



**Gitene v Omweri & 2 others (Election Appeal E001 of 2023)
[2023] KEHC 19285 (KLR) (30 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19285 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
ELECTION APPEAL E001 OF 2023**

JN KAMAU, J

JUNE 30, 2023

BETWEEN

HON VINCENT ONYANDO GITENE APPELLANT

AND

AMOS MOKAYA OMWERI 1ST RESPONDENT

**DAVID KIPKEMOI CHEROP, KITUTU CHACHE SOUTH CONSTITUENCY
RETURNING OFFICER KISII COUNTY 2ND RESPONDENT**

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 3RD
RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon P.K Mutai (SRM) delivered at Kisii
in Chief Magistrate's Court Election Petition No E001 of 2022 on 20th December 2022)*

JUDGMENT

Introduction

1. In his decision of December 20, 2022, the Learned Trial Magistrate, Hon P. K. Mutai, Senior Resident Magistrate, declared that:-
 - a. Election of Member of County Assembly Nyatieko Ward in Kisii County was conducted in accordance with the Constitution and the written law.
 - b. Noncompliance, irregularities by the 2nd and 3rd Respondent in the conduct of the election did not materially affect validity of the results of the election for Member of Assembly Nyatieko Ward in Kisii County.
 - c. There was no evidence that the 1st Respondent committed an election offence under Section 15(2) and Section 20 of the Elections Act.



- d. The 1st Respondent was validly elected and subsequently declared the elected Member of County Assembly Nyatieko Ward in Kisii County.
 - e. Certificate under Section 86 of the *Elections Act* shall accordingly issue.
 - f. The Petitioner was condemned to pay costs of this Petition capped at Kshs 100,000/= for the 1st Respondent and Kshs 200,000/= for both the 2nd and 3rd Respondents.
2. Being aggrieved by the said decision, on 4th January 2023, the Appellant filed a Memorandum of Appeal dated 3rd January 2023. He relied on eight (8) grounds of appeal.
 3. His Written Submissions were dated 25th April 2023 and filed on 28th April 2023. The 1st Respondent's Written Submissions were dated and filed on 8th May 2023 while those of the 2nd and 3rd Respondents were dated 10th May 2023 and filed on 15th May 2023. The Judgment herein is based on the said Written Submissions which parties relied upon in their entirety.

Legal Analysis

4. Section 75 of the *Elections Act, 2011*, grants this court the appellate jurisdiction over decisions of the magistrates' courts on disputes relating to elections to county assemblies. The aforesaid Section provides as follows:-

“An appeal under subsection (1A) shall lie to the High Court on matters of law only (emphasis court) and shall be –

 - a. filed within 30 days of the decision of the magistrate's court; and
 - b. heard and determined within 6 months from the date of filing of the appeal.
5. It was clear from the above statutory provision that an appeal to the High Court from an Election Court was restricted to matters of law. A perusal of the Memorandum of Appeal showed that Grounds of Appeal Nos 1, 2, 3, 4, 6 and 7 were clearly couched as being on law and fact. However, this court noted that the Respondents herein did not object to and/or raise issues concerning the same.
6. Be that as it may, this court had due regard to the case of *Zacharia Obado vs Edward Akongo Oyugi & 2 Others* [2014] eKLR, a decision of the Supreme Court, where it merely stated that where the point for determination on appeal was a mixed point of law and fact, and where the finding of fact by the trial court was unsupported by the evidence or was unreasonable or perverse in nature, then such constituted a point of law.
7. Accordingly, although this is a first appeal, this court did not have the latitude or the luxury of re-evaluating, re-examining and re-assessing the evidence so as to reach its own independent conclusion, as would be the case in other ordinary civil appeals on first appeal. It was alive to the fact that points of law may inescapably be difficult to discern from factual and evidential determination. It was in that regard that circumspection became necessary as the line between the facts, evidence and the law could be blurred.
8. It was therefore bound to determine whether the evidence on record the elections was credible, whether the election was transparent, accountable free and fair, whether the results were properly declared, the interpretation and application of electoral principles and laws, standard of proof, scrutiny and recount, disenfranchisement of registered voters, commission of electoral offences and the effect of illegalities and irregularities in the said election, those were issues of law that.



9. Having looked at the Grounds of Appeal and the respective parties' Written Submissions, it appeared to this court that the only issues that had been placed before it for consideration were as follows:-
 - a. Whether or not the Appellant established a case of scrutiny and recount as required by law
 - b. Whether the election of the Member of County Assembly Nyatieko Ward in Kisii County on 9th August 2022 was conducted in accordance with the [*Constitution of Kenya, 2010*](#) and the Electoral laws
 - c. Who is to bear the costs of the Appeal
10. This court therefore dealt with the said issues under the following distinct and separate heads.

