constitutional violations, irregularities, and illegalities were committed.

[58] We also note that the issues isolated for determination by the learned trial judge of the High Court were, *inter alia*:

> ***i. Whether the election of the Member of the National Assembly for Magarini Constituency was conducted in accordance with the Constitution and the law.***
> ***ii. Whether there was non-compliance with the Constitution and the law in the conduct of the elections of Magarini Constituency.***
> ***iii. Whether there were election offences committed as alleged.***
> ***iv. Whether the alleged irregularities affected the results of the election of the Member of the National Assembly for Magarini Constituency***
> ***v. What order as to costs to issue.***

[59] The High Court, in declaring the election of the appellant as Magarini Constituency Member of Parliament null and void, was persuaded that the 2nd and 3rd respondents failed to comply with the Constitution and the law in the conduct of the election. It held:

> ***"The general principle of free and fair election under Article 81 is given effect by the prescriptive provisions of Article 86 of the Constitution. The principle of substantial compliance must be read into the provisions of section 83 of the Election***

Act so that for an election to be held not to be according to the Constitution and statutory scheme of elections, there must be wanton and widespread non-compliance with such provisions as registration of voters, recruitment of polling officers, voting process, counting and tallying of the votes, among other important steps in an election process."

[60] Ultimately, the High Court came to the conclusion that the irregularities committed by the 2nd and 3rd respondents affected the validity of the results and allowed the petition.

[61] On appeal, the appellate Court identified two issues as being central to the appeal:

i) Whether there were irregularities; and if so,
ii) Whether such irregularities affected the results.

The appellate court, in answering the two questions, was in effect seeking to give meaning to Articles 81 and 86 of the Constitution. It did so by stating as follows when dismissing the appeal:

"78. ....we agree with the Learned Judge that the elections for Magarini Constituency were not conducted in accordance with the Constitution and the law and that the irregularities affected the result...."

[62] The 1st respondent has urged that the appeal is for striking out for the reason that at no stage in the trial or first appeal did the superior courts below apply or interpret Articles 81 and 86 of the Constitution; that they merely made reference to them; and that all the two courts did was to interpret and apply Section 83 of the Elections Act which is not the same thing as interpreting or applying the Constitution. While not every election petition decision is appealable to the Supreme Court under Article 163 (4) (a) of the Constitution, what we must decide in this judgment is whether this appeal meets the twin test; whether the appeal

raises a question of constitutional interpretation and application and secondly, whether the same has been canvassed in the superior courts progressing through the normal appellate mechanisms before reaching this Court by way of an appeal as contemplated under Article 163(4)(a)of the Constitution.

[63] We must reiterate what we have said previously in the preceding paragraphs, that at the heart of this dispute has always been the question whether political rights guaranteed by Article 38 of the Constitution for the citizens to freely express their will through the ballot were upheld in the election in question; whether the general principles for electoral system espoused in Article 81 of the Constitution were adhered to; and whether there was compliance with Article 86 of the Constitution that commands the 2nd respondent to ensure a simple, accurate, verifiable, secure, accountable and transparent voting system, accurate and open counting, tabulation and prompt announcement of results. Then there was the question whether the courts below properly interpreted and applied those two provisions of the Constitution as well as Section 83 of the Elections Act to the facts presented by parties before them. We entertain no doubt that in their respective analysis and assessment of the evidence on record; in determining the integrity of the election, both superior courts below applied the provisions of Articles 81 and 86 of the Constitution.

[64] Our position in this regard is fortified by our own earlier decision in ***Hassan Ali Joho and Another v. Suleiman Said Shahbal & 2 Others,*** SC Petition No. 10 of 2013; where we observed that:

> *"**Applying a principle reading of the Constitution, this Court responds to the demands of justice by adjudicating upon issues that tend to bring the interpretation or application of the Constitution into question. However, it is to be affirmed that any appeal admissible within the terms of Article 163 (4) (a) is one founded upon cogent issues of constitutional controversy. The determination that a particular matter***

bears an issue or issues of constitutional controversy properly falls to the discretion of this Court…."

