REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Maraga CJ&P; Ibrahim, Ojwang, Wanjala, Njoki, Lenaola, SCJJ)

PETITION NO. 18 OF 2018

as Consolidated with

PETITION 20 OF 2018

—BETWEEN—

HON. ANUAR LOITIPTIP.....PETITIONER

—AND—

THE INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....1ST RESPONDENT

MOHAMED ADAN ALI.....2ND RESPONDENT

ALBEITY HASSAN ABDALLA.....3RD RESPONDENT

(Being an appeal from the Judgment and Orders of the Court of Appeal at Malindi in Election Petition Appeal No. 2 of 2018 (Visram, Karanja & Koome JJ.A) dated 12th July, 2018.

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] Before the Court are two Petitions of Appeal, namely, Petition 18 of 2018, dated 21st July, 2018 and filed on 24th July, 2018, and Petition 20 of 2018, dated 3rd August 2018 and filed on 6th of August 2018. Both Petitions seek to reverse the Judgement of the Court of Appeal which nullified the election of the Appellant as

the Senator of Lamu County. The Court of Appeal's Orders have since been stayed by this Court.

B. BACKGROUND

(a) Proceedings in the High Court

[2] After the General Election of 8th August, 2017, the Appellant was declared the winner of the Senatorial election for Lamu County. He garnered 14,432 votes and was closely followed by the 3rd Respondent who got 14,374 votes. Aggrieved by the manner in which the election was conducted, the 3rd Respondent filed Election *Petition No. 8 of 2017* in the High Court at Malindi, dated 6th November, 2017, alleging that: the election failed to meet the requirements of Articles 38, 81(e), 86 and 88(5) (h) of the Constitution as well as Section 30 of the Elections Act; he was not given an opportunity to appoint agents, some ballot papers were tampered with, some Forms were not signed and stamped by the Presiding Officers, and that some Presiding Officers were not gazetted. In that regard, he sought a recount and scrutiny of votes in all polling stations.

[3] Subsequent to the filing of that Petition, on 27th September, 2017, the 3rd Respondent filed three applications seeking the production of election materials, scrutiny and recount of votes. Further, on 9th October, 2017, he filed yet another application seeking leave to adduce additional evidence. In opposing the applications, the Appellant filed a Notice of Preliminary Objection dated 12th October, 2017 and a replying affidavit sworn on 3rd October, 2017 and 30th November, 2017 contending that the 3rd Respondent's claim involved pre-election disputes, which ought to have been determined by the Political Parties Disputes Tribunal (***PPDT***) as per Section 40 (1)(b) of the Political Parties Act; that the trial Court lacked jurisdiction to entertain the petition; that the 3rd Respondent failed

to plead or provide any material facts that would warrant a scrutiny and recount of votes; and that all form 38As were signed and issued to party agents. By a Ruling delivered on 3rd November, 2017, the trial Judge dismissed all the four applications. The 3rd Respondent later brought another application seeking scrutiny and recount but via ruling dated 27th November 2017, it was similarly dismissed. No immediate appeal was preferred against any of those applications.

[4] By a Judgment delivered on 9th February, 2018, the Election Court (*Ongeri J*) dismissed the 3rd Respondent's petition and held that the Lamu Senatorial election was free and fair thereby affirming the Petitioner's win.

On the issue of appointment of party agents, the Learned Judge came to the conclusion that the same ought to have been referred to the PPDT as it arose prior to the date slated for the General Election. On the issue as to whether the Senatorial election was free, fair and credible, the learned trial Judge held that there was no evidence to support the said allegation for two reasons; first that the issues submitted on were at variance with matters that were pleaded especially the allegation that the declared results found in Form 38C for Kiangwe Primary School Polling Station exceeded the number of voters was not found in the pleadings or evidence by the appellant but raised at the submissions stage ; and second, that the allegations raised were unsupported by evidence.

(b) Proceedings in the Court of Appeal

[5] Aggrieved by the High Court's decision, the 3rd Respondent lodged an appeal at the Court of Appeal vide *Election Petition Appeal No. 2 of 2018* raising 13 grounds of Appeal which the appellate Court, in its judgment delivered on ***12th day of July, 2018***, subsequently summarized into four issues for determination namely; ***whether the trial Judge sitting as an Election court had jurisdiction to hear and determine the petition concerning allegations that the appellant was denied an opportunity to appoint***

agents; whether the learned Judge misdirected herself and failed to appreciate the appellant had demonstrated sufficient grounds in his pleadings, supporting affidavits and annexed documents to warrant granting of an order of scrutiny, recount, and /production of documents requested also considering the small margin of 58 votes difference between the appellant and the 3rd respondent; whether the Judges' conclusion that the submission by the appellant that the cast votes in respect of Kiangwe polling station that exceeded the number of registered voters was not pleaded and could not be considered in the evidence was so erroneous and perverse an indication that the 1st and 2nd respondents failed in their constitutional mandate to conduct fair, free and verifiable elections; and whether the trial Judge exercised her discretion judiciously by declining to award costs.

[6] On the issue of appointment of party agents, the Court of Appeal agreed with the trial Court that the internal wrangles pertaining to such appointments was between the 3rd Respondent and his political party and as such, the dispute ought to have been referred to the *PPDT* for resolution.

[7] However, the Appellate Court faulted the High Court for disallowing the application for scrutiny and held that *there was sufficient materials placed before it to support the conclusion that there was need to conduct a scrutiny in regard to the 9 polling stations*. In arriving at that conclusion, the Court of Appeal re-evaluated the evidence on record and found that the 3rd Respondent had identified 9 polling stations which he contended that Forms 38As had not been signed by the Presiding Officers or their deputies. The Court of Appeal also noted that during the close of High Court hearing, the 3rd Respondent still made another attempt to seek scrutiny and recount which was triggered by certain

matters that were revealed during the hearing, yet the High Court still refused to yield to his plea of scrutiny and recount.

[8] With regard to results from **Kiangwe Primary School Polling Station**, the Court of Appeal reasoned that since the votes cast exceeded the number of registered voters, if the entire results of that polling station were to be ignored, the Petitioner who had won the election by a slim margin of 58 votes, would not have been the leading candidate. The Appellate Court dismissed the finding by the High Court that the issue had not been pleaded and held at paragraph 45 as follows:

> ***"[T]he evidence in this particular Form 38C was pleaded by the 1st and 2nd Respondents [IEBC] who attached it to the reply to the petition. A pleading either by the Petitioner or Respondent is a pleading, it was pleaded in reply and nothing would stop any party from relying on it. The fact that no cross-examination was conducted on it did not make it any less of the matters pleaded…It was incumbent upon the 1st and 2nd Respondent to offer an explanation why voters at Kiangwe Polling station exceeded the registered voters."***

[9] Consequently, the Court of Appeal held that taking away the entire results of **Kiangwe Primary School polling station**, the difference of 58 votes disappears and hence the Petitioner could not have been validly elected. Hence, there was substantial non-compliance with the law which affected the integrity of the results. Finally, the Court of Appeal set aside the judgment of the High Court and directed the 1st Respondent to conduct a fresh senatorial election for Lamu County.

[10] The 1st and 2nd Respondents filed a cross-appeal seeking a variation of the trial Court's judgment on two grounds; firstly, that Section 84 of the Elections Act is couched on mandatory terms, in that costs of a petition must follow the cause; and secondly, having found the petition devoid of merit, the learned judge should have awarded costs to the Respondents. A similar position adopted by the 3rd Respondents in his cross appeal dated 16th March, 2018. And on this, the Learned Judges held that costs should follow the event and awarded the 3rd Respondent costs of appeal and trial Court.

c. Proceedings in the Supreme Court

Preliminary issues

[11] By a Ruling delivered on 5th October, 2018, this petition was consolidated with ***Petition No. 20 of 2018, Independent Electoral & Boundaries Commission & Another v. Albeity Hassan Abdalla & 2 Others,*** with Petition (No. 18 of 2018) being the lead file. Both the IEBC and the Petitioner in Petition no. 18 of 2018 are seeking the same orders.