I. Scrutiny And Recount

11. The Appellant submitted that he was one of the contestants in the Nyatieko Ward Member of the County Assembly elective position in the 9th August 2022 General Elections in Kisii County and that the 1st Respondent herein emerged the winner having garnered 2,646 votes whereas he emerged the second with 1,894 votes.
12. He stated that he was dissatisfied with the results, the counting and tallying as the process was marred with padding of votes, false results, exaggeration of voter turn-outs, irregular, unlawful assisted voting and unlawful ejection of political party agents during the election day. He was emphatic that the election as conducted by the 3rd Respondent did not comply with the law.
13. He further submitted that various case laws had been established and were used as guiding principle on the issue of an order of scrutiny and recount. In this regard, he placed reliance on the case of [*Raila Amolo Odinga & Another vs IEBC & 2 Others and the case of Hassan Mohamed & Another vs IEBC & 2 Others*](#) [2013] eKLR where the common thread was that an application for scrutiny and recount was to be made after adequate relevant evidence had been adduced during the trial and it would be such evidence that would provide, if at all sufficient reasons upon which the court would make relevant orders.
14. He argued that his agents were neither present during the casting or counting of votes as they were isolated. It was his contention that the act of isolation contravened Regulation 62(1)(c) of the [*Elections \(General\) Regulations, 2012*](#) as amended Regulation 79(5) which requires a presiding officer to record the reason for their absence. He asserted that failure to do so meant that his agents were present but the presiding officer unlawfully isolated them. In this respect, he relied on the case of [*Mohamed Mahamud Ali vs Independent and Boundaries Commission & 2 Others*](#) [2018] eKLR where the court granted the orders for recount and scrutiny of votes where it had established that Form 35A had not been signed by Jubilee Party agents.
15. He invoked Article 86 of the [*Constitution of Kenya, 2010*](#) and argued that the failure to allow his agents in the aforesaid polling stations violated the said Article as he could not verify the method that was used by the 2nd and 3rd Respondents and therefore the process could not be said to have been secure, accountable and transparent.
16. He placed reliance on the case of [*Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others*](#) [2017] eKLR where it was held that the polling station is the true locus for the free exercise of the voters' will and that the counting of the votes as elaborately set out in the Act and the Regulations, with its open, transparent and participatory character using the ballot as the primary material implied that the count there was clothed with a finality not to be exposed to any risk of variation or subversion.



17. He also submitted that for an election to be free and fair, there existed various electoral rules which governed elections in Kenya that had to be adhered to the letter. He pointed out that the elections held at Nyatieko ward could not be said to have been free, fair, open, transparent and participatory as they were marred with chaos. He added that voters were denied their right to vote which was contrary to Article 38 of the Constitution. He also asserted that he was arrested by GSU Officers and that his agents were denied entry into Mwechobori and Nyabundo Primary Polling Stations.
18. It was his contention that the ejection of agents without reasons affected accountability, credibility and verifiability of the results in the declaration form and that that was a contravention of Article 81(e)(vi) and Article 86(a) of the Constitution.
19. He further invoked Article 38 of the Constitution of Kenya and submitted that PW 4 testified that he was denied his right to vote because the KIEMS Kit could not identify him and that the Presiding Officer refused to verify his name from the register. For the said reason, he urged the court to nullify the impugned election and order for a recount. He urged the court to allow his appeal as prayed.
20. To buttress his point, he placed reliance on the case of William Maina Kamanda vs Margaret Wanjiru Kariuki & 2 Others [2008] eKLR where the court cited with approval the case of Mark Nkonana Supeyo & Another vs Independent Electoral and Boundaries Commission & 2 Others [2017] eKLR where it was held that that where it was believed that irregularities occurred, that would amount to an order of recount or scrutiny being granted.
21. On his part, the 2nd Respondent invoked Section 82(1) of the Elections Act, 2011 and Rule 33(1) of the Election (Parliamentary and County Elections) Rules, 2013 and submitted that Section 33(2) of the Election Petition Rules provides that a court must be satisfied that there existed sufficient reason before making an order for scrutiny and recount. He placed reliance on the case of Masinde vs Bwire & Another (2008) 1 KLR EP 547 where it was held that an order for scrutiny was not automatic and there had to be a basis.
22. He asserted that this was to guard against a party using the exercise of scrutiny and recount as a fishing expedition to uncover new or fresh evidence. He pointed out that under the Constitution, the hearing and disposal of election petitions was governed by strict timelines and as such a court ought to confine itself strictly to the substance of the Petition and not entertain any side shows.
23. He further contended that the exercise of scrutiny and recount was time consuming which required adequate and committed man-power and while it did not mean that courts should be reluctant to grant orders for scrutiny and recount, courts only ought to order scrutiny where good cause existed. He added that the underlying mandate of any election petition court was to ensure that justice was done to both sides and that any discrepancies were closely interrogated in order to reach a just decision in the case.
24. He further submitted that in determining whether or not to grant a prayer for scrutiny and recount a court would be guided by the margin of votes. In this regard, he relied on the case of Hassan Ali Joho vs Hotbman Nyange & Anania Mwasambu Mwaboza (2008) 3 KLR EP 188 where it was held that justice would be done if scrutiny and recount was ordered as the margin of votes was very low.
25. He argued that the difference between the votes he and the Appellant garnered was 752 votes and since the did not have any issue with the number of votes, he could not claim to have won in the first place. In this respect, he cited the case of Phillip Osore vs Michael Aringo & 2 Others Busia High Court Petition No 1 of 2013 (eKLR citation not given) where it was held that for a petitioner to deserve an order for scrutiny then as a starting point, the petition and the affidavit in support must contain



concise statements of material facts upon which the claim of impropriety or illegality of the casting or counting of ballots was made.

26. He further relied on the case of *Harun Meitamei Lempaka vs Hon Lemaken Aramat & Others* Election Petition No 2 of 2013 where it was held that where a petitioner sought scrutiny, a basis had to be founded on the provisions of Section 82(2) of the *Elections Act* and Rule 33(4) of the Election Rules. He invoked Section 82(2) of the *Elections Act* and argued that the aim of scrutiny was to examine all the votes cast and to identify votes by people who were ineligible to vote and those who were legible to vote and voted but their votes are void because they were not properly marked, were unmarked or had a different serial number as was held in the case of *Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 Others* Kericho Petition 1 of 2013.
27. He pointed out that Rule 33(4) of the Election Rules obliged a party to name the polling stations in which the results are disputed and because a party is bound by its pleadings as such any evidence which goes outside of the pleadings on record must be disregarded. He added that the Rules also provide that a petitioner had to specify the documents he sought to be scrutinised.
28. It was therefore his contention that where a request for scrutiny and/or recount was made, the application had to be clear, concise and specific and that that an application that was couched in general terms ought not be permitted as this was tantamount to requiring the court to go through the whole exercise of re-tallying.
29. He further submitted that in his Petition, the Petitioner claimed that more than 200 votes were not in the voting register in Nyakeogiro Primary School which he claimed was his stronghold and yet the same had been verified recently and even had verification cards. He argued that he was merely a victim of the war between the Appellant and the 2nd and 3rd Respondents.
30. It was his case that no remedy for scrutiny was available to the Appellant because he did not allege any violation of Section 82(2) of the *Elections Act*, that is, persons who were not registered voted, there were no allegations of bribery and that no undue influence or persuasion were alleged or proved. He added that there was no dispute of results in all polling stations, there was no request for recount at any polling station (Regulation 80(1) & (2), there was no basis laid out, no complaint was made immediately before or after the results were announced, there was no dissatisfaction recorded upon any Form 35, no agent or candidate refused or gave reasons for not signing Form 35 in terms of Regulation 79(3) of the Election Regulations, there was no conflict between Form 35 and 36 and that there was no allegation against the 1st Respondent.
31. On their part, the 2nd and 3rd Respondents submitted that 1st Respondent was validly elected and the declaration was regular, lawful and legitimate since he garnered the highest number of votes in Nyatieko ward. It was their case that the elections held on 9th August 2022 respected the sovereign will of the people of Nyatieko Ward and upheld the constitutional principles of free and fair elections as they were administered in an impartial neutral efficient, accurate and accountable manner.
32. They invoked Section 82(1) of the *Elections Act* and Rule 33 of the Rules and Regulation and placed reliance on the case of *Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others* [2014]eKLR where it was held that the party seeking a recount or scrutiny of votes in an election petition was to establish the basis for such a request to the satisfaction of the trial judge or magistrate and the case of *Gideon Mwangangi Wambua & Another vs IEBC & 2 Others* where it was held that the petitioner ought to set out his case with sufficient clarity and particularity and adduce sufficient evidence in support thereof in order to justify the court to feel that there was need to verify not only the facts pleaded but the evidence adduced by the Petitioner in support of his pleaded facts.



33. They pointed out that in his Notice of Motion application dated 22nd September 2022, the Appellant sought an order to recount all Member of County Assembly Votes cast in Nyatieko SDA Primary Polling Centre, Nyakeogiro Primary School Centre, Kanyimbo Primary School Polling Centre, Mwechobori DEB Primary School Polling Centre, Ebate Primary School Polling Centre and Nyabundo Primary School Polling Centre. They argued that the said polling centres that the Appellant sought scrutiny and recount contained more than one polling stations thus his application failed the first and crucial test of specificity and clarity of the particular polling stations which he sought that the aforesaid orders be granted.
34. They also relied on Section 80(1) of the [Elections \(General\) Regulations](#) and argued that the said provision provided for a recount at the Polling station where a candidate or his agent was not satisfied after the completion of the counting. It was their contention that all the candidates were granted sufficient opportunity to scrutinise and interrogate the results in each polling station before computation of the final tally. They were categorical that neither the Appellant nor any of his agents requested for a recount at any of the polling stations and was denied. They added that the scrutiny and counting of all votes cast was done methodically in strict compliance with the electoral laws and the [Constitution](#).
35. They argued that the Appellant failed to establish any basis for the grant of an order of scrutiny and recount. They asserted that all the Presiding Officers in all polling stations adversely cited by the Appellant testified that all of the Appellant's agents present at the polling stations were indeed allowed into the respective polling stations from the opening of the polls through to the closure of the polling stations and that they were indeed granted the opportunity to observe the election process and append the signatures on the Forms. They therefore submitted that the Appellant's allegations that his agents were ejected from the various polling stations were malicious, misconceived and baseless.
36. In this regard, they relied on the case of Gatirau Peter Munya Case (Supra) where it was held that the appellant had not shown that the total number of votes casts for each candidate were materially affected by the presence or absence of agents' signatures on Form 35s.
37. They asserted that pursuant to Regulation 79(6) of the [Elections \(General\) Regulations](#), the refusal or failure of a candidate or an agent to sign a declaration from under sub-regulation (4) or to record the reasons for their refusal to sign as required under that regulation could not by itself invalidate the results announced under sub-regulation (2)(a) of the [Elections \(General\) Regulations](#). They added that pursuant to Regulation 79 (7) of the [Elections \(General\) Regulations](#), the absence of a candidate or an agent at the signing of a declaration form or the announcement of results under sub-regulation (2) could not by itself invalidate the results announced.
38. The foundation of the law governing scrutiny in electoral disputes can be traced to the [Constitution of Kenya, 2010](#), which at Article 86(a) requires Independent Electoral and Boundaries Commission (IEBC) to ensure that whatever voting method was used, the system had to be simple, accurate, verifiable, secure, accountable and transparent. In simple terms, the method used must be auditable.
39. The right to scrutiny of votes specifically and generally as well as and recount of votes in an election petition is anchored on Section 82(1) of the [Elections Act](#) (Act. No 24 of 2011) and Rule 33 of the [Elections \(Parliamentary and County Elections\) Petition Rules, 2013](#).



40. Section 82 of *Elections Act* thus reads as follows:

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

1. Where the votes at the trial of an election petition are scrutinized, only the following votes shall be struck off—
 - a. the vote of a person whose name was not on the register or list of voters assigned to the polling station at which the vote was recorded or who had not been authorised to vote at that station;
 - b. the vote of a person whose vote was procured by bribery, treating or undue influence;
 - c. the vote of a person who committed or procured the commission of personation at the election;
 - d. the vote of a person proved to have voted in more than one constituency;
 - e. the vote of a person, who by reason of conviction for an election offence or by reason of the report of the election court, was disqualified from voting at the election; or
 - f. the vote cast for a disqualified candidate by a voter knowing that the candidate was disqualified or the facts causing the disqualification, or after sufficient public notice of the disqualification or when the facts causing it were notorious.
2. The vote of a voter shall not, except in the case specified in subsection (1)(e), be struck off under subsection (1) by reason only of the voter not having been or not being qualified to have the voter’s name entered on the register of voters.”

41. On the other hand, Rule 33 of the *Elections (Parliamentary and County Elections) Petition Rules, 2013* provides:

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

1. Upon an application under sub-rule (1), the court may, if it is satisfied that there is sufficient reason, order for a scrutiny or recount of the votes.
2. The scrutiny or recount of ballots shall be carried out under the direct supervision of the Registrar and shall be subject to directions as the court may give.
3. Scrutiny shall be confined to the polling stations in which the results are disputed and shall be limited to the examination of—
 - a. the written statements made by the presiding officers under the provisions of the Act;



- b. the copy of the register used during the elections;
- c. the copies of the results of each polling station in which the results of the election are in dispute;
- d. the written complaints of the candidates and their representatives;
- e. the packets of spoilt papers;
- f. the marked copy register;
- g. the packets of counterfoils of used ballot papers;
- h. the packets of counted ballot papers;
- i. the packets of rejected ballot papers; and
- j. the statements showing the number of rejected ballot papers.”

42. This court had due regard to the case of *Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others* (*supra*), where the Supreme Court held that the right to scrutiny and recount does not lie as a matter of course but that a party seeking such a request had to establish a basis for the same.
43. The Appellant’s main contention was that his agents were unlawfully ejected from various polling stations. He asserted that his agents at Nyabundo Primary School were isolated as the Form 36a (sic) supplied by the Respondents indicated that none of them signed the same. He added that in other stations such as Nyakeirigo polling station and Nyabundo DEB Primary School polling station, two (2) result declaration forms were not signed by his agents.
44. He contended that Clifford Momanyi (hereinafter referred to as “DW 10”) confirmed in his evidence that Lawrence Ongwae (hereinafter referred to as “PW 2”) was isolated and that was the reason why his name was not captured in the Polling Station Diary at the opening and closure certificate. It was his submission that these actions denied him representation during the time of the opening of ballot boxes, casting of votes, sorting, counting and tallying of votes.
45. A reading of the record showed that “DW 5, DW 6, DW 7, DW 8, DW 9, DW 10, DW 11 and DW 12 (hereinafter referred to as “the Presiding Officers”) of all Polling Stations that were adversely cited by the Appellant averred that all his agents who present were indeed allowed into the respective Polling Stations from the opening and closing of the Polling Stations and that they were indeed granted the opportunity to append the signatures on the Forms.
46. The importance of the role of agents in an election cannot be disputed and/or underestimated. However, failure by an agent to sign the form declaring the results does not of itself render an election a candidate for invalidation. Regulation 79(4) of the *Elections (General) Regulations* makes it mandatory for a presiding officer to record the fact of the refusal or failure by a candidate or an agent to sign the declaration form. Failure by a presiding officer to record the fact or refusal by a candidate or an agent to sign the declaration form amounts to an irregularity.
47. Whether such an infraction of the Regulations should result in the voiding of the election will depend on the facts and circumstances of each case. Indeed, not all irregularities or illegalities will result in the invalidation of an election.



48. Notably, in the case *Gatirau Peter Munya* (*supra*), on the issue of failure by candidates or agents to sign declaration forms, the Supreme Court observed that an election could not be overturned merely because an agent had failed to sign a statutory form.
49. In this case, the evidence showed that agents representing the other candidates were in the polling stations. The Appellant did not adduce any evidence to show that these agents colluded with the Polling officials to tilt the playing field to the disadvantage of the Appellant. Indeed, he did not demonstrate malice on the part of the Presiding Officers. It was therefore this court's finding that his allegations that his agents were singled out for ejection from the Polling Stations had no basis and the transparency of the election could not be faulted on this ground.
50. Going further, having analysed the Appellant's pleadings, that is, the Petition, the application and affidavits by witnesses this court was not persuaded that the Appellant had established a basis for the grant of the order of scrutiny and recount as right from the outset he was not specific as to which Polling Stations he actually referred to and which specific election material. His prayers were couched in a generalised term which fell afoul Rule 33(4) of the Election Rules. Additionally, he did not adduce evidence to prove any of the grounds in Section 82(1) of the *Elections Act* to warrant this court to invoke Section 82(2) of the *Elections Act* so as to grant the Appellant the orders he had sought herein.
51. This court was not persuaded that he had established the basis for seeking scrutiny and recount. In the circumstances, this court was not persuaded that the Learned Trial Magistrate erred in declining to grant an order for scrutiny and recount as the Appellant failed to demonstrate the basis for grant of the same. He indeed arrived at the correct conclusion on this issue.

ii. Kiems Kit

52. The Appellant submitted that the manual register was used alongside the KIEMS Kit in Nyabundo Primary School 1 & 2, Nyatieko Primary School Station 1 and 2, Nyatieko Primary School polling station 1, 2 & 3, Mwechobori Primary School Polling Station 1 & 2 and Kanyimbo Primary School Polling Stations & 2. He contended that the Presiding Officers maintained that the manual register was used alongside KIEMS Kit without proof of authority.
53. He further contended that the use of the KIEMS Kit and the Manual register ordinarily posed a question as to whether all the voters from various Polling Stations would have voted as required by law and whether the same caused discrepancies necessitating a recount.
54. On his part, the 2nd Respondent submitted that the elections were conducted in strict conformity with the *Constitution* and that there was no evidence of non-compliance of the *Constitution* and/or the written law. He pointed out that voter identification was biometric and all the voters were identified using the KIEMS Kit. He explained that all the agents were allowed access into the polling stations and tallying center and that the testimonies of the witnesses present at polling stations were in agreement that the Elections were conducted as required by law. He asserted that the Appellant was not present at the polling station to confirm his allegations that his supporters and agents were chased away and that in his cross-examination, he confirmed that his agents were present in every polling center.
55. On their part, the 2nd and 3rd Respondents invoked Article 86 of the *Constitution* and submitted that the testimony of the 2nd Respondent and the Presiding Officers of the polling station of Nyatieko Ward indeed proved that the elections in the same ward was conducted in a free, fair, transparent and credible manner and that the results were a true reflection of the people's choice based on universal suffrage.
56. They invoked Section 44(1) and 44A of the *Elections Act* and placed reliance on the cases of *John Munuve Mati vs Returning Officer Mwingi North Constituency, IEBC & Paul Musyimi*



- Nzegu*[2018]eKLR and *National Super Alliance (NASA) Kenya vs IEBC & 2 Others* [2017]eKLR where the common thread was that Section 44A of the *Elections Act* requires the IEBC to establish a complementary mechanism for identification of voters and transmission of election results as a fall back in the event of failure of the electronic system.
57. They were categorical that DW 3 testified that the KIEMS Kit was indeed a soft copy of the Manual Register and that voters were being identified by the KIEMS Kit and National Identity Cards before being allowed to vote and thus no person voted without being verified. They pointed out that the manual register was only used to strike out the names of the persons who had voted. They added that DW 3 confirmed that it could not therefore be said that the use of the KIEMS Kit and the manual register resulted in “double voting” as alleged as the data in both election material was the same.
58. They contended that it was the evidence of all Presiding Officers that all registered voters were allowed to vote upon being identified by the KIEMS Kit and their National Identity Cards in accordance with Article 38 of the *Constitution* and that any person who was not registered as a voter in a particular polling station and/or who did not verify their details prior to the Election as required by the 3rd Respondent could not be allowed to vote.
59. They pointed out that the Appellant had in his Further Affidavit sworn on 30th September 2022 produced a raft of voting cards and national identity cards alleging that the said persons were denied their right to vote but the said persons were not called in as witnesses to give evidence of the alleged denial to vote. He asserted that the Appellant only called one witness PW 4 who testified that he was not found on the KIEMS Kit during voting and therefore did not vote.
60. It was their contention that failure on the part of a voter to follow the mandatory statutory requirements in respect of registration and/or verification of votes could not be used as a reason to nullify an election and ultimately subvert the will of the people of Nyatieko Ward. They pointed out that the said PW 4 alleged that he verified his details as required by the 3rd Respondent but failed to produce any documents in support of the said assertion. They asserted that the Appellant had failed to prove that the various individuals complied with the law and were wrongfully denied the right to vote.
61. Section 44(1) of the *Elections Act* provides that:
- “Subject to this section, there is established an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results.”
62. In the case of *John Munuve Mati vs Returning Officer Mwingi North Constituency, Independent Electoral & Boundaries Commission & Paul Musyimi Nzengu* (*supra*) the court observed that Section 44 of the *Elections Act* established an integrated electronic electoral system known as the Kenya Integrated Election Management System (KIEMS) that enabled biometric voter registration, electronic voter identification and electronic transmission of results and that in event of a failure of the electronic system, IEBC could fall back on a complementary mechanism that it had established for identification of voters and transmission of election.
63. Section 44A of the *Elections Act* which provide for a complementary mechanism provides that:-
- “Notwithstanding the provisions of section 44, the Commission shall put in place a complementary mechanism for identification of voters that is simple, accurate, verifiable, secure, accountable and transparent to ensure that the Commission complies with the provisions of Article 38 of the *Constitution*.”



64. The need for this complementary system was a matter of judicial consideration by the Court of Appeal in *National Super Alliance (NASA) Kenya vs Independent Electoral and Boundaries Commission & 2 others* (*supra*) wherein the court observed that the Legislature directed under Section 44A of the *Elections Act*, that IEBC do develop a ‘complementary mechanism’ so as to capture voters who were not identified by the KIEMS kit.
65. From the evidence that was adduced, this court observed that all registered voters were allowed to vote upon being identified by the KIEMS Kit and their National Identity Cards in accordance with Article 38 of the *Constitution of Kenya* and that any person who was not registered as a voter in a particular polling station and/or who did not verify their details prior to the Election as required by the 3rd Respondent could not be allowed to vote.
66. The 2nd and 3rd Respondents’ use of the Manual Register to strike out those who had already voted was not unlawful. This was for purposes of ensuring a verifiable and accurate electoral process. For that reason, this court did not therefore find that the use of the KIEMS Kit alongside the Manual Register to have been an irregularity on the part of the 3rd Respondent. This court was therefore not satisfied that the election could be overturned due to use of the KIEMS kit alongside the Manual Register by the 2nd and 3rd Respondents herein as that was a legal method of identifying voters as was envisaged in Section 44A of the *Elections Act*.

iii. Violence, Padding, Sealing And Storage Of Materials

67. The Appellant submitted that there was paddling of votes and that there were flaws in the electoral process and storage of electoral materials. He was categorical that when the parties visited the 2nd and 3rd Respondent’s warehouse at Gudka Warehouse, Nyatieko polling stations one (1) MCA ballot box had a yellow cover lid instead of a beige cover lid. He argued that a yellow cover lid was usually for the senate as confirmed by DW 3 in evidence.
68. He further pointed out that the anomaly of the cover lid used was never recorded in the comment section of Form 36A and that DW 12 was surprised to learn that the ballot box for the MCA contained a different colour from beige. He asserted that that was an outright indication that the polling materials were grossly interfered with to make a person believe the integrity of the votes cast in that polling station.
69. He added that the exercise at Gudka also revealed that one (1) Ballot Box for Moneke Primary School polling stations had two seals missing and another for Kanyimbo polling stations was unmarked. He pointed out that the issue of a missing seal on a ballot box was sufficient ground to issue an order of scrutiny and recount and nullification of results.
70. He was emphatic that the interference of the ballot boxes by the missing seals and others bearing different lid covers was an election irregularity that could not be overlooked. He asserted that the Learned Trial Magistrate erred in failing to note that such irregularities were not minor and failing to nullify the said election based on the evidence of the irregularities on the part of the 2nd and 3rd Respondents.
71. The 1st Respondent confirmed that from the information he got from his agents, all agents were present in the polling stations and that there was a procedure in assisted voter which was adhered to and further that he had no control over the officers of the 2nd and 3rd Respondents who he believed conducted a fair, transparent and credible member of county assembly election in the said ward. He added that no credible evidence was put forward by the Appellant to show that the Presiding Officers committed grievous electoral fraud and that the Appellant only filed the petition to settle political scores.



72. He was categorical that after voting the ballots were counted after which forms 36As were filled and later Form 36B was generated and issued to him as the winner. He pointed out that the allegations that there were two (2) Presiding Officers at the Polling Station and the issue of having a different lid on a different ballot box were not grave errors enough to have the Petition allowed.
73. In this respect, he placed reliance on the case of *Jobo vs Nyange & Another* [2008] 3 KLR 500 where it was held that error is to human and that if the errors are not fundamental, they should be excused or ignored.
74. It was his case that the whole exercise was conducted fairly and any errors if any were human and therefore could not affect the wishes of the Nyatieko people. He further relied on the case of *Peter Munya vs IEBC & 2 Others* (Supra) where the court held that procedural or administrative irregularities and other errors occasioned by human imperfection are not enough by and of themselves to vitiate an election.
75. He cited the case of *Michael Musyoka Mwananzivu vs IEBC & 4 Others* [2018] eKLR where it was held that the irregularities noted in Forms 36B were minor and did not affect the results of Mukuru Kwa Reuben ward in Embakasi South Constituency. He was emphatic that there was compliance with the conduct of the election and hence his election was valid.
76. The 2nd and 3rd Respondents cited Section 83 of the *Elections Act* and submitted that unless the irregularities, malpractices and illegalities proved were such that they interfered with the free choice of the voters the court ought not to interfere with the existing choice of the said voters. In this respect, they relied on the case of *John Kiarie Waweru vs Beth Wambui Mugo & 2 Others* where it was held that it would not be sufficient for the petitioner to establish that irregularities or electoral malpractices did (not) occur he must establish that the said electoral malpractices were of such a magnitude that it substantially and materially affected the outcome of the electoral process.
77. They contended that all of the Presiding Officers from the polling stations adversely mentioned by the Appellant testified that elections process went on smoothly and that there were no incidences of violence in the impugned polling stations as alleged. It was their further submission that whereas the Appellant alleged that there was chaos at the impugned polling station he failed to adduce evidence in support thereof that any such incident was reported to a police station.
78. They argued that this was against the principle of law that he who alleges must prove. In that regard, they relied on the case of *Raila Odinga & others vs IEBC & others* (supra) where it was held that a petitioner should be under obligation to discharge the initial burden of proof before the respondents are invited to bear the evidential burden.
79. They were categorical that the Appellant failed to prove any attempt of voter padding in any of the polling stations. They asserted that the ballot papers were serialised and every registered voter was entitled to one of each ballot paper for the Presidential election, Gubernatorial election, Senatorial election, Member of National Assembly election, Women representative to parliament election and Member of County Assembly election and that the election process was witnessed by various persons including the Appellant's agents present, all other agents for the various candidates, election observers and the media.
80. It was their case that the sealing of the ballot boxes was done in the presence of all the agents and that the unintended omissions were bound to occur in such a long tedious election process as human is to error. They asserted that the said omissions did not materially change the outcome of the election being that the sealing of the ballot boxes was conducted after the declaration of results were made in the presence of the UDA agents.



81. In this respect, they placed reliance on the cases of *Richard N. Kalembe Ndile & Another vs Patrick Musimba Mweu & 2 Others* [2013] eKLR and *Eliud Musikongo Tenge vs Nyongesa Sospeter Erastus & 2 Others* [2018] eKLR where the common thread was that any irregularities which were shown not to be systematic or persuasive could not be a basis for annulment of an election.
82. They asserted that the discrepancies the Appellant had raised in his Petition or in his application were therefore an afterthought because in his Report on the resealing exercise, the Court Administrator indicated that all ballot boxes were availed and were in good state with their seals intact. They termed the Appellant's allegations as baseless.
83. They were emphatic that the Appellant had failed to satisfy the standard of proof in election Petitions to warrant the issuance of the orders sought. To further support their argument, they referred this court to the case of *Hassan Mohamed Hassan & Another vs Independent Electoral & Boundaries Commission & 2 others* [2013] eKLR where it was held that malpractices of intimidation, bribery and corruption, violence and double voting amounted to criminal conduct prescribed under Section 65 of the *Elections Act* and therefore the standard of proof for such was beyond reasonable doubt.
84. They reiterated that the 1st Respondent was validly elected and that the Appellant had failed to provide cogent evidence to dispute the said election. They relied on the case of *Raila Odinga & 5 others vs IEBC & 3 others* [2013] eKLR where it was held that all acts are presumed to be done rightly and regularly and consequently, the petitioner was required to set out by raising firm and credible evidence of the public authority departures from the prescriptions of the law and the case.
85. They submitted that an order invalidating the election of the 1st Respondent for fresh elections to be conducted in Nyatioko Ward on the basis of mere generalisations would be highly prejudicial to the entire country and the electorate of Nyatioko Ward as elections was a costly affair that disrupts the economic, social and political affairs of the people.
86. They relied on the case of *Jobo vs Nyange* (*supra*) as quoted with approval in *Swaleh Salim Swaleh Imu & Another vs IEBC & 2 others* [2013] eKLR where it was held that elections petitions were not ordinary suits but were disputes of great importance because when elections were successfully challenged, by-elections ensued and these not only cost the country colossal sums of money to stage but also disrupted the constituents' social and economic activities.
87. The parties were in agreement that by virtue of Article 81 of the *Constitution of Kenya*, the elements of free and fair elections were that the elections should be conducted through secret ballot. They are also required to be free from violence, intimidation, improper influence or corruption and must be conducted and administered by an independent body in a transparent, neutral, efficient, accurate, accountable and impartial manner.
88. Going further, Article 86 of the *Constitution of Kenya* requires the 3rd Respondent to ensure that in an election the voting method is simple, accurate, verifiable, secure, accountable and transparent. It also requires that the votes are counted, tabulated and the results announced promptly by the presiding officer at the polling station, the results from the polling stations are openly and accurately collated and promptly announced by the returning office and that appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.
89. The *Elections Act, 2011* and the *Elections (General) Regulations* as amended by Legal Notice No 72 of 2017, the Elections (General) (Amendment) Regulations give flesh to the constitutional provisions.
90. In any election petition, two (2) issues will regularly arise. These are the burden and standard of proof. On the burden of proof, the court in *Raila Odinga & 5 Others vs IEBC & 3 Others* (*supra*) held that the



legal burden rested on the petitioner and that the electoral cause is established much in the same way as a civil cause, which was balance of probability and that depending on the effectiveness with which a petitioner discharged this, the evidential burden kept on shifting.

91. The meaning of the terms “illegalities” and “irregularities” was elucidated by the Supreme Court at Paragraph 304 of *Raila Amolo Odinga & Another vs Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR that illegalities referred to breach of the substance of specific law while irregularities denoted violation of specific regulations and administrative arrangements that had been put in place.
92. In the case of *John Harun Mwau & 2 Others vs Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR, the court noted that stated that not every irregularity or procedural infraction was enough to invalidate an election but that the irregularities had to be of such magnitude as to affect the integrity of the entire election.
93. The Appellant did not adduce evidence to prove his allegation of padding of votes. He did not present any cogent evidence to show that there was manipulation of voters during the electoral process. He did not also show that there were chaos, if at all so as to have affected the outcome of the results of the Member of County Assembly of the Nyatieko Ward or that he was arrested by GSU Officers as he had contended. In addition, the court noted that none of the witnesses told the trial court the nature of intimidation, the names or identities of the persons who intimidated the Appellant nor the names of the agents who were intimidated. This was also noted disclosed in the Petition herein.
94. Further, he did not tender any evidence to support his assertions that there had been interference or tampering with the ballot boxes. Be that as it may, as this fact was not outrightly disputed, this court agreed with the Election Court that such a discrepancy was not so great as to affect the outcome of the elections as an electoral process is a long and tedious process and human is to error.
95. Notably, where a party alleges non-conformity with the electoral law, he or she must not only prove that there had been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. Indeed, in the case of *Gatirau Peter Munya (supra)*, the Supreme Court held that if it was shown that an election was conducted substantially in accordance with the principles of the *Constitution of Kenya* and the *Elections Act*, then such election was not to be invalidated only on ground of irregularities.
96. In the circumstances, this court found no misdirection in law upon which it could interfere with the findings of fact of the election court that the evidence adduced did not prove the extent to which such an irregularity would and/or manifestly affected the outcome of the election.
97. Having carefully considered the judgment of the Election Court as well as the rival submissions made herein this court’s examination revealed that the Election Court properly addressed itself to the specific issues raised by the Appellant.

Iv. Costs

- 97A. The 2nd and 3rd Respondents did not submit on the issue of costs. The Appellant invoked Rule 30 of the *Elections (Parliamentary and County Election) Petitions Rules* and urged the court to consider the said provision while determining who was to bear the costs of this appeal. He added that where the court was not able to make an order on the total amount payable for whatever reason, then the taxing master of the court would assess the costs as per Rule 31 of the *Elections (Parliamentary and County Election) Petitions Rules*.



98. On his part, the 2nd Respondent submitted that Section 84 of the Act donates jurisdiction to an election court to award costs of and incidental to a petition and that such costs shall follow the cause. He invoked Rule 36(1) of the Rules and relied on the case of *Kalembe Ndile & Another vs Patrick Musimba & Others* (*supra*) where it was held that costs awarded should be fairly adequate to compensate for work done but at the same time should not be exorbitant as to unjustly enrich the parties or cause unwarranted dent on the public purse or injure the body politically by undermining the principle of access to justice enshrined in Article 48 of the *Constitution*. He urged the court to condemn the Appellant to pay him the costs of defending the Petition and the Appeal.
99. It has been said time and again that costs are meant to compensate a successful litigant for his labour and not scare aware litigants from the doors of justice as was held by the Court of Appeal in the case of *Martha Wangari Karua vs Independent Electoral & Boundaries Commission & 3 others* [2018] eKLR.
100. Under normal circumstances, the election court is able to assess the amount of work that has gone into the hearing and determination of an election petition. Capping of costs by the Election Court is therefore a good practice. As there was no dispute as to the quantum that was awarded by the Election Court, it was not necessary to determine whether or not the quantum was excessive warranting interference by this court. Suffice it to state, that costs follow the event. In the circumstances of this case, this court did not find the costs awarded to be manifestly excessive, and it therefore declined to interfere with the award made by the Election Court.

Disposition

101. For the foregoing reasons, the upshot of this court's decision was that the Appellant's appeal that was lodged on January 4, 2023 was not merited and the same be and is hereby dismissed. The Appellant will bear the Respondents' costs of this Appeal.
102. It is so ordered.

DATED AND DELIVERED AT KISII THIS 30TH DAY OF JUNE 2023

J. KAMAU

JUDGE

