

**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA AT NAIROBI**

*(Coram: Ibrahim, Ojwang, Wanjala, Njoki Ndungu & Lenaola, SCJJ)*

**PETITION NO. 26 OF 2018**

— BETWEEN —

**ABDIRAHMAN IBRAHIM MOHAMUD.....APPELLANT**

— AND —

- |  |   |                    |
|--|---|--------------------|
| <b>1. MOHAMED AHMED KOLOSH.....</b>                                | } | <b>RESPONDENTS</b> |
| <b>2. INDEPENDENT ELECTORAL AND<br/>BOUNDARIES COMMISSION.....</b> |   |                    |
| <b>3. YASSIN ABDIKARIM HIREY.....</b>                              |   |                    |

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*(Being an appeal from the Judgment of the Court of Appeal at Nairobi (Ouko, Kiage & Murgor, JJ.A) in Election Petition of Appeal No. 15 of 2018 dated and delivered on 27 July 2018)*

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**JUDGMENT OF THE COURT**

**A. INTRODUCTION**

**[1]** Coming up before the Court is a petition dated 24 August 2018, filed on even date. This petition seeks to set aside the Judgment of the Court of Appeal in Election Petition of Appeal No. 15 of 2018, which allowed a cross-appeal, and set aside the High Court decision dated 2 March 2018.

**[2]** The petition seeks relief as follows:

- (i) *the Judgment and decree of the Court of Appeal be set aside with costs;*
- (ii) *the appellant's petition filed in the High Court at Nairobi, (Election Petition No. 4 of 2017) be allowed with costs;*
- (iii) *the appellant be declared the winner of the election for Member of the National Assembly, Wajir West Constituency, in the election held on 8 August 2017;*
- (iv) *the appellant be granted the costs of this appeal.*

## **B. BACKGROUND**

**[3]** This matter relates to an election petition that arose subsequent to the election for Member of the National Assembly, Wajir West Constituency, that was held on 8 August 2017. The 1<sup>st</sup> respondent was declared the winner of the said election, having garnered 6,701 votes as against the appellant who came second, having garnered 6,224 votes.

**[4]** Being dissatisfied with the outcome of the said election, the appellant filed Election Petition No. 4 of 2017, ***Abdirahaman Ibrahim Mohamud v. Mohamed Ahmed Kolosh & 2 Others***, before the High Court of Kenya at Nairobi, on 4 September 2017. The appellant contended that the elections were, *inter alia*, conducted in a shambolic manner, not meeting the threshold of free and fair election, as envisaged by the Constitution.

**[5]** The appellant contended that grave irregularities and illegalities had attended the conduct of the National Assembly election in Wajir West Constituency, and that this state of affairs was even more profound during the tallying of the results

**[6]** By Notice of Motion dated 5 October 2017, the appellant sought scrutiny and recount of votes in 13 polling stations; but by a Ruling dated 5 January 2018, the High Court allowed scrutiny and recount in

only four polling stations, namely Qara, Korich, Arbajaha and Mathow Primary School, and a report thereon was submitted by the Court's Deputy Registrar on 30 January 2018.

- [7] Upon conclusion of the hearing of the petition, the learned Judge, in a Judgment dated 2 March 2018, found that the election for the Member of the National Assembly for Wajir West was not conducted in accordance with the law, and he proceeded to nullify the same.
- [8] The appellant, being dissatisfied with the Judgment of the High Court, filed an appeal in the Court of Appeal, to the effect, *inter alia*, that the Judge should have declared him the winner, upon disregarding the results at Qara Polling Station — which meant that the final tally was 6,224 votes in his favour as against 6,161 votes in favour of the 1<sup>st</sup> respondent.
- [9] The 1<sup>st</sup> respondent, for his part, filed a cross-appeal dated 29 March 2018, averring *inter alia*, that the learned Judge erred by acting *without jurisdiction* in determining matters not pleaded in the petition, and in considering evidence that was at variance with the pleaded case. The 1<sup>st</sup> respondent averred that the reasons advanced by the Judge in disregarding the results for Qara Polling Station were not pleaded in the petition, and only arose from the scrutiny — and that this was contrary to the terms of Section 82 (2) of the Elections Act.
- [10] The Appellate Court, upon considering the grounds of appeal and the submissions of the parties, found that the appeal was devoid of merit, and dismissed it with costs. The cross-appeal was allowed, with the result that the Judgment and decree of the High Court was set aside, and substituted with an Order dismissing the petition of 4 September 2017.
- [11] The Court of Appeal proceeded by considering, firstly, whether the complaints by the appellant were pleaded with requisite specificity;

secondly, whether the poll results declared in respect of Qara Polling Station should have been disregarded; thirdly, whether the 1<sup>st</sup> respondent should have been declared the winner of the election for Wajir West Constituency.

**[12]** On the basis of such an analysis, the Court of Appeal set aside the decision of the High Court; dismissed the petition; allowed the 1<sup>st</sup> respondent's cross-appeal; declared the 1<sup>st</sup> respondent the winner of the election for Member of the National Assembly for Wajir West; and awarded costs to the respondents.

### **C. THE SUPREME COURT: BASIS OF APPEAL**

**[13]** Aggrieved by the decision of the Court of Appeal, the appellant has appealed to this Court. The appellant lists several grounds in aid of the petition, as follows:

- (i) *the learned Judges of the Court of Appeal erred in finding that the trial Court can only base its determination on grounds that are specifically pleaded and supported by evidence;*
- (ii) *the Appellate Court erred in failing to appreciate that the details of certain evidence, including the contents of a ballot box once the same is sealed, can only become apparent in a scrutiny of the ballot boxes, and so cannot be pleaded with specificity;*
- (iii) *the degree of specificity of pleadings required by the Court of Appeal renders the process of scrutiny, which is allowed by Section 82 of the Elections Act, a mere academic exercise, wholly unrelated to the terms of Articles 81 and 86 of the Constitution;*
- (iv) *the Appellate Court erred in finding that the learned Judge of the High Court had usurped the powers of the Returning Officer in disregarding the votes cast at Qara Polling*

*Station, in respect of which a vote-scrutiny revealed that there had been non-compliance with Article 86 of the Constitution, and that this affected the results of the election;*

*(v) the Appellate Court Judges erred in finding that, save for the striking out of votes in accordance with Section 82(2) of the Elections Act, the trial Judge may not invalidate an election for unspecified irregularities that emerge during scrutiny.*

**D. DOES THE CAUSE ENTAIL INTERPRETATION OR APPLICATION OF THE CONSTITUTION? — PRAYER FOR STRIKING OUT OF PETITION**

**[14]** On 11 September 2018, the 1<sup>st</sup> respondent filed an application dated 10 September 2018, seeking to have the petition struck out on the ground that this Court lacks jurisdiction. It was contended that the appellant had not raised any ground before the Court of Appeal that required the interpretation or application of the Constitution: and that on this premise, the petitioner could not purport to invoke Article 163(4) (a) of the Constitution, as a basis for this appeal. The 1<sup>st</sup> respondent urged that the petition must fail, as the appellant had also not obtained certification for his case under Rule 24 of the Supreme Court Rules, 2012.

**[15]** The appellant urged that the averments in his petition seek to demonstrate that the criteria for a valid election, as set out in the Constitution, were not adhered to during the conduct of the relevant election, on 8 August 2017. He argues that the issues raised in the appeal as well as the cross-appeal before the Appellate Court revolved around the determination of the question whether the criteria for a valid election, as set out in Articles 38, 81 and 86 of the Constitution, were adhered to.

[16] In aid of the submission that this Court has jurisdiction, the appellant has cited the Court’s decision in the case of ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others*** [2014] eKLR, which thus holds (paras. 76, 77, 78):

*“We note that, right from the High Court, the central issue revolving around the petition against the applicant’s election was: whether this election was conducted in accordance with the principles of the Constitution. The operative principles in question, in our view, were the provisions of Articles 81 (e) and 86 of the Constitution. **Although the issues, as later formulated by the Court of Appeal, narrowed down to the specifics of irregularity, scrutiny and recount of the vote, the central theme of the application of Articles 81 and 86 to the dispute, was never lost.** Throughout its analysis and assessment of the evidence on record, in determining the integrity of this particular election, the Court of Appeal was applying the provision of Article 81 and 86 of the Constitution....*

*“While we agree with [learned counsel] Mr. Muthomi, regarding his contention that Section 87 of the Election Act cannot be equated to a constitutional provision, **we must hasten to add that the Election 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.***