[65] In any case, in ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 others***, SC Application No. 5 of 2014; [2014] eKLR ***(Munya 1)***, we held that the provisions of the Election Act and the Regulations thereunder are normative derivatives of the principles embodied in Articles 81 and 86. We expressed ourselves as follows:

> ***"[77] While we agree with Mr. Muthomi, regarding his contention that Section 87 of the Elections Act cannot be equated to a constitutional provision, we must hasten to add that the Elections Act, and the Regulations thereunder, are normative derivatives of the principles embodied in Articles 81 and 86 of the Constitution, and that in interpreting them, a Court of law cannot disengage from the Constitution.***
>
> ***[78] Applying these principles to the matter at hand, we hold that this appeal, indeed, falls within the ambit of Article 163(4) (a) of the Constitution."***

[66] Being of a similar view, we have no difficulty in arriving at the determination that this Court is seized with jurisdiction to entertain this appeal under the provisions of Article 163(4)(a) of the Constitution. We overrule the preliminary objection and declare that the appeal passes the merit test for being heard and determined here. With that determination, we now turn to the second issue which turns on the construction and interpretation of Section 83 of the Elections Act in the context of the application of the Constitution to that determination and as explained above and also below.

ii. Whether the Court of Appeal misapplied and misinterpreted Section 83 of the Elections Act

[67] The appellant has faulted both superior courts for misapplying the nullification test under Section 83 of the Elections Act. What this Court must now establish, based on arguments by the parties is whether, in upholding the judgment of the High Court, the Court of Appeal misapplied and misinterpreted Section 83. For context, we reproduce below the constitutional provisions under which Section 83 of the Elections Act is anchored.

[68] In the first place, Article 81 (e) (i) to (v) of the Constitution provides that:

> ***"The electoral system shall comply with the following principles.....***
>
> ***(e) free and fair elections, which are...***
>
> ***(i) by secret ballot***
>
> ***(ii) free from violence, intimidation, improper influence or corruption;***
>
> ***(iii) conducted by an independent body;***
>
> ***(iv) transparent; and***
>
> ***(v) administered in an impartial, neutral, efficient, accurate, and accountable manner."***

[69] Article 86, on the other hand enjoins the 2nd respondent to ensure that at every election —

> ***"(a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;***
>
> ***(b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;***

(c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and

(d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials"

[70] These constitutional imperatives form the solid bedrock upon which our electoral system is built. There cannot be free and fair elections if the voting method used is not simple, accurate, transparent, or secure, and if the results are not verifiable. This is the irreducible threshold that all elections in this country must match. Any election conducted below this threshold will inevitably lead to nullification of the results.

[71] However, under Section 83 of the Election Act, an election will **NOT** be nullified "**for non-compliance with any written law relating to that election if it appears that—**

(a) the election was conducted in accordance with the principles laid down in the Constitution and in that written law; <u>and</u>

(b) the non-compliance did not substantially affect the result of the election".

[72] We have emphasized by underlining the word *"and"* because of the history of this provision to which we shall shortly revert. Suffice it to state at this stage that the original word in place of **and** was **or**, which accorded Section 83 a disjunctive construction. The appellant has made a bold argument that both the High Court and the Court of Appeal erred in according to Section 83 of the Elections Act a disjunctive and not a conjunctive interpretation; that in interpreting the said section, a petitioner must show substantial irregularities and substantial

non-compliance with the law. This is how the appellant expressed his reservations about the interpretation given by superior courts below to Section 83:

> ***"A reading of the section reveals that the drafters of that particular law recognized the possibility of certain errors and issues occurring during elections. To avoid turning elections conducted by human beings into perfection contests, they gave a leeway to the effect that faced with allegations of irregularities in an election, justice demands that the court should assess whether the said irregularities vitiated the voters' choice and resultantly affected the outcome of the election.***
>
> ***33. This Court has severally pronounced itself on the question of how to treat irregularities, and has maintained at all times that prudence requires that courts should assess the magnitude of the irregularities in order to gauge whether the same affected the results. Human errors and administrative lapses occasioned by human imperfection are not sufficient to nullify an election".***

[73] In the appellant's opinion, therefore, the issues that were labeled and elevated to the level of irregularities were mere human errors that were sufficiently explained. Their minor nature, coupled with the explanation proffered was enough to uphold his victory.

[74] We have said that this argument is bold because we believe this question has traveled a well trodden path. The answer to this argument, though simple must be traced to the following historical legislative context of Section 83.

[75] This Court substantively considered the question of the construction to be given to Section 83 aforesaid in 2017. For the reason that the section was not directly in issue in ***Raila 2013***, the Court did not render an authoritative

interpretation but made only a tangential reference to it when addressing the applicable twin questions of burden and standard of proof in an election petition.

