

**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

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

**PETITION NO. 34 OF 2018**

**BETWEEN**

**TIMAMY ISSA ABDALLA ..... PETITIONER**

**AND**

**INDEPENDENT ELECTORAL AND  
BOUNDARIES COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**ADAN ALI MOHAMED ..... 2<sup>ND</sup> RESPONDENT**

**FAHIM YASIN TWAHA ..... 3<sup>RD</sup> RESPONDENT**

**ABDULHAKIM ABOUD BWANA ..... 4<sup>TH</sup> RESPONDENT**

*(Being an Appeal from Judgment of the Court of Appeal (Visram, Karanja and  
Koome, JJA) at Malindi delivered on 9<sup>th</sup> August, 2018 in Election Petition*

*Appeal No. 4 of 2018)*

**JUDGMENT**

***I. INTRODUCTION***

**[1]** This is an appeal against the decision of the Court of Appeal at Malindi, dated 9<sup>th</sup> August, 2018, that dismissed the Appellant’s appeal except in relation to costs thereby upholding the High Court decision that dismissed the Appellant’s Petition, hence upheld the election of the 3<sup>rd</sup> Respondent as the Governor of Lamu County.

**[2]** The Petition of Appeal dated 10<sup>th</sup> September 2018 and filed on 11<sup>th</sup> September 2018 seeks the following specific orders, that:

- i. This Petition of Appeal be allowed.*
- ii. The Judgment and Orders of the Court of Appeal delivered on the 9<sup>th</sup> August, 2018, be reversed and set aside in its entirety.*

iii. *The Petitioner's appeal before the Court of Appeal be allowed as prayed and the Judgment, Decree and Orders of the High Court be reversed and set aside and substituted with the following orders:*

- (a) The judgment, decree and order of the Honourable Lady Justice Dorah O. Chepkwony delivered on 2<sup>nd</sup> March, 2018 in the Malindi Election Petition Number 3 of 2017 – Timamy Issa Abdalla versus Independent Electoral and Boundaries Commission, Adan Ali Mohamed, Fahim Yasin Twaha and Abdulhakim About Bwana together with all consequential orders therefrom, including the order that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents were validly elected as Governor and Deputy Governor for Lamu County, and payment of costs be reversed and set aside in its entirety.*
- (b) The Petitioner's election Petition Number 3 of 2017 in the High Court of Kenya Malindi be allowed with costs to the Petitioner.*
- (c) A declaration that the election of Governor and Deputy Governor for Lamu County held on 8<sup>th</sup> August, 2017 was not conducted in accordance with the mandatory provision and requirements of Articles 38, 81 and 86 of the Constitution, the Elections Act and Regulations made thereunder and were therefore invalid, null and void.*
- (d) A declaration that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents were not validly elected as Governor and Deputy Governor for Lamu County in the general elections held on 8<sup>th</sup> August, 2017.*
- (e) An order that a fresh election be held for the position of Governor and Deputy Governor for Lamu County.*

- (f) *The certificate issued by the High Court pursuant to the provisions of Section 86(1) of the Elections Act be reversed, set aside and annulled.*
- iv. *The costs of this petition of Appeal be awarded to the Petitioner.*
- v. *The costs of the proceedings in the Court of Appeal and in the High Court be awarded to the Petitioner.*
- vi. *Such other or further consequential relief that this Court may deem fit and expedient in the interest of justice to grant.*

**[3]** The appeal is premised on 16 grounds, which grounds we find to be very broad, verbose and repetitive, contrary to the tenets of pleadings that advocates for concise and distinct grounds of appeal as provided for by Rule 9 of the Supreme Court Rules, 2012. We summarize these grounds thus: *that the Court of Appeal:*

- (a) *Misinterpreted and misapplied its jurisdiction under Article 164(3) (a) of the Constitution and Section 85A of the Elections Act as read together with Article 159(2) (c) of the Constitution.*
- (b) *Misinterpreted and misapplied the ratio decidendi in **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others (2014) eKLR**;*
- (c) *Abdicated its constitutional duty as a first appellate Court by failing to subject the evidence to a fresh and exhaustive evaluation so as to determine whether the trial Judge's conclusions were supported by that evidence.*
- (d) *Erred in its findings as regard the Scrutiny Report yet the Scrutiny Report showed that there were no results for 8 polling stations, the results for 18 polling stations were not legible and could not be accounted for; and that the register of voters was not used.*

- (e) *Fell into error in their interpretation and application of Section 83 of the Elections Act as read together with Article 87 of the Constitution in applying the said sections conjunctively instead of disjunctively contrary to **Raila Odinga vs Independent Electoral and Boundaries Commission and 3 others**, [2017] eKLR.*
- (f) *Erred in failing to address various violations and non-compliance with the principles laid in the Constitution and other written laws on elections that were raised in the appeal. For instance, that it applied a wrong test regarding proof of lack of impartiality, fairness and neutrality under Article 81(e) of the Constitution.*

## **II. BACKGROUND**

[4] Following the General Elections of 8<sup>th</sup> August 2017, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents were declared duly elected for the positions of Governor and Deputy Governor respectively, for Lamu County. They had garnered 22,972 votes against the Appellant who emerged 1<sup>st</sup> Runners-up having garnered 22, 420 votes. The margin was only 552 votes.

### ***High Court***

[5] The Appellant was aggrieved by that declaration and filed a Petition at the High Court challenging the results on two broad grounds that: *the election was not conducted in accordance with the principles laid down in the Constitution, the Elections Act and the Regulations made thereunder; and that the election was fraught with massive illegalities and irregularities that affected the results of the elections.* He sought the nullification of the results and an order for fresh elections.

[6] The following illegalities and irregularities were alleged: deprivation of the right to vote; lack of fairness, impartiality, transparency, neutrality and integrity

for the reason that the election was managed and supervised by close friends and former workmates of the 4<sup>th</sup> Respondent; that the Deputy Constituency Returning Officers for Lamu West and Lamu East worked where they were neither appointed nor gazetted hence acted without authority contrary to the law; use of pre-marked ballot papers; that the counting of votes was not done in a transparent, impartial, efficient, accurate and verifiable manner; that 16 persons voted without verification through the KIEMS kit at Kizingitini Secondary School Polling Station 2; that there were cases of voters in need of assistance not being assisted; that valid votes cast in favour of the Petitioner were wrongly rejected; that results for Lamu East Constituency were not openly accurately collated and publicly announced as all Forms 37Bs containing the gubernatorial results for Lamu East Constituency were completely destroyed; and that there was disparity of votes cast for the various elective posts arising from some voters being issued with more ballot papers, while others were issued with less ballot papers or no ballot papers at all.

[7] The Petitioner also filed a Notice of Motion Application dated 26<sup>th</sup> September, 2017 seeking scrutiny and recount orders, which application was allowed in a Ruling delivered on 9<sup>th</sup> February 2017. The scrutiny was conducted and a Report filed by the Deputy Registrar on 12<sup>th</sup> February 2018.

[8] The Respondents opposed the petition denying the Petitioner's allegations averring that the election was conducted in accordance with the law and that the illegalities and irregularities, if any, did not affect the results of the election.

[9] After hearing the testimonies of over one hundred and forty (140) witnesses and upon consideration of submissions of parties, together with the Deputy Registrar's Scrutiny Report, the High Court framed seven (7) issues for determination namely:

- (i) *Whether the August, 2017 gubernatorial election in Lamu County was conducted in accordance with the principles laid*

*down by the Constitution, the Election Act, 2011 and the regulation thereunder.*

- (ii) Whether there were any irregularities and/or illegalities in the conduct of the Lamu County gubernatorial election which would have affected the outcome of the same.*
- (iii) Whether any registered voters were irregularly and illegally deprived of their right to vote contrary to the provisions of the Constitution of Kenya, 2010, the Election laws, and the Election (General) Regulations 2017;*
- (iv) Whether irregularities and/or non-compliance with the law, if at all, materially affected the results;*
- (v) Whether the petitioner has discharged the burden of proof as required of him in the instant petition against the Respondents;*
- (vi) What orders and reliefs should the court grant, if any?*
- (vii) Who shall bear the costs of the petition and to what extent?*

**[10]** In a Judgment delivered on 2<sup>nd</sup> March 2018, the election Court found that the Petitioner had not discharged the burden of proof to the required standard to warrant the nullification of the election. In particular, that he could not prove that there was: deprivation of the right to vote; unauthorized transfer of voters; or lack of impartiality, transparency, fairness, neutrality and improper influence on the part of the 4<sup>th</sup> Respondent. Further, as regards the allegation of lack of impartiality, the Court found that while the 4<sup>th</sup> Respondent had been an employee of the IEBC (as a former Constituency Returning Officer and Elections Coordinator in Lamu County), he had duly resigned as a public officer and he had the right, like any other citizen, to vie or participate in a political contest. That in any event, the Petitioner had not demonstrated any alleged unfair advantage the 4<sup>th</sup> Respondent had yielded over the Appellant.

