REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

PETITION NO.15 OF 2018

–BETWEEN–

FRANCIS WAMBUGU MUREITHI.....PETITIONER

–AND–

OWINO PAUL ONGILI BABU.....1ST RESPONDENT

NICHOLAS K. BUTTUK.....2ND RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....3RD RESPONDENT

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*(An appeal from the Judgment of the Honourable Judges of Appeal **Warsame, Musinga & M'Inoti, JJA** at the Court of Appeal at Nairobi dated 8th June, 2018 in Election Appeal No. 18 of 2018)*

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] This is an appeal against the Judgment of the Court of Appeal (*Warsame, Musinga & M'Inoti, JJA*) sitting in Nairobi and delivered on 8th June, 2018 in **Election Petition Appeal No. 18 of 2018**. The appellate Court allowed the

appeal and set aside the decision of the High Court (Sergon, J) in **Election Petition No. 8 of 2017** delivered on 2nd March, 2018. The Court further declared that the 1st Respondent herein was validly elected as the Member of the National Assembly for Embakasi East Constituency.

B. BACKGROUND

a) Proceedings in the High Court

[2] The 1st Respondent was declared as the duly elected Member of the National Assembly for Embakasi East Constituency following the general election held on 8th August, 2017. He had garnered a total of 46,587 votes against the Petitioner who came in second with 42,253 votes. Aggrieved by the result of the election, the Petitioner filed **Election Petition No. 8 of 2017** on 5th September, 2017 challenging the election of the 1st Respondent.

[3] The following issues were raised for determination by the Election Court, *inter alia*:

a. *Whether there were election irregularities and illegalities in the election of the Member of the National Assembly for Embakasi East Constituency held on 8th August, 2017 and whether the irregularities and the illegalities, if any, affected the electoral process and the outcome of the aforesaid election;*
b. *Whether the 1st Respondent was validly elected and declared as the Member of the National Assembly for Embakasi East Constituency;*
c. *What consequential declarations, orders and or reliefs should issue? and*
d. *Who should bear the costs of the proceedings?*

[4] In the course of the trial, the Petitioner successfully applied for orders of scrutiny and recount of ballots. The report, dated 21st February, 2018 was

submitted in Court and parties were invited to file and exchange written submissions.

[5] In the Judgment delivered on 2nd March, 2018, the High Court nullified the election of the 1st Respondent primarily on the grounds that the conduct of the same was neither free nor fair, and that the elections were marred with irregularities and illegalities that affected the outcome thereof.

[6] The Court further issued orders for a fresh election to be conducted and awarded the Petitioner costs of Kshs. 5,000,000/- against the 1st and 3rd Respondents.

b) Proceedings in the Court of Appeal

[7] Aggrieved by the decision of the trial Court, the 1st Respondent preferred an appeal to the Court of Appeal. Prior to the filing of the appeal, the 1st Respondent had filed a Notice of Appeal on 2nd March, 2018 in the High Court.

(i) Application to strike out the Appeal

[8] In an application aforesaid brought under the provisions of Rule 17 of the Court of Appeal (Election Petition) Rules, 2017 (Hereinafter "Court of Appeal Rules, 2017), the 1st Respondent sought orders to strike out the appeal on the grounds, *inter alia,* that; *no notice of appeal was filed at the registry of the Court under Rule 6 or service effected under Rule 7 of the Court of Appeal Rules, 2017; the Record of Appeal did not contain a Notice of Appeal lodged at the registry of the Court*; and *the Record of Appeal did not contain certification as required under Rule 8(4) of the Court of Appeal Rules, 2017.*

[9] In determining the said application, the appellate Court relied on the provisions of Rule 5 of the Court of Appeal Rules, 2017 which empowers the Court to exercise its discretion in a manner that will not prejudice the parties.

The Court further invoked the provisions of Article 159(2)(d) of the Constitution, Sections 3A and 3B of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya as well as the decision of the Supreme Court in ***Lemanken Aramat v. Harun Meitamei Lempaka & 2 Others*** SC Petition No. 5 of 2014; [2014] (***Aramat***) and deemed that the appeal was properly filed. It therefore dismissed the application paving way for the hearing of the appeal on merit.

(ii) 1st Respondent's Cross Appeal

[10] The 1st Respondent had filed his Notice of Cross Appeal dated 5th April, 2018 on even date. Therein he raised six (6) issues for consideration, namely; *whether the Court erred in finding that the lack of Independent Electoral & Boundaries Commission stamps did not affect the validity of the statutory forms 35; whether the Court erred in law and fact by finding that violence was only occasioned in Soweto Social Hall; whether the Court erred in law in failing to admit the Petitioner's video evidence; whether the Court erred in law by failing to determine or interrogate the nature of the countersigning of forms 35; whether the criminal charges against Jackline Waithera and Monica Kasaya Wambua was conclusive evidence of electoral malpractice and/or fraud*; and *whether the learned Judge properly found, on the issues of irregularity and the non-compliance with the law, that the same did not meet the threshold of Section 83 of the Elections Act as read with Article 81 of the Constitution*.

[11] The issues raised in both the grounds of appeal and the cross-appeal were considered contemporaneously during the hearing of the appeal. In its judgment delivered on 8th June, 2018, the Court of Appeal allowed the appeal and set aside the decision of the High Court and declared that the 1st Respondent was validly elected as the Member of the National Assembly for Embakasi East Constituency; the Court was thus not satisfied that the irregularities and the non-compliance with the electoral law affected the results of the elections.

c) Proceedings at the Supreme Court

[12] Dissatisfied with the Judgment of the Court of Appeal, the Petitioner moved this Court vide the Petition before us dated 12th July, 2018 and filed on 13th July, 2018.

[13] The appeal is based on the following summarized grounds:

a. *That the learned Judges of Appeal erred in failing to find that the failure to lodge the Notice of Appeal was fatal and that there was no proper appeal before them and hence they had no jurisdiction to entertain the appeal thus violated Articles 87(1), 163(7), 164(1)(b) of the Constitution.*
b. *That the learned Judges of Appeal erred in law by finding that the Notice of Appeal as lodged was not proper yet proceeded to hear and determine the appeal.*
c. *That the learned Judges of Appeal erred in law by finding for the admissibility of video evidence but failing to take into consideration its probative value, to wit, demonstration that indeed violence was instigated, occurred and affected the outcome of the election.*
d. *The learned Judges of Appeal acted in excess of/without jurisdiction in delving into matters of fact on the nature and effect of violence on [the] election and the nature and effect of various irregularities on the election and thereby overlooked the doctrine of precedent contrary to Article 163(7) of the Constitution and Section 85 of the Elections Act.*
e. *The learned Judges of Appeal misdirected themselves in their interpretation of Articles 81 and 86 with regard to the appeal before them.*
f. *The learned Judges of Appeal erred in law by allowing an appeal without satisfying themselves as to the discharge of the burden and standard of proof required of the 1st Respondent.*

g. *The Court of Appeal erred in overturning the superior Court's finding on violence and intimidation contrary to the spirit of Article 81(e)(ii) of the Constitution's emphasis on the integrity of elections.*

h. *The Court of Appeal erred in concluding that the issue of evidence of violence in Embakasi Greenspan Mall grounds was a matter of fact (thereby dismissing the ground in the Cross-Petition) whereas that regarding Soweto Social Hall was one of law and thereby misapplied Section 85 of the Elections Act.*

i. *The Court of Appeal erred in dismissing grounds 1-4 of the Cross-Petition and finding that the irregularities seen in the statutory forms had no impact on the integrity of the elections.*

[14] On 3rd August, 2018, the 1st Respondent filed a Notice of Motion Application seeking to strike out the appeal. The Application was supported by the affidavit of the 1st Respondent sworn on 2nd August, 2018. The Application did not cite the provisions of law that the 1st Respondent sought to rely upon in seeking to strike out the appeal. However, during the hearing of the substantive appeal, the Court determined that the Application and the Appeal would be heard concurrently.

[15] On their part, the 2nd and 3rd Respondents filed their submissions dated 3rd September, 2018 on even date.

[16] Appearing for the Petitioner was learned Counsel Mr. Kiragu Kimani and learned Counsel Mr. Gershom Otachi. Learned Senior Counsel Hon. Sen. James Orengo appeared alongside learned Counsel Mr. Jackson Awele for the 1st Respondent while learned Counsel Mr. Isaack Odhiambo appeared for the 2nd and 3rd Respondents.