[76] However, in the 2017 Presidential Election petition (***Raila 2017)*** which led to the nullification of that election for failing to comply with the Constitution and the applicable law pursuant to Section 83 of the Elections Act, the Court analyzed the operative word in the section as it stood then being "**or"** and held that the two limbs of Section 83 of the Election Act should be applied disjunctively. So that, a petitioner who is able to satisfactorily prove either of the two limbs of the section can void an election. For example, it would suffice to demonstrate either that the conduct of the election substantially violated the principles laid down in the Constitution and the law on elections, **or** that, although the election was conducted substantially in accordance with the principles laid down in the Constitution and relevant laws, it was fraught with irregularities or illegalities that affected the result of the election. The majority in that case stressed in that context as follows:

> ***"303. For the above reasons, we find that the 2017 presidential election was not conducted in accordance with the principles laid down in the Constitution and the written law on elections in that it was, inter alia, neither transparent nor verifiable. On that ground alone, and on the basis of the interpretation we have given to section 83 of the Elections Act, we have no choice but to nullify it."***

[77] The foregoing decision triggered the introduction in Parliament of the ***Election Laws Amendment Bill 2017***. The intention was to amend the ***Elections Act 2011, The Independent Electoral and Boundaries Commission Act 2011***, and ***The Election Offences Act, 2016***. Despite strong opposition from a section of Kenyans, the amendments sailed through the two Chambers of Parliament. However, when presented, the President neither assented to the Bill nor returned it to parliament as required by Article 115(2) of the Constitution. After 14 days, the Bill became law by virtue of Article 116 of

the Constitution. It was published in the Kenya Gazette on 2nd November 2017, effectively becoming the Election Laws Amendment Act No. 34 of 2017. It introduced a raft of very extensive changes in the management of election results, declaration of results, and annulment of election results.

[78] Of significance, the amendments introduced Section 9 deleting Section 83 of the Elections Act and introducing a new Section 83 whose effect was that an election cannot be voided except for failure to comply with constitutional principles and the law (**and**) the non-compliance substantially affected the results of the election, a conjunctive test. The word **or** in the original section was replaced with the word "**and**".

[79] Katiba Institute, an organization whose objective was expressed to be the promotion of knowledge and understanding of Kenya's Constitution and constitutionalism, and to defend and facilitate implementation of the Constitution, petitioned the High Court in ***Katiba Institute & 3 others v. Attorney General & 2 others*** [2018] eKLR challenging the amendments. Of relevance to the subject of this appeal, Katiba Institute applied for the declaration that the amendments were constitutionally invalid. The High Court (*Mwita, J*) agreed.

[80] Guided by the holding in ***Raila 2017***, the learned Judge observed as follows:

> ***"110. With this holding the Supreme Court underlined one fact; that Section 83 was in harmony with the 2010 Constitution and that it was different from the previous election laws. The amendment to section 83 which removed the disjunctive word 'or' and introduced the conjunctive word 'and' together with the word "substantially", is a departure from the constitutional requirements for free, fair and transparent election and a draw back in the electoral reforms.***

.....

115. The amendment now means that for an election to be annulled there must not only be failure to comply with the Constitutional principles and election laws but also the failures must substantially affect the result of the election..... It is my holding that there was no constitutional compulsion or rational in amending section 83 of the Act to remove the disjunctive word 'or' and introduce the conjunctive word 'and."

[81] Following the High Court's declarations in this respect, that the entire Section 83 of the Elections Act 2011 was invalid, a debate raged as to the legal implications of striking down the section. This Court in the ***Senate & 2 Others v. Council of County Governors & 8 Others,*** SC Petition No. 25 of 2019; [2022] KESC 7 (KLR) answered in the following passage found in paragraph 54 of the judgment:

> **"[54]** ***Subsection (f) above was deleted by the amendment effectively removing the people's representatives; members of the National Assembly and Senate from the County platforms envisaged by that section. We suppose this was informed by the fact that their participation had been moved to a new platform, the Board. With the deletion of (f) above, the modalities and platforms that were to be established under the section were reserved for citizen participation. Indeed, the entire PART VIII is devoted to citizen participation in counties. <u>The effect of the court declaring the amendment unconstitutional was to restore section 91(f)"</u>*** [Our emphasis].

[82] In the case before us, the provisions of Section 83 *ante* were restored. This construction was followed and reaffirmed in ***Raila 2022***. Today, the test to be applied in Section 83 is a disjunctive one and not a conjunctive one as urged by the

appellant. We do not see in what respect the courts below applied the wrong test. The Court of Appeal whose judgment is the subject of this appeal properly found that the 1st respondent needed to prove either of the two limbs. This ground must for those reasons fall.