**[11]** On allegations of non-gazettement of officers, that is, the Constituency Returning Officers gazetted for Lamu East Constituency and Lamu West

Constituency swopping places, the Court found that it had not be shown how that affected the results. The Court stated that lack of gazettement was not fatal so as to lead to nullification of an election. As regards the use of pre-marked ballot papers, these allegations were found not to have been proved. The Court found that in issue was that the ballot papers had printing errors which had been explained to all parties, prior to the voting, and who agreed to their use. As a consequence of this prior information to all parties, the election Court ordered for criminal investigations to be conducted by the County Director of Criminal Investigations against PW65, a presiding officer at Mapenya polling station stream 2 who had sworn an affidavit in support of the Appellant's allegations yet he had the full knowledge of the true facts, and being an officer on oath of office, committed perjury.

**[12]** Ultimately, the trial Court dismissed the petition making the following orders:

- (a) *The petition be and is hereby dismissed.*
- (b) *The respondents are awarded costs on the following terms:*
  - (i) *the instruction fee for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are applied at Kshs. 6,000,000*
  - (ii) *the instruction fee for the 3<sup>rd</sup> and 4<sup>th</sup> Respondents are applied at Kshs. 6, 000,000*
- (c) *The costs shall be taxed and total costs certified by the Deputy Registrar of this Court.*
- (d) *The certified costs awarded shall be paid out of the security deposited on pro-rata basis.*
- (e) *A certificate of the determination in accordance with section 86(1) of the Elections Act, 2011 shall issue to the Independent Electoral and Boundaries Commission and the Speaker of the (Senate).*

**[13]** The Court opined that the high costs awarded were based on the fact that, *“this is one of the longest petitions, where a total of one hundred and forty seven (147) witnesses were called to testify. The hearings lasted for twenty one (21) days and on each day, hearing would extend beyond the normal working ours, that is upto and between 9-10.00pm. On the last day of hearing, which was the 21<sup>st</sup> of January, 2018 and a weekend, the hearing ended at 12.30 am. Over and above this, I have considered the costs of legal representation, the time spent strain that must have been experienced in the preparation and perusal of pleadings, applications, research, and submissions and expenses incurred in court attendances.”*

### ***Court of Appeal***

**[14]** The High Court decision aggrieved the Appellant, who preferred an appeal to the Court of Appeal seeking to set it aside and a declaration to issue that the election for Governor and Deputy Governor for Lamu County held on 8<sup>th</sup> August, 2017 was not conducted in accordance with the mandatory provisions and requirements of Articles 38, 81 and 86 of the Constitution, the Elections Act, and Regulations made thereunder and were therefore invalid, null and void.

**[15]** The appeal was premised on a total of 41 grounds. The Appellant contended *inter alia* that: the Trial Court misapprehended the import of section 83 of the Elections Act; that the trial Court did not consider and/or misunderstood the implication of the Deputy Registrar’s Scrutiny Report which revealed that the election was marred with irregularities and illegalities which affected the result; and that the trial Court erred as regards the findings on all the other alleged irregularities. He also faulted the trial Court’s exercise of discretion in capping costs at Kshs. 12, 000, 000 as being punitive.

**[16]** The 1<sup>st</sup> and 2<sup>nd</sup> Respondents challenged the Court of Appeal’s jurisdiction to entertain the appeal. On the merits of the appeal, they urged that the Appellant did not discharge the burden of proof to the required standard as regards the

allegations of irregularities he made and that the trial Court correctly applied section 83 of the Elections Act. As regards costs, they urged that costs follow the event and given the circumstances, the sum was reasonable and there was no justification for the Court of Appeal's interference with the award. Their case was supported by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents.

[17] From the convoluted 41 grounds of appeal, which the Court of Appeal expressed its reservations with; the appellate Court delimited five points of law for determination, thus:

- (a) *Whether the learned Judge erred in applying Section 83 of the Elections Act conjunctively.*
- (b) *Whether the learned Judge erred in her interpretation and application of the burden and standard of proof in an election dispute.*
- (c) *Whether the learned Judge erred in concluding that the election was conducted in accordance with the principles laid down in the Constitution, Elections Act and Regulations made thereunder.*
- (d) *Whether the learned Judge erred in finding that the illegalities and irregularities set out and established by the appellant did not affect the results of the elections.*
- (e) *Whether the learned Judge erred in the exercise of her discretion by capping the costs at Kshs. 12,000,000.*

[18] In its judgment, the appellate Court underscored that elections represent the will of the people and as such, a court aims at preserving this will where it is manifestly discernable, even to the extent of overlooking irregularities which do not affect the outcome of election. The Court of Appeal was satisfied that the learned trial Judge correctly applied Section 83 of the Elections Act. It also found that the question of burden and standard of proof had been settled by this Court in the ***Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others*** [2017] eKLR (***Raila 2017*** case).

[19] As regards the question whether the trial Judge's conclusions with respect to whether the election was in compliance with the electoral law and the effect of the irregularities supported by evidence, the appellate Court considered the trial Court's findings on each issue and in the ultimate held that the conclusions were all supported by the evidence on record. Where the Court of Appeal considered that it was being called upon to re-consider evidence and/or its probative value, it declined that invitation holding that that such an action was outside its jurisdiction. The learned appellate Judges also found that the Scrutiny Report was considered by the trial Court and stated that the fact that a court's findings on the same did not favour the Appellant, is not a ground for alleging that the Scrutiny Report was not considered. As for the allegations that there were missing and illegible Forms 37As for Lamu East Constituency rendering the results unverifiable, the appellate Court found that the issue had not been pleaded and could not for that reason be determined.

[20] Ultimately, the Court of Appeal agreed with the trial Court that that the Appellant had not proved that the irregularities alleged did affect the results of the election. It dismissed the appeal, except in relation to the issue of costs. The appellate Court on that issue considered its jurisprudence on costs in the ***Martha Wangari Karua v Independent Electoral & Boundaries Commission & 3 others*** [2018] eKLR (*Martha Karau* case) and drawing from comparable election disputes, found the award of Kshs. 12, 000, 000 to be excessive. It consequently interfered with that discretion as exercised and capped the costs at Kshs. 3,000,000 to be paid equally to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, on one part and the 3<sup>rd</sup> and 4<sup>th</sup> Respondents, on the other part.

[21] It is that Court of Appeal decision that aggrieved the Appellant further and compelled him to file the instant appeal under Article 163(4)(a) of the Constitution.

### **III. THE PETITION BEFORE THE SUPREME COURT**

**[22]** In his Petition, the Appellant has formulated *22 issues for determination*. Again, we find these issues very convoluted and verbose. An appeal against a decision of the Court of Appeal in which the Court of Appeal framed only 5 issues for determination cannot pragmatically have upto 22 issues emerging for determination. This Court's appellate jurisdiction, whether as of right under Article 163(4)(a) or upon certification and grant of leave under Article 163(4)(b) of the Constitution is targeted and issue based. The issues presented for determination before this Court must therefore be precise and concise, directly springing from the issues before the Court of Appeal.