[12] By the same Ruling, this Court disallowed the IEBC application for leave to file and serve a Supplementary Record of Appeal including the Form 38A for Kiangwe Primary School Polling Station.

[13] Counsels present for the parties were as follows: Mr. Binyenya for the Appellant (Hon. Anuar Loitiptip) in Petition No. 18 of 2018, Mr. T.T Tiego for the Appellant in Petition No. 20 of 2018, and Mr. Y.M Aboubakar together with Mr. Mwanakitina Bakari for the Respondents in both Petitions.

D. THE PARTIES' RESPECTIVE CASES

i. The Appellants

[14] Learned Counsel Mr. Binyenya relying on his pleadings and written submissions filed on the 10th and 20th of August, 2018, submitted that a party filing an election petition is from the outset, seized of the grounds, facts and evidence for questioning the validity of an election. Therefore, any allegations made in evidence outside the particulars in the pleadings are not admissible. It was his contention that an application seeking to adduce new evidence must be made within 28 days from the date of declaring the results, especially where were the evidence to be admitted and acted upon, would have the effect of amending the election petition. As parties are bound by their pleadings, he argues that no party can rely on averments made by any other party which are at variance with their own pleadings. He supported this assertion by citing ***Raila Amollo Odinga & another v IEBC & 2 others S. C Presidential Petition 1 of 2017*** **[2017] eKLR (Raila 2017)**, and the Judiciary Bench Book on Electoral Disputes Resolution 2017.

[15] Counsel further submitted that the Court of Appeal ought not to have considered the merits of the interlocutory applications dismissed by the High Court since no Notice of Appeal was lodged with respect to those applications. He urges that the Notice of Appeal is a jurisdictional prerequisite and is a primary document in terms of Rule 85(1) of the Court of Appeal Rules 2010, consequently, lack of one stripped the Court of its mandate to deal with matters arising from those Rulings.

[16] It was his submission that in dealing with matters that were not pleaded by the 3rd Respondent in his Petition, the Court of Appeal prejudiced the Appellant and limited his right to fair trial. Moreover, that the transposition error in Kiangwe Primary School Polling Station was properly explained but the Court of Appeal ignored the submission. He contends that the error did not affect the results, that the 3rd Respondents have not disputed their validity as declared in

the fifty polling stations, reiterating that his only problem remains the lack of agents at those stations.

[17] Counsel faulted the appellate Court on its finding that many Form 38As were not signed or stamped by the Presiding Officers. He urged that the 3rd Respondent never led any evidence to prove the assertion, further that the 1st and 2nd Respondents annexed the Form 38C in their response with Form 38A having been signed by the 3rd Respondent a fact admitted at cross examination. He maintained that it was not the 3rd Respondent's case that Form 38As in the said nine polling stations were not stamped nor signed by the Presiding Officers as held by the Court of Appeal.

[18] Further, learned Counsel submitted that the Learned judges of Appeal erred in failing to appreciate that an election is a process whose true locus is the polling station as stipulated in Articles 81(d) and 86 (b) of the Constitution.

[19] Counsel submitted that the 3rd Respondent failed to discharge his burden of proof as he never led any evidence in support of any alleged irregularities and/or illegalities, submitting that the burden remains with him.

[20] It was the Petitioners case that the Appellate judges erred as they failed to adhere to the standard set by this Honourable Court in ***Raila 2017*** as regards the need to have a petitioner sufficiently plead which polling stations, he /she would wish scrutiny to be carried out and the justification for such scrutiny. According to Counsel, the purpose of scrutiny, is not to provide evidence but to confirm specific allegation as pleaded in the petition.

[21] With these submissions, Counsel concluded by urging this Honourable Court to grant the reliefs sought in the Petition of Appeal.

ii. 1st and 2nd Respondents

[22] The 1st and 2nd Respondents filed written submissions and grounds in support of the petitions both dated 22nd August, 2018. On jurisdiction, they associated themselves with the Appellant's submissions, urging that the appeal was properly before the court and fit for determination as of right under Article 163(4)(a) of the Constitution. They argued that the election petition and the subsequent Appeal were both anchored on the Constitution (**Articles 1, 10, 25(c), 38, 47, 48, 50, 81, 86, 87, 159 and 163(4),** further that they had challenged the appellate judges' interpretation and application of the provisions of the Elections Act among other statutes and regulations which are by virtue of **Article 81 and 86** of the Constitution, all normative derivatives of the Constitution 2010. They support this assertion by citing a number of this court's decisions, that is, ***Gatirau Peter Munya v. Dickson Mwenda & 2 Others*** SC Application No. 5 of 2014; [2014] eKLR ***(Munya 1), Fredrick O Outa vs IEBC & Others SC Civil Application No 10 of 2014, and Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & Another*** Sup. Ct Petition No. 3 of 2012; [2012] eKLR (***Nduttu Case*****).**

[23] It was their submission that the 3rd Respondent did not file a Notice of Appeal in respect of the dismissal of the interlocutory applications **contravening Rules 2, 6(1) and (2)** of the Court of Appeal (Election Petition) Rules. They submit that the appellate Court has deferred and sequential jurisdiction to hear interlocutory matters arising from an election petition only exercisable after the final judgement and decree of the High Court as articulated in ***Peter Gichuki Kin'agra v the IEBC and 2 Others, Nyeri Civil Appeal No 23 of 2013.*** They contend that this jurisdiction was invoked via notice adding that it was not permissible for a party to raise a challenge during the appeal in respect of a decision on an interlocutory application which he has not

filed a Notice of Appeal. They supported this by citing ***Election Petition Appeal No 1 of 2018 Jackton Nyanungo vs IEBC and 2 Others.***

[24] Counsel argued that an appeal from the High Court in an Election Petition shall lie to the Court of Appeal on matters of law only. They urged that by holding that they needed to delve into the evidence presented by the 3rd Respondent, the Appellate Justices through craft and innovation, engaged in a scheme of unbridled calibration of evidence from mere allegations contained in his Petition which they elevated to the pedestal of proven facts. They added that the appellate court misrepresented the record by recalling material which had been respectively struck off and expunged by the trial judge from the record.

[25] Relying on this Court's decision in ***Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others, Presidential Election Petition No. 1 of 2017; [2017] eKLR*** (***Raila 2017)*** it was their submission that parties are bound by their pleadings and cannot be allowed to give evidence outside the beacons they have set. They argued that 2 central issues of fact, the first on alleged over-voting at Kiangwe Primary School polling station, and the second, on the margin of votes between the Petitioner and the 3rd Respondent, had not been pleaded in the Petition but were framed by the Judges of Appeal for determination. They contend that it was on that basis that they made their own findings of fact and proceeded to annul the Appellant's's election.

[26] They submitted that the Court of Appeal failed to adhere to the ***Munya 2B Case***, where this Court pronounced itself on the guiding principles in respect of an application for scrutiny, going against the doctrine of *stare decisis*. Further, that they failed to appreciate that the scrutiny application made after the parties

closed their respective cases was only open to the trial court for consideration as it is not in their jurisdiction.

[27] They argued that the Appeal Judges considered the allegation of the unsigned form 38As in 9 polling stations by the presiding officers though the same were actually signed, adding that they illegally relied on the 3rd Respondent's affidavit sworn on 5th October 2018 which had been struck off and expunged from the record. Further, that the Court of Appeal elevated the un-pleaded allegation of over-voting in Form 38C to the pedestal of proven fact. This submission was fortified by the case of ***Zachariah Okoth Obado vs Edward Akong'o Oyugi, Supreme Court Petition No 4 of 2014.***

[28] They submit that the finding by the Court of Appeal at para 49 of the Judgement holding that *'if the results of Kiangwe were to be disregarded, the margin would disappear and the 3rd Respondent therefore could not have been validly elected',* was factually incorrect as the margin of victory would have extended to 126 votes from 58.