We turn to the third and last substantive issue, where we have been asked to determine;

iii. Whether the Court of Appeal misconstrued the standard and burden of proof applicable in an election petition

[83] Again, we must observe from the onset that the twin question of the burden and standard of proof in election disputes is now settled in this jurisdiction. For example, on the burden of proof, it is established that the ordinary tenets of the law of evidence that the person who makes the allegation must have proof will apply. The entire Chapter IV (Part 1) of the Evidence Act is dedicated to the question of the burden of proof. Section 107(2) defines what constitutes a burden of proof thus:

> ***"2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."***

No similar definition of the meaning of the phrase *"standard of proof"* is provided for in the Evidence Act. However, the standard of proof simply refers to the level of cogency that the evidence should attain before the court can act in favour of the person who bears the burden of proof. It is the quantum of evidence demanded in a specific case for a party to succeed.

[84] Generally, there are two broad standards: proof beyond reasonable doubt in criminal cases and on preponderance of the evidence or balance of probabilities in civil cases. The expression "burden of proof" may refer to either the 'legal burden' or the 'evidential burden.' In between these standards, the courts have developed different levels of proof, depending on the specific type of case and the allegations, as we are due to explain shortly in respect of electoral disputes, which strictly

speaking are not ordinary civil proceedings but *sui generis*. Depending on the evidence presented by the party who has brought a claim and who bears the legal burden, the evidentiary burden may in certain instances shift to the opposing party.

[85] Having established that proof of either of the two limbs under Section 83 of the Election Act is sufficient to nullify an election, we must now turn to determine whether the superior courts below, in nullifying the appellant's election properly construed the standard and burden of proof, as explained above. We reiterate that both the burden and standard of proof in election petitions are settled concepts in this jurisdiction. See ***Raila 2013, Raila 2017, and Raila 2022***, among other judicial authorities. We restate those principles only for emphasis. Section 107 of the Evidence Act casts the burden upon the party who desires the court to give judgment as to any right or liability to provide proof that indeed those facts exist as pleaded. In ***Raila 2017***, this Court described the application of the legal and evidential burden of proof in election cases in the following words:

> ***"...a petitioner who seeks the nullification of an election on account of non-conformity with the law or on the basis of irregularities must adduce cogent and credible evidence to prove those grounds "to the satisfaction of the court." That is fixed at the onset of the trial and unless circumstances change, it remains unchanged."***

[86] The Court went on in the passage below to distinguish between the legal and evidential burden of proof and the circumstances under which the burden may shift to the opposite party;

> ***"[132] Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and "remains constant through a trial with the plaintiff, however, "depending on the effectiveness with which he or she discharges this, the evidential burden***

keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.

[133] It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce 'factual' evidence to prove his/her allegations of breach, then the burden shifts and it behooves the respondent to adduce evidence to prove compliance with the law."

[87] Regarding the standard of proof in an election dispute, it is equally trite that in an allegation of an election offence or quasi-criminal conduct, the proof expected is one that is beyond reasonable doubt. In any other case, the standard has been set at an intermediate level, higher than the balance of probabilities but lower than beyond reasonable doubt. See ***Raila 2017*** and ***Raila 2022***. Applying these principles to the facts and considering the opinion of the Court of Appeal in this regard giving rise to this appeal, we declare that the legal burden rested on the 1st respondent to establish that there were violations, omissions, malpractices, irregularities, and illegalities in the conduct of the election of the Member of the National Assembly for Magarini Constituency or that those infractions affected the outcome of the election. The evidentiary burden would shift to the 2nd and 3rd respondents to show the contrary, only after the 1st respondent has discharged the legal burden.

[88] How did the question of the standard and burden of proof arise in this case? What was the nature of the evidence the burden of which is alleged to have been improperly shifted? The appellant has faulted the appellate court for failing to disturb the High Court's erroneous shifting of the burden of proof from the 1st respondent to the appellant and the 2nd and 3rd respondents. More specifically, the appellant argued that with regard to Mapimo Youth Polytechnic, both superior courts erred in their determination that the ballot box was re-opened in the absence of all agents without such evidence being led; that instead they wrongly shifted the burden to the 2nd and 3rd respondents to demonstrate that all agents were present and witnessed the re-opening of the boxes and retrieval of Form 35A.