C. PARTIE'S RESPECTIVE CASES

i. The Petitioner' s Case

a. *Jurisdiction of the Court of Appeal/Competency of the Appeal/Failure to lodge a Notice of Appeal*

[17] The Petitioner's Counsel argued that the Judges of Appeal had misapplied the law in dismissing the Petitioner's application to strike out the 1st Respondent's Notice of Appeal. Counsel submitted that the said Notice of Appeal was filed contrary to the provisions of Rules 6 & 8 of the Court of Appeal Rules, 2017 and therefore, that there was no appeal that was lodged at the Court of Appeal for its consideration and determination.

[18] Counsel went further to submit that the Court of Appeal Rules, 2017 are of a mandatory nature, and ought to be complied with and as such a Notice of Appeal is a vital and integral component for the institution of an appeal to the Court of Appeal. Furthermore, that a Notice of Appeal is fundamental to a valid appeal and that adherence to the laid-out procedure and rules of filing a Notice of Appeal was imperative, and its filing and service was integral to the validity and competence of an appeal.

[19] It was also submitted on behalf of the Petitioner that the Judges of Appeal, in invoking Article 159(2)(d) of the Constitution, occasioned substantial injustice and acted in violation of Section 3 of the Court of Appeal (Organization and Administration) Act, 2015. And that Article 159(2)(d) is not a panacea to all procedural infractions and it was not meant to oust the obligation of litigants to comply with rules of procedure, and that therefore a procedural deficiency could not be cured simply by invoking the provisions of the said Article. The case of ***Patricia Cherotich Sawe v. Independent Electoral and Boundaries Commission & 4 Others*** SC Petition 8 of 2014; [2015] eKLR (***Patricia Sawe***) was cited in that context. In addition, it was argued that the 1st Respondent had failed to comply with the rules of procedure and therefore, failed

to file an appeal to the Court of Appeal, which in turn meant that there was no competent appeal before the Court of Appeal for its determination.

[20] Relying also on the case of ***Samuel Kamau Macharia & Another v. Kenya Commercial Bank Limited & 2 Others*** SC Application 2 of 2011;[2012] eKLR, Counsel urged that the Court's jurisdiction flows from either the Constitution or legislation or both and that without jurisdiction, it is incumbent upon the Court not to take any further step in the proceedings before it and that upon the Court of Appeal Judges determining that the Notice of Appeal was irregular, they should have downed their tools as they were bereft of jurisdiction to take any further step. The 1st Respondent, it was also heard, did not make a formal application to regularize the Notice of Appeal and therefore, the Judges of Appeal could not exercise their discretion and dismiss the application to strike out the appeal as they had not been properly moved to do so. The Judges of Appeal, it was argued, could not exercise their discretion with regard to a still born appeal and the purported appeal ought to have been struck off without further ado.

b. Failure to consider the impact of video evidence after declaring it admissible

[21] In their Judgment, the Judges of Appeal overturned the decision of the trial Court on this issue, and opined that there was no obligation under Sections 78 and 106B of the Evidence Act that a person producing a certificate thereunder had to swear an affidavit. It was in that regard submitted that despite this finding by the appellate Court, the learned Judges did not admit the video evidence and instead relied upon the provisions of Section 85A of the Elections Act, as well as Rules 29(1)(b) and 29(2)(a) of the Court of Appeal Rules to determine that the Court was not properly moved to admit the video evidence, which matter in their opinion, ought to have been admitted by the election Court.

[22] It was the Petitioner's submission in that context that despite the Judges of Appeal making reference to Rules 29(1)(b) of the Court of Appeal Rules, they nevertheless applied a narrow interpretation of the provision and failed to appreciate the inclusion and exercise of its discretion to take additional evidence as was enunciated by this Court in ***Moses Masika Wetangula v. Musikari Nazi Kombo & 2 Others*** SC Petition No. 12 of 2014;[2015] eKLR (***Moses Wetangula***), and that they had no option but to examine and re-evaluate the evidence once they deemed it admissible. Further, he submitted that the Judges of Appeal ought to have applied a broad and accommodating interpretation of the rule, and call upon the admission of additional evidence in order to satisfy themselves on the merits of the appeal looked at holistically.

[23] It was further submitted that the determination by the Judges of Appeal in finding on admissibility of evidence but nonetheless omitting to admit the same was prejudicial to the Petitioner, and infringed and violated his rights as enshrined under Article 50 of the Constitution. It was also submitted that this was a clear example of the appellate Court paying undue regard to technicalities, in that the Court opined that it would not consider the video evidence unless there was an application calling upon it to do so.

c. Misdirection in interpretation of Articles 81 and 86 of the Constitution

[24] It was submitted on this issue that the election for the Member of the National Assembly for Embakasi East could not be deemed to have attained the expectations contemplated under Articles 81 and 86 of the Constitution, *to wit*, free, fair, transparent, accurate and verifiable elections. That further in presidential petition case of ***Raila Amolo Odinga & Another v. Independent Electoral and Boundaries Commission & 2 Others;*** Presidential Election Petition No. 1 of 2017; [2017] eKLR (***Raila Odinga 2017***) it had been settled that the quantitative and qualitative aspects of an election

could not be segregated; that both had to be considered together in order to ascertain whether the quantity of the discrepancies in an election affected the quality of the outcome of the said election. The Court of Appeal, it was argued, did not analyze these two conditions together and made a determination that despite the discrepancies in the tallying of votes and the numerous anomalies in the Forms 35A and 35C, the outcome of the elections and the margin of difference between the 1st Respondent and the Petitioner, could both be affected. The Court instead, it was submitted, gave more credence to the quantitative aspect and disregarded the qualitative issues.

d. Discharge of burden and standard of proof

[25] The Petitioner submitted that the 1st Respondent (as an Appellant in the Court of Appeal) did not discharge his burden on matters of law, and that the appeal was primarily grounded on matters of fact which the Court of Appeal had no mandate to delve into. That the case of ***Raila Odinga and 5 Others v. Independent Electoral and Boundaries Commission & 3 Others*** SC Petition No. 5 of 2013; [2013] eKLR (***Raila Odinga 2013***) set out the principles as regards the thresholds on the standard and burden of proof in that context and that the 1st Respondent did not satisfy the stated and settled threshold.

e. Court of Appeal acting in excess of and/or without jurisdiction in delving into matters of fact

[26] Counsel submitted that the Judges of Appeal erred in overturning the trial Court's decision on the issue of violence and intimidation during the contested election by evaluating the evidence of facts contrary to the provisions of Article 81(e)(ii) of the Constitution, as read with Section 85A of the Elections Act. It was also submitted that the parameters on the meaning of matters of law had been settled by this Court in cases of ***Gatirau Peter Munya v. Dickson Mwenda***

Kithinji & 3 Others SC Petition No. 2B of 2014; [2014] eKLR and ***Zacharia Okoth Obado v. Edward Akong'o Oyugi & 2 Others*** SC Petition No. 4 of 2014;[2014] eKLR, and that the Court of Appeal had unnecessarily delved into matters outside the scope set out in these decisions.

f. The Petitioner's Replying affidavit to the Notice of Motion application by the 1st Respondent's application to strike out the appeal

[27] In his affidavit, the Petitioner averred that the application to strike out the appeal was defective as it did not comply with the provisions of Rule 11 of the Supreme Court Rules, 2012 which mandates that a Respondent, should, within fourteen (14) days of service of a petition, file grounds of objection or an affidavit or both.

[28] It was further argued that the application was filed well over thirty (30) days after service of the Record of Appeal, and that therefore, the application was misconceived and bad in law and that it sought to challenge an unopposed Petition of Appeal. The Petitioner furthermore urged that the application sought to obstruct the processes of the Court and was an attempt to defeat a legitimate claim to this Court.

[29] On the issue of jurisdiction, the Petitioner emphasized that this Court has the jurisdiction to hear and determine the issues raised in the appeal as it touched on issues of general public importance, and therefore required a conclusive interpretation by this Court. He relied upon this Court's decision of ***Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd & Another*** SC Petition No. 3 of 2012; [2012] eKLR for the proposition that the issues arising for determination involve a discourse in the interpretation and application of Articles 10, 81 and 86 of the Constitution and therefore that the appeal was properly before the Court.

[30] It was further submitted that there were conflicting decisions emanating from the Court of Appeal on the issue of Notice of Appeal. In that context, reference was made to the decision by the Court of Appeal in the case of ***Lesirma Simeon Saimanga v. Independent Electoral and Boundaries Commission & 2 others*** Election Petition Appeal (Application No. 7 of 2018); [2018] eKLR in which the Court of Appeal dismissed an appeal ostensibly on the grounds that there was no competent appeal to the Court in the absence of a regularly filed Notice of Appeal. It was also submitted that in such instance, there was need for intervention by this Court to avert any jurisprudential uncertainty with regards to the issues of Notices of Appeal under Rules 6 & 8 of the Court of Appeal Rules, 2017.

[31] In addition it was submitted that this Court has in the case of ***Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 others*** SC Application No. 16 of 2014; [2014] eKLR (***Nicholas Salat***) determined that the filing of a Notice of Appeal is a jurisdictional matter and not merely a technical matter of procedure and that it would therefore be imperative, in consideration of the prevailing circumstance at the Court of Appeal, for this Court to intervene and make a clear interpretation of the provisions of Rules 6 & 8 of the Court of Appeal Rules, 2017.

[32] It was the Petitioner's contention in conclusion that the Petition satisfied and met the threshold on the jurisdiction of this Court to hear and determine an appeal under Article 163(4)(a) of the Constitution in line with the decision of this Court in the case of ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 others*** SC Application No. 5 of 2014; [2014] eKLR (***Munya 1***) and hence, on its merits, it ought to be allowed with costs.

ii. The 1st Respondent's Case

a. Application to strike out the appeal

[33] In his application to strike out the appeal, the 1st Respondent urged that the Petitioner seeks to relitigate issues on settled matters of electoral law and subsidiary legislation. That further, the issues raised by the Petitioner are factual issues that had been extensively dealt with by the High Court and which issues this Court has no jurisdiction to deal with. The 1st Respondent further urged that the Petitioner seeks to litigate on tangential and/or ancillary constitutional questions that were not litigated at the superior Courts and that he had not demonstrated that he seeks to litigate on cardinal issues of law or jurisprudence that deserve an input by this Court.

[34] It was also argued that the appeal was frivolous, an abuse of the processes of this Court and otherwise a waste of the limited resources of the Court.

b. Jurisdiction of this Court

[35] Counsel submitted that while this Court may exercise its discretion in admitting or dismissing an appeal brought under the provisions of Article 163(4)(a) of the Constitution, where it is shown that the decision of the Court of Appeal does not depart from the interpretive coordinates already set by this Court, it must defer the matters at the earliest opportune time to avoid unnecessary monotony in the interpretation of constitutional provisions. This Court's decision in the advisory opinion of ***In the Matter of the Kenya National Commission on Human Rights,*** Reference No. 1 of 2012; [2014] eKLR was cited in that regard.

[36] Furthermore, Counsel urged that the Petitioner needed to show that the matter before this Court emanated or involved the interpretation or application of the Constitution arising from the decision of the Court of Appeal as was determined in the ***Munya 1*** case and that where the appeal has little or nothing to do with the application or interpretation of the Constitution, then it cannot

receive attention of this Court under the provisions of Article 163(4)(a) of the Constitution.

[37] In concluding on this issue, it was submitted that the Petition before this Court was an attempt to interpret ordinary issues of the law that had already been determined within the confines of applicable and settled jurisprudence of the Court of Appeal, and that the mere citing of the constitutional provisions such as Articles 81 and 86 did not make the instant appeal one that involved the interpretation or application of the Constitution. And that the Petitioner had not shown how the constitutional issues raised, if any, transmuted into issues that would ordinarily require interpretation by this Court. In any event that the said issues had departed from the settled interpretation of constitutional provisions in contravention of Article 163(7) of the Constitution.

c. *Jurisdiction of the Court of Appeal/Competency of the Appeal/Failure to lodge a Notice of Appeal*

[38] On this issue, it was submitted on behalf of the 1st Respondent that the Petitioner had misapprehended and misunderstood the applicable Court of Appeal Rules, 2017. It was urged that the failure to comply with the Rules is a matter for determination at the Court's discretion subject to the provisions of Article 159(2)(d) of the Constitution. Counsel argued that a Notice of Appeal is a mandatory requirement which need to be filed wherever one seeks to appeal the High Court's judgment. Therefore, the question whether a Notice of Appeal is properly filed and the effect of failure to comply with the Rules is one that the Court of Appeal under Rule 5 thereof, has the inherent discretion to adjudicate upon and the Court may broaden the confines of its discretion by applying the provisions of Article 159(2)(d) of the Constitution to determine any controversy on the competency of a Notice of Appeal.

[39] In that context, Counsel argued that the Petitioner had not demonstrated what prejudice he stood to suffer, by virtue of the admission of his Notice of Appeal. Counsel further submitted that the cases of ***Patricia Sawe*** and ***Nicholas Salat*** were distinguishable as the Notices of Appeal thereon, were filed out of time and no formal application for extension of time was made in the former case and while in the later, the service of the Notice of Appeal was out of time and an irregular application for extension of time was made after the record had been filed.

[40] It was thus submitted in the above context that the inherent discretion of the Court of Appeal, fortified by the provisions of Article 159(2)(d) of the Constitution, should not be arbitrarily interfered with unless it is shown that the discretion was exercised whimsically or capriciously. It was further submitted that the technicalities of procedure should at no instance be allowed to cloud substantive justice and the effect of expeditious, just, affordable and proportionate dispensation and resolution of appeals as provided under Section 3B(1) of the Appellate Jurisdiction Act should be carefully considered by Courts.

d. Failure to consider the impact of video evidence after declaring it admissible

[41] Counsel urged that appeal to the Court of Appeal lies from decisions made by the High Court. As such, once the Court of Appeal had determined that the video evidence was inadmissible for failing to comply with the provisions of Sections 78 and 106B of the Evidence Act, no decision lay to the Court of Appeal for its consideration on the probative value, or otherwise. It was also submitted that despite the provisions of Rule 29(1)(b) of the Court of Appeal Rules, 2010 in which the Court of Appeal is granted the discretion to admit additional evidence before it, it nonetheless declined to do so as the Cross Appeal filed did not move

that Court appropriately, and further, it did not have the jurisdiction to hear the evidence and consider its probative value for the first time as an appellate Court.

[42] It was submitted in that context that Section 85A(1) of the Elections Act as read together with Section 31(b) of the Interpretation and General Provisions Act, Rule 29(1)(b) of the ordinary Court of Appeal Rules, is inapplicable to appeals to the Court of Appeal in election appeal matters and in respect to the express jurisdictional restrictions imposed on it under Section 85A of aforesaid Act. That opening up election appeals to appraisal of additional evidence or taking on additional evidence and re-trial before the High Court as envisioned under Rule 29(1)(b) of the Court of Appeal Rules,2010 would defeat the principles embodied under Article 87 of the Constitution, as well as Section 85A of the Elections Act.

e. Misdirection in interpretation of Articles 81 and 86 of the Constitution

[43] On this issue, it was submitted that the Petitioner had not shown how the Court of Appeal misapplied and/or misdirected itself in the interpretation of Articles 81 and 86 of the Constitution. That the Court of Appeal applied the substantiality test, and what came out of their application was that the election in the Embakasi East Constituency, though allegedly marred with illegalities and irregularities, met the threshold under those Articles.

[44] In relying on the decision of ***Raila Odinga 2017***, the 1st Respondent argued that this Court had pronounced itself on the issue of the fundamental principles enunciated under Articles 81 and 86 on the general conduct of elections, and stated that if it could be shown that an election was conducted substantially in accordance with the provisions of the Constitution and the Elections Act, then such election could not be invalidated on the grounds of irregularities only.

[45] It was also submitted that the Petitioner had erroneously alleged that the Court of Appeal had dismissed the decision of the trial Court solely on the "aspect of the winning margin of 4,316 votes between the candidates and not all attendant irregularities identified, both quantitative and qualitative." The 1st Respondent on the contrary contended that the Court of Appeal in its decision had considered, in totality, the set facts and evidence on record, and stated that the nullification of the said elections on account of the irregularities was not properly founded.

f. Discharge of the burden and standard of proof

[46] It was submitted that this issue was not one that warrants the jurisdiction of the Court as it had nothing to do with either the application or interpretation of the Constitution. Suffice to say, it was the 1st Respondent's contention that the burden of proof lay with the Petitioner from the trial Court to the appellate Court, and that at no time did the burden shift to the 1st Respondent. It was also submitted that it was for the Petitioner to submit evidence before the Court that indeed there were electoral irregularities to warrant the dismissal of the elections, and for the 1st Respondent to demonstrate that the said evidence did not meet the evidentiary standards as set out in ***Raila Odinga 2013*** and that therefore, the Petitioner did not discharge this burden and attempted to shift it to the 1st Respondent.

