REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Mutunga, CJ & P, Rawal, DCJ & V-P, Tunoi, Ibrahim, Ojwang, Wanjala, Njoki, SCJJ)

PETITION NO. 2B OF 2014

-BETWEEN-

GATIRAU PETER MUNYA..... APPELLANT

-AND-

1. DICKSON MWENDA KITHINJI.....

2. THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION..... RESPONDENTS

3. FREDRICK NJERU KAMUNDI/COUNTY RETURNING OFFICER, MERU COUNTY.....

(Appeal from the Judgment and Orders of the Court of Appeal sitting at Nyeri (Visram, Mohammed & Otieno-Odek JJ.A) delivered on 12th March, 2014 in Nyeri Civil Appeal No. 38 of 2013)

JUDGMENT

A. INTRODUCTION

[1] This is an appeal against the judgment of the Court of Appeal sitting in Nyeri, delivered on 12th March, 2014 in Nyeri *Civil Appeal No. 38 of 2013,* overruling the decision of the High Court sitting at Meru *(Makau J.)* in *Election Petition No.1 of 2013***.** The Court of Appeal decision invalidated the election of the appellant as the duly-elected Governor of Meru County.

B. BACKGROUND

(a) Proceedings in the High Court

[2] The appellant was declared as Governor of Meru County after the Meru gubernatorial elections held on 4th March, 2013. He won the election by 3,436 votes. The 1st respondent, a registered voter in North Imenti Constituency in Meru County, filed a petition in the High Court at Meru on 26th March, 2013 seeking a nullification of the election results. The petitioner (the 1st respondent herein) alleged that the election was marred by voter bribery, violence, intimidation, harassment, electoral malpractices, undue influence, discrepancy in the results announced, and contraventions of the regulations governing elections.

[3] The respondents in the trial Court argued that the elections were free and fair, and that any non-compliance with the law was insignificant, and did not materially affect the outcome of the election. They urged the court to dismiss the petition.

[4] The Court, on 23rd September, 2013 dismissed the petition, and confirmed the appellant as Governor of Meru County. Aggrieved by this decision, the 1st respondent appealed to the Court of Appeal.

(b) Proceedings in the Court of Appeal

[5] At the Court of Appeal the 1st respondent sought, *inter alia*:

(i) the setting aside of the judgment and orders made by the High Court on 23rd September 2013; and

(ii) a declaration that Mr. Munya had not been validly elected as Governor of Meru County.

[6] The Court of Appeal identified three issues as central to the appeal before it:

(i) whether the errors and irregularities disclosed by the evidence on record materially affected the quantitative margin and the qualitative aspects of the election;

(ii) whether the trial judge was right in ordering a scrutiny and recount of only 7 polling stations; and

(iii) whether the trial judge independently evaluated the evidence on record.

[7] The Court of Appeal held that the results of the Meru gubernatorial elections were not verifiable by the paper-trail left behind. The Court came to this conclusion after applying the *"qualitative and quantitative test",* as required by law, and relying on the case of ***Winnie Babihuga v. Masiko Winifred Komuhangi & Others***, HCT-00-CV-EP-0004-2001, which held that the quantitative test is most relevant where numbers and figures are in question; and the qualitative test is most suitable where the quality of the entire election process is questioned, and the Court has to determine whether or not the election was free and fair.

[8] The Court further held that the trial Judge had erred in ordering a scrutiny and recount in only 7 polling stations, as opposed to the four constituencies indicated by the petitioner. The Court also held that the trial Judge did not independently evaluate the evidence on record, and appeared to rely on the submissions of the respondent, to the extent of including errors found in the 1st respondent's written submissions.

[9] The Court of Appeal held that: *the declared results of the Meru gubernatorial elections were not accurate, verifiable and accountable; the tallying process was not efficient and accurate; the trial judge erred and misdirected himself in finding that a margin of 0.819% could be described as wide; quantitatively, the errors and irregularities disclosed materially affected the results of the elections, given the narrow margin between the winner and the runner-up; the trial judge had erred, in denying the 1st respondent the right to cross-examine one of the defence witnesses.*

[10] The Court of Appeal set aside the High Court's judgment, and declared that the Meru gubernatorial election *did not meet the threshold of Article 81(e) (iv) and (v) and Article 86 of the Constitution*. The appeal was allowed, and the election of Mr. Munya as Governor of Meru County declared null and void.

(c) Proceedings in the Supreme Court

[11] Aggrieved by the said judgment, the appellant, on 20th March, 2014 filed an appeal and a Notice of Motion under certificate of urgency at the Supreme Court. After hearing submissions on the interlocutory motion and on a preliminary objection by the 1st respondent, Ojwang and Wanjala SCJJ, on 2nd March, 2014, ordered the *status quo* to be maintained, and held in abeyance the swearing in of the Speaker of the County Assembly as acting Governor, pending a reserved ruling.

[12] In its ruling **[*Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others*,** Civil Application No. 5 of 2014], the Court determined, *inter alia,* that it had jurisdiction to entertain the appeal, and issued orders preserving the substratum of the appeal. The matter was set for a hearing on the merits on 9th April, 2014.

[13] The petitioner's appeal, lodged on **19th March, 2014** was premised upon 12 grounds, as follows:

(i) The learned Judges of the Court of Appeal patently breached the petitioner's inviolable right enshrined in Article 50(1) of the Constitution of Kenya, 2010 as read together with Article 25(c) to have a dispute that can be resolved by the application of law decided in a fair hearing before a Court, when they misdirected themselves in fact, that the trial Court had expunged exhibits DMK2, DMK3 and DMK4 during trial, as a consequence of which that Court nullified the appellant's election; whereas, as a matter of fact, the appellant's application to strike out the said exhibits had been dismissed by the learned trial Judge.

(ii) The learned Judges of the Court of Appeal exceeded the scope of their jurisdiction in election petitions which, pursuant to the provisions of Article 87(1) of the Constitution and Section 85A of the Elections Act, 2011 (Act No. 24 of 2011) [the Elections Act], is limited to matters of law only, when they made various conclusions of fact.

(iii) The learned Judges of the Court of Appeal erred in law when they failed to appreciate that pursuant to the provisions of Article 87(1) of

the Constitution, the electoral code includes not only the Constitution, but also the Elections Act and the Rules and Regulations made thereunder, including Rule 33(4) of the Elections (Parliamentary and County Election) Petition Rules, 2013 [the Petition Rules] which provides that:

> ***"Scrutiny shall be confined to the polling stations in which the results are disputed..."***

(iv) Whereas the Elections Act enacted pursuant to the provisions of Article 87(1) of the Constitution expressly defines 'polling station' to mean "any room, place, vehicle or vessel set apart and equipped for the casting of votes by voters at an election", as distinct from a 'constituency' which the Elections Act defines as "constituencies into which Kenya is divided under Article 89 of the Constitution", the learned Judges of the Court of Appeal erred in law in purporting to legislate and give Rule 33(4) of the Petition Rules a new meaning by 'amending' 'polling stations' to mean 'constituency', in an action which violated the provisions of Articles 94(1), 1(2), (3)(a) and 87(1) of the Constitution.

(v) Whereas Rule 33(2) and (4) of the Petition Rules published pursuant to the Elections Act that is underpinned in Article 87(1) of the Constitution, expressly provides that scrutiny can only be granted by a Court if the Court is satisfied that there is sufficient reason to do so; and only in respect of a polling station where the results are disputed, the learned Judges erred in law and fact by purporting to take the results from seven polling stations where scrutiny and recount was conducted, and extrapolating results of votes cast in 953 polling stations to estimate votes cast in the whole of Meru County, notwithstanding that no party had sought a scrutiny from the 953

polling stations of Meru County, nor was there evidence from which the Court could make such a conclusion; and in that respect, to the prejudice of the appellant, the Court of Appeal had delved into rumour and conjecture.

(vi) The learned Judges exercised judicial authority in a manner that violated the purposes and principles of the Constitution, contrary to the provisions of Article 159(2)(e), when they made certain inconsistent findings, to *wit*:

(a) placing evidential weight on matters of fact in exhibit DMK2 (an unsigned analysis of election results in South Imenti), exhibit DMK3 (an unsigned analysis of election results in Central Imenti) and exhibit DMK4 (an unsigned analysis of election results in South Igembe) —which exhibits the learned Judges in the very judgment, rightly found were inadmissible in Court on account of the hearsay principle;

(b) applying, as a representative sample, results from the 7 polling stations where a dispute had been raised, and scrutiny and recount granted by the trial Court, to the whole of Meru County consisting of 953 polling stations, while in the very same ruling holding that the Court cannot extrapolate the findings of the 7 polling stations to 953 polling stations of Meru County;

(c) on the one hand, holding that "it was not established that the total votes cast exceeded the number of registered voters," while on the other hand, holding that "there is *prima facie* evidence on record that in some polling stations, the votes cast

exceeded the number of registered voters."

(vii) The learned Judges of the Court of Appeal exhibited bias in their judgment against the appellant herein, and denied the appellant equal protection and benefit of the law, contrary to the provisions of Article 27(1) and 50(1) of the Constitution, when they entirely relied on the testimony of DW10 only, to the exclusion of the appellant's own evidence and those of his witnesses, and proceeded to nullify the election of the appellant.

(viii) The learned Judges of the Court of Appeal exhibited bias in their judgment against the appellant, and denied the appellant equal protection and benefit of the law contrary to the provisions of Article 27(1) and 50(1) of the Constitution, when they entirely relied on the petitioner's exhibits DMK2, DMK3 and DMK4 and totally disregarded the appellant's exhibit GPM6, which exhibit was a report from an expert statistician, specifically outsourced to reply to allegations made in exhibits DMK2, DMK3 and DMK4.

(ix) The learned Judges of the Court of Appeal erred in law and in fact, by deviating from principles of the incidence of burden and standard of proof in election petitions, in departure from the binding decision of the Supreme Court in the case of ***Raila Odinga & Others v. Independent Electoral and Boundaries Commission & Others***, S.C. Petition No. 5 of 2013 [the ***Raila Odinga*** case], in breach of the provisions of Article 163(7) of the Constitution.

(x) The learned Judges of the Court of Appeal erred in law by considering matters of fact and evidence that were extraneous to their jurisdiction and, as such, contrary to the provisions of Article

87(1) of the Constitution as read together with the provisions of Section 85A of the Elections Act.

(xi) The learned Judges of the Court of Appeal discreetly applied the provisions of Articles 81(e) and 86(a) of the Constitution without taking into account Articles 88(5) and 87(1) of the Constitution that underpin the Elections Act as the primary statute for the management of elections in Kenya.

(xii) The Judges of the Court of Appeal erred in law and in fact by converting the difference in votes between the returned candidate and the runner-up candidate to percentage (0.819%), and using their perception therein to reach a determination, instead of the real figure of 3,436 votes, thus downplaying the victory of the appellant, in breach of the provisions of Article 180(4) of the Constitution which provides that *"the candidate who receives the greatest number of votes shall be declared elected",* not *"the candidate who receives the greatest percentage number of votes shall be declared elected."*

[14] The parties were represented by several learned counsel: Prof. Tom Ojienda and Mr. Okong'o Omogeni for the appellant; Mr. Muthomi Thiankolu and Prof. Ben Sihanya for the 1st respondent; and Mr. Martin Munyu for the 2nd and 3rd respondents.

C. THE PARTIES' RESPECTIVE CASES

(i) The Appellant

(a) The right to a fair hearing

[15] Counsel for the appellant submitted that the Judges of the Court of Appeal misdirected themselves on issues of fact, thereby breaching the appellant's right to a fair hearing as stipulated under Articles 50 (1) and 25 (c)of the Constitution. He submitted that the Judges misrepresented the Record of Appeal, in finding that the trial Judge had struck out, or expunged exhibits DMK2, DMK3 and DMK4 whereas the record disclosed the contrary.

[16] Counsel cited as persuasive authority the 1994 cases of ***Ruiz Torija v. Spain***, Application No. 18390/91 and ***Hiro Balani v. Spain***, Application No. 18064/91, in which the European Court of Human Rights applied Article 6-1 of the European Convention on Human Rights (ECHR) which, like Article 50(1) of the Constitution of Kenya, entitles a person to *fair hearing by an independent and impartial tribunal*. In those two cases, the European Court of Human Rights held that a Court's failure to address specific relevant submissions in their judgment, or a Court's failure to give reasons for its judgment, breaches an individual's right to a fair trial enshrined in Article 6-1 of the ECHR. Counsel

argued that based on these principles, the Court of Appeal breached the appellant's right to fair hearing by unjustifiably concluding that the trial Judge had expunged exhibits DMK2, DMK3 and DMK4,contrary to the indications on record. On this basis, counsel argued that the Court had made an erroneous conclusion of fact, thus infringing the limits of its jurisdiction as provided under Section 85A of the Elections Act; and on such erroneous foundation, the Court had nullified the election.

(b) The jurisdiction of the Court of Appeal as provided under Section 85A of the Elections Act

[17] Prof. Ojienda submitted that the Judges had misdirected themselves by delving into issues of *fact*, contrary to the provisions of Section 85A of the Elections Act which limits appeals to the Court of Appeal to matters of *law* only. Section 85A provides as follows:

> ***"An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of county governor shall lie to the Court of Appeal on matters of law only– "***

[18] It was submitted that the Court of Appeal had, by express recognition, appreciated the limited extent of its jurisdiction in election petitions, and had emphasized the need for caution in exercise of the same in the case of ***Timamy Issa Abdulla v. Swaleh Salim Swaleh Imu and 3 Others***, Malindi Civil Appeal No. 26 of 2013. Counsel argued that the Court, in the instant matter,

went beyond the bounds of this jurisdiction, by delving into issues of vote-variance, and margins, rather than the *conclusions* of the trial Judge on fact and evidence. He relied on the decision of this Court in ***Samuel Kamau Macharia and Another v. Kenya Commercial Bank and 2 Others,*** S.C. Civil Application No. 2 of 2011, to urge that a Court cannot arrogate to itself jurisdiction exceeding that which is set by law, nor expand it through judicial craft or innovation.

[19] Counsel submitted that the Judges of Appeal had delved into issues of fact, when they: used the testimony of Kennedy Onditi (DW10), who was the returning officer for Imenti South Constituency, to identify the errors and irregularities in the election; analyzed the evidence regarding the number of votes cast; and considered whether Forms 35 were signed by authorized agents. According to counsel, this resulted in consistent findings that breached the appellant's right to a fair hearing, guaranteed under Articles 50 (1) and 25 (c) of the Constitution.

[20] It was submitted that the Court of Appeal exceeded its jurisdiction, and misapplied the law to come to different conclusions with regard to: scrutiny and recount of seven polling stations (Yururu, Mwichiune Primary School, Igandene Primary School, Kathera Primary School, Nkubu Primary School, Murembu Primary school, St. Alloysious Primary School); whether the number of votes cast

exceeded the number of registered voters; and whether the absence of signatures on Forms 35 and 36 materially affected the results of the election.

[21] In support of the appellant's case counsel for the 2nd and 3rd respondent's submitted that the Court of Appeal misdirected itself and made glaring errors by delving into matters of fact, instead of matters of law. Counsel further submitted that the Court of Appeal had failed to independently analyze and appreciate the evidence on record, and the findings of the trial Court – and thus had no basis to fault the trial Judge.

(c) Recount and Scrutiny of votes

[22] Counsel for the appellant submitted that the Court of Appeal misinterpreted Section 82 (1) of the Elections Act as read together with Rule 33(4)of the Election Petition Rules, by reading the word 'constituency' into the word 'polling station'. Section 2 of the Elections Act defines these two words as follows:

> "***Constituency means one of the constituencies into which Kenya is divided under Article 89 of the Constitution;***
> ***...***
> ***Polling Station means any room, place, vehicle or vessel set apart and equipped for the casting of votes by voters at an election."***

Rule 33(4) provides that:

> ***"Scrutiny shall be confined to the polling stations in which the results are disputed and shall be limited to the examination of—..."***

[23] Counsel argued that the Court of Appeal ought to have applied the literal rule of interpretation in this instance. He relied on the decision of the Supreme Court of India in ***Raghunath Rai Bareja and Another v. Punjab National Bank and Others***, Civil Appeal No. 5634 of 2006 where the Court signalled that as a principle of statutory interpretation, the first and foremost rule is the literal rule of interpretation.

[24] By reading 'constituency' into 'polling station', counsel contended, the Court was, in effect, re-opening a previous application made before the trial Court seeking an order for scrutiny and recount in certain constituencies; and that in so doing, the Court of Appeal violated Articles 87(1) and 94 of the Constitution. Counsel's submission was that the Court of Appeal ought to have properly interpreted the electoral laws, which emanate from the Constitution. To fortify his submission counsel cited this Court's decision in ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others,*** Civil Application No. 5 of 2014, that *the Elections Act, and the Regulations thereunder, are normative derivatives of the principles embodied in Articles 81 and 86 of the Constitution,*

and that in interpreting them, a Court of law cannot disengage from the Constitution.

(d) Burden of Proof

[25] With regard to the burden of proof, counsel for the appellant submitted that the Court of Appeal had interfered with the threshold of proof, and upset the principles laid down and settled by this Court in the ***Raila Odinga*** case, to this effect:

> ***"...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."***

[26] Counsel submitted that the departure by the Court of Appeal from these principles went against the provisions of Article 163(7) of the Constitution, which provides that all other Courts are bound by the precedents set by this Court. Therefore, regarding the argument on the allegations of irregularities, the 1st

respondent was under a legal duty to prove these allegations, and therefore, the initial burden of proof lay with him.

[27] It was counsel's contention that the Court of Appeal shifted the burden of proof by requiring the *2nd and 3rd respondents* to prove human error as a factor that could or could not substantially affect the general conduct of the elections, even when human error had not been presented as a ground of appeal.

(e) Scrutiny and recount

[28] Counsel for the appellant submitted that the appellate Court had misinterpreted and misapplied the law, in holding that the trial Judge ought to have granted the prayers for *scrutiny and recount,* without establishing any basis for the request, or requiring the 1st respondent to establish a case for the same. This was contrary to Rule 33(2) of the Petition Rules which provides:

> ***"Upon an application under sub-rule (1), the court may, if it is satisfied that there is sufficient reason, order for a scrutiny or recount of the votes."***

[29] Counsel also submitted that, in purporting to grant an order for scrutiny and recount for certain particular constituencies, the Court of Appeal undermined the supremacy of the voters, and went against the provisions of the Constitution, the Elections Act and the Petition Rules. On the basis of the alleged

irregularities revealed in the scrutiny-exercise, the Court nullified the Meru County gubernatorial election.

[30] Counsel argued that the Court of Appeal went against the provisions of Rule 33(2) of the Petition Rules, in holding that the right to scrutiny subsists even where an applicant has not laid a basis for the same. He submitted that in its finding, the Court disregarded this Court's holding in the ***Raila Odinga*** case, that a threshold must be established to sustain an order of scrutiny and recount. Counsel asserted that if scrutiny was an automatic right, it would undermine the discretion of a Court considering an election petition; it would further negate the need for rules guiding the conduct of election petitions, and also compromise the mandate of the IEBC, as parties would only need to assert this 'right' before the Courts.

[31] Counsel particularly faulted the appellate Court's decision to extrapolate the results of scrutiny and recount in the seven polling stations to the 953 polling stations, and on that basis coming to the conclusion that the election could not have been free and fair.

[32] Counsel submitted that the Court of Appeal had taken into account extraneous matters of fact, when it considered whether the trial Court erred in its stand that there was no need for scrutiny and recount, as the area was extensive and the polling stations were too many. Counsel urged that such a finding also

fell outside the mandate of the Court of Appeal, under Section 85A of the Elections Act.

[33] Counsel challenged the Court of Appeal's conversion of the vote margin between the appellant and the 1st respondent into a percentage (0.819%). This conversion contravened Article 180(4) of the Constitution which contemplates a win by *simple majority*. The Court of Appeal had further considered the variance of votes in the seven polling stations that were the subject of a recount, and the margin of votes between the two leading candidates, and had come to the conclusion that the margin was minimal; and this was a basis of the decision to nullify the entire election.

(f) Constitutional threshold of an election–Articles 81 and 86 of the Constitution

[34] Counsel for the appellant questioned the materiality of the finding by the Court of Appeal, that human error in the electoral process was excusable only if it was single, isolated and random, but that where mistakes were multiple or persistent, they would not qualify as human error, and would point towards inefficiency, negligence and carelessness affecting the credibility of the election results.

(ii) The 2nd and 3rd Respondents

[35] Counsel for the 2nd and 3rd respondent submitted that the Court of Appeal had allowed the appeal on the basis of alleged errors disclosed during scrutiny, and of errors admitted by DW10 during trial. He urged that by adopting this approach, the Court had shifted the burden of proof from the 1strespondent to the 2nd and 3rd respondents, thereby exonerating the petitioner from the obligation to discharge the legal burden of proof. Counsel referred to this Court's finding in the ***Raila Odinga*** case [at para. 203]:

> ***"..judicial practice must not make it burdensome to enforce the principles of properly-conducted elections which give fulfilment to the right of franchise. But at the same time, 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 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. In case of data-specific electoral requirements (such as those specified in Article 38(4) of the Constitution, for an outright win in the presidential election), the party bearing the legal burden of proof must discharge it beyond any reasonable doubt."***

[36] Counsel submitted that the 2nd respondent had filed all Forms 35 and 36 indicating the total number of registered voters in respect of each stream in each polling station, together with the total number of votes cast, for each stream and each polling station as part of annexures to the affidavit of DW10. He submitted

that no application for the production of the voter register had been made to the trial Court.

[37] Learned counsel invited the Court to consider whether the Court of Appeal properly interpreted and applied the Constitution in its reasoning and findings, with regard to the following issues: whether the Meru gubernatorial elections were in consonance with the requirements of Articles 38, 81, and 86 of the Constitution; whether the right to a fair hearing was compromised by the Court of Appeal; and whether Section 83 of the Elections Act, 2011 is in conformity with the Constitution of Kenya.

[38] Counsel submitted that the Meru gubernatorial elections were held in accordance with the provisions of the Constitution, and particularly Articles 81(e)(iv) and (v) and 86 thereof, which thus provide [Article 81 (e)]:

> ***'The electoral system shall comply with the following principles–***
>
> ***(e) free and fair elections, which are—***
>
> ***(iv) transparent; and***
>
> ***(v) administered in an impartial, neutral, efficient, accurate and accountable manner.'***

And Article 86 provides:

> ***'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.'***

[39] Counsel submitted that the Court of Appeal had appeared to raise the requirement of accuracy to a fool-proof level, notwithstanding the provisions of Section 83 of the Elections Act which provides:

> ***"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."***

[40] Counsel contended that it was difficult to achieve 100% error-free elections in a county comprising 9 constituencies and 953 polling stations. He urged the Court to give guidance on the standard of accuracy contemplated in an election.

[41] Counsel submitted that the Court of Appeal had failed to consider the effect of '*non-compliance*' with election laws, upon the final results; and he sought guidance in an English case, ***Morgan and Others v. Simpson and Another*** [1975] QB 151; 1975. CA.

(iii) The 1st Respondent

[42] Learned counsel for the 1st respondent, quite in contrast to the position of other counsel, submitted that the trial Judge had expressly disallowed the exhibits of DMK2, DMK3 and DMK4 in his ruling of 2nd August, 2013.

[43] In response to the appellant's submission that the Court of Appeal delved into issues of fact as opposed to issues of law, counsel for the 1st respondent argued that a question of law cannot arise in a vacuum but is founded on fact. Counsel submitted that this case was premised on Articles 81 and 86 of the Constitution; and these Articles are not self-executing; thus, when evaluating an issue of law, such as whether a constitutional provision had been complied with, a Court must delve into the facts.

[44] Counsel submitted that a plain reading of Section 85A of the Elections Act, limits appellate jurisdiction to 'issues of law', and not just 'law'. He urged the Court to distinguish 'issues of law' from 'law'. Counsel observed that an issue of law only arises where there is an issue of fact or evidence, and the facts are found in the record as evidence. Counsel submitted that Section 85A of the Elections Act cannot be construed literally, as the law does not operate in a vacuum. He therefore invited the Court to delimit the scope of this provision (Section 85A).

[45] On evidentiary burden of proof, the 1st respondent urged that this would shift, where a party possessed peculiar and exclusive knowledge of a matter. He cited Section 112 of the Evidence Act (Cap. 80, the Laws of Kenya), which states as follows:

> ***"In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."***

[46] In this regard, counsel argued that the 1st respondent had relied on the Voters Register available on the 2nd respondent's (IEBC) website, to show that the total votes cast exceeded the number of registered voters. Counsel submitted that while the 2nd respondent disputed the claim that the register was incorrect, they did not avail the correct register to the Court, and this was an error in law; so

that, in line with Section 112 of the Evidence Act, the burden of proof shifted to the 2nd respondent.

[47] Counsel for the 1st respondent submitted that the basis for scrutiny and recount was laid in the affidavit of the 1st respondent dated 14th June, 2013 supporting the application for scrutiny and recount. He observed that on the basis of the discrepancies found upon scrutiny and recount, and the errors discovered by IEBC's main witness (DW10), the election did not meet the threshold set out in Articles 81(e)(iv) and (v) and 86 of the Constitution.

[48] In response to the appellant's submission that Rule 33(4) of the Elections Petition Rules regulates the process of scrutiny, counsel submitted that as held by the Court of Appeal (para. 148 of its judgment), Section 82 of the Elections Act forms the legal foundation for scrutiny. He urged that Rule 33(4) as subsidiary legislation, cannot oust the provisions of Section 82 of the Elections Act which is the parent statute. Section 82(1) provides:

> ***"An election court may, on its own motion or on application by any party to the petition, during the hearing of an election petition, order for a scrutiny of votes to be carried out in such manner as the election court may determine."***

[49] Counsel contested the appellant's submission that the Court of Appeal had extrapolated the errors and irregularities found in the seven polling stations to all the 953 polling stations.

[50] Counsel submitted that the main issues before the Supreme Court were: whether the Court of Appeal misinterpreted and misapplied Articles 81(e)(iv) and (v) and Article 86 of the Constitution; and whether the Meru gubernatorial elections met the threshold under these provisions of the Constitution.

[51] Counsel submitted that the main issue for determination before the High Court and the Court of Appeal was: whether the elections were conducted in accordance with Articles 81(e)(iv) and (v) and 86 of the Constitution.

[52] According to counsel the Court of Appeal had nullified the election for the following reasons*: the tallying or counting errors and irregularities disclosed in the trial Court's report on scrutiny and recount in the seven selected polling stations; the tallying or counting errors and irregularities disclosed by IEBC's main witness (DW 10); and the qualitative and quantitative impact of the errors on the overall credibility, integrity and validity of the election*.

[53] In response to the 2nd and 3rd respondents' submission that the Court of Appeal lifted the accuracy test to 100%, in disregard of Section 83 of the Elections Act, counsel submitted that *the Constitution* is the supreme law and therefore supersedes the provisions of the Elections Act. He urged that Section 83 would not serve as a panacea for all errors in the electoral process.

[54] Counsel also contested the 2nd and 3rd respondents' submission on the place of human error in the electoral process, urging that although human error could be used as an excuse for mistakes during tallying, it fell upon the party raising this excuse to prove the existence of human error. He submitted that no presiding officer had given evidence with regard to errors and omissions in the electoral process.

[55] Counsel submitted that the election was vitiated, because the errors materially affected the results. He invoked Lord Denning's holding in ***Morgan and Others v. Simpson and Another*** [1975] QB 151;1975. CA as persuasive authority. Learned counsel urged that valid election results must be correct and true in every detail; that the IEBC must demonstrate that it conducted the elections in a responsible manner; and that IEBC must avail the records showing this compliance. He urged this Court to lay down clear guidelines regarding *what constitutes an election that is "accurate, verifiable, secure, accountable and transparent."*

D. ISSUES FOR DETERMINATION

[56] The following are the main issues for determination, as crystallized from the petition of appeal, the responses thereto by the 1st respondent, and the written and oral submissions by counsel for the parties:

(a) 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 as read with Article 87(1) of the Constitution;

(b) whether the Judges of Appeal erred in law, in their interpretation of Section 82(1) of the Elections Act vis-à-vis Rule 33 of the Elections (Parliamentary and County Elections) Petition Rules, 2013 regarding the recount and scrutiny of votes;

(c) whether the Judges of Appeal erred in shifting the "burden of proof" in electoral disputes contrary to the applicable law and the binding precedent, as decreed by the doctrine of stare decisis (Article 163(7) of the Constitution);

(4) whether the Judges of Appeal erred in placing reliance on the percentage "margin of victory" as opposed to the numerical accretion of votes, in annulling the election of the appellant, contrary to Article 180 (4) of the Constitution;

(5) whether the Judges of Appeal erred in their appreciation of the "legal effect" of errors and irregularities upon an election, in the context of Article 86 of the Constitution.

E. ANALYSIS

(i) The Question of Jurisdiction

[57] Counsel for the appellant sedulously urged that the appellate Court had acted in excess of the jurisdiction conferred upon it in electoral disputes, under section 85 A of the Elections Act. Counsel relied upon the decision of this Court in ***Samuel Kamau Macharia and Another v. Kenya Commercial Bank and 2 Others,*** S.C. Civil Application No. 2 of 2011. In that case, this Court was categorical in its pronouncement on the jurisdictional frontiers within which Courts of law must operate (paragraph 68 of the Ruling):

> ***"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."***

[58] We affirm that this statement remains an accurate reflection of the legal position regarding the jurisdictional limits of Courts, and indeed, any quasi-judicial tribunals established by law in this country.

[59] The starting point of our analysis is *Article 87(1) of the Constitution* which provides thus:

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

[60] Pursuant to this provision, Parliament has enacted a raft of legislation to regulate the conduct of election disputes, including election petitions at all levels of the Court system. In what is increasingly being referred to as the "Electoral Code", we now have, *inter alia: the Elections Act 2011, the Elections (General) Regulations 2012, the Elections (Parliamentary and County Elections) Petition Rules, 2013 and the Supreme Court (Presidential Election Petition) Rules 2013.*

Section 85 A of the Elections Act, 2011 provides that:

> ***"An Appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of county governor shall lie to the Court of Appeal on matters of law only…"***

[61] To be able to determine the issue before us, a number of pertinent questions need to be answered. Specifically:

(i) *What is the meaning of the instructive words "an appeal shall lie to the Court of Appeal* ***on matters of law only?"*** *When is an appeal said to lie on matters of law only, as opposed to "matters of fact", or "matters of mixed law and fact"?*

(ii) *What was the intention of Parliament in enacting Section 85A of the Elections Act, confining election petitions to the Court of Appeal to "matters of law" only? What is the constitutional basis of Section 85A of the Elections Act?*

(iii) *Did the Court of Appeal act in excess of jurisdiction by delving into issues of fact, to arrive at its conclusions and ultimate decision?*

(ii) The Rationale and Constitutional basis of Section 85 A of the Elections Act

[62] Article 87 (1) grants Parliament the latitude to enact legislation to provide for "timely resolution of electoral disputes." This provision must be viewed against the country's electoral history. Fresh in the memories of the electorate are those times of the past, when election petitions took as long as five years to resolve, making a complete mockery of the people's franchise, not to mention the

entire democratic experiment. The Constitutional sensitivity about "timelines and timeliness", was intended to redress this aberration in the democratic process. The country's electoral cycle is five years. It is now a constitutional imperative that the electorate should know with finality, and within reasonable time, who their representatives are. The people's will, in name of which elections are decreed and conducted, should not be held captive to endless litigation.

[63] Herein lies the nexus between *Article 87 (1) of the Constitution and Section 85A of the Elections Act*. Election petitions, not surprisingly, come up for special legislation that prescribes the procedures and scope within which Courts of law have to resolve disputes. Thus, judicial resources should be utilized efficiently, effectively and prudently. By limiting the scope of appeals to the Court of Appeal to matters of law only, Section 85A restricts the *number, length and cost of petitions* and, by so doing, meets the constitutional command in Article 87, for timely resolution of electoral disputes.

[64] Section 85 A of the Elections Act is, therefore, neither a legislative accident nor a routine legal prescription. It is a product of a constitutional scheme requiring electoral disputes to be settled in a timely fashion. The Section is directed at litigants who may be dissatisfied with the judgment of the High Court in an election petition. To those litigants, it says:

"Limit your appeals to the Court of Appeal to matters of law only."

(iii) Matters(Issues) of Law–v–Matters (Issues) of Fact

[65] An examination of various legal systems indicates that the right, process and form of appeals from lower to appellate judicial forums are matters

regulated, almost invariably, by legislation, except in cases where the Constitution provides otherwise. Parliaments have often prescribed either narrow or broad scopes, within which judgments and orders may be contested in higher courts of appeal. In one case, a statute may grant an unfettered right of appeal (appeal as a matter of right), or may require that such appeal be by way of leave of the court (appeal subject to leave). In some cases, a statute or rule of procedure may limit the range of questions on which a party may found an appeal: one may be restricted to appealing on a question of fact; while in other cases it may be prescribed that an appeal will only be on a question of law, or a mixed question of law and fact.

[66] What, essentially, is an appeal on a question or a matter of law, as distinct from a question or a matter of fact? How ought the Court of Appeal to proceed, in considering appeals brought before it under Section 85A of the Elections Act? This question is not new to judicial discourse, nor is it unique to this part of the world. It is a matter that has exercised judicial and scholarly attention over the years.

(iv) Review of judicial decisions

[67] The Supreme Court of Canada had to answer a question of a similar nature in ***Canadian National Railways Company v. The Bell Telephone Company of Canada and Montreal L. H & P. Cons*** **(1939) SCR, 308.** The Court adjudicated a case in which the Board of Railways Commissioners, a statutory tribunal under the Canadian National Montreal Terminals Act, 1929, pursuant to section 52 (3) of that Act, had given leave to the appellants to appeal to the Supreme Court on questions which, as the Board determined, involved 'questions of law'. Section 52 (3) of the aforesaid Act thus provided:

"An appeal shall also lie from the Board to such Court upon any question which in the opinion of the Board is a question of law, or a question of jurisdiction, or both, upon leave therefor having been first obtained from the Board...."

[68] Delivering a unanimous decision of the Bench, Duff CJ considered the technical meaning of "a question of law" in a passage that appears below:

"The phrase question of law which the Legislature has employed in this enactment is prima facie a technical phrase well understood by lawyers. So construed, "question of law" would include (without attempting anything like an exhaustive definition which would be impossible) questions touching the scope, effect or application of a rule of law which the courts apply in determining the rights of parties; and by long usage, the term "question of law" has come to be applied to questions which, when arising at a trial by a judge and jury, would fall exclusively to the judge for determination;..."

[69] This passage provides a useful aid in understanding the phrase 'a question of law' in the context of common usage, as well as its composite elements in the judicial process. However, as the learned Judge concedes, it is rather too technical, and too restrictive in a non-jury system such as Kenya's, especially when applied to electoral disputes.

[70] The meaning of "a question of law" and "a question of fact" was further explicated in the English case, ***Bracegirdle v. Oxley* (2) *[1947] 1 ALL E.R. 126*** [at p.*130,* per Lord Denning]:

"The question whether a determination by a tribunal is a determination in point of fact or in point of law frequently occurs. On such a question there is one distinction that must always be kept in mind, namely, the distinction between primary facts and conclusions from those facts. Primary facts are facts which are observed by the witnesses and proved by testimony; conclusions from those facts are inferences deduced by a process of reasoning from them. The determination of primary facts is always a question of fact. It is essentially a matter for the tribunal who sees the witnesses to assess their credibility and to decide the primary facts which depend on them. The conclusions from those facts are sometimes conclusions of fact and sometimes conclusions of law. In a case under the Road Traffic Act, 1930, s. 11, the question whether a speed is dangerous is a question of degree and a conclusion on a question of degree is a conclusion of fact. The court will only interfere if the conclusion cannot reasonably be drawn from the primary facts, and that is the case here. The conclusion drawn by these justices from the primary facts, was not one that could reasonably be drawn from them."

[71] The ***Bracegirdle*** case, in our view, goes further than the ***Canadian Railways case*****,** to the extent that it does not limit what constitutes a question of law to "the scope, effect or application of a rule of law." But even the Lord Denning dictum is not free of limitation, insofar as it does not establish when a conclusion from primary facts would qualify as a conclusion of law, as opposed to a conclusion of fact. The ***Bracegirdle*** case would only offer a partial explanation of the jurisdictional underpinnings of Section 85A of the Elections Act.

[72] This difficulty came into sharp focus in the Indian case, ***Meenakshi Mills, Madurai v. The Commissioner of Income Tax, Madras*** (1957) AIR 49, (1956) SCR 691. The Indian Supreme Court was dealing with section 66(1) of the Indian Income Tax Act, which granted a party the right to refer a question of law to the High Court for resolution. It had been urged by counsel for the appellant that "inferences from facts are questions of law", and that, given the decision of the tribunal, the appellant had a right of appeal. The Court highlighted the relevant considerations as follows:

> ***"Can it be said that a conclusion of fact, pure and simple, ceases to be that when it is in turn a deduction from other facts? What can be the principle on which a question of fact becomes transformed into a question of law when it involves an inference from basic facts?***
>
> ***"Here, there are certain facts which are ascertained, and on these facts, a certain conclusion is reached which is also one of fact. Can it be contended that the finding that the promissory note is not genuine is one of law, as it is an inference from the primary facts found? Clearly not. But it is argued against this conclusion that it conflicts with the view expressed in several English decisions, some of them of the highest authority, that it is a question of law what inference is to be drawn from facts. The fallacy underlying this contention is that it fails to take into account the distinction which exists between a pure question of fact and a mixed question of law and fact, and that the observations relied on have reference to the latter and not to the former, which is what we are concerned with in this case."***

[73] In that case, the Supreme Court of India after reviewing manyEnglish and Indian precedents, came to a conclusion of principle that *a questionof law* would arise in the following three instances only:

> *(a) the construction of a statute or document of title;*
>
> *(b) the legal effect of the facts found where the point for determination is a mixed question of law and fact;*
>
> *(c) a finding of fact unsupported by evidence, or that is unreasonable or perverse in nature.*

[74] In the South African decision, ***Magmoed v. Janse Van Rensbura and Others*** 1993 (1) SA 777 (A), the Court considered what constitutes a question of fact or of law, on the following lines:

> ***"In jurisprudence, the term "question of law" is used in various ways. In the first place it means a question which a Court is bound to answer in accordance with a rule of law — a question which the law itself has authoritatively answered to the exclusion of the right of the Court to answer the question as it thinks fit in accordance with what is considered to be the truth and justice of the matter. In a second and different signification, a question of law is a question as to what the law is. Thus, an appeal on a question of law means an appeal in which the question for argument and determination is what the true rule of law is on a certain matter. A third sense in which the expression "question of law" is used arises from the division of judicial functions between a trier of law and a trier of fact. The general rule is that questions of law in both the aforegoing senses are for the judge, but that questions of fact (that is to***

say, all other questions) are for the trier of fact" [Emphasis supplied].

[75] The Supreme Court of the Philippines has had occasion to distinguish between "a question of fact" and "a question of law" in the case of ***Republic v. Malabanan,*** G.R. No. 169067, October 632 SCRA 338, 345. Citing another case, ***Leoncio v. De Vera,*** G.R. No. 176842, 546 SCRA 180, 184 the Court thus remarked:

> ***"A question of law arises when there is doubt as to what the law is on a certain state of facts, while there is a question of fact when the doubt arises as to the truth or falsity of the alleged facts. For a question to be one of law, the same must not involve an examination of the probative value of the evidence presented by the litigants or any of them. The resolution of the issue must rest solely on what the law provides on the given set of circumstances. Once it is clear that the issue invites a review of the evidence presented, the question posed is one of fact. Thus, the test of whether a question is one of law or of fact is not the appellation given to such question by the party raising the same; rather, it is whether the appellate court can determine the issue raised without reviewing or evaluating the evidence, in which case, it is a question of law; otherwise it is a question of fact."***

[76] The same Court was even more emphatic regarding the meaning of "question of law" and "question of fact" in the case of ***New Rural Bank of Guimba v. Fermina S Abad and Rafael Susan*****;** G.R No. 161818 (2008). This was a petition for Certiorari filed under Rule 45 of the Rules of Civil Procedure, section 1 of which provides that: "The Petition shall raise *only*

questions of law which must be distinctly set forth." Dismissing the petition, the Court ruled:

> ***"The Petitioner would have us delve into the veracity of the documentary evidence and truthfulness of the testimonial evidence presented during the trial of the case at bar…We reiterate the distinction between a question of law and a question of fact. A question of law exists when the doubt or controversy concerns the correct application of law or jurisprudence to a certain set of facts; or when the issue does not call for an examination of the probative value of the evidence presented, the truth or falsehood of facts being admitted. A question of fact exists when the doubt or difference arises as to the truth or falsehood of facts or when the query invites calibration of the whole evidence considering mainly the credibility of the witness, the existence and relevancy of specific surrounding circumstances, as well as their relation to each other and to the whole, and to the probability of the situation. This Court cannot adjudicate which party told the truth… by reviewing and revising the evidence adduced at the trial court. <u>Neither verbal sophistry, nor artful misinterpretations of supposed facts can compel this Court to re-examine findings of fact which were made by the trial court….</u> absent any showing that there are significant issues involving questions of law."***

[77] Yet another relevant case comes from Canada, ***Director of Investigation and Research v. Southam Inc.,****(1997) 1 S.C.R. 748 (para 35):*

"Section 12(1) of the Competition Tribunal Act contemplates a tripartite classification of questions before the Tribunal into questions of law, questions of fact, and questions of mixed law and fact. Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests. A simple example will illustrate these concepts. In the law of tort, the question what "negligence" means is a question of law. The question whether the defendant did this or that is a question of fact. And, once it has been decided that the applicable standard is one of negligence, the question whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact. I recognize, however, that the distinction between law on the one hand and mixed law and fact on the other is difficult. On occasion, what appears to be mixed law and fact turns out to be law, or vice versa."

[78] In the case of ***James R. Ahrenholz v. Board of Trustees of the University of Illinois;*** 219 F.3d 674 (7th Circuit 2000), the United States Court of Appeals for the Seventh Circuit, commenting on the import of the phrase "question of law" embodied in 28 U.S.C, sec.1292 (b), stated:

"We think , 'question of law' as used in section 1292(b) has reference to a question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine rather than the question whether the party opposing summary judgment had raised a genuine issue of material fact....We think

they (framers of section 1292 (b)) used 'question of law' in much the same way a lay person might, as referring to a 'pure' question of law rather than merely to an issue that might be free from a factual contest."

[79] The Court of Appeal in the case of ***M'Iriungu v. R*** **[1983] KLR 455** had occasion to consider the meaning of the expression "question of law", as employed to prescribe the limits of appellate jurisdiction. At page 466, the Court stated:

"In conclusion, we would agree with the views expressed in the English case of Martin v. Glyneed Distributors Ltd that where a right of appeal is confined to questions of law only, an appellate Court has loyalty to accept the findings of fact of the lower courts and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law…unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law. We, here have resisted the temptation" [Emphasis supplied].

[80] From the foregoing review of the comparative judicial experience, we would characterize the three elements of the phrase "matters of law" as follows:

- ***(a) the technical element:*** involving the interpretation of a constitutional or statutory provision;
- ***(b) the practical element:*** involving the application of the Constitution and the law to a set of facts or evidence on record;
- ***(c) the evidentiary element:*** involving the evaluation of the conclusions of a trial Court on the basis of the evidence on record.

[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.

[81A] It is for the appellate Court to determine whether the petition and memorandum of appeal lodged before it by the appellant conform to the foregoing principles, before admitting the same for hearing and determination.

[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.*

(v) Did the Court of Appeal act in excess of its jurisdiction?

[83] It is on the basis of the foregoing principles that we must determine whether the Court of Appeal sitting at Nyeri, acted in excess of jurisdiction in the context of Section 85A of the Elections Act, and on that basis annulled the election of the appellant herein.

[84] It is the appellant's contention that the Court of Appeal delved into and made conclusions of fact. In particular, the appellant's counsel questioned the Court of Appeal's observation that the trial Judge's ruling had "struck out", or expunged exhibits marked **DMK2**, **DMK3, and DMK4,** whereas this was not the case. Instead, the petitioner (1st respondent herein) had been *cross-examined on the contents of the said exhibits*. The conclusion by the Court of Appeal that the exhibits had been "struck out" was a *misdirection in law*, and an *erroneous conclusion of fact*. Indeed, as submitted for the appellant, the appellate Court's stand had the effect of infringing the party's right to a just and fair hearing.

[85] We have examined the ruling of the High Court dated 3rd May, 2013 (appearing at page 763 of volume 5 of the record of appeal). In that ruling the Judge *declined to strike out* the affidavits and several exhibits of the 1st respondent, in support of the election petition. An application had been filed by the 1st respondent (the appellant herein) seeking to strike out the said annexures. At page 763 the learned trial Judge rules:

> ***"The applicant seeks that the annexures DMK2, DMK3 DMK4, DMK7 and DMK8 be struck off for lack of authenticity and thereby being incapable of being relied upon since they have not been authenticated or signed by the requisite authors....Irregularities of the form or a technicality cannot bar the court from receiving such an affidavit for purposes of being used in any suit notwithstanding a defect...In the circumstances, I find that the application dated 30th April, 2013 to be without merit and the same is dismissed."***

[86] At the page 114 of the judgment of the Court of Appeal, the learned Judges make the following categorical statement:

> ***"The trial Judge could not properly make a determination on the weight to be given to exhibits DMK2, DMK3, and DMK4 in relation to the alleged irregularities and malpractices after striking these exhibits from the record and denying himself the opportunity to test in judicial proceedings the veracity of the allegations made. The allegations were substantial enough that the truth thereof could not rationally be established without proper inquiry to resolve the issue one way or the other. In striking out these exhibits, the trial judge breached the rules of natural justice and fair hearing in that no person should be condemned unheard"*** [emphasis supplied].

[87] These remarks were the subject of weighty criticism by counsel for the appellant. We find that the holding by the Judges of Appeal that the three annexures had been struck out by the trial Judge, is not supported by the record. The holding is entirely inconsistent with the ruling of the trial Judge, of 3rd May, 2013. At all times, the said annexures remained part of the record, and their content was the subject-matter of cross-examination of the petitioner, in the course of which he admitted to certain inaccuracies therein.

[88] However, in another ruling dated 2nd August, 2013 what the trial Judge disallowed was the 1st respondent's attempt to rely on the annexures **DMK2**, **DMK3** and **DMK4** which were attached to the supporting affidavit to the petition, to lay a basis for scrutiny of votes in constituencies other than the four that had been pleaded in the petition. The Judge ruled that "annexures to an affidavit cannot be said to constitute pleadings." In addition, in denying the request for scrutiny of votes in constituencies outside those mentioned in the petition, the trial Judge ruled that *no evidence had been adduced to establish a basis for such a request*. This is the issue that the Court of Appeal addressed at paragraph 152 of its judgment.

[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.

[90] The critical question is whether the Court of Appeal in making such an inquiry, exceeded its powers to review only matters of law, under Section 85A of the Elections Act. Was the Court cautious enough to limit itself to issues

regarding the *interpretation and application of the law* by the trial Judge, in relation to the petition at the High Court? Did the Judges of Appeal limit themselves to evaluating the conclusions of the trial Judge on the basis of the evidence on record; and to determining whether such conclusions were not supported by the evidence; or to ascertaining that the conclusions were not so perverse that no reasonable tribunal could arrive at the same?

[91] Or, did the Judges of Appeal descend into the arena of examining the probative value of the evidence presented in the petition? Did the Judges engage in the calibration of evidence, with a view to determining the veracity or otherwise of evidence presented by the witnesses at the petition?

[92] It is not for this Court to issue edicts to the Court of Appeal on how it should exercise its jurisdiction. The process of evaluating 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.

[93] 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 the evidence on record is only to enable the Court to

determine whether the conclusions of the trial Judge were supported by such evidence, or whether such conclusions were so perverse, that no reasonable tribunal would have arrived at the same.

[94] We have to make reference to the relevant parts in the judgment of the Court of Appeal. At page 109, of the judgment, the learned Judges open by observing that *"the petition at paragraph 7 (e) alleges that wrong and misleading figures for the total valid votes cast in Meru for the Governor position was [sic] made and the particulars are as contained in Exhibit DKM2, DKM3 and DKM4 and giving rise to a difference of 2, 163 votes. The fundamental issue in this appeal is that these exhibits are attached to the affidavit in support of the Petition itself and the trial judge struck them out."*

[95] Later at page 113 of the judgment, the learned Judges state:

> ***"Any mistakes of fact or otherwise that may be in exhibits DMK2, DMK3 and DMK4 go towards the weight to be given to the exhibits. The trial Judge could not properly make a determination on the weight to be given to exhibits DMK2, DMK3, andDMK4 in relation to the alleged irregularities and malpractices after striking these exhibits from the record and denying himself the opportunity to test the veracity of the allegations made. The allegations were substantial enough that the truth thereof could not rationally be established without proper inquiry to resolve the issue one way or the other."***

[96] These statements by the learned Judges have caused us anxiety. It is clear to us that paragraph 7(e) of the petition, which triggered the Judges' interest in

annexures DMK2 DMK3 and DMK4, is inviting the Court to delve into the *probative value of the evidence* contained therein. The Judges are certainly being asked to calibrate the evidence, the *truth or falsehood in the allegations*. Small wonder, the Judges are moved to observe that, *"the allegations were substantial enough that the truth thereof could not rationally be established without proper inquiry..."*

[97] It is our view that, in the context of an appeal under Section 85A of the Elections Act, the contents of the three annexures/exhibits could not constitute "facts" or evidence on the basis of which the Court of Appeal could have evaluated the conclusions of the trial Judge. At best, the exhibits contained evidentiary material meant to prove the truth of the allegations contained in the relevant affidavit.

[98] At page 122 of the judgment, the learned Judges of Appeal thus state:

> ***"We are satisfied that the trial Judge properly interpreted the law relating to scrutiny and recount but he erred in the application of the law <u>to the facts before him</u>. In the body of the Petition, the appellant had expressly referred to annexures DMK2, DMK3 and DMK4 as containing the details of polling stations where miscount and errors were to be found. In these annexures, polling stations not only in four but nine constituencies had been identified. We have stated that the honourable judge erred in excluding these annexures."***

[99] It is clear from the statement above that the learned Judges were at this stage, treating the contents of the three exhibits in their original form in the petition at the High Court as *facts*. The Judges repeatedly assert that the exhibits

were struck out of the record, while the contrary is true. A perusal of the record reveals that these exhibits were subject to cross-examination at the trial, and that the trial Judge actually directed his mind to them.

[100] At page 784 of the Record of Appeal, the petitioner (1st respondent herein) is reported to say:

> ***"On DMK2 I admit it does not exceed voters. I did not tell the Court the truth."***

And at page 878 of the Record, the same witness states:

> ***"I agree my analysis in DMK2 is incorrect....My document is erroneous as there is no Mugure Coffee Factory. I have not raised a complaint against Mugure."***

On DMK3, the petitioner states (page 878):

> ***"Votes cast for Central Imenti annexure DMK3 under No. 2, Gituane, I complained that the total votes cast are inaccurate are [sic] the votes allocated and each individual candidate and the rejected votes. My conclusion, I admit was therefore not correct as spoiled votes do not find its [sic] way to the ballot box."***

[101] These statements, their staccato rendition notwithstanding, clearly demonstrate that, not only were the three annexures part of the record, but the contents therein were subject to *cross-examination*. The evidence contained in the exhibits was, indeed, controverted. The learned trial Judge *did* direct his mind to this fact, as demonstrated by his observations in his judgment *(at page 955 of the record)* where he states:

"On allegations that votes cast exceeded registered voters, the Petitioner stated:

"I did not tell the court the truth, I relied on document of Kelvin even when it is incorrect."

[102] Given that we are here dealing with exhibits that were never struck off from the record, and whose evidence was actually controverted in cross-examination; and given that the learned trial Judge *consciously* discounted their probative value *on the basis of the answers by the Petitioner*, was it open to the learned Judges of Appeal to re-open their content? We have already held that the content of the said exhibits could not constitute "facts" *at the Court of Appeal*. As such, *they could not have provided the basis upon which the conclusions of the learned trial Judge could be impugned by the appellate Court,* within the context of Section 85A of the Elections Act.

[103] By *re-opening the evidence in the exhibits whose veracity had already been discounted by the learned trial Judge* and by treating the said evidence as factual, the learned Judges of Appeal were, without a doubt, examining the *probative value* of the same. In stating that the allegations contained in the exhibits "were substantial", the Judges were engaged in an exercise of calibration of evidence, with the ever-present danger of *substituting the conclusions of the trial Judge* with their own.

[104] Learned counsel, Mr. Omogeni for the appellant, also submitted that the Judges of Appeal erred in uplifting the testimony of DW 10, and using the said testimony as "evidence" for the petitioner and drawing conclusions of fact therefrom. By so doing, counsel submitted, the learned Judges not only shifted the burden of proof to the 2nd and 3rd respondents, but delved into matters of fact

contrary to the provisions of Section 85A of the Elections Act. The learned Judges of Appeal, it was submitted, had correctly appreciated the fact that they could not inquire into matters of fact, yet they proceeded to do exactly the opposite. Counsel also submitted that the learned Judges erred in transforming the submissions of counsel for the petitioner into evidence.

[105] At page 136 of the judgment, the learned Judges of Appeal stated as follows:

> ***"Having identified the errors and irregularities disclosed through the scrutiny and recount report as well as through the attachments to the affidavit of DW10, the next issue is to ascertain the quantity of votes that are the subject of errors and irregularities disclosed? This is to evaluate if the quantity of votes involved substantially affect the margin between the winner and runner up and thereby materially affect the result of the election."***

[106] The Court then proceeded (pages 137-138) to rely entirely on the analysis by the appellant/petitioner (1st respondent herein) to determine the quantity of errors and irregularities presumed to be established. This analysis had been abstracted from the now-famous annexures DMK2, DMK3 and DMK4. This analysis introduced *figures that went beyond the 7 polling stations in which an order for recount and scrutiny had been issued by the trial Judge*. The appellant (1st respondent herein) was therefore allowed to re-introduce evidence at the appellate Court, to which the learned trial Judge did not direct his mind in arriving at the conclusions he made. Towards this end, the learned trial Judge had concluded thus:

"As it turns out, from the above results of scrutiny and recount, it is clear that there were no massive discrepancies between the results declared by the 2nd and 3rd respondents in the respective Form 35s of polling stations and Form 36 of tallying stations that were under scrutiny and the finding made by this court."

[107] It is to this finding, that the learned Judges of Appeal ought to have directed their attention, to determine whether the conclusions by the trial Judge were supported by the evidence before him, or not. But, *by elevating the analysis of the appellant/petitioner to a pedestal of "proven evidence", and drawing their own conclusions of fact therefrom, the learned Judges of Appeal cannot be said to have been considering "matters of law" within the meaning of Section 85A.*

[108] In overturning the judgment of the High Court, the Judges thus pronounced themselves:

"We are convinced that the trial Judge misdirected himself and erred in law in not considering the totality of the evidence on record and evaluating the legal effect of the errors and irregularities disclosed in arriving at his decision".

(vi) On Scrutiny and Recount

[109] It was the submission of counsel for the appellant that the learned Judges of Appeal misconstrued Section 82(1) of the Elections Act as read together with Rule 33 of the Elections (Parliamentary and County Elections) Rules, 2013. The Judges had faulted the trial Judge for ordering scrutiny and recount in only seven

polling stations, instead of *all the polling stations* in the four constituencies which had been specifically mentioned by the petitioner.

[110] Learned counsel, Prof. Ojienda argued that the Judges erred in reading the word "constituency" into the word "polling station". It was counsel's submission that the right to scrutiny and recount is not an automatic one. Scrutiny and recount can only be ordered if the party claiming it has established a basis, to the satisfaction of the trial Judge. Counsel also submitted that scrutiny and recount are based at the *polling stations* where the results have been challenged, but not at the *constituency*. Yet, according to counsel, the Judges of Appeal held that the right to scrutiny subsists even where a petitioner has not laid a basis for it.

[111] In effect, counsel contended, the Court of Appeal had overturned Rule 33(4) of the Elections (Parliamentary and County Petition) Rules, which unequivocally restricts the scrutiny of votes to polling stations, as opposed to constituencies. These arguments were echoed by learned counsel, Mr. Munyu for the 2nd and 3rd respondents. Counsel contended that a proper interpretation of Section 82 of the Elections Act as read together with Rule 33 (4) of the Election Petition Rules, meant that the petitioner was required to establish a basis for the order of scrutiny in respect of polling stations where the election results were disputed.

[112] Learned counsel, Mr. Muthomi for the 1st respondent, on the other hand, submitted that the learned Judges of Appeal had correctly interpreted and applied the law relating to the scrutiny and recount of votes. Rule 33 of Elections Rules, being subsidiary legislation, he contended, could not supersede Section 82 of the Elections Act. Counsel submitted that Section 82 of the Elections Act is

the legal foundation for scrutiny, and that the said section mandates the Court to order a scrutiny of *votes* and not a scrutiny of *polling stations*. Counsel submitted that Rule 33(4) must be interpreted so as not to negate the import of Section 82, which provides for scrutiny simpliciter, without limiting the exercise to polling stations. Counsel expressed agreement with the Court of Appeal's observation, that the learned trial Judge had adopted a technical and restrictive interpretation of Rule 33(4) of the Petition Rules.

[113] In sum the questions that arise from these arguments are:

(i) when can an order for scrutiny and recount be made?
(ii) is scrutiny of votes an automatic right, or should a basis be laid for an order for scrutiny to be granted?
(iii) should scrutiny of votes be confined to polling stations where elections were disputed?
(iv) what is the purpose of scrutiny and recount?
(v) does Rule 33 (4) of the Election Petition Rules, 2013 conflict with section 82 of the Elections Act?

(vi) Applicable Law

[114] The applicable provisions of the law in contention are Section 82 of the Elections Act (Cap. 7, Laws of Kenya), and Rule 33 of the Elections (Parliamentary and County Election) Petition Rules, 2013. Section 2 of the Elections Act defines 'constituency' and 'polling station' as follows:

> ***"Constituency" means one of the constituencies into which Kenya is divided under Article 89 of the Constitution;***
>
> ***"polling station" means any room, place, vehicle or vessel set apart and equipped for the casting of votes by voters at an election;***

[115] While the definition of a polling station points clearly to the *arena where votes are cast* in an election, the definition of constituency under the Elections Act points only to the *administrative area* whose residents are entitled to elect a representative.

Section 82 of Elections Act reads as follows:

> *"Scrutiny of votes*
>
> *(1)* ***An election court may****, on its own motion or on application by any party to the petition, during the hearing of an election petition,* ***order for a scrutiny of votes to be carried out in such manner as the election court may determine.***
>
> *(2) Where the votes at the trial of an election petition are scrutinized, only the following votes shall be struck off—*
>
> *(a) the vote of a person whose name was not on the register or list of voters assigned to the polling station at which the vote was recorded or who had not been authorised to vote at that station;*
>
> *(b) the vote of a person whose vote was procured by bribery, treating or undue influence;*
>
> *(c) the vote of a person who committed or procured the commission of personation at the election;*
>
> *(d) the vote of a person proved to have voted in more than one constituency;*
>
> *(e) the vote of a person, who by reason of conviction for an election offence or by reason of the report of the election court, was disqualified from voting at the election; or*

(f) the vote cast for a disqualified candidate by a voter knowing that the candidate was disqualified or the facts causing the disqualification, or after sufficient public notice of the disqualification or when the facts causing it were notorious.

(3) The vote of a voter shall not, except in the case specified in subsection (1)(e), be struck off under subsection (1) by reason only of the voter not having been or not being qualified to have the voter's name entered on the register of voters."

Rule 33 reads as follows:

"Scrutiny of votes.

(1) The parties to the proceedings may, at any stage, apply for scrutiny of the votes for purposes of establishing the validity of the votes cast.

(2) Upon an application under sub-rule (1), the court may, if it is satisfied that there is sufficient reason, order for a scrutiny or recount of the votes.

(3) The scrutiny or recount of ballots shall be carried out under the direct supervision of the Registrar and shall be subject to directions as the court may give.

(4) Scrutiny shall be confined to the polling stations in which the results are disputed and shall be limited to the examination of—

(a) the written statements made by the presiding officers under the provisions of the Act;

(b) the copy of the register used during the elections;

(c) the copies of the results of each polling station in which the results of the election are in dispute;

(d) the written complaints of the candidates and their representatives;

(e) the packets of spoilt papers;

(f) the marked copy register;

(g) the packets of counterfoils of used ballot papers;

(h) the packets of counted ballot papers;

(i) the packets of rejected ballot papers; and

(j) the statements showing the number of rejected ballot papers."

(vii) What is the proper basis for scrutiny? –The Case Law

[116] The petitions arising from the 4th March, 2013 general elections have generated a long line of judicial authority, such as provides a reference point regarding the issue of scrutiny and recount. We revisit some of the decisions by the High Court and Court of Appeal, on the question as to when scrutiny and recount of votes ought to be ordered, in an election petition.

[117] In ***Nicholas Salat v. Wilfred Rotich Lesan & Others,*** the Court of Appeal at Nairobi, Civil Appeal No. 228 of 2013(Kiage, Gatembu & M'Inoti, JJA): the Court of Appeal endorsed the trial Judge's refusal to order scrutiny in certain polling stations, on the ground that *no sufficient basis had been laid for such scrutiny*. In a majority decision (Kiage JA dissenting), Kairu JA stated:

"Rule 33 (2) requires the court to be satisfied that there is sufficient reason and manner in which the scrutiny is to be carried out is set out in detail. An order for scrutiny is therefore not automatic; sufficient reason has to be shown before the court orders scrutiny and recount.....The first part of the appellant's prayer sought an order for recount throughout the entire Bomet County. The appellant laid no basis whatsoever to justify that request....it seemed that the appellant was on a fishing expedition. The alternative prayer for recount was restricted to some polling stations in three constituencies, namely Chepalungu, Bomet East Constituency and Sotik Constituency. Each of those constituencies had numerous polling stations with respect to which the appellant made no complaints."

[118] In ***Hassan Mohamed Hassan & Another v. IEBC & 2 Others*** High Court at Garissa, Election Petition 6 of 2013,the petitioners were seeking scrutiny of votes and related material, in all the polling stations in Wajir West Constituency. Onyancha J. had to determine whether to allow for scrutiny right away, or later during the trial. After setting out the law on scrutiny (Section 82 of the Elections Act and Rule 33 of the Election Petition Rules, 2013) he determined that:

"a party has liberty to apply for scrutiny and recount at any stage of the proceedings for the purposes of establishing the validity of the votes cast. However, the court has to be satisfied that there is sufficient reason for it to order for scrutiny or recount of votes."

[119] *He identified three stages, in theory, at which scrutiny of votes can be sought by a petitioner:*

(a) before the petition trial, in which case the petitioner would seek to persuade the Court to grant the orders sought by affidavit evidence;

(b) during the trial, where the petitioner adduces sufficient evidence to support a scrutiny while the trial still proceeds;

(c) at the end, where the petitioner adduces all the evidence and calls for scrutiny or recount, based on the evidence on record.

[120] The learned Judge was of the view that sufficient reason entails sufficient evidence. He thus pronounced himself:

> ***"If the request for scrutiny is made before the trial starts and therefore before the relevant evidence upon which such decision is adduced, then clearly and logically such relevant evidence must be based on the affidavits, if any, supporting the application."***

[121] Significantly, the learned Judge ruled that the petitioner must have *specified the polling stations* in respect of which a recount or scrutiny would be sought, as well as *probable evidence* pertaining to the same.

[122] In ***Philip Osore Ogutu v. Michael Aringo & 2 Others,*** Busia High Court Petition No. 1 of 2013, the petitioner sought scrutiny of votes in 15 polling stations during the pre-trial conference. Upon making a formal application, Tuiyot J, after setting out the law relating to scrutiny, ruled as follows:

"An order for scrutiny will not be made as a matter of course. In the words of Rule 33(2) of the Election Petition Rules, the court must be satisfied that there is sufficient reason to require an examination of the ballots. This rule codifies a long-held Judicial opinion that scrutiny may only be ordered where a foundation or basis has been laid (see for instance the Court of Appeal decision in Masinde v. Bwire and Another [2008] 1KLR (EP) 547."

[123] In ***Rishad Hamid Ahmed Amana & 2 Others*****,** Malindi Election Petition No. 6 of 2013, the petitioner had sought Court orders for scrutiny, recount and retallying of votes, in disputed polling stations set out in the petitioner's affidavit in support, and in the replying affidavit. Kimaru J set out the law on scrutiny, and the position of the law in regard to the circumstance under which scrutiny of votes can be ordered. He referred to the decisions in ***William Kamanda v. Margaret Wanjiru*** [2008] eKLR, and ***Joho v. Nyange*** [2006] eKLR which he agreed with, and on the basis of these two decisions he concluded that:

"It is clear that scrutiny can be ordered under two (2) circumstances: firstly, where irregularities have been established to have been committed by election officials and secondly where the margin between the winning candidate and the runner-up is such that scrutiny would be the best way in which to settle the dispute as to who actually won the election."

[124] The learned Judge also endorsed the decision in ***Philip Ogutu v. Michael Aringo & 2 Others (supra),*** and was of the view that scrutiny cannot be ordered when the petitioner has not specifically pleaded for scrutiny in his petition. He observed:

> ***"It will not do for the petitioner to aver in the petition that he desires scrutiny and recount to be undertaken in respect of all the polling stations in the electoral area that is the subject of the dispute. The petitioner must plead in sufficient detail why he requires the court's intervention to order scrutiny. In that regard, the petitioner is required to state the specific polling stations that he alleges there were irregularities and therefore should be scrutinized."***

[125] In ***Peter King'ara v. IEBC & 2 Others*** Nyeri High Court Election Petition No.3 of 2013, Ngaah J held:

> ***"From the perspective of Section 82(1) of the Act, the answer to the primary question posed earlier is that indeed votes can be scrutinized by the court either suo motu or on application by a party to the petition. In my opinion, the only reason why a party would be required to make an application before scrutiny is ordered is to lay a basis for such scrutiny. Ordinarily an application would not be made without a basis and the basis for an application for scrutiny of votes would logically be the basis for such a scrutiny. Whether or not the basis be sufficient... to warrant an order for scrutiny is for the court to determine based on the evidence available."***

[126] In ***Charles Oigara Mogere v. Christopher Mogere Obure*** High Court at Kisii, Election Petition No. 9 of 2013, Sitati J thus ruled:

> ***"Under the new electoral regime, scrutiny of votes is provided under Rule 33. Under sub-rule (1) thereof the parties to the proceedings may at any stage, apply for scrutiny of the votes for purposes of establishing the validity of the votes cast and an order for scrutiny or recount can only be made if the court is satisfied that there is sufficient reason for the same. The requirement for sufficiency of reason thus underlies the current electoral regime as it did the old regime. This means that an order for scrutiny cannot be made as a matter of course. Further, and by dint of Rule 33 (4) scrutiny shall be confined to the polling station in which the results are disputed…"***

[127] The High Court in ***Benjamin Onguyo Andama v. Benjamin Andola Andayi & 2 Others,*** Kakamega High Court, Election Petition No. 8 of 2013**,** dealt with Rule 32 of the Election Rules, 2013.Dulu J delivered himself thus:

> ***"In my view, the process of recount of votes or the examination of tallies may apply to all polling stations in a Constituency. The court may allow a recount or examination of the tallies in all polling stations whether complained of or not. <u>However, that has to be the only issue for determination in the petition as required in the rules, and the petitioner must state so in the petition</u>."***

[128] In this case, Dulu J found no basis for granting the request for recount or retallying, as this was not the only issue for the court's determination.

[129] In ***Thomas Malinda Musau & Two Others v. Independent Electoral Boundaries Commission & 2 Others*** High Court at Machakos, Election petition No. 2 of 2013, the petitioner sought, *inter alia,* an order for scrutiny of the votes recorded in Matungulu Constituency in the elections for Member of the National Assembly. Mutende J observed:

> "***17. The issue this court should address is whether the irregularities complained about are sufficient to warrant the order sought being granted.***
>
> ***"18. According to rule 33(2) of the Rules the duty is upon the petitioner to satisfy the court that there is a plausible reason necessitating the scrutiny/recount of votes. This is done by sufficient reasons being given."***

[130] Majanja, J in ***Wavinya Ndeti v. The IEBC & 4 Others*** in Machakos High Court Election Petition No. 4 of 2013, had to determine whether to grant an order for scrutiny for all the 8 constituencies in Machakos County. He considered the decisions in ***Philip Ogutu v. Michael Aringo and 2 Others*** Busia EP No.1 of 2013;the Court of Appeal decision in ***Masinde v. Bwire and Another* (2008)** 1KLR (EP) 547; ***Peter King'ara v. IEBC and Others*** Nyeri EP No. 3 of 2013; ***Kakuta Hamisi v. Peris Tobiko and Others*** Nairobi EP No. 5 of 2013; ***M'inkiria Petkay Shen Miriti v. Rangwa Mbae and 2 Others*** Meru EP No. 4 of 2013; ***Joseph Tiampati ole Musuni 2 Others v. Samuel Kuntai Tunai & 10 Others,*** Nakuru EP No. 3 of 2013; ***Harun Meitamei Lempaka v. Hon. Lemanken Aramat and 2 Others,*** Nakuru

EP No. 2 of 2013; and ***Rashid Hamid Ahmed Amana v. IEBC and Others*** Malindi EP No. 6 of 2013, and determined that:

> ***"What the cases establish is that although scrutiny is within the court's discretion, the applicant must establish sufficient basis for the court to order scrutiny. Further, the petitioner must not be permitted to launch a fishing expedition under the guise of an application for scrutiny in order to discover new evidence upon which to foist his or her case to invalidate an election."***

[131] The learned Judge was not satisfied that a case had been made out for scrutiny.

[132] In ***Ledama ole Kina v. Samuel Kuntai Tunai & 10 Others*****,** Nakuru High Court, Election Petition No. 3 of 2013 the petitioner claimed to have laid a basis for scrutiny. However, Wendo J wondered whether sufficient cause had been established, to warrant an order for scrutiny for the whole of Narok South Constituency. The learned trial Judge stated thus:

> ***"An application for scrutiny of all of Narok South Constituency lacks specificity, is a blanket prayer that, in my view, cannot be granted. The applicant needed to be specific on which polling stations he wanted a scrutiny done [in]. If he wanted scrutiny in all the polling stations, then a basis should have been laid for each polling station. The rationale is clear, the process of scrutiny is laborious, time-consuming, and the applicants cannot be let at liberty to seek ambiguous prayers and waste precious court's time and incur unnecessary costs. They must be specific. For the above reason, the court cannot give a blanket order for***

scrutiny of Narok South Constituency because such order will be prejudicial to the respondent now that the evidence of witnesses has already been taken. The respondent would not have an opportunity to respond to any new issues that may be unraveled during scrutiny."

[133] Also in ***Musikari Nazi Kombo v. Moses Masika Wetangula,*** Gikonyo J, in declining to allow a scrutiny and recount of votes cast in all polling stations in Bungoma County for the senatorial elections, noted:

"***There was no evidence before the court that all polling stations were affected by the irregularities and malpractices complained of by the Petitioner. It will not, therefore, be supported in law to make a general order for scrutiny or re-count of all the votes cast in the election for Senator for the County of Bungoma. That kind of extravagant exercise of discretion will also be an affront to the constitutional policy that election petitions must be determined expeditiously, not later than six months from the date of filing. It will also have unnecessary cost on the public.***"

[134] However, Courts have allowed a recount of votes where substantive justice would be better served if an order for a recount of votes cast in all the polling stations in the entire Constituency, as opposed to a partial recount, is made. Majanja J in ***Richard Kalembe Ndile v. Patrick Musimba Mweu,*** Election Petition No. 7 of 2013, ordered a recount of all polling stations other than the ones pleaded in the petition and stated thus:

"...all that is necessary is for the petitioner to establish sufficient basis for the court to be satisfied that it must engage time and resources to ascertain the validity of the vote through scrutiny. The scrutiny exercise is part of the forensic process available for the court to do justice in the case."

[135] Githua J also allowed, as sought, for a broad-based order of recount covering the whole of Lamu County in ***Hassan Abdalla Albeity v. Abu Mohamed Abu Chiaba & Another,*** Malindi High Court Election Petition 9 of 2013. The Judge took into account all the evidence adduced by the parties, and noted:

"In finding that the circumstances of this case merit a blanket order of recount covering the whole county, I have been guided by the principles of electoral system and process enunciated in Article 81 of the Constitution and the realization that a recount as prayed would assist the court in making a proper and fair enquiry whether the 1st Respondent was validly elected as the senator for Lamu County.

"This however should not be construed to mean that a recount would relieve the petitioner of his burden of proof. The petitioner still bears the burden of proof to establish all the allegations pleaded in his petition to the required standard."

[136] In ***Philip Mungu Ndolo v. Omar Mwinyi Shimbwa & 2 Others*** Mombasa Election Petition Number 1 of 2013,the opinion of Odero J, is worth noting. The learned Judge had the following to say:

> "***In any case where a request is made for scrutiny and/or recount the application therefor must be clear, concise and more importantly specific. An application couched in general terms ought not to be permitted as this is tantamount to requiring of the court to go through the whole exercise of tallying once again. Rule 33(4) of the Election Rules however obliges a party to name the polling stations in which the results are disputed. As general principle in law, a party is bound by its pleadings. As such, any evidence which goes outside of the pleadings on record must be disregarded.***
>
> "***It is not each and every claim of a malpractice that will merit a recount or scrutiny. It must be shown that such malpractices were so widespread, so pervasive as to affect the final tally of votes.***"

(viii) What is the purpose of Scrutiny and Recount?

[137] In ***Raila Odinga v. Uhuru Kenyatta & 3 Others,*** Petition 5 of 2013, this Court explained why it had made an Order *suo motu* for scrutiny at paragraph 169 of its judgment. The Court stated:

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

[138] In ***Philip Mukwewasike v. James Lusweti Mukwe,*** High Court at Bungoma, Petition No. 5 of 2013,the petitioner sought scrutiny and recount of *all* polling stations in Kabuchai Constituency. Omondi J noted, while adopting the decision by Kariuki J (as he then was) in ***William Maina Kamanda v. Margaret Wanjiru Kariuki*** Nairobi Election Petition No. 5 of 2008, that the purpose of scrutiny is to:

> ***"1. Assist the court to investigate if the allegations of irregularities and breaches of the law complained of are valid.***
>
> ***2. Assist the court in determining the valid votes cast in favour of each candidate.***
>
> ***3. Assist the court to better understand the vital details of the electoral process and gain impressions on the integrity of the electoral process."***

[139] The Election Court was of the view that in construing rule 33 (4) of the Election Rules, the Court has the discretion to direct which documents can be scrutinized, in view of the fact that not all documents need to be scrutinized. It was held that the Court may order for *partial scrutiny* where sufficient grounds are established. The trial Judge, in restricting scrutiny to specific polling stations had the following to say:

> "***To order scrutiny and recount in all the 98 polling stations would, in my view, be a fishing expedition which isn't the business of an election court and indeed any other court of law. In making its determinations the court must pay regard to the pleadings and the evidence adduced. The petitioner must demonstrate that the***

irregularities result is making the electoral process opaque and not verifiable or credible."

[140] In ***Gideon Mwangangi Wambua & Another v. IEBC & 2 Others***, Mombasa Election Petition No. 4 of 2013 (consolidated with Election Petition Cause No. 9 of 2013), the dispute entailed the declaration of Khatib Abdalla Mwashetani as elected Member of the National Assembly for Lunga Lunga Constituency. The petitioners sought scrutiny and recount of votes in all the polling stations in the said constituency. In finding that there was insufficient pleading, and a lack of particularity of facts upon which an order for scrutiny could be granted in both petitions, Odunga J observed:

"***26.The aim of conducting scrutiny and recount is not to enable the Court [to] unearth new evidence on the basis of which the petition could be sustained. Its aim is to assist the court to verify the allegations made by the parties to the petition which allegations themselves must be hinged on pleadings. In other words a party should not expect the Court to make an order for scrutiny simply because he has sought such an order in the petition. The petition ought to set out his case with sufficient clarity and particularity and adduce sufficient evidence in support thereof in order to justify the court to feel that there is a need to verify not only the facts pleaded but the evidence adduced by the petitioner in support of his pleaded facts. Where a party does not sufficiently plead his facts with the necessary particulars but hinges his case merely on the documents filed pursuant to Rule 21 of the Rules, the Court would be justified in forming the view that the petitioner is engaging in a fishing expedition or seeking to expand his petition outside the four corners of the petition.***"

[141] In ***Mercy Kirito Mutegi v. Beatrice Nkatha Nyaga & IEBC,*** Meru High Court, Election Petition No. 5 of 2013**,** Lesiit J. remarked: ***"Rule 33 also alludes to the purpose of scrutiny where it provides that one may apply for an order of scrutiny for purposes of establishing the validity of the votes cast."*** The learned Judge proceeded to order for the conduct of scrutiny in the course of the hearing of the petition.

[142] The learned Judge was categorical that scrutiny could only be granted in respect of polling stations specified in the petition, the results of which were disputed. On the purpose of scrutiny, the Judge observed:

> **"*Scrutiny is one of the tools that the court uses to investigate whether an election was conducted in accordance with constitutional principles and to establish that indeed the result as declared was a reflection of the will of the electorate that took part in that election."***

[143] In ***Gideon Mwangangi Wambua & Another v. IEBC & 2 Others*****,** it had been contended that an order for scrutiny would be a waste of the Court's resources and time. Odunga J thus remarked:

> ***"The availability of proportionate judicial remedy for rectifying the result and declaring the true result of the election following scrutiny and a recount prevents the necessity to choose between vitiating the entire election and allowing an erroneous result to stand."***

[144] In ***Mohammed Mahat Kuno v. Abdikadir Omar Aden*****,** High Court of Kenya at Nairobi, Election Petition No. 7 of2013**,** scrutiny of statements, registers and polling-station diaries had been sought in respect of the elections conducted for the Parliamentary seat of Balambala Constituency; and Kamau J thus remarked:

> "***The objective of a scrutiny of votes is anchored on the premise that if votes are struck out as envisaged in Section 82 (2) of the Act, it would have the effect of varying the total number of votes cast for each candidate. In the absence of any evidence that a voter voted in the wrong station, a vote was procured by bribery or treating, a voter had committed or had been prosecuted for impersonation, a voter had voted in more than one (1) constituency, a voter had been disqualified from voting or a vote had been cast for a disqualified candidate, the court finds that it would serve no useful purpose in undertaking scrutiny."***

(ix) Is Rule 33 of the Election (Parliamentary and County) Petition Rules 2013, inconsistent with Section 82 of the Elections Act?

[145] The High Court has had occasion to consider the question whether, and to what extent, Rule 33 of the Petition Rules is inconsistent with Section 82(1) of the Elections Act. The source of the "controversy" lies in the wording and language in the two legal documents.

(a) "Hearing", and "proceedings"

[146] The Court, in ***Joash Wamang'oli v. IEBC & 3 Others***, Bungoma High Court, Election Petition No. 6 of 2013, dealt with this apparent controversy.

[147] While Section 82 (1) of the Elections Act provides that an election court may order for a scrutiny of votes "during the hearing" of an election petition, Rule 33 (1) of the Petition Rules provides that an election court may order for scrutiny of votes "at any stage."

[148] Election courts have had to consider whether there is conflict between the Act and the subsidiary legislation in this regard; and the learned Judge thus remarked in the ***Wangoli*** case:

> "***obviously "during the hearing" and "at any stage of the proceedings", cannot mean one and the same thing and on a plain reading it appears there is a conflict between the provisions in the main statute, and the subsidiary legislation (i.e. the rules).***"

[149] The Judge was also alive to the provisions of *the Interpretation and General provisions Act* (Cap. 2, Laws of Kenya), wherein it is provided *(Section 31 (b))* that no subsidiary legislation shall be inconsistent with the provisions of the Act. However the Judge remarked:

> "***I think the Act sets out the principles on scrutiny and the Rules elucidate the principles. I am inclined to adopt an interpretation which favours realization of the objective of***

Elections Dispute Resolution – i.e. to facilitate a just and proportional resolution. There is however need to harmonize the two provisions so as to avoid creating confusion."

[150] The same question fell for consideration before Gikonyo J, in ***Musikari Nazi Kombo v. Moses Masika Wetangula.*** The learned Judge remarked:

"***Except I wish to add that rule 33(1) of the Election Petition rules, 2013 is not in conflict with section 82(1). The source of that misconception is in the words used in the rule, i.e. at any stage, whereas the Act talks of during the hearing. The words in the rule should be read with the Act and should bear the meaning at any stage during the hearing. Those words emphasize at any time during the hearing without necessarily having to wait until the end of production of evidence although the applicant should always be minded of rules of fair hearing to all parties as a determinant as to what point such application should be made. An applicant who applies when there are clear materials before court to order scrutiny is not the poorer.***"

(b) "Sufficient reason" as a basis for scrutiny

[151] In ***Ramadhan Seif Kajembe v. Returning officer of Jomvu Constituency & 3 Others*** Mombasa High Court Election Petition No. 10 of 2013, Odunga J had to consider whether there was a conflict between the said Rule 33 (2) and Section 82 (1). The learned Judge noted:

"***.....whereas Rule 33 of the aforesaid Rules provides that a sufficient reason be shown before the Court can be satisfied that scrutiny or recount ought to be ordered, Section 82 of the Act <u>on the other hand donates wide and unfettered discretion to the Court to make such orders in such manner as it may direct</u>. If it were to be argued that Section 82 of the Act ought to be interpreted in accordance with Rule 33 that would fall foul of Section 31(b) of the Interpretations and General Provisions Act (Cap. 2, Laws of Kenya) which provides that no subsidiary legislation shall be inconsistent with the provisions of an Act.***"

The learned Judge further observed:

"***7.It follows that if the effect of Rule 33 <u>was to fetter the wide discretion given to the Court by Section 82 of the Act</u> that Rule would be ultra vires the parent legislation. However, that is not the view I take of the matter. <u>As was stated in the above cited case the rule is perhaps unnecessary, but serves to give guidance to the court on what considerations to take into account when the application for scrutiny and recount is made by a party rather than on the Court's own motion.</u>***"

[152] We have considered the wording of Section 82 (1) of the Elections Act and Rule 33 of the Petition Rules. Taking into account the intention of Parliament (which in this instance is "to provide legislative mechanisms for the timely resolution of electoral disputes"), and the judicial thought-process as expressed by the election Courts, we are of the view that:

(i) There is no fundamental inconsistency between Rule 33 (1) of the Petition Rules and Section 82 (1) of the Elections Act. It is our position that an order for a recount or scrutiny of the vote may be made *at any stage after filing of an election petition* or *during the hearing of an election petition* and *before the determination of the said petition.*

(ii) There is no inconsistency between Rule 33(2) of the Petition Rules and Section 82 (1) of the Elections Act, as regards the *exercise of discretion* as to whether to order for scrutiny and recount or not. Contrary to dicta in some of the High Court decisions, *the discretion vested in an election court by Section 82(1) of the Act, is not unfettered. Such discretion must be exercised reasonably, so as not to defeat the objectives of Article 87 (1) of the Constitution and the Elections Act.*

[153] From the foregoing review of the emerging jurisprudence in our Courts, on the right to scrutiny and recount of votes in an election petition, we would propose certain guiding principles, as follows:

(a) *The right to scrutiny and recount of votes in an election petition is anchored in Section 82(1) of the Elections Act and Rule 33 of the Elections (Parliamentary and County Elections) Petition Rules, 2013. Consequently, any party to an election petition is entitled to make a request for a recount and/or scrutiny of votes, at any stage after the filing of petition, and before the determination of the petition.*

(b) The trial Court is vested with discretion under Section 82(1) of the Elections Act to make an order ***on its own motion*** *for a recount or scrutiny of votes as it may specify, if it considers that such scrutiny or recount is necessary to enable it to arrive at a just and fair determination of the petition. In exercising this discretion, the Court is to have sufficient reasons in the context of the pleadings or the evidence or both. It is appropriate that the Court should record the reasons for the order for scrutiny or recount.*

(c) The right to scrutiny and recount does not lie as a matter of course. The party seeking a recount or scrutiny of votes in an election petition is to establish the basis for such a request, to the satisfaction of the trial Judge or Magistrate. Such a basis may be established by way of pleadings and affidavits, or by way of evidence adduced during the hearing of the petition.

(d) Where a party makes a request for scrutiny or recount of votes, such scrutiny or recount if granted, is to be conducted in specific polling stations in respect of which the results are disputed, or where the validity of the vote is called into question in the terms of Rule 33(4) of the Election (Parliamentary and County Elections) Petition Rules.

[154] We are guided by the foregoing principles, and by the relevant case law which we have reviewed, as we determine the question whether the learned Judges of Appeal erred, in faulting the learned

trial Judge's decision to confine the scrutiny and recount to only seven polling stations, rather than extend it to all polling stations in the four constituencies of Meru County.

[155] At page 103 of the judgment of the Court of Appeal, the learned Judges stated:

> ***"Our examination of the jurisprudence developed by election courts in Kenya show(sic) that courts have time and again made orders for scrutiny and recount when the applications refer and point to constituencies and not necessarily polling stations."***

[156] The learned Judges then proceeded to cite a number of cases: ***Ayub Juma Mwakesi v. Chirau Ali Mwakere & 2 Others,*** Mombasa Election Petition No. 1 of 2008; ***Richard Kalembe Ndile v. Dr. Musimba Mweu & Others,*** Machakos Election Petition Nos. 1 & 7 of 2013; ***Joash Wamang'oli v. IEBC & Others*** Bungoma HC Election Petition No. 6 of 2013; and ***William Odhiambo Oduol v. Cornell Rasanga Amoth & Others,*** Kisumu HC Election Petition No. 2 of 2013.

[157] It is a matter of concern to us that the Court invoked the foregoing cases, *but without analyzing the* ***rationes decidendi*** *thereof*. This gives the impression that where a petitioner makes a claim for a recount or scrutiny in a constituency, it should be granted as a matter of course. If such a position were to be sustained, it would stand as a contradictory precedent, with the potential to disrupt the stability of decision-making already evolving, in the practice of scrutiny and recount. It would mean that once an application for recount or

scrutiny refers to *a constituency*, then the trial Court must automatically order scrutiny in *all the polling stations in the constituency*.

[158] It appears to us that the learned Judges of Appeal did not avail themselves of the number of weighty decisions of the High Court, such as the ones we have reviewed hereinabove. From the eminent rationale of these decisions, it is clear to us that *an order for a recount or scrutiny must be grounded on sufficient reasons*. The words of Wendo J, in ***Ledama Ole Kina v. Samuel Kuntai Tunai & 10 Others*** (cited above) are, in this respect, instructive:

> ***"An application for scrutiny of all of Narok South Constituency lacks specificity, and is a blanket prayer that, in my view, cannot be granted. The applicant needed to be specific on which polling stations he wanted a scrutiny done in. If he wanted scrutiny in all the polling stations, then a basis should have been laid for each polling station. The rationale is clear: the process of scrutiny is laborious, time-consuming, and the applicants cannot be left at liberty to seek ambiguous prayers and waste precious Court time and incur unnecessary costs. They must be specific. For the above reason, the Court cannot give a blanket order for scrutiny in Narok South Constituency, because such order will be prejudicial to the respondent, now that the evidence of witnesses has already been taken. The respondent would not have an opportunity to respond to any new issues that may be unraveled during scrutiny."***

[158A] The tenor and effect of the Court of Appeal's judgment is clear from its language at page 105:

> ***"Article 159 of the Constitution enjoins courts to dispense justice without undue regard to technicalities. The Constitution should also be interpreted in a purposive manner. Taking note of Article 159 and the jurisprudence developed by election Courts in Kenya and a purposive approach to interpretation of Rule 33 (4), we are of the considered view that in the instant case, the trial Judge erred in law in placing a restrictive and technical interpretation of Rule 33 (4) of the Election Petition Rules in stating that scrutiny and recount cannot be done in constituencies. It is our considered view that scrutiny and recount in a constituency means scrutiny and recount in all polling stations within a constituency"*** [emphasis supplied].

[159] We are unable to agree with the view of the learned Judges of Appeal. The view that scrutiny and recount in a constituency "means scrutiny and recount in all polling stations in the constituency", is not borne out by emerging jurisprudence from the most relevant fora of adjudication, namely, the election Courts. On the contrary, judicial opinion distinctly favours a view that commends itself to us: *that, an application for scrutiny and recount, must be couched in specific terms, and clothed with particularity, as to which polling stations within a constituency are to attract such scrutiny.* If a party lays a clear basis for scrutiny in each and all the polling stations within a constituency, then the order ought to be granted. Otherwise, a prayer pointing to a constituency but lacking in specificity is not to be entertained. We find clear merits in the dictum of Odunga J, in ***Gideon Mwangangi Wambua & Another v. IEBC & 2 Others,*** Mombasa Election Petition No. 4 of 2013 [quoted above]. So with the

dictum by Kimaru J, in ***Rishad Hamid Ahmed Amana & Others,*** Malindi Election Petition No. 6 of 2013, in which the learned Judge states:

> ***"It will not do for the petitioner to aver in the petition that he desires scrutiny and recount to be undertaken in respect of all polling stations in the electoral area that is subject to the dispute. The petitioner must plead in sufficient detail why he requires the Court's intervention to order scrutiny. In that regard, the petitioner is required to state the specific polling stations [in which] he alleges there were irregularities and, therefore, should be scrutinized"***

[159A] The Court of Appeal had thus maintained its preferred path of reasoning:

> ***"If the trial court had adopted a purposive interpretation of Rule 33(4), it would be apparent that if a petitioner seeks scrutiny and recount of votes in a constituency, the purposive approach is that he is seeking scrutiny and recount of votes in all the polling stations in the constituency. Further, it is also our considered view that Section 82 of the Elections Act is the legal foundation for scrutiny. In this section, the mandate of the Court is to order scrutiny of votes and not scrutiny of polling stations. Rule 33(4), must be interpreted so as not to negate and violate the import of Section 82 that provide [sic] for scrutiny of votes without imposing a restriction that scrutiny is confined to polling stations. It is our view that a regulation cannot add a limitation to a statutory provision when no such limitation exists in its enabling statute."***

[160] We are, with respect, not in agreement with such an interpretation to Rule 33(4) of the Petition Rules. It is not clear to us what the learned Judges meant by the statement: "the mandate of the Court is to order scrutiny of votes and not scrutiny of polling stations." In our understanding, Rule 33(4) does not require the Court to order scrutiny of polling stations. The Rule simply provides that: *"Scrutiny shall be confined to the polling stations in which the results are disputed…"*

[161] Secondly, while it is true that a regulation cannot limit a statutory provision, it is not clear to us how Rule 33(4) would limit Section 82(1) of the Elections Act. The latter provides as follows:

> ***"An election court may, on its own motion or on application by any party to the petition, during the hearing of an election petition, order for scrutiny of votes to be carried out in such a manner as the election court may determine."***

Rule 33 (4), in a complementary scenario, provides as follows:

> ***"Scrutiny shall be confined to the polling stations in which the results are disputed…"***

[162] The Rule then specifies the documents to which examination shall be limited. These include written statements, copies of registers used, results of each polling station, ballot papers, etc.

[163] The authority granted to the election Court is discretionary in nature. In this regard, the Court may order for scrutiny on its own motion or upon

application by a party to the election petition. This necessarily entails that the Court may decline to grant an order for scrutiny following an application seeking one. The Court may also grant an order for *partial scrutiny,* even where a party has applied for scrutiny in a wider electoral area. In exercising this discretion, however, the Court must act judiciously. An order for scrutiny must be rationalized on the basis of evidence, or sufficient account in the pleadings. As we have noted, the purpose of recount and scrutiny is to determine who actually won the election, the validity of votes, and the integrity of the election. Therefore, it is only logical that recount and scrutiny follows "disputed results", or "impugned electoral processes." If an election Court were to order for scrutiny and recount in the *absence of a specific dispute*, then such order would amount to an abuse of discretion, and an act in vain.

[164] Rule 33 (4) is a logical extension of the Court's discretion under Section 82 of the Elections Act. Indeed, the Rule should be seen as providing the necessary guidelines for the exercise of discretion by the Court under Section 82 of the Act. By providing that scrutiny shall be confined to the polling stations in which the results are disputed, the Rule is by no means limiting to the Court's discretion. If election results are seriously disputed in all the polling stations in a constituency, then Rule 33(4) would not erect any barrier to an order for scrutiny in those polling stations. Otherwise, why should a Court order for scrutiny in a polling station in which there is no dispute whatsoever? What would the Court be scrutinizing? It is clear that the overwhelming trend in the emerging judicial opinion, frowns upon the possibility of granting orders of scrutiny that serve no purpose and that may, indeed, be contrary to the public interest.

[165] If on the other hand, Rule 33(4) had provided that the Court may only grant an order for scrutiny upon application by a party to an election petition, then to that extent, it would have been inconsistent with Section 82(1) of the

Elections Act, for placing a fetter on the Court's discretion to order for scrutiny *suo motu*. Rule 33(4), in our opinion, looks up to Article 86 (b) and (c) of the Constitution, which places a premium on *the polling station* as the basic arena of voting, and counting of votes. The Article provides:

> ***"At every election, the Independent Electoral and Boundaries Commission shall ensure that:***
>
> ***....***
>
> ***(b) the votes 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."***

[166] What "purposive interpretation" can be applied to Rule 33(4) to dictate that scrutiny means scrutiny *at the constituency level or in all polling stations in a constituency,* even where there is no basis for such scrutiny? How does Article 159 of the Constitution enter the interpretative frame? Would it not have served good cause for the appellate Court to consider the intention of Parliament in authorizing Rule 33(4) of the Petition Rules? What is the purpose of Rule 33(4)? The utility of that Rule should have become apparent, as "a mechanism for the timely resolution of electoral disputes as decreed by Article 87(1) of the Constitution".

[166A] The lesson to be drawn from an endeavor on the part of Judges to appreciate the legislator's perspective, has been remarked in comparative judicial practice. We would cite, in this regard, the statement of Lord Simon, in ***Maunsell v. Olins*** [1975] AC 373:

"The first task of a court of construction is to put itself in the shoes of the draftsman – to consider what knowledge he had and, importantly, what statutory objective he had ...being thus placed...the court proceeds to ascertain the meaning of the statutory language."

[167] In ***Pepper v. Hart*** [1992] 3 WLR, Lord Griffiths observed that the "purposive approach to legislative interpretation" has evolved to *resolve ambiguities in meaning*. In this regard, where the literal words used in a statute create an ambiguity, the Court is not to be held captive to such phraseology. Where the Court is not sure of what the legislature meant, it is free to look *beyond the words themselves,* and consider the *historical context* underpinning the legislation. The learned Judge thus pronounced himself:

"The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted."

[168] In the ***Matter of the Kenya National Human Rights Commission,*** Advisory Opinion Reference No. 1 of 2012, counsel had urged

this Court to employ a "holistic interpretation of the Constitution." Although the word used was "holistic", the opinion of the Court on the technique of interpretation is not only relevant to the matter at hand, but also indicative of directions. At paragraph 26 of its Advisory Opinion, the Court stated:

> ***"In his written and oral submissions, Mr. Kitonga has persistently urged us to holistically, broadly and robustly interpret the Constitution, so as to find that Article 163 (6) means all persons, and not just the entities mentioned therein, can apply for advisory opinions. Counsel is, in effect, asking us to find that Article 163 (6) of the Constitution does not mean what it says, through "a holistic interpretation." But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result."***

[169] Looking at the Elections Act (and indeed, the Constitution), it is clear that nowhere in the Act are the words "polling station" and "constituency" used interchangeably. There is no ambiguity arising from the language used in Rule 33, in reference to "polling station", and as such there is no reason to apply any other meaning different from the definition embodied in Section 2 of the

Elections Act. The background of Rule 33(4) illuminates its purpose: which is to facilitate the *timely resolution of election petitions*.

[170] This appears to be the true intention in the introduction of Rule 33 (4). The limiting of scrutiny to polling stations enables the election Court to focus on *the determination of the contested facts*, and not to be turned into a large-scale tallying centre. It is well known that scrutiny is often an arduous and laborious process.

[171] A further reason for limiting scrutiny to only those polling stations where the results are disputed, as opposed to an entire constituency, is based upon the principle that the process of scrutiny should not be abused. This can happen when it is turned into a fishing expedition, where a petitioner comes without a basis for challenging an election, but instead elects to seek scrutiny as a device to generate election-dispute material.

[172] In declining to order scrutiny and recount in the polling stations other than the seven in which he thought a sufficient basis for scrutiny had been established, the learned trial Judge stated:

> ***"In the testimony of the Petitioner and his witnesses, no evidence was adduced on the further polling stations which are not mentioned in the Petition nor any cross-examination done on polling stations outside the ones mentioned in the Petition. I find that the said polling stations should be disregarded. In addition to the above, no basis is laid in respect of polling stations outside the four constituencies or the polling stations which were not mentioned in the Petition."***

[173] The trial Judge then went on to observe that the annexures DMK2 DMK3 and DMK4 on which the petitioner intended to rely, had made reference to all polling stations in the 9 constituencies contrary to Rule 33(4) which confines scrutiny to polling stations where the results have been disputed.

[174] In the process, the learned trial Judge made a wrong statement of law relating to pleadings to the effect that "annexures to any affidavit cannot be said to be pleadings;" and this statement led the Court of Appeal to wrongly conclude that the said annexures had been expunged from the Court record.

[175] From our restatement of the applicable law relating to scrutiny and recount of votes in an election petition, and our interpretation of Rule 33 of the Election Petition Rules as read together with Section 82(1) of the Election Act, and further taking into account the emerging electoral jurisprudence in Kenya, we do hold that the learned trial Judge correctly appreciated and applied the law, in confining scrutiny and recount to the seven polling stations mentioned in his judgment.

[176] We have noted that in those cases where the trial Judges had allowed a blanket scrutiny of votes in constituencies, a sufficient basis had been established in the interests of justice, and it was considered fair and proper to all the parties, in the circumstances.

[177] We find that the Court of Appeal fell into error in its interpretation of the law, and in holding that the trial Judge should have ordered for scrutiny in all the polling stations in the four constituencies mentioned, even where the results had not been disputed.

(c) On Burden of Proof

[178] One of the grounds for impugning the judgment of the Court of Appeal was that the Court shifted the burden of proof from the petitioner to the 2nd and 3rd respondents, contrary to the holding by this Court in ***Raila Odinga and Another v. IEBC.*** Regarding the burden of proof, this Court held 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."***

[179] We affirm that this statement represents the legal position regarding the question of burden of proof in election petitions.

[180] Counsel for the appellant submitted that the initial burden of proof lies at all times with the petitioner. It was contended by counsel that the Court of Appeal had ignored the fact that the trial Court had determined that the petitioner had not discharged the initial burden of proof. By requiring that the 3rd respondent should have proved the existence of human error, the Court, it was submitted had wrongly shifted the burden of proof from the petitioner to the respondents. It was further submitted that the issue of human error was not a ground of appeal at the Court. Mr. Muthomi for the 1st respondent on the other hand, contended that the decision in ***Raila Odinga v. IEBC*** should be distinguished, given the fact that

it related to a presidential election while the matter at hand had arisen in a gubernatorial election. Counsel also submitted that in the ***Raila Odinga*** petition, the effect of Section 112 of the Evidence Act had not been raised or considered. Counsel submitted that the evidential burden lay on the 2nd respondent, since it had custody of the electoral register.

[181] In order to maintain a proper focus of the issue at hand, it is important to place the controversy in perspective. The main allegation by the petitioner (1st respondent herein) was that the number of votes cast in some polling stations exceeded the number of registered voters. It is, therefore, certain that at this initial stage, the legal burden of proving this allegation squarely lay with the petitioner (1st respondent herein). What did the petitioner do to discharge this burden, so as to set off the 2nd respondents' evidential burden? He produced "a document", of which the learned trial Judge had the following to say:

> ***" I note the document relied upon by the petitioner and referred to as IEBC Voter Register for Meru County As Of 24/02/13 is not one of the components of the registers used during the 4th March 2013. Its origin, accuracy, and authenticity cannot be verified. The 2nd and 3rd Respondents' witnesses Habiba, Abdi and Onditi all confirmed that the said document was not the register used as it does not bear the names of the voters; it does not have the voters' identity card/passport numbers, serial numbers and the gender. It cannot therefore be the basis for alleging that votes cast exceeded registered voters because its identity and status in law is unknown. The allegation that votes cast exceeded registered voters is further not backed by any independent and cogent evidence. Such evidence would be, for instance an affidavit of any person who was allowed to vote and not registered.....In view of the foregoing I find that the petitioner***

failed to satisfy this court that the votes cast at the complained(sic) polling stations exceeded the registered voters. The allegation was therefore not proved to the required standard" [emphasis supplied].

[181A] It occasions concern to this Court that the burden of the foregoing observation by the trier of fact, the trial Judge, was accorded no place in the Court of Appeal's perception, as emerges from the appellate Court's statement that:

"Guided by the provisions of Section 112 of the Evidence Act, it is our considered opinion that failure by the 2nd and 3rd respondents to produce a certified and confirmed figure as to the total number of registered voters at Yururu Primary Polling Station Streams 1 and 2 means that they did not discharge the evidential burden of proof cast upon them. The total number of registered voters is a fact and matter that was well within the personal knowledge of the 2nd and 3rd respondents. The 2nd and 3rd respondents cannot hide behind the concept of legal burden and fail in its duty to provide a statutory figure that is well within its knowledge and custody. It is not sufficient to state that the origin and authenticity of the figure given by the appellant has not been established.....We find that the learned Judge erred in placing the burden to prove the total number of registered voters on the appellant/petitioner. The 2nd and 3rd respondents are the official statutory custodians of the figure representing the total number of registered voters and they should have produced the same to counter the allegations by the appellant."

[182] The allegation that the total number of votes cast exceeds the number of registered voters is such a serious one, that an election court would not treat it lightly. If proved, such an occurrence would call into question the integrity of the electoral process. *The person who makes such an allegation must lead evidence to prove the fact*. She or he bears *the initial legal burden of proof* which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already-discharged initial burden. "***The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue"*** [*Cross and Tapper on Evidence*, (Oxford University Press, 12th ed, 2010,page 124)]. In the ***Raila case*****,** this Court echoed this trite principle (paragraph 195 of its judgment) when it remarked:

> ***"...an electoral cause is established much in the same way as a civil cause: <u>the legal burden rests on the petitioner</u>, but, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting. Ultimately, of course, it falls to the Court to determine whether a firm and unanswerable case has been made"*** [emphasis supplied].

[183] In the case at hand, can it be said that the petitioner had discharged this burden, so as to shift the evidential burden to the 2nd respondent? *No, if this principle is applied to the evidence before the trial Judge.*

[184] A party that produces a document which was not used during elections, a document without the names of voters, without identity card numbers, without serial numbers, a document whose origin and authenticity cannot be verified, as

evidence to prove that the number of votes cast exceeded the number of registered voters, cannot be said to have discharged the initial burden of proof. That is to say, there was nothing for the 2nd respondent to counter, and this respondent bore *no evidential burden*.

[185] Did the petitioner make an application for the production of the authentic register by the respondent? It does not appear to us that had the petitioner made such an application, the same would not have been granted by the trial Judge. At any rate, part of the authentic register was already available, as it had been used for the purpose of scrutiny and recount in the seven polling stations as ordered by the trial Judge.

[186] The learned Judges of Appeal invoked the provisions of Section 112 of the Evidence Act to attribute the evidential burden to the 2nd respondent. The said Section provides:

> ***"In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him."***

[187] But Section 112 of the Evidence Act is not to be invoked without regard to the preceding sections, especially Section 107 (1) and (2) of the same Act which provide as follows:

> ***"(1) 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.***

(2) When a person is bound to prove the existence of facts it is said that the burden of proof lies on that person"

[188] Can it be said that an electoral register, a public document, is a fact 'especially' within the knowledge of the IEBC in the context of the provisions of Section 112 of the Evidence Act? In our view, what is within the power of the IEBC is the custody of the register, and its production will be a matter of course, upon an application by a party who wishes to rely on its contents. *We would agree with the learned Judges of Appeal, however, that the evidential burden regarding the contents of the register and declared results lies on the IEBC; save that this burden is activated, in an election petition, only when the initial legal burden has been discharged.*

[189] Section 112 of the Evidence Act, on which the learned Judges of Appeal placed reliance, is an exception to the general rule in Section 107 of the same Act. Section 112 *was not meant to relieve a suitor of the obligation to discharge the burden of proof.* The Supreme Court of India, in ***Shanbhu Nath Mehra v. State of Ajmer*** AIR 1956 SC 404, considered the import of Sections 106 and 101 of the Indian Evidence Act (which are in pari materia with Sections 112 and 107 of our Evidence Act), as follows:

> ***"Section 106 is an exception to Section 101. Section 101 lays down the general rule about the burden of proof. '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.'...This lays down the general rule that in a criminal case, the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to***

establish facts which are 'especially' within the knowledge of the accused and which he could prove without difficulty or inconvenience."

The Court further observed:

"...the word 'especially' [indicates stress]. It means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not."

[190] In ***Surender Singh v. Li Man Kay and Others,*** SGHC168, (2009), the defendant had been sued for medical negligence. The plaintiff submitted that pursuant to Section 108 of the Singapore Evidence Act (which is the equivalent of Section 112), the burden should fall on the third defendant to prove that the deceased was adequately and appropriately monitored in the ward since, apart from the evidence of the deceased's sister in law, the plaintiffs were not in a position to provide further details as to how the deceased was cared for while she was in the ward. The Supreme Court of Singapore, citing *Sarkar's Law of Evidence*, vol 2 pp 1672 with approval, stated:

"Section 108 of the Evidence Act applies only to those matters which are supposed to be within the knowledge of a defendant. It cannot apply when the fact or facts are such that they are capable of being known also by a person other than the defendant and which the defendant could prove without difficulty or inconvenience."

[191] In the instant case, the petitioner was content to rely on a document that had no evidential value, when he *could* have made an application for the production of the authentic register, to aid his cause in discharging the *initial burden*. On this premise, we are not in agreement with the Court of Appeal when it thus declares:

> ***"We find that the learned Judge erred in placing the burden to prove the total number of registered voters on the appellant/petitioner."***

[192] *The Court of Appeal, in that regard, and with respect, fell into error. The issue was not the total number of registered voters, but whether the number of votes cast in certain polling stations exceeded the number of registered voters as had been alleged by the petitioner; an allegation which, he had the initial burden to prove.* The trial Court record indicates that upon cross-examination on his allegation that the number of votes cast exceeded that of the registered voters, the petitioner stated:

> *"I did not tell the truth, I relied on the document of Kelvin even when it is not correct… My affidavit is not correct, I agree my analysis 'DMK2' is incorrect"*

[193] On what basis, then, could the evidential burden of proof have shifted to the 2nd and 3rd respondents?

[194] The admission by the petitioner was noted by the trial Judge, and this fact influenced his finding that the petitioner had *not* discharged the burden of proof, to convince the Court that the number of votes cast exceeded the number of registered voters.

[195] In the circumstances, we hold that the learned Judges of Appeal had erred, by not appreciating, firstly, the nature of the burden of proof; secondly, on whom the burden rests; and thirdly, when the evidential burden is activated in an election petition. We further hold that the learned Judges of Appeal erred by shifting the burden of proof from the petitioner to the 2nd and 3rd respondents, contrary to the applicable law, and to the decision of this Court. The holding by the Court of Appeal, in this regard, offends Article 163 (7) of the Constitution.

[196] Article 163 (7) of the Constitution is the embodiment of the time-hallowed common law doctrine of s*tare decisis*. It holds that the precedents set by this Court are binding on all other Courts in the land. The application, utility and purpose of this constitutional imperative are matters already considered in several decisions of this Court: ***Jasbir Singh Rai v. Tarlochan Singh Rai & Others,*** and quite recently, in ***George Mike Wanjohi v. Steven Kariuki & Others*** Petition No. 2A of 2014.

[197] In addition to the benchmark decisions to which this Court adverted in ***Wanjohi v. Kariuki,*** regarding the importance of the doctrine of *stare decisis, we* would echo the dictum in ***Housen v. Nikoaisen*** **(2002) 2 SCR:**

> ***"It is fundamental to the administration of justice that the authority of decisions be scrupulously respected by all courts upon which they are binding. Without this uniform and consistent adherence, the administration of justice becomes disordered, the law becomes uncertain, and the confidence of the public in it undermined. Nothing is more important than that the law as pronounced ...should be accepted and applied as our tradition requires; and even at the risk of that fallibility to***

which all judges are liable, we must maintain the complete integrity of relationships between the courts."

(d) Margin of victory in an election: What Legal Effect?

[198] Counsel for the appellant submitted that the learned Judges of Appeal erred in converting the difference in the vote margin between the appellant and the 1st respondent into a percentage (0.819%), which they then adjudged to be too small, as not to be capable of conferring victory upon the appellant, in view of the irregularities discovered during the recount and scrutiny. By so doing, counsel urged, the Court was in breach of Article 180 (4) of the Constitution which requires only a simple majority, as opposed to "a wide percentage."

[199] The paragraph in question(at page 158 of the judgment of the Court of Appeal) thus reads:

"It is our considered view that the trial Judge erred and misdirected himself in finding that a margin of 0.819 per cent which is less than one per cent could be described as wide. We find and hold that quantitatively, the errors and irregularities disclosed materially affected the results of the elections when one considers that the margin between the winner and the runner-up is 3, 436 votes. This margin is statistically small and we are convinced that had the trial judge made adjustments due to the proved errors and irregularities as disclosed in the evidence of DW 10, the margin between the returned candidate and the runner up would be significantly impacted and the election result materially affected."

[200] Article 180 (4) of the Constitution establishes the statistical basis upon which a candidate may be declared the winner in a gubernatorial election. It provides:

> ***"If two or more candidates are nominated, an election shall be held in the county and the candidate who receives the greatest number of votes shall be declared elected."***

[201] It is clear that the Constitution requires that for one to be declared a winner in a gubernatorial election, he or she needs to garner *a majority* of the votes. This is the logical meaning to be attributed to the words "greatest number of votes". It matters not how wide or small the margin of victory is. Indeed, this is the requirement in all the elections other than a *Presidential election,* where specific percentages are prescribed by the Constitution.

[202] The issue of margins in an election other than a Presidential election, can bear only transient relevance and only where it is alleged that there were counting, and tallying errors or other irregularities that affected the final result. A narrow margin between the declared winner and the runner-up beckons as a red flag where the results are contested on allegations of counting and tallying errors at specified polling stations. Where a re-count, re-tally or scrutiny does not change the final result as to the gaining of votes by candidates, the percentage or margin of victory however narrow, is immaterial as a factor in the proper election-outcome. To nullify an election in such a context would fly in the face of Article 180 (4) of the Constitution.

[203] In the circumstances, the mere description of a percentage or margin as "small" or "wide" is of no legal import, unless it is inextricably linked to a definite uncertainty, an unresolved doubt, as to who won an election.

[204] The appellate Court concluded that, had the trial Judge made adjustments due to the ascertained errors and irregularities as disclosed in the evidence of DW 10, "the margin would have been significantly impacted", and the election result "materially affected." Earlier in this judgment, we perceived as flawed the Court of Appeal's decision to uplift the testimony of one witness (DW 10) to a pedestal of "fact", without due deference to the trial Judge's recorded determination of fact, and without essential notice and recognition of the record contemporaneously made before the lawful trier of fact.

[205] The appellate Court had been content to conclude that the "statistically small margin" would have been "significantly impacted", but without taking into account the numerical alignment of votes. It would have been necessary for the appellate Court to demonstrate how a figure of 3, 436 win-votes would have so diminished as to reverse the victory-outcome in favour of *the petitioner*. Without such a demonstration, the scenario is one in which an election was annulled on the ground of "what might have been" and not necessarily, "what was". This, in truth, amounts to invalidating an election on speculative grounds, rather than proven facts.

[205A] We would state as a principle of electoral law, that an election is not to be annulled except on cogent and ascertained factual premises. This principle flows from the recurrent democratic theme of the Constitution, which safeguards for citizens the freedom "to make political choices" [Article 38 (1)].

[206] We consequently hold that the learned Judges of Appeal erred in questioning the credibility of the election on the basis of the percentage or margin of victory, without demonstrating how the final statistical vote-outcome had been compromised.

(e) Irregularities and Errors in the Election Process: What Legal Effects?

[207] Both counsel for the appellant and for the 2nd and 3rd respondents submitted that the learned Judges of Appeal erred by not appreciating that, irregularities *per se* cannot invalidate an election, unless it is proved that such irregularities either affected the outcome of the election, or materially compromised the electoral process. They submitted that the appellate Court should have read Articles 81 and 86 together with Article 88(5) of the Constitution, and Section 83 of the Elections Act; but the Court had instead, applied a standard that required 100% accuracy in the conduct of the elections – which was not humanly possible to attain. In support of their submissions, counsel cited the decision of this Court in the ***Raila* case,** and the decision by the Supreme Court of Ghana in ***Nana Addo Dankwo Akufo-Addo & 2 Others v. John Dramani Mahama & 2 Others* (2013) SGI**.

[208] Counsel for the 1st respondent, however, contested this argument. It was his view that the words used in Articles 81 and 86 of the Constitution should be accorded their literal meaning. Thus the word accurate should be accorded its natural meaning i.e., *"correct, and true in every detail",* or "*able to give completely correct information or to do something in an exact way*." And on that basis, it was urged, the Court of Appeal could not be faulted for having annulled an election tainted by "widespread irregularities." This Court, counsel urged, should satisfy itself as to whether the gubernatorial elections in Meru

County were conducted in conformity with the constitutional principles embodied in Articles 81 and 86 of the Constitution.

(x) The Applicable Law

[209] Article 81 (e) (v) of the Constitution provides:

> ***"The electoral system shall comply with the following principles.....***
>
> *(e)* ***free and fair elections, which are***
>
> ***(v) administered in an impartial, neutral, efficient, accurate and accountable manner."***

Article 86 further provides:

> ***"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"

[210] These two Articles establish the constitutional threshold against which the conduct of elections is to be measured, to determine whether it meets established standards of a democratic franchise. Article 88 (5) of the Constitution, on the other hand, provides that the Independent and Electoral Boundaries Commission, as the agency charged with the mandate of managing the conduct of elections, is to:

"exercise its powers and perform its functions in accordance with this Constitution and national legislation."

[210A] Section 83 of the Elections Act, 2011 provides:

> ***"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 <u>non-compliance did not affect the result of the election</u>"*** [emphasis supplied].

[210B] In this case, as in other election matters coming up before the Courts, the question as to the nature or extent of electoral irregularities, and as to their legal effect, repeatedly arises. The crisp issue is: *how do irregularities and related malfunctions affect the integrity of an election?*

[211] In ***Morgan v. Simpson*** **(1975) 1 Q.B 151,** Lord Denning summarized the essence of Section 37 of Britain's Representation of the People Act, 1949 (which is couched in similar language to Section 83 of Kenya's Elections Act) in three propositions:

(a) *If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not.*

(b) *If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by breach of the rules or a mistake at the polls–provided that it did not affect the results of the election.*

(c) *But even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls– and it did affect the result– then the election is vitiated.*

[212] In ***Opitz C v. Wrzesnewskyj*** (2012) 3 S.C.R 76 a candidate who lost in a close federal election in Canada petitioned for the setting aside of that election. The petitioner had asked the Court to disqualify several votes, on account of *administrative mistakes*. Rothstein and Moldaver JJ had the following to say about the *effect of irregularities upon an election*.

> ***"At issue in this appeal are the principles to be applied when a federal election is to be challenged on the basis of 'irregularities'. We are dealing here with a challenge based on administrative errors. There is no allegation of any fraud, corruption or illegal practices. Nor is there any suggestion of wrong-doing by any candidate or political party. Given the***

complexity of administering a federal election, the tens of thousands of election workers involved, many of whom have no on-the job-experience, and the short time-frame for hiring and training them, it is inevitable that administrative mistakes will be made. If elections can easily be annulled on the basis of administrative errors, public confidence in the finality and legitimacy of election results will be eroded. Only irregularities that affect the result of the election and thereby undermine the integrity of the electoral process are grounds for overturning an election."

[213] The Court observed 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*.

[214] Such comparative judicial perspective is consistent with this Court's outlook which emerges clearly from the ***Raila case***:

"Judicial practice must not make it burdensome to enforce the principles of properly-conducted elections which give fulfilment to the right of franchise…[Where]a party alleges non-conformity with the electoral law, the petitioner must not only prove that there was non-compliance with the law, but that such failure of compliance did affect the validity of elections."

[215] In ***Nana Addo Dankwa v. John Dramani Mahama,*** the Supreme Court of Ghana thus remarked:

"An election being a process as opposed to it being an event, where all the stages have been gone through and therefore the elections could be said to have been substantially held in accordance with the regulations, to nullify the results on this ground per se, would amount to putting in the power of some unscrupulous presiding officer in some polling station to nullify the solemn act of the whole constituency by his single act of omission."

[216] It is clear to us that an election should be conducted substantially in accordance with the principles of the Constitution, as set out in Article 81 (e). Voting is to be conducted in accordance with the principles set out in Article 86. The Elections Act, and the Regulations thereunder, constitute the substantive and procedural law for the conduct of elections.

[217] If it should be shown that an election was conducted substantially in accordance with the principles of the Constitution and the Election Act, then such election is not to be invalidated only on ground of irregularities.

[218] Where, however, it is shown that the irregularities were of such magnitude that they *affected the election result*, then such an election stands to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection, are not enough, by and of themselves, to vitiate an election. In this regard, we stand on the same plane as the learned Judges in ***Morgan, Opitz*** and ***Nana.***

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

[220] Where an election is conducted in such a manner as demonstrably violates the principles of the Constitution and the law, such an election stands to be invalidated.

[221] In the instant case, we are of the opinion that the learned Judges of Appeal duly appreciated the legal effect of irregularities upon an election, though they erred in the manner in which they applied the test to *the dispute before them*. While the appellate Court took note of errors of entry and transposition of results in Forms 35 and 36, as shown on the record, they did not ask themselves the vital question. Instead, the question they posed for themselves (at paragraph 203) was:

> ***"Should this Court shut its eyes to the identified errors and irregularities?"***

Yet the question the learned Judges ought to have asked themselves was:

> ***"Did these errors/discrepancies affect the result and/or the integrity of the election? If so, in what particulars?"***

[222] This question held such center-stage, that *the answer to it should have been the basis for the decision to annul the election or not*. At paragraph 132 of the judgment, the learned Judges stated as follows:

> ***"Whenever there is a difference between Forms 35 and 36, the entries are not verifiable and yet it is the entries in Forms 36 that are used to declare the winner. In this case, we note that the discrepancies identified in the scrutiny and recount are from 7 out of 953 polling stations and this Court cannot be blind to the plausible fact that if all the 953 polling stations were scrutinized, additional discrepancies may or may not have been detected. Noting that the margin between the returned candidate and the runner up in the instant case, is less than one per cent, the discrepancies disclosed between entries in Forms 35 and 36 begs [sic] the question whether one can confidently state that the candidate returned and declared to be the winner was indeed the actual winner…The trial court found that only a total of 360 votes were irregularly counted in the seven polling stations and this would not significantly reduce the margin between the winner and the runner up to alter the results of the elections. In this case, we observed that the margin between the winner and the runner up was 3436 votes. If the seven (7) polling stations reduced the margin by 360 votes, what would have been the scenario if all the 953 polling stations were counted?"***

[223] We hold the conviction, with due respect, that the appellate Court Judges had misdirected themselves, regarding the test to be applied in determining the effect of irregularities on an election. Such a test cannot be a speculative one, as flows from the language of the learned Judges. It cannot be based on

extrapolation of limited-scale irregularity to the broad expanse of Meru County. Of the shortfall in the appellate Court's treatment of scrutiny and recount, we have already expressed ourselves. Asking themselves the wrong question, and proceeding on the basis of conjecture, the learned Judges could not have avoided falling into error, and arriving at a legally untenable conclusion, to the effect that:

> ***"The identified irregularities lead us to quantitatively conclude that the candidate returned and declared as the winner did not garner a majority of the votes cast. Whereas the election itself was conducted substantially in accordance with constitutional requirements, errors and irregularities became manifest at the tallying and declaration of results. We find that the declared results are not accurate, verifiable and accountable. We find that the tallying process was not efficient and accurate"*** [emphasis supplied].

[224] Having found that the election was *conducted substantially in accordance with the constitutional principles,* the learned Judges had *no basis* for invalidating such an election, unless such errors and irregularities had *demonstrably reversed the result* against the appellant herein.

[225] On its way to annulling the Meru gubernatorial election, the Court of Appeal had shown scant deference to the recorded findings of the trial Judge, substituting the conclusions of the trial Judge with its own, though without *evidentiary justification*. Furthermore, the appellate Court had misinterpreted and misapplied the electoral law, and overlooked the doctrine of precedent, contrary to *Article 163(7) of the Constitution*. There is no basis for sustaining the said judgment, and this Court will reverse it, and make a decree and specific Orders.

F. THE CONCURRING OPINION OF MUTUNGA, CJ & PRESIDENT

[226] I concur with the majority judgment, but write separately to reinforce the majority decision by underlining the manner in which constitutional-interpretation theory relates to electoral jurisprudence; providing a collation of guiding principles under Article 163(4)(a) of the Constitution; and portraying the constitutional collective responsibility as regards the right to free and fair elections.

A. Interpreting the Constitution, and Electoral Jurisprudence

[227] It is unusual for a Constitution to be as preoccupied with the question, scope, methodology of its own interpretation as Kenya's 2010 Constitution. In the same vein the Kenyan Parliament, in enacting the *Supreme Court Act 2011,* [Supreme Court Act] has, in the provisions of Section 3 thereof, reinforced this preoccupation with theory of interpretation. The Constitution and the Supreme Court Act both set out a theory of interpretation of the Constitution.

[228] Under Article 163(7) of the Constitution, *all Courts, other than the Supreme Court, are bound by the decisions of the Supreme Court.* Thus, the adopted theory of interpretation of the Constitution will bind all Courts, other than the Supreme Court. It will also undergird various streams and strands of our jurisprudence, that represent the holistic interpretation of the Constitution.

[229] We have pronounced ourselves on what we mean by a holistic interpretation of the Constitution, in ***In the Matter of the Kenya National Commission on Human Rights***, *Supreme Court Advisory Opinion Reference No. 1 of 2012; [2014] eKLR* (paragraph 26) thus:

"But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in the light of its history, of the issues in dispute, and of the prevailing circumstances."

[230] As the eminent retired Chief Justice of Israel, Aharon Barak has observed, "…one who interprets a single clause of the constitution interprets the entire constitution": Aharon Barak, ***The Judge in a Democracy***, (Princeton: Princeton University Press, 2006), at page 308.

[231] In ***In Re the Speaker of the Senate & Another v Attorney General & 4 Others***, *Supreme Court Advisory Opinion No. 2 of 2013; [2013] eKLR*, I had the occasion to revisit this theory of the interpretation of the Constitution in my concurring opinion. I stated as follows (paragraphs 155-157):

"[155] In both my respective dissenting and concurring opinions, *In the Matter of the Principle of Gender Representation in the National Assembly and Senate, Sup Ct Appl No 2 of 2012****;*** ***and*** *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai and 4 Others Sup Ct Petition No 4 of 2012****, I argued that both the Constitution, 2010 and the Supreme Court Act, 2011 provide comprehensive interpretative frameworks upon which fundamental hooks, pillars, and solid foundations for the interpreting our Constitution should be based. In both opinions, I provided the interpretative coordinates***

that should guide our jurisprudential journey, as we identify the core provisions of our Constitution, understand its content, and determine its intended effect.

"[156] The Supreme Court of Kenya, in the exercise of the powers vested in it by the Constitution, has a solemn duty and a clear obligation to provide firm and recognizable reference-points that the lower courts and other institutions can rely on, when they are called upon to interpret the Constitution. Each matter that comes before the Court must be seized upon as an opportunity to provide high-yielding interpretative guidance on the Constitution; and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents. The Court must also remain conscious of the fact that constitution-making requires compromise, which can occasionally lead to contradictions; and that the political and social demands of compromise that mark constitutional moments, fertilize vagueness in phraseology and draftsmanship. It is to the Courts that the country turns, in order to resolve these contradictions; clarify draftsmanship gaps; and settle constitutional disputes. In other words, constitution making does not end with its promulgation; it continues with its interpretation. It is the duty of the Court to illuminate legal penumbras that Constitution borne out of long drawn compromises, such as ours, tend to create. The Constitutional text and letter may not properly express the minds of the framers, and the minds and hands of the framers may also fail to properly mine the aspirations of the people. It is in this context that the spirit of the Constitution has to be invoked by the Court as

the searchlight for the illumination and elimination of these legal penumbras.

"[157] Section 3 of the Supreme Court Act provides:
The object of this Act is to make further provisions with respect to the operation of the Supreme Court as a court of final authority to, among other things-

a. ...

b. ...

c. develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth;

d. enable important constitutional and legal matters, including matters relating to the transition from the former to the present constitutional dispensation, to be determined having due regard to the circumstances, history and cultures of the people of Kenya.

"In my opinion, this provision grants the Supreme Court a near-limitless, and substantially elastic interpretative power. It allows the Court to explore interpretative space in the country's history and memory that, in my view, goes even beyond the minds of the framers whose product, and appreciation of the history and circumstance of the people of Kenya, may have been constrained by the politics of the moment."

[232] To emphasize, our Constitution cannot be interpreted as a legal-centric letter and text. It is a document whose text and spirit has varied *content*, as amplified by the *Supreme Court Act,* that is not solely reflective of *jural*

phenomena. This content has *historical, economic, social, cultural, and political* contexts of the country, and also reflects the *traditions* of our country. References to ***Black's Law Dictionary*** will not, therefore, always be enough, and references to foreign cases will also have to take into account these peculiar Kenyan needs and contexts.

[233] It is possible to set out the ingredients of the theory of interpretation of the Constitution: the theory is derived from the Constitution through conceptions that my dissenting and concurring opinions have signalled, as examples of interpretative coordinates; it is also derived from the provisions of Section 3 of the *Supreme Court Act,* that introduce non-legal phenomena into the interpretation of the Constitution, so as to enrich the jurisprudence evolved while interpreting all its provisions; and the strands emerging from the various chapters also crystallize this theory. Ultimately, therefore, this Court as the custodian of the norm of the Constitution, has to oversee the coherence, certainty, harmony, predictability, uniformity, and stability of the various interpretative frameworks dully authorized. The overall objective of the interpretive theory, in the terms of the Supreme Court Act, is to "facilitate the social, economic and political growth" of Kenya.

[234] Electoral jurisprudence, as one of the strands of our jurisprudence, must also reflect this theory of interpretation of the Constitution. The Constitution is the constant North, as clearly stated in our finding in the instant appeal, that: ***"...the Elections Act, and the Regulations thereunder, are the normative derivatives of the principles embodied in...the Constitution, and in interpreting them, a Court of law cannot disengage from the Constitution"*** (*infra,* at paragraph 243).

[235] The emphasis on free and fair elections, through an electoral system that is simple, accurate, verifiable, secure, accountable and transparent, in Articles 81(e) and 86 of the Constitution, has a rich Kenyan historical, economic, social, political, and cultural context. Article 86(b), for example, provides that the votes cast are to be counted, tabulated, and results announced promptly by the presiding officer at each polling station. This is because our electoral history is rife with malpractices that occur during the transportation of ballot boxes from polling stations to constituency counting-centres. It is therefore no coincidence that many of the petitions filed in the High Court, before the promulgation of the 2010 Constitution, gave lurid details of the stuffing of ballot boxes, or discarding of them *en route* to the constituency counting-centre. At the constituency counting-centre itself, votes disappeared when lights, either by design, negligence, or power-outage, went off. Our elections were therefore not free, fair and peaceful (*see* Charles Hornsby, ***Kenya: A History Since Independence*** *(I.B. Tauris, 2013)*).

[236] The provision for secret ballot is clearly a response to the undemocratic *mlolongo (queuing)* system of 1988, which ensured that fear and intimidation defined the result, and one was capable of being victimized for his or her voting-choice. This manipulation of the voting system is masterfully painted out in Ngugi wa Thiong'o's ***Wizard of the Crow*** *(Harvill Secker, 2006)*, in the "queuing daemons" of Eldares, and their manipulation by the "Ruler" to express *his* will. It is no longer the will of the Ruler that rules, under the Constitution. Our Constitution envisions the will of Kenyan people through the sanctity of the vote. Indeed, all sovereign power belongs to the people of Kenya, by Article 1 of the Constitution.

[237] Another example of our Constitution's emphasis on the integrity of elections is found in Article 81(e)(ii), which enshrines an electoral system that is

free from violence, intimidation, improper influence or corruption. Again our history is replete with examples that would make the Eatandswill election in Charles Dickens' ***The Pickwick Papers*** *(1836)* look like child's play. Kenya's current Constitution reserves no place to the economic, social, cultural and political manifestations associated with our dim electoral past.

B. Collating guiding principles under Article 163(4)(a) of the Constitution

[238] Article 163(4)(a) provides that appeals shall lie from the Court of Appeal to the Supreme Court "as of right in any case involving the interpretation or application of the Constitution." We pronounced ourselves at the earliest opportunity on the dimensions of our jurisdiction in ***In Re the Matter of the Interim Independent Electoral Commission***, *Supreme Court Constitutional Application No. 2 of 2011; [2011] eKLR,* where we emphasized (at paragraphs 29 and 30) that the assumption of jurisdiction by Courts in Kenya is regulated by the Constitution, by statute law, and by the principles laid out in judicial precedent. Our subsequent decisions have clarified and supplemented the ambit of Article 163(4)(a) of the Constitution.

[239] This Court, in ***Peter Oduor Ngoge v Francis Ole Kaparo & 5 Others***, *Supreme Court Petition No. 2 of 2012; [2012] eKLR*, found that the petitioner had not rationalized the transmutation of the issue in contention from an ordinary subject of leave-to-appeal, to a meritorious theme involving the interpretation or application of the Constitution", such that it became a matter *as of right*, falling within the appellate jurisdiction of the Supreme Court (at paragraph 26). We held that an appellant needs to demonstrate that the Court of Appeal's reasoning and conclusions which led to the determination of the issue can properly be said to have taken a trajectory of *constitutional interpretation or application*. Furthermore, the question requiring the Supreme Court's

examination must have undergone examination in all lower Courts, for they are qualified to determine every issue of law (at paragraph 30):

> ***"In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs to resolve all matters turning on the technical complexity of the law, and only cardinal issues of law or of jurisprudential moment will deserve the further input of the Supreme Court."***

[240] We reiterated the necessity of a meritorious theme involving constitutional application and interpretation in ***Naomi Wangechi Gitonga & 3 Others v IEBC & 4 Others***, *Supreme Court Civil Application No. 2 of 2014; [2014] eKLR* when we noted that (at paragraph 31):

> ***"...meritorious questions of constitutional import inviting interpretation or application, and which therefore fall to the jurisdiction of this Court for purposes of appeal, will readily beckon -..."***

[241] In ***Lawrence Nduttu & 6000 Others v Kenya Breweries Ltd. & Another***, *Supreme Court Petition No. 3 of 2012; [2012] eKLR*, this Court held, at paragraph 27, that merely alleging that a question of constitutional interpretation or application is involved does not automatically, without more, bring an appeal within the ambit of Article 163(4)(a) of the Constitution. We stated:

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

[242] We further opined, at paragraph 28, that an appellant must be challenging the interpretation or application of the Constitution acted upon by the Court of Appeal, to dispose of a particular matter, and such a party must be faulting the Court of Appeal for such interpretation. This Court affirmed that an appeal, within the terms of 163(4)(a), is one founded on cogent issues of constitutional controversy. *See* ***Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others***, *Supreme Court Petition No. 10 of 2013; [2014] eKLR* at paragraph 52.

[243] In our ruling on the application for stay of the judgment and order of the Court of Appeal, in the instant case (***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others***, *Supreme Court Application No. 5 of 2014; [2014] eKLR*), we held that the central issue in the petition was whether the election was conducted in accordance with the *principles of the Constitution,* i.e. the provisions of Articles 81(e) and 86. We held that, *not every election petition decision is appealable to the Supreme Court* under Article 163(4)(a). The Court noted that the issues decided by the Court of Appeal, which were then further brought up on appeal to this Court, would have to have rested on *constitutional interpretation*. We observed in that context that:

"...the Elections Act, and the Regulations thereunder, are normative derivatives of the principles embodied in Articles 81(e) and 86 of the Constitution, and that in interpreting them, a Court of law cannot disengage from the Constitution."

Thus, the question whether an election was *free and fair, under Article 81(e)* and *accurate, verifiable, secure, accountable, and transparent under Article 86* of the Constitution, will engage this Court's jurisdiction to hear an appeal, under Article 163(4)(a) of the Constitution.

[244] In summary, the guiding principles that we have articulated under Article 163(4)(a) are:

(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; and only cardinal issues of law or jurisprudential moment deserve the further input of the Supreme Court;*

(iii) *the lower Court's determination of an issue appealed against must have taken a trajectory of constitutional application or interpretation, for the cause to merit hearing before the Supreme Court;*

(iv) *an appeal within the ambit of Article 163(4)(a) is one founded on cogent issues of constitutional controversy;*

(v) With regard to election petitions, the Elections Act and the Regulations are normative derivatives of the Constitution and, in interpreting them, a Court of law cannot disengage from the Constitution.

C. Collective Constitutional Responsibility to ensure Free and Fair Elections

[245] Democracy is predicated upon notions of free choice, and fair competition. The freedom to choose, is cardinal to democratic processes, to such an extent that it constitutes the heart and soul of any democracy. It is only when ideas are allowed, in pacific conditions, to contend in the political market place, that citizens will be able to make the right political purchases.

[246] Kenya's political history has been characterized by large-scale electoral injustice. Through acts of political zoning, privatization of political parties, manipulation of electoral returns, perpetration of political violence, commercialization of electoral processes, gerrymandering of electoral zones, highly compromised and incompetent electoral officials, and a host of other retrogressive scenarios, the country's electoral experience has subjected our democracy to unbearable pain, and has scarred our body politic. As a result, free choice and fair competition, the holy grail of electoral politics, have been abrogated, and our democratic evolution, so long desired, has staggered and stumbled, indelibly stained by this unhygienic environment in which our politics is played. This is the history that our Constitution seeks to correct, through elaborate provisions, and the adoption of exemplary standards in our electoral system.

[247] Constitutional provisions are by themselves not enough. The duty-bearers, be they individual voters, political parties, agents, the media, IEBC, the Registrar of Political Parties, the Constitutional Commissions, the arms of the State, must all invest in emancipating and protecting the vote. Once the Constitution gives citizens the right to vote, the freedom to choose, and conditions are created for the realization of that right, it is not the business of the Court to aid the indolent. If party agents are required to be present, sign statutory forms, and undertake any other legitimate duty that is imposed upon them as part of the political process in an election, then they are under obligation to do it. To fail to do so is not only to fail one's party, but also to fail our democracy. The Courts must frown upon any such inaction, reluctance, or delay.

[248] The election is first and foremost the citizen's election. Every Kenyan must protect his or her right to vote—the right to participate in the political affairs of the nation. It is upon exercising all the rights which the Constitution bestows upon the citizen, that she or he can claim the sovereign power that she or he donates to her or his representative.

[249] It is, therefore, time for us to develop our election-petition litigation: we must depart from the current practice in which a petitioner pleads 30 grounds for challenging an election, but only proffers cogent evidence for 3. A candidate, or her agent, cannot abscond duty from a polling station, and then ask the Court to overturn the election because of her failure to sign a statutory form. Every party in an election needs to pull their own weight, to ensure that the ideals in Article 86 are achieved: that we shall once and for all have simple, accurate, verifiable, secure, accountable, transparent elections. The election belongs to everybody, and it is, therefore, in everybody's collective interest, and in everybody's collective and solemn duty, to safeguard it.

[250] Given the strict electoral timelines in our Constitution, it is clear that this collective constitutional responsibility to ensure free and fair elections, will result in cogent grounds upon which election results are challenged. We will start seeing candidates conceding defeat in elections because they have been *free and fair*. We will see electoral litigation that may be ended through *consent of the parties* because they agree that the grounds upon which the election results were based, are solid and not frivolous. It is not hard to imagine that one day it will be possible, because of the vigilance of the citizens and all electoral stakeholders, to have elections that will be free and fair, and Courts will no longer be involved in the settlement of electoral disputes.

[251] Finally, let me turn to the issue of election-management. Important as it is, the preparations of the parties and the candidates are not enough, by themselves, to achieve satisfactory electoral culture. Of enormous significance is the conduct of *the electoral agency*. The idea that parties invest in electoral processes in their entirety, including in anticipation of a petition, *does not relieve the electoral management agency of its constitutional obligations*. Nothing could imperil our democracy more than an electoral agency that is contaminated by bias, infected with incompetence, and afflicted by a virulent virus of minimal public accountability. Arguably, Kenya can do with one or two indolent *political parties,* but she cannot afford an *electoral management agency* that exhibits these weaknesses.

[252] The constitutionally-mandated agency for electoral management, the *IEBC,* must demonstrate *competence, impartiality, fairness, and a remarkably high sense of accountability to the public, and the parties who are its primary customers*. It must embrace high *disclosure standards*, and must avoid conduct such as hoarding of information and data that the public has the right to, both as a matter of course, and also as a matter of *Article 35 of the Constitution*.

Materials that are in the possession of the IEBC are not private property; they are *public resources*. The IEBC is not funded by private money; it draws its money from the public purse. Its subject matter—elections and boundaries—are extremely public issues, attended with considerable emotions. Its decisions determine the fates, and interests, at both private and public levels.

[253] The IEBC, therefore, must demonstrate an instant readiness to respond to public concerns, whenever these are raised, and to maintain a *public-accountability* posture at all times. Public confidence in the electoral agency will only be realized if two tests are constantly met: the test of *openness* in the management of the entire electoral process, and two, the test of *competence*.

G. ORDERS

(1) The Judgment of the Court of Appeal sitting at Nyeri, dated 12th March, 2014 annulling the election of Peter Gatirau Munya as Governor of Meru County, is hereby quashed.

(2) The part of the said Judgment of the Court of Appeal recommending to the Director of Public Prosecutions the conduct of investigations to determine whether an election offence was committed by PW4, Stephen Mugambi and PW6, Christine Kananu George, is affirmed.

(3) The Petition of Appeal dated 20th March, 2014, is allowed.

(4) For the avoidance of doubt, the declaration of the result of the election by the Independent Electoral and Boundaries Commission in respect of the seat of Governor of Meru County, is hereby restored.

(5) The parties shall bear their own costs at the High Court and Supreme Court. The 1st respondent herein shall bear his own costs and the costs of the appellant herein at the Court of Appeal. The costs of the 2nd and 3rd respondents at the Court of Appeal shall be borne by the 2nd respondent.

DATED and **DELIVERED** at **NAIROBI** this **30th Day of May, 2014.**

.....	.....
W. M. MUTUNGA **CHIEF JUSTICE & PRESIDENT** **OF THE SUPREME COURT**	**K.H. RAWAL** **DEPUTY CHIEF JUSTICE &** **VICE-PRESIDENT** **OF THE SUPREME COURT**
.....	.....
P. K. TUNOI **JUSTICE OF THE SUPREME COURT**	**M. K. IBRAHIM** **JUSTICE OF THE SUPREME COURT**

…… ……

J.B. OJWANG
JUSTICE OF THE SUPREME COURT

S. C. WANJALA
JUSTICE OF THE SUPREME COURT

……

S. N. NDUNGU
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR, SUPREME COURT