[89] While it is conceded that a ballot box was opened at Mapimo Youth Polytechnic Polling Station 1 of 6 at the tallying centre to retrieve Form 35A, followed by a recount and alteration of some forms, the 2nd and 3rd respondents argued before the trial court that the exercise was witnessed by all the agents. To establish that indeed all the agents were present during the exercise, the two courts below insisted that the onus remained with the 2nd and 3rd respondents to prove this fact on a preponderance of evidence; that it was not sufficient to merely state that all agents were present. The proof required of the 2nd and 3rd respondents to meet the standard of proof entailed the provision of the particulars of the agents who were present. Did they, for example, sign any form to signify their presence or did they counter-sign the alterations on Form 35A to authenticate it? Guided by the decisions in ***Maina Kiai*** and ***Ahmed Abdullahi Mohamed &Anor v. Hon Mohamed Abdi Mohamed & 2 Others*** Election Petition No. 14 of 2017, the learned Judge of the High Court expressed himself as follows;

> ***"36.R1W2 admitted the testimony of PW3. She stated that upon realizing the mistake, she called all the agents and the PO of the polling station and broke the seals on the ballot boxes in their presence to retrieve the original Form 35A***

which had been locked in the ballot box. That the PO then corrected the anomaly.

37. A reading of Regulations 81, 83, 86, and 93 of the Regulations will show that, once ballot boxes are sealed at the polling station, there is no authority whatsoever to break open those ballot boxes without an order of the court.

39. The voting process is an expression of the will of the people and once finalized, no one is allowed to tamper with the material used to express that sovereign will unless authorized by court or by law.

41. ..... This Court notes that R1W7 did not enter any comments on the alterations made on Form 35A though he testified that it was his duty to comment on any alterations in the Form. He also testified <u>that only some of the polling agents witnessed the recount and cancellation. However, there was no evidence to show which agents witnessed the recount and cancellation.</u>

43. It is this Court's finding that the opening of the ballot box was a serious irregularity. This was coupled with the established error of transferring the results of the petitioner to the 3rd respondent.

44. PW5 testified that in Kinyaule polling station, the votes for Chad Karisa Hamadi were increased by 7 votes and Form 35A indicated a total of 81 votes while Form 35B showed 88 votes. This Court has seen both forms and finds that the results therein are different and are as stated by PW5. There were discrepancies and inaccurate results in those statutory forms". [Our emphasis].

[90] Satisfied with the veracity of the testimony of some of the witnesses, the learned Judge identified several anomalies and irregularities that in his view compromised the integrity of the results announced at the end of the election. Some of those anomalies included instances where the 1st respondent's votes were reduced, altered, or interchanged, failure by the presiding officer to sign some Forms 35A without recording that fact in the form itself, discrepancies between Forms 35A and 35B in several identified stations, agents barred from recording their objections in Form 35A regarding specified anomalies in particular stations, as well as the interchange of results during the transfer of results from Form 35A to 35B in two identified polling stations: in Vuga polling station, no single agent signed Form 35A and the only proffered explanation by the Presiding Officer was that the agents left for fear of attacks by elephants; there were statutory documents from specified stations that had alterations which were not countersigned and this fact, according to the learned Judge was admitted by the Returning Officer.

[91] Ultimately, the court concluded on this ground, that the 1st respondent had established to the required standard that the documents relied upon in declaring the appellant the successful candidate were flawed and that;

> ***"63. In many instances, it was the petitioner's*** *(1st respondent's)* ***votes that were either interchanged or altered without countersigning*****".**

[92] In agreeing with these conclusions, the Court of Appeal for its part stated that;

> ***"In our view the act of not only opening the ballot box but also proceeding to conduct a recount at the tallying centre was clearly against the decision in Maina Kiai Case that the votes counted at the polling station are final. The finality of vote counting at the polling station would make no sense if a window for recounting is left open under some circumstances at the tallying centre. The issue was***

compounded by the evidence of Presiding Officer (R1W7), who admittedly failed in his duty to enter any comments on the alterations made. He further admitted that only some of the polling agents witnessed the recount and cancellation without indicating which agents did so.

[93] The court went on to fault the 3rd respondent saying;

"By opening the ballot box and carrying out a recount at the polling centre before ensuring that all the agents of the candidates were present, the election officials failed to meet the test of transparency".