**[23]** Be that as it may, the issues as framed can be summarized as follows:

- (1) *Whether the Court of Appeal misinterpreted and misunderstood the nature and extent of its jurisdiction under Article 164(3) (a) of the Constitution and Section 85A of the Election Act, and in line with the jurisprudence in **Munya 1** case.*
- (2) *Whether the learned judges of the Court of Appeal abdicated their constitutional duty by failing to subject the evidence to a fresh evaluation to determine if the decision of the High Court was erroneous.*
- (3) *Whether the learned judges of the Court of Appeal considered and determined all matters of law raised by the petitioner in the appeal.*
- (4) *Whether the learned judges of the Court of Appeal considered and evaluated the place of the scrutiny report.*
- (5) *Whether the Court of Appeal correctly applied Section 83 of the Elections Act.*
- (6) *Whether the Honourable Court of Appeal addressed the issue of non-compliance with the principles laid down in the Constitution.*

- (7) *Whether the Court of Appeal properly applied Article 86(a), (c) and (d) of the Constitution.*
- (8) *Whether the 1<sup>st</sup> and 2<sup>nd</sup> respondents put in place a proper mechanism to eliminate electoral malpractice.*
- (9) *Whether the Court of Appeal correctly applied the provision of Article 38(2) (a) of the Constitution as to whether the election was free and fair and if the judges applied the correct legal test.*
- (10) *Whether the conclusions arrived at by the Court of Appeal and the High Court were supported by established facts.*

#### **IV. NOTICE OF PRELIMINARY OBJECTION**

**[24]** Upon being served with the appeal, on 21 September 2018, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents filed a Notice of Preliminary Objection under the provisions of Article 163(4) (a) and (b) of the Constitution read together with the provisions of Sections 15 and 16 of the Supreme Court Act seeking the dismissal of the appeal with costs for being incompetent on the following grounds, that:

- i. *The Petition of Appeal does not raise any matter of constitutional interpretation or constitutional application as provided under Article 163(4) (a) of the Constitution.*
- ii. *The Petition of Appeal has not been certified as one involving a matter of general public importance in accordance with Article 163(4)(b) of the Constitution.*

**[25]** By the directions of this Court, the Notice of Preliminary Objection was canvassed together with the substantive petition when the matter was heard on 20<sup>th</sup> November, 2018.

## **V. SUBMISSIONS**

### **a) The Appellant's**

[26] The Appellant filed his submissions dated 27<sup>th</sup> September, 2018 on 28<sup>th</sup> September 2018. His case before this Court was urged by SC Pheroze Nowrojee, and Counsel Messers Yusuf Aboubakar and Okoth Odera.

[27] On the *jurisdiction*, it was submitted that this Court had been properly moved under Article 163(4) (a) of the Constitution. Citing this Court's previous decisions on its jurisdiction under Article 163(4)(a) of the Constitution, it was urged that the appeal raises issues and questions involving interpretation and application of the Constitution. That the case before both the High Court and the Court of Appeal also involved interpretation and application of Articles 1, 2, 10, 38, 81, 83, 86, 88 and 164(3)(a) of the Constitution.

[28] The Appellant further urged that the case also involved the interpretation and application of various provisions of the Elections Act and Regulations made thereunder as well as Section 25 of the Independent Electoral and Boundaries Commission Act, which legislations are normative derivatives of the principles in the Constitution. He thus contended that the reasoning and conclusions of the superior Courts took a trajectory of constitutional interpretation and application. SC Pheroze was furthermore assertive that both the Court of Appeal and the High Court considered the issue whether the election was conducted in accordance with the Constitution, hence clearly demonstrating the constitutional issue(s) in this case.

[29] On the alleged *erroneous exercise of jurisdiction* under Article 164(3)(a) of the Constitution and Section 85A of the Elections Act, it was submitted that the Court of Appeal erred in failing to reconsider and re-evaluate the evidence on record. He contended that the Court of Appeal should have re-evaluated the evidence to determine if the conclusions that were arrived at by the trial Court were supported by established facts or evidence on record, or perverse in line

with this Court's decision in the ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*** [2014] eKLR (*Munya 2* case). Also cited in support were the cases of ***Peters v Sunday post Limited*** (1958) EA 424; ***Okeno v Republic*** (1972) EA 32; ***Selle and Another v Associated Motor Boat Company and others*** (1968) EA 123; and ***Abdalla v Imu and 3 others*** (2014) KLR 545; and an extract from *Muthoni Thiankolu's* Article in the book '*Balancing the Scale of Electoral Justice: Resolving Disputes from 2013 Elections in Kenya and the Emerging Jurisprudence.*'

**[30]** Regarding the *Scrutiny Report*, it was submitted that no party contested its contents as filed by the Deputy Registrar on 12<sup>th</sup> February 2018. However, the Appellant urged, the Court of Appeal neither considered nor evaluated the Report which revealed instances of irregularities and illegalities that had been specifically pleaded in the petition of appeal and reiterated in the written submissions. SC Nowrojee thus submitted that the Scrutiny Report had confirmed the pleaded illegalities and irregularities such as: Forms 37As for 8 polling stations completely missing, Forms 37As for 18 polling stations partly/completely illegible, 2 missing ballot boxes for Kizingitini Secondary School 1 and Kiunga Primary School 1; 10 valid votes cast in favour of the Appellant wrongly rejected by the Presiding Officers et al.

**[31]** It was the Appellant's other submission that the trial Court neither considered, evaluated nor analysed the Report which clearly showed that the election was marred with irregularities that affected the results. Hence, it erred in concluding that the report "*revealed very minor errors in very few aspects which did not affect the outcome of the election*". Despite this error by the trial Court, as opined by the Appellant, it was contended that the Court of Appeal carelessly dealt with the issue of the Scrutiny Report. That it not only introduced new and extraneous evidence to the Report but also reached a conclusion not supported by the Report, hence ignoring the place and purpose of a Scrutiny Report in an election petition. The Appellant invited this Court to consider the

principles on the law relating to scrutiny as set in the various cases referred to: ***Abdalla v Imu & 3 others***, (2014) KLR 545; ***Cyprian Awiti & Another v IEBC & 3 others***, [2018] eKLR; ***Raila 2017***; ***Moses Masika Wetangula v Musikari Nazi Kombo & 2 others*** [2015] eKLR; and ***Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waiitu & 4 others*** [2014] eKLR. Also cited was the Article by Maraga C.J. in “Electoral Disputes: A Kenyan Judicial Perspective” in *“Balancing the Scales of Justice; Resolving Disputes from 2013 Elections in Kenya and the Emerging Jurisprudence”*.

**[32]** In particular, the Appellant expressed reservation with the appellate Court’s findings that the allegations of missing and illegible Form 37As were not pleaded, hence the Court of Appeal “could not help him at all.” That this was manifestly wrong for the learned Judges of Appeal to say that ‘they could not help’ in relation to illegalities and irregularities revealed by the Scrutiny Report.

**[33]** The Appellant further submitted that the Court of Appeal failed to consider the key issue of *non-compliance with Constitution and electoral laws, even after stating it would do so* in gross violation of Articles 25(c) and 50 of the Constitution and in abdication of its duty under Articles 164(3)(a) of the Constitution and section 85A of the Elections Act. That by this omission, the learned appellate Judges gravely erred in their application of section 83 of the Elections Act contrary to the decision of the Supreme Court in ***Raila 2017***.

**[34]** The Appellant in addition submitted that the Court of Appeal erred in refusing to deal with a pure matter of law: as regards the allegations of the 4<sup>th</sup> Respondent’s former employment with IEBC, holding that it was a matter of fact. It was urged in that regard that in the Petition before the trial Court, the Appellant had contended that an election conducted by close friends and former workmates of a candidate, and by un-gazetted officials could not be said to be free, fair, impartial, transparent and neutral. That the trial Court thus misapprehended the Appellant’s complaint, wrongly holding that he was

challenging the candidature of the 4<sup>th</sup> Respondent and held that he should have raised a complaint with IEBC or the Political Parties Disputes Tribunal, which finding was erroneous in law. That this grievance was anchored in Articles 38, 81 86 and 88(4) of the Constitution and the appellate Court should not have declined jurisdiction to deal with this matter.

[35] The Appellant relied on this Court's decision in ***George Mike Wanjohi v Steven Kariuki & 2 others*** [2014] eKLR and the Court of Appeal decision in ***Wavinya Ndeti & another v Independent Electoral and Boundaries Commission & 2 others*** [2018] eKLR to support his submissions on the need for impartiality in elections. He also cites ***Tumaini v Republic (1972) EA 441*** and Lord Denning's dictum in ***Metropolitan Properties Co. (F.G.C) Ltd V Lannon (1969) 1 Q.B. 577***.

[36] The Appellant furthermore urged that the gubernatorial election in Lamu County was grossly undermined by reason of the two un-gazetted Deputy Returning Officers and the Lamu East Constituency Returning Officer being present and determining issues in the election process.

[37] It was the Appellant's other case that the Court of Appeal Judges failed to consider illegalities and irregularities which were matters of law, erroneously holding them to be matters of fact. As such they abdicated their duty and mandate under Article 163(4)(a) of the Constitution and section 85A of the Elections Act.

[38] The Appellant also contended that he discharged his legal and evidential burden in proving that the election was not conducted in accordance with the principles laid down in the Constitution and the electoral laws; and that there were illegalities and irregularities that affected the result of the election. He thus faulted the appellate Court Judges for failing to make a determination on whether the trial Judge erred in law on the issue of legal and evidential burden as well as the function of the court in an election petition.

[39] Finally, the Appellant rehashed his submissions before the High Court and Court of Appeal, in alleging proof of all the allegations he had pleaded in relation to: allegations of denial of the right to vote; improper influence and lack of impartiality, transparency and neutrality; use of pre-marked ballot papers in the election; failure to count votes; voters voting without identification; failure to assist voters indeed of voter assistance; rejection of valid votes cast in favour of the appellant; total and complete destruction of Forms 37Bs containing the Results for Lamu East Constituency; and disparities in the total number of votes for different elective positions.

***b) 1<sup>st</sup> and 2<sup>nd</sup> Respondents'***

[40] The 1<sup>st</sup> and 2<sup>nd</sup> Respondents were represented Counsel Mr. Martin Munyu and Ms Tabitha Weru. They filed their submissions dated 4<sup>th</sup> October 2018 on 5<sup>th</sup> October 2018 opposing the Petition.

[41] On *jurisdiction*, they urged that this Court lacks jurisdiction to hear the appeal since the Appellant is not seeking any specific issue on the interpretation or application of the Constitution as required under Article 163(4)(a) of the Constitution but rather asking the Court to re-evaluate and consider matters of fact. They cited this Court's decisions in ***Lawrence Nduttu and 6000 others v Kenya Breweries Ltd & another*** [2012] eKLR; ***PETER ODUOR NGOGE v FRANCIS OLE KAPARO & 5 others*** [2012] eKLR; and ***Lemanken Aramat v Harun Meitamei Lempaka & 2 others*** [2014] eKLR, in support of their averments that the Court lacks jurisdiction. Counsel Mr. Munyi was emphatic that it is not enough for one to merely mention articles of the Constitution so as to cloth this Court with jurisdiction.

[42] As to whether the Court of Appeal erred in the exercise of its jurisdiction, it was submitted that the Appellant's assertions are misconceived. They argued that the case law cited by the Appellant in support of his contention are applicable to

the Court of Appeal jurisdiction in ‘normal’ appellate matters and not election appeals. They urged in that regard that election appeals are *sui generis* and the Court of Appeal jurisdiction under section 85A of the Act is different from the ‘normal’ appellate jurisdiction. They urged that pursuant to the ratio in the cases of ***Munya 1*** and ***Zacharia Okoth Obado v Edward Akong’o Oyugi & 2 others [2014] eKLR***, the Court of Appeal correctly exercised its jurisdiction by limiting it to evaluation of facts and evidence on record to ascertain whether the conclusions reached by the trial Court were supported by such evidence.

[43] The 1<sup>st</sup> and 2<sup>nd</sup> Respondents also submitted that the Court of Appeal properly evaluated the Scrutiny Report and correctly upheld the trial Court’s finding that the irregularities detected therein were not sufficient to vary the results. Hence, the Court of Appeal never ignored the Report. That the Court of Appeal properly appreciated the role of the Scrutiny Report and correctly held that the Petitioner could not use the findings of the Scrutiny Report to frame new matters that were not pleaded in the petition.

[44] It was further submitted that after analyzing the Scrutiny Report, the Appellate Court properly applied Section 83 of the Election Act, to the effect that a petitioner must satisfy the Court that any irregularities found affected the final outcome of the declared results, which was not the case in this matter. That the Court of Appeal correctly noted the disjunctive interpretation of section 83 of the Act as stated by this Court in the ***Raila 2017*** case.

[45] As regards the burden of proof, it was submitted that the Court of Appeal properly analyzed the legal burden and standard of proof by first ascertaining whether the Appellant discharged his evidential burden of proof to support the grounds of the petition in line with the jurisprudence in ***Raila Odinga and 5 others v Independent Electoral and Boundaries Commission and 3 others [2013] eKLR***. They urged that it is not enough for the Appellant to generally point out irregularities that may have taken place during the election as

he did before the trial Court. It was submitted that the Appellant failed to discharge this legal burden of proof and the appellate Court faced with the same facts could not in its evaluation arrive at a different conclusion. They also urged that the Court of Appeal re-considered all the allegations framed by the Petitioner and either affirmed the trial Court's findings that the petitioner had not discharged the burden of proof or found that what it was being invited to consider was a factual issue that was outside its jurisdiction.

[46] In the ultimate, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents urged that this Court should find that the Appellant did not discharge his legal burden of proving the alleged electoral malpractices and the Court should also find and hold that both Superior Courts were correct in their findings, hence the appeal be dismissed with costs.

### **c) The 3<sup>rd</sup> and 4<sup>th</sup> Respondents'**

[47] The 3<sup>rd</sup> and 4<sup>th</sup> Respondents were represented by Counsel Mr. Maurice Kilonzo. They filed their written submissions on 5<sup>th</sup> October opposing the petition. They had earlier on filed Submissions in regard to their Notice of Preliminary Objection on 28<sup>th</sup> September, 2018.

[48] Citing this Court's decisions in *Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 others* [2012] eKLR, and *In the Matter of Interim Independent Electoral Commission* [2011] eKLR, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents urged that this Court lacks jurisdiction to determine this matter. Counsel Mr. Kilonzo submitted that for one to invoke Article 163(4)(a) of the Constitution, a party has a duty to demonstrate that the issues before this Court came from the High Court through the Court of Appeal as a result of interpretation and/or application of the Constitution. This, it was contended, had not been demonstrated in this matter. Counsel further submitted that the mere fact that the High Court and the Court of Appeal framed issues touching on the

Constitution does not by itself give an Appellant an automatic right of appeal to the Supreme Court. A party has to categorical isolate constitutional issues.

[49] It was contended that the constitutional provisions which the Appellant seeks to rely upon were not canvassed in the High Court or the Court of Appeal. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents also urged that the learned Judges of the Court of Appeal correctly analysed the issues arising in the appeal vis-à-vis the allegations of constitutional and legal violations which the Appellant alleged and correctly agreed with the legal reasoning of the trial Court. Further, that the issues framed by the Appellant for determination by this Court are unclear as to the constitutional provisions alleged to have been wrongly interpreted or applied.

[50] On the flipside, it was urged that the appeal does not raise matters of public importance of an arguable and novel constitutional nature. That it also does not comprise of weighty cardinal issues of law or of jurisprudential moment deserving the exercise of discretion by this Court. Citing the case of *Hermanus Phillipus Steyn vs Giovanni Grecchi Ruscone* [2013] eKLR which laid down principles for certifying a matter as one of general public importance, it was urged that the Appellant had not applied nor been granted such leave under Article 163(4)(b) of the Constitution. Hence, this appeal should not be admitted for hearing.

[51] On the merits of the appeal itself, it was urged that an election is the ultimate expression of the sovereignty of the people, and the electoral system is designed to ascertain and implement that will of the people. As such, an election petition is not an opportunity to conduct another election through the court, as every election conducted in accordance with the law is presumed valid unless it is set aside by an election court. That the Appellant bears the burden of proving any allegations of illegalities and irregularities so made.

[52] They submitted that as a general rule, parties are bound by their pleadings as set out in the petition and cannot be permitted to make a case outside the

petition. The affidavits and witness statements only support the grounds set out in the petition and are not to be used as the basis for introducing new issues not specifically pleaded in the petition. Reference was made to Rules 8 and 12 of the Election (Parliamentary and County Elections) Petition Rules 2017, and the persuasive cases of ***Jackton Nyanungo Ranguma v Independent Electoral and Boundaries Commission & 2 others*** [2017] eKLR; ***Mohamud Muhamed Sirati v Ali Hassan Abdirahman & 2 others*** [2010] eKLR; ***Philip Osore Ogutu v Michael Onyura Aringo & Others*** [2013] eKLR and ***Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Muli & 3 others*** [2014] eKLR.

**[53]** In this regard, it was submitted that the Appellant sought to introduce new grounds in the witness affidavits and oral testimony which were not specifically pleaded in the petition, to wit: *alleged violence at polling stations; alleged acts of bribery; alleged failure of electronic transmission of results; that election materials were not properly kept with particular reference to the polling station diaries (PSDs); allegations of polling stations not specifically set out in the petition; and allegations of irregularities at other polling stations in Lamu East Constituency not specifically pleaded in the petition.* Issues which the Court of Appeal declined to consider as not having been pleaded.

**[54]** Regarding the jurisdiction of the Court of Appeal, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents submitted that the same is governed by Article 164(3) of the Constitution and section 85A of the Elections Act. Citing a number of this Court's decisions on jurisdiction, they re-emphasized that the restriction imposed by section 85A of the Elections Act on the Court of Appeal is derived from Article 87(1) of the Constitution and as such, only the election Court has the final say in factual matters. It was submitted that of the 41 grounds of appeal advanced in the Memorandum of Appeal before the Court of Appeal, only one ground, relating to costs raised an issue in law. The rest of the grounds were on factual matters cleverly drafted in a matter calling on the Court to evaluate and analyze the

probative value of factual matters led in evidence which is outside the jurisdiction and mandate of the Court of Appeal under section 85A. They cited the Court of Appeal decision of **Hon. Mohamed Abdi Mohamed v Ahmed Abdillahi Mohamed & 3 others**, [2018] eKLR in reference to the jurisdictional corners of the Court of Appeal's jurisdiction.

[55] On the merits of the appeal before this Court, it was submitted that the Appellant's case is a regurgitation of the allegations in the petition before the High Court and the grounds of appeal before the Court of Appeal. They urged the Court not to accede to the Appellant's request to examine the probative value of the evidence tendered at the trial and/or to calibrate such evidence to determine the credibility of the witnesses at the trial court contrary to the holding in **Munya 2** case.

[56] On the other issues raised by the Appellant, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents largely reiterated and supported the submissions by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and urged this Court not to interfere with the decision of the Court of Appeal. In summary, they urged that the Court of Appeal correctly appreciated and applied the disjunctive interpretation of section 83 of the Elections Act as stated in **Raila 2017**. That the superior Courts also properly considered the Scrutiny Report and it was the Appellant's admission that his agents had all the Forms 37As, hence the allegation of missing Forms 37As does not stand. That it was not proved how the candidature of the 4<sup>th</sup> Respondent, given his former employment with IEBC affected the results, and that the swopping of the Deputy Returning Officers was not an illegality sufficient enough to vitiate the election. They were also assertive that under section 39(1)(A) and (B) of the Election's Act and Regulations 3(B) of the Elections (General) Regulations, 2012, the conduct of the elections at the Constituency level is by Constituency Returning Officers and not by Deputy Constituency Returning Officers, who, under Regulation 3(5), ONLY undertake duties assigned to them by the Constituency Returning Officer who at all times have the overall duty and obligation to conduct elections in the Constituency.

[57] Ultimately, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents urge that the superior Courts were right in their decisions and this Court should affirm the Court of Appeal judgment and dismiss the appeal with costs.

## **VI. ISSUE(S) FOR DETERMINATION**

[58] From the foregoing, the following issues emerge for determination by this Court:

- (i) Whether this Court has jurisdiction to hear and determine this Petition under Article 163 (4)(a) of the Constitution.**
- (ii) Whether the Court of Appeal abdicated its jurisdiction under Article 164 (3)(a) of the Constitution and section 85A of the Elections Act by failing to re-evaluate the evidence on record.**
- (iii) Whether the Court of Appeal misdirected itself in its findings as regards the Scrutiny Report.**
- (iv) Whether the Court of Appeal correctly interpreted and applied Section 83 of the Elections Act.**
- (v) Whether the gubernatorial elections of Lamu County were conducted in accordance with the Constitutional principles of impartiality, transparency, and neutrality.**
- (vi) Costs**

## **VII. ANALYSIS**

- (a) Whether this Court has jurisdiction to hear and determine this petition under Article 163(4)(a) of the Constitution.**

[59] The Respondents are in unison with each other that this Court has no jurisdiction under Article 163(4)(a) of the Constitution to hear and determine this matter. They urge that there is no issue of constitutional interpretation and/or application in this appeal, which issue was before the High Court and/or the Court of Appeal. The Appellant is on the other hand, assertive that this Court's jurisdiction has been properly invoked.

[60] This Court's appellate jurisdictional contours in election petition appeals from the Court of Appeal under Article 163(4)(a) of the Constitution were defined in the *Munya 1* case thus:

***“[76] We note that, right from the High Court, the central issue revolving around the petition against the applicant's election was: whether this election was conducted in accordance with the principles of the Constitution. The operative principles in question, in our view, were the provisions of Articles 81 (e) and 86 of the Constitution. Although the issues, as later formulated by the Court of Appeal, narrowed down to the specifics of irregularity, scrutiny and recount of the vote, the central theme of the application of Articles 81 and 86 to the dispute, was never lost. Throughout its analysis and assessment of the evidence on record, in determining the integrity of this particular election, the Court of Appeal was applying the provisions of Articles 81 and 86 of the Constitution. This is illustrated by the Court's own conclusion at paragraph 220 (quoted above) of its judgment.***

***[77] While we agree with Mr. Muthomi, regarding his contention that Section 87 of the Elections Act cannot be equated to a constitutional provision, we must hasten to add that the Elections Act, and the Regulations***

**thereunder, are normative derivatives of the principles embodied in Articles 81 and 86 of the Constitution, and that in interpreting them, a Court of law cannot disengage from the Constitution.”**

[61] The *Munya 1* decision has been adopted and expounded on in subsequent cases such as *Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others* [2014] eKLR. Recently, in the *Nasra Ibrahim Ibren vs Independent Electoral and Boundaries Commission & 2 Others*, Petition No. 19 of 2018 (not yet reported) the Court clarified thus:

**“[46] ... we would like to state that the *Munya 1* case did not in any way open a *carte blanche* window so that any appeal can be brought to this Court on allegation that the judgment of the Court of Appeal took a constitutional trajectory. Neither should the phrase “the Elections Act, and the Regulations thereunder, are normative derivatives of the principles embodied in Articles 81 and 86 of the Constitution” be construed as providing a blanket right of appeal to the Supreme Court in all election petition matters to the Supreme Court from the Court of Appeal. It is thus not enough for a party in an election dispute to simply cite the *Munya 1* decision and allege that in determining his matter, the Court of Appeal in its reasoning took a constitutional trajectory. A party is under a duty to squarely bring his case within the four corners of *Munya 1* case...”**

[62] Further, in *Zebedeo John Opore vs Independent Electoral and boundaries Commission & 2 others*, Petition No. 32 of 2018 (not yet reported) the Court formulated four guiding principles to aid in determining

whether Court's jurisdiction under Article 163(4)(a) of the Constitution has been properly invoked in election appeal from the Court of Appeal thus:

***“[56] We are alive, however, to the broader context of the electoral process: elections in general, draw legitimacy from the broad lines of the Constitution, and from the electoral laws. This generality, however, has to be crystallised into clearly-defined normative prescriptions, before the Supreme Court will take up an election appeal as a matter of course, by virtue of the terms of Article 163(4) (a) of the Constitution.***

***[57] Certain principles emerge from the terms of this Judgement, as follows:***

- (a) In election petitions before this Court, a party may not invoke the Court's jurisdiction under Article 163 (4) (a), where the trial Court had found that alleged irregularities and malpractices were not proved, as a basis then does not lie for an application or interpretation of the Constitution.***
- (b) The Articles of the Constitution cited by a party as requiring interpretation or application by this Court, must have required interpretation or application at the trial Court, and must have been a subject of appeal at the Court of Appeal; in other words, the Article in question must have remained a central theme of constitutional controversy, in the life of the cause.***
- (c) A party seeking this Court's intervention has to indicate how the Court of Appeal misinterpreted or misapplied the Constitutional provision in question. Thus, the said***

***constitutional provision must have been a subject of determination at the trial Court.***

***(d) As a logical consequence of the foregoing, a party must indicate to this Court in specific terms, the issue requiring the interpretation or application of the Constitution, and must signal the perceived difficulty or impropriety with the Appellate Court's decision."***

[63] Applying the foregoing principles, we find that this Court has jurisdiction to hear and determine this matter. First, it is common ground that the Scrutiny Report, subject of this matter revealed some irregularities, which in the opinion of both superior Courts, did not affect the results. The Appellant contends that this interpretation by the two Courts was erroneous. This properly invokes this Court's jurisdiction under principle (1) above, as the Court is called upon to determine whether that interpretation was right.

[64] Secondly, the Appellant has throughout the litigation journey of this matter maintained that the election was not conducted in accordance with the constitutional principles. Particularly, that the relationship of the 4<sup>th</sup> Respondent and the IEBC prior to the election rendered otiose the principles of impartiality, transparency and neutrality in elections as decreed by Article 81 of the Constitution. Further, allegations of 'ungazetted' officials being used to conduct the elections are matters of a constitutional nature that goes to the integrity of the election. It thus emerges that at the core of this matter is the interpretation and application of Article 81 of the Constitution that the superior Courts accorded it.

[65] Lastly, the Appellant also alleges that the Court of Appeal abdicated its jurisdiction by not re-evaluating evidence. This allegation goes to the scope of the jurisdiction of the Court of Appeal as constitutionally provided by Article 164(3) of the Constitution vis-à-vis its jurisdiction under section 85A of the Elections

Act. The upshot is that, we find that we have the requisite jurisdiction to hear and determine this matter.

(b) *Whether the Court of Appeal abdicated its jurisdiction under Article 164 (3)(a) of the Constitution and section 85A of the Elections Act by failing to re-evaluate the evidence on record.*

[66] Did the Court of Appeal misdirect itself on its jurisdiction and hence abdicated its mandate? The Court of Appeal’s appellate jurisdiction is provided in Article 164(3) of the Constitution thus:

***The Court of Appeal has jurisdiction to hear appeals from-***

***(a) the High Court; and***

***(b) any other court or tribunal as prescribed by an Act of Parliament.***

[67] The Elections Act is one such legislation contemplated by Article 164(3)(b) of the Constitution. It is the legislation that provides for the conduct of elections and resolution of election disputes. Therein is enacted Section 85A(1) which provides for appeals to the Court of Appeal, thus:

***“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...”***

[68] The interpretation and scope of the Court of Appeal’s appellate jurisdiction under section 85A of the Elections Act was settled in ***Munya 2*** thus:

***“[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.”*

[69] The Appellant submitted that the Court of Appeal abdicated its duty as a first appellate Court by failing to subject the evidence to a fresh and exhaustive evaluation so as to determine whether the trial Court’s conclusions were supported by evidence. That this duty on the first appellate Court is engrained in law and has been the subject of many decided cases. In urging that point, the Appellant cited a number of cases. We note that some of these cases on the jurisdiction of the first appellate Court dates back to the East Africa Court of Appeal such as *Peters v Sunday Post Limited* (1958) EA 424, *Okeno v Republic* (1972) EA 32, and *Selle and Another v Associated Motor Boat Company Ltd and others* (1968) EA 123. This is well before the promulgation of the Constitution 2010 and the enactment of section 85A of the Elections Act. Hence these decisions ought to be so distinguished.

[70] In that context, we agree with the Respondents that the appellate jurisdiction of the Court of Appeal under section 85A of the Act is a special jurisdiction from the ‘general’ appellate jurisdiction of the Court of Appeal. This jurisdiction is restricted to matters of law only. The Court of Appeal aptly noted

this in *Peter Gichuki King'ara v Independent Electoral And Boundaries Commission & 2 others*, Civil Appeal No. 23 of 2013 thus:

***“24. Article 164 of the Constitution establishes the Court of Appeal whose jurisdiction is succinctly spelt out in Article 164 (3) and its jurisdiction is to hear appeals from the High Court and any other court or tribunal as prescribed by an Act of Parliament. Section 3(1) of the Appellate Jurisdiction Act, Cap 9, further espouses the jurisdiction of this Court and it provides that the Court of Appeal shall have jurisdiction to hear and determine appeals from the High court in cases in which an appeal lies to the Court of Appeal under any law.***

***25. The jurisdiction of the Court of Appeal for election purposes is fortified by Section 85A of the Elections Act which stipulates 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. The jurisdiction of this Court to hear Election Petitions is restricted and narrowed to the extent that appeals lie only on points of law...***

[71] Hence, while the Court of Appeal, as the first appellate Court, will generally re-evaluate evidence of the trial Court, under section 85A of the Act, that jurisdiction is ‘qualified and restricted’. The evaluation anticipated is captured in the third evidentiary principle in the *Munya 1* case as being “*the evaluation of the conclusions of a trial Court on the basis of the evidence on record*”. In focus therefore are the conclusions contained in the judgment under appeal and relating them to the evidence on record; whether the conclusions are reasonably drawn from the evidence. The Court of Appeal does not and should not, under Section 85A re-evaluate evidence and reach its own conclusions.

[72] We have perused the Court of Appeal's judgment to find out whether it Court erred in the exercise of its jurisdiction and/or abdicated it. We are satisfied that the Court did appreciate its jurisdiction under section 85A(1) of the Act and in particular as delimited by the Supreme Court in the *Munya 2* case. The appellate Court then proceeded to look at the High Court's findings on each alleged irregularity and concluded as follows, on each:

(i) On the allegation of denial of the right to vote:

***“133. The above findings were based on the learned Judge’s evaluation of the evidence before her. Our reading of the appellant’s submission with respect to this issue is that he is calling upon us to reconsider the witnesses’ evidence as well as the probative value of same and make our own independent factual finding. Certainly, the same is beyond our jurisdiction and cannot be allowed.”***

(ii) Lack of impartiality and transparency in the election:

***“135. The learned Judge found that the perceived lack of impartiality had not been established and was based on mere suspicion and unfounded fear. Again this finding was based on the learned Judge’s appreciation of the evidence before her and amounted to a finding of fact. Like we have pronounced ourselves herein above, we are required to pay homage to the findings of fact by the Election Court unless it is demonstrated that such finding is perverse which is not the case here.”***

- (iii) Swapping of the Deputy Constituency Returning Officers:

***“136. The learned Judge held that in as much as it was not disputed that the Deputy Constituency Returning Officers had swapped the appellant fell short of demonstrating how the same affected and/or vitiated the conduct and outcome of the election therein. This finding like the foregoing relates to the probative value attached by the learned Judge to the evidence adduced. Consequently, we are restricted from deliberating on the same. See the Gatirau Munya case.”***

- (iv) Failure of Presiding Officers to facilitate assisted voters and display votes to agents during the sorting out and counting of votes:

***“137. Likewise, the learned Judge’s finding on the above to the effect that the appellant had not proved those allegations are matters of fact which do not fall within our jurisdiction.”***

- (v) Pre-marked ballot papers:

***“140. The parties herein took divergent positions with the appellant on one hand, alleging that there were pre-marked ballot papers in 10 polling stations which were used contrary to Regulation 77 of the Election Regulations. On the other, the respondents evidence as led by the 2<sup>nd</sup> respondent was that there were no pre-marked ballot papers rather the ballot papers for presidential election at Mapenya Primary School Polling Station 1 and 2 bore printing marks. It is on the basis of this evidence***

***that the learned Judge directed for scrutiny at Mapenya Primary School.***

***141. After taking into account the scrutiny report with respect to this issue and the evidence adduced the learned Judge observed ...***

***142. The foregoing observations and conclusions are matters of fact touching on the probative value of the evidence and the credibility of witnesses and in particular, PW65, the then presiding officer of Mapenya Primary School. To that extent, we decline to accede to the appellant's suggestion to interfere with the same without any reasonable ground.***

(vi) Voters voting without verification:

***“143. It is not in dispute that a polling clerk by the name Nafia was arrested at Kizingitini Secondary School on account of an incident that occurred during the election. Apparently, she had failed to either verify or validate voters before issuing ballot papers; it is not clear which of the two she failed to do since the appellant alleges she failed to verify while the respondents state she had failed to validate the voters. The learned Judge noted that the evidence led in favour of the appellant was contradictory. Another thing which is not clear is how many voters she had failed to verify/validate before issuance of the ballot papers. According to the appellant, they were 16 voters.***

**144. Faced with the foregoing we cannot fault the learned Judge for coming to the conclusion that the said allegation had not been conclusively proved. Furthermore, there was no evidence as to what the police investigations came to and/or the effect of the said allegation to the election in question. In the Mohamed Abdi Mohamud case we took cognizance that there ought to be a nexus between the alleged constitutional violations and the result of the impugned election. In respect to this allegation there was no connection established that even if the 16 votes were meant for the appellant, that would not have affected the results.”**

(vii) Use of Form 36B to collate election results for Lamu east Constituency:

**“146. The learned Judge found that the use of Form 36B did not affect the results of the election in Lamu East Constituency. In point of fact, agents for various parties signed the said Form confirming that the entries therein matched the ones in Form 37A and the scrutiny report also revealed as much. Yet again this is a finding of fact which we cannot interfere with.**

...

**149. All in all, the learned Judge’s conclusions with respect to the aforementioned illegalities and irregularities were supported by evidence.”**

[73] We have gone at length to examine each alleged irregularity and how the Court of Appeal approached the Appellant's invitation to re-evaluate the evidence before the trial Court. The upshot is that we find no fault on the part of the Court of Appeal. It aptly appreciated the limits of its jurisdiction and on each issue held that either the trial Judge's conclusions were supported by evidence on record, or in most cases, that the trial Judge was right in his conclusion that the irregularity had not been proved, or it had not been shown how the irregularity affected the results. Consequently, we find that the Court of Appeal exercised its jurisdiction correctly and at no time did it abdicate it. This ground of appeal therefore fails.

(c) *Whether the Court of Appeal misdirected itself in its findings as regards the Scrutiny Report.*

[74] The Appellant faulted the Court of Appeal for not considering or evaluating the Scrutiny Report which revealed instances of irregularities and illegalities. That the trial Court neither considered, evaluated nor analysed that Report yet it proceeded to conclude that the report revealed very minor errors in very few aspects which did not affect the outcome of the election. Further, that the Court of Appeal did not correct this anomaly on the part of the trial Court.

[75] It is common ground that an application for scrutiny and recount was made and a restricted scrutiny ordered on 2<sup>nd</sup> February 2018. The exercise was done and a Report filed in Court on 12<sup>th</sup> February 2018. Was this report ignored as alleged by the Appellant? It is trite that a Scrutiny Report should not be ignored, though its contents are not binding on the Court. It should be considered, evaluated and either accepted or dismissed. This was aptly captured in the persuasive decision of the High Court in *Milliah Nanyokia Masungu v Robert Mwembe & 2 others* [2014] eKLR thus:

***“... once scrutiny and recount has been undertaken at the direction of the Court, the same becomes part of the record. It becomes evidence before the Court by which the Court has to measure the compliance of the electoral process with the dictates of the Constitution and the Electoral Laws. Once undertaken, neither the Election Court nor the parties can run away from it. Unless it has been undertaken slovenly, capriciously or in a manner that is unacceptable, the results of the scrutiny and recount should not be overlooked and/or easily disregarded. The Court MUST consider the same and arrive at a conclusion as to whether the election whose challenge is before it was conducted in accordance with the Constitution and the Election Law. It is the scrutiny that preserves the integrity of the process.”***

[76] In this Court, Njoki, SCJ in her concurring opinion in *Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others* [2014] eKLR stated thus:

***“[315] From the foregoing, it is clear that scrutiny is aimed at giving the Court a fair impression of how that particular election was conducted for the purposes of finding out whether indeed the election was conducted in accordance with the law, particularly Articles 81 and 86 of the Constitution. The report of the scrutiny cannot be ignored. Scrutiny is a necessary tool in assessing the credibility of the election and the Court must take it into consideration in arriving at its determination.”***

[77] Was the Scrutiny Report in this matter considered? Before the Court of Appeal, the allegations of its non-consideration by the trial Court were dismissed thus:

***“150. There is one more issue we feel we ought to address, that is, the allegation that the learned Judge failed to consider the scrutiny report. Our perusal of the impugned judgment reveals that the said contention is far from the truth. The fact that the learned Judge’s observation or conclusion on the said report did not conform to what the appellant thought did not negate the fact that she took the same into consideration.”***

[78] We are in agreement with the Court of Appeal that indeed the trial Judge considered the scrutiny report. This was captured in the election Court’s Judgement thus:

***“Use of forms 36 B in Lamu East constituency.***

***134. The petitioner at paragraph 44 of his petition alleged that the Returning Officer at Lamu East constituency collated and declared results in form 36 B which is meant for the member of the National Assembly and instead of Form 37B meant for county governor elections. This according to the petitioner was illegal, hence the results null and void. Pw1 in his testimony said that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not dispute that form 36 B was used to announce the results from Lamu East consistency. He gave evidence that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent admitted that form 37 B was destroyed in the printer. He also discredited the form by stating that it lacked security features. He summed up his evidence that Form 36B is used to announce results for Member of Parliament.***

***135. In reply the 1<sup>st</sup> and 2<sup>nd</sup> respondents stated that the Returning Officer for Lamu East is the one who collates the results and that the instrument that declared the results was***

**Form 37 C. The court in its own wisdom after listening to the witnesses and having regard to the pleadings ordered for a scrutiny of forms 37s for Lamu East Constituency.**

**136. The exercise covered the scrutiny of all form 37 A's from Lamu East in forty (40) stations. In all the them, it was established that the presiding officers, agents of candidates and parties signed on them without noting any negative comments while the other comments did indeed confirm that the election was "free and fair". It was also confirmed from the scrutiny exercise that the total numbers tallied were the same as the ones reflected in the said form in form 36 B. It is worth noting that the law with regard to the protection of the will of the people has shifted from the Returning officers at all levels and transferred to the polling stations. The Presiding Officers are deemed to be the ones in contact with the voters and consequently what they announce as the result has to be protested at the polling center. (Refer to the court of appeal decision in Maina Kiai's case ) where the court held this position to be correct. All in all, the scrutiny report filed by the Deputy Registrar, Hon Nyamu revealed very minor errors in very few aspects which in fact did not affect the outcome of the election as recorded on form 37 As of the polling stations where scrutiny was (sic) conducted."**

[79] It thus clearly emerges that the Appellant's claim that the trial Court ignored the Scrutiny Report are baseless. The report was considered and the irregularities therein appreciated. However, in the opinion of the Court, those errors were minor and could not affect the outcome of the election. We reiterate the Court of Appeal's holding that the fact that a court's conclusions on a scrutiny

report are against a party is no ground for contesting its consideration. Indeed, the Court of Appeal did not consider the Scrutiny Report. However, it fell into no error as that was a factual issue and it correctly deferred to the High Court's findings. Consequently, this ground of appeal lacks merit.

(d) *Whether the Court of Appeal correctly interpreted and applied Section 83 of the Elections Act.*

[80] Section 83 of the Elections Act is the law applicable when an Election Court is faced with the question whether to nullify an election or not. Section 83 provides thus:

***“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 noncompliance did not affect the result of the election.”***

[81] The interpretation of this section was settled by this Court in ***Gatirau Peter Munya v. Dickson Mwenda Githinji and 2 Others*** (2014) eKLR, and recently affirmed in ***Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others*** [2017] eKLR, thus:

***“[207] Be that as it may, the issue as to how Section 83 of the Elections Act ought to be interpreted by a court of law in determining the validity or otherwise of an election, was later authoritatively settled by this Court in Gatirau Peter Munya v. Dickson Mwenda Githinji and 2 Others (2014) eKLR ... thus:***

*“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... 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. 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...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.”[Emphasis added.]”*

[82] The Court proceeded on to state as follows:

***“[209] Therefore, while we agree with the two Lord Justices in the Morgan v. Simpson case that the two limbs should be applied disjunctively, we would, on our part, not take Lord Stephenson’s route that even trivial breaches of the law should void an election. That is not realistic. It is a global truism that no conduct of any election can be perfect. We will also go a step further and add that even though the word “substantially” is not in our section, we would infer it in the words “if it appears” in that section. That expression in our view requires that, before vitiating it, the court should, looking at the conduct of the whole election, be satisfied that it substantially breached***

*the principles in the Constitution, the Elections Act and other electoral law. To be voided under the first limb, the election should be what Lord Stephenson called “a sham or travesty of an election” or what Prof. Ekirikubinza refers to as “a spurious imitation of what elections should be.”*

[83] On the disjunctive nature of Section 83, the Court rendered itself thus:

*“[211] In our respectful view, the two limbs of Section 83 of the Elections Act should be applied disjunctively. In the circumstances, a petitioner who is able to satisfactorily prove either of the two limbs of the Section can void an election. In other words, a petitioner who is able to prove that the conduct of the election in question substantially violated the principles laid down in our Constitution as well as other written law on elections, will on that ground alone, void an election. He will also be able to void an election if he is able to prove that although the election was conducted substantially in accordance with the principles laid down in our Constitution as well as other written law on elections, it was fraught with irregularities or illegalities that affected the result of the election.”*

[84] While the Appellant faulted the Court of Appeal for wrongly interpreting and applying section 83, it is our finding that the interpretation of section 83 was not an issue before the appellate Court. Before the Court of Appeal was the consideration of whether section 83 had been correctly applied by the trial Court, which issue the Court of Appeal held in the affirmative in paragraphs 126-128 of its Judgment. Be that as it may, as regards whether the Court of Appeal misapplied section 83, upon perusal of the Judgment of the Court of Appeal, it is our finding that the appellate Court fell into no error when it upheld the trial

Court's application of section 83 of the Act. Consequently, this ground of appeal lacks merit.

(e) *Whether the gubernatorial elections of Lamu County were conducted in accordance with the Constitutional principles of impartiality, transparency, and neutrality.*

[85] The Appellant's case was that the elections violated the constitutional principles of impartiality, transparency, fairness, neutrality and improper influence as decreed in Article 81 of the Constitution. This, they attributed to the fact that the 4<sup>th</sup> Respondent was a former employee of the 1<sup>st</sup> Respondent, IEBC where he served as a Constituency Returning Officer and Elections Coordinator in Lamu County. He then retired so as to run for an elective post, as the running mate for the 3<sup>rd</sup> Respondent. In the Appellant's view, that those actions tainted the election.

[86] The sacrosanct nature of the principles in Article 81 were aptly stated by the Court of Appeal in ***Richard Nchapi Leiyagu v Independent Electoral & Boundaries Commission & 2 others***, [2014] eKLR thus:

***“In our view, the provisions of Article 81 of the Constitution on the principles that underpin our electoral system are clear and unambiguous enough to entertain disputation. Under the Constitution, our electoral system must, among other things, facilitate the citizens to freely exercise their political rights. It must deliver elections by secret ballot and those elections must be transparent, free and fair; devoid of violence, intimidation, improper influence or corruption. The elections must be administered in an impartial, neutral, efficient, accurate and accountable manner, by an independent elections management body.*”**

***Article 81 is a foundational provision as far as the exercise of the sovereign will of the people of Kenya is concerned. At its heart is the burning quest to provide a framework that will enable the people of Kenya to exercise or delegate their sovereignty, which is expressly recognised in Article 1 of the Constitution, in accordance with their true free will. To that end, the election management body is under a constitutional obligation not only to deliver free, fair and impartial elections, but also to be seen to do so.***

[87] The Court of Appeal proceeded to however caution that these principles, particularly impartiality, should not be narrowly interpreted, thus:

***“Bearing in mind what we have said about the importance of impartiality and neutrality on the part of the election management body and its election officials, we must add that there are realities that also must be borne in mind, without necessarily negating the constitutional principle. In our view, it would be undermining the constitutional principle, if we were to interpret it as narrowly as the appellant invites us to do, so as to exclude sundry and all potential election officials on the basis that some candidates are their clansmen or clanswomen.”***

[88] We agree with the foregoing observation that a restrictive interpretation of the principle of impartiality in Article 81 of the Constitution may cripple the IEBC and/or infringe the political rights of the citizens. It is a fact that in conducting elections, the Electoral Board (IEBC), draws its officials from the local community, the same community from which aspiring leaders and candidates to these elective posts come from. A total bar on people who previously worked with IEBC from participating as candidates in elections will have a chilling effect on

democracy and the rule of law. For a fact, it will amount to curtailing the right enshrined in Article 38 particularly the right “*to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.*” The risk of conflict of interest is legally recognised and mitigated by the requirement for such an employee to resign six months to the election.

**[89]** However, we hasten to add that once allegations of lack of impartiality, transparency, fairness and/or improper of influence are proved, then such an election cannot stand the test of validity under section 83 of the Act.

**[90]** In the present case, it is common ground that the 4<sup>th</sup> Respondent was a former employee of the IEBC. However, the trial Court found and the appellate Court affirmed that beyond that statement of fact, the Appellant was unable to prove any allegations of impartiality and or improper influence. The Court of Appeal stated thus:

***“135. The learned Judge found that the perceived lack of impartiality had not been established and was based on mere suspicion and unfounded fear. Again this finding was based on the learned Judge’s appreciation of the evidence before her and amounted to a finding of fact. Like we have pronounced ourselves herein above, we are required to pay homage to the findings of fact by the Election Court unless it is demonstrated that such finding is perverse which is not the case here.”***

**[91]** We find no fault on this Court of Appeal’s finding. The upshot is that the Appellant’s allegations that the elections were not conducted in accordance with the Constitutional principles of impartiality, transparency, and neutrality are without merit and this ground of appeal fails.

[92] From the foregoing, this Court finds that this appeal lacks merit and is for dismissal, which we hereby do.

*(f) Costs*

[93] As regards costs, this Court in *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 others*, [2014] eKLR settled the law that as a general rule, costs follow the event but the court has the discretion in awarding costs. We see no sufficient reason to depart from this general principle.

**VIII. ORDERS**

[94] Consequently, we make the following orders:

- (i) The Notice of Preliminary Objection dated 21<sup>st</sup> September 2018 is disallowed.*
- (ii) The Petition of Appeal dated 10<sup>th</sup> September, 2018 is hereby dismissed.*
- (iii) For the avoidance of doubt, the declaration of the result of the election by the Independent Electoral and Boundaries Commission in respect of the Governor for Lamu County is affirmed.*
- (iv) The Appellant shall bear the costs of the Respondents*

**Orders accordingly.**

**DATED and DELIVERED at NAIROBI this 6<sup>th</sup> Day of February, 2019**

.....  
**D. K. MARAGA**  
**CHIEF JUSTICE & PRESIDENT**  
**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**

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

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