*“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”*

- [17] The 2<sup>nd</sup> and 3<sup>rd</sup> respondents submitted that the main issue falling for determination is whether the High Court and the Court of Appeal misinterpreted and misapplied Article 86(a) of the Constitution, and whether the election of the Wajir West Member of the National Assembly met the threshold set out in the Constitution.
- [18] The 2<sup>nd</sup> and 3<sup>rd</sup> respondents submit that, in so far as the Supreme Court is considering whether the Appellate Court Judges erred in their appreciation of the legal effect of manifest irregularities at the Qara and Korich Polling Stations, in the context of Article 86(a) of the Constitution, this Court has jurisdiction to entertain the appeal. They thus urge that this appeal has been brought under the provisions of Article 163 (4) (a) of the Constitution, and that it involves the interpretation of Articles 38, 81 and 86 of the Constitution.
- [19] According to the 1<sup>st</sup> respondent, Mohamed Ahmed Kolosh, who contests the appeal, the appellant has erroneously invoked the jurisdiction of this Court, as he cannot properly identify any issues framed before the Court of Appeal, that involved the application or interpretation of the Constitution. He submitted that the Supreme Court only has jurisdiction to determine issues that were the subject-matter of an appeal before the Court of Appeal, issues that flow from the Appellate Court's Judgment. He referred to the case of **Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd & Another** [2012] eKLR, where this Court thus stated (para. 27):

***“This Article [Article 163(4) (a)] must be seen to be laying down the principle that not all intended appeals lie from the Court of Appeal to the Supreme Court. Only those appeals arising from cases involving the interpretation or application of the Constitution can be entertained by the Supreme Court. The only [other] instance when an appeal may lie to the Supreme Court***

***is one contemplated under Article 163 (4) (b) of the Constitution. Towards this end, it is not the mere allegation in pleadings by a party that clothes an appeal with the attributes of constitutional interpretation or application.”***

[20] The 1<sup>st</sup> respondent submitted that the appellant can only challenge the decision of the Court of Appeal where it incorrectly interpreted or applied the Constitution. He urged that the Court of Appeal in its Judgment, only considered issues of law arising from the decision of the High Court; and that the petition of appeal does not impugn any part of the Appellate Court Judgment, whether in its interpretation or application of the Constitution.

[21] It was 1<sup>st</sup> respondent’s contention that, the appellant has sought to craft a wholly novel case from the one pleaded and argued before the High Court, and which was the subject of the appeal before the Court of Appeal. He listed the four issues as framed by the Court of Appeal, urging that they turned on the interpretation of the Election Act and the Elections (General) Regulations exclusively. He submitted that there was no basis for any further input by the Supreme Court, and that, were this Court to have any role at all in the matter, then prior leave would have been sought under Article 163 (4) (b) of the Constitution.

[22] The 1<sup>st</sup> respondent urged this Court to adopt the position taken by itself in the case of ***Peter Oduor Ngoge v. Francis Ole Kaparo & 5 Others*** [2012] eKLR, where it was stated as follows (para. 30):

***“In the interpretation of any law touching on the Supreme Court’s appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to***

***resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court.”***

**[23]** The provision that only a cause entailing the interpretation or application of the Constitution qualifies for the Supreme Court forum, in our perception, is *by no means a technically-precise one* — this is the recipe for an *objective, forthright and pragmatic construction*. Such construction calls for a *full appreciation of factors of merit and principle*, on the part of the Court. And the Court, in the circumstances, must be guided by *evaluations of fundamental purpose and overall intent* in the constitutional document, rather than by the mere yearning for the ultimate appellate forum, such as may be moving a party.

**[24]** We are thus guided, as we advert to the submissions of learned counsel in this matter, and as we consider the issues coming up before the trial Court and the Court of Appeal. We have also taken into account the course of practice already set in our earlier decisions (aforementioned). On that basis, we have come to the conclusion that the appeal before this Court *does indeed entail issues of interpretation and application of certain Articles of the Constitution* — notably Articles 38, 81 and 86. This brings the Court to the conclusion that, indeed, we *do* have jurisdiction to entertain the appeal.

#### **E. PETITION OF APPEAL: SUBMISSIONS OF COUNSEL**

**[25]** The parties took occasion to file written submissions, which they properly highlighted in Court. It was the appellant’s standpoint that the conduct of election was compromised, and that, for Qara and Korich Polling Stations, the narrow margin of 477 votes disappears altogether, and in place thereof, he would be the outright winner of the electoral contest. He laid emphasis on the results-scrutiny report

dated 29 January 2018. The High Court, in a Ruling dated 5 January 2018, ordered scrutiny and recount in respect of four polling stations, namely Qara, Korich, Arbajahan and Mathow. He submitted that the final scrutiny report highlighted many illegalities and irregularities, especially at Qara Polling Station.

**[26]** With regard to Qara, the appellant submitted that the scrutiny of the SD Card revealed that this Polling Station had 628 registered voters, out of whom 458 turned out to vote; all voters were identified biometrically; the total number of votes cast (590) was more than the number of people who turned out to vote; the origin of the 538 votes could not be verified, as counterfoils were missing and the random sampling revealed that the votes did not originate from the ballot books issued to the Presiding Officer. The appellant urges that the only remedy is to reject all the 538 sullied votes: the effect being that the appellant emerges as the winner, with 6,224 votes, as against the 1<sup>st</sup> respondent's 6,163 votes.

**[27]** For Korich Polling Station, it was submitted that the counterfoils of used and unused ballot papers were missing from the ballot box, hence the origin of the ballot papers could not be verified; and a disregard of the poll results at Korich Polling Station, would reduce the 1<sup>st</sup> respondent's tally even further, augmenting the appellant's win, the appellant's tally standing at 6,218 votes, and the 1<sup>st</sup> respondent's tally being 5,801 votes.

**[28]** Building his case on the vote-scrutiny issue, the appellant urged that there had been a violation of the Constitution, which he thus depicted:

- (i) *whether the scrutiny exercise established violations of Articles 81 and 86 of the Constitution, as regards the poll held at Qara and Korich Polling Stations;*
- (ii) *whether the poll results from Qara and Korich Polling Stations found to have been in violation of the Constitutional*

*prescriptions set out in Articles 38, 81 and 86 of the Constitution and the law, ought to have been disregarded from the total tally;*

*(iii) whether upon disregarding such poll results, the electoral winner for Wajir West Constituency could be determined as envisaged by Article 38 of the Constitution.*

**[29]** The appellant submitted that the fact of the number of votes cast exceeding the voter turnout at Qara Polling Station, was a constitutional issue which required adjudication. He argued that the election was not free, nor fair, nor verifiable; the voting, counting and declaration of results was not administered in an impartial, neutral, efficient, accurate and accountable manner; the declaration of poll results should have been discounted due to numerous anomalies; and that the election was not conducted substantially in accordance with the law or principles laid down in the law, and each of the breaches, violations and non-compliances, affected the outcome and results of the elections.

**[30]** The appellant submitted that Article 81 (e) of the Constitution provides that elections shall be free and fair; free from violence, intimidation, improper influence or corruption; conducted by an independent body; transparent; and administered in an impartial, neutral, efficient, accurate and accountable manner; and so, these are the vital elements of a valid election process. He urged that Article 86 does enjoin the 2<sup>nd</sup> respondent to ensure that at every election, the voting system is simple, accurate, verifiable, secure, accountable and transparent; and that the 2<sup>nd</sup> respondent is required to ensure that appropriate structures and mechanisms to eliminate electoral malpractices are put in place, including the safe keeping of election materials.

[31] The appellant submitted that certain constitutional violations had occurred during the scrutiny exercise, and this demonstrated that the election in Qara and Korich Polling Stations was not free, fair and verifiable, as envisaged by Article 81 of the Constitution.

[32] The appellant underlined the significance of the scrutiny process, in his pursuit of judicial Orders, relying on case authority – ***Timamy Issa Abdalla v. Swaleh Salim Imu & 3 Others*** [2014] eKLR. The Court in that case, thus observed:

*“[T]he scrutiny and recount of the ballot was thus an issue before the [trial] Court, and the finding of [that] Court on issues arising therefrom were not extraneous matters originating from the pleadings. Thus the [trial] Court could not ignore the scrutiny report or its findings thereon; indeed the Court had an obligation to use its findings on the primary facts established before it, in determining the integrity of the elections.”*

[33] The appellant submitted that the Appellate Court had fallen into error, as regards the effect of the breaches of Articles 81 and 86 of the Constitution, during the conduct of elections; and that the Court’s decision negated the expressed will of the voters in Wajir West Constituency. He urged that the Court should have come to the conclusion that the poll results at Korich Polling Station fell short of the threshold set in Articles 81 and 86 of the Constitution. He urged too that upon annulling the Qara Polling Station results, he is the one who should have been announced as the winner of the Parliamentary polls.

[34] The appellant urged that the requisite judicial decision would have been sustained under Section 80 (4) of the Elections Act, 2011 which thus stipulates:

*“An election court may by order direct the Commission to issue a certificate of election to ... a Member of Parliament ... if –*

- (a) upon recount of ballots cast, the winner is apparent; and*
- (b) the winner is found not to have committed an election offence.”*

And on this basis, it was submitted, the trial Court having found a compromised electoral process at Qara, had properly struck out the poll results. It was urged that the trial Court should have treated Korich Polling results in the same way.

[35] The appellant sought reliance upon Section 83 of the Elections (General) (Amendment) Regulations, 2017 – urging that these empower the Constituency Returning Officer to disregard invalid polling results, whilst still issuing a certificate to a winner on the basis of residual vote tally. He submitted that the terms of these Regulations hold authoritative standing as ‘normative derivatives’ of the principles incorporated in Articles 81 and 86 of the Constitution – in the terms of this Court’s precedent in ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others***, S.C. Appl. No. 5 of 2014 (para. 77).

[36] The appellant called in aid a comparative judicial situation associated with *common law experience*, in the English case, ***John Fitch v. Tom Stephenson & 3 Others*** [2008] EWHC 501 Q.B. 6: that the Court will strive to sustain electoral outcomes even where compromises to election rules are apparent, to the intent *that the will of the electorate be vindicated*. This was the appellant’s basis for the contention that disregarding the Qara poll results should still have allowed a declaration of the winner of the election, on the basis of only the untainted votes.

[37] It was the appellant’s prayer that the will of the voters of Wajir West Constituency be given effect, by declaring *him* as the winner at the National Assembly election of 8 August 2017.

[38] Quite to the contrary, 1<sup>st</sup> respondent was in agreement with the Appellate Court’s stand: to the effect that the trial Judge had erred in determining the petition outside the framework of the pleadings. He urged that the fact of scrutiny and recount of votes at the trial Court, could not confer upon the appellant an opportunity to construct a new case, in departure from the petition’s pleadings. In aid of this argument, 1<sup>st</sup> respondent cited from this Court’s decision in ***Gatirau Peter Munya v. Mwenda Kithinji*** (*op. cit.*), in particular the point therein, that the purpose of scrutiny and recount is not to enable the Court to discover new evidence on the basis of which the petition will rest; and that the object of scrutiny and recount is to enable the Court to verify the allegations already set out in the pleadings.

[39] The 1<sup>st</sup> respondent sought reliance on this Court’s statement regarding scrutiny and recount, in ***Gatirau Peter Munya v. Mwenda Kithinji*** (*op. cit.*) [para. 219]:

***“By way of example, if there would be counting or tallying errors which after scrutiny and recount do not change the results of an election, then a trial Court would not be justified, merely on account of such shortfalls, to nullify such election. However, a scrutiny and recount that reverses an election result against the candidate who had been declared a winner, would occasion the annulment of an election. Examples of irregularities of a magnitude such as to affect the result of an election, however, are not closed”.***

[40] Of the polling stations in contest, Qara and Korich, 2<sup>nd</sup> respondent submitted that the ballot boxes had been intact, with seals in proper condition, and with the Returning Officer confirming that he received all election materials, and safely kept the same: and that in these circumstances the absence of counterfoils bore no significance. He submitted further that the appellant had not questioned the voting process, the counting of votes, or the sealing of election material. He urged that the Court be guided by the principle stated in ***Gatirau Peter Munya v. Mwenda Kithinji*** (*op. cit.*) [para. 218]: that all procedural or administrative irregularities and other errors emanating from human imperfection, are by and of themselves, not sufficient to vitiate election outcome.

[41] The 1<sup>st</sup> respondent, in relation to the stand of the Appellate Court's, that the trial Judge had improperly usurped the Returning Officer's powers, in disregarding the votes cast at Qara Polling Station, submitted that the Elections Act, in Section 80 and 82, is consistent with such a position. He urged that the sanctity of the vote is declared in Article 38 of the Constitution, and in Section 82 of the Elections Act: and that the Court's power to strike out votes is circumscribed – with Section 82 (2) of the Act signalling the vote-category that may be struck out following the process of scrutiny. Counsel urged that the appellant failed to lay a basis for the striking out of the Qara Polling Station votes. He submitted that the trial Judge had wrongly assumed a jurisdiction devolving to the Returning Officer by virtue of Clause 83 (1) (b) and (c) of the Elections (General) Regulations.

[42] Learned counsel submitted that the trial Court's jurisdiction, which emanates from Section 80 (4) of the Elections Act, would only authorize the declaration of a winner if the votes from all the constituency's 75 polling stations had been re-counted, but in this case the recount entailed only four Polling Stations: and so, the mere

handful of discrepancies would not alter the results as declared by 3<sup>rd</sup> respondent. For this proposition, he invoked an earlier decision of this Court, ***Zebedeo John Opore v. John Oroo Oyioka & 3 Others***, in which, with regard to Section 80 of the Act it was stated:

***“Under that Section, for a person to be so declared, upon recount of the ballots cast, the winner must be apparent, and should not have committed an election offence”.***

[43] The 1<sup>st</sup> respondent is in full agreement with the Appellate Court decision, the manifest rationale of which he urges to be encapsulated in the American case from the Supreme Court of Connecticut, ***Steven Bortner v. Town of Woodbudge***, 250 Conn. 241, 736A 2d. 104, which thus rings:

***“[An election is a snapshot that] reflects the will of the people as recorded on that particular day ... as expressed by the electors who voted on that date ... [which can never be] duplicated [on any other date]. Thus when a court orders a new election, it is really ordering a different election. It is substituting a different snapshot of the electoral process from that taken by the voting electorate on the officially designated Election Day”.***

[44] The 2<sup>nd</sup> and 3<sup>rd</sup> respondents, for their part, perceive as the central issues in this cause, just two items:

- (i) *whether the Supreme Court should declare the appellant to be the election-winner, by virtue of the terms of Section 80 (4) of the Elections Act;*
- (ii) *whether the Appellate Court erred in upsetting the trial Court’s finding that it, rather than 3<sup>rd</sup> responder, had the mandate to*

*disregard electoral votes, by virtue of Clause 83 (c ) of the Elections (General) Regulations, 2012.*

[45] On the first issue, it has been submitted that the object of Section 80 (4) of the Elections Act is to empower the trial Court to declare the winner, following recount of the ballots cast. Learned counsel submit that the said provision, by no means, seeks to usurp the sovereign popular electoral power founded upon Article 38 of the Constitution; it only gives effect to the provisions of Articles 81 and 86, which install the pillars of free and fair election.

[46] To the intent that there be no conflict of operations between the two sets of constitutional mandate, learned counsel submit, the Court must exercise its aforesaid powers with maximum caution. The precedent cited in this regard is the Appellate Court decision in ***Zebedeo John Opore v. John Oroo Oyioka***, Ksm Civ. App. No. 44 of 2013, which bears the following passage:

***“We would agree with the appellant’s counsel that the power given to an election Court by Section 80 (4) of the Election Act must be exercised with great caution if there are factors or circumstances that would otherwise create reasonable doubt regarding accuracy of the number of votes garnered by the winner”.***

[47] Learned counsel for 2<sup>nd</sup> and 3<sup>rd</sup> respondents have submitted that the Court’s powers under Section 80 (4) of the Elections Act come into play in three circumstances:

- (a) *upon recount of ballots cast;*
- (b) *when, as a result of a recount, the winner becomes apparent;*  
*and*
- (c) *where the winner has not been found to have committed an election offence.*

They further submit that the terms of Section 80 (4) as read with Section 82 of the Elections Act, and Rules 28 and 29 of the Elections (Petition) Rules, evince a clear distinction between *recount* and *scrutiny*.

[48] Counsel urged that the Court’s mandate under Section 80 (4) of the Elections Act may be exercised in respect of a recount, only where the winner is apparent – as the object of recount is to ascertain the number of votes cast for each candidate. Such a position, they submit, does complement the terms of Rule 29 of the Elections (Petition) Rules, as the question for determination, in recount, is simply: ‘who won the election, and by what numerical margin?’ The answer to that question, Counsel submitted, may require examination of the counterfoils of used ballot papers; and the outcome is a numerical determination – which touches on the Court’s power under Section 80 (4) of the Elections Act.

[49] In making this submission, counsel cite the Supreme Court’s precedent in ***Raila Odinga v. Uhuru Kenyatta & 3 Others***, Pet. No. 5 of 2013:

***“The purpose of a scrutiny was to understand the vital details of the electoral process, and to gain impressions on the integrity thereof”.***

They also cite a past Court decision, ***William Maina Kamande v. Margaret Wanjiru Kariuki***, Election Petition No. 5 of 2008 which stated the purpose of scrutiny as falling under two heads:

- (i) *to assist the Court to investigate allegations of irregularities or breaches of the law;*
- (ii) *to assist the Court to determine the valid votes cast in favour of each candidate.*

**[50]** It was the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' stand, that a scrutiny exercise revealing irregularities of anomalies, would not give a basis for the exercise of this Court's powers under Section 80 (4) of the Elections Act: and that the power of the Court in the circumstances, is limited to recount. They urge that the winner must be apparent after a recount; and that if the Judge had other considerations (than recount) for his decision, the remedy lay not under Article 80(4) of the Constitution — and that his perception reflects the objects of Articles 81, 86 and 88 of the Constitution.

**[51]** It was submitted for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents that, owing to the irregularities found during the process of scrutiny, the winner of the election was not apparent, in the terms envisaged under Section 80 (4) of the Elections Act: and that, therefore, the trial Judge quite rightly annulled the declared election result. Specifically, learned counsel urged, as the margin of votes between the appellant and the 1<sup>st</sup> respondent was only the bare figure of 471 votes, this figure would decrease to an unascertained speck, once the Qara Polling Station result was disregarded.

**[52]** The 2<sup>nd</sup> and 3<sup>rd</sup> respondents were, then, concerned with the question whether the Appellate Court Judges were right to fault the trial Court's finding that the power to disregard certain votes, by virtue of Clause 83(c) of the Elections (General) Regulations, 2012 is vested in the Court, rather than in the 3<sup>rd</sup> respondent. And learned counsel submitted that the jurisdiction to so disregard Polling-Station results, where the total number of valid votes exceeds the number of registered voters, vests solely in the Returning Officer — and applies not to the Court.

**[53]** The 2<sup>nd</sup> and 3<sup>rd</sup> respondents urged this Court to provide an opportunity for fresh election to be conducted, for the seat of Member of the National Assembly for Wajir West Constituency.

## F. ANALYSIS

[54] Upon establishing that this Court, indeed, has jurisdiction to entertain this matter, we have conducted an assessment which validates certain issues for determination, these being:

- (i) *whether the Appellate Court erred in finding upon, and taking into consideration matters that fell outside the pleadings;*
- (ii) *whether the Appellate Court rightly found the trial Court to have erred in disregarding the vote-count for Qara polling station;*
- (iii) *whether the appellant should have been declared the winner of the Parliamentary election for Wajir West Constituency; and*
- (iv) *whether the election in Wajir West Constituency was conducted in accordance with the Constitution.*

[55] It was the Appellate Court's finding that the trial Court's decision to disregard the votes cast at Qara Polling Station was unrelated to the petition's pleaded facts. The relevant fact, in this regard, was that the votes declared for Qara far exceeded the voter turn-out at that station, and that the ballot-box contained votes unlawfully inserted therein. The essence of this scenario is, however, not the appellant's gravamen; he asks instead: this Court should determine the degree of specificity that must accompany a petitioner's pleading that the conduct of an election fails to comply with the terms of Article 86 (a) of the Constitution. That provision thus reads:

***“At every election, the Independent Electoral and Boundaries Commission shall ensure that —***

(a) ***whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent ....***

[56] The appellant submitted that the petition, in its pleadings, is sufficiently specific to support a finding that the election of Member of Parliament for Wajir West Constituency, had not been conducted in accordance with the terms of Article 86 of the Constitution.

[57] For such a proposition, the appellant sought reliance in past Court decisions, notably ***Richard Nyagaka Tong’i v. IEBC & 2 Others*** [2013] eKLR, wherein the following pertinent passage appears:

***“All issues raised in the petition and those which crop up during the hearing, whether pleaded or not, and which had the potential to adversely affect the final results, and the will of the voters in a constituency must come under the spotlight, scrutiny and interrogation ...; what is of prime concern to this Court, is whether the elections were conducted in a fair and free and transparent manner .... Such determination cannot be made if the relevant evidence is locked out on technical grounds that the issues addressed by such evidence were not pleaded”.***

[58] It is necessary to recall aspects of the pleadings in issue. The application for scrutiny and recount was made on 5 October 2017, the Ruling thereupon being delivered on 5 January 2018: with the trial Court allowing scrutiny and recount in four polling stations including Qara and Korich. The inevitable conclusion is that the appellant, indeed, *met the criteria for grant of scrutiny and recount.*

[59] Had the appellant, at that initial stage, laid a sufficient basis by his petition, for the trial Court to consider and make a finding on any

irregularities or anomalies found during scrutiny and recount? The appellant, in his original petition (paras. 10, 14 (a) and (c), 16 and 21), pleaded that the election was not free and fair, or verifiable; voting was compromised by violence and intimidation; voting, counting and declaration of results were not conducted in an impartial, neutral, efficient, accurate and accountable manner; and the election was not conducted substantially in accordance with the law.

- [60]** Would such a pattern of pleading lay a basis for the trial Court to consider and make a finding upon such malpractices or irregularities, as the scrutiny process may disclose?
- [61]** The final report on scrutiny, dated 29 January 2018, disclosed cases of illegalities and irregularities at the Qara Polling Station. *This*, precisely, is the basis of the trial Court’s finding that the votes at both Qara and Korich Polling Stations were *not verified* — especially as the origin of the ballot papers was unclear.
- [62]** The trial Court, in the discharge of its *judicial mandate*, ordered the conduct of scrutiny of the electoral process. From that step arose a factual foundation which is uncontested, marked by certain striking irregularities in the conduct of election — missing ballot counterfoils; untraceable unused ballot papers; discrepancy in ballot serial numbers.
- [63]** In such a context, is it the case that the learned trial Judge overstepped the proper scope of the pleadings? It is clear to us that the application for scrutiny and recount of votes, lay well within the profile of the pleading as properly lodged; and consequently, the Judge had duly acted judiciously, in relation to the findings of the scrutiny and recount.
- [64]** We have addressed ourselves to the question whether, as held by the Appellate Court, the trial Judge was in error in overlooking the vote-

count for Qara Constituency. Section 82 (2) of the Elections Act specifies the conditions in which the trial Court may strike out certain votes, following the conduct of scrutiny. The relevant provision reads as follows:

***“(2) Where the votes at the trial of an election petition are scrutinized, only the following votes shall be struck out:***

- (a) the vote of a person whose name was not on the register or the list of voters assigned to the polling station at which the vote was recorded or who had not been authorized to vote at that station;***
- (b) the vote of a person whose vote was procured by bribery, treating, or under influence;***
- (c) the vote of a person who committed or procured the commission of personation at the election;***
- (d) the vote of a person proved to have voted in more than one constituency;***
- (e) the vote of a person who, by reason of conviction for an election offence or by reason of the report of the election court, was disqualified from voting at the elation; or***
- (f) the vote cast for a disqualified candidate by a voter knowing that the candidate was disqualified or the facts causing the disqualification, or after sufficient public notice of the disqualification or when the facts causing it were notorious.***

***“(3) The vote of a voter shall not, except in the cases specified in Subsection (1) (e), be struck out under Subsection (1) by reason only of the voter not having been or not being qualified to have the voter’s name entered on the register of voters.”***

[65] We have not found the electoral irregularities that occurred at Qara Polling Station to fall within the category set out in Section 82 (2) of the Elections Act. In the circumstances, we are in agreement with the learned Appellate Court Judges, that the trial Court lacked the jurisdiction to disregard the votes recorded at Qara Polling Station.

[66] On the foregoing basis, is it the case that *the appellant herein* should have been declared to be the winner, on account of the election irregularities at Qara Polling Station? The 2<sup>nd</sup> and 3<sup>rd</sup> respondents, while acknowledging that the voting process at Qara entailed certain deficiencies, contested the appellant’s prayer that *he* be, on that account, declared to have been the winner. They called for fresh election in Wajir West — on the basis that the Court can only declare a winner after recount, where *the winner became apparent*. This is, to us, a standpoint of credibility, as it is clear that the process of scrutiny *has not pointed to any contestant as the winner*: the position is blurred and distinctly uncertain. Such doubt is based on certain specific indicators. The total number of votes registered at Qara was 628, out of which 458 turned out to vote. Yet the votes cast rose to 590. The votes cast, moreover, could not be attributed to the candidates individually. Now considering the margin of votes between the appellant and the 1<sup>st</sup> respondent in the remaining 74 Polling Stations, the Qara vote had the potential to shift victory to either side. The irregularities at the Qara Polling Station, therefore, had affected the entire election process.

[67] It is our finding, in the circumstances, that the election for the seat of Member of Parliament for Wajir West Constituency, was not conducted substantially in accordance with the terms of the Constitution, and more specifically, those of Articles 81, 82 and 86 of the Constitution, which had been transgressed. It is quite clear that the irregularities at Qara Polling Station did affect the outcome of the election.

#### **G. ORDERS**

[68] The foregoing analysis and findings lead us to certain specific Orders, in the following terms:

- (a) The Judgment and Decree of the Appellate Court, dated 27 July 2018 in Election Petition No. 15 of 2018, is hereby set aside.***
- (b) The declaration made by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents on 10 August 2017, that 1<sup>st</sup> respondent is the winner of the Wajir West National Assembly election held on 8 August, 2017, is hereby declared invalid.***
- (c) The 2<sup>nd</sup> and 3<sup>rd</sup> respondents are hereby directed to conduct a fresh election for the seat of Member of Parliament for Wajir West Constituency, while ensuring due compliance with the governing terms of the Constitution.***
- (d) The costs of the appellant at the High Court, the Court of Appeal and the Supreme Court shall be borne by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents –the details thereof to be the subject of taxation by the Deputy Registrar.***
- (e) The 1<sup>st</sup> respondent shall bear his own costs at the High Court, the Court of Appeal and the Supreme Court.***

**DATED and DELIVERED at NAIROBI this 18<sup>th</sup> day of January, 2019.**

.....  
**M. K. IBRAHIM**  
**JUSTICE OF THE SUPREME COURT**  
**COURT**

.....  
**J. B. OJWANG**  
**JUSTICE OF THE SUPREME**

.....  
**S. C. WANJALA**  
**JUSTICE OF THE SUPREME COURT**  
**COURT**

.....  
**NJOKI NDUNGU**  
**JUSTICE OF THE SUPREME**

.....  
**I. LENAOLA**  
**JUSTICE OF THE SUPREME COURT**

**I certify that this is a true  
copy of the original**

**REGISTRAR**  
**SUPREME COURT OF KENYA**