Specific to the issue of the agents who were present when the seals to the ballot box were broken, the recount of votes done, and alterations to the form made, the two courts were persuaded that only some and not all the agents were present. Further, even those present could not be ascertained.

[94] These are concurrent factual conclusions by the two superior courts. What is before us is a second appeal and as we emphasized in ***Sonko v. County Assembly of Nairobi City & 11 others;*** (Petition 11 (E008) of 2022); [2022] KESC 76 (KLR), the duty to re-evaluate evidence is the function of a first appellate court, in this case, the Court of Appeal. And even then, a first appellate court must accord deference to the trial court's conclusions of fact and only interfere with those conclusions if it appeared to it, either that the trial court failed to take into account any relevant facts or circumstances or based on the conclusions of no evidence at all, or misapprehended the evidence, or acted on wrong principles in reaching the conclusions.

[95] As a second appellate court in this dispute, we similarly must treat with due deference the conclusions of fact reached by the trial court which had the initial opportunity to assess the evidence first hand and those of the first appellate court that independently analyzed and re-evaluated the evidence afresh by way of a re-

trial before reaching its own conclusion. In other words, an appellate court has loyalty to accept the findings of fact of the lower courts and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, unless it is apparent that, on the evidence, no reasonable court could have reached the conclusions under challenge. Only cardinal issues of law or of jurisprudential moment, based, for example on the application and interpretation of the Constitution would deserve the further input of this Court.

[96] We can do no better than to reinforce the pronouncement of this Court in ***Munya 2***, that;

> **"[82]...*a petition which requires the appellate Court to re-examine the probative value of the evidence tendered at the trial Court, or invites the Court to calibrate any such evidence, especially calling into question the credibility of witnesses, ought not to be admitted. We believe that these principles strike a balance between the need for an appellate Court to proceed from a position of deference to the trial Judge and the trial record, on the one hand, and the trial Judge's commitment to the highest standards of knowledge, technical competence, and probity in electoral-dispute adjudication, on the other hand."***

[97] The Court will entertain a question of fact as though it is an issue of law only if it is satisfied that the conclusions arrived at by the trial Judge in an election petition in the High Court were based on 'no evidence', or that the conclusions were not supported by the facts or evidence on record, or that the conclusions were 'so perverse', or so illegal, that no reasonable tribunal would arrive at the same conclusion.

[98] The submissions by the appellant and the 2nd and 3rd respondents appear to be inviting us to substitute ourselves into the two courts below and take up their roles of re-analyzing the evidence afresh for the third time. This will amount to

parties re-arguing the factual aspects of this case under the guise of constitutional interpretation and application. We cannot find anywhere in the impugned judgment any erroneous or confused treatment of issues of law and fact. Instead, we find at paragraphs 52, 53, and 54 of the judgment a concise rendition of the court's jurisdiction when hearing an appeal from the High Court sitting as an election court based on the provisions of Section 85A of the Elections Act. It said;

> "***52. Before embarking on a consideration of the matters raised, it is important to set out from the outset the jurisdiction of this Court when dealing with appeals from the High Court sitting as an election court.***
> ***……***
> ***53. The Supreme Court clarified what constitutes "matters of law" in Gatirau Peter Munya v Dickson Mwenda Kithinji and 3 others [2014] eKLR where the three elements of the phrase "matters of law" were identified……***
> ***54. Our determination of this appeal must therefore be based on the above principles and we shall, where necessary, revisit the facts of the case purely as regards the evidentiary element in order to satisfy us whether or not the conclusions of the High Court were based on the evidence on record".*** [Our emphasis].

[99] To this clear and correct statement of the law, we wish to add from our reading of the judgment that the court did not misdirect itself as to the burden of proof. All it was concerned about was the standard of proof. It found that without the particulars of the agents who were allegedly present at the tallying centre and witnessed the breaking of the seals to the box, retrieval of the envelope, the recounting and retallying of votes at Mapimo Youth Polytechnic Polling Station 1 of 6, the 2nd and 3rd respondents fell short of meeting the threshold of proof expected of them. The breaking of the seals of the ballot box at the tallying centre

after the conclusion of voting, the recount and the correction of Form 35A, in our considered view, was not only contrary to the law and settled judicial pronouncements but was also unwarranted. In considering this ground we have deliberately endeavored to avoid any engaging with the factual aspects of this case, except to the extent limited to satisfying ourselves whether the conclusions of the superior courts were based on the evidence on record or whether the conclusions were so perverse that no reasonable court would have arrived at them.