[47] On the standard of proof, it was submitted that the primary obligation of the Court of Appeal was to evaluate the evidence tendered by the Petitioner and determine whether the same met the required standard as set out in ***Raila Odinga 2017***. In addition, the Petitioner had to adduce cogent and credible evidence to prove the grounds of non-conformity with the law to the satisfaction of the Court which he failed to do.

g. The Court of Appeal acted in excess of and/or without jurisdiction in delving into matters of fact

[48] It was submitted on behalf of the 1st Respondent that the Court of Appeal correctly and properly directed itself in law by evaluating the evidence on record with regards to violence in Greenspan Mall and Embakasi Primary School against the conclusions of the trial Court, and found that the trial Court had expressly determined the issue. The Court also evaluated the evidence on record, including additional evidence which the Petitioner had alleged had not been considered by the trial Court, and came up with its own findings on the issues raised in the appeal. This was said to be evident when the Court evaluated the evidence on the issue of violence at the Soweto Social Hall and made its conclusions that the same was not attributable to the 1st Respondent, exonerated him from the same, and further made a determination that despite evidence of the violence in the said vicinity, it was not shown or established how the same impacted negatively on the outcome of the results of the election.

[49] It was also submitted that there was no record of evidence from any of the voters that the violence in the areas cited by the Petitioner disenfranchised them and led to them failing to exercise their constitutional rights to vote, and that the Petitioner has not in any event challenged the decision of the Court of Appeal on this issue.

[50] The 1st Respondent further submitted on the issue of intimidation of the Returning Officer that there was no undue pressure or intimidation that was meted out against the Returning Officer, but that the same was expected pressure due to the heightened tension for the releases of the results. And that the Court of Appeal correctly held that the perceived violence and /or intimidation that was occasioned on the Returning Officer is not shown to have altered the outcome of

the results, and that the agitation that was witnessed was neither illegitimate or illegal.

iii. The 2nd and 3rd Respondents' Case

a. Jurisdiction

[51] It was submitted from the onset that the Petitioner's appeal was nebulous in nature, and was purportedly predicated on interpretation of the Constitution without specifying any particular Articles of the Constitution that he sought interpretation on, and that the submissions did not set out the issues in any manner connoting issues warranting constitutional application or interpretation.

b. The status of the Notice of Appeal at the Court of Appeal

[52] Counsel for the 2nd and 3rd Respondents' submitted that the Court of Appeal took cognizance of Rule 6 of the Court of Appeal Rules, 2017 in finding that the Notice of Appeal and the Record of Appeal were filed and served within the stipulated timelines. Counsel urged that according to the provisions Section 72 of the Interpretation and General Provisions Act, Cap 2 of the Laws of Kenya, a document which purports to be substantively in form with what is provided shall not be void by reason of a deviation therefrom.

c. admissibility of video evidence

[53] On this issue, it was submitted that the Judges of Appeal relied on the provisions of Rule 29(1)(b) of the Court of Appeal Rules, 2010 and exercised their discretion by refusing to admit the video evidence. Counsel urged that the Judges of Appeal, though they may move *suo moto*, declined to do so, and instead held that the Petitioner had not properly moved them to consider the video evidence.

[54] In any event, it was submitted that the Petitioner had not given any plausible reason on how the said video evidence was material to the prosecution

of their case, and that he had also failed to show how the same was an issue of constitutional application or interpretation as provided for under Article 163(4)(a) of the Constitution.

d. nature and effect of violence on polling day

[55] Counsel submitted that the appellate Court allegedly delved into matters of fact on the nature and effect of violence on the polling day, which according to the Petitioner, was contrary to the provisions of Section 85A of the Elections Act. In that regard, they relied on the case of ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 3 Others*** SC Petition No. 2B of 2014; [2014] eKLR (***Munya 2***), where this Court set out the guiding principles on the phrase "matters of law", which included the application of the Constitution and the law to a set of facts or evidence on record and the evaluation of conclusions of the trial Court on the basis of the evidence on record.

[56] It was also submitted that the Judges of Appeal properly exercised some restraint to avoid re-evaluating the evidence before the trial Court with a view of verifying a factual finding or, reversing the trial Court's conclusion on the same. It was thus contended that on the violence witnessed at the Soweto Social Hall was a factual and not a legal issue, and thus the Court properly restrained itself under Section 85A of the Elections Act into delving into issue of fact, rather than of law.

e. Misinterpretation of Articles 81(e)(ii) & 86 of the Constitution

[57] It was submitted that the Petitioner had alleged that the Court of Appeal misdirected itself in the interpretation of Articles 81 and 86 of the Constitution on the principles of a free and fair election provided under Article 81 of the Constitution. And that with regard to the evidence of instances of unrest at seven (7) out of the twenty-eight (28) polling stations, specifically at the Soweto Social

Hall Polling Centre, the appellate Court had held that this evidence was not sufficient to nullify the elections. It was thus submitted that there had to be evidence that the violence not only affected the voting but also the outcome of the elections. On the contrary, it was contended that the Petitioner was the author of his own folly, in that it was his own supporters who perpetuated the unrest at the Soweto Social Hall Polling Station.

[58] On the issue of Article 86 of the Constitution, the 2nd and 3rd Respondents submitted that the election method that was used was simple, accurate, verifiable, secure, accountable and transparent, and hence it passed the quantitative test, with the 1st Respondent having the highest tally of votes, which numbers were confirmed after the scrutiny and recount exercise. It was further submitted that the election was conducted in accordance with Article 86 of the Constitution, as read together with Section 83 of the Elections Act.

[59] Relying on the case of ***Zaheer Jhanda & Another v. Independent Electoral and Boundaries Commission & 3 Others*** Election Appeal No. 33 of 2018; [2018] eKLR in which it was stated that elections are not one hundred percent (100%) perfect, Counsel submitted that mistakes are bound to happen in any election but if such mistakes do not affect the result of the election, then the Court would be reluctant to nullify the election. It was thus submitted that the elections met the test of Article 86 of the Constitution, and that the arithmetical mistakes that were found were not sufficient to nullify the same. In addition, the scrutiny and recount exercise, verified the correct and accurate position of the elections.

f. burden and standard of proof

[60] On the issue of standard and burden of proof, it was submitted that the legal position on the twin issues was established in ***Raila Odinga 2013,*** and that the burden lies with the Petitioner at the trial Court to prove his case.

However, Counsel urged that in this case the Petitioner did not discharge the legal burden placed on him and hence the setting aside of the High Court's decision by the appellate Court.

D. ISSUES FOR DETERMINATION

[61] Upon considering the pleadings, oral arguments and submissions by the respective parties, this Court considers the following issues as arising for determination;

a) *Whether this Court has the requisite jurisdiction to hear and determine the instant Petition brought under Article 163(4)(a) of the Constitution.*
b) *Whether the appeal before the Court of Appeal was competent.*
c) *Whether the Court of Appeal erred in failing to admit the video evidence.*
d) *Whether the Court of Appeal acted in excess of and/or without jurisdiction in delving into matters of fact contrary to Section 85A of the Elections Act.*
e) *Whether the Court of Appeal misdirected itself in the interpretation of Articles 81(e)(ii) and 86 of the Constitution.*
f) *Whether the 1st Respondent discharged the burden and standard of proof in the appeal before the Court of Appeal.*
g) *The reliefs available to Parties.*

E. ANALYSIS

a. *Whether this Court has the requisite jurisdiction to hear and determine the instant Petition brought under Article 163(4)(a) of the Constitution*

[62] We have, at the outset, the task of answering the question as to whether, as a Court, we have the jurisdiction to entertain the instant appeal. The Petitioner on one hand argues that this Court is vested with the requisite jurisdiction to hear

and determine his appeal under Article 163(4)(a) of the Constitution, a position that was disputed by the Respondents.

[63] In that context, Article 163(4)(a) of the Constitution reads:

> ***"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."*** [Emphasis added.]

[64] In addressing this jurisdiction, this Court in ***Munya 2*** and particularly the commentary by Mutunga, CJ (as he then was) described what may be termed as the "guiding principles" to be considered by Petitioners seeking to come to this Court under the provisions of Article 163(4)(a) of the Constitution. These guiding principles follow a long line of decisions that this Court has rendered with regards to matters coming before it under the provisions of Article 163(4)(a) of the Constitution. Also instructive are the cases of ***Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others***, SC Petition No. 10 of 2013; [2014] eKLR (***Joho***)*;* ***Lawrence Nduttu & 6000 Others v. Kenya Breweries Limited & Another*** SC Petition No. 3 of 2012; [2012] eKLR and ***Erad Suppliers & General Contractors Limited v. National Cereals & Produce Board*** SC Petition No. 5 of 2012; [2012] eKLR. The guiding principles are as follows:

i. ***A Court's jurisdiction is regulated by the Constitution, by statute law, and by the principles laid out in judicial precedent;***

ii. ***The chain of courts in the constitutional set-up have the professional competence to adjudicate upon disputes coming up before them; and only cardinal issues of law or of jurisprudential moment deserve the further input of the Supreme Court;***

iii. Not all categories of appeals lie from the Court of Appeal to the Supreme Court under Article 163(4)(a); under this head, only those appeals from cases involving the interpretation or application of the Constitution can be entertained by the Supreme Court;

iv. And under that same head, the lower Court's determination of an issue which is the subject of further appeal, must have taken a trajectory of constitutional application or interpretation, for the cause to merit hearing before the Supreme Court;

v. An appeal within the ambit of Article 163(4)(a) is one founded on cogent issues of constitutional controversy;

vi. With regard to election matters, not every petition-decision by the Court of Appeal is appealable to the Supreme Court; only those appeals arising from the decision of the Court of Appeal in which questions of constitutional interpretation or application were at play, lie to the Supreme Court.

[65] These guiding principles are to be considered alongside the provisions of Articles 87(1) and 105(1) of the Constitution on the enactment of legislation to establish a mechanism for timely settlement of election disputes and powers of the High Court sitting as an election Court, to determine the question whether a person has been validly elected as a Member of Parliament, with sub-article (3) therefore calling for the enactment of legislation giving effect to that Article. Reading those Articles of the Constitution and also as was set out in ***Fredrick Otieno Outa v. Jared Odoyo Okello & 4 Others*** SC Petition No. 6 of 2014; [2014] eKLR (***Fredrick Outa***), electoral disputes would therefore generally involve the application and determination of the Constitution unless the converse is expressly shown. In the aforementioned matter, this Court held, *inter alia*:

"***In adopting this view, we would observe that the Elections Act, 2011 enacts in substantive form the constitutional principle of securing for the Kenyan people a representative democracy, in which the mandate of leadership is attained through popular elective politics, based on the ideals of free and fair election. The realization of this goal is partly attainable through universal franchise, expressed in a voting exercise guided by appropriate legislation, that is derived from the premises and values embodied in Articles 38, 81 and 86 of the Constitution. Thus, it is for certain, that electoral contestations will involve constitutional interpretation or application.***" [Emphasis added].

[66] A similar position was adopted by this Court in ***Evans Odhiambo Kidero & 4 Others v. Ferdinand Ndungu Waititu & 4 others*** SC Petition Nos. 18 & 20 of 2014; [2014] we held at paragraph 144 that:

> ***"It follows that Article 163(4)(a) of the Constitution confers upon the Supreme Court a role of constitutional interpretation and application, which cannot be performed through a bare apportionment of judicial tasks,.... It is not feasible in electoral disputes, in respect of which the Constitution dedicates a whole chapter to "general principles" of the electoral system principles that stand alongside prescriptive norms. Where disputes arise with regard to the interpretation and application of such principles and norms in election petitions, this Court, Kenya's apex Court, cannot gaze helplessly when moved by a litigant."***

[67] We reiterate the above holdings but must note that not every election petition appeal to this Court by fact of arising from an electoral contest is,

without a party meeting the expectations of the guiding principles above, is always one to be addressed with constitutional magnifying glasses. In that regard, we note that in the present appeal, the Petitioner is challenging the decision on the reasoning and conclusion of the Court of Appeal, on the admissibility of evidence, the competency of the appeal lying to the Court of Appeal, the alleged excessive exercise of the power by the Court of Appeal under Section 85A of the Elections Act and misinterpretation and/or misapplication of Articles 81 and 86 of the Constitution. He further contended that the appellate Court acted in contravention of the provisions of Article 163(7) of the Constitution, and made decisions contrary to what had previously been determined by this Court. It has also been argued that the issue of the Notice of Appeal to the Court of Appeal as contemplated under the Court of Appeal (Election Petition) Rules, 2017 as read with Article 159(2)(d) of the Constitution is an issue of controversy, and that this Court has been called upon to deliberate and determine the same.

[68] In that regard, it would follow, as was pronounced in both ***Munya 1*** and ***Joho*** that the Petitioner is seeking to challenge the interpretation and application of Constitution in the manner set out hereinabove. Having previously found that electoral adjudication generally bears a constitutional and statutory provenance unless the contrary is shown, (see ***Fredrick Outa*** *case*), we see no reason why this Court should not hold that it has the jurisdiction to hear and determine the present appeal under the provisions of Article 163(4)(a) of the Constitution.

b. Whether the appeal before the Court of Appeal was competent

[69] Having found that we have the requisite jurisdiction to entertain the present Petition, we would now be obligated to deliberate on the merits of the appeal. The one issue that would be deemed to be the gravamen of the appeal would be the

Notice of Appeal to the Court of Appeal that had been filed by the 1st Respondent in his appeal of the decision of the election Court. The Petitioner in that regard contended that there was no competent appeal that was filed before the Court of Appeal.

[70] The Court of Appeal in its determination on the issue of the Notice of Appeal rendered itself at paragraph 33-34 of its Judgment as follows:

> ***"33. How should this Court deal with the noncompliant record of appeal? Considering the provisions of Rule 5 which empowers the Court to exercise its discretion in its determination of an application such as the one before us, we are minded to exercise our discretion in a manner that will not prejudice any of the parties, and which shall permit a determination of the appeal on its merits. The drafter of Rule 5 had in mind the purpose and place of Article 159(2)(d) of the Constitution which ensures and upholds determination of disputes on merit. Again, the Rule gives powers to the Court to exercise its discretion. And as we all know, discretion must not be exercised whimsically, capriciously or unreasonably. In addition, Section 72 of the Interpretation and General Provisions Act provides that whenever a form is prescribed by written law, an instrument or document that purports to be in the described form shall not be void by reason only of deviation, if the deviation does not affect the substance of the instrument or document, or if it is not calculated to mislead.***
>
> ***34. The 1st Respondent was duly served with the record of appeal within the stipulated period of five days from the date of its filing. The 1st Respondent did not suffer any prejudice as a***

result of the manner in which the record of appeal was compiled and presented before this Court. We therefore invoke the provisions of Article 159(2)(d) of the Constitution, Sections 3A and 3B of the Appellate Jurisdiction Act and Rule 5 of this Court's Election Petition Rules and deem the appeal as properly filed."

[71] The decision to allow the Notice and Record of Appeal before the Court of Appeal was therefore made in exercise of the appellate Court's discretionary power donated under Rule 5 of the Court of Appeal (Election Petition) Rules, 2017, Sections 3A and 3B of the Appellate Jurisdiction Act as well as Article 159(2)(d) of the Constitution. The decision was further predicated on this Court's reasoning in ***Aramat*** where we stated:

"In most cases, procedural shortcomings will only affect the competence of the cause before a Court without in any way affecting that Court's jurisdiction to entertain it. A Court so placed, taking into account the relevant facts and circumstances, may cure such a defect and the Constitution requires such exercise of discretion in matters of a technical character."

[72] Such an approach was also adopted by the Supreme Court of New Zealand in the case of ***Kacem v. Bashir*** (2010) NZSC 112; (2011) 2 NZLR 1 where on the issue of an appeal on the discretionary decision of a Court it was held [paragraph 32]:

"In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case, the criteria for a successful appeal are stricter: (1) error of law or principle; (2) taking account of

irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong."

[73] We have also read Joseph Raz in "*The Rule of Law and its Virtue*" (1977) 93 LQR 195 at 196 cited by Honourable Justice Matthew Palmer in his paper title"*The Rule of Law, Judicial Independence and Judicial Discretion*" (2016), where the author wrote;

"In the abstract, "discretion" as a concept, and its relationship with the rule of law, has been the subject of extensive jurisprudential consideration….In practice, of course, there are elements of discretion in many aspects of the judicial enterprise, including the identification of which law is relevant, the identification of which facts are material, and in the interstices of the law's application to the facts. At a basic level, I consider the rule of law requires that the application of law in imposing a penalty must involve at least a modicum of transparency, certainty and predictability. That, in turn, favours the explicit application of identified legal methodology and principles to shape what may otherwise become the relatively arbitrary exercise of discretion. Such methodology and principles constitutes law. They mean a decision-maker's reasoning can be more easily identified and analysed on appeal where an appeal is provided for by legislation. This appears to me to enhance the rule of law."