[29] Counsel submitted that in the ***Munya 2B Case,*** this Court held that the practical realities of election administration are such 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.

[30] Learned Counsel submitted that this Court, in ***Raila 2017,*** reiterated the underpinning of the finality of results recorded at the polling station which is the true locus for the free exercise of the voters' will. They urged that the declaration Form containing those results is a primary document and all other forms subsequent to it are only tallies of the original and final results. They argue that

the Appellate Judges used a tally in total disregard of the evidence proffered by the 1st and 2nd Respondents undermined the supremacy of the voters which went against the provisions of the Constitution and the Elections Act, and annulled the elections on the ground of "what might have been" and not necessarily, "What was". This, they submitted, in truth, amounts to invalidating an election on speculative grounds, rather than proven facts as was held in the ***Munya 2B* Case.**

[31] They submitted that the same bench of the Court of Appeal has demonstrated inconsistency and utter disregard of the provisions of **Articles 159 and 163(7)** of the Constitution by taking a converse position and findings on the same legal questions raised herein, in their Judgement in ***Timamy Issa Abdalla v Independent Electoral and Boundaries Commission & 3 others Election Petition Appeal No. 4 of 2018; [2018] eKLR*.**

iii. 3rd Respondent

[32] Learned Counsel relied on his written submissions dated 28th August, 2018. He submitted that while the present petition was filed within the required period of 28 days, it does not satisfy the requirements of Article 163(4)(a) of the Constitution leaving this Court without jurisdiction to determine it. He referred to this Court's findings in, ***the Nduttu Case ; Munya 1 ; Bwana Mohammed Bwana v Silvano Buko Bonaya and others, and Wavinya Ndeti v IEBC and 3 Others, Supreme Court Petition No 1 of 2014*** where set guiding principles articulated instances where it had jurisdiction to entertain an appeal under Article 163(4)(a) of the Constitution arguing that both the Petitions have failed to meet the set standards.

[33] On the issue of failure to file a Notice of Appeal in respect to the Rulings given by the Election Court, it was counsel's submission that a party's right of appeal on an interlocutory matter arises only after an Election Court has fully determined a matter. Further, that the Court of Appeal Rules do not contemplate the filing of a Notice of Appeal in respect of a Ruling on an interlocutory matter. Relying on the decision of the Appellate Court in ***Jared Odoyo Okello vs IEBC & 3 Others Civil Appeal No 16 of 2013*** it was his submission that he should not be held responsible for a grey provision of the law. Regardless, he urged that the issue of scrutiny was based on the pleadings and the prayers in the Petition, it formed part of the determination by the High Court and was properly before the Appellate Court.

[34] Counsel, disputed the Petitioner's averments that the Court of Appeal decision was based on un-pleaded facts. He argued that the decision was based on pleadings and evidence on record as the question is not so much about the form of pleadings but that the parties were aware of the case and issues in spite of deficiency in the pleadings. He invoked the Supreme Court of India decision in the case of ***Ram Sarup Gupta (dead) by Lrs -vs- Bishun Inter College & ORS 1987 AIR 1242, 1987 SCR(2) 805*** that the Appellate Court relied on, in coming to this conclusion, where it is argued that once it is found that the parties knew the case and they proceeded to trial on those issues it would not be open to a party to raise the question of absence of pleadings in appeal.

[35] Counsel submitted that the transposition error of results from Form 38B to 38C established irregularities that could not be ignored keeping in mind that the margin of victory was only 58 votes.

[36] It was his submission that the Court of Appeal rightfully applied this court's decision in ***Munya 2B Case*** and could not remit this case back to the High

Court as they were guided by this Court's decision in the ***Aramat Case*****,** which declared the High Court *functus officio*, with no jurisdiction to deal with the election Petition after 6 months.

[37] Counsel concluded by arguing that, an application for filing of further affidavits or further additional evidence needed not to have been filed within 28 days after the date of declaration but rather it could be filed at any time before the pre-trial or after the commencement of the hearing with the permission of the court.

E. ISSUES FOR DETERMINATION

[38] The following are the main issues for determination as crystalized from the Petition of appeal, the responses thereto, the written and oral submissions.

(i) Whether this court has jurisdiction to determine the Petition of Appeal.

(ii) Whether the Appellate Court ought to have entertained appeals on interlocutory application in respect of which no Notice of Appeal had been filed.

(iii) Whether the Judges of Appeal acted in excess of their jurisdiction by delving into matters of fact contrary to the provisions of Section 85A of the Elections Act, and whether they considered un-pleaded matters.

(iv) Whether the Judges of Appeal erred in shifting the 'burden of proof'.

(v) Costs.

F. ANALYSIS

(i) Jurisdiction

[39] While it is the Appellant's, 1st and 2nd Respondents' submissions that this matter is properly before this Court and fit for determination as of right under Article 163(4)(a) of the Constitution, the 3rd Respondent submits otherwise, and urges that the Appeal does not meet the requirements of 163(4)(a) of the Constitution and that this court does not have jurisdiction to determine it.

[40] On this matter, the appellate jurisdiction of this Court is well articulated in Article 163(4) of the Constitution of Kenya which states as follows:

> **[Article 163 (4)]**
>
> ***"(4) Appeals shall lie from the Court of Appeal to the Supreme Court –***
>
> ***a) As of right in any case involving the interpretation or application of this Constitution; and***
>
> ***b) In any other case in which the Supreme Court, or Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5)***
>
> ***(5) A certification by the Court of Appeal under clause (4) (b) may be reviewed by the Supreme Court, and either affirmed, varied or overturned."***

[41] Moreover, Section 15 (1) of the Supreme Court Act provides that appeals to the Supreme Court shall be heard only with the leave of the Court. Section (15) (2) on the other hand provides that Sub-Section (1) shall not apply to appeals

from the Court of Appeal in respect of matters relating to the interpretation or application of the Constitution.

[42] In that regard**,** this Court has had the occasion to define the delineations of its jurisdiction under Article 163(4)(a) of the Constitution in a number of its decisions, which decisions are still applicable. In the ***Nduttu Case*** a two Judge Bench of this Court (*Tunoi and Wanjala SCJJ*) established the guiding principles as follows:

[paragraph 28]:

> ***"The appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation or application of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of Article 163 (4) (a)."***

[43] Additionally in the case of ***Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others***, Sup.Ct. Petition No. 10 of 2013, ***(Joho Case)*** this Court observed that [paragraph 37]:

> ***"In light of the foregoing, the test that remains, to evaluate the jurisdictional standing of this Court in handling this appeal, is whether the appeal raises a question of constitutional interpretation or application and whether the same has been***

canvassed in the Superior Courts and has progressed through the normal appellate mechanism so as to reach this Court by way of an appeal, as contemplated under Article 163(4)(a) of the Constitution…" **[emphasis supplied].**

[44] Again, in ***Peter Oduor Ngoge v Hon. Francis Ole Kaparo Petition No. 2 of 2012***; [2012] eKLR *this Court* declined to hear an appeal and stated [paragraph 26]:

"In the petitioner's whole argument, we think, he has not rationalized the transmutation of the issue from an ordinary subject of leave-to-appeal, to a meritorious theme involving the interpretation or application of the Constitution - such that it becomes a matter falling within the appellate jurisdiction of the Supreme Court."

The Court in the ***Ngoge case*** went on to state that:

"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 further input of the Supreme Court" *[emphasis added].*

[45] The foregoing principle is affirmed, in this Court's decision in ***Munya 1*** at paragraph 69 where it was stated as follows:

"The import of the Court's statement in the *Ngoge Case* ***is that where specific constitutional provisions cannot be identified as***

having formed the gist of the cause at the Court of Appeal, the very least an appellant should demonstrate is that the Court's reasoning, and the conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application."

