Mutegi v Nyaga & 2 others (Civil Appeal 48 of 2013)
[2014] KECA 697 (KLR) (8 April 2014) (Judgment)

Mercy Kirito Mutegi v Beatrice Nkatha Nyaga & 2 others [2013] eKLR

Neutral citation: [2014] KECA 697 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 48 OF 2013

ARM VISRAM, MK KOOME & JO ODEK, JJA

APRIL 8, 2014

BETWEEN

MERCY KIRITO MUTEGI ..... APPELLANT

AND

BEATRICE NKATHA NYAGA ..... 1ST RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 2ND RESPONDENT

SAMUEL MUCHERU ..... 3RD RESPONDENT

(An appeal from the judgment and Order of the High Court of Kenya at Meru, (Lesiit, J.) dated 27th September, 2013, in Election Petition No. 5 of 2013 In the matter of the Election for the Women Member of National Assembly of Tharaka –Nithi County)

JUDGMENT

1. Mercy Kirito Mutegi, the appellant in this appeal, contested for the position of Woman Member of the National Assembly for the Tharaka Nithi County during the 4th March 2013 General Elections. There were seven other contestants namely Beatrice Nkatha Nyaga (1st Respondent), Bonifacia Njeri Kigwali, Catherine Muthoni, Juliet Ithima Njage, Kathomi Gatungi Njeru, Penina Nkamba Murungi, and Anestine Nkinga Njue. The election results were declared on the 6th March 2013, by the 3rd Respondent; Beatrice was declared the winner and was issued with a certificate as the elected candidate. According to a declaration of results Form for County Woman Member of the National Assembly for Tharaka Nithi County issued by the 2nd Respondent, Beatrice garnered 48,966 votes, while the appellant came second with 36,031 votes.

2. Subsequently on the 10th April, 2013, the Independent Electoral & Boundaries Commission (IEBC), the 2nd respondent, gazetted the results. Beatrice was duly gazzeted as the elected Woman Member of the National Assembly for Tharaka- Nithi County. The dates of 6th March, 2013 and 10th April, 2013, are significant as they will feature in this judgment on an issue that was raised by the respondents in two interlocutory applications regarding the competency of the petition. The same issue was revisited in this appeal by counsel for the respondents. The appellant came second and as the results will show, the margin between her and the declared winner was 12,935 votes.

3. Being aggrieved by the manner in which the elections were conducted, the appellant challenged the validity of the elections before the High Court citing numerous electoral malpractices on the part of the respondents. The appellant averred that the elections did adhere to the objectives and principles set out in *the Constitution* and the *Elections Act*. In particular the appellant alleged that the 1st respondent breached the election regulations by communicating with voters during the voting; bribery, treating and exercising undue influence upon the voters; visiting a witch doctor to procure the treatment of monies used to bribe and trick the voters. The 2nd respondent was faulted for failing to count, tally and collate the votes from all the polling stations in the presence of the appellants' agents; manipulating the votes and failing to reconcile the huge disparity between the votes cast for the Governor and Senator with those of the Woman Representative. The 3rd respondent was accused for failing to report the malpractices by the 1st respondent to the relevant authorities; for failure to allow the appellant's agents in the polling stations during voting and counting as provided for in the regulations. The appellant also alluded to a request for recount and scrutiny of votes in the petition although no particulars were provided nor was it specifically prayed for in the main prayers. Among other orders she prayed in the main is that the election of the 1st respondent be nullified.

4. The petition before the Election Court was strenuously opposed by the respondents. The 1st respondent filed her detailed response. Several applications were also filed seeking the petition be struck out on grounds of incompetency. In one such application, the respondents sought to strike out the petition on the grounds that it was filed outside the 28 days period in contravention of the express provisions of Article 87 (2) of the Constitution. The appellant was supposed to file the petition within 28 days after the declaration of the results which was done on the 6th of March, 2013. The 2nd and 3rd respondents filed a joint response to the petition. They denied all the allegations of malpractices and the alleged election offences of bribery and corruption that they contended were never brought to their attention. They denied all the allegations save for one incident where a Deputy Presiding Officer in charge of Kirubia polling station was seen getting into a car belonging to one of the candidates contesting for the seat of Member of Parliament on the polling day. The 3rd respondent took immediate action by barring the official from the polling station and the matter was reported to the police whereupon the said officer was arrested.

5. The trial Judge disposed of the interlocutory applications that were filed; the appellant had filed a Notice of Motion seeking inter alia for scrutiny and recount of the votes; the 1st respondent's Notice of Motion sought for an order of striking off the petition on the grounds that it was filed out of time. The 2nd and 3rd respondents' Notice of Motion sought for orders of declaration that the Sections 76 (1) (a), 76(2) and 76(3) of the *Elections Act* was unconstitutional. All these applications were disallowed, and the Judge proceeded to try the Petition.

6. The learned trial Judge of the Election Court identified the following issues as disputed issues that called for her determination:-

1. Whether the 1st respondent committed election offences and engaged in malpractices contrary to Section 63, 71, 72 and 82 of the *Elections Act* and the regulations made thereunder.

2. Whether the 2nd and 3rd respondents conducted the elections for Woman Member of National Assembly for Tharaka Nithi County in an irregular, unlawful and unfair manner with the intention of denying the petitioner her right to be elected as the Woman Member of the National Assembly thereof.

3. Whether the 1st respondent was validly and lawfully elected as the County Woman Member of the National Assembly for Tharaka Nithi County in the elections held on 4th March, 2013, due to her participation in the electoral malpractices as alleged.

4. Whether or not there are valid grounds to nullify the election of the 1st respondent as the elected County Woman Member of the National Assembly for Tharaka Nithi County; and if so, should the elections of the 1st respondent be nullified?

5. Whether or not the irregularities were so substantial as to affect the results declared by the 2nd and 3rd respondents.

6. Whether or not the results in the 10 polling stations specified in paragraphs 42 of the petitioners supporting affidavit to the petition were properly counted, tallied and correctly recorded in the statutory Forms.

7. Whether the petitioner is entitled to any of the reliefs sought in the petition; what orders, remedies and declarations the Court should make.

8. Who should bear the costs of the petition?

7. After hearing the parties, their witnesses, the detailed submissions by respective counsel, and after carefully analyzing the above issues, in a carefully written judgment, the learned Judge of the Election Court found no merit in each of the allegations and proceeded to dismiss the petition for lacking in merit. The costs were awarded to the respondents. This is what the Judge concluded in a pertinent paragraph of the judgment:

> " 175. Having considered the evidence before the Court, I agree that there were irregularities on the part of RRW2 in the filling and supplying Form 36 which was not contemplated under the Regulations. The Form 36 supplied to the Agents was the one used in the tallying process and had alterations and in some cases, like those shown in the table at paragraph 42 of petition, the registered voters for each election in the same electoral area did not tally. It is that draft Form 36 which is the reason for the difference noted in the table at paragraph 42. It has been proved that the draft Form 36 was not the one used to announce the results at the Constituency and the County level.
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> 176. The Petitioner did not include the one she was holding in her Petition and so there was no opportunity to compare the two and determine whether there were material differences in both. Besides, the source of her document was not confirmed, since she claims to have received from someone who is not a witness before the court.
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> 177. Be that as it may, I find that the irregularities complained of were not so great as to affect the result or lead to nullification of the election. It is trite law that no

election shall be declared void by reason of non-compliance with any written law relating to that election. I find that the results in the ten Polling Stations specified in paragraph 42 of the Petitioner's supporting affidavit to the Petition were properly counted, tallied and correctly recorded in the Statutory Forms.

181. The Petitioner has not succeeded in establishing any of the allegations. She has failed to show that she is deserving of any of the reliefs, orders and or declarations sought in the Petition. The answer to this issue is, therefore, in the negative.

189. Costs usually follow the events. In this Petition, it is the Petitioner who has lost her case. It is only fair and just that the Petitioner pays costs to the Respondents pursuant to Rule 34 of the Rules. I order that the maximum amount of costs that the Petitioner shall pay to the Respondents is Kshs. 3.5 Million. The 1st Respondent shall be paid a maximum of Kshs. 2.2 Million while the 2nd and 3rd Respondents shall be paid a maximum of Kshs. 1.3 Million. The amount deposited with the Court shall remain deposited in Court pending the taxation of the costs.

Final orders

191. The orders sought by the Petitioner are without merit and are declined.

192. I declare that the 1st Respondent was legally validly and lawfully elected as the Women Representative of the Tharaka-Nithi County in an election that was in the opinion of this Court free, fair and transparent with an overwhelming big margin of votes. I declare that the results reflect the will of the electorate of the Tharaka-Nithi County and will not interfere with them".

8. This is the judgment that provoked this appeal. The appellant filed a total of 24 grounds of appeal. During the hearing of this appeal, and in his address to us, Mr. Agwara, learned counsel for the appellant combined his arguments into three thematic broad issues. To avoid repetition, proliferation and obvious typographical errors we summarize the grounds of appeal in line with the arguments as thus;

That the learned Judge erred in law by:

Failing to order a scrutiny and recount in the face of several irregularities that were noted in the judgment. Disregarding the evidence of PW8 on voter bribery that identified the 1st respondent as one of the people who were dishing out money to influence the voters unduly.The trial Judge was faulted for capping the costs of the petition to Ksh 3.5 million, being the highest costs for a Parliamentary seat.PARA 9. In further arguments Mr. Agwara relied on the written submissions in which he formulated five issues for determination as follows;

"(a) Whether in determining the validity, lawfulness and the legality of the election of the 1st respondent as Woman Member of the National Assembly for Tharaka- Nithi County, the Superior Court properly interpreted and applied the general electoral principles provided in *the Constitution*, together with the provisions, rules and regulations stipulated under the Election Act 2012.

(b) Whether the 1st respondent committed election offences and engaged in serious electoral malpractices contrary to *the Constitution*, together with the provisions, rules and regulations stipulated under the *Elections Act* 2012.

(c) Whether or not this Honourable Court can consider issues of fact in determining the Appeal herein in view of the provisions of Section 85A of the *Elections Act* 2012.

(d) Whether or not the Learned Judge's assessment of Party and Party costs of Ksh 3.5 Million was proper, fair and just in the circumstances of the petition.

(e) Who should bear the cost of the Petition in the High court and the Appeal herein?"

10. Mr. Agwara submitted that the irregularities which were highlighted in the petition and the evidence were fundamental in nature, and therefore they affected the results; those irregularities contravened the provisions of Section 83 of the *Elections Act* and the provisions of Article 81 of *the Constitution* which provides that the electoral system shall comply with the following principles:

(e) free and fair elections which are;

i. by secret ballot;

ii. free from violence, intimidation, improper influence or corruption.

iii. conducted by an independent body;

iv. transparent; and administered in an impartial, neutral, efficient, accurate and accountable manner.

11. Further under Article 86 of the Constitution, the 2nd Respondent is obligated to ensure that in every election:

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 each polling stations are openly and accurately collated and promptly announced by the returning officer, and that;

d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safe keeping of election materials.

12. According to counsel, the above principles are repeated under Section 25 of the IEBC Act and also under the Regulations to the *Elections Act*. The Returning Officer was obliged to complete Forms 33 which were accountable documents out of which the results are supposed to be transferred to Form 35 and 36; the absence of these Forms meant the counting and tallying was conducted contrary to the provisions of Regulations76 and 78 of the Act. According to Counsel, the trial Judge acknowledged

there was noncompliance with the regulations especially where the Judge observed in the judgment as follows:

> " 124. Forms 35 are completed at the Polling Stations according to the Schedule under the Regulations. The schedule reads 'Declaration of Women Representative Election Results'. It is Presiding Officers who have the information required to complete these Forms. That information is then delivered to the County Co-ordinator in the Form of the Form 35 which is an open document; and is accompanied by the parent documents where the data is obtained from, sealed in the ballot boxes. These other documents include all the ballot papers, whether cast or not, rejected, contested, valid and spoilt, among others. This is clear proof that the Presiding Officer, who is the custodian of all these documents containing the required data to complete Form 35, should fill the said Forms. The Presiding Officer is the officer accountable for the information contained in all the supporting documents. His role cannot under any circumstances be taken over by any other officer, apart from of course his Deputy. Form 35 is completed at the Polling Station by the Presiding Officer, and not at the Constituency Tallying Centre where the co-ordinatiors were stationed".
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> "125. I find that the requirement under the Regulations 83, that the Returning Officer should complete the details of Form 35 is not only humanly impossible but also ludicrous. I recommend an amendment to Regulation 83 to remove the absurdity created by that requirement".

13. It was Mr. Agwara's view that the Judge having agreed there was failure on the part of the Returning Officer, who failed to complete the Forms as required by the Regulations, the appellant had met the threshold of proof that on a balance of probabilities the allegations cited in the Petition were proved and the Court should have made an order of scrutiny and recount of the votes. Counsel drew our attention to the evidence of one Stephen Nthiga Mitungo who testified as RW4. He admitted that he ferried the IEBC election materials on the Election Day despite the fact that he was a member of the 1st respondent's campaign strategist. The appellant's witnesses adduced sufficient evidence to show that her agents were denied access to oversee the elections as provided for under Regulations 62 (1), (2) and 74 of the Elections (General) Regulations 2012. The Returning Officers for Mara, Tharaka and Chuka Igambang'ombe were all faulted for not entering the results in the tallying Form 33 which was difficult to alter. The three Returning Officers confirmed that they received the results from the Presiding Officers in Form 35 which was contrary to the provisions of Regulation 76 (3).

14. Counsel made reference to the case of; - Raila Odinga V IEBC & 3 Others, EP No. 5 of 2013, in which he argued the Supreme Court set the standard of proof on a balance of probabilities except where the court was faced with allegations of criminal or quasi criminal nature. That is when the threshold is higher than a balance of probabilities but not beyond reasonable doubt. Counsel took issue with the following conclusion by the trial Judge that;-

> " ... in order to have a nullification of the elections based on failure to fill statutory Forms, the Petitioner needed to prove beyond reasonable doubt that the said failure was a deliberate act intended to subvert the democratic right of voters to choose a candidate of their choice, and that it affected the integrity and validity of the elections as to invalidate them..."

Mr. Agwara submitted that the above statement was erroneous in law, and he termed it a dangerous precedent as he argued there is no legal requirement for proof beyond reasonable doubt in election petitions that applies only in criminal matters.

15. On the grounds of appeal touching on the allegations of bribery and election offences allegedly committed by the 1st Respondent; there were allegations of massive voter bribery by supporters of the 1st Respondent. In particular, Murithi Bore PW8 swore an affidavit and stated as follows:

> That I am a male adult of sound mind and disposition and a registered voter at Kambandi Primary School Polling Station and an agent of Democratic Party of Kenya (DP), hence fully conversant with the facts relating to this matter and as such competent to swear this affidavit.That on 3rd March, 2013, at about 10 p.m., I was at Kambandi Market. There were many other people when Beatrice Nkatha, Women Representative candidate for Tharaka-Nithi County arrived in her vehicle accompanied by three people. She had earlier passed word that she would come to the market. These people and others had left, were waiting for her the whole day until she arrived.That she addressed the people and asked them to vote for her, Ragwa and other TNA candidates. She reminded them that their symbol was a dove.That after she addressed the crowd of about 75 people, she asked them to queue for "gachai" (money), so they could vote for TNA. "TNA is not mean" she said. She had a bunch of 200/= notes which she personally gave 200/= (one note) to each individual present. However, towards the end, one person snatched the remaining notes from her and escaped into the darkness. I was given a two hundred shillings note.That on 4th March, 2013, about 12.30 pm, Nkatha's Agent arrived at Kambandi market in a vehicle Reg. No. KBR 375R, a Probox, navy blue in colour. They were three in number. They parked at the matatu stage and started talking to those who were going to vote individually.That they were seen dishing out money. They also urged those they talked to vote for Nkatha, Ragwa and other TNA candidates. They asked them to vote for those with dove as their symbol.The Judge was faulted for disregarding this evidence which directly implicated the 1st Respondent with election offences.

16. On the award of costs, counsel for the appellant argued that the conduct of the 2nd and 3rd respondent created doubts as to whether the March, 4th 2013, Elections for Woman Member of the National Assembly for Tharaka Nithi was free and fair and whether it was conducted according to *the Constitution* and the law. The Judge acknowledged there were irregularities but awarded hefty costs against the appellant. According to counsel, the petition was not frivolous, and the 2nd Respondent who allowed the irregularities to take place should have born the costs of the petition. Counsel cited the case of Thuo Mathenge & Another v Nderitu Gachagua & 2 Others, 2013 eKLR, in which the IEBC was ordered to pay the costs of the Petition as the body that caused the mistake in printing of erroneous ballot papers. On the competency of the appeal, Mr. Agwara argued that it is the provisions of Article 164 of the Constitution that sets out the jurisdiction of the Court of Appeal to hear appeals from the High Court. Thus, conclusions that are drawn from misapprehension of facts are matters of law that should be determined by the Court of Appeal.

17. He made reference to the dicta in the case of Timamy Issa Abdala v Swaleh Salim Imu & 3 Others, 2014 eKLR where the Court of Appeal in Malindi while dealing with the issue of jurisdiction of the Court of Appeal under Section 85 A of the Act in election petition cited with approval the dicta in the

case of Bracegirde vs Oxley (1947) 1ALL ER 126 and Attorney General vs Davad Marakaru, (1960) EA 486 and they stated as follows:-

> " In Makarau case (supra) the court in considering an appeal on matters of law, by way of case stated, held that a decision is erroneous in law if it is one to which no court could reasonable come to. The court followed Bracegirde vs Oxney (supra) in which Lord Denning gave the following guidance;-
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> > The question whether determination by a tribunal is a determination on 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 facts. It is essentially a matter for the tribunal who sees the witnesses to assess their credibility and to decide the primary facts which depends on them. The conclusions from those facts are sometimes conclusions of fact and sometimes of law... The court will only interfere if the conclusions cannot reasonably be drawn from the primary facts..."
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> Counsel submitted that there are points of law arising from the conclusions by the trial Judge and are all contained in the grounds of appeal. On the competency of the appeal, Mr. Agwara's submission was that the Supreme Court decision in the case of;- Hassan Ali Joho & Another v Suleiman Said Shubhul & 2 Others, Petition No.10 of 2013, was not applicable in this Petition as the application of Section 76 (1) (a) was still valid and applicable when the Petition was filed; it cannot be considered in retrospect. This appeal was filed on 20th December, 2013, directions were given on 20th January, 2014, and there was no inclination that it would be struck off; thus an application to strike the Petition is utterly prejudicial to the appellant.

18. On the part of the 1st respondent, Mr. Mithega sought leave vide a Notice of Motion he had filed the day before the hearing of the appeal. Counsel was allowed under Rule 104 (b) of the Court of Appeal Rules to argue a point of law on the competency of the appeal alongside his response to the entire appeal. Accordingly, the competency of this appeal was argued on condition that the determination, thereto, will be incorporated in the final judgment. Mr. Mithega submitted that the results for the Woman Member of the National Assembly for Tharaka-Nithi County was declared on 6th March, 2013, whereas the petition was filed on 10th April, 2013, that was 7 days outside the 28 days provided by Article 87(2) of the Constitution of Kenya 2010. This issue was raised before the trial court, it was rejected and the petition which ought not to have proceeded for hearing in the first place, did proceed to hearing. The Supreme Court in the case of Hassan Ali Joho & Another –vs- Suleiman Said Shabbal & 2 Others, Petition No. 10 of 2013, declared Section 76(1) (a) of the *Elections Act* unconstitutional. In other words, this petition that was filed 7 days after the declaration of the results was void in law ab initio.

The Supreme Court held:

> " We held that the certificate in Form 38 comprises the declaration of election results. This declaration sets in motion the timeframe within which to lodge an election petition, and

it is hereby so held. Consequently, the provisions of Article 87(2) of *the Constitution*, as elaborated herein before, and is hereby declared unconstitutional to that extent".

19. In view of the above determination by the Supreme Court, it was Mr. Mithega's view that this Court lacked jurisdiction to entertain a petition that was a nullity in the first place. The High Court lacked jurisdiction to determine the Petition as well and this was confirmed by the dicta in the case of Sir Ali Bin Salim vs Shariff Mohammed Sharry, 1938 KLR where it was stated:

> "(i) If a court has no jurisdiction over the subject matter of the litigation, its judgments and orders, however precisely certain and technically correct, are mere nullities and not only voidable, they are void and have no effect either as estoppel or otherwise, and may not only be set aside at any time by the court in which they are rendered, but be declared void by every court in which they may be presented. It is well established law that jurisdiction cannot be conferred on a court by consent of parties and any waiver on their part cannot make up for the lack or defect of jurisdiction".
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> (ii) Macfoy –vs- United Africa Co. Ltd. (1961) 3 All E.R. 1169, Lord Denning at page 1172 stated as follows:
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> > "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse. So will this judgment collapse if the statement of claim was a nullity. But if an act is only voidable, then it is not automatically void. It is only an irregularity which may be waived. It is not to be avoided unless something is done to avoid it. There must be an order of the court setting aside: and the court has discretion whether to set it aside or not. It will do so if justice demands it but not otherwise".

20. Apart from the fact that the petition before the High Court was filed late, Mr. Mithega also faulted this appeal; under the provisions of Section 85A, an Election Petition appealed to the Court of Appeal is required to be filed within 30 days of the decision of the High Court; the appellant requested for certified copies which was contrary to the rules, whereas, the proceedings and copies of judgment were available to the parties from the date of the judgment that was the 27th of September, 2013, this appeal was filed on the 20th December 2013 outside the timeframe of 30 days that is set by the *Elections Act*; the provisions of the *Elections Act* should be followed strictly. The appeal ought to have been filed on or before the 27th October, 2013, but instead it was filled on the 20th December, 2013. The appellant sought a certificate of delay, which in essence extended the time for filing the appeal. He submitted that Rule 82 of the Court of Appeal Rules does not apply to election petitions.

21. On this ground too Mr. Mithega asked us strike out the appeal as the appellant unnecessarily slept on their laurels while waiting for certified copies of proceedings. On this point, we have perused the record; there is no evidence to show that the proceedings and judgment were supplied to the appellant on the 27th September, 2013. Secondly since the appellant was issued with a certificate of delay on the 11th December, 2013, showing that the Registry took 60 days to prepare the record of appeal. Thirdly,

an application was not filed under Rule 84 of this Court Rules seeking to strike out the appeal. In the premises we embrace a broad view of justice and allow the appellant the benefit of doubt and overrule the submission that the appeal before us was filed out of time.

22. On the merits of the appeal, 1st respondent supported the judgment of the High Court; and counsel argued the appellant did not prove any of the allegations to the required standard. The court was well guided by the five principles on how to determine election petitions. The court considered the pleadings and the issues emanating therefrom were all addressed in a carefully written judgment. The minor irregularities that were noted such as failure by the Election Officials to complete Forms 33, did not subsequently affect the results; the supreme will of the people of Tharaka Nithi Constituency gave the 1st respondent majority votes. The Judge was right in concluding the will of the people cannot be disturbed merely because some Forms were not signed by the candidates, agents when no one had control of the will or movements of the agents. Moreover, alterations in Forms 35 and 36 or any other Forms cannot be used as a ground to set aside an election, unless it can be proved the alteration was done to defeat the will of the people. There is no provision in *the Constitution* or the *Elections Act* that there should be no alterations. Human errors are inevitable; there was no evidence that the errors were not done in good faith.

23. Counsel distinguished this case from that of Peter Gichuki King'ara v IEBC & 2 OthersCivil Appeal No. 31 of 2013 (Nyeri , on the grounds that there was no prayer for recount and scrutiny in the instant case, even this appeal is not predicated on scrutiny and recount and a party cannot get what they did not ask for. On the allegations of bribery, Mr. Mithega submitted that they all came down as a cropper. The allegations of bribery are what can be gathered from the pleadings and the credibility of one Muriithi Bore (PW 8) who said he received Ksh.200 for a cup of tea was found wanting by the trial Judge who had an opportunity to see and hear the witness testify. The issue of the appellant's agents was well addressed by the Judge, that the law is clear, the agents need not be present at all the time. In any event the agents who testified did not have accreditation documents. On the issue of costs, Mr. Mithega defended the order that cost of Kshs. 3.5 Million to be shared among 3 respondents as a reasonable one where the Judge properly exercised her discretion as costs follow the events.

24. M/s Omuko, learned counsel for the 2nd and 3rd respondents basically adopted the submissions by counsel for the 1st respondent regarding the competency of the appeal. Counsel further elaborated on the merit of appeal that she argued was basically predicated on matters of fact: she argued that the factual findings by the trial Judge on whether Forms 35 can be manipulated are not within the province of the Court of Appeal. M/s Omuko referred to the case of Peter Gichuki King'ara (supra), where this Court held:

> "Jurisdiction flows from the law, and without Jurisdiction the Court downs it tools".

The Court also reiterated the principles in Lillian 'J' case 1989 KLR 1:

> "Jurisdiction flows from the law, and the recipient court is to apply the same with limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation by way of endeveavors to discern or intercept the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity".

25. M/s Omuko urged us to ignore issues of facts which include:

> The learned Judge erred in holding that the Appellant failed to adduce material evidence to prove that his agents were denied entry into the polling station and the failure to allow them affected the results.The learned Judge erred in holding that the failure by the 2nd

Respondent to fill Form 33 affected the election results.The learned Judge erred in finding that the Appellant needed to demonstrate how Form 35 was easier to manipulate than Form 33.The finding of the learned Judge that no evidence was adduced to establish that the 1st Respondent participated in electoral malpractices was factual.The learned Judge erred in failing to find that making draft Form 36 created room for manipulation of election results.

26. Regarding the issues of electoral offences and malpractices, counsel submitted that the High Court was properly guided in finding that the allegations were not proved to the required standard. The trial Judge found the appellant failed to adduce cogent, compelling, credible and substantial evidence to prove on a standard of proof above the balance of probability but below proof beyond reasonable doubt. The standard is established under Section 107 of the *Evidence Act* and also by the Supreme Court in the case of Raila Odinga case held: -

> " ...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 the case of data-specific electoral requirements (such as those specified in Article 38(4) of *the Constitution*...), the party bearing the legal burden of proof must discharge it beyond any reasonable doubt".

27. The trial Judge also disregarded the evidence of PW 8 who was described as partisan, an accomplice and not credible. In that case, his evidence required corroboration as it was held in the Indian Supreme Court in the case of D. Venkata Reddy v R. Sultan and Others, AIR 1976 SC 1599, which held that:

> " ...the allegations of corrupt practice being in the nature of a criminal charge, must be proved beyond reasonable doubt. When the election petitioner seeks to drive the charge by purely partisan evidence of his workers; agents, supporters and friends, the court would have to approach the evidence with great care and caution, and would, as a matter of prudence, though not as a rule of law, require corroboration of such evidence from independent quarters, unless the court is fully satisfied that the evidence is so creditworthy and true, that no corroboration to lend further assurance is necessary, [451 A] (d). The attempt of the agents or supporters of the defeated candidate is always to get the election set aside by fair means or foul and the evidence of such witnesses must, therefore, be regarded as highly interested and tainted evidence".

28. Further, Halsbury's Laws of England 4th Edition Vol. 15 paragraph 695, the learned authors gave an insight of the nature of evidence required to prove bribery as follows:

> " ...Due to proof of a single act of bribery by or with the knowledge and consent of the candidate or by his agents, however insignificant that act may be is sufficient to invalidate the election, nor can they allow any excuse, whatever the circumstances may be, such as they can allow on certain conditions in cases of treating or undue influence by agents. For these reasons, clear and unequivocal proof is required before a case of bribery will be held to have been established. Suspicion is not sufficient and the confession of the person alleged to have been bribed is not conclusive. A corrupt motive must in all cases be strictly proved. For this purpose a corrupt motive in mind...".

29. M/s Omuko further referred to the provisions of Section 83 of the Election 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

principle laid down in *the Constitution* and in that written law or that the non-compliance did not affect the results of the election".

The burden lay on the appellant to prove the 2nd and 3rd respondents did not conduct the elections according to *the Constitution*, the *Elections Act* and the governing regulations. The allegations were that the appellant's agents were denied entry to the polling stations. The trial Judge who heard and saw the witnesses testify was satisfied that some agents of the appellant did not have accreditation documents which were a requirement under the Rules. Moreover, it is not a must that every candidate must have an agent in every polling station and failure to have an agent is not a ground for nullifying the elections.

30. On the issue raised by the appellant regarding the provisions of Regulation 79(1) on the signing of the declaration of elections, M/s Omuko was emphatic that it is the Presiding Officer who is required to immediately after announcing the results at the polling station, to communicate the results to the Returning Officer and provide the declaration to the candidate or their agents and then offer a copy at the public entrance to the polling station. The trial Judge, therefore, rightly held that Form 35 is completed at the polling station by the Presiding Officer and not at the Constituency Tallying Centre where the co-ordinators were based. The Judge also found no evidence to prove that Form 36 in respect of the subject election were manipulated. Lastly on costs, M/s Omuko submitted that the trial Judge merely caped the costs pending taxation.

Analysis

31. We wish to state on the onset that in determining the three or so legal issues that arise in this appeal, some of the issues may cut across the spectrum of the factual evidence especially on the conclusions arrived at after the analysis of the primary evidence by the Election Court. We are nonetheless conscious that our jurisdiction is only limited to determination of points of law and thus, our concern regarding the issues that dealt on facts will be limited to our duty of re- evaluation of the Judge's conclusions; and if the conclusions are erroneous; that is, not supported by evidence and the law; the matter becomes a point of law. As it was held in the case of Mwangi v Wambugu, [1984] KLR 453:

> " A Court of Appeal will not normally interfere with a finding fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding; and an appellate court is not bound to accept the trial Judge's finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

32. We have summarized albeit briefly, what constituted the pleadings, the evidence before the Election Court and the submissions before us. The primary issue for us to determine in this appeal is whether there is a valid appeal on record. Thereafter we will proceed to determine the points of law that arise in this appeal as provided for under Section 85A of the *Elections Act*. The first issue relates to the competency of this appeal.

The respondents argued and it is indisputable that the results for the Women Member of the National Assembly for Tharaka Nithi were declared on 6th March, 2013, by the Returning Officer. Therefore, the appellant ought to have filed the petition within 28 days, that is on or about 3rd April, 2013, that notwithstanding, this petition was filed on 10th April, 2013. This issue was raised before the learned trial Judge, through two interlocutory applications. The two applications were filed by the respondents dated the 24th May, 2013, and 10th June, 2013, seeking to strike the appellant's petition on the grounds that it was filed late. A ruling delivered by the Election Court in respect of an application to strike out

the petition is however not included as part of this record. The ruling which we gather was delivered on 25th July, 2013, was a necessary document for the determination of this appeal as provided for under Rules 87 (k) of the Court of Appeal Rules.

33. Needless to state that failure to include necessary documents in the record of appeal may lead to the appeal being struck out. We have been able to establish from the High Court records that the two applications that sought the striking out of the petition were heard and dismissed as the learned Judge held that the provisions of Section 76 (1) (a) of the *Elections Act* was not unconstitutional.

34. At the hearing of this appeal, Mr. Mithega successfully sought to raise the same issue albeit alongside other arguments on the merit of the appeal. He filed an application whereby he sought for leave to challenge the competency of the appeal pursuant to the provisions of Rule 84 and 104(b) of this Court's Rules. Mr. Mithega submitted that on 4th February, 2014, , the Supreme Court authoritatively decided in the case of Hassan Ali Joho & Another,(supra) the question of the ultimate date of declaration of election results by holding that the provisions of Section 76(1) of the Election Act was inconsistent with the provisions of Article 87(2) of the Constitution. They held:

> " 100. After considering the relevant provisions of the law, as well as the submissions made before us, and after taking due account of the persuasive authorities from a number of jurisdictions, we have come to the conclusion that the ultimate election outcome, for the gubernatorial office which is in question here, is the one declared at the county level by the County Returning Officer who issues the presumptive winner with a certificate in Form 38.
>
> 101. In so far as *the Constitution* (Article 87(2) provides that:
>
> > "Petitions concerning an election other than a presidential election, shall be filed within twenty eight days after the declaration of the election results...,"

While the *Elections Act*, 2011 (Section 76(1) provides that:

> "A petition –
>
> To question the validity of an election shall be filed within twenty eight days after the date of publication of the results of the election in the Gazette...,"and as it is clear that expedition in the disposal of electoral disputes is a fundamental principle under *the Constitution*, we hold the said provision of the *Elections Act* to be inconsistent with the terms of *the Constitution*.

By Article 2(4) of *the Constitution*:

> "Any law... that is inconsistent with this Constitution is void to the extent of the inconsistency, any act or omission of *the Constitution* is invalid".

35. It is now established by this decision with absolute clarity that the provisions of Section 76(1) (a) of the Election Act is inconsistent with the Provisions of Article 87 (2) of the Constitution and to that extent Section 76 (1) (a) is null and void. A valid petition could only be filed within 28 days after the declaration of the results by the Returning Officers. Mr. Agwara urged us to find the decision by the Supreme Court did not have a retrospective effect, in other words that judgment did not extend its scope to the matters that were completed before the 4th of February, 2014, and also this appeal that was filed on the 20th December, 2014. Or simply put, the judgment of the Supreme Court was not retroactive.

36. We will not say much regarding this aspect of submission for reasons that we cannot envisage the ramifications of the applicability of the principle of retroactivity (or lack of it), regarding judicial pronouncements as opposed to Legislation. Secondly we are aware the same principle of retroactivity was not argued before the Election Court, the learned Judge did not express her views on the matter, and being aware of our mandate as an appellate court, it is not opportune for us to pronounce ourselves on the matter. As the matters stand, the petition by the appellant did not lie in the High Court. It was filed on the 10th April 2013, which was more than 28 days provided for under *the Constitution* after the results of the Woman Member of Parliament were declared on the 6th March, 2013. The petition thus should have been struck out.

37. We are alive that jurisdiction for a court of law is everything and without it a court of law will as a matter of course down its tools. Borrowing from a Text "Words and Phrase Legally defined" Vol 3 I-N Page 113, "Jurisdiction" is defined as

> " By jurisdiction is meant authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a Formal way for its decision. The limits of this authority are imposed by the statute, charter, or Commission under which the court is constituted and may be extended or restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters which the particular court has cognizance, or as to the area over which the jurisdiction shall extend or it may partake of both of these... Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given"

38. This appeal was however argued before us on merit, besides raising the issue of the competency of the appeal as a point of law, the appellant proceeded with the petition before the Election Court. Indeed she cannot be faulted because there was confusion caused by the conflicting provisions of *the Constitution* and the Election Act, and the Election Court did allow her to proceed. The Court of Appeal also allowed the appellant to proceed with this appeal against the decision of the High Court. This appeal was filed on 20th December, 2013. Having held as we have, that the petition before the Election Court did not lie for reasons that the Election Court's jurisdiction extends to determining validly filed petitions according to *the Constitution*, we have agonized over whether we should down our tools at this stage. We have further considered that since we allowed the appeal to be argued before us on its merits, we should proceed to determine those merits de bene esse. This is a Latin term that means;-

> " Of well-being" in a legal context, it refers to things done conditionally; allowed to stand for the time being; done in anticipation of future need. For example, an appearance de bene esse is a special appearance allowing a person to fulfill their obligation to appear without submitting to the court's jurisdiction unless there is a final determination that the right to object to jurisdiction has been waived".

39. Appeals in election petitions that are appealable to the Court of Appeal are guided by the Constitution and the *Elections Act* in particular the provisions of Section 85A which provides:

> " An appeal from the High Court in an Election Petition concerting Membership of the National Assembly, Senators or the Office of the County Governor, shall lie to the Court of Appeal on matters of law only".

We agree Election Petitions are not ordinary suits, they are sui generis, matters which in matters of appeal are the ones aptly envisaged in *the Constitution* as under Article 164(3):

> " The Court of Appeal has jurisdiction to hear appeals from:-
>
> The High Court and Any other court or tribunal as prescribed by an Act of Parliament".See also the dicta by the Supreme Court of India in the decision of JYOTI BASU & OTHERS V. DEBI BHOSAL & OTHERS reported in AIR 1982 SC, 983. The Court held;
>
> " An election petition is not an action at common law, or in equity. It is a statutory proceeding to which neither the common law nor the principles of equity apply but only those rules which the statute makes and applies it is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to common law and equity must remain strangers to the election law unless statutorily embodied. A court has no right to resort to them on considerations of alleged policy in such matters, as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, the court is put in a strait jacket..."

40. What are the points of law raised in this appeal? An appellate court will not ordinarily differ with the findings on a question of fact, by the trial Judge who had the advantage of hearing and seeing the witnesses. Our role is to review the evidence and determine whether the conclusions reached are in accordance with the evidence and the law. A conclusion although based on primary factual evidence that is erroneous becomes a point of law. See the case of SELLE & ANOTHER V ASSOCIATED MOTOR BOARD COMPANY LTD AND OTHERS [1968] 1 EA 123, the Court of Appeal for East Africa set out the principles to guide the Court of Appeal in determining an appeal from the High Court as follows:

> " An appeal from the High Court is by way of retrial and the Court of Appeal is not bound to follow the trial judge findings of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of thedemeanour of a witness is inhabited with the evidence generally."

In a similar case this Court held in Hahn V Singh [1985] KLR 716 that:

> " On appeal of course, before coming to a different conclusion on the typed evidence this court should be satisfied that the advantage enjoyed by the trial judge of seeing and hearing the witnesses is not sufficient to explain or justify his conclusion."

41. The trial Judge identified the issues that were drawn from the evidence by all the witnesses and the pleadings. We must offer our commendation to the Judge for summarizing and subjecting the entire evidence to a very exhaustive analysis as required of the trial Court. The first issue the Election Court dwelt with, after disposing numerous interlocutory issues on the competency of the petition, was whether the 1st respondent committed election offences and engaged in electoral malpractices contrary to Section 63, 71, 72 and 83 of the *Elections Act*.

On this issue, the Judge concluded:

> " The petitioner has to adduce cogent, compelling, credible and substantial evidence to prove on a standard of proof beyond reasonable doubt that indeed the 1st respondent directly or indirectly bribed voters. Under Rule 12 of the Regulations, witness affidavits should

> contain the substance of the evidence in support of the facts and grounds in the petitioner's petition and supporting affidavit... I find no tangible evidence was given to associate the alleged persons who were bribing voters with the 1st respondent at all. The standard of proof required to establish the allegations is so high that a mere statement to the effect that they were 1st respondent's agents will not do. The petitioner's affidavit does not indicate that they were committing the alleged offences with the knowledge of the 1st respondent or at all. Neither was such evidence adduced in court. I find these allegations of bribery of voters whether widespread or isolated were not proved to the required standard and must, therefore, fail".

42. We have gone over the evidence leading to the above conclusions and on this issue of electoral malpractices, we have no reason whatsoever to fault the conclusions made by the Election Court. The evidence by the appellant and her witnesses was generalized. Murithi Bore PW 8 testified that as an agent of the appellant at Kambandi Polling station, he was able to perform his duties well and there were no incidences inside the polling station. However, he said at Kambandi Market he saw 3 people giving out bribes. He said he did not know their names, but he could tell they were the agents of the 1st respondent as they were telling people to vote for her. He admitted that he too received Ksh 200/= which was being given as tea but he perceived it as a bribe. This evidence was discredited and the reasons were given; the Judge who saw and heard this witness testify, found him partisan and his credibility was questionable. In addition to the reasons given by the Judge, which we agree with entirely in dismissing this evidence, we hasten to add that allegations of bribery or corruption require setting out in the pleadings, particularizing and during the hearing, whoever alleges, has a duty to prove them strictly. There was no evidence connecting the 1st respondent with the offence of bribery, witnesses claimed that they saw agents of the 1st respondent dishing out money and asking people to vote for the 1st respondent. From this evidence, it was difficult to draw a definitive conclusion that the people who were seen bribing voters were authorized agents of the 1st respondent.

43. It is now an established principle of law that an election petition is not an ordinary civil matter; it entails the determination of the collective democratic will of the people. It follows that some allegations, such as corruption and bribery are criminal in nature, if not quasi criminal. That is why the courts have in a long line of authorities, consistently held that the test to be applied in determining some allegations in election Petitions is higher than a balance of probabilities but not "beyond reasonable doubt" as in criminal matters. See the case of Raila Odinga –vs- IEBC and Others, (supra) where the Supreme Court held as follows: -

> " The evidence laid before the Court has to be considered on the basis of relevant principles of law. From the case law, it is clear that an alleged wrong in the electoral process cannot be rectified on the basis of the conventional yardsticks of Civil and Criminal law...

The threshold of proof should in principle, be above the balance of probabilities, 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".

44. The next issue which was determined by the trial Judge was whether the 2nd and 3rd respondents committed irregularities that amounted to unfair process with the intention of denying the appellant and the people of Tharaka- Nithi County their democratic right to a free and fair election as provided for in *the Constitution*. When determining whether election irregularities affect the democratic will of the electorate so as to nullify an election, the Election Court is supposed to construe the provisions of the law liberally and broadly so as to give effect to the democratic will of the electorate. Reasonable compliance as opposed to strict or absolute compliance with the procedures set out in legislation as

long as the irregularities do not affect the will of the people is the standard when considering procedural matters governing the elections. Section 83 of the *Elections Act* 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 non-compliance did not affect the result of the election".

45. It was the appellant's case that the 2nd respondent contravened Section 30 of the Election Act as read with Regulations 62(1) and (2) and 74 & 85 (1) (e) of the Elections (general) Regulations 2012. It was alleged the Presiding Officers admitted in the polling stations more than one agent for their favored political parties; they, however, declined to allow the appellant's agents in various polling stations thus, there was no transparency in the way the electoral process was conducted. To demonstrate this, counsel for the appellant submitted that all the Forms 36 for Tharaka and Maara Constituencies were only witnessed by two Agents from the 1st respondent's party. The Presiding Officers also failed to enter the results in a tallying sheet Form 33 as required by the regulations which is difficult to manipulate as opposed to Form 35 which in his view can be doctored. Counsel referred to the evidence by Hellen Mutava, the Returning Officer for Maara Constituency, who testified that she had various Forms 36 some of which she referred to as drafts although there is no provision for drafts Forms 36 in the regulations.

46. The learned Judge analyzed the above allegations against the evidence that was adduced. The Judge looked at the evidence by Grace Wangechi who testified as PW 9, she told the court that she was a DP Agent and co-ordinator for the Maara Constituency. On the polling day, she received calls from the DP Agents complaining they were being denied entry to the polling station. She intervened at Mukui Primary School and the agent was allowed in the polling station. It also became apparent that the agent who was denied entry at first did not have the accreditation documents. The agent was nonetheless allowed to access the polling station. Also PW6, Humphrey Gitonga Murungi an agent of Safina party stationed at Kiarugu Primary School polling station stated that when he arrived at the polling station at around 6:00 a.m; all the parties agents with the exception of the TNA agent were directed to sit and not leave an area designated for agents; the TNA agent was one Muthoni Riungu the only agent allowed by the presiding officer to assist disabled and illiterate voters to vote. Humphrey testified that at one point a voter voted for Raila and Muthoni tore up the ballot paper and requested for another ballot paper from the polling clerks. He further testified that the said Muthoni destroyed three more ballot papers wherein voters had either not voted for the 1st respondent or other candidates in TNA in a similar manner.

47. The trial Judge found as a fact this evidence was scanty; there was no evidence that critical numbers of the appellant's agents were denied access to the polling stations. The agents who were allegedly denied entry to the polling stations were not disclosed; it was only two agents who testified as PW 2 and PW 3 who confirmed they accessed the polling stations and duly signed Forms 35 as a sign of approval of what had gone on. The allegation that TNA agent interfered with the choice of illiterate and disabled voters and tore about three voting papers cast in favor of CORD Presidential candidate was also a standalone allegation whose effect even if the allegation was true, could not have affected the results if the quantitative or materiality tests was applied in the analysis of this evidence. We further note the appellant failed to provide the names of her accredited agents who were allegedly denied access to the polling stations.

48. Another allegation by the appellant was that she garnered 50,450 votes in her favour, but the final results were manipulated by the 2nd respondents' Agents who failed to complete the tallying sheets,

and doctored Forms 36 and 35. The appellant contended that based on the results given by her own agents, she had garnered more votes than the 1st respondent. This allegation was also not supported by any evidence; indeed the trial Judge found this allegation was contradicted by the appellant's own evidence when she said she had no Agents in about 130 polling stations. The appellant did not provide any personal analysis, tabulations or audits to support this contention. Secondly, she said she obtained the figure from the agents yet the same agents were denied access to the polling stations. Thus the appellant was merely approbating and reprobating. We entirely agree with the observations by the trial Judge that: -

> " 117. Besides, Regulation 79(6) and 79(7) are clear that failure to sign Form 35 does not necessarily nullify the election. Even if it was to be believed that the Petitioner's Agents were not allowed into the polling stations, that per se does not affect the validity or integrity of the elections. Section 30 of the Act which deals with appointment of agents uses a passive word "may" and not "shall" appoint agent. It provides as follows:
>
> "30.
>
> (1) A political party may appoint one agent for its candidates at each polling station.
>
> (2) Where a political party does not nominate an agent under sub-section (1), a candidate nominated by a political party may appoint an agent of the candidate's choice.
>
> (3) An independent candidate may appoint his own agent".
>
> 118. These provisions speak for themselves. It is not a must that every candidate must have an Agent in every polling station relevant to their election. That is why failure to have any Agent cannot be a ground to nullify an election.
>
> 119. Regulation 76(6) and (7) are even more explicit and demonstrate that the presence or absence of Agents for parties or candidates cannot be used as an election. It provides as follows:
>
> The refusal or failure of a candidate or Agent to sign a declaration Form under sub-regulation (4) or to record the reasons for their refusal to sign as required under this sub-regulation (2) shall not by itself invalidate the results announced under regulation (2) (a). The absence of a candidate or an Agent at the signing of a declaration Form or the announcement of results under sub-regulation (2) shall not by itself invalidate the results announced". Nothing turns on these issues and the complaints are dismissed".

49. Regarding the allegations that Forms 33 were not filed, we can do no better than reproduce what the trial Judge stated in her judgment which in our view is a correct interpretation of the law and analysis of the evidence that was before court:

> The pertinent question is whether failure to fill Forms 33 renders the elections invalid. Form 33 is a candidate tally sheet. It is filled during tallying. It has no requirement to be authenticated by signing, or for subsequent use. In order to have a nullification of the elections based on failure to fill Statutory Forms, the Petitioner needed to prove beyond any reasonable doubt that the said failure was a deliberate act intended to subvert the democratic right of voters to choose a candidate of their choice, and that it affected the integrity and validity of the elections as to invalidate them. I have thoroughly considered the Petitioner's evidence. I realized that no attempt was made to adduce any such evidence. It is not sufficient to show that certain Forms were not completed as required; their negative effect to the credibility of the elections must be demonstrated to the required standard. This was not done. Nothing, therefore, turns on this point.
>
> 124. Forms 35 are completed at the polling stations according to the Schedule under the Regulations. The schedule reads "Declaration of Women Representative Election Results'. It is the Presiding Officers who have the information required to complete these Forms. That information is then delivered to the County Co-ordinator in the Form of the Form 35 which is an open document; and is accompanied by the parent documents where the data is obtained from, sealed in the ballot boxes. These other documents include all the ballot papers, whether cast or not, rejected, contested, valid and spoilt, among others. This is clear proof that the Presiding Officer, who is the custodian of all these documents containing the required data to complete Form 35, should fill the said Forms. The Presiding Officer is the officer accountable for the information contained in all the supporting documents. His role cannot under any circumstances be taken over by any officer apart from of course his Deputy. Form 35 is completed at the polling station by the Presiding Officer and not at the Constituency Tallying Centre where the co-ordinators were stationed.
>
> ...
>
> 129. I have considered the submissions by counsel. The 2nd and 3rd Respondents do not deny that they did not fill Forms 33 and 38 and in fact the majority expressed shock at the provisions requiring them to fill these Forms. There is no dispute that these were never completed. In the case of Form 38, it is a certificate from the Constituency Returning Officer to the County Returning Officer, certifying the candidate that has been elected for the relevant seat, where MP, Woman MP, Senator, Governor and County Representative. The Regulations do not say what the County Returning Officer does with the certificate. Regulation 87(3) (c) does say that the certificate should be issued to the persons elected pursuant to the results indicating their election. The person who should complain about this Form is the 1st Respondent and she is not doing so. Further, forwarding a copy of this Form to the County Returning Officer is a mere Formality and has no effect whatsoever on the validity of the election. I am also satisfied that the Petitioner does not stand to suffer any prejudice if the Form 38 was never received by the County Returning Officer. I must end by saying here that the 2nd Respondent who drafted the

Regulations should not be seen to trash the importance of the regulations they themselves drafted. It is good demonstration of professionalism, solemnity and commitment to operationalizing the set rules and regulations, and to the thorough, efficient, transparent and predictable application of the set electoral processes. Not being committed to these standards does create an opportunity for unnecessary suspicion which erodes confidence not only of the officers themselves but the very institution tasked with carrying out this delicate process that is National Elections. Faced with these lapses, I can understand the frustrations of candidates. The bottom line, however, is that the lapses do not go to the substance of the election, nor does it affect the results.

130. Regarding doctoring of Forms 35 and 36 by RRW2 in favour of the 1st Respondent, and filling Forms 36 in pencil for doctoring purposes, and making of draft Forms 36, Mr. Agwara urged that the Returning Officer for Maara Constituency, Hellen Mutuva, RRW2 testified that she had various Form 36 which she kept on changing, while calling others original and others drafts, yet there is no provision in the Election Act, the Rules and/or the Regulations allowing for preparation of draft election results as alleged. Counsel submitted that RRW2 confirmed having prepared draft election results, and entering the same in Form 36, which she signed and gave out to the Agents to sign as the results for the Woman Member of Parliament election in Maara; that she then later changed these results and came to court with a totally different result whose entries depart from the ones she had originally signed and given out to some of the Agents to witness".

50. The overarching principles of Electoral processes as stipulated in *the Constitution* and the *Elections Act* is to facilitate transparent, free and fair elections where people's democratic will prevails. In Fitch vs. Stephenson & three Others2008 EWITC 501 QB the English Court in construing Section 48 (1) of Representation of People Act 1983 (England), also with similar provisions as Section 83 of the *Elections Act* said at paragraphs 43 and 44:

> These cases clearly establish that the courts will strive to uphold an election as being substantially in accordance with the law, even where there has been serious breaches of the Rules, or of the duties of the election official providing that the result of the election was unaffected by those breaches.

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.

Thus .... It is inappropriate for the court to declare that an election should be avoided where breaches of the Rules at the counting stage have not, in fact affected the result".

See Article 81 of the Constitution provides: -

The electoral system shall comply with the following principle:

Freedom of citizens to exercise their political rights under Article 38:

> .....
>
> .....Universal suffrage based on the aspiration for fair representation and equally of vote; and free and fair elections, which are:

By secret ballot

free from violence, intimidation improper influence of corruption; conducted by an independent body; transparent and administered in an impartial, neutral, efficient and accountable manner".

51. It was contended that failure by the Presiding Officers to complete Forms 33, a candidate tally sheet, rendered the elections invalid. We have gone over the evidence by the appellant's witnesses, although the trial Judge applied the test of "prove beyond reasonable doubt" to arrive at the conclusion that the appellant failed to show that failure to complete Forms 33 was not a deliberate act meant to subvert the democratic will of the voters, we have looked at the same allegation; while applying the normal test in civil matters of 'balance of probabilities'. Our conclusion remains the same as that of the trial Judge. That is Form 33 was a candidate's individual tally sheet, there was no evidence to show the information contained in the Forms 35 was doctored, plucked from the air or did not represent the conclusions of the votes collated and tallied.

52. As stated earlier in this judgment, not every non-compliance or every act of omission or breach of the elections regulations or procedure can render an election invalid. See the case of KHATIB ABDALLA MWASHETANI V GIDEON MWANGANGI WAMBUA & 3 OTHERS, [2014] e KLR where the court made the following observations;

> Accuracy is one of the principles that the electoral systems must comply with. The obligation to tally involves confirmation of the figures without recounting the ballots. It is anticipated that during the tallying exercises, the Returning Officer shall confirm the validity of the votes. Indeed Article 86 (c) of *the Constitution* places an obligation on the 3rd and 4th respondents to ensure that the results from the polling are "openly and accurately collated and promptly announced" The Concise English Dictionary defines " collate" as to collect and combine text or information or compare and analyze two or more sources of information. The learned Judge found that the Returning Officer identified errors in two Forms 35's following the recount and this necessitated the changes in Form 36. No doubt the accuracy of Form 35s was crucial, the Forms being the primary tally document in the election, from which detailed results are transposed, to reflect the corrected results as per the corrected Form 35s'. This was part of the collation that the Returning Officer was obligated to do under Article 86 (c) ... nonetheless, other than the irregular recount in regard to the two polling stations there was no evidence of persistent pattern of irregularities, nor was there any allegation that the opened ballot boxes were tampered with. Thus the action could not invalidate the results, as the irregularity did not affect the results in the two polling nor did it affect the election results as a whole... The appellant maintained the lead notwithstanding the irregularity, and thus the will of the electorate in Lunga Lunga Constituency was clear. There is therefore no justification for interfering with the outcome of the electoral process"

53. The errors that were cited in the petition regarding failure to complete Forms 33, and the issue of who was to complete Forms 35 between the Returning Officer and the Presiding Officer to us, were minor infractions that did not affect the overall results. The case of - Peter Gichuki King'ara V IEBC& 2 others, [2014] eKLR was cited before us especially where this Bench stated that:-

> It follows that electoral systems and processes all over the world are not perfect, they are susceptible to human errors and other inadvertent mistakes as long as those mistakes do not affect the overall results and the democratic will of the people"

54. Unlike this case, in the Peter Kinga'ra case, there were so many irregularities in 92 polling stations that were cited by the appellant. Many of those irregularities were admitted by both respondents such that without a scrutiny, the quantitative effect of those errors vis a vis the overall results were not ascertainable. It was found that the errors were far too many and could not be attributed to physical fatigue. After analyzing the evidence, the Court noted that the following questions were not answered;"Why the election officials gave a candidate more or less votes than he or she garnered. * Why would they post incorrect information on Part A of Form 35 and make correct postings on Part B of the same Form in so many stations. * Why would they make so many mistakes in the collation of total votes in Form 36 which are not drawn from Forms 35? * Why would an election official fail to comply with the law and disappear with the results of Kigumo Polling station thereby disenfranchising the voters of that polling station"

55. Also in the same case it was observed:

> ... In election matters, qualitative and quantitative tests are applied as a basis of establishing whether the errors materially affected the outcome. None of the tests were applied to comprehend the votes that were posted in error; similarly there was no way the appellant could have proved the following;His name was not substituted during the counting of votes with that of another candidate;Votes cast in his favour were not incorrectly stated in the Forms 35 and 36;That seals collected from a polling station were not removed deliberately so as to tamper with the contents of the ballot boxes before the final tallying of votes was done to the appellant's disadvantage".Having concluded in the Peter King'ara case, that the above issues were not resolved by the evidence, the appeal was allowed.

56. The instant appeal is distinguishable as the scanty evidence of irregularities was minor in nature. Moreover the difference of the votes garnered by the 1st respondent as against the appellant was about 12,935 votes. If we were to apply the quantitative, qualitative and materiality test in determining the effect of the irregularities, there is no way the isolated incidences cited in the evidence could have led to a definitive conclusion that the democratic will of the people of Tharaka Nithi as regards their choice of the Woman Member of Parliament was affected. In Morgan&others-vs-Simpson&Another(1974)3ALLER722, it was held,

> An election court was required to find an election invalid-
>
> SUBPARA a) if irregularities in the conduct of elections had been such that it could not be said that the election had been conducted as to be substantially in accordance with the law as to election, or
>
> b) If the irregularities had affected the results.
>
> Accordingly, where breaches of the election rules, although trivial, had affected the results, that by itself was not enough to compel the court to declare the election void."

57. Having re-evaluated the entire evidence, the record of appeal, the submissions, and the authorities cited; we come to an inescapable conclusion that the Election Court was correct in dismissing the appellant's Petition. This is nonetheless the third time we so find, as we found the petition was filed out of time, and this appeal, should have been struck out due to the appellant's failure to include necessary documents in the record of appeal as per the provisions of Rule 87 of this Court Rules.

58. The Election Court in its judgment ordered the appellant to pay the costs of the respondents as per Rule36(1) of the ElectionRules. The learned Judge capped the amount of costs payable to the 1st

respondent not to exceed 2.2 million while the amount payable to the 2nd and 3rd respondents not to exceed 1.3 million. The appellant contended that the total amount payable was 3.5million is on the higher side and will scare people from accessing the Courts of law. Counsel argued that the learned Judge did not give reasons for arriving at the colossal sum; the order of costs was contrary to the average amount of costs ordered in similar Petitions especially for a position of Member for the National Assembly.

59. The power to impose costs on parties is usually discretionary. Therefore, before an appellate court can interfere with the Judge's discretion, it must be satisfied that there was misdirection in some matter and as a result, the Judge arrived at a wrong decision or, that he/ she misapprehended the law or failed to take into account some relevant matter. In Mbogo&Another-vs-Shah,(1968)E.A.93 at page 95, SirCharlesNewboldP. held,

> ".....a Court of Appeal should not interfere with the exercise of the discretion of a single judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjuctice..."

60. The trial court was correct in holding that costs ought to follow the event. We are nonetheless unable to decipher the reasoning for awarding a higher sum of Ksh 2.3 million to the 1st respondent and the 2nd and 3rd respondents a sum of Ksh. 1.3 million. We cannot get a possible explanation from the records why the two parties were given different orders. The 1st appellant was represented by one counsel just like the 2nd and 3rd respondents were, and they all strenuously opposed the petition. If there are to be variances in the actual amounts, that is only ascertainable after taxation. To that extent we are inclined to interfere with the costs to be caped for the 1st respondent at Ksh 1.3million as opposed to Ksh 2.3 million bringing the ceiling of the costs to be taxed to Ksh 2.6 million. Consequently the order as to the costs caped to Ksh 3.5 million is set aside and substituted with an order capping the costs to Ksh 2.6 million on the total amount of costs payable to the respondents, the actual costs payable will have to be agreed upon or taxed by the designated taxing master. Rule36 gives the Election Court power to cap the costs payable by a party, which is merely the ceiling and not the floor. Apart from this slight interference on the capping of costs, we find that this appeal has no merit and is accordingly dismissed with costs to the respondents. We direct that the costs in this appeal shall not exceed Kshs.1million.

DATED AND DELIVERED AT NYERI THIS 8TH DAY OF APRIL, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

J. OTIENO – ODEK

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JUDGE OF APPEAL

I certify that this is a true copy to the original.

DEPUTY REGISTRAR