[74] Furthermore, in *H. L. A. Hart, Discretion*, 127 Harv. L. Rev. 652 (2013) Hart gives the term discretion an even broader definition where he writes:

"When we are considering the use of discretion in the Law we are considering its use by officials who are holding a

responsible public office. It is therefore understood that if what officials are to do is not rigidly determined by specific rules but a choice is left to them, they will choose responsibly having regard to their office and not indulge fancy or mere whim, though it may of course be that the system fails to provide a remedy if they do indulge their whim. The position may perhaps be clarified by distinguishing between the following pair of expressions: (1) the expression "a discretion," which means the authority to choose given on the understanding that the person so authorized will exercise discretion in his choice; and (2) the expression "discretion," which means a certain kind of wisdom or deliberation guiding choice, the characteristics of which I shall try to bring out in what follows. Perhaps they may come to light if we consider some choices that are not exercises of discretion but for quite different reasons from the cases which we have so far considered. These are choices where we do not indeed merely give effect to personal whim or desires of the moment but where we attempt to conform to principles and to defend our choices by them; yet because the principles are clear, determinate, highly specific, and uniquely determine the particular thing we have to do, we do not classify them as cases of discretion and it would be confusing to do so. Thus, to take a simple example, suppose I am writing with a pencil, it breaks, and I want to sharpen it to a new point. I go to the drawer and I am faced with a knife, three spoons, and two forks. I choose a knife: if asked why, I would not here reply, "Because I like it," but perhaps, "Because I want to sharpen a pencil and this is the obvious way to do it."

[75] He further propounds:

> ***"These characteristic observations and also the features of the simple case discussed bring out that the <u>distinguishing feature of the discretion case is that there remains a choice to be made by the person to whom the discretion is authorized which is not determined by principles which may be formulated beforehand, although the factors which we must take into account and conscientiously weigh may themselves be identifiable</u>."*** [Emphasis added.]

[76] In determining therefore an issue based on the exercise of a discretion, as has been observed, a Court can only be faulted if the use of the discretionary power was based on a whim, and that it can be established that the Court did not consider the prevailing circumstances and take into account what needed to be considered, or considered what ought not to have been considered. To infringe upon this discretionary power, would be tantamount to a judicial review of the decision of another Court's decision. This is an exercise which this Court, and indeed every other Court, should refrain from engaging in as it would be considered, or indeed viewed as, an interference in another Court's judicial independence and exercise of discretion.

[77] We must in addition state that in ***Deynes Muriithi & 4 others v. Law Society of Kenya & Another***; SC Application No. 12 of 2015; [2016] eKLR this Court affirmed the position that interference in the discretionary powers of one Court by another Court is to be frowned upon, and this Court would only interfere with such decision(s) if the same were on the face of it, an affront to justice or an infringement of fundamental freedoms, such as the right to a fair hearing, as has been alleged in the instant appeal by the Petitioner. Also, in ***Daniel Kimani Njihia v. Francis Mwangi Kimani & Another,*** SC Application No. 3 of 2014; [2015] eKLR, this Court restated the principle that it would not interfere with the discretionary powers of a Superior Court if it is

deemed that the orders issued in the exercise of the discretionary powers were neither whimsical, capricious nor made to the detriment and infringement of either of the parties' fundamental freedoms. In that matter, we specifically held [paragraph 21]:

> ***"Not all decisions of the Court of Appeal are subject to appeal before this Court. One category of decisions we perceive as falling outside the set of questions appealable to this Court, is the discretionary pronouncements appurtenant to the Appellate Court's mandate. Such discretionary decisions which originate directly from the Appellate Court, are by no means the occasion to turn this Court into a first appellate Court, as that would stand in conflict with the terms of the Constitution."***

[78] We replicated this opinion in ***Basil Criticos v. Independent Electoral and Boundaries Commission & 2 others*** SC Petition No.22 of 2014; [2015] eKLR and ***Teachers Service Commission v. Kenya National Union of Teachers & 3 Others,*** SC Application No. 16 of 2015; [2015] eKLR where one of the questions that was placed before us was the challenge of the discretion of the Court of Appeal in rendering its decision. In both matters we held that the exercise of the Court of Appeal's discretionary power cannot be interfered with, except in the circumstances as hereinabove expressly stated.

[79] In applying the above principles to the present appeal, we note that in admitting the Notice of Appeal aforesaid, the Court of Appeal took into account the following factors:

i. ***it was acting in exercise of its discretion, under Rule 5 of the Court of Appeal Rules, 2017.***
ii. ***the need to determine the Appeal on its merits.***

iii. the substance and intent of the Notice of Appeal was clear to it.

iv. the 1st Respondent in the appeal (the present Petitioner) was duly served with the record of appeal within the stipulated period of five days from the date of its filing.

v. the 1st Respondent (present Petitioner) did not suffer any prejudice as a result of the manner in which the record of appeal was compiled and presented to the Court.

vi. Article 159(2) (d) of the Constitution obligated the Court to invoke the principle that it shall not pay undue regard to technicalities in administering justice.

[80] In addressing the question whether we should interfere with the appellate Court's exercise of discretion, therefore we note that Rules 5 and 6 of the Court of Appeal (Election Petition) Rules, 2017 provide as follows:

" 5. Non-compliance with Rules

The effect of any failure to comply with these Rules shall be a matter of determination at the Court's discretion subject to the provision of Article 159 (2)(d) of the Constitution and the need to observe the timelines set by the Constitution or any other electoral law.

6. Filing of notice of appeal

(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."

[81] One of the considerations that the appellate Court is obligated to take into account in exercise of its discretion to excuse non-compliance with the Rules is "*the need to observe the timelines set by the Constitution or any other Electoral Law*" including on the filing and service of a Notice and Record of Appeal, a matter it did take into account in the present case. Another factor is the application of Article 159(2) (d) which it also took into account. The only issue which raises a controversy is whether it ought to have specifically addressed Rule 6 on the place of filing the Notice of Appeal. In our view, the appellate Court in exercising its discretion determined that no prejudice was caused to the Petitioner by that anomaly as he was served within time thus giving clear notice of the intention to appeal and no prejudice was thereby caused to him as he was able, within statutory timelines, to meet and respond to the appeal. While we are

aware that different benches of the Court of Appeal have in the aftermath of the 2017 General Election taken divergent and disparate approaches to this question, (See ***Lesirma Simeon Saimanga v. Independent Electoral and Boundaries Commission & 2 Others*** Election Petition Appeal (Appl.) No. 7 of 2018; [2018] eKLR and ***Musa Cherutich Sirma v. Independent Electoral and Boundaries Commission & 2 Others*** Election Petition Appeal (Appl.) No. 9 of 2018; [2018] eKLR), we are satisfied that in the specific circumstances of the present case, we see no reason to interfere with the appellate Court's exercise of discretion as it was neither whimsical, capricious nor unreasonable. That finding notwithstanding, it would be expected that parties and their advocates, now aware of the clear and unambiguous language of Rules 2, 5 and 6 of the Court of Appeal (Election petition) Rules, 2017 would comply with them in the next election regime to avoid different and potentially conflicting decisions on the place of, content and time frames for filing Notices of Appeal arising from appeals directed at the Court of Appeal. That Court is also now well guided on the expectations of the law as regards that issue.

c) Whether the Court of Appeal erred in failing to admit the video evidence

[82] The Appellant has challenged the decision of the Court of Appeal in not admitting certain video evidence, arguing that it erred in finding that the video evidence that he had adduced, though admissible, was not admitted into evidence in support of his Petition.

[83] It was further argued that the issue of admissibility of evidence was an issue of law, not fact, and that as provided under Section 85A of the Elections Act, as well as the pronunciation by this Court in ***Moses Wetangula*** case, the Court of Appeal had no option but to examine and re-evaluate the said evidence to ascertain its veracity and import on its decision.

[84] The 1st Respondent on the other hand contended and stated that the discretionary power donated to the Court of Appeal under Rule 29(1)(b) of the Court of Appeal Rules applied only to ordinary appeals, and as such the powers to take on additional evidence by the appellate Court were delimited by the provisions of Section 85A of the Elections Act. It was also argued that the Court of Appeal could only determine appeals on matters of law, a matter this Court has elaborated on extensively in the ***Munya 2*** decision. It was further argued that since the veracity or probative value of the video evidence had not been established at the election Court, then the appellate Court, bound by the strictures of Section 85A of the Elections Act, could not delve into the merits of the evidence as the same would call upon the recalibrating and re-evaluation of evidence that had not been presented before the election Court. The 2nd and 3rd Respondents aligned their arguments on this issue with those of the 1st Respondent.

[85] In the above context, at paragraph 81 of the ***Munya 2*** case, this Court prescribed the phrase "matters of law" as opposed to "matters of fact" with specific reference to Section 85A of the Elections Act as follows:

> ***"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 as set of facts or evidence on record, by the trial Judge in an election petition in the High Court concerning the 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 the membership of the National Assembly, the Senate, or the office of County Governor, where the applicant claims that such conclusions were based on 'no evidence' or that the conclusions were not supported by established facts or evidence on record, or that the conclusions were 'so perverse' or so illegal, that no reasonable tribunal would have arrived 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."*** [Emphasis added].

[86] It was further held at paragraph 93 thus:

> ***"However, as we already noted, Section 85A of the Elections Act is not an inconsequential legal provision. Much as the Court is free to navigate the evidential landscape on appeal, it must, in a distinct measure, show deference to the trial Judge; regarding issues such as the credibility of witnesses and the probative value of evidence. The Court must also maintain fidelity to the trial record. The evaluation of evidence on record is only to enable the Court to determine whether the conclusions of the trial Court were supported by such evidence, or whether such conclusions were so perverse, that no reasonable tribunal would have arrived at the same."*** [Emphasis added].

[87] In that regard and with specific reference to the issue of the video evidence that the Appellant sought to adduce, the Court of Appeal stated that:

> ***"93. Having carefully perused Section 106B of the Evidence Act, we agree with the 1st Respondent that there was no legal requirement for the person producing the certificate to swear an affidavit. In our view, the video(s) had met the requirement set out under the aforesaid section and was therefore admissible.***
>
> ***94. Having so found, how should this Court deal with that kind of evidence, considering that the learned Judge did not apply his mind to the contents thereof and decide on it, one way or the other? Although rule 29(b) of this Court's Rules empowers this Court to take additional evidence or direct that additional evidence be taken by the trial Court, or by a commissioner, the Court was not moved appropriately. In the cross-appeal, the 1st Respondent simply urged the Court to find that "the respondent's video evidence was admissible and should have been taken into account." That is all we can, [do] which we hereby do. We shall say no more regarding the issue."*** [Emphasis added].

[88] The Court of Appeal thus found that the trial Judge had not applied his mind to the evidence that the Petitioner sought to rely on and that the probative value of the evidence, or the veracity thereof, had not been tested by the election Court. The content of the video evidence had also not been evaluated by the election Court, and as such, the appellate Court was not able to immediately establish its impact, or lack thereof, on the decision made by the election Court, such as to find that upon re-evaluation of the evidence, the decision by that Court was so perverse or so illegal that no reasonable tribunal or Court would have arrived at a similar conclusion.

[90] As was aptly stated in ***Munya 2***, there are limits on the evaluation of evidence by the Court of Appeal, and in as much as that Court is free to evaluate any evidence that may be presented before it, the same is delimited by the provisions of Section 85A of the Elections Act.

[91] In so far as the appellate Court found that the video evidence was admissible, it nonetheless declined to admit it on two tangential factors; (1) that the probative value of the evidence had not been established by the trial Court; and (2) that it was not appropriately moved by the 1st Respondent to admit the evidence in the Cross-Appeal. The aspect of discretionary powers, as prescribed under Rule 29(1)(b) of the Court of Appeal Rules,2010 and generally under Article 159(2)(d) of the Constitution, is clear to us and we are unable to find that the Court of Appeal misdirected itself in reaching those findings.

[92] As to the issue of appropriately moving the appellate Court, which categorically stated that it was indeed not appropriately moved, we would conclude that the Court exercised its discretion not to act *suo moto*, but expected to be moved by the pleadings filed by the Petitioner which did not expressly state that that the Court be moved to admit the evidence into record. Indeed, during the hearing before this Court, a question was posed to the Petitioner's counsel by the Court. The question was framed thus: ***"It is precisely my problem. In the Wajir governor's case, they have said, we want to admit evidence for you to look at in determining the petition. In this case we have not been moved to admit any evidence. So what value is that submission to us in determining the appeal before us? Of what value is it to you even if we were to agree with the Court of Appeal or with you, that it would have been admitted, then? Where will it take us?"***

[93] The answer given was not helpful, with respect and in essence, the learned Judge was asking which way this Court was supposed to move given that the

Petitioner had not made an application, as was the case in ***Hon. Mohamed Abdi Mohamud*** and ***Ahmed Abdullahi Mohamad & 3 Others***, Petition (Application) No. 7 & 9 of 2018 for the Court of Appeal to admit the additional evidence for its consideration. This ties in with the persuasive decisions by the Court of Appeal in ***Independent Electoral and Boundaries Commission & Another v. Stephen Mutinda Mule & 3 others*** Civil Appeal No. 219 of 2013; [2014] eKLR; ***Housing Finance Company of Kenya v. J. N. Wafubwa*** Civil Appeal No. 102 of 2013; [2014] eKLR; and ***Kenya Airports Authority v. Mitu-Bell Welfare Society & 2 others*** Civil Appeal No. 218 of 2014; [2016] eKLR, where it emphatically stated that a party was bound by its pleadings, and that a Court should not venture beyond what was placed before it in rendering its determination. We therefore hold, that the decision of the Court of Appeal not to admit the video evidence or even evaluate it, was in exercise of its discretion as provided under Rule 29(1)(b) of the Court of Appeal Rules, 2010 delimited by the provisions of Section 85A of the Elections Act and parties were also bound by the pleadings of the Petitioner in the Cross-Appeal before the Court of Appeal which had no such prayer.

d) *Whether the Court of Appeal acted in excess of and/or without jurisdiction in delving into matters of fact in contravention of Section 85A of the Elections Act.*

[94] Similar to the issue highlighted in (c) above, the Petitioner took issue with the jurisdiction of the Court of Appeal to allegedly delve into matters of fact contrary to the provisions of Section 85A of the Elections Act. It was argued in that regard that the appellate Court erred in overturning the finding of the trial Court on the issue of violence and intimidation during the election period contrary to Article 81(e)(ii) of the Constitution, as well as the evidence of violence in Soweto Hall and considering them as matters of law whilst at the same time

disregarding the incidences of violence in Greenspan Mall and Embakasi Primary as matters of fact.

[95] At paragraph 78 of its decision, the Court of Appeal held *inter alia*;

> ***"In <u>Munya's</u> Case, the Supreme Court, in analyzing the jurisdiction of this Court in an appeal of this nature held;***
>
> > ***'...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's 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.'***
>
> ***<u>We must therefore decline the invitation by the cross-appellant to re-examine the record of appeal and find, as a matter of fact, that there was violence in more polling centres than the learned Judge found. We have no jurisdiction to do so</u>."*** [Emphasis added.]

[96] The appellate Court in the present case had similarly refused to re-examine the evidence that had been examined by the election Court, and in which it had found that there were no incidences of violence at Greenspan Mall and Embakasi Social Hall. However, it re-evaluated the evidence with regards to the evidence of alleged violence at Soweto Social Hall, primarily on the grounds that the violence that was allegedly evidenced at the polling station was the evidence that the trial

Court had evaluated to allow the Petition before it. The learned Judges of the appellate Court therefore proceeded to consider the evidence, stating that the election Court Judge ought to have shown how the violence affected the credibility of the election, given that he nullified the election largely on the finding of violence at Soweto Social Hall during the election. The learned Judges at paragraph 82 of their Judgment stated:

> ***"In the impugned judgment, the learned judge simply stated:***
>
> > ***'Though the violence cannot be attributed to the 1st Respondent, (the appellant herein), the truth of the matter is that the election in the entire polling station was affected.'***
>
> ***With respect, the learned Judge ought to have shown the manner in which the election was affected by the violence. There was not a single voter who testified that they were disenfranchised and thus failed to exercise their constitutional right to vote. To the contrary, evidence was tendered to the effect that voting hours were extended to compensate for any time that was lost due to the unrest that occurred at Soweto Social Hall Polling Centre. The learned Judge's conclusion that the election of the entire polling station was affected had no legal premise and must therefore be rejected."***

[97] In our view and with reference to the decision in the ***Munya 2***, the Judges of Appeal correctly re-examined the evidence that was used by the election Court to nullify the election. It thereafter emerged, in the opinion of the appellate Court, that regardless of incidences of violence being reported and evidenced at the Soweto Social Hall, the election Court did not establish how the violence affected the election specifically in the polling centre, and indeed the results in

the entire Constituency. The decision they made was based on the "no evidence" rule as established by this Court at paragraph 81 of the ***Munya 2*** case, that: "*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 the 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 on record****, or that the conclusions were 'so perverse', or so illegal, that no reasonable tribunal would arrive at the same.*" [Emphasis added].

[98] Further, at paragraph 92 ***Munya 2*** we also held that:

> ***"It is not for this Court to issue edicts to the Court of Appeal on how it should exercise its jurisdiction. The process of evaluation of evidence is not a mechanical one; and we agree with learned counsel, Mr. Muthomi, that in considering 'matters of law', an appellate Court is not expected to shut its mind to the evidence on record. We are unable, thus, to hold that, by the mere fact of having considered matters of fact, the learned Judges of Appeal acted in excess of jurisdiction. To so hold, would place inappropriate fetters on the inquiry-scope of the appellate Judges, as they determine whether an election was held in conformity with the principles of the Constitution."*** [Emphasis added.]

[99] In consideration of the foregoing, we do not think that the Court of Appeal Judges acted in excess of and/or without jurisdiction, and that they, thus, acted in accordance with and in consideration of the provisions of Section 85A of the Elections Act and our decision in ***Munya 2***. We so find.

e) Whether the Court of Appeal misdirected itself in the interpretation of Articles 81(e)(ii) and 86 of the Constitution;

[100] Article 81(e)(ii) of the Constitution provides that;

> ***"The electoral system shall comply with the following principles—***
>
> ***(e) free and fair elections, which are-***
>
> ***(ii) free from violence, intimidation, improper influence or corruption."***

[101] Further Article 86 provides that:

> ***"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;***
> ***(b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;***
> ***(c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and***
> ***(d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials."***

[102] The Petitioner argued that the elections for the member of National Assembly for Embakasi East were not carried out in a free and fair manner, and that the election Court had indeed found so. He also argued that the Court of

Appeal on the other hand, had failed to appreciate the substantiality test in election matters and failed to consider the qualitative aspect of the election, only concerning itself with the quantitative aspect thereof- of the winning margin of 4,316 votes.

[103] In that regard, Section 83 of the Elections Act states:

> ***"No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the constitution and in that written law or that the non-compliance did not affect the result of the election."***

[104] This provision, was thus explained in the decision of this Court in ***Raila Odinga 2017*** at paragraph 389:

> ***"In this judgment, we have settled the law as regards Section 83 of the Elections Act, and its applicability to a presidential election. <u>We have shown that contrary to popular view, the results of an election in terms of numbers can be overturned if the petitioner can prove that the election was not conducted in compliance with the principles laid down in the Constitution and the applicable electoral law</u>. Never has the word "or" been given such a powerful meaning."*** [Emphasis added.]

[105] At paragraphs [303] – [304] in the ***Raila Odinga 2013*** (supra) case, this Court also stated:

> ***"[303] We come to the conclusion that, by no means can the conduct of this election be said to have been perfect, even though, quite clearly, the election had been of the greatest***

interest to the Kenyan people, and they had voluntarily come out into the polling stations, for the purpose of electing the occupant of the Presidential office.

[304] Did the Petitioner clearly and decisively show the conduct of the election to have been so devoid of merits, and so distorted, as to not reflect the expression of the peoples' electoral intent? It is this broad test that should guide us in this kind of case, in deciding whether we should disturb the outcome of the Presidential election." [Emphasis added.]

[106] In the above context and looking at the impugned judgment of the Court of Appeal, the learned Judges were guided by the principles enunciated in ***Munya 2*** and ***Raila Odinga 2017*** where in both matters, we held that for an election to be nullified on the grounds of non-compliance as enshrined in Section 83 of the Elections Act, a party must demonstrate that the election was not conducted in compliance with and in accordance to the electoral laws and constitutional principles, or, that the non-compliance affected the results of the election. There must thus be sufficient reason to be supported by evidence for any Court to nullify an election.

[107] The Appellant was put to task to establish how the violence experienced at the Soweto Social Hall impacted negatively on the outcome of the elections. The appellate Court in that regard interrogated the decision of the election Court and opined that the violence at the Soweto Social Hall only affected the enclave, and that it could not have impacted on the general outcome of the elections. The Judges of Appeal indeed asked themselves whether the discrepancies, irregularities and errors affected the results and integrity of the elections. Having pondered and considered the same in the negative, the Court determined that the elections held for the member of the National Assembly for Embakasi East were

conducted substantially in accordance with the principles of the Constitution under Articles 81(e) and 86, and the substantive and procedural statutory provisions of the Elections Act. Do we have sufficient reason to overturn that decision?

[108] For us to do so, it must be shown that the appellate Court misdirected its mind when invoking these principles and that indeed the conduct of the election did not meet constitutional muster. Having considered the question of violence apparent at Soweto Social Hall, its impact in the election as a whole, we are unable to find any reason to state that applying the test in Section 83 of the Elections Act, either there was such non-compliance with the Articles 81(e) and 86 principles or that the results were affected in such a manner as to render the election a sham or incredible.

f) Whether the 1st Respondent discharged the burden and standard of proof in the appeal before the Court of Appeal;

[109] On the issue of burden and standard of proof, we shall not dwell much on the same as the Petitioner has not shown what pertains to constitutional interpretation or application of the same, but merely stated that the 1st Respondent (as Appellant in the Court of Appeal) had not satisfied the burden and standard of proof. We would however, briefly cite previous decisions in which the issue of standard and burden of proof was conclusively and authoritatively determined by this Court.

[110] In ***Raila Odinga 2013***, we held [paragraph 203]:

> ***"...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." [Emphasis added.]

[111] Further in ***Raila Odinga 2017*** we also held:

"[129] The common law concept of burden of proof (onus probandi) is a question of law which can be described as the duty which lies on one or the other of the parties either to establish a case or to establish the facts upon a particular issue. ...With that definition, the next issue is: who has the burden of proof"

[130] The law places the common law principle of onus probandi on the person who asserts a fact to prove it. Section 107 of the Evidence Act, Cap 80 of the Laws of Kenya, legislates this principle in the words: —<u>Whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist</u>. In election disputes, as was stated by the Canadian Supreme Court in the case of <u>Opitz v. Wrzesnewskyj</u>, an applicant who seeks to annul an election bears the legal burden of proof throughout."

[112] Citing the ***Raila Odinga 2013*** decision, we further affirmed that:

"[195] There is, apparently, a common thread in…comparative jurisprudence on burden of proof in election cases…that an electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner…. [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 have been 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 law.'

[113] Thus, in ***Raila Odinga 2017***, we emphasized that:

[131] Thus a petitioner who seeks the nullification of an election on account of nonconformity with the law or on the basis of irregularities must adduce cogent and credible evidence to prove those grounds —to the satisfaction of the court. That is fixed at the onset of the trial and unless circumstances change, it remains unchanged. <u>In this case therefore, it is common ground that it is the petitioners who bear the burden of proving to the required standard that, on account of non-conformity with the law or on the basis of commission of irregularities which affected the result of this election, the 3rd Respondent 's election as President of Kenya should be nullified</u>." [Emphasis added.]

[114] We then concluded on the question thus:

"[133] It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant

impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce factual evidence to prove his/her allegations of breach, then the burden shifts and it behoves the respondent to adduce evidence to prove compliance with the law. We shall revert to the issue of the shifting of the burden of proof later in this judgment."

[115] From the decision emanating from the Court of Appeal, it is clear that the evidentiary burden and standard of proof was met by the 1st Respondent as the appellate Court, in consideration of the record of appeal thereof, overturned the decision of the trial Court. We do not understand which other standard or burden of proof the 1st Respondent was to attain or achieve as that does not come out succinctly in either the pleadings or submissions on record. That is all there is to say on that issue.

g. Reliefs Available to the Parties

[116] Having found as above, it follows that the appeal herein must be disallowed. On costs, as we have previously stated, they follow the event subject to the Court's discretion on a case to case basis (See ***Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai & 4 Others*** SC Petition No. 4 of 2012; [2014] eKLR). In the circumstances, costs are awarded to the Respondents in this Appeal.

F. ORDERS

a. ***The Petition of Appeal dated 12th July, 2018 and filed on 13th July, 2018 is hereby dismissed;***
b. ***For the avoidance of doubt, the declaration of the results of the election by the Independent Electoral and Boundaries Commission in respect of the seat of the member of the National Assembly for Embakasi East, is hereby restored;***
c. ***The Appellant shall bear the costs of the Respondents in this Appeal.***

[117] Orders accordingly.

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

.....	.....
D. K. MARAGA	**M. K. IBRAHIM**
CHIEF JUSTICE/PRESIDENT OF THE THE SUPREME COURT	**JUSTICE 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

THE REGISTRAR
SUPREME COURT OF KENYA