[100] On our assessment of all the factors, we arrive at the conclusion on this ground that the election officials did not meet the test of transparency and contravened the tenor and *ratio decidendi* in the ***Maina Kiai*** case, that decrees that results declared at the polling station are final because that is the true *locus* of the vote where verification exercise is done.

[101] The two superior courts made reference to the narrow margin of victory enjoyed by the appellant, which we wish to turn to only for the sole purpose of restating the *dictum* of this Court expressed in its previous opinions. According to the learned Judge of the High Court, the irregularities, coupled with the opening of the ballot box, and undertaking a recount **"as well as the small margin between the appellant and the 1st respondent affected the results of the election".**

[102] For the Court of Appeal, where there are several irregularities, though minor on their own, coupled with a major one such as the unlawful reopening of ballot boxes and conducting a recount in the absence of all the agents and without countersigning the alterations arising therefrom, **"that may, where the margin is negligible, be, in our respectful view, a basis for nullifying the results".** The court qualified this statement by explaining that;

> ***"It is not in every case that the margin is small that the results of an otherwise properly conducted election must be nullified. A win is a win even if by only one ballot and***

absence any irregularities and illegalities in the conduct of the election, a court will not nullify the results of an election simply because the petitioner lost by a small margin. The conduct of the elections must be considered in its totality and all factors taken into account".

[103] Indeed as ***Raila 2017*** stressed, a win is a win and numbers are only one of its ingredients. The mere fact of a slim margin of votes cannot *per se* lead to the necessary inference that the result of the winning candidate has been materially affected. That is why we said in the judgment in that case that;

"...whether it be about numbers, whether it be about laws, whether it be about processes, an election must at the end of the day, be a true reflection of the will of the people, as decreed by the Constitution, through its hallowed principles of transparency, credibility, verifiability, accountability, accuracy and efficiency."

[104] Prior to this decision, the Court in the ***Munya 2*** had expressed the view that the issue of margins in an election other than a Presidential election, can bear only transient relevance and only where it is alleged that there were irregularities that affected the final result; that a narrow margin between the declared winner and the runner-up beckons as a red flag where the results are contested on allegations of counting and tallying errors at specified polling stations; and that where a re-count, re-tally or scrutiny does not change the final result as to the gaining of votes by candidates, the percentage or margin of victory however narrow, is immaterial as a factor in the proper election-outcome.

[105] How did the two courts deal with the question of scrutiny? Did the scrutiny report absolve the 2nd and 3rd respondents from any wrongdoing in the conduct of the Magarini Member of National Assembly election? In the amended petition, the 1st respondent sought an order of scrutiny of 19 polling stations. The prayer was

granted on 18th January 2023. The Deputy Registrar prepared a scrutiny report dated 23rd January 2023 after the exercise. Challenging the decision of the High Court in the Court of Appeal, the appellant stated in the grounds of appeal that the learned judge erred in law when he allowed scrutiny and recount of votes even when no basis had been laid for doing so; and that the learned judge misdirected himself in law by selectively relying on the scrutiny report in order to find for the 1st respondent. A similar challenge was contained in the Notice of Cross-Appeal filed on behalf of the 2nd and 3rd respondents dated 14th April 2023.

[106] Before this Court it is the appellant's contention that after the 1st respondent failed to adduce evidence in support of his claims, the two superior courts ended up making determinations that were at variance with the evidence and documents on record; that the two courts failed to rely on the scrutiny report which dispelled all the allegations made by the 1st respondent.

[107] From the record, it is plain to us that the learned Judge of the High Court devoted considerable space to analyze the scrutiny report, though he was overturned by the Court of Appeal on certain aspects. For example, on the effect of unstamped counterfoils, the mixup of the names of two polling stations, Majenjeni instead of Mjanaheri, among others. The Court of Appeal relied on the decision of the Supreme Court in ***Munya 2*** and ***Gideon Mwangangi Wambua & Another v. IEBC & 2 Others***, Mombasa Election Petition No. 4 of 2013 on the object of scrutiny and explained how scrutiny is a vehicle to assist the court to verify the allegations made by the parties to the petition which allegations themselves must be hinged on pleadings; that it was never intended to enable the Court to unearth new evidence on the basis of which the petition could be sustained. In ***Walter Enock Nyambati Osebe v. The Independent Electoral and Boundaries Commission & 2 others;*** SC Petition No.28 of 2018, the Supreme Court considered the effect to be accorded of new evidence that emerges out of a scrutiny exercise, which evidence was not part of the pleadings. The Court stated:

> ***"[38] In Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others [Supra], this Court was categorical that a scrutiny exercise, is not a fishing expedition. It was never meant to aid a petitioner in finding evidence to support his/her case. Before a scrutiny is ordered by the election court, a basis must be laid by a party seeking it. The basis is to be laid in the pleadings or affidavit evidence. Even where a court orders a scrutiny suo motu, it must give reasons for such an order. Parties are bound by their pleadings and as such, are not allowed to latch onto whatever evidence to make a case they had not made in their initial pleadings. These principles have repeatedly guided the courts in election disputes, and we see no reason to vary them…"***

[108] It would appear therefore that the report of the scrutiny did not yield the outcome expected by the 1st respondent when he sought it. That did not preclude him from presenting and relying on other pieces of evidence to illustrate that the election in question did not conform with the constitutional and legal imperatives. Indeed, the petition before the High Court raised several grounds. The prayer for scrutiny and reliance on the resultant report was but only one of them.

[109] From what we have stated in the previous paragraphs, it should be apparent the 1st respondent was able to prove on a balance of probabilities, non-compliance with the Constitution and electoral law in the manner the 2nd and 3rd respondents conducted the election, especially from the events at Mapimo Youth Polytechnic polling station 1 of 6, where there was unlawful reopening of the ballot box, alteration of forms without countersigning and a recount of votes in the absence of all the agents. There was an interchange of results at Mapimo Youth Polytechnic Polling Station 1 of 6; alterations of votes or wrong entries for Kayadagamra, Adimaye, Kinyaule Nursery School, Kibaoni Primary School Polling Station,

Mekatili polling station, St. Peters Nursery School polling station and Chakama polling station.

[110] Finally, on the rejected ballot papers, three sentences will suffice to answer the appellant's argument that rejected votes do not count in determining the winner. The trial court found that despite the numerous discrepancies in the rejected votes, the scrutiny exercise revealed that Form 42A for rejected votes was missing in about 15 out of the 24 polling stations. The Court of Appeal was silent on the matter. One: Regulation 81 of the Elections (General) Regulations 2012 enjoins the Presiding Officer upon completion of a count, including a recount, to seal in each respective ballot box, among other documents, rejected ballots sealed in a tamperproof envelope. Two: This Court in ***Raila 2013*** categorically stated that rejected ballot papers do not constitute a vote cast. Three: The requirements of Regulation 81 (1)(b) were breached by the 2nd and 3rd respondents by their admitted failure to include Form 42A in the ballot boxes. Consequently, on this score, we respectfully agree with the appellant's argument that rejected ballot papers should not be counted as valid votes, because they are to be rejected.

[111] In conclusion, we find no error in the determination of the Court of Appeal that the 1st respondent met the standard of proof thereby discharging the burden of proof and establishing that indeed there was non-compliance with the Constitution and the law or that the noted irregularities and illegalities did affect the final result, based on both limbs of Section 83 of the Elections Act.

[112] For this reason, we find no merit in the appeal. It is hereby dismissed and for the avoidance of doubt, we affirm the judgment of the Court of Appeal, together with the directions on the declaration of the seat of the Member of the National Assembly for Magarini Constituency vacant and the direction to the 2nd respondent to conduct a by-election for Member of the National Assembly for Magarini Constituency in accordance with the law.

E. COSTS

[113] Costs follow the event but are at the discretion of the Court. We are guided by the principles on the award of costs enunciated in ***Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai Estate of & 4 others***; SC Petition 4 of 2012; [2013] eKLR. The 1st respondent having been successful in the superior courts below and was awarded costs, we equally award him costs capped at Kshs. 2,000,000.

F. ORDERS

[114] Consequently, upon our conclusion above, we order that:

i. ***The Petition of Appeal dated 1st August 2023 is hereby dismissed.***
ii. ***The 2nd respondent shall forthwith declare the seat of the Member of the National Assembly for Magarini Constituency vacant and proceed to conduct a by-election in accordance with the law.***
iii. ***Costs capped at Kshs. 2,000,000 are awarded to the 1st respondent to be paid by the appellant.***
iv. ***We hereby direct that the sum of Kshs. 6,000 deposited as security for costs upon lodging of this appeal be refunded to the appellant.***

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **31st** Day of **May 2024**

.....
M.K IBRAHIM
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

.....
W. OUKO
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA