Ayiera v Kimwomi & 3 others (Election Petition Appeal E001 of 2023) [2023] KECA 1021 (KLR) (4 August 2023) (Judgment)

Neutral citation: [2023] KECA 1021 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

ELECTION PETITION APPEAL E001 OF 2023

PO KIAGE, M NGUGI & JM NGUGI, JJA

AUGUST 4, 2023

BETWEEN

DENNIS OMWENGA AYIERA ..... APPELLANT

AND

NYARIBO AMOS KIMWOMI ..... 1ST RESPONDENT

JAMES GESAMI ..... 2ND RESPONDENT

THE COUNTY RETURNING OFFICER, NYAMIRA COUNTY .... 3RD RESPONDENT

THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION .... 4TH RESPONDENT

(Being an appeal from the judgment and decree of the High Court at Nyamira (Kimondo, J.) dated 16th February, 2023 in Election Petition No. E002 of 2022)

Actions of a party's agent, especially of a criminal nature, cannot be attributed to the candidates

The appeal was a challenge on the declaration of the 1st and 2nd respondents as the duly elected Governor and Deputy Governor for Nyamira County. The court held that a party challenging an election who proved that the candidate who was declared the winner in the election committed an election offence or corrupt practice was entitled to a nullification without having to prove anything more. The court further held that if the chief agent of the 1st respondent was appointed by his political party, his actions – especially those of a criminal nature – could not be attributed to the candidates.

Reported by Kakai Toili

Electoral Law *– election offences – election offences by agents of political parties – liability of candidates in elections for election offences committed by political parties' agents - whether actions of a criminal nature by an agent of a political party during elections could be attributed to the candidates in the election - what was the standard of proof of any election offence or quasi criminal conduct.*

Electoral Law *– election offences – election offences by candidates in elections - whether a proven election offence committed by a candidate nullified his/her election without need to prove anything more.*

Evidence Law *– evidence – production of evidence in court - whether a public or private document which was marked for identification in court must be produced.*

Brief facts

The appellant challenged the declaration of the 1st and 2nd respondents as the duly elected Governor and Deputy Governor for Nyamira County. The appellant contended that the gubernatorial election was not conducted in compliance with the law; and that the 4th respondent, the Independent Electoral and Boundaries Commission (IEBC) did not conduct a transparent, impartial, neutral, efficient, accurate and verifiable election. The appellant alleged that the chief agent of the 1st respondent was an employee of the County Public Service Board, thus, a public officer who actively participated in the campaigns and safeguarding of the interest of the 1st respondent throughout the voting and tallying cycle.

The appellant also alleged that the 1st respondent's use of a public officer as an agent was a corrupt practice which directly contravened the Election Code of Conduct and section 14 of the Election Offences Act, as it directly and indirectly gave him an advantage over the other candidates vying for the position of governor. The appellant thus sought for among other orders; the election court orders that the 1st respondent was not validly elected as Governor of Nyamira County and order for fresh elections for Governor in Nyamira County within 60 days from the date of judgement. The election court dismissed the petition with costs to the respondent. Aggrieved, the appellant filed the instant appeal.

Issues

i. Whether actions of a criminal nature by an agent of a pollical party during elections could be attributed to the candidates in the election.
ii. Whether a proven election offence committed by a candidate nullified their election without need to prove anything more.
iii. Whether a public or private document which was marked for identification in court must be produced.
iv. What was the standard of proof of any election offence or *quasi* criminal conduct?

Relevant provisions of the Law

Elections Act (cap 7)

"agent" means a person duly appointed by—

(a)a political party or an independent candidate for the purposes of an election under this Act; or

(b)a referendum committee for the purposes of a referendum under this Act,

and includes a counting agent and a tallying agent;

Held

1. The remit of the Court of Appeal in election petitions was stipulated in section 85A of the Elections Act. It limited the appellate court's jurisdiction in electoral disputes to only matters of law. Pursuant to section 85A, in an election appeal, the court should not be drawn into considerations of the credibility of witnesses and other matters of fact. Its engagement with the facts should be limited to satisfying itself whether the conclusions of the trial court were based on the evidence on record or whether they were so perverse that no reasonable tribunal would have arrived on them.
2. A party challenging an election who proved that the candidate who was declared the winner in the election committed an election offence or corrupt practice was entitled to a nullification without having to prove anything more. A proven election offence committed by a person declared victor in an election nullified his illicit victory, period.
3. Parties were bound by their pleadings. That was not just a technical rule which fetishized procedural narcissism; it was a substantive rule of law that played the functional role of ensuring every litigant was informed in advance of the case he had to meet, so that he may effectively prepare and challenge the

same. It was a substantive rule of law that ensured fairness and upholding of the principles of natural justice in the proceedings by ensuring that parties had proper notice of each other's cases. It was a fundamental facet of fair trial that banished trial by ambush.

4. A document which was marked for identification must, simply, be produced – whether the document was private or public. The only time a party was exempted from the need to prove a documentary fact was where the court could take judicial notice of it. No case was made for the court to take judicial notice of the document and no such finding was made. In any event, there was a serious question whether the website printout would meet the criterion of a public document. That controversy in itself justified the rule that all such documents must be procedurally produced so that the trial court could properly entertain arguments about their authenticity and probative value.
5. Under Kenya's electoral statutory scheme, candidates for office sponsored by political parties were not, in the first instance, permitted to appoint their own agents. The default rule was that it was the party which was given the first task to appoint an agent for each polling or tallying center. The individual candidate was only permitted to appoint an agent of his or her own if the party failed to appoint one. Section 2 of the Elections Act, 2011 defined an agent.
6. A candidate for office nominated by a political party could only appoint an agent if the party had not nominated an agent of its own. The appellant admitted that the party, UPA, appointed the chief agent of the 1st respondent as its agent. If the chief agent of the 1st respondent was appointed by the UPA Party, his actions – especially those of a criminal nature – could not be attributed to the 1st and 2nd respondents who had no say in his selection and recruitment.
7. Even where principles of vicarious liability applied to inure liability to a principal who had granted ostensible authority to an agent to perform an act where the act was done negligently or recklessly to cause injury, the principle of vicarious liability was never extended to acts of a criminal nature. The 1st and 2nd respondent not only had no role in the selection and recruitment of the chief agent of the 1st respondent as an agent; but the acts complained of are of a criminal nature.
8. The standard of proof of any election offence or *quasi* criminal conduct was that of beyond reasonable doubt. The chief agent of the 1st respondent was the party's agent. As such, for any conduct amounting to an election offence to be attributable to the 1st and 2nd respondents, the appellant needed to demonstrate that the specific conduct was authorized and sanctioned by the 1st and 2nd respondent. The mere fact that the agent was the party's agent would not suffice to implicate the candidate in an election offence.
9. For an election to be nullified, errors, irregularities or non-compliance with electoral laws must be so grave that the integrity of the election was materially compromised. Put differently, no election should be voided for non-compliance with any written law relating to elections or because of errors and irregularities, if it appeared that the election was conducted substantially in accordance with the principles laid down in the Constitution and written law, or if the non-compliance did not affect the results of the election.
10. The trial court's analysis and conclusions were measured and judicious. The irregularities, discrepancies, and transpositional errors did not, quantitatively, affect the results of the elections. The discrepancies were arithmetical in nature and not such as to change the results of the elections. Neither did they, qualitatively, reach the threshold where the court could, in context, conclude that the election was conducted so badly that it was not substantially in accordance with the law as to elections.
11. The grounds of appeal hinged on the argument that the elections were not conducted in substantial compliance with the law; or that the trial court failed to apply a qualitative test in the disputed election failed. The trial court considered both the quantitative and the qualitative tests as he was required by section 83 of the Elections Act. Both tests failed in the instant case.

Appeal dismissed with costs; judgment of the High Court certifying the election results was upheld.

Citations

Cases

Kenya

1. *Gedi v Njau & 2 others; United States of America Embassy in Kenya & 3 others (Interested Parties)* Civil Application E264 of 2022; [2022] KECA 806 (KLR) - (Explained)
2. *Githinji v Munya & 2 others* Civil Appeal 38 of 2013; [2014] KECA 884 (KLR) - (Explained)
3. *Independent Electoral & Boundaries Commission v Maina Kiai & 4 others* Civil Appeal 105 of 2017; [2017] KECA 477 (KLR) - (Mentioned)
4. *Karanja, Kabage v Joseph Kiuna Kariambegu Ng'ang'a & 2 others* Civil Appeal 301 of 2013; [2014] KECA 639 (KLR) - (Mentioned)
5. *Kithiunji v Munya & 2 others* Election Petition 1 of 2013; [2013] KEHC 3443 (KLR) - (Followed)
6. *Mahamud, Muhumed Sirat v Ali Hasaan Abdirahman & 2 others* Petition 15 of 2008; [2010] KEHC 2287 (KLR) - (Explained)
7. *Mati, John Munuve v Returning Officer Mwingi North Constituency & 2 others* Election Petition 3 of 2017; [2017] KEHC 1707 (KLR) - (Mentioned)
8. *Mohammed, Abdikhaim Osman & another v Independent Electoral and Boundaries Commission & 2 others* Civil Appeal 293 of 2013; [2014] KECA 637 (KLR) - (Mentioned)
9. *Mulwa, Charles Juma v Peter Makau Ndeti & another (Suing on their own behalf and as administrators of the Estate of late Alex Nzomo Muendo)* Civil Appeal 137 of 2016; [2020] KEHC 9530 (KLR) - (Explained)
10. *Musau, Thomas Malinda & 3 others v Independent Electoral & Boundaries Commission & 2 others* Election Petition 2 of 2013; [2013] KEHC 5477 (KLR) - (Applied)
11. *Musikari, Nazi Kombo v Moses Masika Wetangula & 2 others* Election Petition 3 of 2013; [2013] KEHC 2733 (KLR) - (Explained)
12. *Mutua, Alfred Nganga & 2 others v Wavinya Ndeti & another* Petition 11 & 14 of 2018 (Consolidated) [2018] KESC 1 (KLR) - (Applied)
13. *Mwige, Kenneth Nyaga v Austin Kiguta & 2 others* Civil Case 1930 of 2000; [2008] KEHC 2938 (KLR) - (Explained)
14. *Ocholla, Oscar Omoke & 2 others v Independent Electoral and Boundaries Commission (IEBC), Martin Simotwo, Nixon Kiprotich Generali, Odera Daniel Tresvant & Hilary Okumu Mulilia* Election Appeal 23 of 2018; [2018] KECA 363 (KLR) - (Applied)
15. *Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae)* Presidential Election Petition 1 of 2017; [2017] KESC 42 (KLR) - (Followed)
16. *Onsando, Joel Makori & 2 others v Independent Electoral & Boundaries Commission & 4 others* Election Petition 3 of 2017; [2017] KEHC 2124 (KLR) - (Explained)
17. *Onyancha, Joel Omagwa v Simon Nyaundi Ogari & another* Civil Application 104 of 2008; [2008] KECA 170 (KLR) - (Mentioned)
18. *Outa, Fredrick Otieno v Jared Odoyo Okello & 4 others* Civil Application 10 of 2014; [2014] KESC 44 (KLR) - (Explained)
19. *Salat, Nicholas Kiptoo Arap Korir v Independent Electoral & Boundaries Commission & 7 others* Election Petition 1 of 2013; [2013] KEHC 5560 (KLR) - (Applied)
20. *Sunkuli, Julius Lekakeny ole v Gideon Sitelu Konchellah, Elijah Mbogo & Independent Electoral &Boundaries; Commission* Election Appeal 11 of 2018; [2018] KECA 419 (KLR) - (Explained)
21. *Wambora, Martin Nyaga v Lenny Maxwell Kivuti, Embu County Returning Officer & 2 others* Election Appeal 6 of 2018; [2018] KECA 365 (KLR) - (Explained)

22. *Wavinya Ndeti & another v Independent Electoral and Boundaries Commission,Machakos County Returning Officer & Alfred Nganga Mutua* Election Petition 1 of 2017; [2017] KEHC 2446 (KLR) - (Mentioned)
23. *Waweru, John Kiarie v Beth Wambui Mugo & 2 others* Election Petition 13 of 2008; [2008] KEHC 826 (KLR) - (Applied)

Nigeria

1. *Detoun Oladeji (NIG) v Nigeria Breweries PLC* (SC 91/2002) — (Explained)
2. *Buhari v Obasanjo* (2005) CLR 7K — (Explained)
3. *Eco Bank (NIG) Ltd v Uchechukwu Aghazu* (2019) LPELR-46966 (CA) — (Explained)

India

1. *Indira Nehru Gandhi v Shri Raj Narain & another* [1975] AIR 2299 - (Applied)
2. *Nani Gopal Swami v Abdul Hamid Choudhury & another* [1959] - (Explained)
3. *YS Parmar v Shhira Singh Paul & another* [1959] AIR 244 - (Explained)

United Kingdom

Erlam Ors v Rahman & another [2015] EWHC 1215 (QB)— (Explained)

Texts

1. Doabia, HS., *et al* (Eds) (2021), *Elections and Election Petitions* LexisNexis p 2343
2. Stier Jr., RH, (1985), *Revisiting the Missing Witness Inference- Quieting the Loud Voice from the Empty Chair* 44 Maryland Law Review 137

Statutes

Kenya

1. Constitution of Kenya articles 81, 86 — (Interpreted)
2. Court of Appeal (Election Petition) Rules (Sub Leg) rule 6 — Cited
3. Election (General) Regulations, 2012 (Regulations) (Cap 7 Sub Leg) regulation 87(2)(b)— Interpreted)
4. Election Offences Act (cap 66) — sections 14, 15(3) — (Interpreted)
5. Elections Act (Cap 7) sections 83, 85A – (Interpreted)
6. Evidence Act (Cap 80) sections 2,30, 60, 79, 80, 83, 106B(2); 112— (Interpreted)

Advocates

Mr Omwanza, *Mr Awele* and *Mr Mokua* for the appellant.

Mr Ligunya and *Ms Grace Maina* for the 1st and 2nd respondents.

Ms Amimo and *Mr Muyundo* for the 3rd and 4th respondents.

JUDGMENT

A. Introduction

1. This appeal arises from the judgment of the High Court at Nyamira (Kimondo, J) dated February 16, 2023. The subject of the petition was an election dispute respecting the Nyamira County gubernatorial election which was held on August 9, 2022 as part of the General Elections in the country.

2. Dennis Omwenga Ayiera, the appellant herein, challenged the declaration of the 1st and 2nd respondents as the duly elected Governor and Deputy Governor for Nyamira County, respectively. The appellant was the Nyamira County Elections Manager for the United Democratic Alliance Party (UDA Party) and the Chief Agent for one of the gubernatorial candidates, Walter Osebe Nyambati (Nyambati).

3. Twelve candidates contested for the position of governor of Nyamira County in that election. The 3rd respondent declared the 1st respondent as the duly elected governor with 81,980 votes. Nyambati, his closest challenger, garnered 49,339 votes, as per the declared results.

4. The 3rd respondent, Njoroge Anthony Douglas, was at the material time, the County Returning Officer for Nyamira County, whereas the Independent Electoral & Boundaries Commission (IEBC) (4th respondent) is the constitutional authority mandated to manage the elections.

B. The Amended Petition And The Appellant's Case in the Election Court

5. The appellant was aggrieved by the declaration of the 1st and 2nd respondents as governor and deputy governor and filed, at the High Court, a petition dated September 7, 2022 challenging that declaration. Thereafter, on September 9, 2022, he filed an amended petition and contended that the gubernatorial election was not conducted in compliance with articles 81 and 86 of the *Constitution*, *Elections Act* and the *Election (General) Regulations, 2012 (Regulations)*; and that IEBC did not conduct a transparent, impartial, neutral, efficient, accurate and verifiable election.

6. In his amended petition and supporting affidavit of even date, at paragraphs 15 and 10 respectively, the appellant spelt out five main reasons for contesting the final results declared by the 4th respondent, which are that:

    a. There were two differing sets of forms 37C used to declare the results and it was doubtful which of the two was used to announce the results. Additionally, UDA agents or the agents of Nyambati did not participate or execute the forms.

    b. The results in the two forms 37C did not tally with multiple results in forms 37A from the polling stations.

    c. UDA Party agents were denied access into some polling stations, harassed and did not participate in counting and tallying of results.

    d. Results in forms 37A were altered or manipulated by officials of the 4th respondent in favour of the 1st respondent and another candidate, Timothy Bosire (Bosire).

    e. The employees of the 3rd and 4th respondents were biased against other candidates and favoured the 1st respondent and Bosire.

7. There was an additional reason at paragraphs 161, 162 and 163 of the amended petition, which related to criminal conduct and corrupt practice in breach of sections 14 and 15 of the *Election Offences Act*. In this regard, the appellant alleged that the Chief Agent of the 1st respondent, one Leonard Okari Mogaru (Mogaru), was an employee of the County Public Service Board, thus, a public officer who actively participated in the campaigns and safeguarding of the interest of the 1st respondent throughout the voting and tallying cycle. The appellant also alleged that the 1st respondent's use of a public officer as an agent was a corrupt practice which directly contravened the Election Code of Conduct and section 14 of the *Election Offences Act*, as it directly and indirectly gave him an advantage over the other candidates vying for the position of governor.

8. Other reasons for contesting the gubernatorial election results included allegations of: deduction of votes from Nyambati which were allegedly added to the 1st respondent and Bosire in various polling stations in the four constituencies of Nyamira County; a ballot box for Nyanchoka TBC polling center found open at the tallying center without reasonable explanation; absence of UDA party agents in

some polling stations which precipitated significant illegalities and transposition errors; and ignorance by the 3rd and 4th respondents in following basic procedures under the law.

9. The appellant thus sought the following prayers:

    a. An order that there be scrutiny of all the election materials in the polling stations mentioned in paragraph 2 of the notice of motion application filed together with the petition and supervised by the Registrar of the court.

    b. Upon scrutiny, the court be pleased to order that the 1st respondent was not validly elected as governor of Nyamira County in the August 9th elections.

    c. The court be pleased to order fresh elections for governor in Nyamira County within 60 days from the date of judgement.

    d. A determination that the officers of the 3rd and 4th respondents committed electoral malpractices that constitute criminal offences.

    e. The respondents be condemned to pat the petitioner costs and incidentals to the petition.

    f. Such further and consequential orders that the honourable court may lawfully make.

10. During the hearing of the petition, the appellant called a total of thirteen (13) witnesses, including himself. On the other hand, the 1st and 2nd respondents opposed the amended petition and filed their response to it dated September 23, 2022, but opted not to testify or call any witnesses. The 3rd and 4th respondents also opposed the amended petition and filed their response to it dated October 8, 2022, and called a total of seven (7) witnesses. All the parties relied on their pleadings and submissions before the election court.

11. During the hearing of the petition, the appellant and his witnesses reiterated the main grounds as set out in the amended petition, most especially, the two differing sets of form 37C used to declare the election results. The appellant alleged that the final form was filled in the absence of a UDA agent, thus, the results were not transparent, accountable or verifiable. On the whole, the appellant pivoted his case on four sets of arguments.

12. First, the appellant rehashed at length the alterations in the entries in forms 37A and what he saw as errors in transferring data to forms 37B and 37C. To this end, the appellant contended that votes for Nyambati were systematically reduced in over 100 polling stations while those of the 1st respondent and Bosire were increased. Additionally, the witnesses highlighted 38 forms which, they said, had multiple alterations in the entries for the candidates votes, total number of valid votes, registered voters and rejected ballots.

13. Second, one of the appellant's witnesses alleged in a filed affidavit that a ballot box for Nyanchoka TBC polling center was found open at the tallying center without reasonable explanation, and there was a photograph and a certificate of electronic record, but the witness did not take the stand and therefore, it was never admitted in evidence.

14. Third, the appellant and his witnesses contended that UDA party agents or the agents of Nyambati were either not allowed to access or were ejected from about 138 polling stations. It was also contended that some agents were allowed late access to the polling stations, whereas in some polling stations, the presiding officers were biased towards some of the UDA Party agents.

15. Finally, the appellant contended that Mogaru was, impermissibly, both the Chief Agent and campaigner of the 1st respondent and also an employee of the County Public Service Board. Thus, the

appellant argued, Mogaru was a public officer whose actions were in contravention of section 14 and 15 of the *Election Offences Act*. To buttress this contention, a compact disk marked DOA1 containing four short MP4 video clips was played in court and it showed Mogaru at the tallying center wearing a red and white shirt emblazoned at the back with the words "Mogaru Supports Governor Nyaribo".

C. Responses to the Amended Petition and the Respondents' Case in the Election Court

16. In their response to the amended petition, the 1st and 2nd respondents denied all the allegations made by the appellant. They contended that the elections were conducted in accordance with the *Constitution*, *Elections Act* and regulations and that if there was any non-compliance, the same was not substantial and did not affect the results of the election.

17. The 1st and 2nd respondents contended that the position of County Elections Manager is unknown in the election process and parties or candidates were represented by their respective agents.

18. The 1st and 2nd respondents also contended that the votes garnered by all candidates did not change in the two forms 37C. Thus, they argued, the gubernatorial election for Nyamira County could not be said to have been held contrary to the provisions of article 81 and 86 of the *Constitution*. Additionally, they denied the allegations of deductions or additions of votes in favour of or to the detriment of any candidate and stated that the petitioner had failed to adduce any evidence of such additions or subtractions.

19. The 1st and 2nd respondents argued that the election was conducted in a free, fair, accurate and verifiable manner and that they were validly elected. They also argued that they were not aware of instances where agents were barred from accessing polling stations as long as they had the necessary documentation that was a prerequisite under the regulations.

20. The 1st and 2nd respondents further denied the averments in paragraphs 161, 162 and 163 of the amended petition and contended that the choice and appointment of the 1st respondent's agent was the preserve of the United Progressive Alliance (UPA) party which appointed agents for all elections in accordance with the law and it did not act contrary to section 15 of the *Election Offences Act* or any other law. They argued that upon being prompted by the appellant's allegations, the 1st respondent contacted the County Public Service Board for clarification and the Board confirmed that Mogaru had never been their employee.

21. The 1st and 2nd respondents argued that the allegations of malpractices, discrepancies, alterations, irregularities and transposition errors did not substantially affect the results of the election and prayed that the petition be dismissed with costs.

22. It is important to note that the 1st and 2nd respondents did not testify at the trial; and neither did they call any witnesses. The two affidavits filed in support of their case, therefore, were not admitted as evidence. The learned judge concluded that the two affidavits had little, if any, probative value. Indeed, the learned judge concluded that the "net effect was that the 1st and 2nd respondents offered no meaningful rebuttal to the allegations made by the petitioner and his 13 witnesses."

23. On their part, the 3rd and 4th respondents filed a response, replying affidavits, and called seven witnesses to testify. In general, the 3rd and 4th respondents contended that the elections were conducted in accordance with the *Constitution*, *Elections Act* and regulations; and challenged the authenticity of some of the results declaration forms annexed by the appellant, which they termed as either inaccurate or forgeries.

24. The 3rd and 4th respondents argued that there was only one valid form 37C that was used to declare the results of the election and the first form 37C was a draft. They argued that the first form 37C which was initially prepared by the 3rd respondent contained arithmetical errors in terms of summation of the total valid votes cast discernible from the total number of votes garnered by each candidate, such that from the said entries, the total number of valid votes cast was 207,096 (with Osiemo Daniel Nyakundi's votes as 785 and not 985) and not 179,719. They argued that when the 3rd respondent realized the said erroneous summation, he prepared the final form 37C which was signed by all the agents present on August 12, 2022; and it did not alter the number of votes garnered by each candidate but only affected the total number of votes and voter turnout percentage.

25. The 3rd and 4th respondents argued that the confusion as to the total number of votes cast was occasioned by an error in calculation of the total number of votes in polling stations in Kitutu Masaba, North Mugirango and Borabu constituencies. They contended that the total number of valid votes cast for all candidates appearing at the second last column of form 37C did not include the votes garnered by the first two candidates as they appeared in the said form i.e. Bosire Anthony Moseti and Bw'Ondieki John Nyariki.

26. In both his testimony and his affidavit, the 3rd respondent admitted that he did not announce anything with regard to the draft form 37C to the public at the tallying center and claimed that he noted the mistake before he declared the results; and informed the agents present about the errors.

27. The 3rd respondent also admitted to alterations in some forms 37A and stated that the same were necessary to rectify certain errors. He testified that some of the errors were typos or transposition errors or omissions, which skewed data to one side or wrong columns on forms 37B and 37C. He explained, with examples, that transposition errors occurred while transferring data from forms 37A to 37B or from forms 37B to 37C.

28. The 3rd respondent further admitted to a number of errors (wrong data entries) and omissions in form 37C, whose combined effect when computed showed that Nyambati was denied 432 votes while the 1st respondent gained 17 votes. He maintained that even so, the votes garnered by all the other candidates remained unaffected in the primary forms 37A. To this end, the 3rd and 4th respondents argued that the errors did not affect the substance of the election and that no additions or deductions in forms 37A and 37C were made to benefit or disadvantage any candidate. The 3rd respondent denied that the errors were meant to favour Nyaribo and argued that the margin of victory was over 30,000 votes.

29. The 3rd and 4th respondents contended that in any event, the said alterations were done to correct apparent errors and were done in accordance with the law and in a manner that reflected the true will of the electorate. They further contended that the said alterations were done in the presence of other parties and were counter signed and stamped at the polling stations before they were transmitted to the county tallying center; and the agents of various parties appended their signatures on the said forms 37A and raised no objections thereto.

30. The 3rd and 4th respondents denied the allegations that Nyambati's agents were denied access to polling stations or were ejected therefrom or harassed. They argued that all accredited agents were allowed access to polling stations and tallying centers in accordance with the law. They further argued that the selection, deployment and management of agents for parties and candidates was the sole responsibility of the respective candidates and they could not be faulted for failure of parties to avail their agents. According to them, all the agents who presented themselves to them were accorded requisite space and opportunity to observe the election process and they thereafter appended their signatures on forms 37A, ascertaining the results; and no agent indicated that he was denied such a chance.

31. In this regard, the witnesses for the 3rd and 4th respondents testified that in the majority of the polling stations, the results declaration forms were signed by UDA party agents. They contended that if at all the UDA party agents were not present at any of the polling stations, then their absence was their own creation and was not in any way a result of prohibitive or restrictive actions of the 3rd and 4th respondents. In any event, the 3rd and 4th respondents contended that they had a duty to deliver free, fair, credible, verifiable and transparent elections in the presence or absence of agents which is exactly how they discharged their mandate in the polling stations which had no agents present.

32. The 3rd and 4th respondents also denied the averments in paragraphs 161, 162 and 163 of the amended petition on the appointment of Mogaru and contended that candidates appointed their agents and there was nothing irregular about Mogaru wearing his party colours at the county tallying center.

33. The 3rd and 4th respondents argued that the voting, counting, tallying, collating, transmission and declaration of election results was efficient, accurate, accountable, verifiable and a true representation of the will of the people of Nyamira County. They further urged that they discharged their constitutional mandate in conducting a free and fair election that was accurate, secure, verifiable, accountable and transparent and prayed that the petition be dismissed with costs.

D. Scrutiny And Election Court's Judgment

34. Owing to the appellant's successful application for limited scrutiny of election materials in various polling stations, the election court ordered a partial scrutiny in a number of the disputed polling stations in the following terms.

35. First, the court ordered IEBC to provide an inventory of ballot boxes (including their serial numbers and seals' serial numbers) used for the gubernatorial elections at Omonono Primary School polling station 2 of 2 and Nyanchoka TBC 1 of 1. Second, the court ordered a recount of votes cast for governor at the following polling stations: Motagara DEB Primary School stream 2 of 2, Kenyamware DEB Primary School stream 1 of 1, Nyankoba stream 1 and Nyabigege DOK Primary School stream 1 of 2. Third, the court ordered a re-tally of results in the final forms 37B for all the four constituencies in Nyamira County i.e Kitutu Masaba, Borabu, West Mugirango and North Mugirango. Lastly, the court ordered a re-tally of the results in the original forms 37A and the final form 37C, submitted to the 3rd respondent.

36. The said partial scrutiny was carried out under the supervision of the Deputy Registrar, who formally submitted his report to the election court and all parties. The report formed part of the court proceedings and the court permitted the parties to address it in their final submissions.

37. After the hearing of the petition and consideration of the parties' evidence and submissions, the learned judge in his detailed and careful judgment coined five issues for determination. These were as follows:

    1. Whether the gubernatorial election for Nyamira held on August 9, 2022, was conducted in compliance with the *Constitution*, *Elections Act* and *Regulations*;

    2. Whether there were irregularities, illegalities or malpractices in the election;

    3. Whether the 1st respondent was validly elected as governor for Nyamira County;

    4. Whether the petitioner is entitled to the reliefs sought in the Amended Petition;

    5. Who will bear the costs of the petition.

38. The election court then reasoned that "a close scrutiny of those [five] issues reveal[ed] that they are subsumed under the third one: ... to determine whether the 1st respondent (and by extension, the 2nd respondent) were validly returned as the Governor and Deputy Governor of Nyamira County."

39. Both the structure of the judgment of the election court as well as the arguments in the present appeal make it clear that transcendental question as framed by the election court was to be answered on the crucible of two key issues:

    a. First, whether any errors; discrepancies; and irregularities proved in evidence could lead to the conclusion that they were of such sufficient nature that they quantitatively affected the results of the election to warrant a declaration that the election was void for non-compliance with the law or qualitatively whether the entire election process was conducted so badly and not substantially in accordance with the law as to elections so as to lead to the conclusion that the election was vitiated or was not free and fair; and

    b. Second, whether the petitioner had proved beyond reasonable doubt that the 1st and 2nd respondents engaged in conduct of a criminal nature or a corrupt practice contrary to sections 14 and 15 of the *Election Offences Act*.

40. On both questions, the learned judge, after extensive analysis of the evidence adduced and the law applicable, answered in the negative. The learned judge, therefore, dismissed the amended petition with costs to the respondent.

E. The Appeal

41. Aggrieved by the decision of the election court, the appellant filed a notice of appeal dated January 21, 2023 in which he raised nine (9) grounds of appeal. These are that the learned judge erred in law by:

    1. Disregarding cogent and credible evidence of "corrupt practices" found on the part of the 1st and 2nd respondents.

    2. Failing to hold that "corrupt practice" had been proved to the required standard, having found that the petitioner had established the same against the 1st and 2nd respondents and with no answer from the said respondents in accordance with section 112 of the *Evidence Act*.

    3. Failing to appreciate that "corrupt practices" go to the root of an election and therefore vitiate the declared result.

    4. Failing to find that proof of a "corrupt practice" by the candidate or his agent was sufficient to avoid the election without subjecting the "corrupt practice" to a substantive test or its effect on the result.

    5. Failing to appreciate that a candidate is until a mitigating factor is established, responsible for the acts and omissions of his agent, in the instant Mr. Leonard Mogaru.

    6. Failing to appreciate that where a sponsoring political party (United Progressive Alliance) appointed agents on behalf of the candidate (ie the 1st and 2nd respondents), that agent (Mr Leonard Mogaru) would *prima facie* be treated as a candidate's agent.

    7. Failing to find that the 1st and 2nd respondents obtained and procured the assistance of Mr Leonard Mogaru for furtherance of their election prospects when Mr. Leonard Mogaru was serving as a public officer with the County Government of Nyamira/the County Assembly of Nyamira.

8. Failing to hold that the impugned elections were not conducted in substantial compliance with the law.

9. Applying a quantitative test to the election rather than a qualitative test in the disputed election.

42. The appellant prayed that the appeal be allowed, the judgment and decree of the election court be set aside, the petition before the trial court be allowed and the election of the 1st and 2nd respondents as governor and deputy governor be annulled, and there be an order of fresh elections in Nyamira County within 60 days from the date of our judgment, and the appellants be awarded costs of this appeal and petition at the election court.

43. However, contemporaneously with the record of appeal, the appellant filed a document styled "memorandum of appeal" dated March 12, 2023. In it, the appellant reiterates the nine (9) grounds of appeal contained in his notice of appeal and then adds one more thus:

10. The learned judge, in a ruling dated November 25, 2022, erred in law by exercising his discretion whimsically and/or capriciously granting the appellant limited scrutiny while he had laid a prima facie case for the grant of scrutiny as prayed.

44. The appeal was canvassed by way of written submission filed by all parties. During the virtual (plenary) hearing, learned counsel Mr Omwanza, Mr Awele and Mr Mokua appeared for the appellant. Learned counsel Mr Ligunya and Ms. Grace Maina appeared for the 1st and 2nd respondents, whereas learned counsel, Ms Amimo and Mr Muyundo appeared for the 3rd and 4th respondents. All parties relied on their written submissions and orally highlighted them in plenary.

45. The very first issue that was raised by the court for the appellant's counsel was the additional ground of appeal contained in the document styled as "memorandum of appeal" which counsel for the 1st and 2nd respondents had accurately pointed out is a creature unknown to our Election Petition Rules. As aforesaid, this additional ground was not contained in the notice of appeal filed pursuant to rule 6 of the *Court of Appeal (Election Petition) Rules*, 2017. Counsel for the appellant quickly conceded that the additional ground was improper since it impermissibly expanded the grounds of appeal and amounted to filing a new ground of appeal beyond the statutory time limits. The court, therefore, instructed appellant's counsel to restrict themselves to only the nine grounds of appeal raised in the notice of appeal dated January 21, 2023.

F. The Appellant's Arguments

46. With that direction, the appellant condensed his grounds of appeal into two main categories as follows:

a. Whether the issue of corrupt practices was proved to the required standard; and if so, what is the consequence?

b. Whether the gubernatorial elections in Nyamira County were conducted in substantial compliance with the law.

47. Learned counsel, Mr. Omwanza, started off his submissions by stating that as a matter of considerable public importance, purity of elections must be maintained, hence the existence of provisions relating to corrupt practices. As such, courts must zealously ensure that people do not get elected through fragrant breaches of law by indulging in corrupt practices. Therefore, any allegation of corrupt practices involving elections must be thoroughly investigated.

48. As regards the first set of grounds – related to allegations of election offences and corrupt practices -- counsel contended that the appellant proved the issue of corrupt practices to the required standard at the election court. He submitted that during trial, the 3rd respondent, who testified as DW1, produced a website printout, PMFI-1, which was marked under section 79, 60 and 80 of the *Evidence Act*. PMFI-1 has a list and photographs of members of the County Assembly Service Board, in which Mogaru is listed. Counsel argued that PMFI-1 is a public document which was "produced" without objection from the 1st and 2nd respondents counsel, and admitted as part of the record. Thus, the probative value thereof was established and this court should take judicial notice of the same.

49. In this regard, counsel rejected the learned judge's finding that PMFI- 1 was only marked for identification and could not be deemed as an exhibit for consideration by the court; and also, that the issue pleaded by the appellant only related to Mogaru being a member of the County Public Service Board and not a member of the County Assembly Service Board. He contended that the learned judge narrowly read and applied this court's decision in *Kenneth Nyaga Mwige v Austin Kiguta & 2 others* [2015] eKLR, to apply to all documents, whether public or private. This was the case, counsel argued, because the "public" document tendered demonstrated that Mogaru was a member of the County Assembly Service Board. For this proposition, counsel relied on the case of *Simon Nyaundi Ogari & another v Hon Joel Omagwa Onyancha & 2 others* [2008] eKLR, wherein the High Court held that an election court can examine any public document that is shown to be relevant; and that an election court can even undertake investigations where important issues related to the integrity of elections are concerned.

50. Counsel also contended that the two forms 37C produced by the 3rd respondent, which were used to declare the gubernatorial results, had the signature of Mogaru as an agent of UPA, the party that sponsored the 1st and 2nd respondents. According to counsel, PMFI-1 proved that Mogaru was and is an employee of the County Assembly Service Board, whose engagement as an agent vitiated the ability of the 1st and 2nd respondents to vie for elections. He argued that the appellant presented a case based on section 15(3) of the *Election Offences Act*, which disqualifies any candidate who uses public officers as agents.

51. Counsel argued that despite being the target of criminal conduct and corrupt practice allegations, the 1st and 2nd respondents refused to take the stand during trial for purposes of rebuttal, which action triggered the election court to make a negative inference, to wit, not taking the stand was "a perilous gamble." However, in the same breath, counsel argued, the court erred in not applying the inference to the facts. For this proposition, counsel relied on the case of *Njau v Gedi & 2 others; United States of America Embassy in Kenya & 3 others (Interested Party)* (Constitutional Petition 10B of 2022) [2022] KEHC 11889 (KLR), wherein the High Court held that the circumstances of the case were such that the burden of proof shifted to the 1st respondent. Counsel argued that since the 1st and 2nd respondents did not table contrary proof or rebut the allegations to demonstrate that Mogaru was not a public servant or their agent, the allegation was proved.

52. Counsel contended that information of that kind would have been in the special knowledge of the 1st and 2nd respondents and so the onus to prove facts within the special knowledge of a person would lie upon him alone. In this regard, he relied on *Doabia & Doabia: Law of Elections and Election Petitions* (page 2343) for the proposition that courts should be cautious not to stretch the doctrine of strict proof to the extent of making it impossible to prove allegations of corrupt practices which would defeat the object of the laws barring the vice. Thus, counsel urged this court to set aside the holding of the election court and hold that the burden of proof shifted to the 1st and 2nd respondents.

53. To further buttress his argument on the impact of the 1st and 2nd respondents' refusal to take the stand, counsel submitted that during the hearing of the application to expunge the proceedings involving the participation of the 1st and 2nd respondents, their counsel conceded that the primary reason for not calling them as witnesses was in exercise of their right to remain silent owing to the pleaded issues of corrupt practices. In this regard, counsel argued that the learned judge should have taken note of the said direct admission and taken cognizance of it as part of the negative inference, pursuant to the "empty chair doctrine" propounded in *Robert H Steir: Revisiting the Missing Witness Inference-Quieting the Loud Voice from the Empty Chair* and the decision in *Joel Makori Onsando & another v IEBC* [2018] eKLR, as was submitted by the appellant in the election court.

54. Counsel made reference to the case of *Moses Masika Wetangula v Musikari Nazi Kombo & 2 others* (*supra*) wherein the Supreme Court held that election petition proceedings are not part of the normal criminal process, therefore, it would not be appropriate for an appellant to invoke the regular scheme of a criminal trial with its strict substantive and procedural safeguards for the rights of the accused. He argued that the court held that election offences have a tendency to undermine the popular will which is the foundation of the governance system declared in the *Constitution*. Thus, election courts have a duty to stand firm against any violations under *the Constitution*. He further argued that the Supreme Court directed in *Moses Masika Wetangula v Musikari Nazi Kombo & 2 others* (*supra*), that a court cannot appear to condone illegality in an election process, and that, therefore, a court should investigate any legal breaches of the law, even where the breaches were not in the pleadings but arose in the course of trial. This would be procedurally fair, counsel represented the Supreme Court as saying, since such breaches go to the root of the petition, and it is assumed that the respondent had sufficient notice that there will be proof of the offence and as such, relevant sanctions will be applicable if he/she is found culpable. In this regard, counsel argued that the 1st and 2nd respondents had sufficient notice as they made steps to fight the said allegations, some of which included extensive cross examination of the appellant and his witnesses and failure to take the stand. For this proposition, counsel relied on the case of *Eco Bank (NIG) Ltd v Uchechukwu Aghazu* (2019) LPELR-46966 (CA), wherein it was held that once an aspect of a fact has been pleaded and while cross- examining the advocate puts questions to the witness that helps the witness explain further the facts pleaded or to supply elements of the facts left out, counsel cannot turn around to ask for the evidence to be expunged because that particular aspect was not pleaded.

55. Counsel submitted that the facts on corrupt practices were admitted as no contrary evidence was tabled to controvert them. He further, submitted that if some corrupt practices came to the notice of the court out of the admitted facts on record, the same can be considered in the public interest, even though they have not been pleaded by any party. Additionally, counsel submitted that an election court has jurisdiction to make inquiry into allegations made in an election petition suo motu and also, that a respondent can bring to the notice of the court illegalities and irregularities not alleged in the election petition itself and support the petitioner by proving them. For this proposition, counsel relied on the decision of the High Court of India, *Guahati High Court in Nani Gopal Swami v Abdul Hamid Choudhury and another* [1959], wherein it was held that a tribunal has jurisdiction suo motu to enquire into allegations of corruption made in an election petition and even a respondent can bring to the notice of the tribunal, illegalities and irregularities not alleged in the election petition itself and support the petitioner by proving them.

56. Counsel argued that even though the burden of proof is initially and almost entirely on the petitioner, the respondent is not altogether absolved of his responsibility to assist the court by producing the best evidence available in rebuttal. He urged that the 1st and 2nd respondents failed to do so, and the court may draw such inference against them as may appear just and reasonable, as was the case during trial.

In other words, counsel urged that courts should not ignore blatant breaches of electoral laws in any circumstance, as was held in *Mahamud Muhumed Sirat v Ali Hassan Abdirahman & 2 others* [2010] eKLR.

57. Counsel argued that it was proved that Mogaru was an agent of the 1st and 2nd respondents and a public officer, thus, the use of a public officer as an agent in an election amounted to corrupt practices by a candidate. For this proposition, he relied on the decision of the Supreme Court of India in *Indira Nehru Gandhi v Shri Raj Narain & another* [1975] AIR 2299, wherein the court held that it was a corrupt practice for a candidate or his agent to obtain or procure any assistance from gazetted officers, for the furtherance of the prospect of that candidate. Counsel urged that in the context of the Indian law, gazetted officers are public officers in the Kenyan legal system. Thus, Mogaru is a gazetted officer who falls within the ambit of people who should not actively take sides in elections.

58. Thus, counsel submitted that proof of breach of section 15 of the *Elections Offences Act* should automatically nullify the result of the 1st and 2nd respondents, regardless of its impact on the election results and relied on the cases of *Karanja Kabage v Joseph Kiuna Kariambegu Nga'ang'a & 2 others*, Nairobi Court of Appeal, Civil Appeal No 301 of 2013 [2014] eKLR, Erlam ors v Rahman & another and *Fredrick Otieno Outa v Jared Odoyo Okello & 4 others*, Supreme Court Petition No 6 of 2014 [2014] eKLR. Counsel submitted that in the latter case, the Supreme Court held that proof of corrupt practices is enough to nullify an election even when the said corrupt practice is seen not to affect the election results. Similarly, in Erlam ors v Rahman & another (*supra*), the High Court held that proof of a corrupt practice is enough to void an election even when it does not affect the outcome of the results; and it matters not whether the agent was a political party agent. In other words, if the party sponsoring a candidate appoints an agent who is a public servant, that agent belongs to the candidate and the candidate should suffer the consequences.

59. Counsel also relied on the decision of the Supreme Court of India in *Dr YS Parmar v Shhira Singh Paul & another* [1959] AIR 244, wherein it was stated that a person shall be held to have furthered the election prospects of a candidate if he acts as a polling, tallying or counting agent in that election. It was urged that the responsibility of appointment of agents fall on a candidate even if the appointment was made by another person on his behalf.

60. Counsel further argued that the learned judge misapplied the case of *Alfred Nganga Mutua & 2 others v Wavinya Ndeti & another*, Supreme Court Petition Nos 11 & 14 of 2018 (Consolidated) [2018] eKLR. He contended that the facts in the said case were distinguishable from this case, as in that case, the issue was that the agent, Urbanus Wambua Musyoka, was a MCCP party agent and a public officer in Machakos County Government, whereas this was not the issue in the instant case. He argued that the fact that Mogaru was a party agent and not the 1st and 2nd respondent's agent was never tendered in evidence, rather, the same was tendered in their submissions. Therefore, their submissions on the issue should not have been taken as a finding of fact by the learned judge. In the circumstance, counsel urged this court to depart from the finding of the election court on that particular issue.

61. Counsel also argued that Mogaru was present at the county tallying center in full party gear christened "Mogaru 4 Nyaribo", which conduct the judge described as "despicable", but the learned judge erred in applying the wrong test when he held that donning party colours after the close of voting was inconsequential.

62. As regards the set of grounds alleging substantial non-compliance with the law, learned counsel, Mr Mokua, contended that the gubernatorial election was marred with irregularities, illegalities and malpractices that seriously affected its credibility. He argued that the appellant proved that the 3rd respondent produced two conflicting forms 37C which were used to declare the results, there were

significant transposition errors which substantially affected the outcome of the election, and there was a deduction of Walter Osebe's votes and an addition to the 1st and 2nd respondents votes.

63. Counsel argued that the use of the two conflicting forms 37C precipitated the disputed voter turnout and weakened the credibility of the results. In this regard, he contended that the first form 37C indicated the voter turnout as 179,719 whereas the second form 37C indicated the voter turnout as 207,907 and had no record of rejected ballots; which effectively meant that all the people who voted made a perfect choice despite the fact that there were rejected ballots in the election. Counsel argued that under *Regulations* 87(2)(b), the 3rd respondent is mandated to aggregate the total number of rejected votes in each constituency and the total number of votes rejected in the county. However, the tally in the second form 37C, which is said to have been used to declare the results, stated the total number of people who came to vote, whereas forms 37A, 37B and the first form 37C show the entries of rejected ballots. Thus, failure to include a field for rejected ballots in the second form 37C was unlawful and a breach of the said Regulation.

64. Counsel argued that the figures in both forms 37C did not reflect the will of the people as they were reverse engineered to reach a pre- determined outcome, which explained why the same failed to make mathematical or logical sense. According to counsel, the actions/omissions of the 3rd respondent revealed instances of ill motive on his part in so far as the gubernatorial election was concerned, as he elected to prepare two forms 37C, contrary to regulation 87(2)(a) which mandates him to accurately collate, tally and announce the election results. Thus, counsel contended that the gubernatorial election was not conducted in substantial compliance with the law and the quality thereof was not credible, verifiable or transparent, given the clandestine manner in which the forms were prepared and disseminated.

G.Respondents' Arguments

65. Opposing the appeal, learned counsel, Mr Ligunya, rejected the appellant's submission that in maintaining the purity of elections as provided for by laws relating to corrupt practices, any allegation thereof should trigger investigations by the election court. Counsel contended that by virtue of Kenya being an adversarial legal system as opposed to an inquisitorial legal system, a court serves as an arbiter and not an overseer over claims brought before it. Thus, a court can only make a determination premised on the evidence tendered before it and cannot aid a litigant in advancing his case when it is called upon to be an impartial umpire.

66. Counsel contended that both the trial court and this court cannot *suo motu* investigate alleged breaches of the law and submitted that the appellant's reliance on the Supreme Court decision in *Moses Masika Wetangula v Musikari Nazi Kombo & 2 others* (supra), was skewed to the wording that favours him as the court was clear on its role at paragraph 137, wherein it held that a court has a duty to forward evidence of general offence that may emerge in election petition proceedings to the office of Director of Public Prosecutions (DPP) for further investigations and possible criminal charges. Thus, in the instant case, the election court could only forward the allegations that arose in the course of trial to the office of the DPP, who is constitutionally mandated to take up any such matters; to wit, the election court found no such merited allegation to warrant forwarding to the DPP for investigation.

67. On the allegations of election offences or corrupt practices, counsel argued that the appellant did not lead evidence to prove that Mogaru was an employee of the County Public Service Board and relied on this court's decision in Independent Electoral & Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR, which cited with approval the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) v Nigeria Breweries PLC* SC 91/2002, wherein it was held that parties are bound by their pleadings and any evidence led by any party that does not support the averments in

the pleadings goes to no issue and must be disregarded. This position, counsel submitted, was also affirmed by the Supreme Court in *Raila Odinga v IEBC & 2 others; Aukot & another (Interested Parties) and Attorney General & another (Amicus Curiae)* (*supra*). Counsel argued that during trial, the appellant attempted to amend his petition to introduce a new entity known as "County Assembly Board", distinct from "County Public Service Board", to no avail, as the same was objected to by the respondents and the objection was upheld by the election court.

68. Contrary to the appellant's submission that the 3rd respondent produced PMFI-1, counsel contended that during cross examination of the 3rd and 4th respondents' witnesses, counsel for the appellant moved the court to mark for identification a website print out, PMFI-1 However, he never called any of the appellant's witnesses to produce the same as part of the court's record, since the appellant's case was already closed. To this end, counsel argued that the appellant, in his submissions, used the word "produced" several times to connote that the said document was produced during trial, in an effort to misguide this court and sell the same on a factually inaccurate position. Counsel submitted that the record shows that PMFI-1 was marked and never produced, and relied on this court's decision in *Kenneth Nyaga Mwige v Austin Kiguta & 2 others* (*supra*), wherein it was held that a witness must move the court to have a document produced as an exhibit and be part of the record.

69. Thus, counsel submitted, the learned judge was correct when he found that PMFI-1 had no probative value and answers given in cross examination by the 3rd respondent about PMFI-1 could not be used to establish the appellant's claim. Additionally, the appellant could not meander outside his pleading in which he stated that Mogaru was an employee of the County Public Service Board. According to counsel, at best, PMFI-1 was hearsay, untested and unauthenticated. As a result, counsel argued that to admit PMFI-1 in this court would fundamentally prejudice the respondents as there is no opportunity perceived in law that would give the parties an avenue to interrogate a document not produced before the trial court.

70. Counsel rejected the allegation that Mogaru was a public officer and stated that the same was factually baseless as the appellant did not adduce any evidence by way of identification documents, pay slips and/or payroll numbers, job description or any other means whatsoever, to prove that Mogaru who signed forms 37C on behalf of UPA party was the same person who was a public officer. Counsel contended that the appellant misapplied the case of *Indira Nehru Gandhi v Shri Raj Narain & another* (*supra*) as he failed to tender any evidence that demonstrated that Mogaru was a gazetted officer at the time of the election. Counsel also cited *Fredrick Otieno Outa v Jared Odoyo Okello & 4 others* and *Moses Masika Wetangula v Musikari Nazi Kombo & 2 others* (*supra*). Counsel submitted that the Supreme Court in the said cases held that "the legal framework for electoral disputes confers upon the court a quasi- criminal jurisdiction, thus, a court ought not to enter a finding of guilt if the evidence adduced is not definitive or is not strictly proved. Accordingly, the person alleging the commission of an offence is required to prove its ingredients, as a basis for any penal consequences, which proof is higher than mere preponderance of probabilities."

71. Counsel contended that no cogent evidence was tendered by the appellant that strictly proved the occurrence of an offence and rejected the appellant's submission that failure of the 1st and 2nd respondents to take the stand during trial was sufficient proof of the allegations leveled against them. Counsel also relied on the Supreme Court decision in *Alfred Nganga Mutua & 2 others v Wavinya Ndeti & another*, Supreme Court Petition Nos 11 & 14 of 2018 (Consolidated) (*supra*), where, he said, a distinction was made between a party agent and a candidate's agent. Counsel submitted that in that case, the court held that the 1st appellant's party, MCCP, and not the appellant, engaged Urbanus Wambua Musyoka as its election agent. Consequently, the 1st appellant was absolved of any culpability in the engagement of the said Urbanus Wambua Musyoka as an agent of the 1st appellant's sponsoring

political party in the election. Thus, counsel disapproved the appellant's reliance on the case of *Njau vs Gedi & 2 others* (*supra*), that the burden shifted to the 1st and 2nd respondents. He argued that the case lacks merit and is not binding on this Court, being a High Court decision.

72. In the same vein, counsel also disapproved the appellant's reliance on the High Court decision in *Simon Nyaundi Ogari & another v Hon Joel Omagwa Onyancha & 2 others* (*supra*), that an election court should endeavor to do substantive justice and examine any public document shown to be relevant. In this regard, counsel contended that in the instant case, no public document was shown to be relevant before the election court or this court. Further, he argued, there can be no substantive justice without protection of procedural safeguards set out in legislation and jurisprudence of the courts, as the two are conjoined twins. Counsel relied on the Supreme Court decision in *Telcom Kenya Ltd v John Ochanda and 996 others* [2015] eKLR, wherein it was held that "parties should comply with procedure, rather than look into court's discretion curing the pleadings before it...it is to be borne in mind that rules of procedure are not irrelevant, but are the handmaiden of justice that facilitate the right of access to justice in the terms of article 48 of the *Constitution*." other cases cited in this regard included: this court's decision in *Charles Juma Mulwa v Peter Makau Ndeti & Esther Mbula Makau (Suing on their own behalf and as administrators of the Estate of the late Alex Nzomo Muendo)* [2020] eKLR, which cited with approval the decision of Kiage, JA in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral & Boundaries Commission & 6 others* [2013] eKLR.

73. Turning to the set of grounds alleging substantial non-compliance with the law, counsel for the 1st and 2nd respondents argued that elections are conducted by "mere mortals" who are prone to human error and fatigue, and rejected the appellant's submissions that the two forms 37C resulted in a disputed voter turn-out and affected the credibility of the elections. In this regard, counsel concurred with the learned judge's finding which was premised on the case of *Oscar Omoke Ocholla & 4 others v Independent Electoral & Boundaries Commission & 2 others*, wherein it was held that the error in the total number of registered voters did not affect the final results of the elections.

74. Counsel contended that the margin of votes between the appellant and the 1st and 2nd respondents remained over 30,000 while the total votes garnered by contenders in the two forms 37C remained unaffected; and relied on the case of *Joho v Nyange & another* (4) [2007] eKLR, wherein the court held that some errors are always likely to occur in the conduct of an election but if the same are not fundamental, they should be excused or ignored. Counsel also relied on the case of *Dickson Mwende Kithinji v Gatirau Peter Munya & others*, wherein the court held that practical realities of an election administration are such that imperfections are inevitable, and on this account, elections should not be lightly overturned, especially where neither a candidate nor the voters have engaged in any wrong doing. Ultimately, counsel urged this court to be guided by its celebrated decision in *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR and maintain that the polling station is the true *locus* for the free exercise of the voters will and any irregularities, as already admitted by the 3rd and 4th respondents in the two forms 37C, did not affect the votes of the candidates or alter the gubernatorial elections.

75. Similarly, learned counsel, Mr Amimo, for the 3rd and 4th respondents opposed the appeal, and associated himself with the submissions of the 1st and 2nd respondents. As regards grounds related to the commission of electoral offences, Mr Amimo, too, argued that the appellant did not lead evidence to prove that Mogaru was an employee of the County Public Service Board as pleaded. He also argued that the appellant admitted during trial that he did not have any evidence to substantiate the allegations that Mogaru was an employee of the County Public Service Board.

76. Counsel contended that the piece of evidence that the appellant sought to rely on to demonstrate that Mogaru was an employee of the County Public Service Board was a website print out publication of the County Assembly of Nyamira, which comprised members thereof. Counsel argued that during cross examination of the 3rd and 4th respondents' witnesses, and after the close of the appellant's case, counsel for the appellant asked the 3rd respondent to confirm whether the name and picture of Mogaru appeared on the said website print out and thereafter, the court directed that the document be marked as PMFI-1. To this end, counsel argued that the appellant never made an application to re-open his case and produce the said document. Thus, it was never produced and could not form part of the record, which failure in effect was fatal to the appellant's case.

77. Counsel for the 3rd and 4th respondents insisted that PMFI-1 was not produced in evidence and cited *Kenneth Nyaga Mwige v Austin Kiguta & 2 others* (*supra*) for the distinction between documents marked for identification and documents produced as exhibits, which then form part of the court record. Counsel rejected the appellant's submission that PMFI-1 is a public document which proved that Mogaru was an employee of the County Public Service Board, hence, his alleged appointment as an agent of the 1st and 2nd respondents constituted a corrupt practice. He argued that parties are bound by their pleadings and any evidence led which is at variance with the pleadings is of no consequence and must be disregarded. Counsel cited *Arikala Narasa Reddy v Venkata Ram Reddy Reddygari & another*, which was cited with approval by the Supreme Court of Kenya in *Raila Amollo Odinga v Independent Electorial & Boundaries Commission & 2 others* [2017] eKLR.

78. In any event, counsel argued that PMFI-1 is a website print out, allegedly of the County Assembly of Nyamira, hence, an electronic evidence which was never produced. Therefore, its authenticity cannot be guaranteed as per the requirements of section 106B(2) of the *Evidence Act*, as there was no certificate to authenticate the source thereof. In the circumstance thereof, the same is not admissible in law.

79. Counsel further argued that the appellant did not tender evidence to prove that Mogaru was a public officer and was gazetted as such. For this proposition, counsel relied on this court's decision in *Julius Lekakeny ole Sunkuli v Gideon Sitelu Konchella & 2 others* [2018] eKLR, wherein it was held that "even though the appellant contended that the 1st respondent used public officers in his campaigns, there was no credible evidence to support the allegation. The court opined that even though the said officers may have been gazetted, the appellant did not tender in evidence the said gazette notice or even the date, if at all, of such gazette notice for the court to take judicial notice."

80. Counsel argued that a petitioner is under obligation to discharge the initial burden of proof before the respondents are invited to bear the evidential burden. As such, the burden of proof only shifts to the respondents once the petitioner discharges the initial burden of proof to the required standard, as was held by the Supreme Court in *Raila Odinga & 5 others v Independent Electoral & Boundaries Commission & 3 others* (Petition 5, 3 & 4 of 2013(Consolidated)) [2013] KESC 6 (KLR), which decision was affirmed in the Supreme Court decision in Gatirau Peter Munya v Dickson Mwende Kithinji v & 2 others [2014] eKLR, as well as the Nigerian Supreme Court decision in Buhari v Obasanjo (2005) CLR 7K. In this regard, counsel rejected the appellant's submission that the burden of proof of PMFI-1 shifted by virtue of the appellant's counsel cross examination of the 3rd respondent. According to counsel, as already stated hereinabove, the same was never produced and further, its contents were at variance with the pleadings and did not form any nexus with Mogaru being an agent. Counsel also argued that a criminal offence is not proved by failure of the accused person to provide contrary evidence, as alleged by the appellant in the instant case.

81. Turning to arguments directed at the proposition that there was no substantial compliance with the law in the conduct of the election, counsel contended that section 83 of the *Elections Act* recognizes the

sanctity of the right of people to choose their political leaders and forbids the court from trivializing that right by nullifying an election merely because of commission of errors and irregularities, or because of failure to comply with electoral laws. Thus, errors and irregularities or non-compliance with electoral laws must be so grave that the integrity of an election is materially compromised. Counsel submitted that this position was appreciated in this court's decision in *Martin Nyaga Wambora v Lenny Maxwell Kivuti & 3 others* [2018] eKLR, and the Supreme Court decisions in *Gatirau Peter Munya v Dickson Mwende Kithinji v & 2 others* (*supra*) and *Nathif Jama Adam v Abdikhaim Osman Mohammed & 3 others* [2014] eKLR.

82. Counsel contended that during trial, the appellant never alleged any illegality, irregularity or malpractice associated with voting, counting of votes, filling of forms 37A and 37B or transmission of results to the constituency tallying center. Additionally, counsel contended that the appellant never alleged that presiding officers at the polling station made entries in forms 37A which differed with the actual count. He argued that in any event, the only witness who alleged that the results differed ended up admitting that it was all hearsay.

83. Counsel further contended that the appellant did not dispute the results in any of the forms 37B from the four constituencies, which contained the tallying and collation of forms 37A, whereas form 37C contained the tallying and collation of forms 37B; in which regard he argued that the 3rd respondent does not deal with forms 37A when putting together form 37C. Counsel also contended that throughout the proceedings, the authenticity of the adduced forms 37A remained unchallenged. Hence, all the processes of the election were conducted in accordance with the relevant laws.

84. Be that as it may, counsel argued that the 3rd and 4th respondents readily admitted minimal transposition errors in collating results from forms 37A to form 37C, and the trial court analyzed the evidence adduced by all parties. However, the scrutiny report which collated results from all forms 37A afresh did not support the appellant's allegation that the results were doctored. In this regard, counsel relied on this court's decision in *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others* (*supra*), which emphasized the finality of results in form 37A at the polling station.

85. Counsel rejected the allegation that the 3rd and 4th respondents concealed evidence when they failed to present ballot boxes for Nyanchoka and Omonono polling stations. He argued that the same was untrue and misleading since the learned judge held that no such refusal took place, because the order on scrutiny did not require the 3rd and 4th respondents to present the said ballot boxes for inspection. Therefore, the appellant's insistence that this Court should penalize the 3rd and 4th respondents for the alleged failure to comply with the order of the court is preposterous.

86. Finally, counsel argued that the appellant was misguided in his averment that he proved that the two conflicting forms 37C were used in the declaration of results, whereby the first form 37C had the total number of voter turn-out as 179,719, whereas the second form 37C has the total number of voter turn-out as 207, 907. Additionally, the appellant alleged that the second form 37C which was used to declare the winner did not include a field for rejected ballots and as such, the results therein are not credible.

87. To this end, counsel contended that the appellant intentionally failed to appreciate the finality of the results of forms 37A at the polling station and secondly, the learned judge found that the only difference in the two forms 37C was the summation of the results because of errors, and no candidate was affected in the correction. Further, counsel contended that the appellant failed to prove that there were significant transposition errors that substantially affected the outcome of the elections, and also, that there was a deduction of votes of Walter Osebe and addition of votes to the 1st and 2nd respondents. Thus, counsel urged this court to find that the gubernatorial elections were conducted in substantial compliance with the law.

H.Analysis, Synthesis and Conclusions

88. Having considered the pleadings in the record of appeal, the judgment of the election court, the appellant's grounds in the notice of appeal and the rival submissions of the parties, two substantive issues present themselves for determination in this appeal:

    a. First, whether corrupt practice as an electoral offence occurred and was proved against the 1st and 2nd respondents; and if so, what is the consequence thereof.

    b. Second, whether the gubernatorial election in Nyamira County was conducted in substantial compliance with the law.

89. The remit of the Court of Appeal in election petitions is stipulated in section 85A of the *Elections Act*. It limits the appellate court's jurisdiction in electoral disputes to only matters of law. It directs 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."

90. In interpreting this remit, this court correctly stated in *John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others,* [2018] eKLR, that pursuant to section 85A of the *Elections Act*, in an election appeal, the court should not be drawn into considerations of the credibility of witnesses and other matters of fact. Its engagement with the facts should be limited to satisfying itself "whether the conclusions of the trial judge are based on the evidence on record or whether they are so perverse that no reasonable tribunal would have arrived on them." This is the standard of review this court will utilize in determining this appeal.

91. We will turn to the first issue. The answer to the question whether the 1st and 2nd respondents were guilty of corrupt practices and/or election offences is hinged on three separate questions which must all be answered in the affirmative for the appellant to prevail:

    a. First, was it proved to the required degree that Mr. Mogaru was a public officer?

    b. Second, if so, was Mr Mogaru's participation in the elections as an agent (of either UPA Party or the 1st and 2nd respondents) an election offence and/or a corrupt practice?

    c. Third, if the answer to the second question is in the positive, is the criminal conduct or corrupt practice of Mr Mogaru attributable to the 1st and 2nd respondents for purposes of impugning their election?

92. In the amended petition, the appellant pleaded that Leonard Okari Mogaru was a "Chief Agent...of the 1st respondent....[and] is an employee of the County Public Service Board, which is against section 15 of the *Electoral Offences Act*, 2016...[and that] the said Leonard Okari Mogaru actively participated in the campaigns of the 1st respondent and was subsequently appointed as the Chief Agent where he actively participated in safeguarding the interest of the 1st respondent throughout the voting and tallying cycle."

93. In their response to the amended petition, the 1st and 2nd respondents denied the averments of misconduct on the part of Mr Mogaru but more importantly pointed out that "the choice- and appointment of the 1st respondent's agents was the preserve of the UPA Party which appointed agents for all elections in accordance with the law...." The 1st respondent, also, importantly, pleaded that "as a prudent and diligent person, upon having been prompted by the allegations by the petitioner, the

1st respondent did contact the County Public Service Board for clarification and the Board confirmed that the said Mogaru has never been an employee of the Board."

94. Before us, Mr Omwanza sought to persuade us that the appellant had proved the allegations of corrupt practices and/or election offences beyond reasonable doubt. To reach this conclusion, Mr Omwanza sought to persuade us on five consequential propositions:

    a. First, Mr Omwanza argued that, by the learned judge's own reasoning, the appellant had proved the allegations that Mr. Mogaru had committed election offences and/or engaged in corrupt practices for two reasons. One, the learned judge had already concluded that the failure of the 1st and 2nd respondents to call witnesses meant that the petitioner's case had been proved; and that the only reason the petition did not succeed on that score was because the 3rd and 4th respondents had called witnesses. Yet, Mr Omwanza argued, on the specific allegations of corrupt practices pleaded in paragraphs 161-163 of the amended petition, the 3rd and 4th respondents did not traverse the allegations or bring any evidence to controvert them. Two, as such, Mr. Omwanza argued, the allegations respecting corrupt practices should be taken as proven as the judge himself concluded that "from that analysis I readily find that the said Mogaru was an agent of the UPA Party and showed his preferences openly at the County Tallying Center."

    b. Second, while Mr Omwanza conceded that the appellant did not have the website printout which was marked as PMFI-1 produced and admitted as evidence, he was of the view that it formed part of "admitted" probative evidence from which the learned judge should have reached a finding that Mr Mogaru was a public officer.

    c. Third, in making the argument that the learned judge should have considered the web printout which was marked as PMFI- 1, Mr Omwanza urged that the Kenneth Mwige Nyaga rule has no application where the document sought to be relied on by a party in a litigation is a public document. He argued, in essence, that in a situation where a party has marked for identification a public document, the court is bound to refer to it and make findings based on it by dint of section 79 of the *Evidence Act* which distinguishes private and public documents. For public documents, Mr Omwanza argued, there is a presumption of authenticity. This presumption would permit a judge to refer to and make findings on such a document if it is merely brought to their attention even if it is not produced and admitted in evidence.

    d. Fourth, Mr Omwanza argued that once it is established that Mr Mogaru was a public officer and was an agent for UPA party, and since the election court already made an unchallenged finding that he had committed electoral malpractices, then his actions are attributable to the 1st and 2nd respondents.

    e. Fifth, the appellant argues that the logical consequence of that attribution would be to find the 1st and 2nd respondents liable for those electoral offences and, thereby, void the election.

95. On their part, the respondents deny both the factual inferences drawn by Mr. Omwanza as well as the assumed doctrinal implications of those factual inferences. In particular, the respondents deny that the judge's findings can be read to conclude that Mr Mogaru was a public officer; and that his conduct as an agent of UPA party was attributable to the 1st and 2nd respondents.

96. It is important to begin with a point of convergence among all the parties. It is an important one given the state of our political hygiene in the country. It is that any electoral offence committed by a candidate for office is, without more, sufficient to nullify that election. Such an offence, once proved, does not have to be subjected to any qualifying or modulating test of seriousness or substantiveness:

an established election offence on the part of a candidate for electoral office is a per se dispositively nullifying factor in a subsequent election petition. A party challenging an election who proves that the candidate who was declared the winner in the election committed an election offence or corrupt practice is entitled to a nullification without having to prove anything more. A proven election offence committed by a person declared victor in an election nullifies his illicit victory, period.

97. The question that arises in the present appeal is whether there was proof that the 1st and 2nd respondents committed an election offence or engaged in a corrupt practice. As restated above, the two hills upon which the appellant must live or die is, first, whether it was proved to the degree required by law that Mr Mogaru was a public officer; and secondly, whether his actions are attributable to the 1st and 2nd respondents. I say so because the learned judge made express findings that Mr Mogaru was both an agent of UPA party; and that he engaged in conduct which could, in context, be characterized as election offences under sections 14 and 15 of the *Election Offences Act*. These are findings of fact to which this court is not entitled to interfere with.

98. The first legal obstacle the appellant must overcome is one the learned judge made explicit in his judgment: he is bound by his pleadings. Yet, in his pleadings, the appellant alleged that Mr Mogaru is an employee of the County Public Service Board. In the trial, however, the appellant belatedly and ill-fatedly sought to prove that Mr Mogaru was an employee of the County Assembly Service Board. In the election court, the appellant's counsel was of the view that it is impermissibly technical to make a finding that Mr Mogaru was not a public officer because the appellant pleaded that he was an employee of the County Public Service Board while the evidence brought to court tended to demonstrate that Mr Mogaru was, in fact, an employee of the County Assembly Service Board. In the election court counsel had pleaded with the court "not to stretch the doctrine of strict proof too far to the extent of making it nigh impossible to prove an allegation of corrupt practice."

99. Before us, the appellant did not make any arguments directly on this point. Unfortunately, avoidance is not an effective strategy in this case: it remains a fact that even if the appellant was, in fact, successful in demonstrating that Mr. Mogaru was an employee of the County Assembly Service Board, it would be a Cadmean victory; it would not translate to success on the cause of action. This is because that demonstration would be at variance with his pleadings:

He pleaded that Mr. Mogaru was a member of the County Public Service Board; he would have succeeded in showing that he was a member of the County Assembly Service Board; his cause of action would still have failed. The law is quite well settled that parties are bound by the pleadings. See, for example, *Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae)* (Presidential Election Petition 1 of 2017) [2017] KESC 42 (KLR) (20 September 2017) (Judgment) and this court's decisions in *John Waweru Kiarie v Beth Wambui Mugo & 2 others* - Election Petition No 13 of 2008 and *IEBC v Stephen Mutinda Muli & 3 others* (*supra*). This is not just a technical rule which fetishizes procedural narcissism; it is a substantive rule of law that plays the functional role of ensuring every litigant is informed in advance of the case he has to meet, so that he may effectively prepare and challenge the same. It is a substantive rule of law that ensures fairness and upholding of the principles of natural justice in the proceedings by ensuring that parties have proper notice of each other's cases. It is a fundamental facet of fair trial that banishes trial by ambush.

100. This easily overcomes Mr Omwanza's first salvo against the decision of the learned judge – that the learned judge had already concluded that the case against the 1st and 2nd respondents had been established since they did not offer any evidence in rebuttal. Even if one accepted that line of reasoning, the appellant would still come against this insurmountable rule of law.

101. Supposing the appellant had properly pleaded the issue of Mr Mogaru's being a public officer, is the appellant correct that he established by admissible evidence that he was, indeed, one? Unfortunately, we do not think so despite Mr Omwanza's valiant efforts to innovatively distinguish the *Kenneth Nyaga Mwige* rule. That rule, announced by this court in *Kenneth Nyaga Mwige v Austin Kiguta & 2 others* [2015] eKLR and cited by the learned judge is, really, no more than a straightforward application of the logical rules of adduction of evidence. It simply states that a document which has been marked for identification does not, *ipso facto*, become evidence; it must be produced by a witness and admitted into evidence before a court can rely on it in its findings. In this court's words:

> 20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account.

102. In the present case, the appellant freely admits that he did not produce PMFI-1, the website printout, into evidence. It was merely marked for identification. In fact, it was so marked for identification long after the appellant had closed its case, during the cross- examination of the 3rd and 4th respondents' witnesses. The appellant argues that since the website printout is a public document, by dint of section 80 of the *Evidence Act*, it is given the presumption of authenticity and can be relied on by the court in coming up with its conclusions. Counsel is innovative in his argument; but is, with respect, wrong. There is no such bifurcated qualification to the rule in the *Kenneth Nyaga Mwige* case. A document which is marked for identification must, simply, be produced – whether the document is "private" or "public". The only time a party is exempted from the need to prove a documentary fact is where the court can take judicial notice of it. In the present case, no case was made for the court to take judicial notice of the document and no such finding was made. In any event, there is a serious question whether the website printout would meet the criterion of a "public" document. This controversy in itself justifies the rule that all such documents must be procedurally produced so that the trial court can properly entertain arguments about their authenticity and probative value.

103. Finally, even if the appellant had survived these first three substantive landmines, as the learned judge correctly analyzed, he would still have been unable to attribute the actions and conduct of Mr Mogaru to the 1st and 2nd respondents in the circumstances of this case. This is because it is admitted that Mr Mogaru was the party's agent and not the agent of the 1st and 2nd respondents. He was recruited and instructed by the party; and not by the 1st and 2nd respondents. Contrary to the appellant's arguments, that distinction matters. It matters for two reasons.

104. First of all, under our electoral statutory scheme, candidates for office sponsored by political parties are not, in the first instance, permitted to appoint their own agents. The default rule is that it is the party which is given the first task to appoint an agent for each polling or tallying center. The individual candidate is only permitted to appoint an agent of his or her own if the party fails to appoint one. Hence, section 2 of the *Elections Act*, 2011 defines an agent thus:

> " Agent" means a person duly appointed by—
>
> (a) a political party or an independent candidate for the purposes of an election under this Act; or

(b) a referendum committee for the purposes of a referendum under this Act, and includes a counting agent and a tallying agent.

105. On the other hand, section 30 of the *Act* on the appointment of agents provides as follows:

(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 subsection (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.

(3A) A registered referendum committee may appoint one agent at each polling station.

106. It follows that a candidate for office nominated by a political party can only appoint an agent if the party has not nominated an agent of its own. In the instant case, it is freely admitted by the appellant that the party, UPA, appointed Mr Mogaru as its agent. If Mr Mogaru was appointed by the UPA Party, his actions – especially those of a criminal nature – cannot be attributed to the 1st and 2nd respondents who had no say in his selection and recruitment. Even where principles of vicarious liability apply to inure liability to a principal who has granted ostensible authority to an agent to perform an act where the act is done negligently or recklessly to cause injury, the principle of vicarious liability is never extended to acts of a criminal nature. In this case, the 1st and 2nd respondent not only had no role in the selection and recruitment of Mr Mogaru as an agent; but the acts complained of are of a criminal nature.

107. As the Supreme Court pointed out in Raila 2017 Case, it is also settled law that the standard of proof of any election offence or quasi criminal conduct is that of beyond reasonable doubt. In *Alfred Nganga Mutua & 2 others v Wavinya Ndeti & another* [2018] eKLR, the Supreme Court intimated that where an agent whose conduct is impugned as amounting to an election offence is a party agent as opposed to a candidate's individual agent, such an allegation would not only have to be proved beyond reasonable doubt; but that such conduct would not, without more, be attributable to the individual candidate who had nothing to do with the selection and recruitment of the candidate. Such is the case here. It is not denied that Mr Mogaru was the party's agent. As such, for any conduct amounting to an election offence to be attributable to the 1st and 2nd respondents, the appellant needed to demonstrate that the specific conduct was authorized and sanctioned by the 1st and 2nd respondent. As in the *Alfred Nganga Mutua* case, the mere fact that the agent was the party's agent would not suffice to implicate the candidate in an election offence.

108. Respecting the second issue, the Supreme Court has pronounced itself in a number of cases that for an election to be nullified, errors, irregularities or non-compliance with electoral laws must be so grave that the integrity of the election is materially compromised. Put differently, no election should be voided for non-compliance with any written law relating to elections or because of errors and irregularities, if it appears that the election was conducted substantially in accordance with the principles laid down in the *Constitution* and written law, or if the non-compliance did not affect the results of the election.

109. In *Gatirau Peter Munya v Dickson Mwende Kithinji v & 2 others* (*supra*) the Supreme Court rendered itself as follows:

> " 216. It is clear to us that an election should be conducted substantially in accordance with the principles of the *Constitution*, as set out in article 81(e). Voting is to be conducted in accordance with the principles set out in article 85. The *Elections Act* and the regulations thereunder, constitute the substantive and procedural law for conduct of elections.

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

218. Where however, it is shown that the irregularities were of such magnitude that they affected the election result then such an election stands to be invalidated, otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection are not by and of themselves, to vitiate an election..."

110. In *Raila Amollo Odinga v Independent Electoral and Boundaries Commission and 2 others* (*supra*), the Supreme Court rendered itself as follows:

> "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."

111. The appellant's contention is that the gubernatorial election was marred with irregularities, illegalities and malpractices that seriously affected its credibility. At the heart of the appellant's contention was that: the 3rd respondent elected to prepare two conflicting forms 37C which he used to declare the results, contrary to *Regulation* 87(2)(a) which mandates him to accurately collate, tally and announce the election results; there were significant transposition errors which substantially affected the outcome of the election; and there was a deduction of Walter Osebe's votes and an addition of 1st and 2nd respondents votes.

112. For the sake of completeness, it is important to recall that one of the main arguments the appellant had raised in the election court was that Nyambati's agents were not allowed into the polling stations. Indeed, he alleged that Nyambati's agents were not allowed into at least 138 polling stations "due to discriminative restrictions imposed upon them by the 3rd and 4th respondents." The learned judge dismissed these allegations when he made findings that UDA Party agents were, in fact, present in these polling stations and the law only provides for sponsored party candidates to have agents only where the nominating party has not appointed an agent for the party. The appellant does not seem to have been aggrieved by those findings because he did not make any arguments on appeal in this regard.

113. To return to the argument about substantial non-compliance with the law, the appellant argued that the use of the two conflicting forms 37Cs impugned the voter turnout numbers and weakened the credibility of the results. He argued that the first form 37C indicated the voter turnout as 179,719, whereas the second form 37C indicated the voter turnout as 207,907, and had no record of rejected ballots; which effectively meant that all the people who voted made a perfect choice despite the fact that there were rejected ballots in the election. According to the appellant, the figures in both forms 37C did not reflect the will of the people as they were "reverse engineered" to reach a pre-determined outcome, which explained why the same failed to make mathematical or logical sense. Hence, the appellant argued, the election was not conducted in substantial compliance with the law and the quality thereof was not credible, verifiable or transparent.

114. In this regard, we take note of the fact that the learned judge made a scrutiny order for: IEBC to provide an inventory of ballot boxes (including their serial numbers and seals' serial numbers) used for the gubernatorial elections at Omonono and Nyanchoka polling stations; a recount of votes cast for governor at Motagara, Kenyamware and Nyabigege polling stations; a re-tally of results in the final forms 37B for all the four constituencies in Nyamira County; and a re-tally of the results in the original forms 37A and the final form 37C. In part as a result of the partial scrutiny whose report formed part of the court proceedings and which all parties were at liberty to address in their final submissions, the learned judge made extensive findings of fact regarding the alleged discrepancies and transpositional errors. It is necessary to reproduce at length these detailed and careful findings of the learned judge for their full tenor and meaning:

> "255. I however find the following. There is no express regulation that bars the County Returning Officer from correcting such errors in form 37C. The regulations only require the process of tallying to be done in the presence of candidates, agents or observers if present. Secondly, the existence of an error in such a form is not sufficient to annul the results.....
>
> 256. Furthermore, the results for the candidates in both disputed forms remained the same. The introduced changes related to the number of total number of voters who turned out to vote, the valid votes cast and rejected ballots.
>
> 257. Keeping in mind the decision in *IEBC v Maina Kiai & 5 others* [*supra*] about the finality of results from the polling center, I find that DW1 or IEBC did not deliberately or fraudulently alter the results of candidates as captured by presiding officers in forms 37A. However, owing to wrong data entry in form 37C, Nyambati lost a total of 432 votes while the 1st respondent gained 17 votes.
>
> 258. I have analyzed at length the errors, cancellations, over-writings or alterations to the primary forms 37A. I stated earlier that there was no significant attack on the validity of forms 37B from the four constituencies in Nyamira. Nevertheless, I have analyzed the variances between forms 37A and the entries into forms 37B. In particular, I have highlighted the key findings from the scrutiny report. Whereas the transfer of data from forms 37A into the 37B series generated lesser heat, the petitioner raised serious grievances with what IEBC termed a "draft form 37C" and the final form 37C used to declare the winner.
>
> 259 .....
>
> 260. In the initial form 37C, the total number of voters who turned out to vote were recorded as 179,719 (55.59%). But in the second form, they are indicated as 207,096 (64.06%). Again, in the first form, the second last column lists the valid votes as 176,929 while the final form 37C states a figure of 207,096. The rejected ballots in the first form are 2,790 and 2791 in the subsequent form. Learned counsel for the petition thus submitted that the voter turn-out was a moving target.
>
> 261. In examining the certified final form 37C it is critical to keep in mind the centrality of the primary forms 37A; and, the binding precedent in *IEBC v Maina Kiai & 5 others* [*supra*]. Secondly, not all registered voters turn out to

vote. and those who do cast some ballots that may be rejected. I am persuaded by the simple logic that voters mean the people who cast their votes for a candidate. Those are the "voters who turns out to vote". It must follow that rejected ballots are not votes. It also means that valid votes and votes cast mean the same thing.

262. .....

263. That said, I am satisfied that the first form 37C contained some errors. For instance, the total number of valid votes cast for all candidates appearing in the second last column of the form did not include the votes of two candidates, Bosire Anthony Moseti and Bwo'ndieki John Nyariki in three constituencies of Kitutu Masaba, North Mugirango and Borabu.

264. As explained by DW1, they were "arithmetical errors in terms of summation of the total number of valid votes cast discernable from the total number of votes garnered by each candidate such that from the said entries, the total number of valid votes cast is 207,096 (with Osiemo's votes being 785 and not 985) and not 179,719.

265. I dealt at great length with the transpositional errors in the first form 37C and which were largely admitted by the IEBC at paragraphs 69, 70, 71, 72 and 73 of the affidavit of DW1. Firstly, the combined errors of transferring the data from forms 37A into 37C denied Nyambati 432 votes and added Nyaribo 17 votes. The votes of all the other candidates were unaffected. But to this, one must now add the votes gained or lost from the scrutiny exercise that I highlighted at paragraphs 247 and 248 of this judgment.

266. Secondly, the final form 37C that was used to declare the results was amended primarily to correct the figure of the total valid votes cast or the contentious number of voters who turned out to vote. I have dealt earlier with the changes and definitions of those terms. Fundamentally, the changes in the second form 37C did not affect the votes for any candidate.

267. In the end, the claim by the petitioner that the final form amounted to "reverse engineering" or fraud to reach a pre-determined outcome was not proved to the required standard for a number of reasons. Firstly, the petitioner admitted that he was not an agent in the election. He did not this participate in the preparation or execution of the two impugned forms. He did not receive a copy of it either. Secondly, his key witnesses, Kinaro Ndubi (PW13), was not also at the county tallying center. The latter relied largely on information obtained from a candidate, Nyambati. Nyambati on the other hand did not take to the stand. I have reached the conclusion that it is classic hearsay. Thirdly, it was common ground that the results were announced on August 12, 2022. Fourthly, the petitioner also failed to prove that the second form was fraudulently made ten days after the declaration of results.

268. There is no doubt that the inquiry by the election court has revealed a number of discrepancies and irregularities in the poll.....

269. When all those flaws are juxtaposed against the overall findings in the scrutiny report and the remaining wide margin between the two leading candidates, I

have reached the conclusion that they did not substantially affect the results. I am not thus satisfied that there was a choreographed scheme to systematically deduct the votes from Nyambati and credit them to candidates Bosire and Nyaribo; or, that there was a fraudulent stratagem contrived by the IEBC to subvert the will of the people of Nyamira.

270 .....

271 .....

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275. From the partial scrutiny and recount of votes in some of the disputed polling stations, the 1st respondent's lead remained unassailable. Furthermore, the election court was dealing with specific complaints pleaded in the amended petition and the quality of evidence. I would be hard pressed to say that the overall result did not reflect the will of the people.

276. In view of the centrality of forms 37A; and, the binding precedent in *IEBC v Maina Kiai & 5 others*, [*supra*], I am not persuaded that the election was not conducted in accordance with the principles laid down in the *Constitution* and written law. It follows that my answer to issue number (i) is in the affirmative. The gubernatorial election for Nyamira held on August 9, 2022 was substantially conducted in accordance with the *Constitution*, the *Elections Act* and regulations."

115. In considering the appeal on this issue, it is important to recall the limited remit of the appellate court on factual matters: Its engagement with the facts should be limited to satisfying itself "whether the conclusions of the trial judge are based on the evidence on record or whether they are so perverse that no reasonable tribunal would have arrived on them."

116. We have just reproduced at length the careful, thorough, detailed, and candid findings of fact by the learned judge on the allegations of irregularities and transpositional errors alleged by the appellant. The learned judge drew from the evidence of the pleadings, the evidence of the parties and the scrutiny report and the documentary evidence produced at trial to reach the careful conclusion that the errors and irregularities in the electoral forms were inadvertent (and certainly not intentional or reverse-engineered); in context immaterial and insubstantial; and did not, overall, affect the outcome or substance of the elections. In particular, the learned judge worked from the original Forms 37As and 37Bs deposited in court and reached the conclusion that despite the transpositional errors when moving the figures to Form 37C, the numbers of votes garnered by each candidate as well as the number of rejected votes were, generally, accurate. The learned judge concluded that the 1st and 2nd respondent's lead remained unassailable and the totality of the anomalies did not substantially affect the numbers or the outcome of the elections. The learned judge also concluded that there was no systematic failure of process or advertent scheme to transfer votes from one candidate to another or otherwise thwart the will of the people of Nyamira County in the elections. In doing the former, the learned judge was eminently applying the quantitative test in section 83 of the *Elections Act* while in doing the latter the judge was applying the qualitative test of the same section.

117. Having independently looked at the record and these documents and aware of the limited remit of this court in reviewing the factual findings of an election court, we are simply unable to say that the analysis

and conclusions of fact by the learned judge were in any way perverse and unsupported by evidence to warrant a review and reversal by this court. To the contrary, as stated above, we find the learned judge's analysis and conclusions measured and judicious. The irregularities, discrepancies, and transpositional errors did not, quantitatively, affect the results of the elections. The discrepancies were arithmetical in nature and not such as to change the results of the elections. Neither did they, qualitatively, reach the threshold where this court can, in context, conclude that the election was conducted so badly that it was not substantially in accordance with the law as to elections. Consequently, the grounds of appeal hinged on the argument that the elections were not conducted in substantial compliance with the law; or that the judge failed to apply a qualitative test in the disputed election fail as well. It is obvious, from the parts of the judgment extracted above, that the learned judge considered both the quantitative and the qualitative tests as he was required by section 83 of the *Elections Act*. Both tests failed in the instant case, and correctly so.

118. The upshot is that the appeal as a whole lacks merit. It is accordingly dismissed with costs. The judgment of the High Court delivered on February 16, 2023 that certified the election results is thus upheld.

DATED AND DELIVERED AT KISUMU THIS 4TH DAY OF AUGUST, 2023.

P. O. KIAGE

JUDGE OF APPEAL

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MUMBI NGUGI

JUDGE OF APPEAL

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JOEL NGUGI

JUDGE OF APPEAL

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I certify that this is a true copy of the original

Signed

Deputy Registrar