[46] So as to establish whether this appeal is proper before us, we must have a glance at the nature of the issues from which this appeal has arisen. In the present matter, a look at the record at page 13, reveals that the Petition at the trial Court was anchored on Articles 30, 81(e), 86, 85 (5)(h) of the Constitution as well as Section 30 of the Elections Act. A further look at the record at page 927 to 929 shows that the 3rd Respondent, through his memorandum of Appeal challenged the trial Court's application and interpretation of Articles 38, 81, 86 and 88 of the Constitution and Section 30, 39 and 74 of the Elections Act 2011.

[47] Applying these principles to the matter at hand, we hold that this appeal does indeed fall within the realm of Article 163(4)(a) of the Constitution of Kenya.

ii. Whether the Appellate Court ought to have entertained appeals on interlocutory application in respect of which no Notice of Appeal had been filed.

[48] Both Counsel for the Appellant and for the 2nd and 3rd Respondents unwaveringly urged that Notice of Appeal is a jurisdictional prerequisite, and a primary document under Rule 85(1) of the Court of Appeal Rules, 2010, without which, the Appellate Court lacked jurisdiction to deal with issues arising out of the interlocutory rulings at the trial court. On this, they relied on the Appellate Court's decision in ***Election Petition Appeal No 1 of 2018 Jackton Nyanungo vs IEBC and 2 Others.*** Conversely, Learned Counsel for the 3rd

Respondents, urged that there is no right of appeal in respect of interlocutory applications, anchoring his submission on the Appellate Court's decision in ***Jared Odoyo Okello vs IEBC & 3 others, Civil Appeal No 16 of 2013***. Further, that the Court of Appeal Rules do not contemplate filing of Notice of Appeal in respect of Rulings on an interlocutory application. Regardless, it was their submission that scrutiny was based on the pleadings and the prayers in the petition and the issue on scrutiny and recount formed part of the determination by the High Court and it was thus covered by the Notice of Appeal in respect of the final decision of the High Court.

Timelines and settlement of election disputes

[49] Since this appeal originates from the 3rd Respondent's non-compliance with filing of the Notice of appeal on rulings on interlocutory applications, where appeals could not be preferred immediately before the final determination of the main petition at the trial Court, we need to analyze the significance of timelines in settlement of electoral disputes. ***Article 87(1)*** of the ***Constitution*** provides:

> ***"Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes"***

[50] The envisaged legislation for dispute resolution in election disputes is the *Elections Act*. *Section 96 (1)* of the *Elections Act* gives power to the Rules Committee, constituted under the *Civil Procedure Act*, to make rules generally to regulate the practice and procedure of the High Court and the Court of Appeal with respect to filing and trial of election petitions as well as interlocutory applications including, *inter alia,* specifying the time within which any requirement of the rules is to be complied with.

[51] The *Election Petition Rules 2017* and the Court of Appeal (Election Petition) Rules 2017 are subsidiary legislations enacted pursuant to *Section 96 (1)* of the *Elections Act*.

52] On the construction of subsidiary legislation, Section 29 of the *Interpretation and General provisions Act* is clear that such legislation, except where a contrary intention appears, shall have the same respective meanings as in the Act conferring the power. Consequently, the *Election Petition Rules, 2017 and* the Court of Appeal (Election Petition) Rules 2017 are part of the Electoral laws in their own right.

[53] We further affirm that in relation to this appeal, Rule 6 of the Court of Appeal (Election Petition) Rules 2017**,** have the same legal effect as if they had been enacted under the ***Elections Act***.

[54] Election Dispute Resolution mechanism are by their very nature time bound calling for strict adherence to the prescribed timelines by the Constitution. This Court has, in several of its decisions, underscored the significance of timelines in settlement of electoral disputes. For instance, in ***Hon. Lemanken Aramat versus Harun Meitemei Lempaka and 2 others [2014] eKLR (Aramat's case)*** at paragraph 69 partly states that;

> ***"We have to note that the electoral process and the electoral dispute – resolution mechanism in Kenya are marked by certain special features. A condition set in respect of electoral disputes, is the strict adherence to the time lines prescribed in the Constitution and the electoral law".***

Further at paragraph 78 we state:

> ***"We are not, with respect, in agreement with the Learned counsel for the 1st respondent that there is any conflict at all in this case, between the electoral requirements of timelines on the one hand, and values of the Constitution on the other hand. It is clear to us that compliance with timelines, is itself a***

Constitutional principle, one that reinforces the Constitutional values attendant upon the electoral process"

[55] Additionally, in ***Mary Wambui Munene v. Peter Gichuki King'ara & 2 Others*** SC Petition No. 7 of 2014, this Court, while annulling the proceedings of the High Court and Court of Appeal in an election petition that had been filed outside the time-frame prescribed in Article 87(2) of the Constitution, stated as follows:

"***.... Time as a principle, is comprehensively addressed through the attribute of accuracy, and emphasized by Article 87(1) of the Constitution, as well as other provisions of the law. Time in principle and applicability, is a vital element in the electoral process set by the Constitution. This Court's decision in*** *Joho* ***was guided by this consideration. For purposes of this case, we apply the precedent in*** *Joho*, ***taking into account that the issue in question involves imperatives of timelines demanded by the Constitution in settling electoral disputes which involve accuracy, efficiency and exactitude, limiting any other considerations, in the exercise of our discretion."***

[56] Also, in ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & Others*** *SC Petition No. 2B of 2014;* [2014] eKLR(***Munya 2B***), this Court clearly established the constitutional genealogy of Section 85A of the Elections Act, when it declared that the same was "*neither a legislative accident nor a routine legal prescription*. "Section 85A, the Court affirmed, "*is a product of a constitutional scheme requiring electoral disputes to be settled in* ***a timely fashion*****.[emphasis supplied]***"*

[57] In the ***Aramat case,*** this Court further stated at paragraph 123 as follows:

"A Court dealing with a question on procedure where jurisdiction is not expressly limited in scope as in the case of Article 87(2) and 105(1)(a) of the Constitution – may exercise a discretion to ensure that any procedural failings that lends itself to cure under Article 159, is cured. We agree with the learned counsel that certain procedural shortfalls may not have a bearing on the judicial power (jurisdiction) to consider a particular matter. In most cases, procedural shortcomings will only affect the competence of the cause before the court, without in any way affecting Courts' jurisdiction to entertain it. A court so placed, taking into account the pertinent facts and circumstances may cure such defects; and the Constitution requires such exercise of discretion in matters of a technical character".

[58] In ***Wavinya Ndeti versus Independent Electoral & Boundaries Commission [IEBC] & 4 others [2014] eKLR,*** this Court also stated in part:

"***It stands to reason that the enactment of section 85A (a) having been sanctioned by the Constitution cannot be inconsistent with the right of access to justice and fair hearing. As the Supreme Court of Nigeria held in Senator John Akpanu doedehe versus Godswill Obot Akabio SC. No. 154 of 2012, where a Constitution provides a limitation period for hearing a matter, the right to fair hearing is guaranteed by the Courts within the specified period. In one view, the same is true when the limitation period is provided by a stature sanctioned by the Constitution like in the instant case. The right of access to justice and fair hearing is guaranteed by the courts within the law".***

The appellant in that appeal (*Wavinya Ndeti*) filed a petition in the Supreme Court on the grounds, *inter alia,* that ***Article 159 (1) and (2)*** of the ***Constitution*** had been violated and the petitioner's right to just and fair trial under ***Article 25(1) and 50(1)*** of the Constitution were also violated. This Court in the same case and in allowing a preliminary objection to the petition stated at paragraph 43:

> ***"The Court of Appeal has itself noted that Section 85A (a) of the Elections Act having been sanctioned by the Constitution could not be inconsistent with the right of access to justice and fair hearing. That Court's judgment focused on the interpretation of section 85A of the Election Act, the Election Rules and the Court of Appeal Rules, and on clarifying the jurisdiction of the Court of Appeal to extend time in matters of election petition appeals. The Appellate Courts holding in this regard has been reaffirmed repeatedly in our decisions cited above"***

[59] Additionally, in ***Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others SC. Application No. 16 of 2014; [2014] eKLR* (*Nick Salat Case*),** we emphasized that time is a crucial component in dispensation of justice, hence the maxim: *Justice delayed is justice denied*. We stressed the fact that it is a litigants' rightful expectation where they seek justice, that the same will be dispensed timeously hence, the various constitutional and statutory provisions on time frames within which matters have to be heard and determined. Time, is of more essence in election matters, where the people's sovereign power to elect their legal representatives is involved.

[60] Further, in the ***Joho Case,*** this Court also goes on to say in part at paragraph 101 that:

> ***"...expedition in the disposal of electoral disputes is a fundamental principle under the Constitution ..."***

[61] Following the 2016 amendments to the Election Act, 2011, the Court of Appeal was able to develop a long line of jurisprudence on interlocutory appeals arising from election petitions. In this light, the Appellate Court through a number of decisions has held that the right of appeal against interlocutory decisions was available to a party in an election petition but, that right is to be deferred and awaits the final decision of the election court. The Court in ***Peter Gichuki King'ara v Independent Electoral and Boundaries Commission & 2 others, Civil Appeal No 23 of 2013*** stated**;**

[43] "From the foregoing we find that this Court as an appellate court has deferred and sequential jurisdiction to hear interlocutory matters arising from an Election Petition. However, the jurisdiction of this Court is only exercisable after a final judgment and decree of the High Court has been made. The points of law raised in the memorandum of appeal dated 12th August, 2013 and the prayers sought therein are interlocutory in nature. The main Election Petition is still pending before the High Court and there is no judgment or decree from an election court that is before this Court. We hold that the issues raised in this appeal are premature and must await the final judgment and decree of the High Court in the Election Petition. We concur and paraphrase in italics the dicta by this Court differently constituted in the case of Kakuta Maimai Hamisi –vs- Peris Tobiko & 2 Others- Civil Appeal No. 154 of 2013 where it is stated:-

> **"*We are on our part perfectly satisfied that the delay or deferment of interlocutory matters is an exemplar of that sense of balance, proportionality and appreciation of the practical realities of just, expeditious, time-bound and substantive determination of election petitions on merit***

untrammeled by the delays and confusion that can be sown by appeals to this Court on interlocutory rulings. The law on electoral dispute resolution as currently formulated was meant to facilitate a speedy and seamless process of adjudication of the petitions proper, hence the deferment of disruptive distractions such as interlocutory appeals that serve only to unnecessarily prolong the process with the attendant peril of piercing the statutory timelines."

[62] Flowing from the above, we agree with the position adopted by the Court of Appeal as stay or suspension of the proceedings in the middle of election petitions would put a court at the risk of failing to comply with Article 105(2) of the Constitution. Essentially this means, that while there is a right to appeal an interlocutory decision, that this right is delayed for good order and in keeping with timelines of election petition matters.

Notice of Appeal in interlocutory rulings

[63] Now, coming to the matter at hand*, how then does a party present an appeal to a court on account of an interlocutory order?*

[64] It is trite law that jurisdiction of an appellate court is invoked by filing of a Notice of Appeal. This Court has stated in ***the Nick Salat Case as follows:***

"A Notice of Appeal is a primary document to be filed outright whether or not the subject matter under appeal is that which requires leave or not. It is a jurisdictional pre-requisite. The California Supreme Court while reversing the Court of Appeal decision that had dismissed the appellant's notice of appeal as having been filed out of time in Silverbrand vs County of Los Angeles (2009) 46 Cal. 4th 106, 113 stated inter alia:

"As noted by the Court of Appeal, the filing of a timely notice of appeal is a jurisdictional prerequisite. "Unless the notice is actually or constructively filed within the appropriate filing period, an appellate court is without jurisdiction to determine the merits of the appeal and must dismiss the appeal." (sic) The purpose of this requirement is to promote the finality of judgements by forcing the losing party to take an appeal expeditiously or not at all."

[65] The importance of a Notice of Appeal was accentuated in our decision in ***Patricia Cherotich Sawe v. Independent Electoral & Boundaries Commission & 4 Others*** SC Pet. No. 8 of 2014; [2015] eKLR **(*Patricia Sawe case*)** where we pronounced as follows [para 28]:

> "***What is the objective purpose of the Notice of Appeal? It serves the important role of informing the relevant parties to the suit, especially the successful litigants, that their gains may be cut short, or delayed. It signals the intention to pursue an appeal. It is only fair that the parties, in the light of their legitimate anticipation, should know within the shortest time possible, whether to rest their litigious poise. It is consistent with the general rule guiding the judicial process: "litigation must come to an end."***

[66] Similarly, in ***Independent Electoral & Boundaries Commission vs Jane Cheperenger & 2 Others SC. Civil Application No. 36 of 2014; [2015] eKLR***, this court *emphasized at paragraph 19 that without filing a Notice of Appeal, there can be no expressed intention to appeal.*

[67] The applicable provision of law pertaining to Notice of Appeal in election petitions at the Court of Appeal is Rule 6 of the Court of Appeal (Election Petition) Rules 2017. It states:

> "***6(1) A person who desires to appeal to the Court shall file a notice of appeal, which shall be lodged in quadruplicate in the registry.***
>
> ***(2) A notice of appeal shall be filed within seven days of the date of the decision appealed against.***
>
> ***(3) A notice of appeal shall be in separate numbered paragraphs and shall -***
>
> > ***(a) Specify whether all or part of the judgment is being appealed and, if part which part;***
> >
> > ***(b) Provide the address for service of the appellant and state the names and addresses of all persons intended to be served with copies of the notice; and***
> >
> > ***(c) Contain a request that the appeal be set down for hearing in the appropriate registry.***
>
> ***(4) It shall not be necessary that the decree or order be extracted before lodging a notice of appeal.***
>
> ***(5) A notice of appeal shall be substantially in the Form EPA 1 set out in the schedule and shall be signed by or on behalf of the appellant.***"

[Emphasis added]

[68] This Rule must not be read in isolation, and must be read together with the following Rule.

Rule 4 (1)...

> ***(2) where there is no applicable provision in these Rules, the provisions of the Court of Appeal Rules, 2010 relating to civil appeal shall apply to an election petition appeals in so far as they are not inconsistent with the Rules.***

[69] This being election petition regulations, where expeditious dispensation of matters within a time limit is key, the use of the word ***'shall'*** in Rule 6, illustrates that the rule is mandatory in nature, and in the circumstances, it is important to note that it envisions that the appeal arises out of a '***judgement'*** which is deemed to be the final pronouncement of the court.

[70] It follows then that one must read the two provisions, (Rule 6 and Rule 2) together with the Court of Appeal Rules 2010, to find direction on how to deal with interlocutory appeals.

[71] The Court of Appeal Rules 2010, provides as follows;

"Rule 75 Notice of appeal

> ***(1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.***
>
> ***(2) Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.***
>
> ***(3) Every notice of appeal shall state whether it is intended to appeal against the whole or part only of the decision and where it is intended to appeal against a part only of the decision, shall***

specify the part complained of, shall state the address for service of the appellant and shall state the names and addresses of all persons intended to be served with copies of the notice.

(4) When an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall not be necessary to obtain such leave or certificate before lodging the notice of appeal.

(5) where it is intended to appeal against a decree or order, it shall not be necessary that the decree or order be extracted before lodging notice of appeal.

(6) A notice of appeal shall be substantially in the Form D in the First Schedule and shall be signed by or on behalf of the appellant."

[72] The combined effect of the above is that a person who seeks to appeal from a final determination of the High Court must file a Notice of Appeal within 7 days of the decision in accordance with Rule 6(2) of the Court of Appeal (Election Petition) Rules, 2017, and one who seeks to appeal against an interlocutory decision must file their intended notice within 14 days of the decision, in line with Rule 75 of the Court of Appeal Rules 2010.

[73] However, we note that this position may present some impracticalities as where judgement is in ones favour, a party who had filed notice of appeal against an interlocutory order may be faced with unnecessary costs, a situation which may make parties shy away from filing Notices of Appeal pending the hearing and determination of the petition. We therefore direct that, *for the purposes of election petitions only,* where one is aggrieved by a decision in an interlocutory application in election petitions, such a party must file a notice of appeal against

the interlocutory decision consecutively with the notice of appeal against the final judgement. Indeed, it is this notice that shall grant an appellate Court jurisdiction to determine issues before it.

[74] As to when an appeal against an interlocutory application from the trial Court may be disposed, we agree with the position adopted by the Court of Appeal in ***Dickson Mwenda Kithinji v Gitirau Peter Munya & 2others, Civil Appeal (Nyeri) No. 38 of 2013*** that the hearing of the appeal of the interlocutory decision must wait the determination of the matter at the trial Court. In this case, the court while acknowledging the timely filing of the notice of appeal in respect to interlocutory decisions, declined to hear the matter deferring it until its full determination at the trial Court.

[75] The special nature of election petitions was canvased by this court in the ***Aramat Case*** where it stated that:

> ***".. the electoral process, and the electoral dispute-resolution mechanism in Kenya, is marked by certain special features. A condition set in respect of electoral disputes, is the strict adherence to the timelines prescribed by the Constitution and the electoral law. The jurisdiction of the Court to hear and determine electoral disputes is inherently tied to the issue of time, and a breach of this strict scheme of time removes the dispute from the jurisdiction of the Court. This recognition is already well recorded in this Court's decisions in the Joho case and the Mary Wambui case".***

[76] Now turning to the matter at hand, the 3rd Respondent made different applications in the course of the petition at the trial Court, seeking orders of scrutiny and recount as well as production of various documents which were in the custody of the 1st Respondent, whose determinations were delivered on the 3rd of November and 27th of November 2017. It is not in contention that Notices of Appeal in relation to those interlocutory applications were not filed. The Appellant's case is that the Court of Appeal ought not to have dealt with those application for lack of Notices of Appeal. Conversely, the 3rd Respondent submitted that since the trial Judge made conclusions on scrutiny at paragraph ***(x)*** of her judgment, then the Court of Appeal was right to address the application.

The impugned paragraph from the judgment states:

> ***'(x) In the circumstances I find that the petitioner has not adduced evidence in support of this petition and his prayers herein including an order seeking "scrutiny and recount of all the Polling Stations in Lamu County in order to determine the valid votes cast and therefore who was validly elected as the Senator for Lamu County" amount to a fishing expedition and cannot be granted as the petitioner is not specific in his prayers and neither did he point out specific irregularities or specific polling stations where he was disputing the results.'***

[77] This being an election petition, it is important to note that the basis of the scrutiny is laid in the Election Petition, that foundation is then followed by a separate application for the same. After pronouncement on the applications, the High Court, becomes *functus officio* on that issue.

[**78]** We are of the view that the failure to launch an appeal against specific decision would deem that party having waived the right to challenge the decision. It is a conditional precedent to the existence of the appeal, and we emphasize that it is in the proper and timely filing of a Notice of Appeal, an absolute requirement, that invokes a court's jurisdiction. It is a vital document and without it, there can be no appeal.

Notice of Appeal and the right to fair hearing.

[79] It is the Appellant's, 1st and 2nd Respondents case that the appellate Court in allowing the 3rd Respondent to canvass issues on the applications without the due notice, their right to fair trial had been violated.

[80] Fair hearing is a tenet of international law that is a fundamental safeguard to ensure that individuals are protected from unlawful or arbitrary deprivation of their human rights and freedoms. The notion of a "fair" hearing is an inalienable right enshrined in Article 10 of the Universal Declaration on Human Rights, Article 6 and Article 14(1) of the International Covenant on Civil and Political Rights, Article 6(1) of the European Convention on Human Rights, Article 8(1) of the American Convention on Human Rights and Article 60 of the Charter on the African Commission on Human and Peoples' Rights " encompasses these where it states that it shall draw inspiration" from other international instruments for the protection of human and peoples' rights.

[81] This right is a cornerstone of justice and our Constitution guarantees it under Article 50(1), which encompasses the right to fair hearing, a non – derogable right protected under Article 25(c) of the Constitution.

[82] The essential elements of a fair hearing include *equality of arms between the parties to a proceeding, whether they be administrative, civil, criminal, or*

military, the right to adduce and challenge evidence, as well as an entitlement to have a party's rights and obligations affected only by a decision based solely on evidence presented to the judicial body.

[83] On the issue of filing of Notices of Appeal, we have interrogated pages 4 of the Supplementary record of Appeal and page 944 of the record of Appeal and confirm that the Appellant, 1st and 2nd Respondents submitted on the issue although there is no determination by the appellate Court. There is also no explanation why the appellate Court did not address the same**.**

[84] The Appellate Court in determining the questions arising from rulings on interlocutory applications must do so only if the Appellant has filed a Notice of Appeal on the interlocutory ruling simultaneous to filing of the Notice of Appeal to the main appeal. Consequently, we hold that the Court of Appeal erred in in law by determining questions pertaining to rulings on interlocutory applications on scrutiny without proper Notices of Appeal, thereby exceeding its jurisdiction and jeopardizing the Appellants' right to fair trial.

iii. Whether the Court of Appeal exceeded its jurisdiction under section 85A of the Elections Act, 2011?

[85] Learned Counsel for the Appellant submitted that the Court of Appeal delved into and made conclusions of fact in; concluding that Form 38As were unsigned in several un-pleaded polling stations, relying on evidence in annexures **(Annexures AH3 and AH4)** which was also struck off by the trial Court on 21st of November, 2017, relying on the 3rd Respondent's affidavit that had been withdrawn from the record, concluding that the marginal error between the Appellant and the 3rd Respondent was substantial to nullify the election,

thereby contravening Section 85A of the Elections Act which limits the Court of Appeal's jurisdiction to matters of law only and this Court's decision in ***Munya 2B***. Counsel for the 3rd Respondent submitted to the contrary maintaining that the Learned Judges in reaching their decision complied with Section 85A of the Elections Act, this Court's decision in ***Munya 2B*** and documents on record.

[86] In that context, Section 85A of the Elections Act No. 24 of 2011 stipulates as follows:

"(1) A appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of county government shall lie to the Court of Appeal on matters of law only and shall be-

(a) filed within thirty days of the decision of the High Court; and

(b) heard and determined within six months of the filing of the appeal.

(2) ……."

[87] This provision is explicit that with respect to Appeals from the High Court challenging the election of a Member of the National Assembly, Senate or the office of a county government, the Court of Appeal's jurisdiction is limited to matters of law only.

[88] We have earlier stated that a Court's jurisdiction flows from either legislation or the Constitution as enunciated in the case of ***Samuel Kamau Macharia and Another v. Kenya Commercial Bank and 2 Others,*** **S.C. Civil Application No. 2 of 2011**.

[89] In Munya 2 B, this Court has discussed Section 85A of the Elections Act, and determined the rationale for limiting the Court of Appeal's jurisdiction to matters of law in election petitions in the following terms:

> ***"[81] Now with specific reference to Section 85A of the Elections Act, it emerges that the phrase "matters of law only", means a question or an issue involving:***
>
> > ***a. the interpretation, or construction of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, in an election petition in the High Court, concerning membership of the National Assembly, the Senate, or the office of County Governor;***
> >
> > ***b. the application of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, to a set of facts or evidence on record, by the trial Judge in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of County Governor;***
> >
> > ***c. the conclusions arrived at by the trial Judge in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of County Governor, where the appellant claims that such conclusions were based on "no evidence", or that the conclusions were not supported by the established facts or evidence on record, or that the conclusions were "so perverse", or so illegal, that no reasonable tribunal would arrive at the same; it is not enough for the appellant to contend that the trial Judge***

would probably have arrived at a different conclusion on the basis of the evidence."

[90] This Court proceeded to state as follows:

"[82] **Flowing from these guiding principles, it follows that 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."***

[91] We have examined the judgment of the trial Court dated 9th February, 2018 appearing at page 871 of Volume 4 of the Record of Appeal where the trial Court declined to make a determination on the issue of overvoting at Kiangwe Primary School Polling Station on two grounds first, that the question of overvoting was not pleaded by the Respondent and second, that the issue was raised by the Respondent at the Submissions stage thereby denying the Appellants an opportunity to respond to the issue because the respondent's submissions were filed outside the timelines. At page 871 of the Record, the trial Judge specifically stated as follows:

"[xii] I also find that on the issue that more votes were cast at Kiangwe Primary School Polling Station than the registered voters, <u>the said issue which was not raised by the petitioner in</u>

his petition or affidavit cannot be raised at the submission stage as that would amount to amending the petition**.....**

(xiv) I find that the petitioner did not even raise the said issue in his list of issues for determination and therefore the same was a non-issue to him and further, I find that the petitioner did not comply with the directions of the court on timelines in filing the submissions as the petitioner's submissions were filed after the Respondents had already filed theirs and therefore the Respondents did not have an opportunity to respond to the said issue." [emphasis added]

[92] At page 997 and 1000 of the Record, paragraphs 40 and 45 of the judgment of the Court of Appeal, the Learned Judges stated as follows:

"[40] It appears to us out of the said forms 38 C's that were annexed to the 2nd respondents replying affidavit, that contained the results for the Lamu Senatorial seat, the appellant was able to identify in his closing submissions the results declared for *KIANGWE PRIMARY SCHOOL* ***that had a total of*** *213* ***registered voters but the number of voters exceeded the register as it showed*** *216* ***voters turned up. We shall advert to this particular issue of*** *"over voting"* ***later in this judgement as we do not wish to mix it with the issue of whether the appellant made a case for scrutiny or recount."***

"[45] The 3rd issue is perhaps the one that presents a complete watershed in this appeal. This is in regard to the results attached by the 2nd respondent in Form 38C that showed voters

at Kiangwe Primary School Polling station exceeded the registered voters by 3 voters. <u>We agree this particular ground was not pleaded by the appellant although it was generalized in his pleadings within the alleged malpractices and non-compliance with the law and regulations by the 1st and 2nd respondents</u>. Nonetheless, in our considered view the evidence in this particular Form 38C was pleaded by the 1st and 2nd respondents who attached it to the reply to the petition. A pleading either by the petitioner or respondent is a pleading, it was <u>pleaded in reply and nothing would stop any party from relying on it.</u> The fact that no cross- examination was conducted on it did not make it any less of the matters pleaded. It was on record, and <u>it was incumbent upon the 1st and 2nd respondents to offer an explanation why voters at Kiangwe Polling station exceeded the registered voters</u>. Or why those results were not disregarded from the final tally. We therefore find the learned Judge's conclusion that the issue was not pleaded plainly wrong and therefore a matter of law for our consideration [emphasis added]."

[93] Whereas the trial Court was of the view that overvoting in Kiangwe Primary School polling station was not pleaded and therefore not subject for consideration in its judgment, the Court of Appeal thought otherwise. According to the Court of Appeal, the question of overvoting although not specifically pleaded, was generally pleaded in the Respondent's Petition and by the Appellant via annexures (Form 38C) in the Replying affidavit. We have settled the law on whether or not annextures in affidavits form part of pleadings in ***Munya 2B*** at paragraph 89 where we specifically stated as follows:

"[89] We agree with the Court of Appeal in its faulting of the trial Judge's statement that "annexures to an affidavit cannot be said to constitute pleadings." The reasoning by the Court of Appeal regarding this question, in our view, represents the correct position in the law and practice relating to pleadings."

[94] Before we conclude whether or not the Court of Appeal erred in law in faulting the trial Court for not deciding on overvoting in Kiangwe, we need to re-evaluate the trial Court's second reason for not considering the issue namely, *the Appellants were not given opportunity to respond to the same*. It is not disputed that the Respondent discovered overvoting at the submission stage going by the Court of Appeal's judgment at paragraph 40 (**at page 997 of the Record**), where it specifically stated as follows:

"[40] It appears to us out of the said forms 38 C's that were annexed to the 2nd respondents replying affidavit, that contained the results for the Lamu Senatorial seat, <u>the appellant was able to identify in his closing submissions the results declared for KIANGWE PRIMARY SCHOOL that had a total of 213 registered voters but the number of voters exceeded the register as it showed 216 voters turned up</u>. We shall advert to this particular issue of "over voting" later in this judgement as we do not wish to mix it with the issue of whether the appellant made a case for scrutiny or recount [emphasis added***]."***

[95] From the foregoing, we are persuaded by the trial Court's conclusion that it ought not have considered the issue of overvoting in Kiangwe Primary School Polling Station as it was raised in the submission stage, further, that the Appellant was not accorded the opportunity to respond it. This we note, was not

only because the 3rd Respondent filed his submission out of time, but also filed them after the Appellant had already filed his submissions.

[96] Additionally, we are persuaded to hold that by looking at Form 38C and arriving at a conclusion in page 1001 of the Record that ***"[49] ...taking away the entire results of Kiangwe Primary School Polling Station from the results of Lamu Senatorial seat, the difference of 58 disappear. The Third Respondent therefore could not have been validly elected..."*** the Learned Judges were obviously examining the probative value of the evidence of Form 38C. This is because the question of overvoting in Kiangwe, having not been conclusively determined by the trial Court for reasons adduced above, remained a matter of fact thereby remaining outside the Court of Appeal's jurisdiction.

[97] Moreover, a look at paragraph 44 of the judgment of the Court of Appeal, the Learned Judges of Appeal state as follows:

> ***"[44] Upon consideration of the pleadings and affidavits by the appellant and the responses given by the 1st and 2ndrespondents and considering the circumstances of this election that was won on a very slim margin of 58 votes that made the 3rd respondent be declared a winner, we are satisfied that the appellant had placed sufficient material before court to support a conclusion that there was need to conduct a scrutiny in regard to the 9 polling stations named. <u>There was also an allegation that was not controverted by the 1st and 2nd respondents to the effect that IEBC caused the arrest of a polling clerk who had allowed 16 voters to proceed to cast their votes without properly identifying them as was required by the law.</u> Regulation 69 (d) of the Election Regulations requires a***

voter to place his or her fingers on the finger print scanner after which the name is crossed out from the printed copy. In case the electronic scanner failed to identify the voter, there was a procedure provided for identification. Since this was not denied by 1st and 2nd respondents this taken with the myriad of allegations of the forms that were not signed by the election officials and the results that were not tallying, clearly show the learned Judge failed to consider very crucial material which when taken into account casts a heavy doubt as to whether the 2017 Lamu Senatorial election was conducted in accordance with the principles laid down in the Constitution and the written law. This coupled with the slim margin of 58 votes between the declared winner and the appellant; the cited non- compliance cannot be said that it did not substantively affect the overall results. All these could have been sorted out by scrutinizing the materials that were used for voting

[emphasis added].”

[98] We further interrogated pages 565-573 of the Record of Appeal confirming that evidence supporting the Respondent’s averments in paragraph 21 (VII) &VIII of his supporting affidavit, namely annextures AHA3 and AH4, were expunged from the trial Court’s record (Ruling of the trial Court dated 21st November, 2017) as they failed to comply with Section 106B (4) of the Evidence Act. This is what the said paragraph stated as per page 32 of the Record of Appeal:

> ***“21(VII) I aver that many forms 38As were not signed by the Presiding Officers and their deputies and or were not stamped. In other Polling Stations no such forms were issued such as at;***
>
> ***a. Witu Primary School (01)***

b. Witu Primary School (02)

c. Witu Primary School (04)

d. Hongwe Primary School (02)

e. Lake Kenyatta Primary School (02)

f. Lake Kenyatta Primary School (05)

g. Kizingitini Primary School (02)

h. Kizingitini Secondary School (02)

i. Kiunga Primary School (02)

Annexed hereto and marked "AHA 3" is a copy document confirming the same.

VIII. In fact, I witnessed a Presiding Officer from Dide Wa Ride Daniel Kazungu Karisa filling form 38A at the Tallying Centre.

Annexed hereto and marked "AHA 4" is a CD confirming the same,"

[99] We hold that the Court of Appeal in relying on expunged evidence to arrive at its conclusion at paragraph 44, delved into factual issues contrary to Section 85A of the Elections Act and this Courts guidelines in ***Munya 2B***.

[100] From the foregoing, it is evident that the Court of Appeal in making such an inquiry, whether or not Form 38C was pleaded; whether or not the marginal error would have been slim; and relying on expunged affidavits exceeded its powers to review only matters of law, under Section 85A of the Elections Act.

iv. Whether the Judges of Appeal erred in shifting the 'burden of proof'

[101] The 1st and 2nd Respondents argued that apart from the assertions in the Affidavits, the 3rd Respondent did not call witnesses in support of the Petition, challenge any results or adduce any evidence in support of their case. They claimed that the Appellate Judges elevated the 3rd Respondents allegations in the Petition to the pedestal of proven facts, misrepresented the record by recalling material which had been struck off and expunged by the trial Judge from the record, brought in issues of over voting and margin of victory not pleaded in the Petition. It was their submission that the Justices of Appeal shifted the burden of proof from the 3rd Respondent to the Petitioner, 1st and 2nd Respondent contrary to applicable law and decisions of this Court.

[102] ***Section 108*** of the Evidence Act states that, *"the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side."* **Section 109** of the **Evidence Act** states that,*" the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."*

[103]This court has pronounced itself on the issue of burden of proof in elections petitions in ***Raila Odinga & Others -v- Independent Electoral &***

Boundaries Commission & Others, Petition No. 5 of 2013, where we stated that:

> ***"...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden. The threshold of proof should in principle be above the balance of probabilities, though not as high as beyond-reasonable doubt. Where a party alleges non-conformity with the electoral law, the Petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the Respondents bear the burden of proving the contrary".***

Further we observed that;

> ***[196] .... This emerges from a long-standing common law approach in respect of alleged irregularity in the acts of public bodies, omnia praesumuntur rite et solemniter esse acta, all acts are presumed to be done rightly and regularly. So, the Petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescriptions of the laws.***

As regards the standard of proof, we held that;

> ***[203] .... The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable-doubt – save that this would not affect the normal standards where criminal charges linked to an election, are in question.***

[104]We affirm that this remains the legal position regarding the question of burden of proof in election Petitions.

[105] It goes without saying that the 3rd Respondent having made a myriad of allegations against the 1st and 2nd Respondent as well as the Petitioner on non-conformity with the electoral laws, the initial burden of proof remained with him. He also had the burden of proving that the 1st and 2nd Respondents' non-conformity affected the election. In the instant case, the evidence that the 3rd Respondent intended to rely upon, was expunged by the trial Court for non-compliance with Section 106B (4) of the Evidence Act. The Burden of proof on the allegations made by the 3rd Respondent especially at Paragraph 21(VII) of the Petition, the basis on which the Court of Appeal nullified the election, remained on him and at no point did it shift to the Petitioners.

[106] On overvoting in Kiangwe Primary School Polling Station, it is not disputed that the issue was raised for the first time by the 3rd Respondent at the Submissions Stage. Despite agreeing that overvoting was raised for the first time at the submission stage, the Court of Appeal, ignored the Election Court's factual finding that the submissions were filed out of time and after the Appellant had filed their submissions. This only means that the initial burden of proof remained with the 3rd Respondent and not the Appellants contrary to the Court of Appeal's Conclusion at Paragraph 44 of their judgment.

[107] Based on our review of the record, we are satisfied that the evidential burden of proof had not shifted to IEBC for two reasons. First, the Appellate Court erroneously relied on expunged documents to established as a fact at paragraph 44 of its judgment that the documents put in evidence by the 3rd Respondent originated from IEBC. Secondly, the Court of Appeal erred in shifting the evidential burden of proof on overvoting at Kiangwe Primary School Polling Station because the same was raised by the 3rd Respondent in its written submissions and without according the Appellants an opportunity to respond to

the same, there was no way the burden could shift to them. As a Respondent, the burden of proof shifts only when a *prima facie* case has been laid against the IEBC.

[108]Consequently, we allow the Petitions of Appeal and find that the election of the Senator of Lamu County held on the 8th of August 2017, *was conducted substantially in accordance with the constitutional principles*.

V. Costs

[109] Section 84 of the Elections Act provides for costs and states that:

> ***"An election court shall award the costs of and incidental to a petition and such costs shall follow the cause."***

[110] The Elections Petitions Rules, 2017, provide as follows:

> ***"Rule 30. (1) The election court may, at the conclusion of a petition, Costs, make an order specifying –***
>
> ***(a) the total amount of costs payable;***
>
> ***(b) the maximum amount of costs payable; (c)the person who shall pay the costs under paragraph (a) or (b); (d) the person to whom the costs payable under paragraphs (a) and (b)***
>
> ***(2) When making an order under sub-rule (1), the election court may –***
>
> ***(a) disallow any prayer for costs which may, in the opinion of the election court, have been caused by vexatious conduct, unfounded allegations or unfounded objections, on the part of either the petitioner or the respondent; and***

(b) impose the burden of payment on the party who may have caused an unnecessary expense, whether that party is successful or not, in order to discourage any such expense…"

[111] This Court has previously settled the law on award of costs, that costs follow the event, and that, a Judge has the discretion in awarding costs. This was the decision in the case of ***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others <u>Petition No. 4 of 2012;</u>*** *[2014]* eKLR where it was stated as follows*:*

"[18] It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation."

"[22] Although there is eminent good sense in the basic rule of costs – that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs

do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the applicant."

[112] We note that none of the parties has challenged the manner in which the appellate Court exercised its jurisdiction on award of costs. Therefore, we see no reason to divert from the above legal provisions and the decision of this Court.

ORDERS

[113] Consequently, upon our findings above, the final orders are as follows:

1. ***That the Petitions of Appeal No 18 of 2018 and No 20 of 2018 are hereby allowed.***
2. ***That the judgment of the Court of Appeal of Kenya at Malindi dated 12th July 2018 be and is hereby set aside.***
3. ***For the avoidance of doubt, the declaration of the result of the election by the Independent Electoral and Boundaries Commission in respect of the Senator of Lamu County is affirmed.***
4. ***The 3rd Respondent shall bear the costs of this Appeal.***

[114] Orders accordingly**.**

DATED and **DELIVERED** at **NAIROBI** this 18th day of January 2019

.....	.....
D.K. MARAGA	**M.K. IBRAHIM**
CHIEF JUSTICE/PRESIDENT SUPREME COURT	**JUSTICE OF THE SUPREME OF THE SUPREME COURT**
.....	.....
J.B. OJWANG	**S.C WANJALA**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**
.....	.....
NJOKI NDUNGU	**I.LENAOLA**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

I certify that this is a
true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA